STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1728-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PERCY ANTIONE ROBINSON,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

ISSUES PRESENTED

1. Three eyewitnesses who interacted with or saw the suspected robber attended a lineup targeting Mr. Robinson. One of the witnesses identified Mr. Robinson as the suspect. The other two did not make any identification.

In a case where two out of three eyewitnesses actually fail to identify the defendant as the suspect, is trial counsel ineffective if he does not present this evidence of innocence to the jury?

The circuit court answered no and the court of appeals affirmed.

2. Although trial counsel's choice of defense at trial was misidentification, he did not present expert testimony to provide scientific backing for those arguments. In a case hinging on the reliability of a single eyewitness, does this constitute ineffective assistance of counsel?

The circuit court answered no and the court of appeals affirmed.

3. As the court of appeals has now recognized, the eyewitness identification at issue was inadmissible pursuant to a United States Supreme Court decision issued in 2008. Mr. Robinson's trial occurred in 2018.

Was trial counsel ineffective for ignoring this authority and allowing the inadmissible identification to be used against Mr. Robinson?

The circuit court answered no and the court of appeals affirmed.

4. If this Court accepts review, it should also address the following two issues:

- Whether trial counsel was ineffective for failing to present evidence that police received tips pointing toward two other suspects;

- Whether the evidence was sufficient to convict.

Mr. Robinson did not prevail in either lower court on these issues.

CRITERIA FOR REVIEW

At its core, this case centers on the power—and the inherent risks—of eyewitness identification evidence. Notably, those risks have been acknowledged by courts for decades. *See United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."). This Court, meanwhile, has acknowledged those risks in at least two noteworthy prior decisions. *State v. Dubose*, 2005 WI 126, ¶ 30, 285 Wis. 2d 143, 699 N.W.2d 582; *State v. Hibl*, 2006 WI 52,¶¶ 37-38, 290 Wis. 2d 595, 714 N.W.2d 194.

Thus, the first issue in this case presents the Court with an opportunity to revisit the issue of potential misidentification and to reaffirm the wisdom of its prior decisions which: (1) relied on social science in order to recognize the risks of eyewitness identification evidence and (2) recognized a corresponding need to safeguard our criminal justice system against the dangers of wrongful convictions stemming from misidentification. Here, Mr. Robinson was convicted based largely on the strength of a single eyewitness. Yet, the jury was never told that of the three total eyewitnesses, two out of three failed to identify Mr. Robinson as the robber.

Instead of recognizing that counsel's conduct omitted colorable evidence of innocence, the court of appeals essentially hand-waved any failure to present witnesses under an unduly deferential reading of the ineffectiveness rubric. That decision cuts against the grain of the constitutional guarantee of effective counsel, signals an alarmingly laissez-faire attitude toward the risks of eyewitness evidence, and contravenes settled precedent requiring appointed counsel to act "reasonably" in representing their indigent clients. Accordingly, review is warranted under Wis. Stat. § 809.62(1r)(a)&(d).

Relatedly, this case also presents the Court with an opportunity to reaffirm our State's commitment to science and expertise in the courtroom. Here, trial counsel made persuasive arguments as to why the jurors needed to resist the "confident" identification of an eyewitness. Yet, trial counsel never provided those

jurors with the social science they needed to objectively evaluate that crucial evidence—an omission that other jurisdictions have recognized as potential ineffectiveness. By ignoring the worth of such evidence, the court of appeals has once again weakened the constitutional guarantee of effective counsel. Accordingly, review is warranted under Wis. Stat. § 809.62(1r)(a)&(d).

Moving away from forensic science, the third issue in this petition presents this Court with an important opportunity to grapple with overarching ineffectiveness principles: namely, how "settled" law must be in order for the Sixth Amendment to mandate an objection. Here, the court of appeals has concluded that the key evidence of guilt in this case—the eyewitness identification—was inadmissible under a United States Supreme Court ruling issued a decade before Mr. Robinson's trial.[1] Yet, it has denied relief

[1] The State has consistently argued that Mr. Robinson's Sixth Amendment right to counsel could not have attached following the CR-215 procedure, primarily because this all-paper procedure did not require Mr. Robinson's physical appearance in court. Based on the State's recent submission to the publication committee of the court of appeals, the State therefore takes issue with the court of appeals' underlying holding that this procedure triggers the attachment of the Sixth Amendment right.

Yet, because Mr. Robinson ultimately did not prevail on his ineffectiveness claim—as the court of appeals concluded the law was too unsettled to merit an objection—the State is now prohibited from seeking review of this "adverse" holding under Wis. Stat. § 809.62(1m)(a)1. It is for that reason that the State has asked for the decision to remain unpublished.

because it perceives the issue to have been "unsettled" when the jury was sworn. Because this is an important issue of constitutional law that is likely to recur in future ineffectiveness cases, review is warranted under Wis. Stat. § 809.62(1r)(a), (b), & (c).

