STATE OF WISCONSIN

COURT OF APPEALS

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 A. Havas and the Honorable Lindsey Grady presiding.

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Arrested persons have a Sixth Amendment right to counsel once the government initiates adversary criminal proceedings against them.

Does a CR-215 procedure—in which a police officer files a formal accusation with a judicial officer, followed by a judicial determination of probable cause and the setting of bail—trigger the arrested suspect's right to counsel?

The trial court answered no.

2. Counsel failed to challenge the asserted violation of Mr. Robinson's right to counsel, despite the existence of a controlling 2008 United States Supreme Court decision and four favorable decisions by the United States District Court for the Eastern District of Wisconsin.

Counsel also failed to call two witnesses at Mr. Robinson's trial who were present during the robbery, had an opportunity to view the suspect, and later failed to identify Mr. Robinson as the robber.

Finally, counsel also failed to present evidence of other inconsistent identifications obtained by law enforcement, which should have been used to call into question the reliability of the identification evidence at trial.

Is Mr. Robinson entitled to a hearing on his claims of ineffective assistance of counsel arising from these three errors?

The trial court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Robinson requests publication. This case was previously certified to the Wisconsin Supreme Court, which accepted review before remanding back to this Court without issuing an opinion. As there are other cases currently stayed pending the outcome of this appeal, publication is warranted.

Oral argument is not requested.

INTRODUCTION

This case involves two important questions, both of which center on Mr. Robinson's right to counsel under the Sixth Amendment.

The United States Supreme Court has held that the right to counsel attaches when a law enforcement officer files a formal accusation with a judicial official followed by a judicial determination of probable cause and the setting of bail. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 207 (2008).

In Milwaukee County,[1] these three events—(1) the filing of a formal accusation with a judicial official; (2) a judicial determination of probable cause and (3) the setting of bail—are encompassed within the CR-215 procedure, so-named because of the standardized circuit court form bearing that title. The only difference between Milwaukee County's CR-215 procedure and the mechanism assessed in *Rothgery* is that, in Milwaukee County, the process is conducted entirely on paper and arrested suspects do not physically appear before a reviewing magistrate.

This distinction, however, is not sufficient to distinguish away the controlling force of *Rothgery*. Because the core components of the "attachment" inquiry are all satisfied by Milwaukee County's procedure, this Court should hold that the CR-215 process triggers an arrested person's right to counsel.

As is well-established in law, "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). In this case, Mr. Robinson's postconviction motion plainly alleged three egregious violations of his right to the effective assistance of counsel; his motion pleaded both prongs of the relevant legal inquiry. Despite this, the trial court

[1] The CR-215 is a statewide circuit court form; however, based on this record, counsel can only presently assert that Milwaukee (our largest and highest-volume criminal court system) is following the procedure at issue in this appeal.

refused to hold a hearing. This Court should therefore reverse and remand.

STATEMENT OF THE CASE

An information filed in Milwaukee County Circuit Court charged Mr. Robinson with robbery of a financial institution contrary to Wis. Stat. § 943.87. (5:1).

Mr. Robinson was convicted after a jury trial and sentenced to a term of imprisonment. (30:1; 36:1). (App. 20). Mr. Robinson filed a postconviction motion and a supplemental filing requesting an evidentiary hearing on his claims of ineffective assistance of counsel. (61; 72). The court denied the motion in a written order without a hearing. (80:7). (App. 19). Mr. Robinson appealed, and this Court certified the matter to the Wisconsin Supreme Court. *See* Certification Opinion issued April 19, 2022.

Although the Supreme Court accepted review and the parties briefed and argued the case, the Court ultimately vacated its prior order granting review and remanded so this Court could consider Mr. Robinson's claims in light of the Seventh Circuit's persuasive decision in *Garcia v. Hepp ("Garcia IV")*, 65 F.4th 945 (7th Cir. 2023).

STATEMENT OF THE FACTS

Trial Testimony

Mr. Robinson's trial hinged on the testimony of a single eyewitness—S.D., an "international banker" at U.S. Bank's West Capitol Drive location in Milwaukee. (89:63). She was working her usual shift on the date of the robbery, December 18, 2017. (89:64).

While "helping out" by filling in as a teller toward the end of her workday, she observed a man appearing to fill out a "Western Union slip." (89:64-65). According to her testimony, the man was wearing a black skullcap and a black jacket with colored lining. (89:69). S.D. remembered that the man was taller than her and that he had a dark complexion. (89:69).

The man waited in line and, when it was his turn at the teller window, handed S.D. a note stating, "I have a gun, give me the money." (89:67). S.D. handed the robber a "wad" of bills totaling roughly $1,900. (89:67; 89:75-76). The man thanked her and walked away. (89:67). As he was leaving, S.D. activated the bank's alarm. (89:67). This transaction was captured on surveillance video, which was played for the jury. (89:71). Still photographs showing the robber's face were derived from that video and also presented to the jury. (22; 23); (App. 25).

The next day, December 19th, S.D. met with the police and gave a description of the robber. (89:92). She told police that the robber was a dark-skinned black man about 5'9" or 5'10". (89:92-93). He was 20-30 years old and had a mustache. (89:92-93). When

compared against the surveillance video, S.D. accurately described the robber's clothes, except for his pants, which she believed to have been dark jeans. (89:93).

Three days later, S.D. attended a live lineup arranged by the Milwaukee Police Department. (89:79). She identified Mr. Robinson as the person who had robbed the bank. (89:87). She told the jury she was "100 percent" confident in her identification. (89:88). She also identified Mr. Robinson as the robber during her trial testimony. (89:87).[2]

On cross-examination, however, the defense used a booking photo of Mr. Robinson taken the day after the robbery to illustrate that the robber in the video had a darker complexion, different facial hair, looked younger, and did not have "worry lines" on his face when compared against Mr. Robinson. (89:96-98; 90:7-11; 27).

Detective Tyler Kirkvold informed the jury that he was dispatched to Mr. Robinson's home after he was arrested as a suspect in this robbery. (91:7-8). Detective Kirkvold searched Mr. Robinson's car and recovered a single $100 bill. (91:9). Mr. Robinson also had $134.25 on his person at the time of his arrest. (91:10).

[2] S.D. also testified that she participated in a photo identification procedure conducted by the defense and that she also identified Mr. Robinson as the robber during that procedure. (89:89).

