STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2021AP1100

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALBERTO E. RIVERA,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING A WIS. STAT. § 974.06 MOTION WITHOUT A HEARING ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the circuit court soundly deny Alberto Rivera's Wis. Stat. § 974.06 motion without a hearing after it concluded that Rivera failed to establish that postconviction counsel omitted "clearly stronger" claims than those raised in his direct appeal?

This Court should affirm. Neither of the alleged claims that Rivera thinks postconviction counsel should have raised would have succeeded. Accordingly, the circuit court correctly determined that Rivera could not overcome the *Escalona-Naranjo* procedural bar and soundly denied his Wis. Stat. § 974.06 motion without a hearing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted. This case can be resolved by applying established law to the facts as set forth in the parties' briefs.

STATEMENT OF THE CASE

A jury convicted Rivera of numerous criminal counts, including two counts of first-degree intentional homicide with use of a dangerous weapon as a party to a crime and as a repeater, one for the completed crime and one as an attempt. (R. 188:1–3.) The charges arose after Rivera shot and killed his friend Henry Hodges, and shot and injured Hodges's girlfriend "Beth," in Hodges's vehicle after Hodges and Beth had driven to Rivera's apartment. (R. 2:1–4.)

At trial, Beth identified Rivera as the shooter. (R. 262:8, 51.) She testified that she and Hodges were driving to dinner when Hodges received a call from Rivera; Hodges told Beth they needed to stop at Rivera's apartment. (R. 262:5–10.) Once they parked outside Rivera's apartment building, Hodges went inside while Beth waited in the car. (R. 262:10.)

Ten to fifteen minutes later, Beth saw a person leave the apartment and walk toward her car; she saw that it was Rivera, whom she had seen before, when he arrived at her front passenger window. (R. 262:11–12.) Rivera told Beth to look under the driver's seat. (R. 262:13.) She did, saw nothing, and when she sat back up, Rivera had a gun with a laser sight aimed at her head. (R. 262:12–13.) He directed her to move to the third-row passenger seat in the car and to keep her head down. (R. 262:14.)

Rivera got in the second-row passenger seat, while another man got into the driver's seat and drove the car to the alley behind Rivera's apartment building. (R. 262:14–15, 17–19.) Beth heard Rivera make a call and say, "[B]ring him down." (R. 262:18.) Shortly after, Hodges was pushed into the second row; Beth could tell that his mouth was covered and he could not walk on his own. (R. 262:19.) Rivera asked Hodges multiple times about money, which Hodges denied having. (R. 262:20.) The encounter continued, with Rivera insisting that the driver go to Hodges's apartment to see if he had money there. (R. 262:20–21.) When they got there and realized that Hodges's keys were still in Rivera's apartment, they began driving back. (R. 262:22–23.)

About five minutes into the drive back to Rivera's apartment, Rivera told the driver to stop. (R. 262:24.) Shortly after, Beth heard Rivera say something to Hodges, the door open, and two gunshots discharge from the second row. (R. 262:25–26.) She then felt someone reaching "over [her] head" from that row; she heard a shot, followed by a pause, a second shot, and the car door closing. (R. 262:24–25.) After two or three minutes, and bleeding from wounds on both arms, both hands, and her head, Beth ran to a nearby house for help. (R. 262:27–29.)

On the way to the hospital, Beth had told police that she recognized the gunman as "Alberto," that Alberto was a "good friend" of Hodges's, and that she had seen Alberto

approximately six times before that night when she accompanied Hodges to Alberto's apartment on previous occasions. (R. 262:30–31.) The next day, while Beth was in the hospital, police showed Beth a photo of Rivera and asked her if she recognized him; she immediately confirmed that Rivera was the Alberto she was familiar with and the gunman with 100 percent certainty. (R. 262:32–33, 77–78.) Four months later, Beth also picked Rivera as the gunman with 100 percent certainty from a live lineup. (R. 262:38, 52.) Further, at trial, Beth identified Rivera in court as the gunman. (R. 262:8, 51.)

After he was convicted and sentenced, Rivera pursued a direct appeal, where he argued that the trial court committed prejudicial error in admitting other-acts evidence of a similarly executed crime Rivera had committed years earlier, and that the evidence at trial was insufficient to support the homicide and attempted homicide convictions. *See State of Wisconsin v. Alberto E. Rivera*, No. 2018AP952-CR, 2019 WL 1906035, ¶ 2 (Wis. Ct. App. Apr. 30, 2019) (unpublished). This Court affirmed his judgment of conviction.

Rivera filed a Wis. Stat. § 974.06 motion claiming that his trial counsel was ineffective for failing to suppress Beth's in-court identification of him because (1) it was precipitated by an impermissibly suggestive photo identification and (2) his Sixth Amendment right to counsel was violated at the lineup because, though he was represented by a public defender at the lineup, that attorney was not his counsel of choice. (R. 198–199; 203.) Rivera argued that his motion was not procedurally barred because his original postconviction counsel ineffectively failed to raise these "clearly stronger" claims in a previous postconviction motion and in his direct appeal. (R. 203:17–18.)

After the parties submitted briefs, the postconviction court[1] concluded that since neither proposed basis for trial counsel's ineffectiveness had merit, those claims were not "clearly stronger" than what postconviction counsel advanced in Rivera's direct appeal. (R. 226:2–4.) Accordingly, the court held that Rivera failed to show a sufficient reason to overcome the *Escalona-Naranjo* procedural bar, and it denied his motion without a hearing. (R. 226:4.)

Rivera appeals.