Finally, if the Court accepts review, Mr. Robinson will ask this Court to assess the remaining issues presented in the court of appeals briefing.

STATEMENT OF FACTS

Trial Evidence

This case arises from a bank robbery occurring in 2017. (89:64). According to the trial testimony, S.D. was working as a teller at U.S. Bank branch when a man with a black skullcap handed her a note telling her that he was armed. (89:67-69).

Mr. Robinson agrees that the decision of the court of appeals has put the State in something of a bind and he sympathizes with their litigation conundrum. Yet, in Mr. Robinson's view, an appeal to the publication committee is not the correct means by which to lodge objections to the court of appeals' legal analysis. If the State believes the court of appeals got the Sixth Amendment "attachment" inquiry wrong, its remedy is to file a response to this petition for review joining, or at the very least not opposing, Mr. Robinson's request for review. Although Mr. Robinson believes the court of appeals got it right, he agrees that further review of this important issue of constitutional law would otherwise satisfy the Court's criteria for review.

Three days after the robbery, S.D. attended a live lineup and identified Mr. Robinson as the robber. (89:87). However, during the ensuing trial, defense counsel's cross-examination used a booking photograph of Mr. Robinson to point out that the robber in the surveillance video (which was played for the jury) 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).

Two individuals who met with Mr. Robinson earlier that day but who did not witness the robbery also identified Mr. Robinson as the robber based on their review of the surveillance footage. (91:13; 91:21). The State also presented evidence that, upon his arrest, Mr. Robinson had a $100 bill in his car. (91:9).

Mr. Robinson testified and denied committing the crime. (91:34). Instead, he told the jury that he was elsewhere and high on heroin when the crime occurred. (91:40).

In closing argument, counsel asked the jury to acquit Mr. Robinson, arguing that he had been misidentified. Counsel 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).

Postconviction Proceedings

Following his conviction and sentence, Mr. Robinson filed a postconviction motion and a supplement. (61; 72). Relevant to this petition, 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). The motion was denied in a written order, without a hearing. (80:7); (App. 36).

Appeal

On appeal, the court of appeals affirmed. It first addressed the admissibility of the identification derived from an in-person lineup and held that the

United States Supreme Court's decision in *Rothgery v. Gillespie County*, 554 U.S. 191 governed. Opinion, ¶ 23. (App. 12). Because Mr. Robinson was subjected to a "CR-215" procedure which combined a probable cause assessment with the setting of bail, then his Sixth Amendment right to counsel had "attached" prior to the lineup. *Id*. As the lineup is a "critical stage," then the results were inadmissible given that it is undisputed Mr. Robinson did not have counsel at that time. *Id*.

Yet, although Mr. Robinson won this particular legal battle, he actually lost the larger war. Mr. Robinson's challenge was made through the lens of ineffective assistance of counsel and, under the court of appeals' view of that case law, counsel could not be ineffective for failing to raise an "unsettled" issue of law. *Id*., ¶ 32. (App. 16). It therefore concluded Mr. Robinson did not adequately plead deficient performance in his motion and was not entitled to relief. *Id*.

The court of appeals then made short work of Mr. Robinson's remaining arguments. As to his claim that trial counsel should have presented evidence that two other witnesses attended the lineup and actually failed to identify Mr. Robinson as the suspect, the court of appeals concluded Mr. Robinson's ineffectiveness argument did not merit a hearing as he had failed to "allege that either D.W. or E.T. were confident that they had seen the robber well enough to identify him, such that their failures to identify a suspect in the live lineup would infer that the robber

was not present." *Id*., ¶ 39. (App. 20). And, given the eyewitness who *did* testify, the court of appeals assumed it was "unlikely" that conflicting identification evidence would have made a difference. *Id*.

Likewise, the court of appeals also concluded evidence that two other tipsters called in to identify other persons after seeing the surveillance footage was also incapable of making a difference. *Id.,* ¶ 44. (App. 22).

Moreover, counsel was also not ineffective for failing to present an expert on eyewitness identification as Mr. Robinson's motion was insufficient to establish either prong of the ineffectiveness inquiry. *Id*., ¶ 46. (App. 23). Finally, the court of appeals also held that the circumstantial evidence was sufficient to prove the bank in question was a financial institution as defined in the bank robbery statute. Op., ¶ 54. (App. 26).

This petition follows.

