STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2020AP1728-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PERCY ANTIONE ROBINSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MICHELLE ACKERMAN HAVAS AND THE HONORABLE LINDSEY CANONIE GRADY PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Page

Page

Statutes

INTRODUCTION

Percy Robinson had a $100-a-day heroin habit and was being evicted from his apartment. On December 18, 2017, following a drug binge of heroin, cocaine, and marijuana, Robinson walked into a US Bank building in Milwaukee and gave the teller a note stating that he had a gun and demanding money. The teller gave him approximately $1900 in cash and pulled the alarm.

The teller identified Robinson in a live police lineup, later in photo stills from bank video footage, and finally in court at trial, stating she was "100 percent sure" and had "zero doubt" that Robinson was the robber. Two other women that spent time with Robinson the day of the robbery identified him from the video stills based on his jacket. Police apprehended Robinson and found a $100 bill on the floor of his vehicle and another $100 bill on his person. The bank video, showing Robinson, was played for the jury, and the State introduced very good quality color photo stills from the video as exhibits. The jury asked (and was granted permission to) review the video and stills while in deliberation to make a "final decision."

The jury convicted Robinson of robbery of a financial institution, as charged in the Information. Robinson moved for postconviction relief, under a variety of theories. The postconviction court denied Robinson's motion. This Court should affirm because none of Robinson's various methods for attacking his conviction have any merit.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. Robinson's challenges to his conviction are governed by well-established law and can be resolved on the briefs.

STATEMENT OF THE ISSUES

The State re-orders and re-frames the issues Robinson raises as follows[1]:

1. Was there evidence that US Bank is a "financial institution" such that the State presented sufficient evidence to convict?

Robinson did not present this claim in his postconviction motion. This Court should find the evidence was sufficient.

2. Is the statute proscribing robbery of a financial institution, Wis. Stat. § 943.87, facially unconstitutional because it allegedly lacks an "intent to steal" element?

The postconviction court found the statute was constitutional. This court should affirm because the statute contains an implied intent element (which the jury found); alternatively, the statute is constitutional even without an intent element.

3. Was Robinson's trial counsel ineffective for: (a) not calling two bank employees who could not positively identify anyone from the bank footage; (b) not introducing evidence that two other individuals were identified as potential suspects by phone tipsters after the bank robbery footage was released; (c) not obtaining expert testimony about the limits of eyewitness identifications; and (d) not moving to suppress the post-arrest/pre-charging lineup identification on Sixth Amendment grounds?

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[1] The State addresses sufficiency first because the court need not address the various legal and constitutional issues raised by Robinson if the evidence was insufficient to convict. Likewise, the State next addresses the constitutionality of Wis. Stat. § 943.87 before the alleged instances of ineffective assistance.

The postconviction court rejected each of Robinson's claims, finding that counsel was not deficient and that the alleged deficiencies were not prejudicial based on the weight of evidence at trial. This Court should affirm.

STATEMENT OF THE CASE

The State charged Robinson with one count of robbery of a financial institution. (R. 1.) Robinson entered a US Bank in Milwaukee on December 18, 2017 and told a teller that he had a gun, demanded money, and then walked out with roughly $1900 in cash. (R. 1.)

At trial, the teller, Ms. Dunn,[2] testified that she was an international banker employed by US Bank who was filling in as a teller the day of the robbery. (R. 89:63–64.) She testified that that Robinson approached her window and handed her a note saying: "I have a gun, give me the money." (R. 89:67.) He told Dunn, "no dye packs." (R. 89:67.) Following her training, Dunn gave Robinson all of the money in her top drawer, roughly $1900, and pulled the alarm after Robinson walked away. (R. 89:67–68, 76.)

Dunn testified that as a bank employee, she is trained to concentrate on a robber's facial features, build, and other distinguishing characteristics to later make an identification. (R. 89:68–69.) She did so and later told police she was "absolutely" sure she could identify the perpetrator. (R. 89:79.) Dunn then identified Robinson on three separate occasions—from a live lineup, from still photos of the bank robbery, and in court. (R. 89:77–89.) Robinson, she stated that she was "100 percent sure" and had "zero doubt" that Robinson is the person who robbed the bank. (R. 89:88–91.) Dunn said she would "never forget his eyes." (R. 89:88.)

[2] The State uses a pseudonym.

The State introduced video of the bank robbery as well as high-resolution, close-up color still images of Robinson at the teller window during the robbery. (R. 21; 22; 23.)[3]

Additionally, two other women that spent time with Robinson the day of the robbery testified and positively identified him from the bank video stills based on his jacket, which he wore with them. (R. 91:13–16; 19–23.) Both women were "100 percent" sure of their identification. (R. 91:16, 23.)

A detective testified that when Robinson was being investigated, he recovered a $100 bill from the floor of Robinson's vehicle, as well as another $100 bill on his person. (R. 91:9–11.)

Robinson testified and denied being the individual depicted on the bank surveillance footage. (R. 91:54.) Robinson said he was a "scrapper" who made $80 to $100 a day doing "odd jobs." (R. 91:44–45.) Robinson admitted that he had a $100-a-day heroin habit. (R. 91:42–43.) Robinson admitted to being under the influence of heroin, cocaine, and marijuana the day before the robbery and taking more heroin later in the day after the robbery occurred. (R. 91:40.) He also admitted that at the time of the robbery he was being "asked to move on" by his landlord. (R. 91:57.) When asked about the $100 dollar bill found in his vehicle, he said it likely came from "exchanging dollars for dollars" but couldn't remember "where it came from" or how it ended up in his car. (R. 91:41.) As for the $100 bill police found on his person, Robinson claimed it was "actually saved up." (R. 91:41–42).

During deliberations, the jury asked to view the bank surveillance footage and photo stills to "make a final decision," which the court provided. (R. 92:37–38.) Thereafter, the jury found Robinson guilty of the charged offense. (R. 30.)

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[3] The video was introduced at Exhibit 1 at trial and the still photos as Exhibits 3 and 4. (R. 21; 22; 23.)

The court sentenced Robinson to a bifurcated sentence of five years' confinement and five years' extended supervision. (R. 36.)

Robinson then moved for postconviction relief, arguing that his trial counsel was ineffective for a variety of reasons, including: (1) failing to call other bank employees who were unable to identify the robber; (2) failing to introduce evidence that two phone tipsters identified someone other than Robinson after the bank footage was released; (3) not calling an expert on eyewitness identification; and (4) not moving to exclude the pre-charging lineup where Dunn identified Robinson. (R. 61:1–16.) He also alleged that the statute under which he was convicted was unconstitutional. (R. 61:17.) In a written decision, the postconviction court denied the motion without a hearing after concluding that counsel was not deficient in any of the ways alleged and that any deficiencies were not prejudicial. (R. 80.)

Additional facts are discussed below.