STANDARD OF REVIEW

Whether a defendant in a section 974.06 motion alleges a sufficient reason for failing to bring available claims in his initial postconviction motion is a question of law that this Court reviews de novo. *See State v. Romero-Georgana*, 2014 WI 83, ¶ 30, 360 Wis. 2d 522, 849 N.W.2d 668.

To that end, when a defendant proposes that postconviction counsel ineffectively failed to challenge trial counsel's performance as a sufficient reason to overcome the *Escalona-Naranjo* bar, the defendant must show that the unraised claims are "clearly stronger" than those raised on appeal. This Court likewise reviews de novo whether the unraised claims are clearly stronger. *See id.*

ARGUMENT

The circuit court soundly denied Rivera's Wis. Stat. § 974.06 motion without a hearing.

A defendant is barred from raising a claim for relief under Wis. Stat. § 974.06 absent a "sufficient reason" for having failed to raise the claim in his previous postconviction motion or on direct appeal. *See Romero-Georgana*, 360 Wis. 2d

[1] The Honorable Jeffrey A. Wagner presided over both Rivera's trial and his Wis. Stat. § 974.06 proceedings.

522, ¶ 34 (citing *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 173, 517 N.W.2d 157 (1994)). In some cases, ineffective assistance of postconviction counsel may be a sufficient reason for failing to raise an available claim sooner. *Id.* ¶ 36 (citations omitted). To prove that original postconviction counsel was deficient for failing to raise or preserve claims for direct appeal, a defendant must show that the unraised or unpreserved claims are "clearly stronger" than those previously raised. *Id.* ¶ 46.

Thus, when a defendant claims ineffective assistance of postconviction counsel as a proposed sufficient reason, he must prove (1) deficient performance, i.e., that counsel's performance was objectively unreasonable, and (2) prejudice, i.e., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). "It is well-established that trial counsel could not have been ineffective for failing to make meritless arguments." *State v. Allen*, 2017 WI 7, ¶ 46, 373 Wis. 2d 98, 890 N.W.2d 245. By extension, unraised, but meritless, ineffective assistance of trial counsel claims cannot be "clearly stronger" than those raised on appeal or support a claim of ineffective assistance of postconviction counsel.

Here, the postconviction court correctly denied Rivera's motion without a hearing. The proposed suppression motions Rivera argued that trial counsel should have advanced would have failed; therefore, trial counsel was not ineffective for failing to raise them. And since Rivera's proposed claims of ineffective assistance of trial counsel would have been rejected, they were not "clearly stronger" than the claims raised in his direct appeal. Accordingly, Rivera's original postconviction counsel provided effective assistance and Rivera failed to show a sufficient reason allowing him to overcome the *Escalona-Naranjo* bar.

A. The trial court would have denied a motion to suppress Beth's in-court identification based on the showup procedure.

Rivera first claims that his trial counsel was ineffective for not seeking suppression of Beth's in-court identification of Rivera, which in his view was tainted by an "impermissibly suggestive" showup procedure when law enforcement showed Beth a photograph of Rivera when she was in the hospital and asked her if she recognized the person. (Rivera's Br. 15–26.)[2] As discussed below, Rivera cannot show that law enforcement's showing Beth a single photo was improper or that it would form a basis to exclude her in-court identification of Rivera.

1. An in-court identification is suppressed only when it is tainted by an out-of-court procedure that was impermissibly suggestive and unreliable.

Generally, the admissibility of evidence is governed by the rules of evidence. *State v. Roberson*, 2019 WI 102, ¶ 25, 389 Wis. 2d 190, 935 N.W.2d 813. It is up to the jury to determine whether the evidence is credible and what weight it should be given. *Id.* The Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012).

Yet, in some circumstances, due process requires the exclusion of evidence shown to be unreliable. For example, an eyewitness identification that has been "'infected by improper

[2] Citations to Rivera's brief are to the electronic filing page numbers.

police influence' may be excluded when 'there is "a very substantial likelihood of irreparable misidentification,"' unless 'the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances.'" *Roberson*, 389 Wis. 2d 190, ¶ 26 (quoting *Perry*, 565 U.S. at 232).

Recently, in *Roberson*, the Wisconsin Supreme Court concluded that that analysis applies to a showup, which includes "an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes," including when police show a witness a single photograph of a suspect. *Id.* ¶ 48.

This Court uses a two-step test to determine whether an identification resulting from a pretrial showup should be excluded. First, the defendant must prove that the police used an impermissibly suggestive procedure "such that there was a very substantial likelihood of misidentification." *Id.* ¶ 27. Courts determine on a "case-by-case basis" whether the particular facts establish that a showup procedure was impermissibly suggestive. *Perry*, 565 U.S. at 239. If the defendant proves that the showup procedure was impermissibly suggestive, the burden shifts to the State to show that the identification was nevertheless reliable. *Roberson*, 389 Wis. 2d 190, ¶ 27. Courts assessing reliability apply the so-called *Biggers* factors, which include: "(1) the opportunity of the witness to view the suspect at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of [the witness'] prior description of the suspect, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation." *Id.* ¶ 35 (citation omitted); *see also Neil v. Biggers*, 409 U.S. 188, 199–200 (1972).