ARGUMENT

I. This Court should accept review and hold that trial counsel, who was pursuing a defense of mistaken identification, was ineffective for not presenting evidence that two out of three eyewitnesses did not identify Mr. Robinson as the suspect during a lineup.

Here, the court of appeals erred in failing to accord proper weight to the evidence of non-identification. In fact, that holding is directly contrary to the prevailing social science which recognizes that non-identifications should not be weighted differently than positive identifications suggesting guilt; rather, non-identifications are persuasive evidence that the person on trial may, in fact, have been misidentified.

Thus, researchers in the field of eyewitness memory agree that lineup rejections are evidence of innocence. Simply put, "witnesses are more likely to reject the lineup (make a non-ID decision) if it is a target-absent lineup than if it is a target-present lineup." John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 10, 44 (2017).[2] As a study of cases involving multiple eyewitnesses where one of them identified the suspect (while others did not) found, "the diagnostic

[2] Available online at https://journals.sagepub.com/doi/10.1177/1529100616686966.

probabilities of guilt were shown to . . . decrease with the addition of non-identifications." Steven E. Clark & Gary L. Wells, *On the diagnosticity of multiple witness identifications*, 32 LAW & HUM. BEHAV. 406, 406 (2008).

Accordingly, psychologists researching the issue have consistently concluded that non-identifications "are diagnostic of the suspect's innocence." Steven E. Clark et al., *Regularities in eyewitness identification*, 32 LAW & HUM. BEHAV. 187, 211 (2008); *see also, e.g.,* Gary L. Wells et al., *Eyewitness Identification: Bayesian Information Gain, Base-Rate Equivalency Curves, and Reasonable Suspicion*, 39 LAW & HUM. BEHAV. 99, 105 (2015) (discussing results of 94 studies). Non-identifications "are not merely 'failures' to identify the suspect, but rather carry important information whose value should not be overlooked. It is important to note as well that lineup rejections carry a different meaning than don't know responses. . . . In contrast to the witness who responds don't know, the witness who rejects the lineup may be more clearly stating 'I do know—that the culprit is not in the lineup.'" Clark et al., *Regularities in eyewitness identification*, at 211.

Here, however, the court of appeals ignored this scientific reality and instead privileged the single identification resulting in Mr. Robinson being charged with this crime for the simple reason that the witness in question was confident in her identification during her testimony. Op., ¶ 39. (App. 20). Because Mr. Robinson did not include any allegations about the

confidence of the two witnesses who did not make an identification, the court held that he failed to plead both deficient performance and prejudice. *Id.* Setting aside the fact that Mr. Robinson included, with his postconviction motion, all of the relevant discovery material with respect to these uncalled witnesses, (62), the court of appeals' resolution of this claim is a problematic distortion of ineffectiveness principles which wholly ignores that these non-identifications were persuasive evidence of actual innocence. Mr. Robinson should not have had to prove that these witnesses were *more* credible or believable than S.D., as that is a jury function. And, as demonstrated above, the mere fact that witnesses did not identify Mr. Robinson is prima facie evidence of his innocence; the failure to present this evidence is not only deficient performance but also prejudiced Mr. Robinson's defense in a case which hinged on the jury believing that he had been misidentified.

Accordingly, this Court should accept review and hold that attorneys representing clients in situations involving possible misidentification have an affirmative duty to follow the social science and present colorable evidence of innocence when it exists. In so doing, the Court should further reject the court of appeal's hyper-specific and unduly burdensome reading of the pleading requirements set forth by this Court in *State v. Allen,* 2004 WI 106, ¶ 13, 274 Wis. 2d 568, 682 N.W.2d 433. Mr. Robinson was merely required to plead facts which, if true, would result in relief. Here, given that non-identifications are colorable evidence of innocence, his averments that his

lawyer failed to present that evidence and that this omission mattered to an assessment of his culpability were categorically sufficient. This Court should accept review, reverse, and remand for an evidentiary hearing.

II. This Court should accept review and hold that trial counsel fails to adequately defend a client in a case of misidentification when they do not provide expert backing for this science-based defense.

Despite the existence of high-profile exonerations in cases involving faulty eyewitness identifications, jurors still tend to place a great deal of reliance on such usually-dramatic courtroom testimony. Thus, even though the United States Supreme Court recognized decades ago that misidentifications are a common feature in our criminal law, *Wade,* 388 U.S. at 228, eyewitness identifications continue to be the centerpiece of many cases prosecuted by the State. As the New Jersey Supreme Court explained, with reference to social science, there is at least some evidence for the proposition "that jurors tend to place great weight on eyewitness identifications, often ignoring other exculpatory evidence." *State v. Cromedy*, 727 A.2d 457, 461 (N.J. 1999).

