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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP2119 CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

LARRY L. JACKSON,

Defendant-Appellant-Petitioner

PETITION FOR REVIEW AND APPENDIX OF THE DEFENDANT-APPELLANT-PETITIONER LARRY L. JACKSON

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III. Statement of Issues Presented for Review.

The issue presented in this appeal is whether Jackson's post-conviction motion, claiming ineffective assistance of his trial counsel, alleged sufficient facts to warrant an evidentiary hearing?

The circuit court held that "the defendant's allegations of ineffective assistance of trial counsel fail because his allegations of deficient performance are conclusory, and further, he has not demonstrated that any of counsel's alleged missteps were prejudicial." (R.155:4; Appx. 19).

The Court of Appeals, in a *per curium* opinion, affirmed Jackson's conviction and sentence and the denial of Bruce's motion for post-conviction relief. In so affirming, the Court of Appeals held that at least certain claims in Jackson's postconviction motion alleged sufficient facts to show, if proven, deficient performance. (Opinion ¶23; Appx. 11). Nonetheless, the Court held that even if trial counsel was deficient in certain aspect of her performance, "Jackson has not established that this was a prejudicial error due to the strength of the State's case against him." (Opinion ¶¶24-29; Appx. 11-13).

IV. Statement of Rule 809.62 Criteria Relied Upon For Review.

Mr. Jackson believes that there are special and important reasons for this Court to exercise its discretion to review the decision of the Court of Appeals because "a real and significant question of federal or state constitutional law is presented" § 809.62(1r)(a), Wis. Stats.

"The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." ***Strickland v. Washington***, 466 U.S. 668, 684 (1984). Among the rights included in the Sixth Amendment of the United States Constitution is the right "… to have the Assistance of Counsel for his [the accused's] defense." U.S. Const. Amend. VI. In this case Jackson claims that his trial counsel was deficient in her pre-trial investigations.

Jackson was convicted of a first degree intentional homicide. He alleges in his post conviction motion that the were at least two alibi witnesses that his trial counsel did not even attempt to find and produce for trial. The circuit court denied his postconviction motion without even holding a hearing to assess the credibility of these alibi witnesses. (R.155:4; Appx. 19). The Court of Appeals acknowledged that Jackson's motion alleged facts which, if proven, would demonstrate deficient performance by trial counsel with regard to investigating and producing these alibi witnesses. (Opinion ¶23; Appx. 11). If their testimonies are to be believed, then Jackson was innocent of this crime. And yet, the Court of Appeals, like the circuit court, felt there was no need to hear what these witnesses might say, to observe their demeanors, and evaluate their respective credibilities. (Opinion ¶¶24-29; Appx. 11-13).

The analysis of the circuit court and Court of Appeals, respectively, were unreasonable applications of existing constitutional law, which should be reviewed by this Court.

V. Statement of Case and Facts.

A. The Proceedings below.

On November 3, 2016, Larry L. Jackson[1] was found guilty and convicted, after a jury trial, of first degree intentional homicide, as a party to a crime, with use of a deadly weapon, in violation of §§ 940.01(1)(a), 939.05, 939.63(1)(b), Wis. Stats.. (R.90; Appx. 14-15). Jackson was also convicted of possession of a firearm by a felon, in violation of § 941.29(2), Wis. Stat. *Id.* On December 15, 2016, Jackson was sentenced by the Honorable Jeffrey A. Wagner, to a life sentence, with eligibility for release to extended supervision in 35 years, for the crime of first degree intentional homicide; and to a consecutive sentence of 5 years state prison, with two years of initial incarceration followed by three years of extended supervision, for the crime of possession of a firearm by a felon. *Id.*

Jackson subsequently filed a motion for post-conviction relief with supporting affidavits. (R.124 and 125; Appx. 20-39 and 40-49). The circuit court established a briefing schedule, in accordance with which the State filed a response to the Jackson postconviction motion, (R.152), and to which Jackson filed a reply brief. (R.154). Thereafter, the circuit court, without first holding an evidentiary hearing, entered a written order denying Jackson's postconviction motion. (R.155; Appx. 16-19). Jackson then sought relief in the Court of Appeals, and on October 12,

[1] aka Larry L. Johnson (DOC # 00413418).

2021, the Court of Appeals affirmed, *per curium*, Jackson's judgment of conviction, as well as the circuit court's order denying his postconviction motion without hearing. (Opinion; Appx. 3-13).

B. Facts of the case.

On March 11, 2015, R.K. was shot and killed in front of his home located at 4147 N. 60th Street, Milwaukee, Wisconsin. (R.1:1-2). Larry L. Jackson was ultimately charged with the intentional homicide of R.K., as a party to the crime. (R.5). He was also charged with one count of possession of a firearm by a felon. *Id.* The case proceed to a jury trial which was held on October 31, 2016, through November 3, 2016. (R.170-R.176).

At trial, testimony was received from City of Milwaukee Police Officer Jullian Goggans, the first responder to the scene. (R.171:104-112). Officer Goggans testified that he had been sent to 4147 N. 60th Street, Milwaukee, to respond to a shooting. (R.171:104-05). When he arrived he found the victim, R.K., lying on the grass, bleeding from the chest. (R.171:107). Police Officer Lucas McAleer, arrived at the scene shortly after Goggans. (R.172:4-7). Officer McAleer tried to speak with R.K., but the victim was unable provide any information as to who had shot him. (R.172:6-7).

