STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2021 AP 1100

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALBERTO RIVERA,

Defendant- Appellant.

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM AN ORDER DENYING A NEW TRIAL ENTERED ON JUNE 23, 2021, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable Jeffrey A. Wagner, Presiding
Trial Court Case No. 2015 CF 1640

Respectfully submitted:

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ISSUES PRESENTED

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The trial court answered: No.

II. WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO SECURE *SUPPRESSION* OF THE IN-COURT IDENTIFICATION OF RIVERA BY THE STATE'S PRIMARY WITNESS BASED ON A VIOLATION OF HIS RIGHT TO HAVE RETAINED COUNSEL PRESENT DURING THE LINE-UP PROCEDURE.

The trial court answered: No.

III. WHETHER POST-CONVICTION COUNSEL'S FAILURE TO RAISE THE CLEARLY STRONGER ISSUES PRESENTED ON APPEAL CONSTITUTED INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL.

The trial court answered: No.

STATEMENT ON PUBLICATION

The appellant believes the Court's opinion in this case will meet the criteria for publication as it will clarify, *inter alia*¸ a defendant's right to have his or her retained attorney present for a post-indictment line-up procedure.

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument insofar as he believes the briefs will sufficiently explicate the facts and law necessary for this Court to decide the issues presented.

STATEMENT OF THE CASE

On April 16, 2015, the State filed a criminal complaint charging Rivera with Felon in Possession of a Firearm (FPF) and an arrest warrant issued. (R1; R2). The complaint described an incident where Henry Hodges had been shot and killed and B.J. shot and wounded. (R2). By the time the complaint was filed, Rivera had heard from his parole officer, that he was wanted for questioning. (R200). Thus, Rivera hired Attorney Robert LeBell to represent him on the FPF charge and Attorney LeBell made arrangements for Rivera to turn himself in. (*Id.*). Rivera, however, decided not to turn himself in, and was eventually arrested on August 20, 2015. (R201, Ex. A, p. 1). When arrested, and later when questioned, Rivera asked for "his" attorney: Attorney Robert LeBell. (*Id.;* R200). On August 26, 2015, Rivera made his initial appearance on the FPF charge. (R230).

Later that same day, Rivera was taken for a live line-up procedure for B.J. to identify the shooter. (R201, Exhibit A, p. 2). Once again, Rivera asked that Attorney LeBell be contacted and present for the line-up procedure. (R200). Law enforcement refused to do so, however, instead telling Rivera "there's your attorney," while pointing at a female Rivera did not know. (*Id.*; R201, Ex. A, p. 2). Rivera said she was not his attorney and again asked for Attorney LeBell. (R200). Once it became apparent police were not going to honor his request, Rivera cooperated with the line-up. (*Id.*). B.J., who had already been shown a single photo of Rivera (with the name "Alberto" on it), picked Rivera out of the line-up.

On September 3, 2015, Rivera appeared for his preliminary hearing with Attorney Joseph Kennedy, sent by Attorney LeBell. (R231). On that same date, the State filed an Information charging Rivera with more charges, including first degree intentional homicide and attempted first degree intentional homicide. Rivera waived the preliminary hearing. (R231).

On September 14, 2015, Rivera appeared with Attorney LeBell. (R232-2). Attorney LeBell, confirming he had been retained for the FPF charge, but noting he had not yet been retained for the homicide charges, asked for more time so

Rivera could determine when he could retain him for those more serious charges. (*Id.* at 2-3). On September 29, 2015, Attorney LeBell again appeared with Rivera, but moved to withdraw noting Rivera had been unable to retain him for the more serious charges. (R233-2-3). The motion was granted, and Rivera eventually hired other private counsel. (*Id.*).

On November 9, 2015, the State filed a motion to introduce other acts evidence; a 1997 homicide involving Rivera. (R11). On December 18, 2015, the court heard the motion and ruled it would not allow the evidence unless Rivera testified and presented a defense of identity or motive, in which the case the door would open, and the prior act evidence could come in. (R235-14-15). On June 26, 2017, following numerous adjournments, a final pretrial was conducted. Once again, this it was noted that the court would address the prior act evidence when the defense rested. (R258).

On July 10, 2017, a jury trial began. (R259). An overview of the evidence is set forth below. B.J. identified Rivera in court as the shooter. Rivera testified and denied he was the shooter. Rather than waiting for the State to present evidence of the prior act in rebuttal, Rivera and his counsel made a strategic decision to address his prior act during his direct examination. (R265-7-8). Rivera admitted he had been in prison because in 1997, he and a friend had tried to rob someone, and he shot and killed someone by accident. Rivera was 18 years old at that time, and had pled guilty. (R264-47).

A cautionary instruction was given to the jury regarding the proper use of this prior acts evidence. (R264-154-55). On July 17, 2017, the jury returned guilty verdicts on all counts. (R266-2-4). Rivera was sentenced to life without parole. (R188). Rivera appealed and argued two issues: (1) admission of other acts evidence was prejudicial error; and (2) insufficiency of the evidence. On April 30, 2019, this Court rejected both arguments. *State v. Rivera,* Appeal No. 2018 AP 952-CR.

On November 10, 2020, Rivera filed a motion, pursuant to section 974.06, Stats., requesting a new trial based on ineffective assistance of counsel. (R198). The bases for that motion are the same as the issues presented here for appeal.

(*Id.*). On June 23, 2021, the circuit court denied the motion without a hearing. (R226). The rationale for that decision, including its adoption of the State's brief, is discussed *infra*. This appeal followed. (R227).

STATEMENT OF THE FACTS

On April 8, 2015, Romaine Hailey was at his West Allis home watching TV when he heard gunshots, a woman screaming, and squealing tires. (R260-82-91). He looked out his dining room window and saw a body in the backseat of a car, and the woman who was screaming. (*Id.*). Moments later, Claudia Derringer, who lived in an apartment building across the street, heard pounding on her lobby door and when she opened it, saw B.J. standing outside, frantic and crying, with blood on her hands and head, and asking to be let in. (*Id.* at 92-100). B.J. said "they" had just shot her and her boyfriend. Derringer dialed 911. (*Id.*). Police were dispatched and found the deceased Hodges right behind the driver's seat, his arms tied behind his back with electrical cord, and duct tape wrapped around his wrists and mouth.[4] (*Id.* at 114-120).