The Wisconsin Department of Justice, meanwhile, has recognized the concomitant risks and rewards of relying on such evidence:

> Eyewitness identification has always been a powerful tool for investigating and prosecuting criminal cases. Eyewitness evidence can be the most important and convincing evidence in a case. Research and nationwide experience have demonstrated that eyewitness evidence can be a particularly fragile type of evidence, and that eyewitnesses can be mistaken. Eyewitnesses can make significant identification errors, but those errors can be difficult to detect, because the witnesses are sincere and have no motive to lie. When wrong, they usually are not being deceitful, but just simply mistaken.

Wisconsin Department of Justice Model Policy and Procedure for Eyewitness Identification, p. 2. (Available online at https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf).

As a result of the obvious risks of eyewitness testimony—and the way in which failures result not from deceitfulness but from unconscious psychological influences—courts have begun to recognize that jurors need help in order to make sense of such intuitively suggestive, but potentially unreliable, evidence.

For example, in *Jones v. United States,* 262 A.3d 1114, 1125 (D.C. 2021), the District of Columbia's highest court recognized not only the "inherent unreliability" of such evidence but also the troubling fact that "many jurors have basic misunderstandings about the way memory works and about specific circumstantial factors that can affect the reliability of eyewitness identifications." In contrast to the

hopelessly muddled folk wisdom of individual jurors, the scientific community has reached a consensus as to how to objectively and scientifically evaluate such identification evidence. *Id.* However, these lessons from the social sciences are not within the common knowledge of most jurors; as a result, jurors need experts to help them make sense of the factors and criteria useful for placing this often-key testimony in its proper scientific context. Accordingly, failure to present such evidence can be ineffective assistance of counsel in a case where the adequacy of an identification is the central disputed issue. *Id.* at 1129-1130.

Likewise, the Supreme Court of Ohio has also concluded that, "When the core of the state's case against a defendant involves evidence that the jury cannot properly understand without the assistance of expert testimony, the failure to engage a competent expert can constitute deficient performance." *State v. Bunch*, 220 N.E.3d 773, 785, (Ohio 2022).

Here, however, the court of appeals did not substantively engage with the claim and instead rejected Mr. Robinson's argument by finding his motion insufficient. Op., ¶ 46. (App. 23). Yet, Mr. Robinson, in that motion, offered examples of what an expert could provide and averred that this testimony could have "bolstered" his defense of a mistaken identification. (61:11).

This case therefore gives this Court an opportunity to join other jurisdictions which have

recognized the need for experts to assist jurors in helping to ensure just results in our courtrooms. By holding that defense lawyers may have an obligation to utilize such witnesses in cases of this nature, the Court will also have an opportunity to develop and clarify the law of ineffective assistance of counsel.

Accordingly, this Court should accept review and hold that the postconviction motion entitles Mr. Robinson to a hearing on remand.

III. This Court should accept review and hold that the law was sufficiently "settled" in this case so as to mandate an objection, thereby ensuring the Sixth Amendment's guarantee of effective representation.

As the court of appeals has now concluded, the eyewitness identification of Mr. Robinson which is central to the State's case derives from a violation of Mr. Robinson's rights under the Sixth Amendment. Op., ¶ 23. (App. 12). As the Seventh Circuit has also concluded when analyzing the same legal question, that conclusion flows from a "long line of Sixth Amendment cases" issued by the United States Supreme Court, "all of which reinforces a clearly established legal rule […]." *Garcia v. Hepp*, 65 F.4th 945, 954 (7th Cir. 2023). In fact, these precedents are sufficiently established such that the petitioner in *Garcia* was actually able to obtain habeas relief based on the violation—meaning that he was able to overcome one of the most stringent legal standards in our criminal law. *See 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.").

Here, Mr. Robinson argued that the lineup identification was inadmissible as it was derived from a probable cause procedure which occurred after Mr. Robinson's Sixth Amendment right to counsel "attached," but before counsel had been appointed to represent him. He argued that this outcome was governed by the United States Supreme Court's decision in *Rothgery*, which analyzed a nearly identical Texas procedure and concluded that such a pretrial procedure which combines the assessment of probable cause with the setting of bail triggers the attachment of the right to counsel. *Rothgery,* 554 U.S. at 207.

Moreover, as Mr. Robinson has repeatedly pointed out in this litigation, federal courts analyzing our procedure have reached this same legal conclusion since 2009. *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).

