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 THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MICHELLE ACKERMAN HAVAS AND THE HONORABLE LINDSEY CANONIE GRADY, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## INTRODUCTION

Percy Robinson had a $100-per-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 U.S. Bank building in Milwaukee and gave the teller a note stating that he had a gun and demanded 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. Even before police asked her to make an identification, she told them that she "absolutely" would be able to identify Robinson. After identifying Robinson, she stated that she was "100 percent sure" and had "zero doubt" that Robinson was the person who robbed the bank. When police apprehended Robinson, they found a $100 bill on the floor of his vehicle and another $100 bill on his person.

At trial, the teller recounted with specificity her interactions with Robinson at the bank, how close she was, her observations of his clothing and facial features, stated she would never forget his eyes, and repeatedly testified that she was looking straight into his face the entire time. Two other women who spent time with Robinson the day of the robbery identified him from the video stills. The bank video of the robbery was played for the jury, and the State introduced high-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. Robinson moved for postconviction relief under a variety of theories, including that counsel was ineffective for not moving to exclude the results of the post-arrest/pre-charging lineup under the Sixth Amendment.

The first issue Robinson discusses in his briefing—whether his Sixth Amendment right to counsel attached after the CR-215 probable cause finding—does *not* dictate the outcome of this case. The issue is whether the law was settled that Robinson's right to counsel attached after the CR-215 probable cause finding, such that Robinson's trial counsel was ineffective for failing to move to suppress the results of the pre-charging lineup. Because no binding authority holds that the right to counsel attaches before a personal appearance where formal charges are filed, Robinson's counsel was not ineffective for failing to raise the objection.

To the extent this Court nevertheless addresses the Sixth Amendment issue on the merits, no violation occurred because the CR-215 procedure does not constitute the commencement of adversary proceedings and does not involve a personal appearance by an arrestee where he learns of the charges against him. The CR-215 procedure merely is an informal, ex-parte paper review for purposes of meeting *Riverside*'s[1] requirement of a prompt probable cause determination following arrest. *Rothgery*[2] does not mandate that all *Riverside* procedures trigger the Sixth Amendment right to counsel. Decisions to the contrary are not binding on this Court and are not well reasoned.

Robinson's remaining ineffective assistance of counsel claims fail both on the performance and prejudice prongs of *Strickland*.[3] This Court should affirm.

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[1] *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991).

[2] *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 212 (2008).

[3] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

## ISSUES PRESENTED

1. Was Robinson entitled to an evidentiary hearing on his postconviction motion alleging that counsel was ineffective for failing to raise a Sixth Amendment objection to the post-arrest, pre-charging lineup that occurred after the CR-215 probable cause finding?

The postconviction court concluded that counsel was not ineffective because even if existing law were incorrectly decided, the issue was "unsettled" such that counsel could not be ineffective.

This Court should affirm.

2. Does a judge or commissioner's finding of probable cause via Form CR-215 mark the start of adversary criminal proceedings such that it triggers a suspect's Sixth Amendment right to counsel?

The postconviction court concluded that no Sixth Amendment violation occurred in this case because the filing of Form CR-215 did not trigger the Sixth Amendment right to counsel.

This Court need not reach this issue, but if it does, it should hold that the completion of Form CR-215 does not trigger a suspect's Sixth Amendment right to counsel.

3. Was Robinson entitled to an evidentiary hearing on his postconviction motion alleging that counsel was ineffective for not calling two bank employees who were unable to positively identify anyone from the bank surveillance or not introducing evidence that two other individuals were identified as potential suspects by phone tipsters after the bank robbery footage was released?

The postconviction court concluded that counsel was not ineffective for failing to call the bank employees because the fact that they could not identify Robinson did not mean someone else committed the robbery and because the tipster

evidence would have been barred by *State v. Denny*.[4] The circuit court further concluded none of the alleged deficiencies were prejudicial due to the strength of the State's case against Robinson, including multiple eyewitness identifications, the bank footage clearly depicting Robinson, the $100 bills found in Robinson's possession, and Robinson's drug habit and dire financial straits.

This Court should affirm.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the parties' arguments are fully set out in the briefs. The State does not request publication because this Court can and should decide this case through the straightforward application of the ineffective assistance of counsel standard to the facts.

## STATEMENT OF THE CASE

### *Charges and trial*

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

At trial, the teller, Ms. Dunn,[5] testified that she was an international banker employed by U.S. Bank who was filling in as a teller the day of the robbery. (R. 89:63–64.) She testified that Robinson approached her window and handed her a note saying: "I have a gun, give me the money." (R.

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[4] *State v. Denny*, 120 Wis. 2d 614,623–24, 357 N.W.2d 12 (Ct. App. 1984).

[5] The State uses a pseudonym.

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—before seeing Robinson in a lineup. (R. 89:79; 80:2.) 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.) She stated that she was "100 percent sure" and had "[z]ero 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.)[6]

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. 22; 23.)[7]

Additionally, two other women who spent time with Robinson "in a professional capacity" on the day of the robbery testified and positively identified him from the bank video stills based on his clothing and appearance. (R. 91:13–16, 19–23.) Both women were "100 percent" sure of their identification. (R. 91:16, 23.)

Detective Kirkvold testified that when Robinson was being investigated, he recovered a $100 bill from the floor of

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[6] Further details about Dunn's identification of Robinson and her trial testimony explaining her training and opportunity to observe Robinson are set forth below in the Argument, III.C.

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

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-per-day heroin habit. (R. 91:42–43.) Robinson further admitted to being under the influence of heroin, cocaine, and marijuana the day before the robbery and taking more heroin later in the day on the day of the robbery. (R. 91:40.) He also admitted that during the timeframe 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 the final decision," which the court provided. (R. 92:37–38.) Thereafter, the jury found Robinson guilty of the charged offense. (R. 30.) The court sentenced Robinson to a bifurcated sentence of five years' initial confinement and five years' extended supervision. (R. 36.)