The State's primary witness was B.J., who had known Hodges for six months and was his girlfriend. (R262-5). She said that on April 8, 2015, she called Hodges and told him she was hungry. He picked her up in his SUV and they headed to Speed Queen. (*Id.* at 6-9). On the way, Hodges got a call and she heard him say they were going to Rivera's house. (*Id.*). His demeanor remained normal. (*Id.*). At some point, however, they were also pulled over for tinted windows and delayed.[5] (*Id.*).

[4] The vehicle was processed. (R261-7). Two prints were found on the outside of the vehicle, and bullets and casings inside the vehicle. Police processed the vehicle for DNA and swabbed door handles, grab handles, seats, blood stains, window smears, the gear shift, etc. Police also recovered rolled up duct tape found on the floor. Forensics determined there were at least two weapons, and maybe three, involved in the incident, but no firearms were ever recovered. Nor were Rivera's prints, or his DNA, ever connected to the crime scene.

[5] She claimed to have seen Rivera 5-6 times, and to have been at his house once before, but never inside. (*Id.*). As discussed *infra*, the record contains nothing to substantiate this claim and much to cast doubt on it.

When they eventually reached the building where Rivera lived, Hodges got out, went inside, and was gone for about 10-15 minutes, which was normal. (*Id.* at 10-13). She then saw someone come out and she unlocked the door, whereupon she saw a reflection of a light-skinned person going to the back of SUV. (*Id.*). Someone then approached her side of the vehicle and told her to look under the seat. (*Id.*). She did so, and when she came back up, a person had a gun pointed at her head. Although it was dark and she only saw the person for a few, brief seconds, through tinted windows, she would later claim the person was Rivera. (*Id.* at 47). She said Rivera told her to go to the very back of the SUV and keep her head down, and she did by crawling through the vehicle.[6] (*Id.* at 14).

According to B.J., Rivera got into the middle of the SUV on the passenger side. (*Id.* at 15-19). He told her that if she kept her head down she would be fine, and so she did, and crossed her wrists over her forehead. (*Id.*). A black man walked around the car and got in the driver's side, but she could not see who it was. (*Id.*). The car moved to the back of the house and Rivera called to have something brought down. (*Id.*). Hodges was then pushed into the middle seat and his voice was muffled like something was over his mouth. (*Id.*). She then heard the individual ask Hodges where the money was, and Hodges responded that he did not have any. (*Id.*).

B.J. claimed it was Rivera who then demanded they go to Hodges' house to see if he had money there. (*Id.* at 20-24). The car then drove toward Hodges' house at 35th and Greenfield. (*Id.*). Ten minutes later, Rivera demanded Hodges tell him which house was his. Hodges said he would have to raise his head, but they refused. Hodges said they would have to pull around the back to get into the house and they did. Then, another truck pulled up and someone approached Rivera's side to say they forgot Hodges' keys, and Rivera said to go back. (*Id.*).

On the way back, however, and after about 5-6 minutes, the vehicle stopped, and the door opened. (*Id.* at 24-28). She

[6] B.J.'s trial testimony that she saw Rivera as one of the perpetrators was the result of an impermissibly suggestive show-up, as examined in the Argument section of this brief. Nevertheless, the Statement of Facts will refer to "Rivera" as the perpetrator and attribute to him the acts B.J. attributed to him during the trial.

then heard two shots, separated by a pause. (*Id.*). She did not see the shooter but said the shots came from where Rivera had been sitting. (*Id.*). Then someone climbed over the seat toward her and fire two shots, separated by a pause. She did not see this shooter either, nor feel anything, and only later realized she had been shot when she felt blood on her head. She called out for Hodges, but he did not respond. (*Id.*). She then got out of the truck, felt blood coming from her head and, since Hodges was not moving, ran to the apartment across the street, where she encountered Derringer.[7] (*Id.*).

The next day, while B.J. was still at the hospital, the police showed her a single photo of Rivera with the name Alberto emblazoned across the bottom. (*Id.* at 44). Police asked her if the photo depicting Rivera was someone from the incident. (*Id.*). B.J. responded affirmatively. (*Id.*). From that point forward, Rivera, in B.J.'s mind, became the person who had been the shooter. And when Rivera was later apprehended, B.J. identified Rivera in a line-up. (*Id.*). The only person in the line-up that she had seen a photograph of was Rivera. (*Id.* at 44).

Rivera admitted he knew Hodges. Indeed, they had been in prison together and when they got out, they began selling drugs together. (R264-46). Hodges supplied Rivera with heroin and cocaine, and they would generally see each other throughout the day at different places. (*Id.* at 48-49). Rivera, for his part, was running drugs out of the Appleton apartment, which actually belonged to his girlfriend, Gitonna, as Rivera had his own place in West Bend. (*Id.* at 50-53). There were several people who Rivera, in turn, was supplying and who

[7] There was much B.J. did not see, as she took seriously the order to keep her head down. (*Id.* at 41-44). She did not know where the driver of the car was when the door opened. (*Id.*). She did not know how many people brought Hodges to the car. (*Id.*). She did not know where the other person from the other vehicle came from, the one who was talking about getting the keys. (*Id.*). B.J. also did not know who was in the apartment Hodges entered. (*Id.*). She did not know how many people were in the other vehicle. (*Id.*). And most notably, she did not see who shot her or Hodges. (*Id.*). On the way to the hospital, however, she gave police the name Berto, and she used her phone to show police the location of the apartment where she and Hodges had gone. (*Id.*).

would get a share of the drugs, and these included Levell Drew and Terrance Jackson.[8] (*Id.* at 50-51).

In fact, Rivera and Hodges had a great personal relationship and a mutually profitable business relationship, with no animosity. (*Id.* at 48-49). Neither ever cheated nor shorted the other. (*Id.* at 49). Rivera, on the other hand, had never met Hodges' new girlfriend, B.J. (*Id.* at 128). Among the places where Rivera and Hodges would meet was Hodge's place. (53). Thus, the idea that Rivera would have needed Hodges to point out where he (i.e. Hodges) lived made no sense. (*Id.* at 53).

Rivera admitted he called Hodges on April 8, 2015, to ask him to supply drugs for sales the following day, as Rivera's supply was dwindling. (*Id.* at 54-58). Hodges agreed to make a drop-off to Rivera, and no other reason for why Hodges went to the Appleton residence is apparent on the record. Rivera's request to Hodges was not unusual. Rivera would typically be one of Hodges' last stops for drug delivery each day. (*Id.* at 56). Thus, Rivera, along with Drew and Jackson who were hanging around to be supplied, in turn, by Rivera, waited for Hodges to arrive. (*Id.* at 56-58).

