STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2021 AP 1100

STATE OF WISCONSIN,

Plaintiff-Respondent-Respondent,

v.

ALBERTO RIVERA,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW AND APPENDIX

PETITION FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, DATED JULY 12, 2022

Respectfully Submitted:

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ISSUES PRESENTED

I. WHETHER THE IN-COURT IDENTIFICATION OF RIVERA BY THE STATE'S PRIMARY WITNESS SHOULD HAVE BEEN SUPPRESSED BECAUSE OF A VIOLATION OF HIS RIGHT TO HAVE RETAINED COUNSEL PRESENT DURING THE LINE-UP PROCEDURE.

The trial court answered: No.

The court of appeals answered: No.

II. WHETHER THE IN-COURT IDENTIFICATION OF RIVERA BY THE STATE'S PRIMARY WITNESS SHOULD HAVE BEEN SUPPRESSED BECAUSE IT WAS TAINTED BY A HIGHLY SUGGESTIVE "SHOW-UP" PROCEDURE.

The trial court answered: No.

The court of appeals 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.

The court of appeals answered: No.

CRITERIA RELIED UPON FOR REVIEW

I. THIS PETITION PRESENTS A NOVEL, REAL AND SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW, THE RESOLUTION OF WHICH WILL HELP TO DEVELOP AND CLARIFY THE LAW, WITH STATEWIDE IMPACT.

This petition presents a significant constitutional question of law heretofore unaddressed in this state: whether a defendant has a right to have his or her already retained counsel present when being compelled to participate in a post-indictment, pretrial line-up. In this case, the petitioner, Alberto Rivera, had already retained Attorney Robert LeBell and, upon arrest and again before being compelled to participate in a line-up, demanded access to, and the presence of, Attorney LeBell. Rivera's demands were ignored and a public defender he did not know was foisted upon him for purposes of the line-up. Consequently, this petition asks whether the State can completely disregard one facet of the Sixth Amendment (the right to counsel of choice) while paying mere lip service to another facet of the Sixth Amendment (the right to counsel during a post-indictment, pretrial line-up).[1]

The post-indictment, pretrial line-up is a critical stage at which defendants have a right to counsel. The Supreme Court has reasoned that because there is grave potential for prejudice

[1] As further addressed below, the line-up identification of Rivera as the perpetrator by B.J., the State's primary witness, also came in the wake of, and was tainted by, the police having conducted a "show-up" - showing B.J. a single photo of Rivera with his first name – Alberto – on it.

in the pretrial lineup, not capable of reconstruction at trial, and since presence of counsel can often avert prejudice and assure meaningful confrontation at trial, a post-indictment lineup is a critical stage 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). Accordingly, the right to counsel at trial and at a post-indictment line-up have been placed on equal footing.

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 is the right of a defendant who does not require appointed counsel to choose who will represent him. *Wheat v. U.S.*, 486 U.S. 153, 159 (1988). *Cf. Powell v. Alabama*, 287 U.S. 45, 52 (1932). ("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).

This petition presents this Court with an opportunity to address the intersection of two recognized Sixth Amendment rights: (1) the right to counsel of choice; and (2) the right to the presence of counsel at a post-indictment, pretrial line-up. The last time this Court came close to addressing this issue was in *State v. Wright*, 46 Wis. 2d 75, 175 N.W.2d 646 (1970). Notably, in addressing this issue in this case, the State, the circuit court, and the court of appeals all relied on *Wright*, to varying degrees, when rejecting Rivera's claim.

In *Wright*, this Court established that the rulings in *Wade* and *Gilbert* become applicable in Wisconsin once a criminal complaint is filed. *Id.* at 82. This Court decided *Wright*, however, in the wake of an evidentiary hearing the circuit court refused to grant Rivera, upon which the appellate court of appeals has now placed its imprimatur. And the evidentiary hearing in *Wright* mattered because this Court relied, in large part, on the circuit court's findings that prior defense counsel's testimony about the circumstances surrounding the line-up was 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 . . . 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, in *Wright* this Court addressed whether *counsel* was present, not whether *defendant's counsel* was present. And indeed, there was a finding-of-fact that the counsel defendant desired (and summoned) *was* present. *Wright* is therefore unhelpful in resolving the issue presented here. Moreover, to the extent this Court examined a difference between the attorney at the line-up and the attorney the defendant ultimately chose, said examination elides the issue presented herein, because the legal issue boiled down to whether Wright had the right to have the same attorney at both the line-up and the trial. *Wright,* at 85. Rivera never asserted such a right and as can be seen, *Wright* falls far short of resolving the claim presented because it addressed a claim of a different color.[2]

[2] It would be a queer and unworkable requirement indeed if the Sixth Amendment required an attorney who happened to be present at a line-up to also conduct a defendant's trial.