Even if a showup was impermissibly suggestive and unreliable, a circuit court may still admit an in-court identification if that identification is based on an independent

source. *State v. David J. Roberson*, 2006 WI 80, ¶ 34, 292 Wis. 2d 280, 717 N.W.2d 111. To be admissible, "the in-court identification must be made 'by means sufficiently distinguishable to be purged of the primary taint'"; in other words, it "must rest on an independent recollection of the witness's initial encounter with the suspect." *Id.* The State must prove by clear and convincing evidence that the witness's in-court identification was based on observations of the defendant that occurred independent of and before the improper out-of-court identification process. *Id.* ¶¶ 35, 68. That determination involves a seven-factor analysis identified in *United States v. Wade*, 388 U.S. 218, 242 (1967):

> (1) the prior opportunity the witness had to observe the alleged criminal activity; (2) the existence of any discrepancy between any pre-lineup description and the accused's actual description; (3) any identification of another person prior to the lineup; (4) any identification by picture of the accused prior to the lineup; (5) failure to identify the accused on a prior occasion; (6) the lapse of time between the alleged crime and the lineup identification; and (7) the facts disclosed concerning the conduct of the lineup.

State v. McMorris, 213 Wis. 2d 156, 168, 570 N.W.2d 384 (1997) (citing *Wade*, 388 U.S. at 241); *see also David J. Roberson*, 292 Wis. 2d 280, ¶ 35 n.14.

The witness's familiarity with the suspect also can establish a sufficient independent basis for an in-court identification despite a suggestive showup procedure. In *State v. Larsen*, 141 Wis. 2d 412, 423, 415 N.W.2d 535 (Ct. App. 1987), for example, this Court upheld a witness's in-court identification of the defendant following a single-photograph identification when the witness had previously met the

defendant.[3] Similarly to this case, in *Larsen*, the witness knew Larsen by sight from having met him on a few occasions and identified him by name before being shown his photograph. *Id.* at 423–24. Given that, the pretrial photo identification "was not tainted" and provided no basis to exclude the witness's trial identification. *Id.* at 424.

2. The Facebook photo was not impermissibly suggestive.

Here, an officer rode to the hospital with Beth, who told police that she knew the gunman, that he was known to her as "Berto" or "Alberto," and told the officer that "she had seen him approximately four times on prior occasions." (R. 262:58–59.) She described Alberto as "a male, Hispanic, approximately 30 years of age, with a stocky build and possible facial hair." (R. 262:59.)

Police followed up with Hodges's nephew, Kyraim, to try to determine who Alberto was. (R. 262:62, 68–69.) Kyraim told police that he knew Alberto through his uncle and he took police to Alberto's apartment, which was the same apartment Beth had seen Hodges go to the night of the crime. (R. 262:62–

[3] Other courts recognize that a witness's familiarity with the suspect makes it less likely that a suggestive showup or lineup has tainted their identification. *See Commonwealth v. Ali*, 10 A.3d 282, 303 (Pa. 2010) (stating that a witness's prior familiarity with the defendant creates an independent basis for an in-court identification); *Simons v. State*, 860 A.2d 416, 422 n.1 (Md. App. 2004) (citing cases recognizing that an unduly suggestive identification is less likely to taint an in-court identification when an eyewitness knew the witness before the crime occurred). *People v. Graham*, 725 N.Y.S.2d 145, 148 (N.Y. App. Div. 2001) (in determining whether a witness was "impervious to suggestion," courts consider factors including the "details of the extent and degree of the protagonists' prior relationship, their encounters, and how they knew one another").

63.) At the officers' request, Kyraim found a photograph of Alberto on Facebook. (R. 262:64.) When shown the photograph at trial, Kyraim testified that it depicted the Alberto he knew to be his late uncle's friend; Kyraim also made an in-court identification of Rivera. (R. 262:64–65.)

At around 6 p.m. on the day after the shooting, a detective visited Beth in the hospital and brought the Facebook photo that Kyraim had supplied. (R. 262:77, 80.) The detective told Beth that he "had a photograph [he'd] like to show her to see if she recognized the person" in it. (R. 262:77.) While the photograph included the name "Alberto Ortiz," the detective displayed the photo in a way that prevented Beth from seeing the name. (R. 262:79.) When Beth looked at the photo, she "gasped, opened her mouth, and said, 'That's him.'" (R. 262:78.) She said that she was 100 percent certain that the person in the photograph was the gunman and the person she knew as Alberto "based on her past dealings with him," having seen him approximately six times before the crime. (R. 262:77–79.)

When Beth saw the photograph, she had already told police that she knew the person who shot her and that his name was Alberto. (R. 262:30, 50.) Beth testified that none of the officers at the crime scene mentioned the name Alberto, and that she was the first person to identify the gunman by that name. (R. 262:50–51.) And she confirmed that she gave the name Alberto to police because she knew the person who pointed the gun at her as Alberto.

At trial, Beth was again shown the Facebook photo and confirmed that it depicted the person who she saw with the gun the day of the crime. (R. 262:30.) She acknowledged, while shown the photo (R. 102) on direct, and later when questioned on cross-examination, that the name "Alberto Ortiz" appeared at its bottom. (R. 262:32–33, 44.) But Beth never said that she saw the name when the detective showed her the photo in the hospital; at best, she couldn't remember if she saw the name

at the time. (R. 262:51–52.). Moreover, Beth explained that she recognized in the photo the face of the person she knew as Alberto, who was Hodges's friend and who had held her at gunpoint that night. (R. 262:52, 55.) She confirmed that she "identified the name Alberto and the face of the defendant . . . because that's who [she] saw that night." (R. 262:52.)

In all, the procedure was not impermissibly suggestive. The detective showed Beth a photograph of Rivera after corroborating whom the Alberto Beth had named could be. The police narrowed down who Alberto was after Hodges's nephew independently confirmed that he also knew Alberto, and produced a photograph of him. The detective showed Beth that photo (but not the name). The detective also did not tell Beth that the photo was of Alberto or a suspect; he simply asked if she recognized the person. And Beth confirmed immediately that the person was the Alberto she knew and the Alberto who pointed a gun at her that night. In short, Beth identified Rivera by the photo because she knew him and recognized him as the gunman, not because of a name on the photo or the fact that it was the only photo that the detective showed her.