STANDARDS OF REVIEW

Sufficiency of the Evidence

Whether the evidence was sufficient to sustain a guilty verdict is an issue of law reviewed de novo. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410. However, this Court does not review the evidence de novo or choose between competing inferences; rather, the question is whether there was sufficient evidence for a reasonable jury to find guilt beyond a reasonable doubt. *Id.* ¶¶ 24–33. Accordingly, an appellate court will reverse a conviction "only if 'the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" *State v. Schulpius*, 2006 WI App 263, ¶ 10, 298

Wis. 2d 155, 726 N.W.2d 706 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)). And this Court must "search the record to support the conclusion reached by the fact finder." *State v. Owen*, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996).

Constitutionality of Statute

The constitutionality of a statute is reviewed de novo. *Matter of Commitment of K.E.K.*, 2021 WI 9, ¶ 16, 395 Wis. 2d 460, 954 N.W.2d 366. When adjudicating a facial challenge, this Court must presume that the statute is constitutional, and it is the challenger's obligation to show that the statute cannot be constitutionally applied under any circumstances. *Id.* ¶ 14.

Ineffective assistance of counsel

When a circuit court denies a postconviction motion alleging ineffective assistance of counsel without a hearing under *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), this Court reviews de novo whether a hearing was required based on the allegations in the motion. *State v. Allen,* 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

ARGUMENT

I. There was sufficient circumstantial evidence that Robinson robbed a "financial institution."

Robinson claims that the State failed to present sufficient evidence that the bank he robbed was a "financial institution" because it did not produce evidence that US Bank was a "chartered bank." (Robinson's Br. 36–38) This argument is meritless.

A. Circumstantial evidence is sufficient to satisfy an element of the charged offense.

Circumstantial evidence, standing alone, is sufficient to sustain a jury's finding that the State has proved the elements of an offense beyond a reasonable doubt. *State v. Kitowski*, 44 Wis. 2d 259, 261–62, 170 N.W.2d 703 (1969) The State's use of circumstantial evidence does not alter the standard of review when reviewing a conviction for sufficiency of the evidence. *Poellinger*, 153 Wis. 2d at 501. The question simply is whether there was enough evidence from which a jury could infer the fact in question. *Id.* at 507; *see also Smazal v. State*, 31 Wis. 2d 360, 363, 142 N.W.2d 808 (1966) (elements of an offense may be proved by "facts and circumstances from which it may be inferred").

B. The State proved that US Bank is a "financial institution."

Subchapter IV of Wis. Stat. Ch. 943 proscribes various crimes against or involving "financial institutions." *See* Wis. Stat. §§ 943.81–.92. Robinson was convicted of theft from a financial institution under Wis. Stat. § 943.87. That statute states: "Whoever by use of force or threat to use imminent force takes from an individual or in the presence of an individual money or property that is owned by or under the custody or control of a financial institution is guilty of Class C felony." Wis. Stat. § 943.87. The term "financial institution" is defined for all of Subchapter IV of Wis. Stat. Ch. 943 to mean "a bank," or "a savings bank," among other entities "whether chartered under the laws of this state, another state or territory, or under the laws of the United States." Wis. Stat. § 943.80(2).[4]

[4] The relevant portion of the statute states in full:

In prosecuting a violation of section 943.87, the State is not required to produce "documentary evidence" of a bank's charter, such as the charter itself or someone with "personal knowledge" of the charter. *State v. Eady*, 2016 WI App 12, ¶ 8, 366 Wis. 2d 711, 875 N.W.2d 139. Indeed, Robinson recognizes that under *Eady*, the bank's status as a financial institution can be "established circumstantially." (Robinson's Br. 37.)

In *Eady* the defendant, like Robinson does here, claimed that there was insufficient evidence that US Bank was chartered. *Eady*, 366 Wis. 2d 711, ¶ 8. This Court disagreed, holding that there was sufficient circumstantial evidence that US Bank was chartered "including evidence regarding the day-to-day operation of the bank, the U.S. Bank deposit slip found in the clothing discarded near the bank, and the numerous signs indicating that the bank was a 'U.S. Bank' insured by the FDIC." *Id.* ¶ 12.

Robinson claims that the State failed in its proof because "there was no discussion as to whether the bank was 'chartered'" and because the State failed to produce a bank deposit slip or other circumstantial evidence of a charter. (Robinson's Br. 36–37.) Neither argument has merit.

First, unlike in *Eady*, 366 Wis. 2d 711, ¶ 6, the jury here was not even instructed that it needed to find that US Bank

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> "Financial institution" means a bank, as defined in s. 214.01 (1) (c), a savings bank, as defined in s. 214.01 (1) (t), a savings and loan association, a trust company, a credit union, as defined in s. 186.01 (2), a mortgage banker, as defined in s. 224.71 (3), or a mortgage broker, as defined in s. 224.71 (4), whether chartered under the laws of this state, another state or territory, or under the laws of the United States.

Wis. Stat. § 943.80(2).

was "chartered." Instead, the court instructed the jury that it needed to find that "U.S. Bank is a financial institution" and that "Financial institution" meant "a bank, a savings bank, a savings and loan association, a trust company, a credit union, a mortgage banker, or mortgage broker." (R. 89:49; 92:6.) Robinson did not object to this instruction at trial. (R. 92:3.) Accordingly, to the extent that Robinson's sufficiency challenge assumes that the jury was not properly instructed that it needed to find that US Bank was "chartered" in order to find that it was a "financial institution," that objection has been forfeited. *State v. Trammell*, 2019 WI 59, ¶ 24, 387 Wis. 2d 156, 928 N.W.2d 564.

Second, the State did, in fact, provide sufficient circumstantial evidence that US Bank is a financial institution in line with *Eady*. Ms. Dunn, the teller who gave the money to Robinson, testified that she was "an international banker" who worked at "US Bank" full time and that "US Bank is a financial institution located here in Milwaukee." (R. 89.63.) She further testified about the layout of the bank and the fact that the bank had a station "where you get teller slips and things to do with withdrawals or deposits," such as if a person "wanted to make a deposit to your checking account or savings account." (R. 89:65.) She testified that Robinson went to one of these stations and obtained a "Western Union slip," which is "a wireless way to send . . . money internationally or domestically." (R. 89:65.) Dunn explained how after Robinson gave her the robbery note, she gave him money from the teller drawer and then pulled the alarm. (R. 89:67.) And the video stills of Robinson robbing US Bank shows an "FDIC" sign prominently on the teller's window in the lower left. (R. 22; 23.)

In short, the State provided evidence of US Bank's "day-to-day operation"—that the bank was engaged in depositing and withdrawing funds for clients, that it was involved in

international wire transfers, and that it was "insured by the FDIC." *Eady*, 366 Wis. 2d 711, ¶ 12.

Accordingly, Robinson's sufficiency challenge fails.