The State also called Meagan Thielecke, who met with Mr. Robinson "in a professional capacity" the morning of the robbery.[3] (91:13). She had previously been shown a still photograph of the robber and identified him as Mr. Robinson. (91:15). Ana Sandoval, also present during that meeting, likewise identified the man in the photograph as Mr. Robinson. (91:21).

Mr. Robinson was the only defense witness. (91:34). He denied being the robber and specifically denied being at the bank on the day of the robbery. (91:35). Instead, he told the jury that on the day the robbery was committed, he was recovering from the prior day's heroin, marijuana, and cocaine binge. (91:40). He also told the jury he met with Ms. Thielecke and Ms. Sandoval and then got high on heroin. (91:40). According to Mr. Robinson, heroin puts him to sleep. (91:40).

Closing Arguments and Jury Verdict

At the conclusion of the trial, the State focused on S.D.'s identification and argued to the jury that the other evidence in the case supported her testimony that Mr. Robinson was the robber. (92:14). In the State's view, S.D.'s identification was corroborated not only by circumstantial evidence—Mr. Robinson had two $100 bills in his possession at

[3] This was apparently a medical appointment. (88:8). In order to avoid apparently irrelevant or potentially prejudicial material, the State intentionally made the testimony vague on this point. (88:8).

the time of his arrest—but also by the testimony of Ms. Thielecke and Ms. Sandoval. (92:19-21).

In contrast, counsel for Mr. Robinson identified several reasons to disbelieve S.D.'s identification, focusing most intensely on the differences between the photograph of the robber and the booking photo of Mr. Robinson. (92:28-30). Counsel pointed out differences with respect to the eyes, nose, complexion, facial hair, bone structure and overall face shape. (92:28-29). The two men were also clearly not the same age. (92:28). Counsel even pointed out fine differences in the wrinkles and folds on the faces of the two men. (92:29). Moreover, counsel also asked the jury to consider the differences in demeanor between the man on the video and the way in which Mr. Robinson presented himself during his testimony. (92:29).

In addition to the obvious differences between the two photographs, counsel also pointed out the initial description of the robber given by S.D. was likewise inconsistent with Mr. Robinson. (92:28). And, while the State believed that her identification was corroborated by the other witnesses, counsel reminded the jury of Ms. Sandoval's demeanor during cross-examination, which involved her looking to the district attorney for reassurance with "doubt all over her face." (92:30). Counsel therefore argued this was a case of mistaken identity. (92:30).

During deliberations, the jury asked to see the video of the robbery "to make a final decision."

(92:37). They also asked to view the still photos. (92:38). Thereafter, the jury found Mr. Robinson guilty of the charged offense. (93:3).

Postconviction Proceedings.

After being sentenced to a term of imprisonment, Mr. Robinson filed a notice of intent to pursue postconviction relief. (33; 40). He then filed a Rule 809.30 postconviction motion raising several claims. (61). Relevant to this appeal, Mr. Robinson alleged that he had received ineffective assistance of counsel because his lawyer: (1) failed to object to the admission of S.D.'s out-of-court identification, as that evidence was derived from a violation of his Sixth Amendment right to counsel; (2) failed to introduce evidence that two witnesses to the bank robbery did not identify Mr. Robinson as the robber; and (3) failed to introduce other evidence which would undermine the State's theory that S.D. and the other witnesses had correctly identified the robber. (61; 72).[4] Mr.

[4] Mr. Robinson originally filed an § 809.30 postconviction motion arguing that the police had failed to adhere to the dictates of *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991) and *State v. Koch*, 174 Wis. 2d 684, 696, 499 N.W.2d 152 (1993) by not providing Mr. Robinson with a judicial determination of probable cause within 48 hours of his arrest. (61:12). As a result, Mr. Robinson argued that the results of the lineup identification procedure were inadmissible. (61:12). In response, the State filed a CR-215 form proving that it had complied with *Riverside* (this document was presumably not in the possession of prior counsel). (70); (App. 12). As a result, Mr. Robinson raised a supplemental postconviction claim arguing that the

Robinson asked the court to hold an evidentiary hearing on his claims. (61; 72).

The court, the Honorable Lindsey Grady presiding, denied the motion in a written order, without a hearing. (80:7); (App. 19). With respect to the asserted deprivation of the right to counsel, the circuit court noted that a recent unpublished decision by this Court rejected an identical claim. (80:7); (App. 19). The court not only agreed with the outcome of the unpublished decision on the merits, but also found that trial counsel could not be responsible for failing to raise an issue of unsettled law. (80:7); (App. 19).

As to the second ineffectiveness claim—failure to call witnesses who had seen the robber but did not identify Mr. Robinson as that person—the court concluded that the witnesses' "inability to identify [Mr. Robinson] as the bank robber would not have been materially probative that anyone other than the defendant committed the bank robbery." (80:4); (App. 16).

Finally, with respect to the claim that counsel should have presented evidence that witnesses identified persons other than Mr. Robinson, the court concluded that this evidence would have been barred by *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (1984). (80:4); (App. 16). Moreover, the court also concluded that this evidence would not have made a

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identification was inadmissible due to a violation of the *Rothgery* rule. (72:5).

difference given S.D.'s identification of Mr. Robinson as the robber. (80:4); (App. 6).

ARGUMENT[5]

I. The State violated Mr. Robinson's Sixth Amendment right to counsel when it conducted a live lineup after initiating an adversary judicial proceeding. Accordingly, S.D.'s out-of-court identification was not admissible evidence.

A. Mr. Robinson's right to counsel attached after the CR-215 procedure conducted in conformity with *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

1. The Sixth Amendment right to counsel "attaches" when an "investigation" shifts to a "prosecution."

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right […] to

[5] Mr. Robinson's original appeal to this Court presented numerous other issues. However, in his briefs to the Wisconsin Supreme Court, Mr. Robinson explicitly abandoned several of his claims. By abandoning those claims in the Wisconsin Supreme Court, Mr. Robinson believes he is not able to resurrect them in this forum.

have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.[6]

Well-settled precedent establishes that the Sixth Amendment right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[7] *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). This formulation of the "attachment" requirement was subsequently ratified and reaffirmed in *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) and *United States v. Gouviea*, 467 U.S. 180, 188 (1984).