Because Hodges affirmed he was on his way, Rivera waited a long time. (*Id.* at 56). Rivera, however, had another customer coming from out of town who had called and arranged for Rivera to make a delivery. (*Id.* at 57-59). Thus, Rivera, not knowing Hodges had been delayed because of a traffic stop for a window tint violation, left to make that delivery. (*Id.* at 57). Rivera took Drew's car, leaving Drew and Jackson behind. (*Id.* at 58-60).

Rivera was gone for about 20-25 minutes. (*Id.* at 58-59). When he returned to Gitonna's place on Appleton, he noticed the lights were turned off in her corner apartment, which he thought strange. (*Id.* at 60). Rivera parked on Appleton and went in the front door, which was the only way to get into Gitonna's second floor apartment. (*Id.* at 60). Rivera had the

[8] Drew was of a similar height, weight, build and complexion as Rivera. (*Id.* at 51). Detective Brandon Hurley also testified that Rivera and Drew are physically similar. (*Id.* at 10).

keys, opened the door, and saw that all the lights were out, and nobody was there. (*Id.* at 61). Rivera also noticed another set of keys on a table in the back of the kitchen. (*Id.* at 65).

Rivera decided to call Jackson. (*Id.* at 65). Jackson told him to ride down to 36th and Greenfield and Rivera jumped in the car and did so. (*Id.*). Rather than take Drew's rental car, however, Rivera drove Gitonna's car because it had tinted windows, and he had a feeling that something was up. (*Id.* at 65-66). When he arrived, he saw what he recognized as Hodges' SUV parked there, and when he saw Jackson get out of the driver's seat, it was clear something was wrong, as Jackson and Hodges were not close associates. (*Id.* at 66-67).

As he pulled up, Jackson walked toward his car and told Rivera to follow him as he was going to park the SUV down the street. (*Id.* at 67-69). He did not tell Rivera what was going on, but Rivera suspected a robbery. (*Id.*). Jackson drove to an alley and Rivera followed. (*Id.*). Rivera did not see anyone in the SUV. (*Id*.). Jackson stopped the SUV in an alley and Rivera stopped too.

At this point, Jackson got out of the SUV, opened the rear passenger's door, and shot his gun twice. (*Id.* at 70). Rivera then saw another flash in the back of the vehicle, and Jackson ran to his vehicle. (*Id.* at 77). He then saw Drew exit the SUV and he also ran to Rivera's vehicle. (*Id.* at 72). At that moment, Rivera roughly understood what had happened (that Hodges had been shot) and he drove Jackson and Drew back to the Appleton apartment where Drew's car was parked. (*Id.* at 72-73).

Everyone remained quiet during the drive and when they arrived, Drew got out and went to his car while Jackson got out and put away his gun. (*Id.* at 74-75). Rivera went into the apartment, turned off the light, and sat in the dark and realized he had to play it cool or possibly be killed. (*Id.* at 74-75). Rivera did not learn what had happened to B.J. until days later when saw it on the news. (*Id.* at 75-76). That was when he first learned that someone else had been in the car. (*Id.*).

Rivera was shocked that people he knew had killed his friend and he did not know what to do. (*Id.*). When Rivera

heard from his mother that the police were looking for him about a shooting, he eventually went to Green Bay where he had a friend. (*Id.* at 77). Rivera did not have any contact with Drew or Jackson after that, knowing that showing any weakness could be fatal.[9] (*Id.* at 77-78).

Argument

II. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO SECURE *SUPPRESSION* OF B.J.'S IN-COURT IDENTIFICATION OF RIVERA ON THE GROUNDS IT WAS TAINTED BY A HIGHLY SUGGESTIVE "SHOW-UP" PROCEDURE.

The constitutional right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on an Ineffective Assistance of Counsel (IAC) claim, the defendant must prove: (1) counsel's performance was deficient; and (2) the deficiency prejudiced his defense. *Id.*. To establish prejudice, the defendant must show a reasonable probability that, but for counsel's error(s), the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305; *Strickland*, 466 U.S. at 694. The focus is not on the outcome of the trial, but on the reliability of the proceedings. *Thiel*, 2003 WI 111, ¶ 20.

Reasonably effective defense counsel will have a general understanding of a client's constitutional rights and the exclusionary rule. Failure to be aware of controlling law in the jurisdiction in which one practices is deficient performance. *Thiel*, at ¶ 51 (failure to understand statute is deficient performance as a matter of law); *State v. Felton*, 110 Wis. 2d 485, 504, 329 N.W.2d 161 (1983) (ignorance of statutorily-authorized defense and failure to investigate constitutes IAC);

[9] The physical evidence corroborated Rivera's testimony. His fingerprints were not found anywhere on the crime scene. (R263-34). Nor was Rivera's DNA ever found at the crime scene. (*Id.* at 106-112). Drew's fingerprint, however, was found on the duct tape. (*Id.* at 12). And yet, it does not appear Drew was ever charged with any crimes arising from this incident.

State v. DeKeyser, 221 Wis. 2d 435, 451, 585 N.W.2d 668 (Ct. App.1998) ("Trial counsel is expected to know the law relevant to his or her case."), *overruled on other grounds by State v. Veach*, 2002 WI 110, 255 Wis. 2d 390, 648 N.W.2d 447.

The issues in this case pertain to suppression of B.J.'s identification of Rivera at trial. Accordingly, this is a case where ineffective assistance of counsel, *vel non*, turns entirely on the merits of the underlying issues counsel did not raise. Here, deficient performance and prejudice are joined at the hip. They are bound by a synergy because if suppression was there for the taking, it was deficient not to take it. And absent an in-court identification by B.J., precious little remained to suggest Rivera was the perpetrator. There was no gun and no forensic evidence to tie him to the crime scene. B.J.'s in-court identification of Rivera was the centerpiece and pillar of the State's case against Rivera. Confidence in Rivera's guilt would be undermined and there would have been reasonable doubt. The reliability of the proceedings would be very suspect.