Detective Michael Washington, the "scene detective," testified that five .40 caliber bullet casings were found on or near the front porch of 4147 N. 60th Street. (R.172:22-36). He further testified that the location of the casings was consistent with a shooter firing from the porch with a semi-automatic firearm. (R.172:31-34). Detective Washington also testified that single bullet was found beside the sidewalk leading up to

the porch, at a point approximately half-way between the porch and the street. (R.172:28-29).

R.K.'s wife, C.W., testified. (R.172:42-71). She testified that on the day of the homicide she lived in the lower apartment of a duplex at 4147 N. 60th Street. (R.172:44-45). She lived there with her husband, R.K., and their three children. *Id.* The upper apartment was occupied by a Gerald Tucker, his wife, Tiffany, and their children. (R.172:46). She testified that the two families did not get along. (R.172:49). On the day of the homicide, there was disagreement between her husband and the upstairs neighbor, Gerald Tucker, was over broken glass that had been thrown under two vehicles owned by R.K.. (R.172:50-51). R.K. had told C.W. that he was going to confront Gerald over the broken glass; telling her that he was "going to knuckle up with him." (R.152:50 and 67). Later that evening, as C.W. was walking down the hallway she heard four to five gunshots ring out. (R.172:55). After telling her children to hide beneath their beds, she ran to the front of the house, looked out a window, and saw a young African-American male run past the window. (R.172:57). She described him as being around seventeen to twenty-one years of age, 5'6" to 5'7" in height, thin built, clean shaven, of dark complexion, and had what looked like acne on the left side of his face. (R.172:57 and 66). As far as she could tell, the man who ran past her window was unarmed. (R.172:59). She did not see the shooting, nor saw anyone with a gun that evening. (R.172:62). She did not recognize this man, but was positive that it was not Gerald Tucker. (R.172:70).

C.W. further testified that a couple of weeks after the March 11th shooting, she saw a man who she thought might be the man who ran past the front window. (R.172:57). It happened while she was moving, and he

was in the front hallway of the duplex with Tiffany Tucker. *Id.* She was later shown a photo array in October 2015, but could not definitively pick out any of the photographs as being the person she saw run past the window and then later saw in the front hallway with Tiffany. (R.172:57-58). There were, however, two photographs which she thought "potentially looked like" the person she saw. *Id.* One of those photographs was of Jackson. (R.173:14).

Andre Dorsey, a friend of R.W.'s, testified at trial. (R.173:19-63). Dorsey said that he went to R.K.'s residence after he received a phone call from R.K. (R.173:22). R.K. told him that Gerald Tucker put glass under his tires. *Id.* Dorsey said that there was bad blood between R.K. and Gerald, and that R.K wanted to confront Gerald. *Id.* R.K. felt that Gerald had put glass under his cars on purpose, and "that was the last straw for him." (R.173:23). According to Dorsey, when he arrived R.K. was standing by Gerald's car arguing with him about the glass underneath his truck. (R.173:24 and 27). The argument then proceeded to the front yard, with Gerald walking away saying he did not put glass beneath R.K.'s car, and R.K. not believing him. (R.173:28-30). While R.K. and Gerald walked to the front of the house, Dorsey moved off to the southside of the front yard and stood by a fence. *Id.*

At this point, Dorsey testified that another individual then approached the house from the north, walking down the sidewalk from 60th Street towards Hope Street. (R.173:31-32). This person had on a long coat, a scarf wrapped around his head, and a hood. *Id.* This person walked up the front stairs of the house, directly to Gerald Tucker, and the two began whispering to one another. (R.173:32-33). Gerald then waved to R.K., said "I don't want to fight you, man, I'm not going fight

you over glass," then he and the newly arrived person went into the house through the front door. (R.173:35). Dorsey testified that R.K. turned and looked at him with an exasperated look. *Id*. Dorsey then reached into his pocket for a lighter, when he heard gunshots ring out. *Id*. The gunshots came from inside the house. *Id*. He looked up and saw R.K. fall to the ground. *Id*. He then saw a hand with a gun reach out the door, turn toward him, and fire two shots. *Id*. Dorsey backed off to the side of the house. (R.173:37). From that vantage point he saw R.K. get up off the ground and run across the street, where he fell again. *Id*. Dorsey then went over to R.K., applied pressure to one of R.K.'s wounds, and waited for the police to arrive. *Id*.

When asked if he saw the person who walked up to Gerald Tucker in the courtroom today, Dorsey pointed at Jackson and said, "I don't know his name, but I believe it's that guy." (R.173:33-34). Dorsey also testified to being shown a photo array in October of 2015 in which he picked out Jackson as the person he saw walk up to Gerald Tucker. (R.173:39-41). On the day of the shooting, Dorsey described the person who walked up to Tucker as thin built, six feet in height, having a dark complexion and acne, and wearing black coat and light scarf which was not covering his face. (R.173:50-51).

