STATE OF WISCONSIN

COURT OF APPEALS

Case No. 2020AP001728-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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008) is directly on point and compelled counsel to object.

A. The State's attempts to "unsettle" the law are unpersuasive.

The State's primary argument in response to Mr. Robinson's Sixth Amendment claim is straightforward and nothing more than an outright disavowal of *Rothgery's* precedential force. (State's Br. at 20). The law was not "settled," so the argument goes, hence, counsel had no "duty" to object. (State's Br. at 20).

The State is simply mistaken. In this case, trial counsel was confronted with a procedure that violates settled United States Supreme Court case law. Decisions of the United States Supreme Court on federal constitutional questions are controlling and bind lower courts. *State v. Jennings*, 2002 WI 44, ¶ 18, 252 Wis.2d 228, 647 N.W.2d 142. Accordingly, counsel had a plain duty to object; he did not, and therefore was constitutionally defective. The State's procedural arguments about "settled" law are therefore fatally flawed.

In effect, the State is asking this Court to hold that reasonably competent counsel, faced with a factual scenario directly governed by controlling and

on-point authority, has no obligation to apply that precedent to assist his client. (State's Br. at 20). However, a criminal defense attorney who chooses to ignore precedent in this fashion is not fulfilling "the role in the adversary process that the [Sixth] Amendment envisions." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

None of the State's citations can disturb this fundamental principle. For example, *State v. Morales-Pedrosa*, 2016 WI App 38, ¶ 26, 369 Wis. 2d 75, 879 N.W.2d 772 merely addresses a pure question of Wisconsin law, asking whether controverted testimony was within the province of established Wisconsin precedent. Because the Wisconsin precedent did not squarely resolve the issue, the law was not sufficiently "settled" so as to create a plain legal duty for counsel to violate. Likewise, in *State v. Breitzman*, 2017 WI 100, ¶¶ 55- 56, 378 Wis. 2d 431, 904 N.W.2d 93, the Wisconsin Supreme Court explicitly looked to United States Supreme Court decisions to determine whether there was a clear legal standard governing the underlying alleged legal error; finding none, it found no ineffectiveness.

To claim that a defendant must first have a state court ratify an otherwise binding United States Supreme Court decision is a distortion of the ineffectiveness rubric. It also makes little sense to claim, as the State does, that any specific local practice must be specifically condemned by precedent before any plain legal duty exists. (State's Br. at 22). Likewise, it makes little sense to claim, as the State

does, that the intervening issuance of an unpublished and uncitable intermediate state appellate court decision could somehow "unsettle" binding United States Supreme Court precedent. (State's Br. at 22). An unpublished decision of this Court is *not* the law; counsel does not have any "duty to research or cite it." Wis. Stat. § 809.23(3)(b).

And, while Mr. Robinson would agree that the resolution of the habeas litigation in the *Garcia* saga does not directly resolve the reasonableness of counsel's historical conduct, the State's preferred holding in this case creates a problematic mismatch between Wisconsin and federal law. While principles of federalism obviously permit this Court to go its own way, the creation of such an obvious conflict in our overlapping legal systems should ordinarily be avoided.

In sum, Mr. Robinson is not asking that counsel argue an issue of unsettled law. Counsel was not being asked to anticipate a "change" in the law. Counsel was being asked—as the constitution requires—to acquaint himself with binding precedent and to apply that precedent to his defense of Mr. Robinson. Because he did not, deficient performance resulted.

B. The State badly misreads *Rothgery* and that deficient reading of settled law should not be endorsed by this Court.

1. *Rothgery* does not require a personal appearance.

In *Rothgery*, the United States Supreme Court clearly held that a probable cause/bail hearing like the one that occurred in this case can trigger the right to counsel; at no point did it assert that the defendant must be physically present before a magistrate. That was not the issue presented to the Court for review and it misstates the scope of the Court's decision to claim that it "narrowly" applies only to the specific facts presented.[1]

Instead, the Court clearly held 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. The State's claim that this *must* require an actual appearance is not represented in the text of the opinion. Likewise, there is nothing in *Rothgery* that suggests that it is dispositive that a defendant be in-person for the reading of charges rather than being copied on the paper procedure, as occurred here.