Ultimately, the court of appeals agreed with Mr. Robinson, holding that the 2008 *Rothgery* decision and its supporting precedents renders the lineup identification obtained in 2017 inadmissible. Op., ¶ 23. (App. 12). Yet, Mr. Robinson is not entitled to a new

trial, as the court of appeals has also held that the law was insufficiently "settled" so as to compel counsel's objection under the Sixth Amendment when the case was tried roughly a decade after the *Rothgery* decision was issued. Op., ¶ 32. (App. 16).

This outcome contravenes basic ineffectiveness principles, especially in a situation where the Seventh Circuit has otherwise found the legal rule so clearly established that the extraordinary remedy of granting a writ of habeas corpus is appropriate. A comparison between these two standards of review illustrates the crux of the conflict. Garcia pursued habeas relief, arguing that Wisconsin courts unreasonably applied federal law in concluding that *Rothgery* did not apply to Wisconsin's CR-215 procedure. In order to prevail, he needed to prove "that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). In other words, that it would be unreasonable for a judge to conclude that Wisconsin's CR-215 procedure *did not* trigger the attachment of the right to counsel.

Garcia met this high bar and proved that, when the Wisconsin courts analyzed his appeal, they acted unreasonably in failing to recognize the clear impact of Supreme Court precedent on the legal question presented. Thus, under the Seventh Circuit's analysis, had Mr. Robinson filed a motion to suppress on this basis, it would have been "unreasonable" for the circuit court to reach any outcome other than granting the motion. However, at the same time, our court of

appeals has now held that trial counsel could still act "reasonably" in choosing not to file the motion at all. Op., ¶ 32. (App. 16).

Thus, as the decision of the Seventh Circuit persuasively suggests, while 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 cannot have been "unsettled." After all, 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). And, when presented with the opportunity to resolve the issue on the merits, the court of appeals wasted no effort in finding that the issue was straightforwardly controlled by *Rothgery*.

At its core, the ineffectiveness inquiry is a reasonableness test. *Strickland v. Washington,* 466 U.S. 668, 688 (1984). The court of appeals' rigid application of this Court's language from *Breitzman* is therefore problematic, inasmuch as it appears to suggest that lawyers in Wisconsin only have a duty to act once a published authority of this State has analyzed an identical fact pattern. Lawyers are seemingly free to ignore precedents of the United States Supreme Court, which are controlling on questions of federal constitutional law, at least until Wisconsin confirms they are "really" the law.

This view of the law ignores the basic duty of competence that lawyers have under our ethical code—a duty that requires practicing attorneys to be familiar with relevant United States Supreme Court law, especially law addressing nearly-identical fact patterns encountered by a criminal client. It also has concerning implications for the meaningful ability of the United States Supreme Court to authoritatively interpret the United States Constitution so as to guarantee uniformity across states. If lawyers must wait for individual local practices to be condemned before they are required to act, the holdings of the United States Supreme Court are of limited importance.

Accordingly, this Court should accept review and hold that the law was sufficiently settled such that Mr. Robinson pleaded a claim of ineffective assistance and remand for the requested evidentiary hearing.

IV. If this Court accepts review, it should also analyze the remaining two claims briefed in the court of appeals.

Finally, if this Court accepts review Mr. Robinson asks the Court to address two other issues remaining.

First, related to the eyewitness identification issue, Mr. Robinson argued that his lawyer was ineffective for not presenting evidence that two other tipsters viewed the surveillance video and actually identified totally distinct suspects. 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).

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, a low bar that the evidence easily clears.

Here, however, the court of appeals resolved the issue by holding that this evidence could not have made a difference and therefore held that Mr.

Robinson had failed to adequately plead prejudice. Op., ¶ 44. (App. 22). However, evidence that other persons viewed the same footage as State witnesses and came to completely different conclusions does support the proffered defense of misidentification. Accordingly, this Court should accept review and remand for an evidentiary hearing.

Finally, Mr. Robinson's remaining claim related to sufficiency of the evidence. Here, although no attention was paid to a required element—that the financial institution be chartered—during the trial proceedings, the court of appeals nevertheless concluded that circumstantial proof supported the conviction. Op., ¶ 54. (App. 26).

Mr. Robinson notes that this Court has not yet addressed a claim of sufficiency under this unique requirement stemming from *State v. Eady*, 2016 WI App 12, ¶1, 366 Wis. 2d 711, 875 N.W.2d 139. Accordingly, he asks this Court to accept review, assess that alleged circumstantial evidence, and determine whether the requirements of the statute were proven in this case.

CONCLUSION

For the reasons set forth herein, Mr. Robinson asks this Court to accept review and reverse.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 4,894 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 3rd day of September, 2024.

Signed:
Electronically signed by
Christopher P. August
CHRISTOPHER P. AUGUST
Assistant State Public Defender