II. Wisconsin Stat. § 943.87 is not facially unconstitutional for lack of a *scienter* element.

A. This Court need not address Robinson's constitutional arguments because the statute contains an intent element.

Robinson asserts multiple constitutional arguments for invalidating section 943.87. (Robinson's Br. 34–36.) All are based on the faulty premise that section 943.87 lacks an "intent to steal" element. (Robinson's Br. 34–36.) But because the statute contains an intent element within its "force" requirement, Robinson's constitutional arguments do not even come into play.

Robinson is correct that the statute under which he was convicted does not contain an express "intent" element. It states: "Whoever by use of force or threat to use imminent force takes from an individual or in the presence of an individual money or property that is owned by or under the custody or control of a financial institution is guilty of Class C felony." Wis. Stat. § 943.87. However, the intent element is implied because it is subsumed under the statutory requirement that the defendant must "use force" or "threat[en] to use imminent force." Wis. Stat. § 943.87.

The jury in this case was instructed that an essential element of the offense is that the defendant "acted forcibly." (R. 20:2.) The jury instructions defined "forcibly" to mean that "the defendant threatened the imminent use of force against the individual *with the intent to compel the individual to submit to the taking or carrying away of the money or*

property." (R. 20:2 (emphasis added).)[5] Thus, because the jury found Robinson guilty, it necessarily determined that he acted "with the intent to compel" Dunn, as a representative of US Bank, to "submit to the taking or carrying away of the money or property." (*Id.)*

This instruction is consistent with the general rule in Wisconsin "criminal intent is the rule in our criminal jurisprudence." *State v. Stoehr*, 134 Wis. 2d 66, 77, 396 N.W.2d 177 (1986). Accordingly, *scienter* "is generally presumed even absent express statutory reference." *State v. Weidner*, 2000 WI 52, ¶ 11, 235 Wis. 2d 306, 611 N.W.2d 684. And Robinson does not develop any argument that Wis. Stat. 943.87 meets any of the criteria for concluding that the statute imposes strict liability, as set forth in *State v. Luedtke,* 2015 WI 42, ¶ 65, 362 Wis. 2d 1, 863 N.W.2d 592.

Because intent is the rule and Robinson does not argue that the statute qualifies as a strict liability statute, this Court should conclude that Wis. Stat. § 943.87 contains an implicit element of "intent" under the "force" element and that the jury properly found that Robinson acted with the requisite intent when he walked into US Bank and gave the teller a note saying "I have a gun. Give me the money." (R. 89:67.)

And because section 943.87 contains a *scienter* element, this Court need not engage in an extensive constitutional analysis and may dispose of Robinson's arguments on this basis alone. However, if the Court disagrees with the State and concludes that section 943.87 lacks an intent element, Robinson's constitutional arguments fail for several other reasons.

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[5] As Robinson does not even mention the jury instruction, he does not argue that "intent to compel the individual to submit to the taking or carrying away of the money or property" (R. 20:2) is meaningfully different than his proffered "intent to steal." (Robinson's Br. at 34.)

B. Robinson's constitutional arguments are comingled and insufficiently developed.

1. Constitutional arguments must be developed and analyzed separated.

When a defendant presents multiple constitutional challenges to a statute, each constitutional claim must be examined independently from one another. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19–20 (2010). A party must not conflate differing constitutional doctrines. *Id*. The party must sufficiently raise and develop each discrete constitutional claim separately. *Cemetery Servs., Inc. v. DRL*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998). For example, a vagueness challenge and overbreadth claim are distinct from one another, "[o]therwise the doctrines would be substantially redundant." *Humanitarian Law Project*, 561 U.S. at 20.

And because a party making a facial challenge to the constitutionality of a statute faces a heavy burden, his constitutional arguments must be adequately developed before a court will address them. As the Wisconsin Supreme Court has explained: "Constitutional claims are very complicated from an analytic perspective, both to brief and to decide. A one or two paragraph statement that raises the specter of such claims is insufficient to constitute a valid appeal of these constitutional issues to this court." *Cemetery Servs.,* 221 Wis. 2d at 831.

Accordingly, an appellate court generally will not address arguments of constitutional magnitude that are not sufficiently developed because to do so it would need to "serve as both advocate and court." *Id.*; *see also State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court may decline review of underdeveloped arguments).

2. Robinson's constitutional claims are comingled and insufficiently developed.

Here, Robinson commingles three distinct constitutional claims when he argues that section 943.87 is unconstitutional because it lacks an "intent to steal" element. (Robinson's Br. 34–36.) First, Robinson argues it is unconstitutionally overbroad in violation of the Fourteenth Amendment's guarantees of substantive due process. *See State v. Tronca*, 84 Wis. 2d 68, 89, 267 N.W.2d 216 (1978) (overbreadth rests upon substantive due process). Second, Robinson argues the statute is unconstitutionally vague, a procedural due process claim under the Fourteenth Amendment.[6] *See City of Oak Creek v. King*, 148 Wis. 2d 532, 546, 436 N.W.2d 285 (1989) (vagueness rests on procedural due process). Third, Robinson argues the statute violated the equal protection clause of the Fourteenth Amendment. (Robinson's Br. 35–36.)

Despite mounting a facial constitutional challenge to a criminal statute that has been on the books for over 15 years[7] under three different constitutional provisions,[8] Robinson devotes a mere three-pages to his constitutional arguments.

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[6] Robinson incorrectly states that vagueness claim is a substantive due process claim. (Robinson's Br. 34.)

[7] Wisconsin Stat. 943.87 was enacted in 2005 Wis. Act 212.

[8] Robinson also cites Wis. Const. Art 1 § 1, but does not claim that Wisconsin's constitution offers textually-based broader protections than its federal counterpart. "The United States and Wisconsin constitutions generally provide due process guarantees with no substantive differences." *State v. Wood*, 2010 WI 17, ¶ 17 n.9, 323 Wis. 2d 321, 780 N.W.2d 63; *see also State v. Roberson,* 2019 WI 102, ¶ 56, 389 Wis. 2d 190, 935 N.W.2d 813 ("A state court does not have the power to write into its state constitution additional protection that is not supported by its text or historical meaning.").

(Robinson's Br. 33–36.) He presents each claim in only one or two paragraphs. Robinson first states the standard of review and sets forth the elements. (Robinson's Br. 33–34.) He then presents a commingled substantive due process overbreadth claim with a procedural due process vagueness claim in three short paragraphs. (Robinson's Br. 34–35). Robinson dedicates a mere paragraph to his equal protection claim. (Robinson's Br. 35–36.)

So Robinson presents three constitutional claims in four paragraphs. In doing so, he replicates the same error criticized in *Cemetery Servs.*, 221 Wis. 2d at 831, by commingling and under-developing claims in a few short paragraphs. "A one or two paragraph statement that raises the specter of such claims is insufficient to constitute a valid appeal of these constitutional issues to this court." *Id.*

This principle is particularly relevant to Robinson's claims because there is no general requirement that criminal statutes must have a *scienter* element. The Wisconsin Supreme Court has upheld the constitutionality of strict liability offenses—i.e. those where the State is not required to prove that the defendant acted with a culpable state of mind. *See, e.g., Luedtke*, 362 Wis. 2d 1, ¶ 65 (upholding constitutionality of Wis. Stat. § 346.63(1)(am)(c), prohibiting operating a motor vehicle with a detectible amount of a controlled substance under due process challenge).