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[1] The State insists that *Rothgery* was intended to be read narrowly on this point. (State's Br. at 24). The "narrow" nature of the decision refers not to the attachment inquiry, but to a second, related, question—whether the initial appearance which triggers the right to counsel at subsequent proceedings is itself a "critical phase" necessitating the appearance of counsel. *See Rothgery*, 554 U.S. at 218 (Alito, J., *concurring*) (explaining that the Court's opinion addresses only the "limited" attachment question).

What matters is that there has been *some* State-initiated action signaling that the relationship between the arrested person and the State has become "solidly adversarial." *Id*. at 202. Here, an agent of the State submitted a sworn statement listing specified criminal infractions along with supporting proof that Mr. Robinson had committed those offenses. A judicial officer neutrally reviewed that evidence and determined Mr. Robinson "probably" committed the crimes at issue and then set bail to ensure Mr. Robinson's availability for prosecution. The paper probable cause paperwork was then distributed to Mr. Robinson, giving him notice of these accusations and the related finding of probable cause.

It strains credulity to insist there was not an "adversarial" relationship between Mr. Robinson and the State such that a prosecution had not "commenced." *See id.* at 207-208. The case law is concerned not with hyper-specific procedural requirements, but with the more pivotal question of whether "the machinery of prosecution [has been] turned on." *Id*. A CR-215 proceeding does just that.

The State analogizes the CR-215 procedure to the filing of a criminal complaint used to obtain a warrant in federal court, a procedure that several courts (most speaking pre-*Rothgery*)[2] have labeled

[2] For example, the State's reliance on *United States v. Boskic*, 545 F.3d 69 (1st Cir. 2008), is clearly misplaced. That case relies, in part, on an understanding that a prosecutor must be involved to initiate criminal proceedings, a viewpoint directly rejected in *Rothgery*.

insufficient to trigger the Sixth Amendment right to counsel. (State's Br. at 25). This analogy is flawed as the procedures are insufficiently similar. A document filed for the purpose of obtaining a warrant is not at all like a document filed after arresting a person which functions to continue that person's incarceration pending prosecution.

Accordingly, because the State's cited "requirement" of a personal appearance as opposed to an *ex parte* procedure is not reflected in the case law, this Court should adhere to the precedential rule announced in *Rothgery*.

2. *Rothgery* defines when a criminal prosecution initiates; because the essential facts of this case are indistinguishable from *Rothgery,* the State's arguments about non-initiation are plainly irrelevant.

Separately from its argument that the arrested person must appear at an in-court proceeding, the State also argues that a CR-215 is *categorically* incapable of initiating a criminal prosecution. Its arguments are inconsistent and unpersuasive.

Principally, the State suggests that Robinson's criminal prosecution could not have commenced because a complaint was not filed, contradicting its earlier argument that a complaint is irrelevant to the attachment inquiry. (State's Br. at 27). The State cites isolated language from *Rothgery* discussing the Texas equivalent of a complaint, as well as this Court's

decision in *State v. Forbush*, 2011 WI 25, ¶ 16, 332 Wis. 2d 620, 796 N.W.2d 620. (State's Br. at 28). Setting aside the logical inconsistencies in the State's argument, the State ignores that the attachment inquiry is flexible and not triggered by any single, jurisdiction-specific procedure. *Rothgery*, 554 U.S. at 198. Thus, while a criminal complaint *may* trigger the attachment of the right to counsel, that does not mean that *only* a criminal complaint can do so.

Likewise, the factual distinctions highlighted by the State—that the CR-215 did not create a "criminal court case file" and that a prosecutor's charging discretion is not restricted by the filing of a CR-215—are irrelevant and not derived from any case law. (State's Br. at 28). It cannot feasibly matter, for the purposes of analyzing the Sixth Amendment right to counsel, whether the clerk's office opens "a file" on the defendant; likewise, a prosecutor *always* has discretion with respect to charging throughout the criminal process.