Another decision of this Court - *McMillian v. State*, 83 Wis. 2d 239, 265 N.W.2d 553 (1978) – was also deployed to address the issue Rivera presents. But *McMillian* is also unhelpful, however, because in that case, this 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 the 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. There is no evidence that Rivera's line-up was recorded.

In summary, there is a void in Wisconsin law as to whether a defendant who has retained counsel has the right to the presence of his retained counsel at a post-indictment, pretrial line-up. Can law enforcement eschew a defendant's demand for a phone call to *his* attorney, and instead call the public defender's office for just "someone, anyone," without violating the defendant's Sixth Amendment right to counsel of choice? This unanswered question is one that will have statewide impact and is also a question likely to reoccur until resolved by this Court.

II. THIS PETITION PRESENTS A NOVEL LEGAL ISSUE, THE RESOLUTION OF WHICH WILL HELP TO DEVELOP AND CLARIFY THE LAW, AND WITH STATEWIDE IMPACT.

As previously noted, B.J.'s identification of Rivera was initiated by the police showing her 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., 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. 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 . . . . 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. As will be seen, B.J.'s opportunity to view the suspect was both brief *and* under poor conditions. She only momentarily viewed the suspect at night through a tinted car window. Moreover, the suspect was pointing a gun at her, which would tend to have focused 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). Thereafter, she was laying down in the third-row seat of a 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. Indeed, B.J. testified she only saw the individual for "nothing more than seconds." (R262-47).

The court of appeals correctly noted that the law in Wisconsin regarding show-ups has shifted in recent years. At the time of Rivera's trial, the standard for show-ups was controlled by *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, *abrogated by Roberson*, *supra.* The appellate court ultimately decided Rivera's case was controlled by *Dubose* because it was final at the time *Roberson* was released, and therefore the "new" rule *Roberson* set forth could not be retroactively applied to Rivera's case.(Appendix A at 10, *citing State v. Lagundoye*, 2004 WI 4, ¶ 20, 268 Wis. 2d 77, 674 N.W.2d 526).

There is an inquiry, however, shared by both *Dubose* and *Roberson*, and it is an inquiry that merits this Court's attention, as it will assist in developing the law: the *necessity* of deploying a "show-up." *Dubose* at ¶ 32; *Roberson* at ¶ 20. This is fully consistent with Supreme Court precedent. The burden is on the defendant to show the method law enforcement chose to employ to identify a suspect as the perpetrator was "an unnecessarily suggestive identification procedure," creating a substantial likelihood of misidentification. *Perry v. New Hampshire*, 565 U.S. 228, 232 n.1, 235 (2012). *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. Due process concerns arise when law enforcement uses 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 his nephew. (R262-59-68). B.J., meanwhile, was in the hospital and going nowhere. Accordingly, nothing prohibited the police from assembling a photo array to show to B.J. Moreover, already knowing B.J. had committed herself to someone named "Berto," it was not merely "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.[3]

Further favoring the granting of this petition is that the appellate court alternatively applied *Roberson* to the issue presented. (Appendix A, ¶¶ 29-33). The appellate court noted that because B.J.'s identification of the photo likely provided the probable cause required to initially issue the arrest warrant for Rivera, showing B.J. the photo would have been deemed necessary, thus satisfying the necessity test of *Dubose*. (Appendix A, p. 11, fn 6). Among other things, this seems to erroneously suggest that post-*Roberson*, "necessity" no longer has any role to play in the analysis.

[3] In all candor, the record is ambiguous as to whether B.J. was shown, and saw the name "Alberto," on the photo presented to her. This ambiguity works against the State, however, since Rivera met his burden of production. B.J. first testified she was shown a photograph with the name "Alberto" on it. (R225-3-4; 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.*). A similar dynamic played out regarding who first injected the name "Berto" into the discussion, B.J. or the police. 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). Again on redirect, however, she was cajoled into testifying *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, it was not the first time she had seen it, as it had already been shown to her on the night of the incident. (*Id.* at 55).