In denying Rivera's motion, and concluding he failed to prove IAC, the circuit court leaned heavily, too heavily, on the State's brief:

> **For the reasons set forth in State's postconviction response brief, which the court adopts and incorporates as part of its decision in this matter**, and herein, the court finds that the defendant has not set forth a viable claim of ineffective assistance of trial counsel, and further, that the issues presented are not clearly stronger than those raised by former appellate counsel during the direct appeal.

(R226-4) (emphasis added). Nearly one decade earlier, this Court frowned on just such an approach. *State v. McDermott*, 2012 WI App 14, ¶ 9, fn 2, 339 Wis. 2d 316, 810 N.W.2d 237.

McDermott held that judges must not only make their independent analyses of issues presented to them for decision, but should also explain *their* rationale to the parties and to the public. *Id., citing Trieschmann v. Trieschmann*, 178 Wis.2d 538, 541–542, 504 N.W.2d 433 (Ct. App. 1993) (Improper to

simply accept a party's position on all of the issues of fact and law without stating any reasons for doing so). Although Wisconsin has no specific rule requiring trial judges to state their reasons, as does, for example, the United States Court of Appeals for the Seventh Circuit, *McDermott* believed the following admonitions by that court a good reminder why judicial decisions at all levels must be explained by the judge or judges in their own words:

> Circuit Rule 50, which requires a judge to give reasons for dismissing a complaint, serves three functions: to create the mental discipline that an obligation to state reasons produces, to assure the parties that the court has considered the important arguments, and to enable a reviewing court to know the reasons for the judgment. A reference to another judge's opinion at an earlier stage of the case, plus an unreasoned statement of legal conclusions, fulfils none of these. . . . From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own . . . . Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views. Unvarnished incorporation of a brief is a practice we hope to see no more.

McDermott. at *id.*, *citing DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990). With this stark shortcoming of the circuit court decision here under review now brought front and center, Rivera turns to the first of the two legal issues presented. This shortcoming, of course, also tarnishes the circuit court's disposition of the second legal issue under review.

B.J.'s identification of Rivera was initiated by the police showing B.J. a single photograph of Rivera, a process known as a "show-up." That the process consisted of showing B.J. a single photograph of Rivera, as opposed to physically

presenting Rivera to B.J. in person is of no consequence. Either procedure is a show-up. *State v. Roberson*, 2019 WI 102, ¶¶ 47-48, 389 Wis. 2d 190, 935 N.W.2d 813. And the Supreme Court has long recognized the problems inherent in the use of a show-up procedure to identify a suspect:

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Simmons v. United States, 390 U.S. 377, 383–84 (1968).

When expressing the dangers associated with a show-up, *Simmons* could have been discussing this case. The record here reveals that B.J.'s opportunity to view the suspect was both brief *and* under poor conditions. She only momentarily viewed the individual through a tinted car window, and it was dark outside. Moreover, the individual was pointing a gun at her, which would have tended to focus her attention on the

muzzle of the gun, rather than the individual's face. *See e.g., People v. Hines*, 407 N.E.2d 853, 855 (Ill. App. 1980) ("when a victim is attacked with a gun, she tends to focus on the gun, not on the face of the attacker"). Thereafter, she was laying down in the third-row seat of the vehicle with her head down and her arms across her face. These are poor conditions for viewing an individual in a different row of seats and again, it was dark.[10]

As the question here ultimately boils down to suppression of B.J.'s in-court identification of Rivera, it should be noted that the admissibility of an in-court identification depends upon whether it has been tainted by unlawful activity. In general, evidence must be suppressed as fruit of the poisonous tree if it is obtained by exploitation of an illegality. *State v. Knapp*, 2005 WI 127, ¶ 24, 285 Wis. 2d 86, 700 N.W.2d 899; *New York v. Harris*, 495 U.S. 14, 19 (1990). The remedy for an illegal warrantless search is suppression of any identification evidence that has been tainted. *Id.*

An in-court identification is admissible if it is based on an independent source. *McMorris*, 213 Wis. 2d 156, 166–68, 570 N.W.2d 384 (1997). To be admissible, the in-court identification must be made "by means sufficiently distinguishable to be purged of the primary taint. *McMorris*, 213 Wis. 2d 156, 167 570 N.W.2d 384 (1997), *quoting United States v. Wade*, 388 U.S. 218, 241 (1967). In other words, the in-court identification must rest on an independent recollection of the witness's initial encounter with the suspect. *State v. Walker*, 154 Wis. 2d 158, 188, 453 N.W.2d 127 (1990).

Due process restricts admission of eyewitness identification testimony infected by improper police influence when there is a substantial likelihood of irreparable misidentification unless the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances. *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012). Under due process analysis, the Supreme Court places the burden on the defendant to show the method law enforcement chose to employ to identify a suspect

[10] B.J. testified that she only saw the individual for "nothing more than seconds." (R262-47).

as the perpetrator was "an unnecessarily suggestive identification procedure," creating a substantial likelihood of misidentification. *Id.* at 232 n.1, 235. *Perry*'s discussion of "unnecessarily" focused on the police conduct claimed to have manufactured a challenged identification procedure when identification may have been obtained by a less suggestive means. *Id.* at 235. *Perry* thus explains that due process concerns arise when law enforcement officers use an identification procedure that is both suggestive and unnecessary. *Id.* at 238-39, *citing Manson v. Brathwaite*, 432 U.S. 98 107, 109 (1977).

The show-up procedure here was decidedly not "necessary." Police obtained a photo of Rivera from Kyraim Hodges, a nephew. (R262-59-68). B.J., meanwhile, was in the hospital. Nothing prohibited the police from assembling a photo array to show to B.J. Moreover, already knowing B.J. had committed herself to a "Berto," not only was it "unnecessary" to show B.J. a single photograph labeled "Alberto" on the bottom, it was reckless. The name "Alberto" could easily have been redacted from the photo and should have been redacted because including the name the police knew B.J. had already used created an impermissible risk B.J. would identify Rivera.

Thus, counsel for Rivera could have established the method chosen by police was impermissibly suggestive. *Roberson*, 2019 WI 102, at ¶ 68. While *Roberson* assumed, without deciding, the identification procedure it reviewed was impermissibly suggestive, its remarks are helpful because like this case, the identification in *Roberson* began with the display of Roberson's Facebook photo. *Roberson* conceded it would have been better practice for police to show Facebook photos of more than one black male, but noted the officer never asked if the picture depicted the culprit.