*Postconviction proceedings*

Robinson then moved for postconviction relief, arguing, *inter alia*,[8] that his trial counsel was ineffective for a variety of reasons, including: (1) failing to call other bank employees

[8] Robinson has abandoned several of his initial postconviction and appellate arguments. (Robinson's Letter 5/11/2023.) As Robinson concedes, these arguments are now forfeited. *See State v. Mercado*, 2021 WI 2, ¶ 34, 395 Wis. 2d 296, 953 N.W.2d 337.

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 to the public; and (3) not moving to exclude the pre-charging lineup where Dunn identified Robinson. (R. 61:1–16.)

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.)[9]

As to the Sixth Amendment claim, the court made the following factual findings:

- The defendant was arrested for bank robbery and the arrest occurred on December 19, 2017 at 6:35 PM.
- Milwaukee County Court Commissioner Robert Webb reviewed a CR-215 form presented to him at or about December 21, 2017 at 2:15 PM in which he found there was probable cause set forth in a sworn statement of a law enforcement officer that Percy Robinson had committed the criminal offense of Robbery of a Financial Institution.
- Milwaukee County uses a form called the CR-215 form to comply with the requirements of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). The CR-215 form is used when a person is arrested without a warrant and is in custody. The CR-215 form is a form in which a law enforcement officer sets forth a sworn statement facts that he or she believes establishes probable cause that a suspect has violated a criminal law.
- The CR-215 form is prepared by law enforcement, without assistance from a prosecutor, and brought

[9] The State discusses the postconviction court's analysis of only those issues that are now being argued before this Court.

> to a judicial officer for an ex parte review. The judicial officer then reviews the form and indicates the presence or absence of probable cause on the form, along with the date and time of the review. The judicial officer also sets an initial bail for the suspect.
>
> - The review of the CR-215 form is not a formal hearing and the suspect is not present for it, nor is a prosecutor.
> - The suspect is not at that time provided a copy of the CR-215 form.
> - The signing of the CR-215 form does not create a criminal court case file.
> - The review of a CR-215 form does not bind the prosecutor to issue any charges.
> - Sometime after the CR-215 form was signed and probable cause found, but before any criminal charges were issued by way of a complaint, Robinson was placed in a live lineup. Robinson had not been provided counsel at the time of the lineup.

(R. 80:5–6.)

The postconviction court concluded that the "[t]he *exact* same issue the defendant now raises with almost identical facts were presented to the Court of Appeals" and rejected in *State v. Garcia*.[10] (R. 80:6.) The court "adopt[ed] the analysis set forth in *Garcia*" and concluded that the CR-215 form was not an adversary criminal proceeding and did not involve the defendant appearing before a judicial officer and told of the formal charges against him. (R. 80:6–7.) Accordingly, Robinson's Sixth Amendment right to counsel did not attach

[10] *State v. Garcia*, No. 2016AP1276-CR, 2018 WL 1738747 (Wis. Ct. App. Apr. 10, 2018), *aff'd*, 2019 WI 40, 386 Wis. 2d 386, 925 N.W.2d 528 (per curiam) ("*Garcia I*").

at that point. (R. 80:6–7.) Moreover, the court reasoned that even if *Garcia* were wrongly decided, the Sixth Amendment issue Robinson raised was "unsettled law" and thus counsel could not be ineffective for failing to raise it. (R. 80:6–7.)

As to Robinson's claim that counsel should have called the two bank employees who could not identify him, the court concluded that "evidence that people present during the bank robbery were unable to identify the defendant is not evidence that the defendant was not the robber – it simply means, for any number of reasons, they could not identify him following their relatively brief and innocuous interactions with him." (R. 80:4.) Counsel was not deficient because "[t]heir inability to identify him as the bank robber would not have been materially probative that anyone other than the defendant committed the bank robbery." (R. 80:4.)

The court also concluded that counsel was not ineffective for failing to call the two tipsters who identified someone other than Robinson from the publicly released bank footage because such evidence did not satisfy the *Denny* standards for evidence implicating an alternate suspect. (R. 80:4.)

Finally, the court concluded that any errors by counsel were not prejudicial because "there was not a reasonable probability of a different outcome." (R. 80:4.) The court reasoned that the missing evidence "would not have been persuasive when contrasted against the video and stills themselves, which depict an individual appearing to be the defendant, as well as the strength of [Dunn's] first-hand eyewitness identification." (R. 80:4.) Further, Dunn's identification "was significantly corroborated" by (a) "video and stills depicting the defendant robbing the bank," (b) "other witnesses recognizing him or his clothes from those stills," and (c) "the defendant's own inability to explain why he had unaccounted for $100 bills on his person and on the floorboard of his car in spite of his $100 a day heroin habit

and the fact that he was being kicked out of his apartment." (R. 80:4.)

Robinson appealed (R. 81), and the parties submitted letters of supplemental authority concerning the effect of the then-recent federal district court decision in *Garcia v. Foster*, 570 F.Supp.3d 659 (E.D. Wis. 2021) ("*Garcia III*"). The State argued that, at best, *Garcia III* "demonstrates that the law governing the right to counsel in the circumstances of *Garcia* and the present case is unsettled" such that trial counsel could not have been ineffective for failing to raise it. (State's Letter 11/22/2021.) And, the State argued that "*[Garcia III]* is inconsistent with *Kirby v. Illinois*, 406 U.S. 682 (1972) and its progeny, which '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." (State's Letter 11/22/2021.)