> Moreover, the *urgency* justification implicit in this rationale fails on several fronts. Any "delay" entailed in creating a photo array, as opposed to a show-up, can be measured in hours, not days. B.J. was not suffering from life-threatening injuries. Moreover, the arrest warrant did not issue until eight days later. And under the rubric of "the State should not be permitted to have its cake and eat it too," the warrant issued was merely for FPF, which undermines any putative claim of exigency.

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). The complaint also averred that Rivera was the person who shot and killed Hodges and shot and wounded B.J. (*Id.*).

By the time the complaint was filed, Rivera had heard his parole officer wanted him for questioning. (R200). Thus, Rivera hired Attorney Robert LeBell to represent him on any charges and Attorney LeBell made arrangements for Rivera to turn himself in. (*Id.*). Rivera, however, decided not to turn himself in, and was eventually arrested four months later 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 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 a 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 withdrew as Rivera had not been able to retain him for the more serious charges. (R233-2-3). Rivera eventually hired other private counsel. (*Id*.).

On November 9, 2015, the State moved to introduce other acts evidence; a 1997 homicide involving Rivera. (R11). On December 18, 2015, the court ruled it would not allow the evidence unless Rivera testified and presented a defense of identity or motive, in which case the door would open, and the prior act evidence could come in. (R235-14-15). On June 26, 2017, at a final pretrial, it was again noted 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 strategically addressed the prior act during Rivera's 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. (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 in this petition. (*Id.*). On June 23, 2021, the circuit court denied the motion without a hearing. (R226). Rivera appealed. (R227). On July 12, 2022, the court of appeals affirmed. [4] (Appendix A).

[4] In denying Rivera's motion, and concluding he failed to prove IAC, the circuit court simply incorporated, as part of its decision, large portions of the State's brief. (R226-4). One decade earlier, the appellate court frowned on such an approach. *State v. McDermott*, 2012 WI App 14, ¶ 9, fn 2, 339 Wis. 2d 316, 810 N.W.2d 237. Here, however, the appellate court

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 and saw a body in the backseat of a car, and a woman screaming. (*Id.*). Moments later, Claudia Derringer, who lived in an apartment across the street, heard pounding on her lobby door and opened it to see 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.[5] (*Id.* at 114-120).

The State's primary witness was B.J., who had known Hodges for six months. (R262-5). She said that on April 8, 2015, Hodges picked her up in his SUV and they were heading to Speed Queen when Hodges got a call and then announced they were headed to Rivera's house. (*Id.* at 6-9). Hodges' demeanor remained normal, but then they were stopped for tinted windows and delayed. (*Id.*).

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apologetically found a way to deem the lazy approach to be inconsequential. (Appendix A, p. 9, fn 4).

[5] The vehicle was processed and prints, bullets and casings, and DNA samples obtained. Forensics determined at least two weapons, and maybe three, were involved in the incident. No firearms were ever recovered, however, nor were Rivera's prints, or his DNA, ever connected to the crime scene.

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). The record reflects that after befriending each other in prison, Hodges and Rivera began dealing drugs together upon their release. (R264-46). B.J. eventually saw someone come out and unlocked the door, whereupon she saw a reflection of a light-skinned person going to the back of the 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, and through illegally 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 row of the SUV on the passenger side. (*Id.* at 15-19). He told her to keep her head down and she would be fine; so she did, crossing her wrists over her forehead. (*Id.*). A black man got in the driver's side, but she could not see who it was. (*Id.*). The car moved to the back of the building and Rivera called to have something brought down. (*Id.*). Hodges was then pushed into the middle seat and his voice was muffled as if something covered his mouth. (*Id.*). She then heard the individual ask Hodges where the money was. Hodges responded he did not have any. (*Id.*).

[6] The reliability of B.J.'s identification of Rivera is central to this petition, and Rivera has steadfastly denied involvement in the incident. Nevertheless, the Statement of Facts will refer to "Rivera" as the perpetrator and attribute to him the acts B.J. attributed to him at trial.

B.J. claimed Rivera 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. This would have been curious if the inquisitor was Rivera since Rivera already knew where Hodges lived. (CITE). In either event, 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, a truck pulled up and someone approached Rivera's side to say they forgot Hodges' keys, and Rivera told his driver to go back. (*Id.*).

On the way back, however, after about 5-6 minutes, the vehicle stopped, and the door opened. (*Id.* at 24-28). She 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 fired two shots, separated by a pause. She did not see this shooter either, nor feel anything, and only later realized she had been shot. 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.*).