Thus, while suspects in a criminal case do not have a Sixth Amendment right to counsel at the time of their arrest, once the criminal *investigation* begins to ripen into a criminal *prosecution*, the right to counsel will have been triggered. *See State v. Hattaway*, 621 So.2d 796, 803 (La. 1993) (discussing

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[6] While Wisconsin's constitution also guarantees the right to counsel, Wis. Const. Art. I, § 7, this Court has previously held that the rights discussed therein are viewed as "interchangeable" with the provisions of the federal constitution. *State v. Sanchez*, 201 Wis. 2d 219, 229, 548 N.W.2d 69 (1996).

[7] While many states, including Wisconsin, have specific, statutorily-defined procedures denoted as an "arraignment," *see* Wis. Stat. § 971.05, the Court has made clear that its usage of this term is not tethered to any specific state procedural mechanism; instead it is a generic reference to the first appearance at which time the arrestee learns of the accusations against him or her. *Rothgery,* 554 U.S. at 202-203.

the significance of a "shift" from investigation to prosecution). The United States Supreme Court has therefore held that "an accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty to facilitate the prosecution." *Rothgery,* 554 U.S. at 207.

Whether the right to counsel has been triggered is a question of law that this Court reviews *de novo*. *See State v. Eason*, 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 629 N.W.2d 625 (application of constitutional principles to undisputed facts merits *de novo* review).

2. The Fourth Amendment mandates a judicial determination of probable cause for arrested suspects. When combined with the setting of bail, this probable cause hearing satisfies the attachment requirement.

Suspects in a criminal case also have a Fourth Amendment right under *Gerstein v. Pugh*, 420 U.S. 103 (1975), as well as *Riverside*, to a judicial determination of probable cause within 48 hours of their arrest for a criminal offense. *Riverside*, 500 U.S. at 58. Given the dictates of federalism, however, the Court has "left it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures." *Id*. at 53.

And, while *Gerstein* makes clear that the accused does not have an absolute right to counsel at this initial phase of the proceedings, *Gerstein*, 420 U.S. at 120, the United States Supreme Court clarified in *Rothgery* that this procedure can nevertheless trigger the attachment of the right to counsel for subsequent proceedings.

Rothgery analyzes a Texas procedure designed to comply with the *Riverside* requirement. *See Rothgery v. Gillespie County*, 491 F.3d 293, 300 (5th Cir. 2007). In Gillespie County, the initial probable cause determination is described as follows:

> The arresting officer submitted a sworn "Affidavit Of Probable Cause" that described the facts supporting the arrest and "charge[d] that ... Rothgery ... commit[ted] the offense of unlawful possession of a firearm by a felon-3rd degree felony," After reviewing the affidavit, the magistrate "determined that probable cause existed for the arrest." The magistrate informed Rothgery of the accusation, set his bail at $ 5,000, and committed him to jail, from which he was released after posting a surety bond.

Id. at 196 (internal citations omitted). This procedure does not involve the prosecutor. *Id.* at 198.

The Court held that this probable cause hearing marked the commencement of adversary criminal proceedings against the defendant, such that he was entitled to counsel at all critical phases of the prosecution that followed. *Id.*, at 194. In the Court's view, "by the time a defendant is brought

before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial." *Id*. at 202. The involvement of a prosecutor is not required to trigger the right, *id*. at 207-208, nor does it matter whether the nuances of state law may operate to provide some kind of follow-up initial appearance at which time the State will provide counsel. *Id*. at 201-202. *Rothgery* is therefore quite clear that the Sixth Amendment right to counsel is not subordinate to "absurd distinctions" resulting from non-dispositive factual differences which arise from the inherently idiosyncratic workings of local government units. *Id*. at 207. To hold otherwise would "bog the courts down" in resolving unnecessary factual disputes rather than focusing on essential constitutional guarantees. *Id*.

Thus, under controlling federal law, the decision to file a formal accusation against an arrested person with a judicial officer for the purpose of determining probable cause—combined with the setting of bail, to ensure that the person is available for prosecution—is sufficient to trigger the Sixth Amendment right to counsel and, as the Court also held, that outcome should not depend on the vagaries of local court practice. So long as these requirements are met, the accused will have a right to counsel under the federal constitution at any subsequent "critical stage." *Id*.

3. Milwaukee County's probable cause procedure—which is nearly identical to the procedure in *Rothgery*—triggers the attachment of the Sixth Amendment right to counsel.

"The post-arrest probable cause determination (the CR-215 form) is the mechanism Milwaukee County employs to satisfy" the constitutionally-mandated *Riverside* requirements. *State v. Garcia*, ("*Garcia I*"), Appeal No. 2016AP1276-CR, ¶ 21, unpublished slip op., (Wis. Ct. App. April 10, 2018). (App. 23-33). This is the mechanism utilized in this case. (70); (App. 12).

The CR-215 is a standardized court form available online at the Wisconsin Court System website.[8] According to the circuit court form, the CR-215 must be completed by either "the arresting officer" or another "law enforcement officer." The affiant must inform the reader when the person was arrested and include information as to how the person's identity was verified. The affiant is further required to specifically identify the crimes for which they have identified probable cause and to then

[8]https://www.wicourts.gov/forms1/circuit/ccform.jsp?FormName=&FormNumber=&beg_date=&end_date=&StatuteCite=&Category=8&SubCat=All

include supporting information enabling judicial review of that determination. The form must be notarized before it is presented to a judicial official. The CR-215 is then reviewed by a court official who makes a probable cause determination and sets bail. This form is distributed to the accused, which serves to give notice of the accusations against them. (70:3); (App. 14).

Thus, unlike the Texas courts, Milwaukee County's high-volume criminal courts have opted for a less time-consuming, all-paper, probable cause procedure. However, as the United States District Court for the Eastern District of Wisconsin has concluded when analyzing this procedure in detail, this process "produces the same results—A judicial officer reviewed a sworn statement outlining the factual basis for the charges against the arrestee, the judicial officer found probable cause, the judicial officer established the bail for the arrestee, and the arrestee was informed of the charges against him (as the form is distributed to the arrested person)." *Garcia v. Foster*, ("*Garcia III*"), No. 20-CV-336, 2021 WL 5206481 (E.D. Wis. November 9, 2021).

Accordingly, because Wisconsin's procedure designed to comply with *Riverside* is substantially similar to the procedure used in Texas for the same purposes, it follows that Wisconsin's procedure is governed by the Court's decision in *Rothgery* and the CR-215 procedure therefore triggered the attachment of Mr. Robinson's right to counsel. This is because the form constitutes "an accusation filed with a judicial

officer" which is also occasioned by "restrictions on the accused's liberty to facilitate the prosecution." *Rothgery*, 554 U.S. at 207.

