STATE OF WISCONSIN

IN THE SUPREME COURT

Case No. 2020AP2119-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY L. JACKSON,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals Affirming
a Judgment of Conviction entered in the Circuit Court for Milwaukee County,
Honorable Jeffrey A. Wagner, Presiding

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief to address the applicable standards for assessing prejudice in claims of ineffective assistance of counsel for the failure to present certain witnesses' testimony when deciding whether to conduct an evidentiary hearing on the motion. WACDL takes no position on whether Mr. Jackson's motion satisfies the requirements for a hearing.

WACDL requests that this Court hold that its decision in *State v. Jenkins*, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786, applies to a circuit court decision to hold an evidentiary hearing on an ineffective assistance of counsel claim for trial counsel's failure to call certain witnesses at trial. Just as in *Jenkins*, when assessing the motion's prejudice pleadings, the circuit court cannot substitute its judgment for that of the jury in assessing which testimony, the called or the uncalled witnesses, would be more or less credible. This Court should explain that unless a witness' proffered testimony is incredible as a matter of law, a circuit

court may not itself assess a witness's credibility or the credibility of their proffered testimony to deny the motion without a hearing. The appropriate standard is not whether the court reviewing the motion believes the proffered witness's testimony. The appropriate standard is whether a jury could credit the substance of the witness's proffered testimony enough to create a reasonable doubt.

ARGUMENT

Courts Evaluating Whether a Postconviction Motion has Sufficiently Pled that Trial Counsel's Failure to Call a Witness Prejudiced a Defendant Cannot Substitute Their Own Judgment for That of the Jury in Assessing Which Evidence Would be More or Less Credible to Deny the Motion Without a Hearing.

A. General Legal Standards for Postconviction Motion Allegations of Ineffective Assistance of Trial Counsel.

The United States and Wisconsin Constitutions guarantee a criminal defendant the effective assistance of counsel. *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). To demonstrate that counsel was constitutionally ineffective, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland*, 466 U.S at 687.[1]

To prove prejudice, a defendant must show that, absent trial counsel's deficient conduct, there was a reasonable probability of a different result. *Jenkins*, 355 Wis. 2d 180, ¶49. A defendant need not prove that counsel's conduct "more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. "A

[1] The standard for determining ineffective assistance of counsel claims under the Wisconsin Constitution is identical to that under the federal constitution. *Thiel*, 264 Wis. 2d 571, ¶ 18, n.7.

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thiel*, 264 Wis. 2d 571, ¶20 (quoting *Strickland*, 466 U.S. at 694).

Whether a defendant was prejudiced by counsel's conduct at trial is an objective standard that necessarily focuses on the jury as the trier of fact. The determinative question is whether there is a reasonable probability that, absent counsel's errors, the jury would have a reasonable doubt as to the defendant's guilt. *Strickland*, 466 U.S. at 693. A defendant need only show "a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).[2] Furthermore, "prejudice has been established so long as the chances of acquittal [had the defendant received effective representation] are better than negligible." *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003) (citation omitted).

A defendant alleging ineffective assistance of counsel in a postconviction motion must plead both deficient performance and prejudice with sufficient specific facts entitling the defendant to relief. *State v. Bentley*, 201 Wis. 2d 303, 311-12, 318, 548 N.W.2d 50 (1996). Additionally, a claim of ineffective assistance of counsel requires a postconviction evidentiary hearing for trial counsel to testify to the reasons for their challenged conduct. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

It is well-settled that when reviewing a motion for postconviction relief, the circuit court is required to hold an evidentiary hearing if the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2008 WI 106, ¶¶9, 14, 274 Wis. 2d 568, 682 N.W.2d 433. A court may deny the motion without a hearing if: 1) the motion does not raise sufficient facts entitling the defendant to relief; 2) if it presents only conclusory allegations;

[2] *Wiggins* involved a death penalty case where a single juror's vote would have spared the defendant's life. In a Wisconsin criminal defendant's case a single juror's holdout would result in a hung jury.

or 3) if the record conclusively demonstrates that the defendant is not entitled to relief. *Id*. at ¶¶9, 12 (citations omitted).

B. When Assessing the Sufficiency of a Motion's Ineffective Assistance of Counsel Prejudice Pleadings for the Failure to Call a Witness, the Proffered Witness's Testimony Must Be Accepted as True and the Court Cannot Assess the Credibility of the Witness or Their Proffered Testimony to Deny a Hearing.

When assessing sufficiency of a motion's objective material factual assertions of prejudice to require a hearing based on counsel's failure to call certain witnesses, a circuit court must assume that the substance of the proffered testimony is true. *State v. Love*, 2005 WI 116, ¶37, 284 Wis. 2d 111, 700 N.W.2d 62.

Furthermore, when deciding whether a hearing is warranted, a court cannot reject the proffered testimony of witnesses not presented at the original trial merely because it may choose to disbelieve them or because it may find the trial evidence believable. The credibility of the witnesses and the weight to be given to their testimony are for the jury to decide. *Jenkins*, 355 Wis. 2d 180, ¶72 (Crooks, J., concurring) (citing *State v. Friedrich*, 135 Wis. 2d 1, 16, 398 N.W.2d 763 (1987)). As the Sixth Circuit Court of Appeals has stated "our Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence." *Ramonez v. Berghuis*, 490 F.3d 482, 490 (6th Cir. 2007).