3. Beth's identification was reliable, and the showup procedure did not taint her later identifications of Rivera.

Even if the showup was impermissibly suggestive, Beth's identification of Rivera from the photo was reliable based on the facts applied to the *Biggers* factors.

The first two factors consider the witness's opportunity to view the suspect at the time of the crime and her degree of attention. *Biggers*, 409 U.S. at 199. These factors "appear to question identifications where a witness briefly sees a stranger, perhaps out of a window, under poor conditions." *Roberson*, 389 Wis. 2d 190, ¶ 72. Here, Beth knew Rivera, she had seen him five or six times before, and she recognized him

when he stood just outside her car window, his face unconcealed, and talked to her. Beth's observation of Rivera was not in passing or from a distance; he was within a few feet of her and had her attention, particularly once he aimed his gun at her.

Beth's observations of Rivera did not end there. Even though she had to put her head down once she was in the back of the car, she sensed that the gunman got into the second row, where over the course of the ordeal Beth heard Rivera speak to Hodges and others; she testified that she recognized Rivera's voice. (R. 262:20.)

As for the third factor, Beth provided police with a description of Rivera before identifying him in the photo. Beth knew his first name was Alberto, she knew where he lived, and her description of him as "a male, Hispanic, approximately 30 years of age, with a stocky build and possible facial hair" (R. 262:59) was not inaccurate.

As for the fourth and fifth factors weighing the level of certainty and length of time between the crime and confrontation, both favor reliability. Beth immediately identified Rivera in the photo the day after the crime, reacting emotionally, saying "[t]hat's him," and confirming with 100 percent certainty that Rivera was the Alberto she knew. To that end, Beth consistently testified that she knew Rivera by his face, not simply because the police showed her a photo and not based on any physical features like tattoos. She never signaled any uncertainty or assumptions about who the gunman was. In her statements to police, in her out-of-court identifications, in her in-court identification, and in her testimony at trial, she never expressed doubt or hesitation about identifying Rivera.

To that end, there was no basis based on the showup to suppress Beth's in-court identification of Rivera. The *Wade* factors demonstrate that Beth's in-court identification was

not tainted by her seeing the photo. As discussed, Beth saw Rivera face-to-face and heard him speak over the many minutes that the crime took place. There were no significant discrepancies between her description of Rivera to police and his actual appearance. Beth did not identify or suggest that anyone else was the gunman, and never failed to identify Rivera as the gunman. The lapse of time between the crime and Beth's seeing the photo was short, just a day. And again, Beth had seen Rivera before that night. *Cf. Larsen*, 141 Wis. 2d at 422–23 (witness's prior familiarity with defendant supported determination that in-court identification was not tainted).

Beth later identified Rivera again during a lineup procedure four months after the crime with 100 percent certainty, again based on her recollection of seeing the gunman's face the night of the crime and the fact that she knew Rivera before the crime occurred. (R. 262:35–36.) Rivera makes no challenge to the propriety of that procedure. And at trial, Beth remained 100 percent certain that Rivera was the gunman. (R. 262:46.) While Beth acknowledged that her out-of-court identifications contributed to her certainty of her in-court identification of Rivera (R. 262:46), Beth was unequivocal that the photo depicted the gunman based on her knowing Rivera and encountering him that night (R. 262:51–52, 55). The showup procedure was not impermissibly suggestive, Beth's identification was reliable, and nothing about it tainted her later lineup or in-court identifications of Rivera.

4. Rivera's arguments do not compel a different conclusion.

Rivera provides a lot to unpack in his brief, but little of it is correct and none of it is persuasive.

a. Rivera misstates the law governing admissibility of identifications both as it is now and as it was at the time of his trial.

As an initial matter, it is not clear what law Rivera thinks trial or postconviction counsel should have advanced to support this proposed motion to suppress. He notes that at the time of his trial and direct appeal, *Dubose* and its "necessity" test governed the admissibility of showup identifications. (Rivera's Br. 33, n.15), *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W2d 126.[4] Yet he doesn't cite *Dubose* when he states the law governing admissibility of out-of-court identifications. Instead, he suggests that there remains a "necessity" test under *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012). (Rivera's Br. 20.) But he does not acknowledge that the *Roberson* court: (1) overruled *Dubose* to the extent that it required a "necessity" test to showup procedures, and (2) held that the admissibility of an out-of-court showup identification is subject to the same impermissibly suggestive/reliability test under which all

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[4] In *Dubose*, the supreme court held that to admit an identification from a showup procedure, the State had to show that the procedure was "necessary," i.e., the police lacked probable cause to arrest or exigent circumstances prevented the police from conducting a lineup or photo array. *Dubose*, 285 Wis. 2d 143, ¶ 33.

In his brief, Rivera says that *Dubose* governed the law regarding admissibility of an in-court identification arising from a showup. (Rivera's Br. 33 n.15.) That's not correct. *Dubose* required its necessity standard to apply to out-of-court identifications resulting from live showups. Its holding had no effect on the rule allowing admission of an in-court identification that "had an origin independent of the [improper showup] or was 'sufficiently distinguishable to be purged of the primary taint.'" *See Dubose*, 285 Wis. 2d 143, ¶ 38 (citing *State v. McMorris,* 213 Wis. 2d 156, 175, 570 N.W.2d 384 (1997)).

other out-of-court identifications are assessed. *Roberson,* 389 Wis. 2d 190, ¶¶ 81–82.

