STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP1728-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PERCY ANTIONE ROBINSON,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Defendant-Appellant-Petitioner Percy Antione Robinson has filed a Petition for Review of the court of appeals' decision affirming his conviction for robbery of a financial institution. This case has a long history. Previously, this Court granted the court of appeals' request for certification. The parties submitted full briefing and oral arguments before this Court vacated the order granting certification and remanded the case to the court of appeals. The court of appeals then issued a decision recommended for publication with two holdings relevant here. First, the court held that the use of Form CR-215[1], which allows for a probable cause determination to be made following a warrantless arrest, triggers the attachment of a suspect's Sixth Amendment rights, including the right to counsel. Second, the court held that Robinson's attorney was not ineffective for failing to seek suppression of a lineup that occurred without the presence of counsel after Form CR-215 was filed because the law was not settled at the time counsel would have sought suppression.[2]

The court of appeals could have affirmed Robinson's conviction without issuing a holding on the Form CR-215 issue. Doing so would have been consistent with the court's usual practice of constitutional avoidance and deciding cases on the narrowest grounds. And had the court of appeals done so, this case would not meet this Court's criteria for review, as it would involve only the application of settled law to the

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[1] The present version of the form is available on the court's website at https://www.wicourts.gov/formdisplay/CR-215.pdf?formNumber=CR-215&formType=Form&formatId=2&language=en.

[2] Robinson raised other claims of ineffective assistance of counsel, as well. As will be discussed, those claims of ineffective assistance of counsel involve only the application of settled precedent, and do not warrant this Court's review.

facts. But because the court of appeals reached the Form CR-215 issue, and because the decision is published[3], the State asks that this Court grant review so that it can address and reverse the court of appeals' holding on that point. This Court should affirm the court of appeals' mandate, however, affirming Robinson's conviction.

ARGUMENT

I. This Court should grant review to determine whether the use of Form CR-215 triggers a suspect's Sixth Amendment right to counsel.

This Court has already twice determined that its review was warranted to assess the Sixth Amendment implications of Form CR-215: once in *Garcia*[4], and once in this very case. And that makes sense; the issue related to Form CR-215 presents a "real and significant question of federal . . . constitutional law." Wis. Stat. § (Rule) 809.62(1r)(a). Form CR-215 is available for use statewide, and thus, the Sixth Amendment implications of the Form have statewide impact. *Cf.* Wis. Stat. § (Rule) 809.62(1r)(c)2. However, this Court still has not issued a decision on the matter. It now once again has the opportunity to do so, and it should take that opportunity.

Two points bear acknowledgement. First, as a practical matter, the Seventh Circuit's decision in *Garcia*[5] now dictates how all sides must proceed following the filing of Form

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[3] On August 22, 2024, the State sent a letter to the Publication Committee of the court of appeals urging against publication of the court's opinion in this case. On September 25th, the court of appeals denied the State's request and ordered the decision published.

[4] *State v. Garcia*, 2019 WI 40, 386 Wis. 2d 386, 925 N.W.2d 528.

[5] *Garcia v. Hepp*, 65 F.4th 945 (7th Cir. 2023), *reh'g en banc denied* 2023 WL 3742346.

CR-215. But the Seventh Circuit's decision is not binding on this Court, and the possibility of issuing a decision conflicting with a holding of the Seventh Circuit should not compel this Court to allow an incorrect holding by the Wisconsin Court of Appeals to stand.[6] Second, because the court of appeals' decision is now published, the Form CR-215 issue would be settled law even if this Court were to deny review. However, it is the State's position that this Court should give extra scrutiny to the court of appeals' decision when deciding whether to grant review, both because the court's holding regarding Form CR-215 was unnecessary to its holding that Robinson did not receive ineffective assistance of counsel, and because the State did not have the option of directly petitioning for review of that holding.[7]

To be clear, if review is granted, the State will ask this Court to affirm the court of appeals' mandate in this case. The court of appeals was incorrect when it held that Form CR-215 triggers attachment of a suspect's Sixth Amendment rights.

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[6] Notably, there is no risk of the federal courts overturning a decision by this Court in this case; because Robinson is deceased, he is not "in custody" and cannot seek or obtain federal habeas corpus relief. *See* 28 U.S.C. § 2254(a).