Overall, the State's arguments reflect a basic misunderstanding of *Rothgery*. The State repeatedly asserts that, because the CR-215 is "merely" a means of satisfying *Riverside,*[3] then, obviously, it is incapable of initiating criminal proceedings against the arrested person. *Rothgery*, however, concerned just such a *Riverside*-satisfying procedure.

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

Finally, the State falls back on irrelevant restatements of law not germane to the resolution of the immediate question. Reiterating that persons do not have a right to counsel until their prosecution has commenced, as the State correctly notes, does nothing to resolve the underlying question of *when* that attachment occurs. (State's Br. at 28). The cited case law merely restates the settled precedent from *Kirby v. Illinois*, 406 U.S. 682 (1972) and does not resolve the underlying question presented in this case. Moreover, it is unclear why either an intermediate state appellate court ruling or a dated decision of the Wisconsin Supreme Court predating the issuance of *Rothgery* by 35 years, also echoing the general *Kirby* rule but not otherwise meaningfully elaborating on the attachment issue, are in any way relevant to resolution of this appeal.

3. The "rule" requested by Mr. Robinson is just a straightforward recognition of *Rothgery's* established holding.

As noted above, the only rational reading of *Rothgery* is that probable cause procedures, when combined with the setting of bail, are sufficiently adversarial such that they initiate criminal prosecutions for the limited purpose of determining whether Sixth Amendment rights have "attached." *Rothgery*, 554 U.S. at 195 (stating that the procedure in that case found to trigger the Sixth Amendment right to counsel "combines the Fourth Amendment's

required probable-cause determination with the setting of bail […].").

The State's reading of the case law is complicated, however, by its conflation of two separate Sixth Amendment doctrines—the attachment inquiry and the critical stage analysis. (State's Br. at 31). Even though a defendant's right to a lawyer has "attached," he still will not be entitled to counsel unless and until a "critical stage" of the prosecution follows. *See Rothgery*, 554 U.S. at 217 (Alito, J., *concurring*) (highlighting that the Court "point[s] out the 'analytical mistake' of assuming 'that attachment necessarily requires the occurrence or imminence of a critical stage.'"). The State's citation to "critical stage" language therefore betrays its misunderstanding of the underlying legal issue. The parade of horribles cited by the State therefore has no basis in Mr. Robinson's argument.

B. The State's attempt to relitigate its failure in federal court in this forum is, as the State concedes, an irrelevant distraction.

As conceded above, the decision of the Seventh Circuit in *Garcia v. Hepp*, 65 F.4th 945, 947 (7th Cir. 2023) is not binding on this Court and does not resolve the issue of attorney ineffectiveness with respect to the *Rothgery* claim. However, as Mr. Robinson has argued, it is an incredibly persuasive and powerful ratification of the ideas he has been advancing in the circuit court, this Court, and the Wisconsin Supreme Court.

Again, while this Court is free to ignore *Garcia*, doing so creates an avoidable conflict between two systems of law. If decades of precedent "clearly establish" that the legal argument advanced herein is correct, then it seems almost absurd to also hold that a competent lawyer, reviewing those same authorities, would fail to grasp the "settled" nature of the question.

The State, perhaps disgruntled by their failure in *Garcia*, wishes to use the litigation in this case as a forum to air its disagreements with that holding. (State's Br. at 32-34). Perhaps what the State means to argue is that *Garcia* is such a badly reasoned opinion it cannot even have persuasive value in this jurisdiction. The State claims *Garcia* is a wild deviation from other federal law; it creates interpretative uncertainty while "obscuring" fundamental Sixth Amendment principles. (State's Br. at 34).

The State is mistaken; for all the reasons set forth in the opening brief, *Garcia* is a well-reasoned and persuasive opinion that provides substantial (but not binding) guidance to this Court in assessing those same authorities.

II. Mr. Robinson's motion entitled him to a hearing.

A. Failure to call witnesses who saw the robber, but did not identify Mr. Robinson, as that person is deficient performance.