Moreover, Rivera also suggests that *Roberson*, to the extent that it held that a single-photo identification procedure was a "showup," and to the extent that that court assumed that that showup was impermissibly suggestive, would have supported a motion to suppress in his case. (Rivera's Br. 17–20.) But Rivera's trial counsel could not have relied on the supreme court's decision in *Roberson* at the time of Rivera's trial, because *Roberson* hadn't been decided at that point. And, at the time of Rivera's trial, it was not settled law that law enforcement's showing a witness a single photo was a "showup" triggering the Dubose "necessity" test.

Indeed, whether law enforcement's showing a single photo to a witness qualified as a "showup" to which the *Dubose* necessity test applied was, at best, unsettled law at the time of Rivera's trial. In fact, when *Roberson* was still before this Court (a year after Rivera's trial) Roberson had argued that the rule in *Dubose* should apply to the single-photo identification procedure in his case. This Court rejected that argument, stating that *Dubose* was limited to live showups and that "our case law dictates that a single photo identification procedure is not a 'showup.'" *State v. Roberson*, 2018 WI App 71, ¶¶ 10–13, 384 Wis. 2d 632, 922 N.W.2d 317, *aff'd on other grounds,* 389 Wis. 2d 190, ¶¶ 10–13.

So even though the supreme court in *Roberson* later said that a single-photo procedure would be subject to the same constitutional scrutiny as a live showup, *Roberson*, 389 Wis. 2d 190, ¶ 48, this Court's decision in that case reflects that, as of Rivera's trial, the holding in *Dubose* did not extend beyond live showups. Accordingly, counsel at the time of Rivera's trial likely could not have successfully argued that *Dubose* should apply to Beth's identification of Rivera from the Facebook photo. At best, whether the *Dubose* necessity test applied to a single-photograph procedure was unsettled

law at the time of Rivera's trial and thus could not be a basis to claim that counsel was ineffective. *See State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93 (stating that to show deficiency, a defendant must show that counsel failed to raise an issue of settled law).

Thus, even if trial counsel at the time of Rivera's trial sought to exclude both Beth's out-of-court identification of Rivera from the photo and Beth's in-court identification, counsel would have had to argue the following: first, the "necessity" standard for showups under *Dubose* also applied to a photo identification process like the one used in this case; second, that the photo identification process did not satisfy the *Dubose* "necessity" standard; and third, that Beth's in-court identification did not rest on a source independent of the initial out-of-court identification. *See Dubose*, 285 Wis. 2d 143, ¶ 33, *overturned by Roberson*, 389 Wis. 2d 190, ¶ 81. Alternatively, counsel would have had to argue that if *Dubose* did not apply to the single-photo procedure here, it was impermissibly suggestive, the State could not show that Beth's identification of Rivera was otherwise reliable, and that the in-court identification could not be purged of the taint of the improper out-of-court identification.

As discussed above, the first argument, relying on *Dubose*, could not support a claim of ineffective assistance, because at the time *Dubose* and its necessity test was limited to in-person showup procedures, not to situations where police showed a witness a single photograph. As for the second argument, as discussed above, that claim would have failed because the officer's showing Beth the photo was not impermissibly suggestive, her identification was reliable, and

Beth's in-court identification was not tainted by her seeing the photo.[5]

b. The postconviction court's reliance on part of the State's brief was neither improper nor a basis for reversal.

Rivera primarily faults the postconviction court for adopting the State's reasoning in its brief in concluding that the showup was not impermissibly suggestive, that Beth's identification was reliable under the circumstances, and that as a result, Rivera failed to establish a viable claim of ineffective assistance of trial counsel that postconviction counsel failed to raise. (Rivera's Br. 16–17; *see* R. 226:4.) Rivera cites a case in which this Court criticized a postconviction court for adopting the State's entire brief as its decision without making clear which arguments it found persuasive. (Rivera's Br. 16–17 (citing *State v. McDermott*, 2012 WI App 14, ¶ 9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237)).

Here, the court's adoption of part of the State's brief on one issue was not as wholesale or as stark as the court's adoption in *McDermott*. Rather, the court set forth the relevant legal standard, and the State's brief applying the facts to that standard was concise and straightforward; the court's adoption of a part of the State's brief did not leave any mystery of what it found persuasive. In all events, this Court reviews these issues de novo, so the postconviction court's adoption of part of the State's brief "is of no consequence in this case." *McDermott*, 339 Wis. 2d 316, ¶ 9 n.2. And, as

[5] Even if Rivera could somehow argue that law was settled, that counsel was ineffective for not raising a *Dubose*-based claim, and he ultimately got a new trial on that basis, at a new trial *Roberson* would apply and the court would not exclude Beth's out-of-court or in-court identification. Accordingly, the outcome of a new trial would be the same.

discussed, the showup was not impermissibly suggestive, and Beth's identification was reliable under the circumstances.

c. Rivera misconstrues and misstates the trial testimony.

Rivera claims that here, "police asked [Beth] if the picture was the man she knew as Berto." (Rivera's Br. 20 (citing R. 262:44).) The transcript page Rivera cites to contains no testimony reflecting what police asked Beth. Rather, the detective testified that he simply asked Beth whether she recognized the person in the photograph. (R. 262:77.) There is no testimony suggesting that the detective told Beth that the person in the photo was a suspect or asked her whether he was Berto.

Rivera insists that Beth's viewing Rivera that night was limited because she saw Rivera for only a few seconds in "poor" conditions and through a tinted window. (Rivera's Br. 11, 18–19, 21.) But Beth testified that the window tint didn't make it hard to see outside the vehicle. (R. 262:10.) And while it was dark outside and Beth only looked at Rivera face-to-face for a few seconds, he was close to her, he spoke directly to her, and he was someone she knew and had seen before. Moreover, her full encounter, including driving to and from Hodges's apartment, was significantly longer than a few seconds, and during which she recognized Rivera's voice when he demanded money from Hodges. (R. 262:20.)