[7] Robinson asserts that the State's letter to the Wisconsin Court of Appeals' publication committee asking the court not to publish its decision was "not the correct means by which to lodge objections to the court of appeals' legal analysis." (Pet. 7.) The State disagrees that its letter was directed towards the court of appeals' legal analysis. Instead, the State's letter to the publication committee identified the situation as a reason not to publish: because the court of appeals issued an adverse legal holding that the State could not appeal, the State was left with little recourse if Robinson elected not to petition for review. Here, Robinson did file a petition for review, though it was filed *after* the State's letter to the publication committee. The State acknowledges that the more problematic cases are those where the defendant elects not to petition this Court for review. Further argument on this point is beyond the scope of this case.

As the State has maintained throughout this case, Form CR-215 implicates only a suspect's Fourth Amendment rights, not their Sixth Amendment rights. The United States Supreme Court's holding in *Rothgery* explains that 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 v. Gillespie Cnty*, 554 U.S. 191, 194 (2008). The filing of Form CR-215 does not involve an appearance before a judicial officer, so it does not cause the right to attach. So, Robinson's attorney was not ineffective for failing to seek suppression of the lineup.

Even if the court of appeals was correct, however, the law with respect to Form CR-215 was *at best* unsettled during the time leading up to Robinson's trial. At the relevant time, no binding case law in Wisconsin held that Form CR-215 triggers the attachment of Sixth Amendment rights[8], and the most on-point decision on the issue was the court of appeals' decision in *State v. Garcia*, No. 2016AP1276-CR, 2018 WL 1738747 (Wis. Ct. App. Apr. 10, 2018) (unpublished), *aff'd* 2019 WI 40, 386 Wis. 2d 386, 925 N.W.2d 528 (equally divided court), which held that Form CR-215 does *not* cause attachment of the Sixth Amendment rights. Thus, Robinson still cannot establish that his attorney was ineffective for failing to seek suppression of the lineup. *See State v. Maloney*, 2005 WI 74, ¶ 23, 281 Wis. 2d 595, 698 N.W.2d 583 (An attorney is not deficient for failing to pursue an "unsettled proposition of law.").

[8] This remained true until the court of appeals' decision in this case was published.

II. This Court should decline to grant review on any of Robinson's remaining proposed issues because they do not meet this Court's criteria for review.

Robinson raises multiple additional issues that he urges this Court to review. However, none of those issues warrant this Court's review.

Ineffective Assistance of Counsel – Lineup Identification

The court of appeals rejected Robinson's claim that his attorney was ineffective for failing to introduce the testimony of two witnesses—D.W. and E.T.—who were at the bank when Robinson robbed it but did not identify Robinson as the robber during the (allegedly unlawful) lineup. The court concluded that Robinson failed to allege "sufficient, non-conclusory, material facts to make a showing of both the deficiency and prejudice prongs of this ineffectiveness claim," reasoning that nothing in the record indicated whether D.W. and/or E.T. had seen Robinson clearly enough during the robbery that their inability to identify him in the lineup was material. *State v. Robinson*, No. 2020AP1728-CR, 2024 WL 3666147, ¶ 39 (Wis. Ct. App. Aug. 6, 2024) (ordered published)[9].

The court of appeals' decision was well-reasoned and correct on this issue. But more to the point, resolution of this issue required nothing more than application of the settled law related to pleading requirements and ineffective assistance of counsel to the facts of this case. Were this Court to grant review on this issue, there would be no opportunity for law development; the court would simply have to decide whether the facts met the settled legal standard. This issue

[9] The court of appeals' decision was ordered published at 2024 WI App 50 on September 25, 2024. However, as of the filing of this response, the decision does not appear on Westlaw with that citation, so the State uses the Westlaw citation for ease of accessibility.

therefore does not meet the court's criteria for review. *See* Wis. Stat. § (Rule) 809.62(1r).

Ineffective Assistance of Counsel – Alternate Identifications

Robinson next asks this Court to review his claim of ineffective assistance of counsel with respect to counsel's failure to introduce the fact that police received multiple tips that someone other than Robinson robbed the bank. Here again, the claim involves nothing more than the application of settled law to the facts. The court of appeals concluded that Robinson failed to establish prejudice on this claim because police received a similar tip from someone identifying Robinson as the robber. *Robinson*, 2024 WL 3666147, ¶ 44. Thus, while police may have received other incorrect identifications, the independent identification of Robinson, coupled with the bank teller's "strong confidence in her identification" of Robinson, rendered the other misidentifications unlikely to sway the jury's verdict. *Id.*

Robinson contends that the court of appeals misapplied the legal standard by effectively requiring him to establish that the witnesses who identified others were *more* credible than the witness who identified him in order to establish prejudice. (Pet. 14.) Setting aside the fact that Robinson's complaint is about the application of the test in this case rather than the test itself, he is simply wrong. The court of appeals properly concluded that the independent identification of him *combined with the other evidence* meant that he could not establish prejudice. The court of appeals set no requirement that Robinson needed to meet any standard other than the well-established prejudice standard in ineffective assistance cases. Further review is unwarranted because it would seek only error correction.