Thus, Robinson must do much more than string together a few paragraphs of general constitutional principles and "raise[ ] the specter" of a constitutional violation, leaving it to this Court to fill in the details. *Cemetery Servs.*, 221 Wis. 2d at 831. Because Robinson's arguments are comingled and insufficiently developed, this Court should decline to address them. *Pettit*, 171 Wis. 2d at 646.

C. The statute is constitutional even if it lacks an intent element.

This Court does not need to address the merits of Robinson's constitutional arguments unless it first concludes that section § 943.87 lacks an intent element and that Robinson's claims are properly addressed and developed. However, all three of his constitutional claims fail on the merits as well.

1. Robinson faces the "heavy burden" of proving the statute unconstitutional beyond a reasonable doubt under each theory.

All statutes are presumed to be constitutional. *State v. Heft*, 185 Wis. 2d 288, 517 N.W.2d 494 (1994). Therefore, a party challenging the constitutionality of a statute bears the "heavy burden" of proving the provision unconstitutional beyond a reasonable doubt. *State v. Quintana*, 2008 WI 33, ¶ 76, 308 Wis. 2d 615, 748 N.W.2d 447. In a facial challenge, this means that the party challenging the statute must prove that it "cannot be enforced 'under any circumstances.'" *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 38, 393 Wis. 2d 38, 946 N.W.2d 35 (citation omitted).

The presumption of constitutionality and obligation to prove a statute unconstitutional beyond a reasonable doubt applies with equal force to each of the theories Robinson asserts. *Redevelopment Auth. of Milwaukee v. Uptown Arts & Educ.*, Inc., 229 Wis. 2d 458, 462, 599 N.W.2d 655 (Ct. App. 1999) (overbreadth); *State v. Ruesch*, 214 Wis. 2d 548, 556, 571 N.W.2d 898 (Ct. App. 1997) (vagueness); *Heft*, 185 Wis. 2d at 298 (equal protection). With that said, none of Robinson's three constitutional arguments have merit.

2. Wisconsin's robbery of a financial institution statute is not unconstitutionally overbroad.

a. Overbreadth claims are limited to First Amendment claims involving "substantial number" of unconstitutional applications.

Overbreadth rests upon the concept of substantive due process. *Tronca*, 84 Wis. 2d at 89. Substantive due process is a constitutional limitation on the boundaries of police power. *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶¶ 57–61, 353 Wis. 2d 307, 845 N.W.2d 373. And states generally have "plenary" authority to curtail actions for public protection. *State v. Emery*, 178 Wis. 147, 155, 189 N.W. 564 (1922).

Therefore, overbreadth claims "are especially to be discouraged." *Sabri v. United States*, 541 U.S. 600, 609–10 (2004), and a party generally "does not have standing to raise a facial challenge that a statute is overbroad." *State v. Konrath*, 218 Wis. 2d 290, 305, 577 N.W.2d 601 (1998). Indeed, such claims are confined to instances in which a statute implicates First Amendment protections, and overbreadth claims generally are "not recognized . . . outside the limited context of the First Amendment." *United States v. Salerno*, 481 U.S. 739, 745 (1987). So in most circumstances, unless a statute "infringe[s] on a fundamental right protected by the First Amendment, [a court] should not address the overbreadth challenge." *Brandmiller v. Arreola*, 189 Wis. 2d 215, 228–29, 525 N.W.2d 353 (Ct. App. 1994), *aff'd*, 199 Wis. 2d 528, 544 N.W.2d 894 (1996).

However, even where the overbreadth doctrine applies, courts are "careful" to "only sparingly utilize the overbreadth doctrine as a tool for statutory invalidation, proceeding with caution and restraint." *State v. Jackson*, 2020 WI App 4, ¶ 13, 390 Wis. 2d 402, 938 N.W.2d 639 (citation omitted). To succeed, the claimant must show that "a substantial number

of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *State v. Culver*, 2018 WI App 55, ¶ 9, 384 Wis. 2d 222, 918 N.W.2d 103 (alteration in original) (citation omitted).

b. Section 943.87 does not implicate a fundamental right and has a rational basis.

Robinson argues that without an intent to steal element the statute "violates substantive due process because it is overbroad and vague; it proscribes conduct that the state has no authority to condemn." (Robinson's Br. 34.) Robinson is wrong.

Because section 943.87 does not implicate a fundamental right or suspect class, this Court must apply rational basis scrutiny under which a statute is constitutional so long as it "is rationally related to achieving a legitimate governmental interest." *Luedke* 362 Wis. 2d 1, ¶ 76. The rational basis need not be expressly articulated in the law. Rather, the statute passes muster if this Court "can conceive of facts on which the legislation could reasonably be based." *Quintana*, 308 Wis. 2d 615, ¶ 77.

Here, there is a perfectly legitimate governmental objective the state sought to achieve in enacting section 943.87—preventing people from using force or threatening to use force to obtain money from a financial institution. This objective involves legitimate public safety concerns as well as legitimate concerns about the integrity of the banking system. The state has a particularly strong interest in maintaining order in banks—and this includes the conduct of customers as well as those who come to do violence. Robinson fails to convince that the state lacks the authority to proscribe such conduct. Instead, Robinson argues that the statute violates due process because it could be construed as preventing a

person from entering a bank and threatening to use force to obtain his own money. (Robinson's Br. at 35.)

There are two problems with this. First, a facial challenge is not won by pointing to an obscure hypothetical situation where a statute *may* be unconstitutional. Second, Robinson had to show a "substantial number" of unconstitutional applications, *Culver*, 384 Wis. 2d 222, ¶ 9 (citation omitted), and his single example does not even present an unconstitutional application. Robinson utterly fails to explain why the state cannot outlaw a person from entering financial institution and using force or the threat of force to obtain money—even their own.

The statute is not overbroad.

3. Wisconsin's robbery of a financial institution statute is not unconstitutionally vague.

a. Robinson has the burden to prove the statute gives insufficient notice of the prohibited conduct in all applications.

Vagueness rests upon the concept "that procedural due process requires fair notice and proper standards for adjudication." *City of Oak Creek*, 148 Wis. 2d at 546. The primary issue is whether the regulation is "sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties." *Id.* A regulation may be unconstitutionally vague when "it fails to afford proper notice of the conduct it seeks to proscribe." *City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 16, 291 N.W.2d 452 (1980).

And importantly, a person raising vagueness "does not have standing to challenge it on the grounds of being vague as it may be applied to others." *State v. Clement*, 153 Wis. 2d 287, 296, 450 N.W.2d 789 (Ct. App. 1989). So a "defendant

cannot hypothesize fact situations but is confined to the conduct charged." *State v. Driscoll*, 53 Wis. 2d 699, 701–02, 193 N.W.2d 851 (1972).

