United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 25, 2019
Decided December 3, 2019

Before

DIANE P. WOOD, *Chief Judge*

MICHAEL S. KANNE, *Circuit Judge*

No. 19-1679

CYRUS LINTON BROOKS,
Petitioner-Appellant,

v.

RANDALL R. HEPP,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 17-C-1718

William C. Griesbach,
Judge.

ORDER

Cyrus Brooks has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CYRUS LINTON BROOKS,

Petitioner,

v. Case No. 17-C-1718

RANDALL R. HEPP,

Respondent.

DECISION AND ORDER

Petitioner Cyrus Linton Brooks, who is currently serving a sentence for first-degree reckless homicide in a Wisconsin state prison, filed a petition for federal relief from his state conviction pursuant to 28 U.S.C. § 2254 on December 11, 2017. A Milwaukee County jury found Brooks guilty as party to the crime and he was sentenced to thirty years of initial confinement and eight years of extended supervision. Brooks asserts that his state court conviction and sentence were imposed in violation of his rights under the United States Constitution. For the reasons that follow, the petition will be denied and the case dismissed.

BACKGROUND

In March 2011, the State charged Brooks and his co-defendant, Maurice Stokes, with first-degree reckless homicide as a party to the crime for the shooting death of Terry Baker in October 2005. They were tried separately. At Brooks' trial, Julius Turner described the events that took place the night before the shooting and the day of the shooting.

Turner testified that the night before the shooting, as he was walking back from a gas station, Brooks, Stokes, and another man approached him looking for Baker. Brooks told Turner that he

should stop hanging around Baker because Baker was a dead man and then showed Turner a handgun. The next morning, Baker left Turner's house on his bicycle, and Turner got in his car and traveled in the same direction. Turner then heard three or four gunshots. He saw a green vehicle that he recognized as usually being occupied by Brooks and Stokes parked in an alley. Turner testified that he saw Brooks in the ally with a rifle and Stokes with a handgun. Brooks then aimed his rifle at Baker as Baker was trying to flee over a fence. Brooks fired and struck Baker in the back.

According to the autopsy, the bullet traveled through Baker's lungs and heart, and he died in the backyard. ECF No. 10-19 at 64:24–65:23. Although Turner did not see Stokes fire his handgun, several .40 caliber casings were found at the scene, along with several .30-.30 spent cartridges. The bullet fired from a .30-.30 rifle that passed through Baker was found in his clothes at the autopsy. *Id.* at 67:7–16.

The preliminary hearing testimony of Michael Henderson, who failed to respond to a subpoena, was also read to the jury. Henderson testified that he was about two houses away from the location of the shooting. He testified that he saw Stokes with a gun, chasing Baker, and saw Stokes fire toward Baker. He did not see anyone else chasing or shooting at Baker. The State's theory was that Henderson's observations were at the beginning of the chase, that Brooks fired the fatal shot, but that both were criminally responsible. Based upon this and other evidence, the jury found Brooks guilty of first-degree reckless homicide.

Brooks subsequently filed a postconviction motion, which the circuit court denied. The Wisconsin Court of Appeals affirmed Brooks' conviction. *State v. Brooks*, No. 2013AP2260-CR, 2014 WI App 110 (Wis. Ct. App. Sept. 30, 2014). The Wisconsin Supreme Court denied Brooks'

petition for review on February 10, 2015. On October 5, 2016, Brooks filed a *pro se* collateral appeal brief with the Wisconsin Court of Appeals. The Court of Appeals affirmed the postconviction order denying relief. *See State v. Brooks*, No. 2016AP974, (Wis. Ct. App. Aug. 3, 2017). The Wisconsin Supreme Court denied Brooks' petition for review on November 13, 2017.

ANALYSIS

The petition is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. Under AEDPA, a federal court may grant habeas relief only when a state court's decision on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" decisions from the Supreme Court, or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d); *see also Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). A state court decision is "contrary to . . . clearly established Federal law" if the court did not apply the proper legal rule, or, in applying the proper legal rule, reached the opposite result as the Supreme Court on "materially indistinguishable" facts. *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state court decision is an "unreasonable application of . . . clearly established Federal law" when the court applied Supreme Court precedent in "an objectively unreasonable manner." *Id.*

This is, and was meant to be, an "intentionally" difficult standard to meet. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Woods*, 135 S. Ct. at 1376 (quoting *Harrington*, 562 U.S. at 103).

A. Right to Confrontation

Brooks asserts that he was denied his right to confrontation under the Sixth Amendment. The Sixth Amendment's Confrontation Clause provides that in all criminal prosecutions, "the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, the Supreme Court found that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant . . . had a prior opportunity for cross-examination." 541 U.S. 36, 53–54 (2004). Subsequently, in *Bullcoming v. New Mexico*, the Supreme Court addressed "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." 564 U.S. 647, 652 (2011). There, the Court reviewed the admissibility of a BAC report authored and signed by a non-testifying analyst. The report was introduced at trial through a surrogate analyst to prove that the defendant had a BAC level of 0.21. The Court held that the Confrontation Clause prohibits an analyst from testifying about a report completed by another analyst when the testifying analyst neither participated in nor observed or reviewed the other's analysis and did not have an "independent opinion" concerning the forensic testimony. *Id.* at 655.

In this case, Dr. K. Alan Stormo conducted an autopsy of Baker's body on October 30, 2005. Dr. Stormo retired prior to trial, and the prosecution called Dr. Wieslawa Tlomak to testify about Baker's cause of death at Brooks' trial. She testified that it was her opinion, to a reasonable degree of medical certainty, that Baker's cause of death was gunshot wounds to his chest. Brooks asserts

that his confrontation rights were violated because he could not confront the medical examiner who performed the autopsy.