[7] There was much B.J. did not see, as she scrupulously followed the order to keep her head down. (*Id.* at 41-44). She did not know where the driver was when the door opened, or how many people had brought Hodges to the car. (*Id.*). She did not know where the other person from the truck came from. (*Id.*). She did not know who was in the apartment Hodges entered. (*Id.*). She did not know how many people were in the truck. (*Id.*). Most notably, she did not see who shot her or Hodges. (*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 photo of was Rivera. (*Id.* at 44).

Rivera admitted he knew Hodges, as 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 drugs to, and these included Levell Drew and Terrance Jackson.[8] (*Id.* at 50-51).

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). Among the places Rivera and Hodges would meet was Hodge's place. (*Id.* at 53). Thus, Rivera would not have needed Hodges to point out where he (i.e., Hodges) lived. (*Id.* at 53).

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

Rivera, however, had never really met Hodges' new girlfriend, B.J. (*Id.* at 128).

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 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, the only way to get into Gitonna's second floor apartment. (*Id.* at 60). Rivera had the keys, opened the door, and saw that nobody was there. (*Id.* at 61). Rivera also noticed another set of keys on a table in the kitchen. (*Id.* at 65).

Rivera called Jackson, who told him to drive to 36th and Greenfield so Rivera did so, taking Gitonna's car, because he had a feeling something was up. (*Id.* at 65-66). When he arrived, he saw Hodges' SUV parked there, and when he saw Jackson get out of the driver's seat, he knew something was wrong, because 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.

Jackson then 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 Rivera's 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 also when he first learned 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 avoided all contact with Drew or Jackson after that, knowing that showing any weakness could be fatal.[9] (*Id.* at 77-78).

[9] The physical evidence corroborated Rivera's testimony. Neither his fingerprints nor his DNA were ever found anywhere at the crime scene. (R263-34, 106-112). Drew's fingerprint, however, was found on the duct tape. (*Id.* at 12). It does not appear Drew was ever charged with any crimes arising from this incident.

Argument

I. 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 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, 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 is 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.*

The court of appeals largely dodged this issue by pointing out that at the time of the line-up, Rivera was technically only facing the charge of FPF:

> [A]t the time of the lineup, the only charge that had been filed against Rivera was for being a

> felon in possession of a firearm, for which he had retained Attorney LeBell. The other, more serious charges against him - including first-degree intentional homicide, attempted first-degree intentional homicide, and armed robbery - were not filed until approximately a week after the lineup was conducted. The Sixth Amendment right to counsel is "offense specific[.]" *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). In other words, "[i]t cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* Thus, even assuming for the sake of argument that Rivera was entitled to have Attorney LeBell present for the lineup, this right would have only attached to the felon in possession of a firearm charge. *See id.*

(Appendix A, ¶¶ 37-38).

The appellate court then spun this reasoning, employing additional and especially circuitous reasoning, into an absence of prejudice: "Because the jury convicted him of first-degree intentional homicide . . . for the shooting[] of Hodges . . . there is not a reasonable probability of a different outcome relating to his conviction for being a felon in possession of a firearm." *Id.* at ¶ 40. This entirely ignores that the deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants.

Moreover, engrafting the "offense-specific" analysis of *McNeil* onto this case is inappropriate, and does serious harm to the Sixth Amendment rights implicated in this case. *McNeil* addressed whether the existence of counsel in the context of a West Allis robbery charge should be deemed the existence of counsel for the universe of potential charges, including the investigation of a murder in Caledonia. The issue in *McNeil* was:

> Does an accused's request for counsel at an initial appearance on a charged offense constitute an invocation of his fifth amendment right to counsel that precludes police-initiated interrogation on unrelated, uncharged offenses?

McNeil, at 175. Contrary to the issue in *McNeil*, and the implication of the appellate court's decision here, the charges at issue in Rivera's case were not "unrelated."

Indeed, all of the facts necessary to establish probable cause that Rivera had committed a homicide were already set forth in full in his original criminal complaint, the same complaint that curiously charged him only with FPF. (R2-3) ("[B.J.] stated that she believed that the defendant had tried to kill her as he must have aimed at her head for the round to strike her as they did . . . She stated she was 100% certain that the defendant was the person who shot her based on her contact with him at least 5 or 6 times in the past"). This criminal complaint was never amended. Instead, when the information was filed, the State simply added the homicide charges. In other words, it was no secret, but apparent to all, especially the State and law enforcement, that when Rivera was required to appear in a line-up, it was to expand the *very same* offense into

homicide charges. Stated differently, it is disingenuous to view the line-up as driven by a desire to solidify the pending FPF charge. All of the charges were related and inextricably bound up in the same offense.[10]

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."