This Court certified the merits of the ineffective assistance of counsel issue to the Wisconsin Supreme Court: "Whether the CR-215 procedure triggers the attachment of the Sixth Amendment right to counsel, which would then entitle an accused person to have the right to counsel for any subsequent 'critical stage' of the legal proceedings." (Certification by Wisconsin Court of Appeals 4/19/2022.) The Wisconsin Supreme Court granted certification, but after full briefing and argument, the United States Court of Appeals for the Seventh Circuit delivered a decision in *Garcia* affirming the district court's grant of habeas relief in that case. *Garcia v. Hepp*, 65 F.4th 945, 947 (7th Cir. 2023) ("*Garcia IV*"). The Wisconsin Supreme Court thereafter issued an order vacating its grant of certification in this case and returned the matter to this Court for resolution.

## STANDARD OF REVIEW

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. Similarly, "[w]hether the record conclusively demonstrates that the defendant is entitled to no relief is also a question of law" this Court reviews independently. *State v. Ruffin*, 2022 WI 34, ¶ 27, 401 Wis. 2d 619, 974 N.W.2d 432.

## ARGUMENT

### I. Robinson's trial counsel was not ineffective for failing to raise a Sixth Amendment objection to the post-arrest lineup because whether the right to counsel attaches upon the filing of Form CR-215 is unsettled law.

#### A. Counsel is not ineffective for failing to raise unsettled issues of law.

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.

In order to make 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). To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* 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.*

When assessing counsel's failure to raise a legal objection, "[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." *State v. Jackson*, 2011 WI App 63, ¶ 10, 333 Wis. 2d 665, 799 N.W.2d 461. 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. And 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.

"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.

### B. No binding precedent has found that the right to counsel attaches in the absence of a personal appearance where a defendant is informed of the formal charges against him.

Robinson begins by addressing the merits of his Sixth Amendment claim. (Robinson's Br. 21.) This is an incorrect approach, however, because Robinson's trial counsel never raised a Sixth Amendment objection to his post-arrest/pre-charging lineup. A court "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. When a defendant argues that his lawyer was ineffective by not raising a certain issue, this 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.

Here, Robinson cannot show his counsel was ineffective because there is no "settled law" holding that Milwaukee County's Form CR-215 probable cause determination procedure causes the Sixth Amendment right to counsel to attach. Indeed, no binding authority has found that the right to counsel attaches before a formal appearance before a judicial officer where an arrestee is informed of the charges against him or when charges have yet to be filed.

"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); *see also 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, *(Bolivar) 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

before the defendant's initial appearance before a judicial officer.

To the contrary, the law is well-established that "the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery*, 554 U.S. at 194. That is when "the State's relationship with the defendant has become solidly adversarial" for the defendant to receive the Sixth Amendment's panoply of protections. *Id.* at 202. And no binding case holds that the use of Form CR-215 meets this standard. The absence of controlling case law in Robinson's favor dooms his ineffective assistance of counsel claim because to establish deficient performance, 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.

Robinson contends that *Rothgery* compels a finding that counsel was deficient. (Robinson's Br. 38–40.) Not so. Again, under *Rothgery*, the right to counsel does not attach until "the *first appearance* before a judicial officer *at which a defendant is told of the formal accusation against him*." *Rothgery*, 554 U.S. at 194 (emphasis added). As discussed in greater detail below, and as the circuit court concluded, unlike the defendant in *Rothgery*, at the time of his lineup, Robinson had not yet made a first appearance before a judicial officer or been told of the formal charges against him. (R. 80:6.) Indeed, charges had not yet been filed. (R. 80:6.)

And as the postconviction court recognized "[t]he *exact* same issue the defendant now raises with almost identical facts were presented" in *State v. Garcia*, No. 2016AP1276-CR, 2018 WL 1738747 (Wis. Ct. App. Apr. 10, 2018), *aff'd*, 2019 WI 40, 386 Wis. 2d 386, 925 N.W.2d 528 (per curiam). (R. 80:6.) *Garcia* held that under *Rothgery*, the right to counsel does not attach during Milwaukee County's paper-only CR-

215 *Riverside* procedure. *Garcia*, 2018 WL 1738747, ¶¶ 28–30. The court of appeals 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, "adversar[ial] criminal judicial proceedings" have not been commenced at this point within the meaning of *Rothgery*. *Garcia*, 2018 WL 1738747, ¶ 30.

While *Garcia* was unpublished, it was still an on-point, citable decision that directly applied to the facts of this case in the lead up to Robinson's trial. This forecloses any argument counsel was deficient for failing to argue that Robinson's Sixth Amendment rights were violated in this case because the question before this Court is not whether the court of appeals' decision in *Garcia* was correct, but whether, in light of that opinion and the absence of any controlling authority in his favor, it was unreasonable for Robinson's trial counsel not to lodge a Sixth Amendment objection to the post-arrest lineup procedure. *See State v. Stroik*, 2022 WI App 11, ¶ 36, 401 Wis. 2d 150, 972 N.W.2d 640 ("attorneys are generally not required to advance losing arguments").

And although a federal court later granted habeas relief to Garcia and the United States Court of Appeals for the Seventh Circuit upheld that grant of relief, those decisions were not yet issued at the time of Robinson's trial. The federal court decisions thus do not bolster Robinson's claim of ineffective assistance because counsel is not required to anticipate changes in the law, even when an issue is "percolating" in other courts. *Basham v. United States*, 811 F.3d 1026, 1029 (8th Cir. 2016).

In short, Robinson's trial counsel was not deficient because at the time, it was an open question whether the Milwaukee County CR-215 probable cause determination triggers a defendant's Sixth Amendment right to counsel.