Rivera asserts that it was an established fact at trial that Beth saw the name on the photo during the showup, and that the court ignored it. (Rivera's Br. 24–25.) This argument depends on a tortured reading of the trial testimony. Rivera writes that Beth testified that she "actually saw the name on the photo" but that the "skilled prosecutor" persuaded her to "become unsure of whether she actually saw the name on the photo." (Rivera's Br. 24–25.) He then leaps to the conclusion that Beth "saw the name 'Alberto' on the photo during the

show-up, but the circuit court managed to ignore that fact." (Rivera's Br. 25.)

The only testimony as to whether Beth possibly saw the name "Alberto" on the photo at the time of the showup was from the detective, who testified that he showed Beth the photo in a way to prevent her from seeing the name. (R. 262:79.) Contrary to Rivera's claims (Rivera's Br. 24–25), there was no testimony to the contrary. Beth never confirmed that she saw the name "Alberto" on the photo at the showup.

To be sure, Beth agreed on cross-examination that the at the bottom of the photo she was shown, "it has a name Alberto." (R. 262:44.) But neither the question nor Beth's answer to it make clear that she saw the name when the detective showed her the photograph. Indeed, when Rivera's counsel asked Beth about the name on the photo, Beth had moments earlier seen the photo and the name when the prosecutor displayed it. (R. 262:32.) When asked by the prosecutor, Beth confirmed that that was the photo the detective showed her, but again, she never stated that she saw the name when she first saw it. (R. 262:32–33.) Moreover, on redirect, when asked how she knew, when shown the photo, that the person depicted was the gunman, she said "[b]ecause of his face." (R 262:51.) And given her recognition of Rivera's face, Beth simply couldn't remember whether she saw the name Alberto on the photo at the time of the showup. (R. 262:50–51.)

Rivera also claims that Beth testified that "when she first identified the suspect as 'Alberto,' she had already heard the name 'Alberto' being used in the ambulance. (R. 262- 46)." (Rivera's Br. 25.) Again, Rivera misconstrues Beth's testimony. Beth was asked by Rivera's counsel:

> Q: When you said the night in the ambulance that it was Berto, that was after you had heard the name being used, Berto, right?
>
> A: Correct.

(R. 262:45–46.) On appeal, Rivera reads that exchange to be an admission by Beth that she had heard law enforcement mention Alberto (or Berto) before she told police Alberto was the shooter. (Rivera's Br. 25.)

But counsel did not ask Beth whether she had heard a responder use the name "Berto" before Beth so identified the gunman. Rather, counsel appeared to be asking Beth to confirm her testimony on direct that Hodges had told her that they were stopping at "Berto's house." (R. 262:7.) Indeed, in closing arguments, counsel referred back to the fact that Beth said that she heard the name "Berto" from Hodges early in the evening, not from someone in the ambulance. (R. 265:59–60.) And on redirect, Beth confirmed that she had not heard any officers mention the name Alberto before she did, and that she was the first person to use Alberto's name when identifying the gunman. (R. 262:50–51.)

Rivera also claims that there's no evidence that Beth really knew or had seen Rivera before that night, given Beth's testimony that when Hodges had gone to Rivera's apartment in the past, she stayed in the car while Hodges went inside. (Rivera's Br. 25.) He notes that the record lacks any details about when Beth had seen Rivera face-to-face, for how long, or the circumstances of those encounters, and he cites to one portion of the transcript where Beth said, "No," when asked whether she knew "the person that shot you." (Rivera's Br. 25; *see* R. 262:30–31.)

But that Beth may have stayed in the car when Hodges went to Rivera's apartment does not mean she had never seen him or encountered him. And Beth's testimony on that point was unequivocal—she knew Rivera because she had seen him around six times before, she knew his first name, and she knew that Alberto was the person who came out of the building, who told her to look under the driver's seat, and who pointed a gun at her. It was consistent with her statements to police that she knew Alberto because she had seen him before.

She never stated that she merely assumed or guessed that the gunman was Alberto or that she never saw Hodges's friend Alberto (or "Berto"). And the single time that Beth answered "no" to the question whether she knew "the person that shot" her, she clarified that she had seen the gunman, identified him, knew his name to be Alberto, but she wasn't "friends with him." (R. 262:31.)

Rivera further imputes significantly more meaning in another of Beth's answers than the record supports, to the extent that she said she saw the Facebook photo "[i]n the hospital, the night it happened and the next day after it happened." (R. 262:55.) He calls it "curious and suspicious" that, in that remark, Beth said the showup was not the first time she saw the Facebook photo. (Rivera's Br. 23.)

A more reasonable interpretation of Beth's statement is that she was correcting herself to state that the showup occurred the next day. That is so because the shooting took place around 9:00 p.m. on April 8; the testimony reflects that it took law enforcement some time to determine who Alberto was. The detectives talked with a few people before locating Kyraim Hodges, who found the Facebook photo of Rivera and showed police where Rivera lived. Moreover, the detective who showed Beth the photo at the hospital said that it occurred the next day, April 9, at around 6:00 p.m. (R. 262:80.) Given the many steps the police had to take to figure out who Alberto was, get the photograph, tie the Alberto in the photograph to Rivera, and get to the hospital to meet with Beth, it was not possible that she first saw the photograph the same day as the shooting. Rivera reads far too much into Beth's statement.