Dorsey admitted that he told the police on three occasions that the unknown person had noticeable acne. (R.173:50, 52 and 53). Dorsey also admitted to being convicted of a crime three times and to being a felon. (R.173:41). He further acknowledged that a firearm was recovered from his car on the night of the shooting, and that he was arrested for possessing it. (R.173:42). But he was not charged with the crime of being

a felon in possession of a firearm. (R.173:42). Dorsey denied that the State's decision not to prosecute had influenced his testimony. *Id.*

Testimony was also received from a Joe Brown, a friend of Jackson. Brown identified a .40 caliber Smith & Wesson pistol which was found in his apartment in early June of 2015, during the execution of a search warrant. (R.173:99-100). That .40 caliber Smith & Wesson pistol was matched by ballistic experts to the bullet and bullet casings found at the scene of the shooting. (R.173:.119-23). Joe Brown testified that he had lent his Smith & Wesson pistol to Jackson around the time of March 11, 2015. (R.173:81). His story was that Jackson called him asking if he could borrow Brown's "banger." *Id.* Jackson did not tell him why he needed his firearm, and Brown didn't ask. (R.173:82). Jackson came over around six or seven o'clock and picked up Brown's Smith & Wesson pistol, and then was gone for thirty to forty-five minutes. (R.173:82-83). When he came back to Brown's apartment, Brown said that Jackson was wearing blue rubber gloves; and that they boiled the gloves to destroy any evidence. *Id.* Brown also told the police that when Jackson came back he took off a sweatshirt. (R.173:104). Brown said nothing about Jackson wearing an overcoat, or of a scarf being wrapped around Jackson's head. (R.173:104-05).

Later that evening, after Jackson had left, Brown checked the magazine of his gun and saw bullets were missing; he thought maybe five. (R.173:84). Brown then called Jackson and told him that bullets were missing, but Jackson didn't want to talk on the phone. (R.173:85). The next day, according to Brown, they met in Jackson's car. *Id.* Brown testified that Jackson told him "...that his friend called him, he went over there, and pretty much his friend told him to shoot him." *Id.* This friend

of Jackson's was variously referred to as "Sabir" or "the law-abiding citizen." (R.173:86). "Sabir's girlfriend was having a problem with the people or the girlfriend -- the woman who lived downstairs." (R.173:87). According to Brown:

> [Jackson] said he came through the gangway. There was a person sitting -- leaning on the fence, and then there was another person on the porch that was arguing with his friend. And when he went past -- when he walked past the person that was leaning on the fence, went on the stairs, and as soon as he was walking past, the person started laughing at him. Then he stepped into the doorway, he turned around and shot him.
> ...

(R.173:87-88). Brown said he had never met "Sabir", and while he had heard the name "Gerald" before, he was unable to identify Gerald Tucker when shown his photograph by police. (R.173:86).

Brown also testified that a few days later he and Jackson both drove over to the residence where the shooting occurred to help "the girl" move. (R.173:90). Brown also said that at some point Jackson told him "Sabir" had been arrested, and that Jackson put money into "Sabir's" jail canteen account. (R.173:91). Det. Jeffery Sullivan later testified that jail records indicated two deposits into Gerald Tucker's canteen account were made by Jackson on May 13, 2015, for $20, and July 23, 2015 for $61. (R.173:147-148 and R.67-R.69).

Brown also admitted to having been convicted of a crime three times, and to being a felon. (R.173:92). Brown acknowledged that after the search of his apartment, the discovery of his Smith & Wesson pistol, and his ensuing arrest; he was charged in state court with being a felon in possession of a firearm, and more importantly, was indicted in federal court under the Armed Career Criminal Act,[2] which carried a potential

[2] 18 U.S.C. § 924

sentence of fifteen years to life. (R.173:92-93). Under a plea agreement in federal court, the charge under the Armed Career Criminal Act was amended to transfer of a firearm to a prohibited person (namely Larry Jackson). *Id.* The federal prosecutors agreed that they would recommend a sentence of not more than five years prison. (R.173:94). Part of the plea agreement was that he would assist state law enforcement in their investigations of related matters, i.e. the homicide of R.K.; and to testify truthfully in any subsequent trial or proceeding. (R.173:94-95). Brown acknowledged that he did not cooperate with state law enforcement when charged in state court; and it was only when he was indicted in federal court under the Armed Career Criminal Act that he agreed to cooperate. (R.173:95-96). He agreed that he was facing a fair amount of federal time and was trying to minimize that by testifying here. *Id.*

Anthony Boone, an associate of Joe Brown's, also testified at trial. (R.173:127-46). Boone delivered bootleg videos that Brown sold from his apartment. (R.173:132 and 146). Boone was able to testify that he had seen Jackson at Joe Brown's apartment before, though he did not know Jackson, nor could identify him by name. (R.173:131-34). Once he had seen Jackson in Joe Brown's bathroom holding a white plastic grocery bag. *Id.* Boone had once told detectives that he believed Jackson had change his clothes, but had not seen Jackson doing so. *Id.* He had not seen a firearm, and did not discuss the incident with Joe Brown. (R.173:135). He did not remember when the incident happened, and testified at trial that he thought it was in June. (R.173:139-40).

Gerald Tucker testified for the State. (R.174:16-59). Gerald stated that he lived with his wife and four children in the upper floor apartment

of the duplex located at 4145-4147 N. 60th Street, Milwaukee, Wisconsin. (R.174:17). He said that R.K., his downstairs neighbor, had issues with his wife, Tiffany Tucker. (R.174:18). On the night of the shooting the disagreement concerned glass under R.K.'s truck. *Id.* He said he pulled his car into the back parking area when R.K. "... greeted me from shopping with a gun and his friend"; R.K.'s friend being Andre Dorsey. *Id.* An argument immediately ensued. (R.174:21). Eventually, Gerald got away from R.K. and brought the groceries into his upstairs apartment. (R.174:22). He put the groceries away, did a few other things, then came down the stairs. *Id.* Gerald said he exited the front door and was smoking a cigarette outside when R.K noticed him and came rushing up to the front, with Dorsey tagging along. *Id.* R.K. was standing on the grass, next to the sidewalk, approximately halfway between the steps and the street. (R.174:27). Dorsey was further to the left, by the fence. *Id.*