4. This Court's decision in *Garcia I*—later found to be an "unreasonable application" of federal constitutional law by the Seventh Circuit Court of Appeals—has no persuasive value at this stage of the appeal.

Based on the foregoing authorities, an outcome favorable to Mr. Robinson is straightforwardly compelled by the controlling and on-point decision in *Rothgery*. *See State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993). ("Certainly, the United States Supreme Court's determinations on federal questions bind state courts.")

However, Mr. Robinson concedes that this Court has previously addressed, and rejected, an identical claim in *Garcia I*, Appeal No. 2016AP1276-CR. (App. 17). While that decision is unpublished and therefore not precedential,[9] Wis. Stat. § 809.23(3)(a),

[9] Although the Wisconsin Supreme Court agreed to review *Garcia I*, the Court split 3-3 without issuing a substantive opinion. *State v. Garcia*, ("*Garcia II*"), 2019 WI 40, ¶ 1, 386 Wis. 2d 386, 925 N.W.2d 528. That tie vote had the effect of affirming the Court of Appeals' decision. *Gruhl Sash & Door Co. v. Chicago, M. & St. P. Ry. Co.*, 173 Wis. 215, 180 N.W. 845 (1921); *State v. Fitzgerald*, 2019 WI 69, ¶ 34, 387 Wis. 2d 384, 929 N.W.2d 165.

it nevertheless has theoretical "persuasive" force. However, given that this Court's decision in *Garcia I* has now been found to be an "unreasonable application" of federal law, *Garcia IV,* 65 F.4th at 954 it should have no further persuasive "value" at this stage of the appeal.

In *Garcia I*, this Court focused on the defendant's failure to physically appear before the court commissioner in connection with the CR-215 procedure as a means of distinguishing *Rothgery*. *Garcia I*, Appeal No. 2016AP1276-CR, ¶ 27. (App. 27-28). Unlike in the CR-215 procedure, which is an all-paper process, the arrestee subjected to the probable cause procedure discussed in *Rothgery did* make a personal appearance before the reviewing magistrate. *Rothgery*, 554 U.S. at 196. As a result, *Garcia I* hones in on the Court's usage of the term "first appearance" within the text of the decision as grounds for its finding that the CR-215 procedure, which does not entail a personal appearance, is categorically incapable of triggering the right to counsel. *Garcia I*, Appeal No. 2016AP1276-CR, ¶ 27. (App. 27-28).

However, the Seventh Circuit has now completely rejected that reading of binding United States Supreme Court law. Notably, it reached that result despite a stringent standard of review meant to make it difficult for a federal court to grant relief. *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003) ("In the interest of finality AEDPA constrains a federal court's power to disturb state-court convictions."). Under binding federal law, the Seventh Circuit was

obligated to defer to this Court's legal analysis and could only reverse if it found this Court's holding in *Garcia I* to be "wrong beyond "fairminded disagreement." *Garcia IV*, 65 F.4th at 954 (citing *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). This means that the Court's holding had to be more than just "incorrect," and instead had to constitute an "unreasonable" reading of binding federal law. *Id*.

This Court's hyper-focus on this irrelevant factual distinction—whether the defendant was actually present in the courtroom—satisfied that "demanding" standard as, under half a century of Sixth Amendment precedent from the United States Supreme Court, "[i]t is of no Sixth Amendment consequence that Garcia never appeared in court during the CR-215 proceeding." *Id*. at 955. Not only is this Court's prior decision inconsistent with decades of binding precedent, it also contrives a "physical appearance" requirement out of thin air, as there was in fact no "reference" to even an implied physical presence requirement in *Rothgery's* text. *Id*. at 953.

Thus, not only did this Court misread *Rothgery*, it also ignored the Supreme Court's overall "body of Sixth Amendment law" establishing that the crucial inquiry is not whether a person has made an "appearance" but, rather, whether the government has signaled its "commitment to prosecute" that person by turning on the "machinery" of the criminal justice system. *Id.* And, under that long of line of binding precedent, it is indisputable that the CR-215

procedure is sufficient to "set the wheels of judicial machinery into action." *Id*.

Of course, this Court is under no obligation to reflexively accept and apply the Seventh Circuit's holding in resolving this state appeal as that decision is not "binding" on this Court. *Thompson v. Village of Hales Corners,* 115 Wis. 2d 289, 307, 340 N.W.2d 704 (1983). However, even if this Court is tempted to reject the persuasive force of this most recent decision in the *Garcia* saga, a close analysis of the binding legal authorities shows that this would be an imprudent choice. After all, the necessity of a physical appearance was *not* the dispositive legal inquiry in *Rothgery*; instead, the Court was tasked with answering whether the non-involvement of a prosecutor in the Texas procedure (as in the CR-215 process) made a constitutionally cognizable difference (it did not). *Id*. at 197-198. There is no reason to suppose that this technical distinction mattered to the outcome of *Rothgery* and, as this Court well knows, individuals may "appear" in court without being physically present and do so with some regularity (for example, parties may "appear" by phone or video or may ask their lawyer to "appear" on their behalf).

Likewise, the very requirements for a probable cause hearing speak of the defendant needing to be "brought before" a magistrate within 48 hours. *Riverside*, 500 U.S. at 53. However, this Court has had no difficulty reconciling that language with the merely figurative "appearance" of the defendant

present in the CR-215 procedure. *See State v. Koch*, 175 Wis. 2d 684, 698, 499 N.W.2d 152 (1993). An equally commonsense reading of the Supreme Court's references to a "first appearance" should also prevail here.

More to the point, such a distinction would reduce the attachment inquiry to the kind of "mere formalism" specifically rejected in *Rothgery*, 554 U.S. at 199. Because *Riverside* authorizes state courts to experiment with differing procedures designed to accommodate specific constitutional requirements, *Riverside*, 500 U.S. at 53, it is inevitable that there will be small-scale differences in jurisdictional practice.