In all, and as the postconviction court correctly concluded, any motion to suppress Beth's in-court identification based on the showup would have failed. Because trial counsel could not be ineffective for failing to file

a losing motion, it would not have served as a "clearly stronger" claim for postconviction counsel to raise.

B. The trial court would have denied a motion to suppress because Rivera was assisted by counsel at the lineup.

Rivera also claims that postconviction counsel should have challenged trial counsel's performance for not seeking suppression of Beth's in-court and lineup identification based on the fact that a public defender assisted him during the lineup procedure when he had retained counsel at the time. (Rivera's Br. 26–32.) He claims that he was entitled to his counsel of choice at the lineup, and that that deprivation was per se prejudicial. (Rivera's Br. 26–27.) As with Rivera's first claim, any motion filed on this basis would have failed.

A defendant has a Sixth Amendment right to counsel at a post-indictment lineup. *Wade*, 388 U.S. at 228; *State v. Beals*, 52 Wis. 2d 599, 607, 191 N.W.2d 221 (1971). Counsel's purpose at the lineup is to serve as "eyes and ears for the accused, not as interrogator or cross-examiner." *Wright v. State*, 46 Wis. 2d 75, 84, 175 N.W.2d 646 (1970). "The important purpose to be served is that of observer . . . . It is [counsel's] presence, not his participation, that is relied upon to prevent unfairness and lessen the hazards of eyewitness identification at the lineup itself." *Id.*

Here, because Rivera was represented by counsel at the lineup, and because his Sixth Amendment right attached only to the felon-in-possession count, a motion to suppress based on a claimed deprivation of counsel at the lineup would have failed.

1. The record reflects that, at the time of the lineup, the public defender's office represented Rivera and that an attorney from that office represented him at the lineup.

Here, Rivera was represented by counsel at the lineup. Rivera was charged with a count of possession of a firearm by a felon, as a repeater, on April 16, 2015. (R. 2.) Rivera was taken into custody in West Allis on August 20, 2015. (R. 201:2.) At his initial appearance on that charge on August 26, 2015, Rivera was represented by a state public defender. (R. 230:4.) At that hearing, the court informed Rivera that the public defender's office would appoint him counsel. (R. 230:5.) Later that day on August 26, police conducted an in-person lineup at which Rivera was represented by another attorney from the public defender's office, Attorney Liggins. (R. 201:3.)

Rivera claims that he was denied counsel at the lineup; he asserts that he had "immediately retained counsel" when the State had charged him in April and remained represented by that attorney, Robert LeBell, as of August 2015. (Rivera's Br. 28) (R. 206:2.) Yet the record contradicts Rivera's assertion. Rivera attended an initial appearance on August 26, 2015, with a public defender, at which the court informed Rivera that he had a right to counsel, that he qualified for public defender representation, and that the public defender's office would appoint him counsel. (R. 230:5.) At no point in that hearing did Rivera indicate that he was actually represented by someone else, and there's nothing in the appellate or circuit court record to suggest that the State or court was on notice that as of August 26, 2015, Rivera had retained counsel outside the public defender's office.

The only evidence that Rivera had retained other counsel as of August 26, 2015, came from Rivera himself in an affidavit attached to his postconviction motion. (R. 206:2.) Rivera seems to think that his word is enough to establish

that fact as true (Rivera's Br. 28), but if Rivera had hired a different attorney as of that date, the record would reflect it or, if not, counsel could seemingly easily confirm that fact. Yet Rivera provided nothing from his allegedly then-retained counsel confirming that he represented Rivera at the time or that he had filed notice as Rivera's attorney of record. Rivera points to nothing in or outside the record suggesting that LeBell was his attorney at the time of the lineup and initial appearance and that the prosecutor or court had reason to know that.

The simplest explanation is usually the correct one, and it so follows here. Rivera, at the time of the lineup, was represented by the public defender's office and had a public defender present at the lineup. He had no basis to suppress the lineup identification based on any alleged deprivation or absence of counsel.

Even if there was some impropriety as to *which* attorney observed the lineup, Rivera cannot show that he is entitled to relief, because substitute counsel at a lineup is not impermissible.

2. Counsel's role in a lineup is limited, and the right to counsel does not preclude the use of substitute counsel to fulfill that limited role.

Counsel's role at a post-indictment lineup is limited. *Wright*, 46 Wis. 2d at 84. The right requires the presence of counsel at the lineup, but not their participation:

> The presence of counsel at the lineup is intended to make possible the reconstruction at the time of trial of any unfairness that may have occurred at the time of the lineup. The important purpose to be served is that of observer. A police lineup is not a magisterial or judicial hearing at which a record is made and objections to procedures can be entered. The lawyer is present as eyes and ears for the accused, not as interrogator or cross-examiner. It is his presence, not

> his participation, that is relied upon to prevent unfairness and lessen the hazards of eyewitness identification at the lineup itself.

Id. at 84–85 (footnotes omitted); *see also Wade*, 388 U.S. at 231–32 (stating that counsel's role at a lineup is as an objective observer to assist in "reconstruct[ing] at trial any unfairness that occurred"). Accordingly, the right to counsel at a lineup does not necessarily require the presence of defendant's counsel of record or even of choice, noting that "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 238 n.27.

Based on that language in *Wade*, then, having substitute counsel at a post-indictment lineup would not seemingly function as a "complete" deprivation—i.e., absence of counsel—triggering the presumption of prejudice. Moreover, prejudice is presumed when a defendant is denied their counsel of choice *at trial*. Prejudice in that instance is presumed because no two counsel would represent a defendant identically, thus making it impossible to identify how the defendant's chosen counsel would have handled the strategy, objections, or questioning, or whether those choices would have had a different effect. *See, e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150–51 (2006). There is no authority holding that prejudice is presumed when substitute counsel observes a lineup, a scenario the Court in *Wade* made clear is not necessarily a Sixth Amendment violation.