While Gerald was having his smoke on the porch, he said he saw Jackson walking down the sidewalk from the north. (R.174:23-24). He and Jackson had been friends for ten years. *Id.* Gerald denied calling Jackson, and claimed that it was his wife, Tiffany, who had called Jackson. *Id.* "I went, approached the defendant real closely, I grabbed him, put one arm over his shoulder, and walked him into my residence." (R.174:25). He claimed that he did so because he was afraid Jackson might shoot R.K., or that R.K. might shoot Jackson. *Id.* He testified:

> I think I closed the door. I'm not sure if I closed the door, but the door was closed, and I motioned to the defendant, like, man everything is straight, let's go upstairs. I point towards upstairs. He shakes his head, shows me a gun. I hold out my hand, ask him for the gun. I point again upstairs, like, no, let's go upstairs. ... The defendant shakes his head, says, fuck that, opens the door, and says something to my neighbor. ...

> He said, what's up? I don't know what my neighbor said, but he shot him after that.

(R.174:26). He thought Jackson fired the gun seven to nine times. (R.174:27). He said that after the shooting the door was somehow closed for a while, then reopened and Jackson left. *Id.* Gerald then closed the door again and locked it. *Id.* He went upstairs, told his wife and children to go to the back of the house and call the police. (R.174:27-28). He told his wife that R.K. had been shot, but not by whom. *Id.* Gerald denied knowing Joe Brown, and agreed that he had no relationship with Joe Brown which would allow him to call Joe Brown and borrow a gun. (R.174:35).

Gerald acknowledged that his testimony on the day of trial was not consistent with statements he made to the police on numerous other occasions. (R.174:30). He admitted that on the day of the crime he spoke to Police Officer Rebecca Rodriguez. *Id.* He told her that he did not know a thing about the shooter and did not mention Larry Jackson's name. *Id.* He also spoke to detectives Harold Thomas and Michael Washington. (R.174:32). Gerald admitted that he told the detectives a story similar to his trial testimony, but did not say that Jackson was the shooter. *Id.* In fact, he suggested that the unknown black male seemed to know R.K. (R.174:33). He told the detectives that he did not see the shooting, but rather, turned his back on the victim and the unknown black male, and moments later heard gunshots. *Id.* Tucker did not deny that he also told detectives Troy Porter and Jason Enk in October 2015, that before the shooting someone came from behind the house started and talking to R.K. (R.174:41). He said that he did not look at the person; so he could not describe him. *Id.* At one point he also told police the unknown black male, was in his thirties, 6'2" in height, wore short hair and weighed

about 300 pounds, about the same size as Andre Dorsey. (R.174:43). The first time he identified Jackson was in October of 2015, when interviewed by detectives Keith Kopcha and Brett Houston. (R.174:34).

Gerald was on probation the day of the shooting, and he was subsequently revoked and began serving a fifteen year sentence on the revocation. (R.174:29). He admitted that he hoped to get a sentence modification as a result of his testimony.[3] (R.174:30). Gerald insisted that he was not covering for Jackson at the time, but was protecting his family. (R.174:37-38). Were it not for his family, he claimed he would have told the police immediately that Jackson was the shooter. Id. Gerald initially denied on cross-examination that he had acne, but later admitted that a photograph of him taken on October 23, 2015, in fact showed him with acne. (R.174:38 and 55-56 and R.63).

There was forensic evidence testimony received at trial. Kyle Anderson, a forensic firearms tool mark examiner at the State Crime Laboratory, testified that the striations produced by the .40 caliber Smith & Wesson pistol found at Joe Brown's apartment matched the striations on the bullet and bullet casings found at the scene of the shooting. (R.173:119-23). Michelle Burns, a DNA analyst with the Wisconsin State Crime Laboratory, testified to finding DNA on the Smith & Wesson pistol recovered from Joe Brown's residence, but was unable to draw any conclusions from the profiles obtained other than it contained the DNA of two individuals. (R.173:64-78). Dr. Brian Linert, the medical examiner, testified to the autopsy performed on R.K.

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[3] Which he did. *See,* Milwaukee County Case No. 1995CF954284, CCAP entries for 9/6/2017 and 2/26/2018. This court may take judicial notice of facts which are contained on CCAP. *See,* Wis. Stat. § 902.01; ***Kirk v. Credit Acceptance Corp***., 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

(R.174:5-16). He could not say in what position exactly the victim and shooter were relative to one another, but stated that the trajectory of the bullet wound would be "consistent with the shooter being higher, but that would all depend on the way that the victim's body is situated." (R.174:13).

After the State rested its case-in-chief, the circuit court inquired of the defense whether Jackson intended to testify. (R.174:61). Initially, Jackson indicated that he would be testifying, and the circuit court conducted a personal colloquy with Jackson regarding his decision to testify. *Id*. The following exchange then occurred:

> THE COURT: ... Is there any other witness other than him?
>
> MS. BOWE: Yes.
>
> THE COURT: That's a new microphone.
>
> MS. BOWE: I know. Yes, Your Honor. The defendant's mother, Carol.
>
> THE COURT: So who's going to testify first?
>
> MS. BOWE: She is. And I need a few minutes to check on something else here.
>
> THE COURT: I'm just wondering -- so you've got somebody testifying before him?
>
> MS. BOWE: I know the Court's aware of the logistical issues we have with him. Let me just talk to him about that, about if it would be okay if he testifies first.
>
> THE COURT: Okay. We'll go off the record.