However, constitutional guarantees cannot be subordinated to quirks of local practice; to hold otherwise would result in an unjust and arbitrary application of binding Supreme Court precedent. For example, imagine that a neighboring and less-populous county such as Ozaukee County, were to adopt the CR-215 procedure. Imagine further that Ozaukee County, due to its much less congested criminal courts, adopts a local rule modifying the all-paper procedure and instead mandating that defendants are to be physically present and actually handed their copy of the CR-215 by a court commissioner. The other components of the procedure remain unchanged. If physical presence is dispositive, this means that arrestees in Ozaukee County obtain a Sixth Amendment right before a similarly situated arrestee in Milwaukee County due only to a non-

material and exceedingly brief courtroom "appearance." Mandating that constitutional rights can only attach if a defendant physically sets foot in a courtroom cannot be consistent with the overall thrust of *Rothgery*, which explicitly rejects a reliance on such procedural nuances in determining when constitutional rights attach.

To be clear, the Seventh Circuit did not explicitly reach *Garcia I*'s other basis for affirmance—the absence of the word "charges" from the CR-215. However, the Seventh Circuit had good reasons to outright ignore that potential rationale in its decision, as the United States Supreme Court has made very clear that "an accusation filed with a judicial officer is sufficiently formal […]," *Rothgery*, 554 U.S. at 207, and using specific magic words like "charges" within the text of a document finds no support within either *Rothgery* or the decades of precedent it straightforwardly applied. In the CR-215 procedure, an accusation specifically linked to a discrete statutory infraction is indisputably filed with a "judicial officer." To hold otherwise violates commonsense and elevates form over substance to an absurd degree. As the Seventh Circuit held, "[h]owever you state the legal test for attachment, Milwaukee's CR-215 hearing fits the bill." *Garcia IV*, 65 F.4th at 954.

Under the plain terms of binding precedent, *Garcia I* misreads and misapplies the law. Accordingly, it is of limited persuasive value and cannot meaningfully inform this Court's resolution of

the underlying constitutional issue. Instead, this Court must rely on *Rothgery*, which is binding on this Court, as well as the persuasive authority of the recent habeas decision directly rejecting this Court's contrary holding under an imposing standard of review.[10]

B. Because the live lineup occurred after the CR-215 procedure but before the appointment of counsel, the resulting identification is inadmissible.

"Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings […]." *Rothgery,* 554 U.S. at 212. The United States Supreme Court has concluded that an in-person lineup, occurring after the initiation of a prosecution, is such a "critical stage." *United States v.*

[10] Notably, the Seventh Circuit's decision in *Garcia IV* follows multiple prior district court decisions reaching the same result. *See United States v. West*, No. 08-CR-157, 2009 WL 5217976 (E.D. Wis. March 3, 2009), *United States v. Mitchell*, No. 15-CR-47, 2015 WL 5513075 (E.D. Wis. September 17, 2015), and *Jackson v. Devalkenaere*, No. 18-CV-446-JPS, 2019 WL 4415719 (E.D. Wis. September 16, 2019). A similar, though not legally dispositive analysis, is present in *Ross v. Jacks*, No. 19-CV-496-JPS, 2019 WL 4602946 (E.D. Wis. September 23, 2019). Moreover, the Seventh Circuit was affirming the district court's grant of habeas corpus in *Garcia v. Foster*, ("*Garcia III*"), No. 20-CV-336, 2021 WL 5206481 (E.D. Wis. November 9, 2021), which uses similarly strong language to reject this Court's analysis of the "attachment" issue.

Wade, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

Mr. Robinson was arrested for this offense on December 19, 2017 at 6:35 P.M. (80:5); (App. 7). Thereafter, police prepared a CR-215 probable cause affidavit. (70:2-3); (App. 13-14). The form was presented to Commissioner Robert Webb "at or about" 2:15 P.M. on December 21, 2017. (80:6); (App. 8). Commissioner Webb determined that there was probable cause and signed the form. (70:3); (App. 14). Commissioner Webb imposed a cash bail of $35,000. (70:3); (App. 14). The form was then distributed to Mr. Robinson.[11] (70:3); (App. 14). It is undisputed that the lineup procedure occurred after this document was signed by Commissioner Webb, but before Mr. Robinson was provided counsel. (80:6); (App. 8).

Accordingly, in light of the foregoing authorities, the lineup was impermissibly conducted and the resulting identification evidence should not have been admitted at trial. *Wade*, 388 U.S. at 230.

[11] In its findings of fact, the circuit court indicated, with respect to the CR-215 process, "[t]he suspect is not at that time provided a copy of the CR-215 form." (80:6); (App. 8). However, the CR-215 filed with the court shows that Mr. Robinson was on the distribution list for that document. (70:3); (App. 14).

II. Mr. Robinson was entitled to an evidentiary hearing on his claims of attorney ineffectiveness because his motion sufficiently alleged facts demonstrating the need for a new trial.

A. Legal requirements governing ineffective assistance of counsel claims.

A criminal defendant has the right to the effective assistance of counsel under both the state and federal constitutions. U.S. Const. Amend. VI & XIV; Wis. Const. Art. 1, § 7 & 8. To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

An attorney's performance is deficient if it falls "below objective standards of reasonableness." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305.

To establish prejudice, the defendant must show that counsel's deficient performance was "sufficient to undermine confidence in the outcome." *Thiel*, 2003 WI 111, ¶ 20 (citing *Strickland*, 466 U.S. at 694). Counsel's deficient performance is prejudicial when there is a reasonable probability "that, but for counsel's [deficient performance], the result of the proceeding would have been different," or when

counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 694. Whether confidence in the outcome has been undermined is distinct from whether the evidence is sufficient to convict. *State v. Pitsch*, 124 Wis. 2d 628, 645, 369 N.W.2d 711 (1985). A defendant also need not be prejudiced by "each deficient act or omission in isolation." *Thiel*, 2003 WI 111, ¶ 63. Rather, prejudice may be established by the cumulative effect of counsel's deficient performance. *Id*.

In Wisconsin, a defendant can only prevail on an ineffective assistance of counsel claim after presenting the testimony of trial counsel at a postconviction hearing. *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). To obtain such a hearing, the postconviction motion must allege, on its face, "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

This condition—that a postconviction motion allege sufficient material facts entitling the defendant to relief—is necessary but not sufficient to mandate that an evidentiary hearing be held. *Id.* The Wisconsin Supreme Court recently reaffirmed and emphasized this point, explaining that "an evidentiary hearing is not mandatory if a defendant's motion presents only conclusory allegation or if the record as a whole conclusively demonstrates that the defendant is not entitled to relief." *State v. Ruffin*, 2022 WI 34, ¶ 38, 401 Wis. 2d 619, 974 N.W.2d 432.