Robinson cannot demonstrate that the "law was so well settled that counsel's performance was legally deficient." *Breitzman*, 378 Wis. 2d 431, ¶ 56. This Court can dispose of Robinson's Sixth Amendment ineffective assistance of counsel claim on this basis alone, without reaching the merits of the underlying objection.

## II. The CR-215, ex-parte, paper probable cause finding does not involve a personal appearance or initiate formal adversary proceedings such that defendant's Sixth Amendment right to counsel attaches.

If this Court decides to reach the merits of Robinson's Sixth Amendment claim in deciding whether trial counsel was deficient, it should nonetheless affirm the circuit court. Robinson's Sixth Amendment argument is based almost entirely on a misreading of *Rothgery*. *Rothgery*, properly interpreted, does not support Robinson's position that his right to counsel attached upon the CR-215 probable cause determination. Robinson's Sixth Amendment claim fails for three reasons: (1) Robinson did not appear before a judicial officer when the CR-215 form was completed, nor did he receive notice of the charges against him; (2) no formal charges were filed at the time the CR-215 form was completed; and (3) Robinson's assertion that under *Rothgery* the right to counsel attaches at any *Riverside* probable cause hearing when bail is set is contrary to United States Supreme Court precedent and precedent from this Court. The CR-215 procedure is not "nearly identical"[11] to the Texas procedure discussed in *Rothgery*. The CR-215 procedure serves solely to satisfy the Fourth Amendment's requirement that probable cause be found before liberty is restrained; it does not implicate an arrestee's Sixth Amendment right to counsel.

[11] (Robinson's Br. 26.)

### A. *Rothgery* requires a personal appearance at which a defendant is informed of the charges against him before the right to counsel attaches.

*Rothgery* addressed "whether attachment of the right [to counsel] also requires that a public prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct." *Rothgery*, 554 U.S. at 194–95. The defendant in that case was arrested without a warrant and pursuant to Texas statute was "brought . . . before a magistrate" where the magistrate reviewed a sworn affidavit of probable cause by the arresting officer, "informed Rothgery of the accusation, set his bail . . . and committed him to jail." *Id.* at 195–96. The Supreme Court issued a "narrow" holding that reiterated the established principal that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Id.* at 213.

Contrary to what Robinson says (Robinson's Br. 29–30), the personal appearance in *Rothgery* was significant to its holding. *Rothgery* placed particular emphasis on the defendant's personal appearance at the hearing. The Court stressed that it had "twice held that the right to counsel attaches at the initial appearance before a judicial officer" and that "Texas's article 15.17 hearing *is an initial appearance*." *Rothgery*, 554 U.S. at 199 (emphasis added). Indeed, the Court in *Rothgery* used some form of the term "initial appearance" 25 times. And it noted that under the Texas procedure at issue, the defendant was present and was "formally apprised of the accusation against him." *Id.* at 195.

Unlike *Rothgery*, the CR-215 procedure does not involve a defendant being brought before a magistrate and being informed of the charges against him. The circuit court made specific factual findings that:

> - The CR-215 form is prepared by law enforcement, without assistance from a prosecutor, and brought to a judicial officer for an ex parte review. . . .
> - The review of the CR-215 form is not a formal hearing and the suspect is not present for it, nor is a prosecutor.
> - The suspect is not at that time provided a copy of the CR-215 form.

(R. 80:6.)

Robinson entirely misses the point by arguing that a *physical* appearance is not necessary for the right to counsel to attach because a defendant may appear in court in circumstances other than a personal appearance. (Robinson's Br. 31.) The CR-215 procedure is entirely ex parte; no appearance—whether personal, by phone, by video, or through counsel—occurs. Given these differences from the Texas procedure at issue in *Rothgery*, that decision does not control.

Federal procedure involving the criminal complaint provides a useful comparison. A federal criminal complaint is made on oath before a magistrate judge and contains a statement of facts establishing probable cause of the offense. Fed. R. Crim. P. 3, 4.1. The Seventh Circuit has confirmed that the filing of a federal criminal complaint does not trigger the Sixth Amendment right to counsel, which instead attaches at the defendant's initial appearance, "where he learns the charge against him." *See United States v. States*, 652 F.3d 734, 741 (7th Cir. 2011). The court noted that "[a]ll of our sister circuits to have examined the issue have

concluded that the mere filing of a federal criminal complaint does not trigger the right to counsel. *Id.* (collecting cases).

In reaching the same result, the First Circuit explained that "[t]he process of securing a federal criminal complaint *does not involve the appearance of the defendant before a judicial officer*. It is therefore unlike a preliminary hearing or arraignment," and therefore does not implicate a defendant's Sixth Amendment rights. *United States v. Boskic*, 545 F.3d 69, 83 (1st Cir. 2008) (emphasis added).

If the filing of a federal criminal complaint—a document signed by a magistrate judge, outlining probable cause to support specific charges against the defendant, that is later provided to the defendant and formally lodged on the criminal docket—does not implicate *Rothgery*, then neither can Wisconsin's less formal CR-215 procedure.[12] *Rothgery* says nothing about whether the right to counsel attaches at a post-arrest, pre-indictment lineup where the defendant has not yet personally appeared before a magistrate and had the formal charges against him read.

### B. The CR-215 form does not initiate criminal proceedings, and there is no right to counsel at post-arrest lineup when no charges have been filed.

Robinson's reliance on *Rothgery* is misplaced for a second reason—completion of the CR-215 form does not initiate criminal adversary proceedings. And established law holds that there is no right to counsel at a post-arrest lineup if criminal proceedings have not been initiated.

*Rothgery* reaffirmed the long-established rule that the right to counsel is not triggered "until a prosecution is commenced." *Rothgery*, 554 U.S. at 198 (citing *McNeil v.*

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[12] The State discusses the Seventh Circuit's decision in *Garcia IV* in more detail *supra*.