Ineffective Assistance of Counsel – Expert Testimony

Robinson's next issue is the claim that his attorney was ineffective for failing to retain an expert and present expert

testimony on mistaken identification. (Pet. 15.) Robinson did not raise this claim before this Court when this Court previously heard this case. Instead, Robinson's brief to this Court stated that he "raised additional legal claims, including additional ineffectiveness arguments and a challenge to the sufficiency of the evidence[, in the court of appeals]. Those claims are not being renewed here." (Robinson's SCOW Br. 20.) Upon remand, Robinson filed a motion in the court of appeals asking to file new briefs, stating, "the litigation strategy changed in the Supreme Court. Mr. Robinson dropped several issues to streamline the issues in that court. The briefs on file in this Court do not reflect that additional issues have now been forfeited on appeal by Mr. Robinson." (May 11, 2023 Mot. 1.) The motion was granted, and in his new brief to the court of appeals, Robinson informed the court, "in his briefs to the Wisconsin Supreme Court, Mr. Robinson explicitly abandoned several of his claims. By abandoning those claims in the Wisconsin Supreme Court, Mr. Robinson believes he is not able to resurrect them in this forum." (Robinson's Remand Br. 21.)

Despite Robinson stating that he had "not renewed," "explicitly abandoned," and "forfeited" both this claim and his sufficiency of the evidence claim, the court of appeals addressed them on the merits. While this Court can, of course, grant review on whichever issues it sees fit, the State submits that Robinson's conceded non-renewal, abandonment, and forfeiture of these claims should foreclose their review in this Court.

Regardless, the court of appeals swiftly rejected this claim as insufficiently pled. *Robinson*, 2024 WL 3666147, ¶ 46. Robinson contends that this was in error because his motion "offered examples of what an expert could provide and averred that this testimony could have 'bolstered' his defense of a mistaken identification." (Pet. 17.) But offering examples of what an expert "could" provide is different than offering

examples of what an expert *would* provide. Thus, Robinson's motion provided only conjecture about a possible expert witness. Moreover, his assertion that the expert testimony would "bolster" his mistaken identity argument is conclusory, again confirming the court of appeals' point that this argument was not sufficiently pled. And again, review of this issue would involve nothing more than error correction related to the pleading standard for ineffective assistance of counsel claims.

Sufficiency of Evidence

Finally, Robinson asks this Court to weigh whether the evidence against him was sufficient. As with his claim of ineffective assistance of counsel related to expert testimony, this claim was "not renewed," "explicitly abandoned," and "forfeited" earlier in this litigation. But regardless, the court of appeals correctly noted that the law is clear that a finding of guilt may rest on circumstantial evidence, and that there was ample circumstantial evidence here to establish that U.S. Bank is a "financial institution." *Robinson*, 2024 WL 3666147, ¶ 54 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990)).

Robinson contends that this Court's review is necessary to apply *State v. Eady*, 2016 WI App 12, ¶ 1, 366 Wis. 2d 711, 875 N.W.2d 139, for the first time. It is not. *Eady* has been published for over eight years now, and there is no indication that courts are having difficulty applying it; the court of appeals applied it without confusion in this case. *See Robinson*, 2024 WL 3666147, ¶ 52. Here again, Robinson seeks little more than error correction. This issue thus fails to meet this Court's criteria for review.

CONCLUSION

This Court should grant Robinson's petition for review solely on the question of ineffective assistance of counsel with respect to counsel's failure to seek suppression of the lineup, so that it can reverse the court of appeals' holding that the use of Form CR-215 triggers attachment of a suspect's Sixth Amendment rights. It should, however, decline to review the other issues Robinson presents, and it should ultimately affirm Robinson's conviction because Robinson did not receive ineffective assistance of counsel.

Dated this 1st day of October 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2,481 words.

Dated this 1st day of October 2024.

Electronically signed by:

John A. Blimling
JOHN A. BLIMLING
Assistant Attorney General

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 1st day of October 2024.

Electronically signed by:

John A. Blimling
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Assistant Attorney General