Here, by contrast, police asked B.J. if the picture was the man she knew as Berto. (R262-44). Moreover, with B.J. having already said the perpetrator could be "Berto," showing her a photo with the name "Alberto" written across the bottom went beyond the pale. It would not have been difficult for trial counsel to establish the unnecessary use of a show-up photo bearing Rivera's name was impermissibly suggestive.

This would have shifted the burden to the State to prove that under the totality of the circumstances the identification was reliable, *Roberson*, 2019 WI 102, at ¶ 69, and here, again, *Roberson*'s discussion is instructive. Applying the reliability assessment factors from *Neil v. Biggers*, 409 U.S. 188 (1972), and confirmed in *Brathwaite*, *Roberson* noted the victim (C.A.S.) had ample opportunity to view the suspect (P), as C.A.S. had spent two and a half hours with P, on three separate occasions, over a short period of time. Moreover, P never made any substantial effort to conceal his identity and such a degree of attention favored reliability. And C.A.S. agreed to participate in a drug-dealer relationship with P, and P gave C.A.S. a phone, presumably to forward their plans. They contemplated an ongoing relationship where they expected to know each other's faces, and P had even been at C.A.S.'s personal residence.

Standing in stark contrast to the *Roberson* identification are the circumstances underlying B.J.'s poor opportunity and ability to see the perpetrator in this case. As already noted, it was momentary, versus two and a half hours. Moreover, it involved nothing of an anticipated and/or ongoing relationship. B.J. and the suspect never expected to know each other's faces and the suspect had never been inside of B.J.'s residence. More important still, the suspect in this case *did* make a substantial effort to conceal his identity. Indeed, using a gun for emphasis, he ordered B.J. to the last row of seats in the vehicle and warned her to keep her head down if she wished to emerge unscathed. B.J. testified that she fully complied with the warning.[11]

The record here is also devoid of any prior description of the suspect. One *Biggers* factor is the accuracy of the prior description of the suspect. *Brathwaite*, 432 U.S. at 114. Here, while there was testimony about what B.J. told police on the way to and at the hospital, and that she gave police all of the

[11]*Roberson* observed that the first two *Biggers* factors appeared to question identifications where a witness briefly sees a stranger, perhaps out of a window, under poor conditions. C.A.S.'s identification, however, presented facts that were completely opposite. In short, the shooting was not the product of a brief, momentary encounter between two strangers. *Roberson*, at ¶ 72. Here, that is exactly what it was.

information she had, she never provided a description of the individual she claimed was the perpetrator. Under the *Biggers* factors, collecting such evidence prior to displaying the Facebook photo of Rivera was the State's responsibility. *Roberson*, 2019 WI 102, at ¶ 73.

Roberson was further persuaded by the fact the identification was extremely well-documented, as it was videotaped in its entirety. *Roberson* at ¶ 77 ("[i]f a picture is worth a thousand words, a video is a thousand pictures"). The jury was able to watch the video and hear and see C.A.S.'s comment and gestures regarding her ability to identify blacks. The jury could hear what C.A.S. said and her accompanying gestures and demeanor. The jury could also see if there was certainty on C.A.S.'s face when shown the Facebook photo. *Roberson*, 2019 WI 102, at ¶¶ 67-78. Here, by contrast, there was no documentation of B.J.'s identification of Rivera.

The State will likely argue that B.J. claimed to have seen Rivera five or six times previously, a claim Rivera emphatically denied. A review of the record will reveal the putative basis for B.J.'s claim was utterly vacuous. There was no testimony about where, when, or for how long, B.J. had ever been in the same space as Rivera. While she claimed an ability to identify Rivera, her testimony demonstrated little more than an ability to identify where he lived.

Moreover, she tied those alleged instances to the times she accompanied Hodges to Rivera's apartment. (R262-9-11). This is problematic because she always remained in the vehicle while Hodges went up to the apartment, and Hodges would always just come back after 10-15 minutes. (*Id.*). The record is devoid of any description of any face-to-face encounter between B.J. and Rivera and when asked if she knew him she replied "No." (*Id.* at 30-31). And in fact, B.J. did not mention the name "Berto" to the police until after she already heard police using that name. (*Id.* at 45-46). Thus, even the seed that sprouted into use of a FaceBook photo, and then bloomed into a line-up identification, was suspect and tainted *ab initio.*[12] (*Id.* at 46).

[12] She later retracted this concession on redirect. (*Id.* at 50). In other words, B.J. initially testified that when she first identified the suspect as "Alberto," she had already heard the name "Alberto" being used in the ambulance. (*Id.* at 46).

The circuit court, however, glossed over all of these problems and stated:

> The defendant also argues that B.J.'s in-court identification was tainted by police showing her a single Facebook photo of him. A defendant who alleges that pretrial identification procedures by photograph were impermissibly suggestive and not otherwise reliable has the initial burden to prove that the photo identification was impermissibly suggestive. See State v. Mosely, 102 Wis. 2d 636, 652 (1981). If this burden is not met, no further inquiry is needed. Id. If this burden is met, the burden then shifts to the State to show that despite the suggestiveness, the identification was nonetheless reliable under the totality of the circumstances. Id. Where a subsequent in-court identification is also challenged as tainted by the prior one, the State must show that the in-court identification derives from an independent basis. Id. The court wholly agrees with the State's cogent analysis of this issue and finds that the Facebook photo was not impermissibly suggestive and that B.J.'s identification was reliable under the totality of the circumstances. The court therefore finds that trial counsel was not ineffective for failing to pursue an argument for suppression on this basis.

(R226-3-4). Once again, because the circuit court failed to set forth its own reasoning, and instead employed unvarnished incorporation of the State's brief, it withheld information about what arguments, in particular, it found persuasive, and why it rejected contrary views.

On redirect, however, she was cajoled into testifying that *she* was the first person to use the name "Alberto." (*Id.* at 51). It is also both curious and suspicious that B.J. testified that when police showed her the FaceBook photo of Rivera the next day, it was not the first time she had seen it, as somehow it had also been shown to her on the night of the incident. (*Id.* at 55).

The State conceded that B.J.'s identification of Rivera was initiated by a "show-up: showing B.J. a single photograph of Rivera. Consequently, Rivera needed only have demonstrated the show-up was impermissibly suggestive, at which the point the burden would have fallen on the State to prove the identification was still reliable. *State v. Wolverton*, 193 Wis. 2d 234, 264, 533 N.W.2d 167 (1995). This was the paradigm within which the circuit court needed to, but did not, analyze the issues.