(R.174:63). To be clear, the record does not reflect the circuit court telling Jackson that he must testify first. But some concern regarding the order of testimony was expressed. There was a recess, and when proceedings resumed Jackson's trial counsel told the circuit court that:

> MS. BOWE: Mr. Jackson has further conferred with me on this issue, and also I -- he has asked me to talk to his father who's in court behind me, and he has now decided he will not testify. But he does want his

> mother to testify. And counsel has an issue about that, so that's where we are.

(R.174:64). The court then conducted a second personal colloquy with Jackson regarding his decision not to testify. (R.174:64-66).

The defense called Jackson's mother, Carol Denise Jackson. (R.174:72-92). On direct examination Carol Jackson testified that on the evening of March 11, 2015, Larry Jackson was at her home on 5357 North 37th Street, Milwaukee, Wisconsin. (R.174:73-79). She remembered the night of March 11th in particular because Larry L. Jackson got into an argument with his girlfriend JaNikka Marsh over a phone conversation. (R.174:74). It was the last time JaNikka Marsh had been in Carol Jackson's home, so the night stood out. (R.174:75). She asserted that Larry never left her house that evening. (R.174:78).

Carol Jackson underwent a withering cross-examination. (R.174:79-90). She acknowledged that she received a phone call from Det. Sullivan asking her about this case. (R.174:80). She acknowledged that during this phone call she told Sullivan that she did not know when the offense occurred, and therefore did not know the whereabouts of her son at the time of the offense. *Id*. She also acknowledged telling Sullivan that all she knew about this case was what she read in police reports. *Id*. When informed that the police reports indicated that the offense had occurred on March 11, 2015, she gave a number of confusing responses before saying, "I don't even know what time this happened." (R.174:81-82). She acknowledged that she did not tell Det. Sullivan the things to which she testified that day in court. (R.174:82-83). She insisted that she knew the events to which she testified occurred on March 11, 2015, because that was the last day she saw JaNikka Marsh at her house. (R.174:84). Also she recalled Larry Jackson receiving a phone call that

day from Tiffany Tucker about a problem at Gerald Tucker's house. (R.174:85). She continued to insist that Larry Jackson did not leave the house that night. *Id*. Carol Jackson acknowledged that when Sullivan asked her to meet with him "...I told him no, I didn't have no reason to meet with him." (R.174:86). The prosecution was also able to draw out that Carol Jackson had met with Larry Jackson maybe ten times since his arrest, and spoke with him on the phone between ten and twenty times. (R.174:87-88). She acknowledged that she spoke to Larry after he received Det. Sullivan's police report on their conversation. (R.174:89).

The jury came back with verdicts of guilty on both charges. (R.176:2-3 and R.76). The verdicts were entered, and Jackson was subsequently sentenced as related above. (R.176:5 and R.90; Appx. 14-15). Jackson timely filed his notice of intent to pursue postconviction relief, and later filed a postconviction motion. (R.88 and R.124; Appx. 20-39). Accompanying the motion were supporting affidavits from Jackson, (R.125:1-3; Appx. 40-43), his ex-girlfriend, JaNikka D. Marsh, (R.125:4-6; Appx. 43-45), his sister, Crystal Jackson, (R.125:7-8; Appx. 46-47), and his father, Larry Jackson, Sr., (R.125:9-10; Appx. 48-49).

Jackson's postconviction motion alleged that he was denied effective assistance by his trial counsel's failure (1) to investigate or call potential alibi witnesses, (2) by failing to interview and prepare the witness Carol Denise Jackson, and (3) by incorrectly advising the defendant that he would have to testify before the other defense witnesses in his case. (R.124; Appx. 20-39). Supporting the first claim of ineffective assistance, JaNikka D. Marsh's affidavit stated that on March 11, 2015, she and Larry L. Jackson were together from

approximately 4:30 p.m. to 11:00 p.m. (R.124:4-6; Appx. 43-45). Crystal Jackson's affidavit stated that she was with Jackson at her mother's home, watching television, during the late afternoon and evening of March 11, 2015. (R.124:7; Appx. 46). She stated that she saw JaNikka and Larry go to their room so that JaNikka could take a nap before work, and that they stayed in their room until JaNikka left for work that evening. *Id*. Both Crystal Jackson and JaNikka D. Marsh, stated in their affidavits that they were not contacted by trial counsel, and that they would have testified at trial if subpoenaed to do so. (R.125:6 and 7; Appx. 45 and 46). With regard to his second claim of ineffective assistance of counsel, Jackson alleged that counsel failed to interview or prepare the witness Carol Jackson prior to listing her as an alibi witness, and prior to calling her to testify at trial. (R.124:8-9; Appx. 27-28). This resulted in Ms. Jackson being subject to a withering cross-examination. *Id*. With regard to his third claim of ineffective assistance, Jackson alleged that as a result of erroneous advice given by his trial counsel he elected not to testify in his defense. (R.124:9-12; Appx. 28-31). Specifically Jackson alleged that at trial, in a private consultation, which his father attended, his attorney advised him that he would be required by the Court to testify before his alibi witnesses testified. (R.124:10; Appx. 16). Prior to this consultation, Jackson intended to testify at trial and it was only "[w]hen trial counsel told the defendant that he would have to testify before the other defense witnesses, Jackson told his attorney that he thought this was wrong and that he would not testify if he had to testify first." *Id*. Had he testified at trial Jackson would have told the jury that he was with his mother Carol, his sister Crystal, and

his girlfriend, JaNikka Marsh, at the time the victim R.K. was murdered. (R.124:11; Appx. 30).