Jenkins, a case involving a circuit court decision following an evidentiary hearing, articulated the principle that the court cannot assess the credibility of uncalled witness's testimony to find that there was not a reasonable probability of a different result at trial. In *Jenkins*, the circuit court conducted an evidentiary hearing on the defendant's postconviction motion claim that he was denied the effective assistance of counsel for counsel's failure to call an eyewitness at trial. 355 Wis. 2d 180, ¶¶23, 26-28. After the hearing, the circuit court concluded that

trial counsel was not ineffective because first, the witness would not have come across as a credible witness, and second, there was not a reasonable probability that the result of the trial would have been different. *Id*. at ¶31.

This Court reversed and ordered a new jury trial, finding that Jenkins proved both deficient performance and prejudice. *Id*. at ¶¶67-68. Regarding prejudice, it held that there was a reasonable probability that the trial result would have been different had counsel called the eyewitness to give testimony which contradicted that of the State's eyewitness at trial. *Id*. at ¶¶59, 66. In so holding, this Court explained that in assessing prejudice a circuit court may not substitute its judgment for that of the jury about which testimony would be more credible:

> In assessing *the prejudice caused by the defense trial counsel's performance, i.e.* the effect of defense trial counsel's deficient performance, a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible.

Id. at ¶64 (emphasis in the original).

The *Jenkins* concurrence explained "it is the jury's duty to resolve questions as to the credibility and significance of an uncalled witness's testimony. *See* majority op., ¶¶64-65." *Jenkins*, 355 Wis. 2d 180, ¶87 (Crooks, J., concurring).

This Court should hold that the same principle articulated in *Jenkins* applies to circuit court review, to determine whether a hearing is warranted, of postconviction motion claims of ineffective assistance of counsel for the failure to present certain witness testimony. If the court must accept the motion allegations as true, *Love*, 284 Wis. 2d 111, ¶37, and cannot itself determine the credibility of the uncalled witness' testimony versus the trial testimony, *Jenkins*, 355 Wis. 2d 180, ¶64, the court similarly cannot substitute its judgment for that of the jury in deciding whether a defendant's motion meets the prejudice pleading requirements. This Court should explain that, unless the proffered testimony is incredible as a matter of law, i.e. "'in conflict with …nature or with fully established or conceded facts,'" *Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975) (quoted

citation omitted), the reviewing court cannot itself assess the credibility of the proffered testimony to deny a hearing.

When a court finds that there is no reasonable probability of a different result if the jury had heard the testimony of uncalled witnesses, for example to an alibi or misidentification, given the strength of the State's case, the court is finding that the jury would not believe the uncalled witnesses' testimony. This is a credibility conclusion that, for the reasons outlined above, a court cannot make.

Furthermore, such a conclusion ignores the defense evidence and the defendant's attack on both the State's evidence and its witnesses' credibility. As the United States Supreme Court recognized in *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006), that "[j]ust because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that" other evidence could have no impact. "[W]here the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact." *Id*. (emphasis in original) The Court cautioned that, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of the contrary evidence offered by the other side to rebut or cast doubt." *Id*. at 331.

Yet, the circuit court is not always required to conduct a hearing on an allegation of ineffective assistance of counsel for the failure to call certain witnesses at trial. Whether trial counsel's deficient performance prejudiced the defendant is fact-dependent and depends on the totality of the circumstances at trial. *Jenkins*, 355 Wis. 2d 180, ¶50. Depending on the particular case's circumstances, a court may deny such a claim if the allegations in the motion are conclusory. The court may also deny a hearing if the motion fails to lay out material objective factual assertions outlining the proffered witness's testimony and fails to explain specifically why the proffered testimony mattered to the defense.

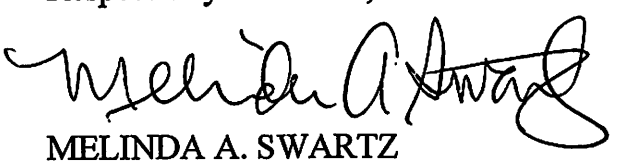
Further, under certain circumstances, the record may conclusively prove that the witness's proffered testimony is incredible as a matter of law. For example, where the proffered testimony is an alibi witness, uncontroverted proof in the State's postconviction pleadings that the witness was incarcerated at the time they claim to have been with the defendant may prove their proffered testimony is incredible as a matter of law.

CONCLUSION

For all of the reasons set forth above, WACDL respectfully requests that this Court hold that when assessing a postconviction motion's ineffective assistance of counsel prejudice pleadings, the circuit court cannot substitute its judgment for that of the jury in assessing which testimony, the called or the uncalled witnesses, would be more or less credible. This Court should explain that unless a witness' proffered testimony is incredible as a matter of law, a circuit court may not itself assess a witness's credibility or the credibility of their proffered testimony to deny the motion without a hearing.

Dated this 18th day of May, 2022.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a non-party brief produced with a proportional serif font. The length of the brief is 2,053 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) (2019-2020)

I hereby certify that the electronic copy of this brief is identical to the paper copy of the brief.

Dated this 18th day of May, 2022.

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