Also missing from the circuit court's decision is any analysis on the State's reliance on *Roberson* commenting favorably on situations where an officer never asks a victim if a picture is of the suspect. (R217-18), *citing Roberson*, at ¶ 68. Rivera replied and directed the circuit court to that portion of B.J.'s testimony where the officer *did* ask B.J. if the photograph of Rivera depicted one of the people from that night. (R225-3), *citing* (R262-44). By simply adopting the State's brief, the circuit court never addressed this important issue.

The State also argued that the officer testified that when showing B.J. the photo, he asked her if she "recognized the person." (R217-18). Then, leveraging to its fullest this nondescript testimony, and ignoring the full context of the situation (i.e., why B.J. was being shown a photo in the first place), the State went on to claim, without a record cite, that the officer "kept the description vague, clearly in an attempt not to influence any reaction to the photo." (*Id.*).

Once again, Rivera replied that the detective never testified that such was his approach, nor did B.J. ever back off her testimony as to how the photo was presented to her. (R225-3). The State's spin on the show-up simply ignored the reality and totality of the circumstances, and B.J. own testimony. How the circuit court resolved this problem also remains unknown.

The State then employed a slight variation of this specious brand of argument when examining whether B.J. actually saw the name "Alberto" on the photo when it was presented to her. As Rivera pointed out for the circuit court, B.J. first testified that indeed, she was shown a photograph with the name "Alberto" on it. (R225-3-4), *citing* (R262-44).

Only later in the hands of a skilled prosecutor on redirect was B.J. persuaded to become unsure of whether she actually saw the name on the photo. (*Id.*). However, then undermining the very idea she was not sure if she saw the name, she testified that seeing "the name" on the photo did not affect her identification. (*Id.*). Thus, B.J. saw the name "Alberto" on the photo during the show-up, but the circuit court managed to ignore that fact.

The State also deployed the same argument with regard to the origin of the name "Alberto." B.J. initially testified that when she first identified the suspect as "Alberto," she had already heard the name "Alberto" being used in the ambulance. (R262- 46). On redirect, however, she was cajoled into testifying that *she* was the first person to use the name "Alberto." (*Id.* at 51).

As Rivera replied and pointed out, this revealed the record was rather nuanced on the issue of identification. Rivera posited that had the issue of the show-up been litigated, as it should have been, it would have been on the basis of B.J. being shown a single photo with the name "Alberto" emblazoned across the bottom of it, which she saw, after having heard the name Alberto being mentioned during her ride in the ambulance. (R225-4). And that moreover, she continued to look at that Facebook photo of Rivera the next day. (*Id.*), *citing* (R262- 55). Once again, how the circuit court processed all of these issues is unknown, and it is possible it never processed them at all.

The State also argued that B.J. had claimed to have seen Rivera five or six times previously. As Rivera replied and pointed out, however, the problem with that testimony was that it could not be disentangled from her testimony that on the five or six times she had gone with Hodges to where Rivera lived, she had always remained in the car while Hodges went into Rivera's apartment for ten to fifteen minutes. (R225-4), *citing* (R262-10). Rivera noted there was precious little substance to this claim. (*Id.*). The record is devoid of any testimony about where, when, or for how long, B.J. had ever been in the same space as Rivera, or any description of any face-to-face encounter between B.J. and Rivera. And B.J. testified she did not know any of the people associated with Rivera's apartment. (R262-46).

How the circuit court managed to resolve all of these problems in favor of the State remains a mystery. Had Rivera's counsel not been deficient, Rivera could easily have shifted the burden to the State must prove that "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. *Roberson* at ¶ 82. For the aforementioned reasons, the State could not have met its burden. B.J.'s testimony was too fraught with contradictions (*police* first mentioned the name Alberto and then, *she* was the first to mention it, she *saw* the name "Alberto" on the photo and then, she did *not* see that name, etc.). B.J.'s testimony was further devoid of any meat on the bald bone of her claim that she knew Rivera. The 5-6 times she claimed to have seen Rivera were the 5-6 times she remained in the car while Hodges went up to Rivera's apartment.

II. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO SECURE SUPPRESSION OF B.J.'S IDENTIFICATION OF RIVERA BASED ON A VIOLATION OF HIS RIGHT TO HAVE RETAINED COUNSEL PRESENT DURING THE LINE-UP PROCEDURE.

The post-indictment, pretrial line-up is a critical stage at which defendants have a right to counsel. The Supreme Court has reasoned that there is grave potential for prejudice, intentional or not, in the pretrial lineup, not capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure meaningful confrontation at trial, there is little doubt a post-indictment lineup is a critical stage of the prosecution at which a defendant is as much entitled to the aid of his counsel as at the trial itself. *U.S. v. Wade*, 388 U.S. 218, 236–38 (1967). *See also Powell v. State of Alabama*, 287 U.S. 45, 57 (1932). Accordingly, the right to counsel at trial and at a post-indictment line-up have been placed on equal footing by the highest court in the land.

The right to counsel of choice is also firmly embedded in the constitution. The Supreme Court has held that an element of the Sixth Amendment right is the right of a defendant who does not require appointed counsel to choose who will represent him. *See Wheat v. U.S.*, 486 U.S. 153, 159 (1988).

Cf. Powell, 287 U.S. at 53 ("It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"). The Sixth Amendment guarantees defendants the right to be represented by a qualified attorney whom defendants can afford to hire, or who is willing to represent the defendant even though he is without funds. *Caplin & Drysdale v. U.S.*, 491 U.S. 617, 624–625 (1989).

Had Rivera's counsel raised this issue in response to Rivera's concerns, she would not have had to demonstrate prejudice. The Sixth Amendment right to counsel of choice commands, not that a trial be fair, but that a particular guarantee of fairness be provided: that the accused be defended by the counsel he believes best. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). While the Constitution guarantees a fair trial through the Due Process Clause, it defines the basic elements of a fair trial largely through the several Sixth Amendment provisions, including the Counsel Clause. *Strickland, supra*. The right at stake is the right to counsel of choice, not the right to a fair trial; and that right is violated when the deprivation of counsel was erroneous. In that case, no showing of prejudice is required to make the violation "complete." *Gonzalez-Lopez*, at 146. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. Otherwise the right to counsel of choice would be confused with the right to effective counsel. *Id.*

As the Supreme Court noted in *Wade*, both Wade and his counsel should have been notified of the lineup, and counsel's presence was a requisite to conducting the lineup, absent an intelligent waiver. *Carnley v. Cochran*, 369 U.S. 506 (1962). No countervailing policy considerations were advanced against the requirement. While concern was expressed the requirement could forestall prompt identifications and result in obstruction of the confrontations, *Wade* was not persuaded:

> As for the first, we note that in the two cases in which the right to counsel is today held to apply, counsel had already been appointed and no

> argument is made in either case that notice to counsel would have prejudicially delayed the confrontations.