To that end, even if Rivera can show that there was some error here in the State's not notifying the person whom Rivera now claims was his retained counsel (notwithstanding that the person did not represent Rivera at a hearing that same day) about the lineup, he should have to show that he was prejudiced by the State's providing him counsel from the office that had represented him that morning. To that end,

he's offered nothing to suggest that Attorney Liggins did not adequately observe the lineup, that she did not convey her observations to Rivera's subsequent counsel, or that she failed to fulfill her role as an observer such that he was prevented from reconstructing the lineup and identifying any unfairness.

On this point, Rivera primarily cites cases like *Wade*, which involved the complete absence of counsel from a post-indictment lineup, or cases not on point because they involved allegations that there was a the wholesale deprivation of counsel at trial, *Powell v. Alabama*, 287 U.S. 45, 57 (1932); the erroneous exclusion at trial of the defendant's counsel of choice, *Gonzalez-Lopez*, 548 U.S. at 150–51; a denial of the defendant's request to proceed at trial with conflicted counsel, *Wheat v. United States*, 486 U.S. 153, 164 (1988); and an argument that application of forfeiture laws infringed upon the defendants' ability to retain counsel of choice. *Caplin & Drysdale*, 491 U.S. 617, 623–24 (1989). (Rivera's Br. 26–28.) None of those cases is applicable here.

Rivera also tries to distinguish *Wright* from this case, because there, the court held a hearing, Wright's counsel testified, and the court found that Wright was informed of his right to an attorney at the two lineups in that case and that counsel Wright had chosen was present at both lineups. (Rivera's Br. 30–31.) To be sure, *Wright* does not address whether a defendant's rights are violated when substitute counsel observes a lineup. But *Wright* stands for the proposition that the Sixth Amendment requires the *presence* of an attorney at a post-indictment lineup, which is what Rivera had.

Finally, and as discussed below, at the time of the lineup, Rivera's Sixth Amendment right had only attached to the felon-in-possession charge, not the more serious charges that the State later filed.

3. Rivera's Sixth Amendment right to counsel at the lineup attached only to the felon-in-possession count.

Even if Rivera is correct that the State and parties were somehow on notice that Rivera was represented by different counsel than the state public defender at the time of the lineup and that the State deprived him of his counsel of choice at the lineup, his Sixth Amendment right attached only to the felon-in-possession charge, not to the more serious charges for which he is seeking reversal.

The Sixth Amendment right to counsel is offense-specific. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Accordingly, though the Sixth Amendment right attaches when a defendant is charged for an offense, the right attaches only to that offense and other "offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test." *Texas v. Cobb*, 532 U.S. 162, 172–73 (2011). The *Blockburger* test provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Hence, the Sixth Amendment right to counsel does not attach to uncharged offenses that are not the "same offense" as the charged offense inasmuch as they require proof of facts or elements that the charged offense does not. *Id.* at 173.

Here, at the time of the lineup, Rivera was charged with felon in possession of a firearm as a repeater. Under the *Blockburger* test, the later-charged crimes of homicide, attempted homicide, and armed robbery all required proof of different facts and elements than the felon-in-possession count. Thus, Rivera had no Sixth Amendment right to counsel

with regard to those charges. Any deprivation of counsel at the lineup, then, cannot support a new trial on those counts.

Accordingly, to the extent that Rivera is ultimately seeking relief from his convictions for the homicide and robbery counts, his Sixth Amendment right to counsel did not attach at the lineup with respect to those charges. With regard to the felon-in-possession count, which given Rivera's past felony conviction only required the jury to find that Rivera possessed a firearm, Rivera cannot show that the attorney who observed the lineup failed to fulfill their limited purpose role and as a result, prejudiced him with regard to that conviction.

C. Because the underlying claims challenging trial counsel's ineffectiveness cannot prevail, they are not "clearly stronger" than those raised; postconviction counsel was not ineffective.

Rivera faults the postconviction court for not doing a comparative analysis of the claims that postconviction counsel raised on appeal and those he now claims counsel should have raised. (Rivera's Br. 32–33.) He asserts that because the sufficiency of the evidence and other-acts claims were weak, the ineffective assistance of trial counsel claims were "clearly stronger."[6] (Rivera's Br. 33–34.)

The State disagrees that the claims raised on appeal were "weak." The admission of other-acts is often a point of contention on appeal, and the sufficiency-of-the-evidence claim wasn't frivolous. Even so, neither motion that Rivera

[6] Ironically, Rivera claims that the sufficiency of the evidence claim was particularly weak because Beth had testified that Rivera was the shooter (Rivera's Br. 33), notwithstanding his other claims that Beth's out-of-court and in-court identifications were so unreliable and tainted that they should have been suppressed.

now claims trial counsel should have raised would have succeeded; had counsel raised them in Rivera's initial postconviction motion and direct appeal, the court of appeals would have still affirmed Rivera's conviction. Accordingly, it doesn't matter how weak the original claims were when the complained-of omitted claims also lacked merit. The new, but demonstrably meritless claims cannot satisfy the "clearly stronger" standard. Given that, the postconviction court correctly denied Rivera's motion without a hearing.

CONCLUSION

Rivera is not entitled to an evidentiary hearing on his motion. This Court should affirm the decision and order denying Rivera's Wis. Stat. § 974.06 motion without a hearing.

Dated this 22nd day of December 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,579 words.

Dated this 22nd day of December 2021.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of December 2021.

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