*Wisconsin*, 501 U.S. 171, 175 (1991)). Commencement is "pegged" to "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* (citation omitted). This "is not 'mere formalism,' but a recognition of the point at which 'the government has committed to prosecute.'" *Id.* (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). *Rothgery* held that the Texas procedure at issue marked the point of commencement, regardless of the fact that the prosecutor was not involved in the procedure. *Id.* at 198–99. That was so, in part, because the Texas procedure involved the defendant being "formally apprised of the accusation against him." *Id.* at 195. The magistrate explicitly informed Rothgery that he "*stands charged by complaint duly filed*." *Id.* at 196 (emphasis added).

As the Seventh Circuit has recognized, *Rothgery* squarely "answers the question" as to when criminal proceedings are formally commenced. *States*, 652 F.3d at 741. "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Rothgery*, 554 U.S. at 213.

As mentioned above, criminal proceedings in Wisconsin are initiated by the filing of a complaint.[13] Thus, "[t]he right to counsel under the Sixth Amendment arises after adversary judicial proceedings have been initiated—in Wisconsin, by the filing of a criminal complaint or the issuance of an arrest warrant." *State v. Forbush*, 2011 WI 25, ¶ 16, 332 Wis. 2d 620, 796 N.W.2d 741 (citation omitted).

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[13] Under Wis. Stat. § 939.74(1), "a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed" for purposes of time limitations.

And the circuit court here specifically found that "[t]he signing of the CR-215 form does not create a criminal court case file" and that "[t]he review of a CR-215 form does not bind the prosecutor to issue any charges." (R. 80:6.) These specific factual findings foreclose Robinson's argument that the CR-215 form is the legal equivalent of a formal charge. (Robinson's Br. 33–34.) Put plainly, the CR-215 procedure is not the equivalent of a "formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby*, 406 U.S. at 689. Unlike the defendant in *Rothgery*, at the time the CR-215 form was completed, Robinson did not "stand[ ] charged by complaint duly filed." *Rothgery,* 554 U.S. at 196.

The use of Form CR-215, designed to satisfy *Riverside*, was merely a judicial determination of probable cause tied to Robinson's Fourth Amendment due process rights. The complaint in this case was not filed until two days after the CR-215 probable cause finding and after the live lineup was completed. (R. 1; 80:6.)[14] Thus, criminal proceedings were not initiated at the time the CR-215 form was completed.

And because criminal proceedings had not been initiated by the CR-215 procedure, Robinson had no right to counsel at his post-arrest lineup. Wisconsin has expressly recognized that under *Kirby* and its progeny, "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) (emphasis added). And as this Court recognized in *Jones,* "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,

[14] The CR-215 form was completed on December 21. (R. 80:6.) Robinson had his initial appearance on December 24, 2017. (R. 83.)

preliminary hearing, indictment, information, or arraignment.'" *(James) Jones v. State*, 59 Wis. 2d 184, 194, 207 N.W.2d 890 (1973) (citation omitted). 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.*

Because no formal charges were filed at the time of the lineup and because the CR-215 determination is not a "formal charge, preliminary hearing, indictment, information, or arraignment" *Kirby*, 406 U.S. at 689, Robinson's Sixth Amendment right to counsel did not attach at the time of the lineup.

### C. *Rothgery* does not say that the right to counsel attaches following *Riverside* proceedings where bail is set.

Robinson seems to seek a blanket rule that the right to counsel attaches anytime bail is set at a *Riverside* probable cause hearing. (Robinson's Br. 23–25, 31–32.) No such rule exists, and such a ruling would be contrary to both United States Supreme Court precedent and well-established law in Wisconsin.

Both parties acknowledge that the CR-215 form is the procedure employed by Milwaukee County to satisfy *Riverside*'s rule that the Due Process Clause of the Fourth Amendment requires a neutral magistrate to make a post-arrest probable cause determination within 48 hours of a warrantless arrest in order to hold a detainee for further proceedings. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–59 (1991). *Riverside* reiterated that states may combine post-arrest probable cause determinations with proceedings to set bail and initial appearances. *Id.* at 55–56. But such proceedings need not necessarily be combined, and a post-arrest probable cause determination may be made using

"informal procedure[s]." *Gerstein v. Pugh,* 420 U.S. 103, 121 (1975).

So, while some jurisdictions may combine procedures into a hearing that both satisfies the Fourth Amendment and triggers the Sixth Amendment, others may not. Justice Alito acknowledged this possibility in his concurrence to *Rothgery*: "Because pretrial criminal procedures vary substantially from jurisdiction to jurisdiction, there is room for disagreement about when a 'prosecution' begins for Sixth Amendment purposes." *Rothgery*, 554 U.S. at 215 (Alito, J., concurring).[15]

Yet, Robinson seeks a blanket rule that the right to counsel attaches at any form of *Riverside* hearing where bail is set, regardless of whether a defendant is required to appear personally, whether charges are filed, or whether the defendant is informed of the charges against him. (Robinson's Br. 23–25, 31–32.) But *Rothgery* does not say that, and *Gerstein* expressly held that a post-arrest probable cause determination is "not a 'critical stage' in the prosecution that would require appointed counsel," *Gerstein*, 420 U.S. at 122, and rejected the notion that the probable cause determination must "be accompanied by the full panoply of adversar[ial]" rights, *id.* at 119.