In other words, a trial court has no discretion to deny a postconviction motion for an evidentiary hearing when the motion alleges sufficient material facts entitling the defendant to relief unless either those allegations are conclusory or the record as a whole conclusively demonstrates that the defendant is not entitled to relief.

Whether Mr. Robinson's postconviction motion on its face alleges sufficient material facts that, if true, would entitle him to relief is a question of law this Court reviews de novo. *Id.* ¶ 27 (citing *Allen*). Whether the record conclusively demonstrates that the defendant is entitled to no relief is also a question of law this court reviews independently. *Id.* (citing *State v. Sulla*, 2016 WI 46, ¶ 23, 369 Wis. 2d 225, 880 N.W.2d 659).

B. Trial counsel made several significant, and unreasonable, errors pertaining to the key issue at trial—the identification of Mr. Robinson as the suspected robber.

1. Because *Rothgery* clearly establishes a binding principle of constitutional law, trial counsel was deficient for not moving to suppress the identification on that basis.

As explained above, Milwaukee County's CR-215 procedure triggers adversary criminal proceedings under *Rothgery* such that Mr. Robinson had a right to counsel at the live lineup. The trial

court did not endeavor to conduct its own analysis of Mr. Robinson's federal legal claim, but rather expressly adopted the reasoning in *Garcia I*. (80:7); (App. 9). That analysis is unsound as explained above in Section I, and for those reasons, the trial court was wrong to deny Mr. Robinson's postconviction motion on that basis.

But the trial court went one step further and denied Mr. Robinson's motion on a second basis, concluding that the question—whether the CR-215 procedure triggered the right to counsel—was an issue of "unsettled law," meaning that Mr. Robinson's trial counsel could not have performed deficiently. (80:7); (App. 9).

The trial court was wrong. Although an attorney is "generally" insulated from a finding of ineffectiveness in cases where the law is genuinely "unsettled," *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93, here, the issue was not "unsettled." The legal prerequisites for the motion are established United States Supreme Court precedents which have been in existence for decades; "the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). Moreover, reasonably competent counsel, who conducted proper research on the topic, would have doubtless been aware of the multiple persuasive district court opinions also supporting a defense-friendly reading of the law.

Garcia I does not impact this analysis, and the trial court was wrong to conclude that it did. *Garcia I* is an unpublished and non-binding intermediate state appellate court opinion that cannot overrule or modify prevailing United States Supreme Court precedent. This Court's incorrect interpretation of federal law does nothing to "unsettle" the rule articulated in *Rothgery*. If this Court allows the existence of a single unpublished decision to render the issue sufficiently unsettled such that no reasonable lawyer would file a motion to suppress, this will have inadvertently elevated that decision above the authorities it claims to interpret, in contravention of Wis. Stat. § 809.23.

Similarly, the absence of a binding opinion from the Wisconsin appellate courts on the CR-215 question cannot "unsettle" *Rothgery*, either. It would be absurd to expect attorneys to avail themselves of the rules articulated by the United States Supreme Court only after Wisconsin's courts have expressly ratified those rules.

Accordingly, given the existence of controlling, on-point, authority which would have led to the omission of key evidence, reasonably competent counsel would have moved to suppress S.D.'s identification. Because counsel for Mr. Robinson failed to do so, deficient performance resulted.

2. Trial counsel unreasonably failed to present affirmative evidence of Mr. Robinson's factual innocence—that two eyewitnesses who later viewed him in a lineup did not identify Mr. Robinson as the bank robber.

As set forth in the postconviction motion, S.D. was not the only eyewitness to observe the robber. Two other bank employees also observed him—and neither identified Mr. Robinson after viewing him in a lineup. This evidence was never presented to the jury.

One of these witnesses was Dyshawn Wright, a security guard at the bank. (62:8). Ms. Wright had been working as a security guard for a little over a year at the time of the robbery. (62:8). She was responsible for ensuring bank security and, to facilitate that task, had a defined observation post that allowed her to monitor the entrances and exits. (62:8).

She witnessed the suspected robber enter the building with a hood over his head. (62:8). She asked him to remove the hood. (62:8). He asked her why, and she explained that it was a bank policy. (62:8). She then watched him remove the hood, retrieve a "Western Union" envelope and get in line. (62:8). After the robbery, Ms. Wright described the suspect to police as "a black male, 30's, 6'0", dark complexion, thin build, last seen wearing a black coat, with a

black hood hooded [sic] sweatshirt underneath the black coat." (62:9).

Later, Ms. Wright attended a lineup targeting Mr. Robinson. (62:10). She made no identification. (62:10). To be clear, Ms. Wright indicated that none of the individuals presented to her during the lineup, including Mr. Robinson, was the suspected robber she observed at the bank. (62:10). During a follow-up interview, Ms. Wright stated that while Mr. Robinson appeared "familiar" to her, his complexion was "too light." (62:12).

The other witness, Elishay Taylor, had over 20 years of experience as a bank employee. (62:9). Like Ms. Wright and S.D., she saw the suspected robber take a piece of paper from the Western Union kiosk. (62:9). This was unusual to Ms. Taylor because the normal practice would have been to speak with a teller first before retrieving a form. (62:9). At this point, Ms. Taylor "began to watch" the suspect (whom she did not recognize as a regular customer) until he eventually arrived at the teller window. (62:9). Ms. Taylor described the suspected robber to police as "a black male, 20's–30's, 5'9"–5'11", dark complexion[,] thin build" and wearing a "black skull hat, dark pants, [and] black coat." (62:9). Later, Ms. Taylor also viewed a lineup targeting Mr. Robinson. (62:11). Like Ms. Wright, Ms. Taylor did not make an identification. (62:11).

Trial counsel did not call either bank employee as a witness. Trial counsel also did not attempt to

elicit the fact that neither witness identified Mr. Robinson as the robber through the detective who arranged the lineup, Detective Marco Salaam. This latter failure is especially problematic, precisely because Detective Salaam was the witness the State called to explain the lineup procedure to the jury, meaning trial counsel had an obvious opportunity to question Detective Salaam on this point. (90:29).

As set forth in the motion, trial counsel's failure to introduce evidence regarding two bank employees' failure to identify Mr. Robinson as the robber is deficient performance. As argued therein, the central issue in this case was the robber's identity and, with that in mind, there is no apparent strategic reason for not presenting evidence that two bank employees, both of whom observed the robber (and both of whom did so long enough to later provide police with a detailed physical description) *viewed Mr. Robinson in a lineup days later and did not identify him as the robber* (61:8).