In a vagueness challenge, the party must show the statute is vague in *all* its applications. *Hegwood v. City of Eau Claire*, 676 F.3d 600, 604 (7th Cir. 2012). Thus, Robinson's vagueness challenge requires him to "establish, beyond a reasonable doubt, that there is no possible application or interpretation of the statute which would be constitutional." *State v. Smith*, 215 Wis. 2d 84, 90–91, 572 N.W.2d 496 (Ct. App. 1997).

b. The statute gives fair notice of the conduct it prohibits.

Robinson's vagueness challenge is doomed by his misapplication and misunderstanding of vagueness doctrine. He bases his claim on a single hypothetical that "a person could be charged with robbery of a financial institution for forcibly demanding and leaving with his own money." (Robinson's Br. 35.)

But Robinson wasn't trying to obtain his own money when he robbed US Bank. He was broke with a $100-a-day drug habit—that's why he robbed the bank. Robinson cannot (and does not even attempt to argue) that section 943.87 fails to give adequate notice of the conduct it prohibits in this circumstance. To state the obvious: You can't enter a bank and threaten to use force to obtain someone else's money.

In addition to the problem that Robinson cannot prove vagueness by relying on hypothetical situations involving other people, *Driscoll*, 53 Wis. 2d at 701–02, his hypothetical is unconvincing. The goal of maintaining public order and safety in banks demands that citizens refrain from using or threatening to use force against bank employees to obtain money that they believe is their own. The statute gives clear notice of that and therefore is not unconstitutionally vague.

4. Wisconsin's robbery of a financial institution statute doesn't violate equal protection because it has a rational basis.

Moving onto Robinson's equal protection challenge, he claims that there is no rational basis for the criminal statutes to require an intent element for other theft-related crimes but not have the same element in section 943.87 (Robinson's Br. at 36.) This argument fares no better than his overbreadth claim because "[a]lthough substantive due process and equal protection may have different implications, '[t]he analysis under both the due process and equal protection clauses is largely the same.'" *State v. Smith*, 2010 WI 16, ¶ 16, 323 Wis. 2d 377, 780 N.W.2d 90 (citation omitted). And because Robinson does not argue that that the statute implicates a suspect class or fundamental right, it is subject to rational basis scrutiny, like most statutes challenged on equal protection grounds. *In re Commitment of Alger*, 2015 WI 3, ¶ 39, 360 Wis. 2d 193, 858 N.W.2d 346.

It is perfectly rational for the state to omit the intent element relating to theft from a financial institution. Using Robinson's hypothetical, the Legislature very reasonably could have concluded that in order to maintain public safety and order within banks and consumer confidence in financial institutions, members of the public cannot use or threaten to use force to obtain money—regardless of what they intend to do with it afterwards. This is why the statute not only proscribes using force to carry away someone else's money, but also an individual's own funds that are in "under the custody or control of a financial institution." Wis. Stat. § 943.87.

The statute is constitutional.

III. Robinson was not entitled to a *Macher* hearing because his trial counsel did not perform deficiently and he was not prejudiced.

Robinson claims that his trial counsel was ineffective in a variety of ways. He asserts that counsel was ineffective for failing to: (1) introduce evidence that two people present at the bank robbery were unable to identify him as the robber; (2) present evidence that two people called police in response to a photograph from the robbery shown on TV and identified two other people as the robber; (3) call an eyewitness identification expert; and (4) moving to suppress Dunn's identification of the him on grounds that he was entitled to counsel. (Robinson's Br. 11–32.) But because the record conclusively demonstrates that counsel was not deficient and that Robinson was not prejudiced by the alleged errors, the postconviction court properly denied his postconviction motion without a hearing.

A. In order to be entitled to a hearing, Robinson was required to allege facts showing both deficient performance and prejudice.

"When a circuit court summarily denies a postconviction motion alleging ineffective assistance of counsel without holding a *Machner* hearing, the issue for the court of appeals is whether the defendant's motion alleged sufficient facts entitling him to a hearing." *State v. Sholar,* 2018 WI 53, ¶ 51, 381 Wis. 2d 560, 912 N.W.2d 89. In order to make out a prima facie case of ineffective assistance of counsel, a defendant must allege facts that establish counsel was both deficient and the deficiency was prejudicial under the familiar two-part test articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

But a defendant is not entitled to a *Machner* hearing simply because he makes conclusory allegations in a posttrial

motion, "no matter how cursory or meritless the ineffective assistance of counsel claim might be." *State v. Curtis*, 218 Wis. 2d 550, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998). Accordingly, a "circuit court has the discretion to deny the postconviction motion without a *Machner* hearing 'if the motion fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.'" *State v. Ortiz-Mondragon*, 2015 WI 73, ¶ 58, 364 Wis. 2d 1, 866 N.W.2d 717 (quoting *State v. Roberson,* 2015 WI 73, ¶ 43, 292 Wis. 2d 280, 866 N.W.2d 717).

B. Trial counsel did not perform deficiently in any of the manners alleged.

1. Counsel is not deficient if his conduct falls within the wide realm of objectively reasonable actions.

A criminal defendant has the right to effective assistance of counsel. *State v. Balliette,* 2011 WI 79, ¶ 21, 336 Wis. 2d 358, 805 N.W.2d 334. However, "counsel's performance need not be perfect, nor even very good, to be constitutionally adequate." *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695.

To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.*

"The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (citing *Strickland*, 466 U.S. at 688). A court judges an attorney's performance based

on "an objective test, not a subjective one." *State v. Jackson*, 2011 WI App 63, ¶ 9, 333 Wis. 2d 665, 799 N.W.2d 461. "So, regardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." *Id.*

Additionally, "[i]n order to constitute deficient performance, the law must be settled in the area in which trial counsel was allegedly ineffective." *State v. Hanson*, 2019 WI 63, ¶ 28, 387 Wis. 2d 233, 928 N.W.2d 607. "When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance." *Jackson*, 333 Wis. 2d 665, ¶ 10. The law is unsettled "[w]hen case law can be reasonably analyzed in two different ways," *id.*, or when "there is no Wisconsin case law directly on point on the issue" and existing Wisconsin case law does not "present a factual situation similar enough to the facts of this case," *State v. Morales-Pedrosa*, 2016 WI App 38, ¶ 26, 369 Wis. 2d 75, 879 N.W.2d 772.

Accordingly, when a defendant argues that his lawyer was ineffective by not raising a certain issue, a court generally is "confined to considering the narrower issue of whether the law was so well settled that counsel's performance was legally deficient." *State v. Breitzman*, 2017 WI 100, ¶ 56, 378 Wis. 2d 431, 904 N.W.2d 93.