The circuit court entered a decision and order denying Jackson's motion for postconviction relief, without holding an evidentiary hearing, concluding that "the defendant's allegations of ineffective assistance of trial counsel fail because his allegations of deficient performance are conclusory, and further, he has not demonstrated that any of counsel's alleged missteps were prejudicial." (R.155:4; Appx. 19).

The Court of Appeals, on the other hand, held that at least certain claims in Jackson's postconviction motion alleged sufficient facts to show, if proven, deficient performance.

> ¶23 Turning to Jackson's claim about trial counsel's failure to call his other two alibi witnesses, Crystal and Marsh, Jackson did provide affidavits from them averring to Jackson's alibi. The State argues that the record does not establish that trial counsel failed to investigate these witnesses, but rather that counsel was unable to reach them. This contention is based generally on Carol's testimony that she had no contact information for Crystal, and Marsh's affidavit averring that she never contacted trial counsel even though she "knew [Jackson] was innocent[.]" However, both Crystal and Marsh averred that they were never contacted by counsel with regard to testifying. Furthermore, Carol's testimony does not establish that counsel actually made any effort to search for these witnesses but was unable to locate them, as argued by the State.

(Opinion ¶23; Appx. 11). Nevertheless, the Court held that even if trial counsel was deficient in certain aspect of her performance, "Jackson has not established that this was a prejudicial error due to the strength of the State's case against him." (Opinion ¶24; Appx. 11). The Court of Appeals waived away the credibility issues concerning the witnesses who identified Jackson as the shooter, by citing the testimony of Anthony Boone, Dorsey, C.W., and the ballistics evidence, as corroboration of Brown and Tucker's testimony. (Opinion ¶¶25-26; Appx. 11-12). The

court concluded that "Jackson has not established the substantial likelihood of a different result if the jury had heard the testimony of Crystal and Marsh, given the compelling nature of the State's case." (Opinion ¶27; Appx. 12). Similarly, with regard to Jackson's claim that trial counsel was deficient in providing him with erroneous information relating to the order of witnesses, the Court of Appeals wrote, "[f]urthermore, even if we assume that trial counsel was deficient by providing erroneous information regarding the order of the defense witnesses, Jackson has not established he was prejudiced—that there is a substantial likelihood of a different result absent that alleged error—due to the strength of the State's case." (Opinion ¶29; Appx. 12).

Jackson now petitions this Court for review of the Court of Appeals' decision, and the judgment and order of the circuit court.

VI. Argument.

A. This matter should be remanded for an evidentiary hearing on Jackson motion for postconviction relief.

Jackson was convicted of first degree intentional homicide. He alleges in his post conviction motion that the were at least two alibi witnesses that his trial counsel did not even attempt to find and produce for trial. The circuit court denied his postconviction motion without even holding an evidentiary hearing to assess the credibility of these alibi witnesses. (R.155:4; Appx. 19). The Court of Appeals acknowledged that Jackson's motion alleged facts which if proven would demonstrate deficient performance by trial counsel, at least with regard to investigating and producing these alibi witnesses. (Opinion ¶23; Appx. 11). If their testimonies are to be believed, then Jackson was innocent

of this crime. And yet, the Court of Appeals, like the circuit court, felt there was no need to hear what these witnesses might say, to observe their demeanors, and evaluate their respective credibilities. (Opinion ¶¶24-29; Appx. 11-13). The analysis of the circuit court and Court of Appeals, respectively, were unreasonable applications of existing constitutional law, which should be reviewed by this Court, after which this matter should be remanded for an evidentiary hearing.

If there has been "deficient performance," as the Court of Appeals has acknowledged in its opinion, then the second prong of the ***Strickland*** test requires that "the defendant must show that the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "A defendant must demonstrate `a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ***State v. Hunt***, 2014 WI 102, ¶40, 360 Wis.2d 576, 851 N.W.2d 434, quoting ***Strickland***, 466 U.S. at 694. "The defendant is not required ... to show `that counsel's deficient conduct more likely than not altered the outcome in the case.'" ***Strickland***, 466 U.S. at 693. Rather, "the ultimate inquiry must concentrate on `the fundamental fairness of the proceeding.'" ***Weaver v. Massachusetts***, 137 S.Ct. 1899, 1911, 198 L.Ed.2d. 420 (2017). "[T]he focus is, ... on the reliability of the proceedings. Thus the Court said, `The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'" ***State v. Moffett***, 147 Wis.2d 343, 354, 433 N.W.2d 572 (1989), *quoting* ***Strickland***, 466 U.S. at 694.

"When a court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice." ***State v. Coleman***, 2015 WI App 38, ¶41, 362 Wis.2d 447, 865 N.W.2d 190, *quoting* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis.2d 571, 665 N.W.2d 305. "Just as a single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding." *Id*., *quoting* ***Thiel***, 264 Wis.2d 571 at ¶60. In applying this standard, the court should look at both the State's and the defendant's cases. ***State v. Cooks***, 2006 WI App 262, ¶55, 297 Wis.2d 633, 726 N.W.2d 322,; ***Washington v. Smith,*** 219 F.3d 620, 633-34 (7th Cir. 2000).