While the *Rothgery* Court identified the setting of bail as one of the reasons why a defendant's right to counsel attached under the procedure in question there, it did not say it was the *dispositive* factor. *Rothgery*, 554 U.S. at 199. *Rothgery* did not state that the right to counsel attaches whenever bail is set via a *Riverside* procedure, regardless of whether formal charges have been filed or whether the defendant personally appears before the court and learns of those charges. If the Court had intended to create such a rule,

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[15] Despite this, Robinson argues that "constitutional guarantees cannot be subordinated to quirks of local practice." (Robinson's Br. 32.)

it could have done so easily, and the *Rothgery* opinion would have read very differently.

Notably, the *Rothgery* Court contrasted Wisconsin's pretrial procedures at issue in *McNeil*, where it held that "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused,' and observed that 'in most States, at least with respect to serious offenses, free counsel is made available at that time . . . ." *Id.* at 203–04 (quoting *McNeil*, 501 U.S. at 180–81). Among the States that provided counsel at the time the Sixth Amendment right to counsel attached, the Court noted, was Wisconsin. *See Rothgery*, 554 U.S. at 204 n.14. Thus, the *Rothgery* Court at least tacitly distinguished Wisconsin's procedures from those at issue in Texas. And in Wisconsin, free counsel is not provided until after the initial appearance and before the preliminary examination. *See* Wis. Stat. § 970.02(6) (requiring that referral of indigent defendant to SPD must be made following the initial appearance); *(Bolivar) Jones*, 37 Wis. 2d at 69 ("all that presently is required is that the appointment be made at least by the preliminary").

Finally, the entire *point* of a *Riverside* hearing is to determine if there is sufficient probable cause to hold an arrestee until formal criminal proceedings are commenced. *See Riverside*, 500 U.S. at 55–56. Thus, the infringement on liberty itself cannot be the definitive trigger that establishes when criminal proceedings are "commenced" for purposes of *Rothgery*. If, as Robinson contends, the setting of bail were the dispositive factor as to when the right to counsel attached, then jurisdictions would have the perverse incentive to simply not set bail when making a *Riverside* probable cause determination. Indeed, *Riverside* expressly contemplates that a post-arrest probable cause determination need not be combined with bail. *Riverside*, 500 U.S. at 58.

Adopting Robinson's argument would be inconsistent with *Rothgery*, *Gerstein*, *Riverside*, and the Wisconsin

authorities cited above and would cause a wholesale change in the law as to when the right to counsel attaches under Wisconsin's pretrial procedures.

### D. *Garcia IV* is not binding on this Court, and this Court should decline to adopt its reasoning, which raises more questions than it answers.

Robinson understandably makes much of the Seventh Circuit's decision in *Garcia IV*. However, that decision is not binding on this Court. *See Johnson v. Williams*, 568 U.S. 289, 305 (2013) ("[T]he views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law."). In addition, there is ample room to question its reasoning when it comes to the Sixth Amendment implications of the CR-215 procedure.

First, the Seventh Circuit's decision is difficult, if not impossible, to square with its other decisions interpreting when Sixth Amendment rights attach. For example, as previously discussed, the Seventh Circuit has held that the filing of a federal criminal complaint pursuant to Fed. R. Crim. P. 3 does not cause attachment of the Sixth Amendment:

> [t]he Supreme Court's holding in [*Rothgery*], answers the question: "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, *marks the start* of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." Thus, in the federal system, the initial appearance, Fed.R.Crim.P. 5, marks the point at which interrogations by law enforcement cease to be controlled by the Fifth Amendment and begin to be governed by the Sixth Amendment.

*States*, 652 F.3d at 741 (citations omitted). The Seventh Circuit had no difficulty in concluding that the government's

filing of a federal criminal complaint "charging States with multiple violations of federal criminal law" did not cause the Sixth Amendment right to counsel to attach; it attached only when the defendant made his initial appearance under Fed. R. Crim. P. 5. *Id.*

Wisconsin statutes lay out an initial appearance procedure similar to that of the federal system. *See* Wis. Stat. §§ 970.01, 970.02. The federal rule requires that "[a] person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer," while Wisconsin's rule states that "[a]ny person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed." *Compare* Fed. R. Crim. P. 5(a)(1)(A), *with* Wis. Stat. § 970.01(1). In both Wisconsin and the federal system, the judge at the initial appearance must inform the defendant of multiple things: the complaint against him, his right to retain counsel or have counsel appointed, the terms of any pretrial release or bail, and the right to a preliminary hearing or examination. *Compare* Fed. R. Crim. P. 5(d)(1), *with* Wis. Stat. § 970.02.

The majority in *Garcia IV* determined that Form CR-215 causes attachment of the Sixth Amendment because "the complaint filed with the magistrate accused [Garcia] of committing a particular crime and prompted the judicial officer to take legal action in response." *Garcia IV*, 65 F.4th at 954 (quoting *Rothgery*, 554 U.S. at 199 n.9). But the filing of a federal criminal complaint under Fed. R. Crim. P. 3 also triggers judicial action: a complaint that establishes probable cause requires a judge to issue an arrest warrant. *See* Fed. R. Crim. P. 4(a). Despite this, every circuit court to have considered the issue has held that the federal procedure does not cause attachment of the Sixth Amendment. *See States*, 652 F.3d at 741 (collecting cases). Yet the *Garcia IV* majority

held that Wisconsin's similar procedure does. Those holdings cannot be reconciled.

Second, the decision in *Garcia IV* obscures, rather than clarifies, when suspects' Sixth Amendment rights attach. At multiple points in its decision, the *Garcia IV* majority emphasized that attachment of the Sixth Amendment right to counsel follows the government's use of "the judicial machinery" to signal a commitment to prosecute. *Garcia IV*, 65 F.4th at 953–56. This "judicial machinery" was the court's metaphor for certain types of procedure. But the decision does not answer which qualities of some procedures cause the right to counsel to attach while those of others do not, and it lacks any limiting principle to determine where the line of Sixth Amendment attachment is drawn. Lacking a limiting principle, the decision creates uncertainty in a variety of different scenarios.