A court thus "need not address the merits" of the issue that counsel failed to raise. *State v. Lemberger*, 2017 WI 39, ¶ 32, 374 Wis. 2d 617, 893 N.W.2d 232. Of course, "[i]n determining whether counsel's performance was deficient for failing to bring a motion, [a court] may assess the merits of that motion." *State v. Sanders*, 2018 WI 51, ¶ 29, 381 Wis. 2d 522, 912 N.W.2d 16. And "[c]ounsel does not perform deficiently by failing to bring a meritless motion." *Id.* Indeed, an attorney's failure to raise a meritless argument is neither deficient performance nor prejudicial under *Strickland*. *State*

v. Ziebart, 2003 WI App 258, ¶ 14, 268 Wis. 2d 468, 673 N.W.2d 369.

2. Counsel was not deficient for failing to call two witnesses who were unable to identify anyone as the bank robber.

Robinson claims his trial counsel was deficient for failing to call two bank employees who were unable to identify anyone as the robber. (Robinson's Br. 11–13.) The first witness, Ms. Wright, worked as a security guard at the bank and asked Robinson to remove his hood when he entered. (R. 62:8.) He did so, walked away, and got in line at the teller window. (R. 62:8.) "[M]oments later," the teller informed her that the bank had been robbed. (R. 62:8–9.) The second witness, Ms. Taylor, was on the phone when Robinson entered the bank. (R. 62:9.) She observed Robinson grab a Western Union slip from the kiosk, and then get in line, "at which time she did not pay any more attention to him. (R. 62:9.) Neither Wright nor Taylor identified anyone from a lineup as the robber. (R. 62:10–11.)

It is not ineffective assistance for trial counsel to fail to present evidence with "limited value." *State v. Lindell*, 2001 WI 108, ¶ 130, 245 Wis. 2d 689, 629 N.W.2d 223. As the postconviction court recognized, these witnesses' "inability to identify [Robinson] as the bank robber would not have been materially probative that anyone other than the defendant committed the bank robbery." (R. 80:4.) That is because, their inability to make an identification "is not evidence that the defendant was not the robber—it simply means, for any number of reasons, they would not identify him following their relatively brief and innocuous interactions with him." (R. 80:4.)

Indeed, the police reports Robinson relies upon do not indicate that either Wright or Taylor had the same opportunity to observe Robinson's facial features up close for

any extended period of time. (R. 62:8–11.) Accordingly, these witnesses' testimony had limited probative value and contrary to Robinson's claim, they would not have undercut Dunn's identification. (Robinson's Br. 12–13.)

3. Counsel was not deficient for failing to present evidence that would have been barred by *State v. Denny*.

Robinson next argues that his trial counsel was deficient for failing to call two members of the public who phoned police and identified other individuals as the perpetrator after still images from the bank robbery were released. (Robinson's Br. 14–15.) One of these individuals was an anonymous caller who identified someone living in Green Bay; the caller did not give her name and hung up when pressed for details. (R. 62:2.) Police were unable to trace the number from where the call originated. (R. 62:2.) The other caller thought the bank photo looked like her son. (R. 62:6.) Police follow-up revealed that no family members had seen him in some time and no one knew of his whereabouts. (R 62:6.)

The postconviction court concluded that the failure to call these witnesses was not deficient performance because their testimony would have been barred by *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). (R. 80:4.) The postconviction court was correct.

Denny holds that evidence may not be introduced of potential alternative perpetrators unless a defendant can satisfy the "legitimate tendency" test. *Denny*, 120 Wis. 2d at 623–24. Under that test, evidence that someone other than the defendant committed the crime is not admissible unless a defendant shows "motive and opportunity" and that there "is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances." *Id.* at 624. In other words, the test looks at:

(1) did the alleged alternative perpetrator have a "plausible reason" to commit the crime; (2) "could the alleged third-party perpetrator have committed the crime directly or indirectly"; and (3) is there evidence that the third-party "actually committed the crime." *State v. Wilson*, 2015 WI 48, ¶¶ 57–59, 362 Wis. 2d 193, 864 N.W.2d 52.

Relying on *State v. Scheidell*, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999), Robinson argues that *Denny* does not apply where the defense seeks only to show that an "unknown third party" committed the offense. (Robinson's Br. 17.) But Robinson mischaracterizes both the holding in *Scheidell* and how he claims trial counsel should have used the evidence.

Scheidell held that *Denny* does not apply "where the defendant seeks to show that some *unknown* third party committed the charged crime *based on evidence of another allegedly similar crime*." *Scheidell*, 227 Wis. 2d at 296 (emphasis added). Robinson ignores this crucial language and does not even assert that either of the two individuals identified by the phone tipsters committed an allegedly similar crime. (Robinson's Br. 17.)

Further, Robinson does not claim that the phone tipster evidence involved "unknown third part[ies.]" *Scheidell*, 227 Wis. 2d at 296. To the contrary, he claims that two phone tipsters identified specific individuals who allegedly committed the robbery Robinson was charged with. (Robinson's Br. 17.) According to Robinson, evidence of these specific alternative identifications would show that eyewitness testimony is inherently unreliable. (Robinson's Br. 17–18.) That is simply another way of saying that the evidence pointed to other discrete individuals as the perpetrator.

Robinson's attempt to distinguish *Denny* based on *Scheidell* therefore fails.

Second, Robinson claims that the *Denny* test could be satisfied because both identified individuals had motive because "[r]obbing a bank is a profitable crime" and because the phone tipsters' identifications establish that these individuals "were at the scene and actually committed the crime because they were identified as the man in the video." (Robinson's Br. 19.) But this argument is at such a high level of generality that it renders the *Denny* test meaningless.

Under Robinson's logic, the first step in *Denny* is always satisfied in cases involving property or financial crime because any member of the public has a profit motive. No case interprets *Denny* so loosely.

Additionally, evidence that the phone tipsters—who were not even witnesses to the crime—*thought* they recognized other individuals as the robber in the bank video stills is not direct evidence, *Denny*, 120 Wis. 2d at 624, that either person *actually was present* at US Bank in Milwaukee at the date and time of the robbery. Indeed, the police reports do not indicate that police confirmed that either individual was in the immediate vicinity of the crime. (R. 62:2, 6.)

Therefore, the evidence Robinson claims counsel should have presented would not have satisfied the *Denny* test and was inadmissible. And counsel is not deficient for failing to seek admission of inadmissible evidence. *Carter*, 324 Wis. 2d 640, ¶ 54.

Robinson's final argument is that the requirements of *Denny* should not apply because they are unconstitutional. (Robinson's Br. 19–20.) But this Court cannot directly review this argument because it was first raised in Robinson's postconviction reply brief. (R. 72:3.) Rather, the question is

whether Robinson's trial counsel was ineffective for failing to argue that *Denny* is unconstitutional.[9]

And as described above, counsel cannot be deemed ineffective for failing to raise an issue that is "unsettled." *Jackson*, 333 Wis. 2d 665, ¶ 10; *Breitzman*, 378 Wis. 2d 431, ¶ 5. This is true even if counsel's argument is a reasonable interpretation of existing law. *Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 26. It follows then, *a fortiori*, that counsel cannot be deemed deficient for failing to argue that current law is wrongly decided. *State v. Beauchamp*, 2010 WI App 42, ¶ 18, 324 Wis. 2d 162, 781 N.W.2d 254 (stating that trial counsel has "no Strickland responsibility to either seek a change in Wisconsin law or lay a fact-predicate to try to precipitate that change").