Wade, 388 U.S. at 237–38. Here, Rivera was indicted on April 16, 2015. (R2). Rivera immediately retained counsel. (R200). Rivera was arrested on August 20, 2015. (R201-2). His initial appearance was on August 26, 2015. (R230). The line-up was conducted later on August 26, 2015, and *after* the initial appearance. (R201-3).

The facts of this case are therefore bereft of any indication that obtaining the presence of Rivera's own counsel would have resulted in any prejudicial delay. The State already had long-standing notice that Attorney LeBell was Rivera's attorney and nearly one week to notify him of its intention to conduct a line-up. Attorney LeBell had contacted the State to arrange Rivera's surrender. Rivera told law enforcement that Attorney LeBell was his attorney upon his arrest. Rivera reiterated the point when law enforcement read him his *Miranda* rights, a point tacitly conceded by the State when it documented that Rivera "would not answer any questions without ***his*** attorney present," as opposed to *an* attorney. (R201-2) (emphasis added). And Rivera lobbied for his own attorney specifically for the line-up.[13] (R200-2).

The Sixth Amendment secures a defendant facing incarceration the right to counsel at all critical stages of the criminal process. *State v. Bohlinger*, 2013 WI App 39, ¶ 14, 346 Wis. 2d 549, 828 N.W.2d 900. Rivera's post-indictment line-up was a critical stage. Rivera did not make a knowing, voluntary, or intelligent waiver of the right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). On the contrary, he

[13] There was no urgency in getting B.J. to view a line-up. It had been four months since the incident. Another day or two would not have made any difference. Had police needed to get B.J. to a line-up within hours or days of the incident while her memory was still fresh, such would have presented a different set of circumstances. Even then, however, law enforcement would have been tasked with showing an unfruitful attempt to contact Attorney LeBell. Here, however, police had no interest in Rivera's *chosen* counsel. They presumed that providing Rivera *an* attorney, even if he neither knew nor wanted her, was sufficient.

attempted to exercise that right and was denied. The line-up evidence should have been suppressed.

The circuit court, however, disagreed and denied this issue stating:

> With regard to the line-up, there is some question as to whether the defendant's Sixth Amendment right to counsel attached as to the homicide, attempted homicide, and armed robbery charges, since he had not been charged with those offenses at the time the line-up was conducted on August 26, 2015. United States v. Wade, 388 U.S. 218 (1967) held that a post-indictment lineup is a "critical stage" of the proceedings such that a defendant is entitled to counsel. Five years later, in Kirby v. Illinois, 406 U.S. 682 (1972), the United States Supreme Court dealt with the issue of whether post-arrest and pre-indictment lineups were a "critical stage" in criminal prosecutions implicating the Sixth Amendment right to counsel. The Court held that they were not and that the Sixth Amendment right to counsel did not attach. This court need not concern itself with the constitutional distinction between pre- and post-indictment for purposes of these proceedings because it is undisputed that the defendant was represented by an attorney at the line-up, albeit not retained counsel. The defendant alleges that the detectives refused his request to have retained counsel present during the line-up; however, there is no authority which entitles a defendant to a specific attorney at a line-up. On this point, the court is persuaded by the State's citation to Wright v. State, 46 Wis. 2d 75, 85 (1970) and State v. McMillian, 83 Wis. 2d 239, 246 (1978). The defendant relies on U.S. v. Wade, 388 U.S. 218 (1967); however, that case recognized that substitute counsel's presence at a line-up may suffice: "Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified

> on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's own counsel." Id. at n. 27. Thus, the court rejects the defendant's argument that he is not required to show prejudice resulting from retained counsel's absence during the line-up. The defendant has made no such showing, and therefore, there is no reasonable probability that a motion to suppress B.J.'s line-up identification would have been granted. Consequently, trial counsel was not ineffective for failing to pursue an argument for suppression on this basis.

(R226-2-3).

Here, the circuit court at least provided a clue as to its reasoning, even if in the end it simply incorporated, with no further discussion or independent analysis, the State's argument based on *State v. Wright*, 46 Wis. 2d 75, 175 N.W.2d 646 (1970), and *McMillian v. State*, 83 Wis. 2d 239, 265 N.W.2d 553 (1978). While perhaps a bit closer to what is required of circuit courts, the result is the same. In his reply brief, Rivera explained precisely why *Wright* was not controlling on the issue. (R225-5-6). How the circuit court could have relied on *Wright*, in light of Rivera's cogent analysis of that case, is yet another unknown.

As Rivera explained, *Wright* is helpful only to the extent it established that the rulings in *Wade* and *Gilbert* become applicable in Wisconsin once a criminal complaint is filed, as it was here. *Id.* at 82. *Wright* was decided, however, in the wake of an evidentiary hearing that the circuit court refused to conduct in this case. And Wright was decided, in large part, because the court found the attorney's testimony about the circumstances surrounding the line-up to be more credible than that offered by the defendant:

> The evidence at the hearing established that the police did inform the defendants of their right to have counsel present at the time of the lineup. One of the defendants then called a Milwaukee attorney. He was unable to attend, but sent one

> of his associates to be present at the lineup. This attorney testified that he arrived on the scene, talked to the defendants, and then observed the lineup. He testified that he spoke to both defendants before the lineup, informed them of their rights before the lineup was conducted, discussed fees, and spoke to both defendants after the lineup. Another associate of the attorney also came down to the police station, and apparently observed the second lineup. A police officer testified that he allowed defendant Wright to phone an attorney, that both defendants had refused to stand in the lineup until the attorney got there, that the police honored this demand, and that there was an attorney present at both lineups. It is true that defendant Wright testified that the attorney left before the lineups, and that defendant Jones testified that he never did have the chance to talk with an attorney before the lineup and that the attorney showed up after the lineup. The trial court was not required to disbelieve the testimony of both the attorney and the police officer that counsel was present at both lineups. The trial court finding that counsel was present stands.