The State's case relied heavily upon the testimony of four witnesses to identify Larry L. Jackson as the man who shot the victim R.K. Those witnesses were Andre Dorsey, Joe Brown, Gerald Tucker, and C.W., the wife of R.K. Each of these witness had serious issues concerning their credibility.

Andre Dorsey's description of the unknown black male that he originally gave to investigating officers was markedly different from Jackson. Notably, he said that the unknown black male had a dark complexion and noticeable and distinctive acne. (R.173:50 and 52). Jackson did not have acne, noticeable or otherwise. Further, Dorsey was a felon with three prior criminal convictions. (R.173:41). Most importantly, on the evening of R.K.'s homicide, a firearm was recovered from Dorsey's car. Dorsey was arrested, but never charged, with the

crime of being a felon in possession of a firearm. (R.173:42).

Joe Brown was directly implicated in the murder of R.K. by his possession of the murder weapon. (R.173:92). Moreover he was a felon with three prior criminal convictions. *Id.* Brown had been charged in state court as a felon in possession of a firearm, and in federal court under the Armed Career Criminal Act, a crime which carried a potential sentence of 15 years to life. *Id.* As part of a plea agreement, the state charge was dismissed; and his charge in federal court was amended to a charge of transferring a firearm to a prohibited person, with a government sentence recommendation of only five years imprisonment. (R.173:92-96). That plea agreement included a condition that Brown would cooperate in related investigations, and testify truthfully in subsequent trials or proceedings. (R.173:95). Brown acknowledged that he hoped to minimize his time in federal prison by testifying at Jackson's trial. (R.173:96). The Court of Appeals relies heavily on the testimony of Anthony Boone as corroboration that Jackson was in Brown's apartment shortly after the shooting. (Opinion ¶¶25-26; Appx. 11-12). But Boone's actual testimony was that he saw Jackson in Brown's apartment in *June*. (R.173:139-40). R.K.'s homicide was in March.

Gerald Tucker was also a felon with prior convictions. (R.174:29). Moreover, like Brown, Tucker was directly implicated in the murder of R.K. He had the clearest motive for killing R.K. In fact, Tucker was immediately arrested as a suspect and was looking at homicide charges prior to his naming Jackson as the shooter. (R.174:16-39). Tucker had been incarcerated for seven month before identifying Jackson as the man who shot R.K. (R.174:40). Also, Tucker was on probation at the time of R.K.'s homicide, and by the time of the trial that probation had been

revoked, and Tucker had begun serving a 15-year sentence on the revocation. (R.174:29-30). Tucker admitted on the stand that he hoped to receive a sentence reduction as a result of his testimony. *Id.* Finally, prior to identifying Jackson as the shooter of R.K., Tucker had given multiple statements to law enforcement in which he denied knowing who shot R.K. (R.174:30). On the day of the shooting, Tucker told detective Troy Porter that he saw a black male come from behind the house, start talking to R.K., and then heard gunshots. (R.174:42). Tucker told Porter that he didn't look at the person so he could not describe him. *Id.* He also told another officer, Rebecca Rodriguez, that he did not know who the shooter was. (R.174:31). Tucker was also interviewed by detectives Harold Thomas and Michael Jackson, and again did not mention Jackson as the shooter, and even told the detectives that it seemed R.K. and the unknown black male knew each other. (R.174:32-33).

Of the three witness who could directly identify Jackson as the shooter of R.K., two of those witnesses, Tucker and Brown, were directly implicated in the homicide. All three were felons with prior convictions. And all three expected to receive some consideration for their testimony, either in the form of a sentencing recommendation, a sentence modification, or in charging discretion by the State.

The fourth witnesses the State relied upon for their identification of Jackson as the man who shot R.K was C.W., the wife of R.K. C.W. did not claim to have seen who shot R.K. (R.172:62). She did, however, see a man run pass the front window after the shooting. (R.172:56). She did not see the man carrying a gun. (R.172:62). Nor did she get a good look at the man, but did tell law enforcement that it looked like the man had acne on the left side of his face. (R.172:65). In October of 2015, some six

to seven months after the shooting, she was shown a photo array of six photographs, and was asked if any of the photographs were the man she saw run past the window. (R.173:13). C.W. indicated "no" to each of the photographs in the array. *Id.* She did, however, state that two of the photographs looked like the person who ran by the window, one of which was a photograph of Jackson. *Id.* This was less than a positive identification of Jackson as the unknown black man who shot R.K.

As for physical evidence, there was none linking Jackson with the homicide of R.K. The firearm recovered from Joe Brown's residence was tested for DNA, but did not contain a sufficient amount for an identification. (R.173:75). The tool mark evidence linked the firearm found at Joe Brown's to the casings and bullet found at the scene of the crime, but the State's case absolutely depended upon Brown's testimony to put that firearm in Jackson's hand. (R.173:119-23). The weapon, after all, was found by law enforcement in *Brown's* possession, not Jackson's. (R.173:99-100).

Turning from the State's case to Jackson's defense, it is clear that Jackson's defense was one of misidentification. Critical to that defense was the presentation of his alibi defense. Jackson had three potential witness available testify to his alibi. Only one witness testified, his mother Carol Jackson.