For example, if an in-person appearance is not a requirement for Sixth Amendment attachment, then what about the setting of bail or notification of an accusation against a defendant? Does every procedure designed to comply with *Riverside*—a case grounded in the Fourth Amendment—cause attachment of the Sixth Amendment? If so, what about a state's application for an arrest warrant, which has the same basic effect as a *Riverside* procedure except that it precedes arrest? Conversely, if it is possible for a *Riverside* procedure not to cause Sixth Amendment attachment, what factual distinctions do matter and why? If Form CR-215 were amended to eliminate the setting of bail and suspects subjected to warrantless arrest were simply held until their initial appearance, what effect would that have on the attachment of the Sixth Amendment and why?

In short, the decision in Garcia IV raises more questions than it answers about when the Sixth Amendment right to counsel attaches following a warrantless arrest. Adopting that decision is not only unnecessary, it also would create

uncertainty surrounding the attachment of the right in other circumstances.[16]

## III. The circuit court properly denied Robinson's postconviction motion without a hearing because the record conclusively demonstrates that he is not entitled to relief.

In addition to his Sixth Amendment argument, Robinson argues that trial counsel was ineffective for failing to call two bank employees who were unable to identify Robinson as the culprit and for failing to call two phone tipsters who identified someone other than Robinson from the publicly released bank robbery footage. (Robinson's Br. 41–45.) These arguments fail because the record demonstrates that counsel did not perform deficiently, and that any deficient performance did not prejudice Robinson. Robinson was therefore not entitled to a *Machner* hearing on the claims. *See State v. Spencer*, 2022 WI 56, ¶ 4, 403 Wis. 2d 86, 975 N.W.2d 383 ("If the record as a whole conclusively demonstrates the defendant is not entitled to relief, an evidentiary hearing is not mandatory.").

### A. 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. 41–44.) He baldly asserts these witnesses would have established his "factual innocence." (Robinson's Br. 41.) This claim fails because these

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[16] The State acknowledges that, as a practical matter, the decision in *Garcia IV* will dictate police procedure in the vast majority of cases going forward, lest eventual convictions be invalidated on habeas review. The State submits, however, that this is not a good reason to adopt bad law.

two witnesses could not identify *anyone* out of the lineup and several other witnesses positively identified Robinson. Their testimony would not have called into question the credibility of the other eyewitnesses, and failing to identify anyone hardly counts as evidence of Robinson's alleged actual innocence.

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.)

Counsel has discretion as to what witnesses to call at trial. *State v. Wood*, 2010 WI 17, ¶ 73, 323 Wis. 2d 321, 780 N.W.2d 63. 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. Further, "[a] defense counsel has no obligation to call or even interview a witness whose testimony would not have exculpated the defendant." *Millender v. Adams*, 376 F.3d 520, 527 (6th Cir. 2004).

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 could 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. 44.)

Dunn was the bank employee with whom Robinson interacted at the teller window, from whom he demanded money, and who gave the money to him. (R. 89:67.) She "absolutely" could identify Robinson before the lineup and was "100 percent sure" and had "[z]ero doubt" he was the perpetrator after seeing him in the lineup. (R. 89:79, 88–91.) In contrast, Wright saw the robber in passing with a hood on as he entered the bank and Taylor was on the phone at the time of robbery. (R. 62:8–9.)

Neither Wright nor Taylor's inability to identify Robinson would have damaged Dunn's credibility. And their inability to identify anyone from the lineup did not exculpate Robinson. Their testimony, had it been admitted, would been of marginal probative value. Accordingly, Robinson's postconviction motion failed to allege sufficient facts to demonstrate trial counsel performed deficiently for electing not to call these two witnesses.

### B. Counsel was not deficient for failing to present tipster 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 different individuals as the perpetrator after still images from the bank robbery were released. (Robinson's Br. 44–47.) 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. The phone tipster suspects do not satisfy any of these requirements. Robinson makes no argument before this Court that they do.

Instead, relying on *State v. Scheidell*, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999), Robinson argues that "*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." (Robinson's Br. 45.) There are two problems with argument.

First, it is based on a misreading of *Scheidell*. *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 or that their identities were unknown. (Robinson's Br. 44–45.) To the contrary, he admits that the phone tipsters identified Louis Baker and Timothy Tolliver as individuals whom they "thought" were the robber. (Robinson's Br. 44–45 (citing R. 62:2, 6).) Robinson's attempt to circumvent *Denny* based on *Scheidell* therefore fails.

Second, Robinson fails to articulate what "other theory" (Robinson's Br. 45), the phone tipster witnesses would have supported *other than* that someone other than Robinson committed the crime. Robinson tries to split hairs by saying that the tipster evidence would simply undermine those witnesses who identified him. According to Robinson, evidence of these specific alternative identifications would show that eyewitness testimony is inherently unreliable—not necessarily that someone else committed the crime. (Robinson's Br. 44–45.) But that is a distinction without a difference because the tipster evidence could be relevant only to undermining the eyewitness identifications *to the extent that the tipsters identified someone other than Robinson*. In other words, using the tipster evidence to try and undermine the eyewitness identifications at trial would necessarily involve the "evidentiary proposition," (Robinson's Br. 46), that some other individual(s) committed the crime.[17]

[17] Robinson's suggestion (Robinson's Br. 47) that the phone tipster evidence would have been useful to undermine the jury's

For the same reason, Robinson's argument, if accepted, would amount to nothing less than a *sub silencio* overruling of *Denny*. In virtually every case in which a defendant seeks to introduce evidence of an alternative perpetrator but cannot meet *Denny's* "legitimate tendency" test, he could sidestep the *Denny* framework by arguing that he is not offering the evidence to prove someone else did it, but merely to undermine the credibility of those witnesses who identified him as the culprit. This Court should reject Robinson's attempt to short-circuit the requirements of *Denny*.