Wright, 46 Wis. 2d at 83–84. Thus, as an initial matter, *Wright* addressed whether *counsel* was present, not whether *the defendant's counsel* was present. And indeed, the counsel the defendant desired (and summoned) *was* present, and *Wright* thus does not control this case.

Moreover, and as Rivera pointed out to the circuit court, the State's use of *Wright* for the proposition that "the presence of an attorney at the line-up, whether or not such attorney eventually represents the defendant at the time of trial, is all that is required," is misleading. Rivera tried to make the circuit court see that the State was conflating two distinct issues: (1) the right to one's retained counsel at the line-up; and (2) the right to have the same attorney at both the line-up and the trial. Rivera pointed out that the first issue was before the court, while the second was not. (R225-6).

Indeed, the language upon which the State relied came in response to the defendant's argument that the attorney at the lineup must also be the attorney at trial. *Wright*, at 85. That would be a queer requirement indeed, as it would bind an attorney who happened to be present at the line-up to also conduct the defendant's trial, lest the defendant's right to counsel be violated. Rivera's claim is *not* that his rights were violated because public defender Alexis Liggins was not his trial attorney. Rivera's claim has nothing to do with who was his trial attorney. Rivera's claim is that his rights were violated because he was denied the presence of his *actual* attorney at the lineup, despite his repeated protestations. How the circuit court managed to rely on *Wright*, having been advised of its inapplicability to this case, is yet another mystery.[14]

IV. POST-CONVICTION COUNSEL'S FAILURE TO RAISE THESE CLEARLY STRONGER ISSUES CONSTITUTED IAC.

On the question of whether Rivera presented a sufficient reason for not having raised the issues *sub* judice during his direct appeal, and whether they are clearly stronger than the issues raised on direct appeal, the circuit court's "reasoning" that they are not is especially weak. Again, this is because on this issue, the circuit court largely relied entirely on adopting the State's brief without setting forth its own rationale. (R226-4). Conspicuously absent from the circuit court's summary statement that the issues *sub judice* are not clearly stronger than the issues on direct appeal is any mention at all of the issues that were raised on direct appeal, much less a comparative analysis.

As Rivera noted, ineffective assistance of post-

[14] *McMillian* is also unhelpful because in that case, the supreme court ruled that a criminal defendant who participated in a lineup recorded by means of audio-video recording was not constitutionally entitled to be represented by counsel at either the taping or the viewing of the audio-video recording by witness who identified defendant. In such a case, the presence of defense counsel as the eyes and ears for the accused is unnecessary because in a recorded lineup, the camera and the microphones are the eyes and ears for the accused. *McMillian*, 83 Wis. 2d at 246.

conviction counsel may constitute a sufficient reason for not raising issues in a previous postconviction motion. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App.1996). Defendants who allege in such motions that postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate the claims he brings are clearly stronger than the claims postconviction counsel brought. *See State v. Starks*, 2013 WI 69, ¶ 6, 349 Wis. 2d 274, 833 N.W.2d 146; *State v. Romero-Georgana*, 2014 WI 83, ¶ 4, 360 Wis. 2d 522, 849 N.W.2d 668. The strength of the claims now before this court are elaborated *supra*, and clearly stronger than the claims pursued on appeal.[15]

The merits of claims now before this Court stand in stark contrast to the two claims post-conviction counsel pursued: (1) sufficiency of the evidence; and (2) other acts evidence. The sufficiency of the evidence is an issue with a notoriously difficult and very narrow standard of review. *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203. Great deference is paid to the trier of fact. Higher courts will comb the record to find facts to uphold a jury's verdict. *Id.* Appellate courts may not substitute their judgment for the trier of fact unless the evidence, viewed most favorably to the State so lacks probative value that no trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The inherent weakness of this direct appeal issue and that its failure was a fait accompli can be summed up in six words*: B.J. testified Rivera was the shooter*.

[15] It is worth noting that when post-conviction counsel was tasked with pursuing Rivera's most meritorious issues, the law governing the admissibility of an in-court identification arising from a show-ups was governed not by *Roberson*, but by *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. Since the issue, at its core, is ineffective assistance of post-conviction counsel, the decisions post-conviction counsel made must be measured by the law at the time those decisions were made, not by how the law may have fortuitously developed *post hoc*. The proper analysis must thus be made from the standpoint of *Dubose* which, ruled that evidence obtained from a show-up would not be admissible unless, based on the totality of the circumstances, the show-up was necessary. *Id.* at ¶¶ 33, 45. Here, and as already discussed, the State would not have been able to establish that showing B.J. a single photo of Rivera was "necessary." Thus, the show-up issue was even stronger when both previous defense attorneys did not raise it..

As for the other acts issue, once Rivera testified and put identity at issue, the failure of that issue on appeal was also a foregone conclusion. Identity is a statutorily enumerated permissible purpose for other acts evidence. Section 904.04(2), Stats. And there was such similarity between the two homicides that it strongly suggested a *modus operandi*, yet another permissible purpose under section 904.04(2). *State v. Hammer*, 2000 WI 92, ¶ 24, 236 Wis. 2d 686, 613 N.W.2d 629, 637.

Assuming, *arguendo,* that Rivera was involved in the crime in this case, both cases involved an individual acting in concert with others to lure a drug supplier to a location where the victim was held hostage while he and his residence were searched for drugs and/or money. (R11). In both cases, the victim was shot and killed when neither was found. (*Id.*). In both cases, Rivera went on the run, and never turned himself in, despite knowing he was wanted. (*Id.*). The two incidents were also close in time, (*id.*), because in determining the nearness in time between the prior acts and crime charged, time spent in confinement is not considered. *State v. Murphy*, 188 Wis. 2d 508, 519, 524 N.W.2d 924 (Ct. App. 1994). By that metric, only one and a half years separated the two. This issue was also doomed for failure.

Conclusion and Relief Requested

For all the foregoing reasons, Rivera respectfully requests that this Court reverse the circuit court's decision and order denying his motion and remand for an evidentiary hearing on his motion.

Dated this 23rd day of August, 2021.

Electronically signed by: Rex Anderegg
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 9,943 words, as counted by Microsoft Office 365.

Dated this 23rd day of August, 2021.

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