Carol Jackson testified that on the evening of March 11, 2015, the defendant, Larry L. Jackson, was in her home located at 5357 North 37th Street, Milwaukee, Wisconsin. (R.174:74). She remembered her son having an argument with his girlfriend JaNikka Marsh. *Id.* And she remembered this as happening some time between 6:30 and 7:00 pm, because she was trying to watch Wheel of Fortune, which comes on at

6:30 pm. (R.174:77). She further testified that Larry L. Jackson did not leave the house that evening. (R.174:78).

However, the probative value of Carol Jackson's testimony was crippled by the disastrous phone conversation she had with detective Jeffrey Sullivan. During that phone conversation she became very defensive and told Sullivan that she did not want to talk to him. (R.174:96-97). She also told detective Sullivan that she did not know when the offense occurred, and therefore did not know about the whereabouts of her son at the time of the offense. (R.174:80). At the same time, she also told Sullivan that she had read the police reports, which would have contained the date of the homicide. *Id.* At trial she testified that she did not understand the timeframe Sullivan was asking about. (R.174:82). Her testimony was wholly confused. (R.174:72-92). This confusion could have been avoid had trial counsel interviewed Carol Jackson prior to her interview by detective Sullivan. Confusion concerning the timeline could have been cleared up before the interview. Ms. Jackson would have been better prepared for this interview, and the damage to Ms. Jackson's credibility could have been avoided.

While Carol Jackson's testimony was crippled by her prior statements to detective Sullivan; the other two alibi witnesses, Crystal Jackson and JaNikka Marsh, were not compromised so. Indeed, calling the other two witnesses would have allowed Jackson's defense to forgo calling Carol Jackson as a witness at all. Crystal Jackson and JaNikka Marsh were both available as witnesses; neither was unwilling to testify. (R.125:6 and 7; Appx. 32 and 33). These witnesses cannot simply be dismissed as cumulative evidence. Not only was Jackson deprived of the benefit of having three witnesses who could directly testify to his alibi,

the witness who did testify, his mother Carol Jackson, was probably the least credible of the three alibi witnesses who were available. *See,* ***Cooks****,* 2006 WI App 262 at ¶ 55, *quoting* ***Washington v. Smith***, 219 F.3d at 634 ("Rather than one direct alibi witness with a criminal record, Washington could have had three potentially more credible witnesses, all of whom would have supported his claim that he was [elsewhere] when the [tavern] was robbed.").

Moreover, Carol Jackson in her testimony made reference to JaNikka Marsh and Crystal Jackson being present in her home on March 11, 2015. (R.174:74). Failing to call JaNikka and Crystal undercut Carol Jackson's testimony as the jury had good reason to wonder why JaNikka Marsh and Crystal Jackson were not called as witnesses. *See,* ***Cooks****,* 2006 WI App 262 at ¶64 ("Given the absence of any witnesses, the jury had good reason to find Cooks' alibi dubious").

Finally, trial counsel's deficient performance denied, Larry L. Jackson of a fourth alibi witness, himself. Trial counsel's erroneous advice led Jackson to waive his right to testify because he thought he would have to testify before his alibi witness. (R.124:9-12; Appx. 15-18). Had he not been provided with this incorrect advice; Jackson would have testified at trial. *Id***.** Had he testified at trial he would have told the jury that he was with his mother, his sister Crystal Jackson, and his girlfriend JaNikka Marsh, at the time R.K. was murdered. *Id***.** Jackson's testimony would have supported his alibi witnesses testimony, as their testimonies would have supported his alibi defense.

Trial counsel's errors crippled Jackson's defense by calling the weakest witness possible to testify to his alibi; by failing interview and prepare that witness for her interview by detective Sullivan, or for

testimony at trial; by giving erroneous advice which interfered with his right to testify; and by failing to investigate or call those witnesses who could have most credibly testified that he was at the home of his mother on the night R.K. was murdered. Jackson asserts that the cumulative prejudice resulting from these errors was sufficient to undermine confidence in the outcome of Jackson's trial.

All the above was alleged in Jackson's postconviction motion. (R.124:12-19; Appx. 18-25). The issue in this appeal was whether Jackson's postconviction motion was sufficient on its face to entitle him to an evidentiary hearing on his claim of ineffective assistance of trial counsel. Whether Jackson's alibi witnesses should be believed is a question best determined after holding an evidentiary hearing. ***John Allen***, 274 Wis.2d 568, at ¶12. at fn. 6. If Jackson's alibi witnesses are telling the truth, then Jackson was innocent of this crime. Each of the identifying witnesses for the State had credibility issues. Had the alibi witnesses testified, this case would have turned on witness credibility. That is, Crystal Jackson and JaNikka Marsh versus Joe Brown, Andre Dorsey, and Gerald Tucker. These are lineups favorable to Larry Jackson. The circuit court and Court of Appeals rejected the testimony of Crystal Jackson and JaNikka Marsh unheard. How can a court determine whether an alibi witness is credible unless it hears their testimony from their own mouths? That should be enough to warrant an evidentiary hearing.

VII. Conclusion.

Wherefore, Mr. Jackson respectfully requests that this Court grant review and then reverse the decisions of the Court of Appeals and the circuit court's order denying his motion for post-conviction relief, and remand this case for an evidentiary hearing on Jackson's postconviction motion.

Respectfully submitted November 3, 2021.

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VIII. Certifications.

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the petition is 7988 words.

I further certify that I served the State of Wisconsin, Plaintiff-Respondent, with a copy of this petition the same day it was filed with this court.

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 first and last initials 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.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this petition, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated November 3, 2021.

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