Here, the State's case revolved around eyewitness evidence, specifically, the identification of Mr. Robinson by S.D. In the State's view, S.D. was *the* key witness, and all other evidence merely served to corroborate or support her identification of Mr. Robinson. (92:14). The State asked the jury to believe S.D., in part, because she was an experienced bank employee who had training and experience enabling her to make a more accurate identification of the suspected robber. (92:14-15). However, the jury was never told that two other experienced bank

employees—one of them a security guard specifically tasked with monitoring customers as they entered and exited—failed to identify Mr. Robinson as the suspect. As set forth in the motion, testimony that Mr. Robinson was not identified would have gone to the heart of the controversy and would have cast doubt on the other testimony identifying him as the robber. (61:8).

Reasonably competent counsel would have used this evidence to further support the defense of a mistaken identification. Trial counsel's failure to present the testimony is unreasonable and therefore satisfies the deficient performance prong of the ineffectiveness inquiry.

3. Reasonably competent counsel, dedicated to undermining the State's identification evidence, would have informed the jury that several other witnesses identified persons other than Mr. Robinson.

As set forth in the postconviction motion, law enforcement's decision to release footage of the robbery to the media yielded two tips inculpating two separate men.

According to a police report appended to the motion, an anonymous caller told police that after viewing the news, she recognized the robber as a man named Louis Baker. (62:2). A second caller, Mary Nimmer, told police her "heart dropped" when she saw the footage because she believed it was her son,

Travis. (62:6). The father of Travis Nimmer's girlfriend, Timothy Toliver, also told police that he "immediately thought" it was Travis after seeing the media release. (62:6).

As outlined in the postconviction motion, reasonably competent counsel should have made the jury aware of these other identifications, as they cast doubt on the integrity of the eyewitness statements and support the defense theory of misidentification. (61:11). To the extent the witnesses at this trial were confident that the man they witnessed was Mr. Robinson, counsel could show that other individuals viewed the same evidence and confidently identified someone else entirely. Not only would this be a powerful demonstration as to the shortcomings of eyewitness identification evidence generally, but it would also make the mistaken identity defense more plausible. Here, three sets of witnesses identified three separate suspects. They cannot all be correct, meaning that someone's "confident" identification was, in fact, mistaken.

This evidence is relevant to the disputed issue of identification and—if admitted for that purpose—does not need to be analyzed under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (1984). *Denny* is only applicable when the defendant specifically wishes to argue that some defined alternate perpetrator committed the offense; it does not apply when the evidence is proffered to support some other theory. *See State v. Scheidell*, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999). In those situations where the

evidence is being offered to establish some other evidentiary proposition, the normal rules of evidence—rather than *Denny's* "legitimate tendency" test—apply. *Id*. at ¶ 27-28.

Thus, so long as the evidence was being offered to prove either that Mr. Robinson had been misidentified or that eyewitness identifications are inherently questionable—and not to prove that either Mr. Baker or Mr. Nimmer actually robbed the bank—the only barrier to admissibility would be Wis. Stat. § 904.01.

The evidence easily clears that low bar because it is obviously relevant to the disputed issues of identity and the reliability of those witnesses claiming Mr. Robinson was the robber. Here, other members of the community were so confident in their identification of the robber that they contacted the police to concretely identify two alternate suspects. In one case—that of Travis Nimmer—the identification was made by a close family member. Assuming, arguendo, that these identifications are mistaken, then this casts doubt on the State's reliance on other eyewitness evidence. If a mother can mistake the person on video for her son, then this shows the inherently faulty nature of eyewitness evidence, generally, while also calling into question the identifications based on that same video which were obtained from Ms. Thielecke and Ms. Sandoval.

More broadly, proof that the robber's appearance seemed to "match" at least two other men

opens the door to further questions as to the reliability of the identification evidence in this case. The jury appeared to place dispositive weight on the video, asking to review it before making their final decision. (92:37). Presumably, they wished to view the video and assure themselves the man depicted therein was Mr. Robinson. However, proof that multiple other people viewed that same footage and identified completely different individuals with a high degree of confidence short-circuits this intuitive approach to determining guilt. Considering the prior identifications, the video evidence appears much more ambiguous and therefore susceptible to an inherently subjective analytical process. Thus, the existence of other identifications is admissible, highly relevant evidence supporting Mr. Robinson's defense at trial.

C. When assessed in the aggregate, counsel's unprofessional errors undermine confidence in the fairness and reliability of the proceedings below.

As this Court has previously held, "prejudice should be assessed based on the cumulative effect of counsel's deficiencies." *Thiel*, 2003 WI 111, ¶ 59. "Looking at the alleged errors as a whole," *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984), this Court must inquire whether the aggregate effect of those errors is sufficient to call into question the "fundamental fairness" of the underlying trial. *Strickland*, 466 U.S. at 696.

In this case, the State conceded that its case hinged on the eyewitness identification provided by S.D. (92:14). Defense counsel asked the jury to critically assess her testimony, arguing that the case was one of mistaken identity. (92:30).

As alleged in Mr. Robinson's postconviction motion, there were three avenues of attack which, if pursued by reasonably competent counsel, would have sufficiently undermined the State's identification evidence.

First, counsel could have moved to exclude S.D.'s out-of-court identification, evidence that the State pointed to as being uniquely reliable and persuasive. (92:15-16). While trial counsel focused intensely on the differences between the photograph of the bank robber and the photograph of Mr. Robinson, the State suggested that a pictorial comparison was simply not as reliable as S.D.'s ability to see the robber firsthand and to then identify Mr. Robinson in-person a few days later. (92:16).

Aside from the identification by S.D., the State's case was primarily reliant on otherwise weak circumstantial evidence—like the mere fact that Mr. Robinson possessed two one hundred-dollar bills at the time of his arrest. (92:18). And, while the State argued that S.D.'s identification was also corroborated by the testimony of Ms. Thielecke and Ms. Sandoval, (92:21), there is reason to doubt the validity of their identification evidence. After all,

other witnesses viewed the surveillance footage and confidently identified persons who the State has *never* seriously considered as suspects. (61:9-11). Thus, by eliminating S.D.'s contemporaneous identification from the trial evidence, reasonably competent counsel would have therefore substantially impaired the believability and persuasiveness of the State's case.