In this case, the only issue for the jury was identification. Trial counsel therefore urged the jury to consider, as a basis for reasonable doubt, the possibility that Mr. Robinson had been wrongly identified by the State's witnesses. (92:30). Yet, he omitted any witnesses who would actually support that defense—like the two bank employees who also saw the robber but who did not identify Mr. Robinson as that person. Failure to do so meant that counsel did not fulfill his role to "render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688.

The State disagrees, explaining that because the witnesses made no identification (when presented with Mr. Robinson) instead of identifying someone else (like a known innocent filler) then they were useless to the defense and no reasonably competent attorney would have a duty to present them. (State's Br. at 36). This argument is problematic. These were the *only* potential witnesses who would support the proffered defense; without them, the jury was left with three witnesses pointing the finger at Mr. Robinson and only the arguments of counsel, to rebut them

The State picks around the fringes of the witnesses' statements, essentially asking this Court to

determine that it would not have credited their testimony if presented with it at trial. (State's Br. at 37). That, however, is not the standard. It is the jury's obligation to weigh and assess the credibility of the evidence and resolve conflicts in the testimony when determining a defendant's guilt or innocence. *See State v. Gomez*, 179 Wis. 2d 400, 404, 507 N.W.2d 378 (Ct. App. 1993).

B. Evidence that witnesses identified persons other than Mr. Robinson was not foreclosed by *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

In addition to testimony from witnesses who saw the robber but did not identify Mr. Robinson, counsel should have also presented evidence that other witnesses viewed pictures or video of the crime and confidently identified people other than Mr. Robinson, including close family members.

On this point, the State's only response is that such testimony would have been foreclosed by *Denny*. Not so; *Denny* is a judge-made rule prohibiting alternative perpetrator evidence and has no applicability when the proffered evidence is presented for some other evidentiary proposition. Thus, to the extent that the State relied on testimony from witnesses who were not present but who relied on footage of the robbery to identify Mr. Robinson, the evidence code would permit counsel to introduce this evidence to undermine the reliability of those identifications.

The State's only argumentative tack is to misrepresent Mr. Robinson's argument, asserting that he has inaccurately relied on *State v. Scheidell*, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999). Mr. Robinson has never argued that this is an "unknown perpetrator" case as discussed in *Scheidell*. Instead, he has merely cited the case as analogical support for his argument that *Denny* has a narrow reach; it does not prohibit the admission of evidence regarding other suspects for other evidentiary purposes.

The State also ignores Mr. Robinson's arguments, expressing confusion as to what other purpose such evidence would have. (State's Br. at 39). It labels his arguments a "distinction without a difference" and bemoans a stealth attempt to overrule *Denny*. (State's Br. at 39). The State's concerns are exaggerated. For example, our evidence code permits all manner of testimonial evidence to be admitted for purposes other than the "truth" of the matter asserted; this evidence is no different.

C. Mr. Robinson was cumulatively prejudiced by his attorney's errors.

The State expends its energies describing the totality of the evidence it used to convict Mr. Robinson. Fair enough. But the prejudice inquiry is distinct from a sufficiency analysis. *State v. Pitsch*, 124 Wis. 2d 628, 645, 369 N.W.2d 711 (1985). Here, counsel's errors introduced sufficient unreliability into the proceedings such that a new trial is required.

As argued in the opening brief, effective counsel could have removed the teller's contemporaneous identification of Mr. Robinson—testimony the State told the jury was uniquely relevant to its assessment of Mr. Robinson's guilt or innocence. (92:16). Counsel would be able to present contrary witnesses who saw the robber but, if believed and credited by the jury, did not identify Mr. Robinson as that person. Finally, counsel would be able to introduce powerful evidence to call into question the reliability of the State's identification-based case by showing how easily other witnesses identified completely different (and presumably innocent) suspects.

Accordingly, Mr. Robinson is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Mr. Robinson asks this Court to grant the requested relief.

Dated this 24th day of November 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 2,993 words.

Dated this 24th day of November 2023.

Signed:

Electronically signed by Christopher P. August

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