Due process restricts admission of eyewitness identification testimony infected by unnecessary and 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). The admissibility of an in-court identification depends upon whether it has been tainted by unlawful activity. Evidence must be suppressed as fruit of the poisonous tree if it is obtained by exploitation of an illegality. *New York v. Harris*, 495 U.S. 14, 19 (1990). The remedy for an illegal warrantless search is suppression of any tainted identification evidence. *Id.*

[10] No countervailing policy considerations were advanced against telephoning Attorney LeBell. The facts of this case are bereft of any indication that obtaining the presence of Rivera's chosen counsel would have resulted in any prejudicial delay. The State 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. (R200-2). Nor was there any urgency in getting B.J. to view a line-up. It had been four months since the incident.

In-court identifications are admissible if 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). 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).

Counsel for Rivera could have established the method chosen by police was unnecessarily and 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.

In his brief-in-chief to the court of appeals Rivera averred that police asked B.J. if the picture was the man she knew as Berto. The court of appeals, in turn, and noting it was unable to find support for such an averment in B.J.'s testimony, cautioned Rivera's counsel to maintain accuracy in the facts presented in his brief. (Appendix A, p. 13, fn 7). Counsel takes said caution to heart, and concedes the averment should have been developed as implicit, rather than explicit, on the record. In either event, the averment was borne from the fact that B.J.

had already said "Berto" was the individual who shot her and Hodges, and then law enforcement showed her a single photo of "Berto," and with the name "Alberto" on the photo. Even if the police did not explicitly ask B.J. "is this Berto?," that such was the implicit inquiry seems rather imbedded in the very act of showing her that particular photo.

This 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 B.J.'s residence. More important still, the suspect in this case *did* make a substantial

effort to conceal his identity. 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 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

[11]Prophetically, *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.

was no documentation of B.J.'s identification of Rivera. And while B.J claimed an ability to identify Rivera, her testimony demonstrated little more than an ability to identify where he lived.

Moreover, B.J. 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).

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 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 is the paradigm within which the issue must be, but to date has not been, analyzed.

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).

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); *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.[12]

[12] Rivera will not address in full, at this stage (but will do so upon request) whether he presented a sufficient reason for not having raised the issues *sub judice* during his direct appeal, *see* section 974.06(4), Stats., or whether they are clearly stronger than the issues raised on direct appeal. *See, e.g., State v. Romero-Georgana*, 2014 WI 83, ¶ 4, 360 Wis. 2d 522, 849 N.W.2d 668. It suffices to say that the merits of the claims now before this Court stand in stark contrast to the two claims post-conviction counsel pursued: (1) sufficiency of the evidence, with its notoriously difficult and very narrow standard of review, *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203; and (2) other acts evidence, given that Rivera testified and put both identity and *modus operandi* at issue, and knew such would open the door for other acts evidence where the prior conduct was eerily similar and not remote in time. Section 904.04(2), Stats. *See also State v. Hammer*, 2000 WI 92, ¶ 24, 236 Wis. 2d 686, 613 N.W.2d 629. *State v. Murphy*, 188 Wis. 2d 508, 519, 524 N.W.2d 924 (Ct. App. 1994). Rivera therefore chooses brief treatment of this procedural issue. Moreover, it is unlikely this Court would grant review to address those procedural issues. Furthermore, the relative strength of the merits of the (overlooked) issues he *does* present are largely dispositive of these procedural questions.

Conclusion and Relief Requested

For all the foregoing reasons, Rivera respectfully requests this Court grant his petition.

Dated this 8th day of August, 2022.

/s/ Rex Anderegg
REX R. ANDEREGG
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Attorney for the Defendant-Appellant-Petitioner

CERTIFICATIONS

I hereby certify that this petition conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this petition is 7,935 words, as counted by Microsoft Office 365.

I further hereby certify that filed with this petition is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this petition is from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that the electronic copy of the Petition for Review filed with this Court is identical to the paper copies filed with the Court.

Finally I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of

juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 8th day of August, 2022.

Electronically signed by: Rex Anderegg
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