For this reason, trial counsel could not have been deficient for failing to seek admission of evidence barred by current law and for not arguing that Wisconsin's current *Denny* standard is unconstitutional.[10]

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[9] Even if this Court *did* address this argument on the merits it is bound to follow *Denny* under *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

[10] While this Court is not in a position to directly review Robinson's argument that *Denny* is unconstitutional, the State notes that *Denny*'s "legitimate tendency" standard is based on precedent from the United States Supreme Court. *State v. Denny*, 120 Wis. 2d 614, 623–24, 357 N.W.2d 12 (Ct. App. 1984) (citing *Alexander v. United States*, 138 U.S. 353 (1891)). And while *Denny* was limited in *State v. Scheidell*, 227 Wis. 2d 285, 297, 595 N.W.2d 661 (1999), the Wisconsin Supreme Court has not given any indication that the *Denny* test is unconstitutional.

4. Counsel was not ineffective for not obtaining an expert witness on eyewitness identification.

Robinson next argues that his trial counsel was ineffective for not presenting an expert witness to testify as to the limitations and alleged unreliability of eyewitness identification testimony. (Robinson's Br. 22–24.) In adjudicating Robinson's claim, this Court must bear in mind that the question is not whether an eyewitness identification expert would have been helpful to the jury, but rather whether counsel's failure to present such an expert "fell below an objective standard of reasonableness as measured against prevailing professional norms." *State v. Van Buren*, 2008 WI App 26, ¶ 19, 307 Wis. 2d 447, 746 N.W.2d 545.

And the State is not aware of any published Wisconsin case holding that counsel is deficient for failing to present an expert to discuss the limitations of eyewitness identification testimony. To the contrary, the Wisconsin Supreme Court has held that a circuit court may properly exclude such evidence as being unhelpful to the trier of fact because alleged shortcomings of a particular identification can be thoroughly explored in cross-examination. *State v. Shomberg*, 2006 WI 9, ¶ 14, 288 Wis. 2d 1, 709 N.W.2d 370.

Therefore, Robinson's trial counsel was not deficient for failing to procure an expert witness to discuss the limitations of eyewitness identifications.

5. Counsel was not ineffective for not arguing that the right to counsel attached to the Robinson's pre-charging lineup.

Robinson's final claim of deficient performance is that his trial counsel should have sought to exclude Dunn's lineup identification on the grounds that he was entitled to counsel during the lineup because the lineup occurred after a court

commissioner signed a Milwaukee County CR-215 form. (Robinson's Br. 25–31.) But this argument fails because no case has held that the right to counsel attaches to post-arrest but pre-charging lineups. To the contrary, the law is well-established that the right to counsel does *not* attach in such circumstances.

"Under the Sixth Amendment, a person *formally charged* with a crime has a right to counsel at every critical stage of the proceedings." *State v. Hornung*, 229 Wis. 2d 469, 476, 600 N.W.2d 264 (Ct. App. 1999) (emphasis added). However, the fact that the right to counsel attaches at a particular point does not mean it is a "critical stage" that requires the presence of counsel, for instance, when the prosecutor files the complaint. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 212 (2008). While it is undisputed that a defendant has a constitutional right to representation before the preliminary hearing, *Jones v. State*, 37 Wis. 2d 56, 69, 154 N.W.2d 278 (1967), no case in Wisconsin has held that the right to counsel attaches during a post-arrest lineup that occurs before a complaint is filed.

Indeed, under *Rothgery*, 554 U.S. at 194, the right to counsel does not attach until "the first appearance before a judicial officer at which the defendant is told of the formal accusation against him." Likewise, *Kirby v. Illinois*, 406 U.S. 682 (1972) and its progeny "say that the presence of counsel at a lineup is not required if formal charges have not yet been filed against the suspect." *State v. Winters*, 2009 WI App 48, ¶ 32, 317 Wis. 2d 401, 766 N.W.2d 754 (collecting cases).

As the Wisconsin Supreme Court recognized in *Jones v. State*, 59 Wis. 2d 184, 194, 207 N.W.2d 890 (1973), "the United States Supreme Court has since made clear that [the right to counsel] appl[ies] only to lineups conducted 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Jones*, 59 Wis. 2d

at 194. Indeed, *Jones* specifically held "that presence of counsel is not required at one-to-one or one-out-of-a-crowd observations held before commencement of criminal prosecution." *Id.*

Therefore, the only question is whether a CR-215 hearing constitutes the initiation of criminal proceedings. But it plainly does not under *Jones*, 59 Wis. 2d at 195. *Jones* described "adversary judicial criminal proceedings" entitling a defendant to counsel at a lineup as a "formal charge, preliminary hearing, indictment, information, or arraignment." *Id.*

A CR-215 hearing is none of these. On this issue, the postconviction court made the following factual findings about Milwaukee County's CR-215 procedure:

> - The CR-215 form is used when a suspect is arrested without a warrant for purposes of determining probable cause to arrest under *Riverside*[11];
> - The CR-215 hearing occurs ex parte, without the suspect or prosecutor and the form is reviewed by a court commissioner;
> - Signing a CR-215 form does not open a criminal case file and a prosecutor is not bound to issue any charges;
> - Suspects (like Robinson) are not given a copy of the signed CR-215 form;

(R. 80:6.)

Put simply, at the end of a CR-215 hearing, there has not been a "formal charge, preliminary hearing, indictment, information, or arraignment." *Jones*, 59 Wis. 2d at 195.

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[11] *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

Accordingly, there is no right to counsel during a lineup that occurs after a CR-215 form has been filed but before the initiation of criminal proceedings.

In order to show the trial counsel was deficient for failing to raise a Sixth Amendment issue relating to the lineup, Robinson needs to point to "Wisconsin case law directly on point on the issue" under "a factual situation similar" to the case at hand that controls the issue. *Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 26. As described above, Wisconsin case law is fundamentally at odds and directly contrary to the Robinson's Sixth Amendment argument. It follows then that his trial counsel could not, by definition, have been ineffective for failing to raise an argument that is foreclosed by existing law. *State v. McMahon*, 186 Wis. 2d 68, 84–85, 519 N.W.2d 621 (Ct. App. 1994).

And while it is true that none of the above cases specifically address Milwaukee County's use of the CR-215 form, at least one citeable, unpublished opinion from this Court has addressed it and concluded that a CR-215 hearing does not constitute the initiation of formal judicial proceedings such that the right to counsel attaches. *State v. Garcia*, No. 2016AP1276-CR, 2018 WL 1738747 (Wis. Ct. App. Apr. 10, 2018),[12] *aff'd* 2019 WI 40, 386 Wis. 2d 386, 925 N.W.2d 528 (equally divided court).