The phone tipster identifications were not admissible under *Denny's* "legitimate tendency" test, and Robinson's attempt to side-step *Denny* are unavailing. Counsel is not deficient for failing to seek admission of inadmissible evidence. *See Carter*, 324 Wis. 2d 640, ¶ 54.

### C. Robinson was not prejudiced by counsel's alleged deficiencies due the strength of the State's case against him.

#### 1. To show prejudice, a defendant must show that there is a substantial likelihood of a different result but-for the alleged errors.

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

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confidence in their *own* ability to identify Robinson from the bank footage based on their request to view it during deliberations also fails. Counsel could have no way of knowing that the jury would request to view the video during deliberations. This is the precise kind of hindsight Monday-morning quarterbacking *Strickland* prohibits. *Strickland*, 466 U.S. at 689.

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).

Further, "[t]he 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. Thus, the prejudice determination involves consideration of the totality of the evidence and the strength of the State's case. *Strickland*, 466 U.S. at 695–96.

**2. Robinson failed to demonstrate prejudice due to the overwhelming evidence of his guilt—including multiple witness identifications, high quality footage of the robbery, and Robinson's possession of $100 bills.**

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 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 "[z]ero 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 Dunn's identification during the in-person lineup had been excluded, there is no indication that the identifications she made based on the still photos and during trial were tainted by the live line-up. The fact that she told police from the outset that she "absolutely" could identify the robber and detailed the steps in her training to remember features and details (R. 89:69–70, 79) establishes that her in-court identification was made based on her "independent recollection[ ] of [her] observations of and encounter[ ] with" Robinson at the teller window when he demanded money from her. *State v. Roberson*, 2006 WI 80, ¶ 36, 292 Wis. 2d 280, 717 N.W.2d 111.

While watching the surveillance video in court, Dunn described Robinson's activities in the bank, how he approached her window, demanded money from her, and how she gave it to him. (R. 89:70–77.) Dunn described how Robinson was leaning over the counter and looking "straight into" her face and she was looking "straight into his face." (R. 89:73.) Dunn said her face was "inches apart" from Robinson, separated only by the glass. (R. 89:74.) She was looking at the shape of his nose, his eyes, his cheekbones, and "[t]rying to remember as much as" she could. (R. 89:74.) Robinson was "largely stationary" during the encounter and easy to see. (R. 89:74.) When Dunn handed him the money, she was looking straight into Robinson's face again. (R. 89:75.) She testified she was looking at Robinson "[t]he whole time." (R. 89:68.)

She also specifically recalled Robinson's clothing—his hat, and jacket with colored inside lining. (R. 89:69.) And she positively identified Robinson in court. (R. 89:87.)

Because this is an ineffective assistance of counsel claim, the burden is on Robinson to prove that the in-court identification would have been inadmissible. *Roberson*, 292 Wis. 2d 280, ¶ 35. He has failed to do so and does little more than attack the reliability of in-court identifications generally. (Robinson's Br. 50.)[18] Given the amount of time Dunn observed Robinson, the closeness of their faces, the fact she was looking at him the entire time, Dunn's training, the fact she focused on and described his physical features and clothing, and the certainty of her identification, Robinson cannot establish that Dunn's in-court identification would have been inadmissible as required by *Roberson*. *Roberson*, 292 Wis. 2d 280, ¶ 31. To the contrary, the specificity of her recollection of the encounter—supported by the video surveillance footage—establishes that Dunn's in-court identification "rest[s] on an independent recollection of [her] initial encounter with" Robinson. *Id.* ¶ 34. And the alleged discrepancies between Dunn's description of Robinson at the time of the robbery and his later booking photo, (R. 27), do nothing to undermine the fact that her trial court identification was independent from her identification of Robinson at the lineup, (Robinson's Br. 49–50).

Additionally, Dunn's multiple identifications of Robinson were corroborated by two other women that had spent time with Robinson the day of the robbery in a "professional capacity," who positively identified him from the bank video stills based on his appearance and clothing. (R.

[18] While making general mention of the "seven factors" set forth in *United States v. Wade*, 388 U.S. 218, 241 (1967), Robinson makes no serious attempt to describe those factors or address each discretely. (Robinson's Br. 49–50.)

91:13–16, 19–23.) Both women were "100 percent" sure of their identification. (R. 91:16, 23.)

And 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—capturing both a straight-on and profile view of his facial features. (R. 22; 23.) The jury asked to view all these during deliberations to "make the 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 they concluded that he was. And the jury was also shown Robinson's booking photo as well as photos of him individually and in the lineup array. (R. 25; 26; 27.)

In short, the record belies Robinson's assertion that the jury was presented with "incomplete identification evidence." (Robinson's Br. 53.)

And 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 time of robbery. (R. 91:40.) He also admitted that in the timeframe of the robbery he was being "asked to move on" by his landlord. (R. 91:57.) When asked about the $100 dollar

bills found in his vehicle, he gave an implausible and unspecific account that 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), 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 excluding Dunn's lineup identification would have affected her in-court identification. And the jury ultimately based its decision on its own viewing of the video and photographic evidence of the robbery.

* * *

The record conclusively demonstrates that Robinson's 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

For the reasons discussed, this Court should affirm the circuit court's order denying Robinson's motion for postconviction relief.

Dated this 9th day of November 2023.

Respectfully submitted,

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Electronically signed by:

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,678 words.

Dated this 9th day of November 2023.

Electronically signed by:

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## CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 9th day of November 2023.

Electronically signed by:

John A. Blimling
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