Of course, this Court must also grapple with the in-court identification of Mr. Robinson by S.D. while assessing prejudice.[12] *State v. Roberson*, 2006 WI 80, ¶ 31, 292 Wis. 2d 280, 717 N.W.2d 111. If this Court concludes that police violated Mr. Robinson's Sixth Amendment right to counsel when it conducted the procedure enabling the procurement of S.D.'s original identification, then the in-court identification is only admissible if it is derived from "an independent recollection of the witness's initial encounter with the suspect." *Id*., ¶ 35. The Court analyzes this question with reference to the seven

[12] In *Roberson*, the Wisconsin Supreme Court created a *per se* rule that a defendant is seemingly unable to establish prejudice resulting from a failure to exclude an out-of-court identification when the in-court identification is apparently admissible. *Roberson*, 2006 WI 80, ¶ 35. However, the United States Supreme Court has been quite clear that the assessment of prejudice *must* consider the totality of the trial evidence. *Strickland*, 466 U.S. at 695-696. Moreover, this Court is also obliged, under *Thiel*, to aggregate the effect of the asserted errors in assessing the overall prejudice to the defendant. *Thiel*, 2003 WI 111,¶¶ 60-61.

factors set forth in *United States v. Wade*, 388 U.S. 218, 241 (1967). *Id.*, ¶ 26.

As a threshold matter, it is worth noting that perhaps no form of identification evidence is as transparently questionable as that which is derived from an in-court, single subject, show-up. *See United States v. Archibald,* 734 F.2d 938, 943 (2d Cir.), *modified*, 756 F.2d 223 (2d Cir. 1984); *State v. Dickson*, 141 A.3d 810, 823 (Conn. 2016); *Com. v. Crayton*, 21 N.E.3d 157, 166 (Mass. 2014). In some sense, asking whether the witness has accurately identified the defendant involves the application of a legal fiction. After all, when asked whether the defendant on trial and seated at counsel table is the person who committed the crime, it seems difficult to imagine a scenario less suggestive and more prone to inaccurate identifications.

Setting that point aside, the available evidence shows there *was* ample reason to question the in-court identification. S.D. was, for example, clearly incorrect about the pants worn by the robber telling the police he had dark jeans when in fact they are light blue in color. (89:93; 24:1). And, as counsel pointed out, there are numerous discrepancies between the suspect captured on video and Mr. Robinson. Most notably, S.D. believed that the robber was between 20 and 30 years old. (89:93). According to the biographical information in the court record, however, Mr. Robinson was nearly a full decade older at the time of the robbery. (1:1). When asked to compare the booking photo of Mr. Robinson against a

photo of the robber, S.D. agreed that Mr. Robinson had a darker complexion (although she later reversed her position and stated there was no difference in complexion). (89:96).[13] He also had different facial hair. (89:97). Mr. Robinson's booking photo showed distinct lines on his face; S.D. identified no such lines on the robber's face. (89:98).

Second, trial counsel unreasonably omitted perhaps the most intuitive method of challenging the State's identification-based case: presenting evidence that other witnesses had seen the robber but, when given an opportunity, did not identify Mr. Robinson as that person. As alleged in the motion, if identity was the main disputed issue, testimony tending to rebut the State's identification evidence would have had an obvious impact on the jury's assessment of that critical issue. (61:8). While trial counsel did an acceptable job trying to poke holes in the State's evidence via cross-examination, he never offered the jury *any* concrete evidence that the State's witnesses could have been mistaken.

Had trial counsel not performed deficiently in this respect, the jury would have heard that not one, but *two* eyewitnesses, both experienced bank employees, observed the robber and then failed to identify Mr. Robinson. It would have dramatically

[13] Counsel's cross-examination is somewhat confusing, as he appeared to get tripped up on the exhibit numbers. (89:96-97). However, the overall thrust of the examination shows counsel developing differences between the still photo of the robber and the booking photo of Mr. Robinson.

altered the State's identification evidence calculus, which it described to the jury as follows:

> Three people. Think about how many times he's been identified: Three times, not counting the one in court by Ana. She's identified him twice, the picture in court; Megan, the picture in court, three more. Seven times, every time 100 percent, or absolute is the word that's being used.

(92:22).

As it stands, the defense case did nothing to rebut these arguments and gave the jury no witnesses on the other side of the ledger, despite the police reports making clear that such evidence was available. That evidence would directly call into question the reliability of S.D.'s identification, lending significant weight to the defense of a mistaken identification.

Finally, reasonably competent counsel could have evened the "score" even further—and created reasonable doubt—if he had presented further evidence that other witnesses were confidently claiming that someone other than Mr. Robinson was the person on the video shown to the jury.

As set forth in the motion, evidence that someone other than Mr. Robinson was identified as the robber impinges on a central trial question—whether Mr. Robinson was correctly identified as the robber. (61:11). This evidence not only contradicts the State's theory—that S.D. and the other witnesses correctly identified Mr. Robinson—but also

buttresses the defense strategy. (61:11). After all, a defense of mistaken identity is obviously buttressed by evidence that at least two other people had, in fact, been mistaken about the robber's identity.

As a result of these collective failures, the jury was presented with incomplete identification evidence. Had the jury been presented with a sufficiently complete picture of the identification evidence, there is a reasonable probability at least one juror would have not voted to convict Mr. Robinson. After all, the jurors were required to acquit Mr. Robinson if there was "any reasonable hypothesis consistent with [Mr. Robinson's] innocence." (92:8). They were further instructed that if the evidence caused them to "pause or hesitate," that they should not convict Mr. Robinson. (92:8). Here, counsel provided the jury with a reasonable hypothesis—that of a mistaken identification. Yet, he failed to provide evidence that would support the needed "pause or hesitation." A jury learning that S.D.'s identification was inconsistent with at least two other witnesses who saw the suspect in person and up to three more who saw him on the news would have such a pause—especially if they were not permitted to consider her more contemporaneous out-of-court identification.

In sum, the cumulative effect of trial counsel's errors undermines confidence in Mr. Robinson's trial. He has sufficiently alleged that the underlying result is unreliable, *see Strickland*, 466 U.S. at 696, and, for that reason, is entitled to relief.

CONCLUSION

Mr. Robinson's postconviction motion on its face alleged sufficient material facts that, if true, entitled him to relief. Accordingly, this Court must reverse and remand for an evidentiary hearing.

Dated this 25th day of August, 2023.

Respectfully submitted,

Electronically signed by Christopher P. August

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 9,312 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 instead of full names of persons, 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 25th day of August, 2023.

Signed:
Electronically signed by
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