As the postconviction court recognized "[t]he *exact* same issue the defendant now raises with almost identical facts were presented" in *Garcia*. (R. 80:6.) *Garcia* held that under *Rothgery*, the right to counsel does not attach during Milwaukee County's paper-only *Riverside*[13] probable cause determination utilizing the CR-215 form. *Garcia*, 2018 WL

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[12] Included at R-App 101–109.

[13] *County of Riverside*, 500 U.S. 44.

1738747, ¶¶ 28–30. This Court reasoned that the right to counsel does not attach at a CR-215 hearing because the defendant is not present and no charges are filed. *Id.* Because the CR-215 probable cause determination concerns probable cause for the *arrest* and no "charges" are filed and the defendant is not present, "adversarial criminal proceedings" have not been commenced at this point within the meaning of *Rothgery*, 554 U.S. at 194. *Garcia*, 2018 WL 1738747, ¶ 30.

Although Robinson disagrees with the correctness of *Garcia*, at best, all that does is established that the issue is "unsettled." And as set forth above, counsel is not ineffective for failing to raise a point of unsettled law. *McMahon*, 186 Wis. 2d at 84–85.

And while Robinson argues that *Garcia* is inconsistent with *State v. Koch*, 175 Wis. 2d 684, 698, 499 N.W.2d 152 (1993), (Robinson's Br. 29–30), *Koch* holds only that a *Riverside* hearing does not require a personal appearance of the defendant. There is no inconsistency. *Koch* and *Riverside* address probable cause for *arrest*—where a personal appearance is not required. In contrast, *Rothgery*, *Kirby*, and *Jones* recognize that the constitutional right to counsel does not attach until "formal" charges are filed—where a personal appearance occurs.

Robinson simply cannot point to a case that extends the right to counsel to post-arrest/pre-charging lineups under similar circumstances, such that counsel's failure to raise this argument was objectively unreasonable. *Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 26. Therefore, the record conclusively demonstrates that Robinson's Sixth-Amendment ineffectiveness claim fails.

C. Robinson cannot show prejudice because of the overwhelming evidence of his guilt.

In assessing whether the defendant has alleged sufficient facts demonstrating prejudice, the question is

whether the defendant has shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. *Strickland*'s prejudice standard "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (quoting *Strickland*, 466 U.S. at 693, 697).

"The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). The Wisconsin Supreme Court has commented that in most cases, errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling. *State v. Thiel*, 2003 WI 111, ¶ 61, 264 Wis. 2d 571, 665 N.W.2d 305.

The postconviction court concluded that Robinson failed to demonstrate prejudice on all of his claims. (R. 80:4–6.) The court was correct.

As the postconviction court recognized, there was very strong and compelling evidence of Robinson's guilt. This evidence included three separate identifications of Robinson made by the teller he robbed—Dunn. (R. 80:2; 89:77–89.) Dunn testified that following her training as an international banker, she was looking at Robinson the entire time of the robbery in order to concentrate and remember his facial features, clothing, and build. (R. 89:68–69.) Even before police asked her to make an identification, she told them that she "absolutely" would be able to identify Robinson. (R. 89:79.) After identifying Robinson, she stated that she was "100 percent sure" and had "zero doubt" that Robinson is the

person who robbed the bank. (R. 89:88–91.) Dunn said she would "never forget his eyes." (R. 89:88.) And even if Robinson's identification during the in-person lineup was excluded, there is no indicia that the identifications she made based on the still photos and during trial was tainted by the live line-up. The fact that she told police from the outset that she "absolutely" could identify the robber and the certainty with which she made the subsequent identifications is strong indication that they were independently admissible. (R. 89:56.)

Additionally, two other women that had spent time with Robinson the day of the robbery positively identified him from the bank video stills based on his jacket. (R. 91:13–16; 19–23.) Both women were "100 percent" sure of their identification. (R. 91:16, 23.)

But the jury did not need to take these witnesses at their word alone because the State introduced video of the bank robbery as well as high-resolution, close-up color still images of Robinson at the teller window. (R. 21; 22; 23.) The jury asked to view all three of these during deliberations to "make a final decision," which the court provided. (R. 92:37–38.) The fact that the jurors specifically requested to view this evidence during deliberations is strong indication that they made their own independent determination of whether Robinson was the man in the video and photographs depicted robbing the bank, and that thy concluded that he was.

But that was not all. A detective testified that when Robinson was being investigated, the detective recovered a $100 bill from the floor of Robinson's vehicle, as well as another $100 bill on his person. (R. 91:9–11.)

Robinson had no convincing explanation for how he came to have such large denomination bills on him. Robinson said he was a "scrapper" who made $80 to $100 a day doing "odd jobs." (R. 91:44–45.) Robinson admitted that he had a

$100-a-day heroin habit. (R. 91:42–43.) Robinson admitted to being under the influence of heroin, cocaine, and marijuana the day before the robbery and taking more heroin after the robbery. (R. 91:40.) He also admitted that at the time of the robbery be was being "asked to move on" by his landlord. (R. 91:57.) When asked about the $100 dollar bills found in his vehicle, he said it likely came from "changing dollars for dollars" but couldn't remember "where it came from" or how it ended up in his car. (R. 91:41.) As for the $100 bill police found on his person, Robinson claimed it was "actually saved up" (R. 91:41–42), despite the fact that he admitted to having a $100-a-day-heroin habit and not having permanent employment.

In short, the State marshalled a compelling case against Robinson. There is no reasonable likelihood that the outcome of trial would have been different had Robinson called two other bank employees who were unable to identify anyone. There is no probability of a different result had testimony from the phone tipsters been allowed. There is not a reasonable possibility that generalized expert testimony about eyewitness testimony would have made the jury discount Dunn's multiple identifications. And the jury ultimately based its decision on its own viewing of the video and photographic evidence of the robbery.

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The record thus conclusively demonstrates that Robinson trial counsel was not deficient and that Robinson was not prejudiced by any alleged deficiencies. To the extent this Court disagrees, the appropriate remedy is a remand for a fact-finding *Machner* hearing.

CONCLUSION

This Court should affirm the judgment of conviction and order denying Robinson's motion for postconviction relief.

Dated this 19th day of April 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,027 words.

Dated this 19th day of April 2021.

Electronically signed by:

s/ Timothy M. Barber
TIMOTHY M. BARBER

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 19th day of April 2021.

Electronically signed by:

s/ Timothy M. Barber
TIMOTHY M. BARBER

Supplemental Appendix
State of Wisconsin v. Percy Antione Robinson
Case No. 2020AP1728-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 19th day of April 2021.

Electronically signed by:

s/ Timothy M. Barber
TIMOTHY M. BARBER

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this appendix which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this appendix filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 19th day of April 2021.

Electronically signed by:

s/ Timothy M. Barber
TIMOTHY M. BARBER