The Court of Appeals found that Brooks failed to establish that he was denied his right to confrontation. In reaching this determination, the court relied on the Wisconsin Supreme Court's decision in *State v. Williams*, which held that "the presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion" satisfies a defendant's confrontation rights, "despite the fact that the expert was not the person who performed the mechanics of the original tests." 2002 WI 58, ¶ 20, 253 Wis. 2d 99, 644 N.W.2d 919. The court also noted that the Wisconsin Supreme Court later reiterated in *State v. Griep* that "expert testimony based in part on tests conducted by a non-testifying analyst satisfies a defendant's right of confrontation if the expert witness: (1) reviewed the analyst's test, and (2) formed an independent opinion to which he testified at trial." 2015 WI 40, ¶¶ 3, 47–57, 316 Wis. 2d 657, 863 N.W.2d 567. Applying these principles, the Court of Appeals found that the analyst who testified as to Baker's cause of death satisfied both prongs of this test and did not violate Brooks' confrontation right. *See* ECF No. 10-11 at 6–7.

While Brooks relies on *Bullcoming* to support his position that the prosecution was required to call the analyst who created the autopsy report as a witness, the testifying medical examiner here was more than a "surrogate" witness. As the Wisconsin Court of Appeals explained, the testifying medical examiner testified that she was a forensic pathologist for the Milwaukee County Medical Examiner's Office and had performed approximately 1,300 autopsies. She stated that she actively reviewed Baker's file, including the autopsy report and photographs, and reached her own

independent opinions regarding Baker's cause of death. *See id.* at 7. The analyst was able to convey what those opinions were and Brooks had an opportunity to confront her about the same. *Bullcoming* does not compel the conclusion that the analyst's testimony infringed Brook's confrontation right. The Seventh Circuit reached essentially the same conclusion in *United States v. Maxwell*, 724 F.3d 724 (7th Cir. 2013), in upholding the admissibility of the testimony of a lab analyst as to the nature of a controlled substance in reliance on information gathered and produced by an analyst who did not himself testify. I therefore cannot say that the Wisconsin Court of Appeals unreasonably applied clearly established federal law in concluding that Brooks was not denied his right to confrontation. Brooks is not entitled to federal habeas relief on this claim.

B. Ineffective Assistance of Counsel

Brooks has raised a number of arguments suggesting that his trial counsel and appellate counsel were ineffective. A claim of ineffective assistance of counsel is governed by well-established law set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the petitioner must show that (1) counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) counsel's deficient performance deprived the defendant of a fair trial. *Id.* at 687–88. A petitioner satisfies the first prong if he demonstrates that "counsel's representation fell below an objective standard of reasonableness." *Id.* To satisfy the second prong, a petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

"It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

unsuccessful, to conclude that a particularized act or omission from counsel was unreasonable." *Id.* at 689. For this reason, the Supreme Court has made clear that "judicial scrutiny of counsel's performance must be highly deferential." *Id.* That is, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and that "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

1. Trial Counsel

Brooks claims his trial counsel was ineffective for failing to investigate footprint evidence obtained from the hood of a car at the crime scene. This evidence revealed that the footprints crossing the hood of the car were size 11 to 11½. Brooks argues that because he wears a size 9 to 9½ shoe, he could not have left the footprints on the hood of the car. The Court of Appeals determined this evidence was not exculpatory. The court explained, the evidence at trial was that there were two men with guns, Brooks and Stokes, chasing Baker before he was killed. Therefore, the evidence that the footprints did not belong to Brooks would not have been exculpatory. The state court's conclusion was eminently reasonable and so federal habeas relief is unavailable.

Brooks also argues that he is entitled to habeas relief on his claim that trial counsel was ineffective for failing to subpoena Michael Henderson to testify at trial. Henderson testified at Brooks' preliminary hearing. He testified that he was approximately two houses away from where the shooting occurred and did not see anyone else firing a gun at Baker or chasing Baker except Stokes. Henderson never testified that Brooks had any involvement in the shooting. Henderson later testified at Stokes' trial. His testimony there contradicted the testimony he provided at Brooks'

preliminary hearing. In particular, Henderson indicated that he saw another person with Stokes; that the other person was caramel-skinned with braids; that Baker approached the two men on his bicycle, but jumped off the bicycle and ran between the houses, out of Henderson's sight; and that Henderson heard gunshots but did not see who was shooting. The State listed Henderson as a witness it planned to call at Brooks' trial, and Brooks' trial counsel believed he could rely on the State's subpoena to produce Henderson for trial. When the parties could not secure Henderson as a witness, Henderson's preliminary hearing testimony was read to the jury.

Brooks claims he was prejudiced by his counsel's failure to have Henderson testify about the caramel-skinned person involved in the shooting. But as the state courts noted, Henderson's preliminary hearing testimony in which he denied the existence of a second shooter was more favorable to Brooks than Henderson's testimony at Stokes' trial because the jury could have still reasonably concluded from the testimony regarding a caramel-skinned individual that Brooks was the second shooter. In other words, any testimony about a caramel-skinned individual would not have tipped the outcome of the case, and thus there was no showing of prejudice. This is a reasonable conclusion that does not come close to reaching the federal AEDPA standard for habeas relief. Moreover, if Henderson failed to appear in response to the prosecution's subpoena, there is no reason to believe he would have shown in response to a subpoena issued by the defense.

Finally, Brooks claims his trial counsel was ineffective for failing to preserve a claim that the State "purchased" a witness to falsely testify at his preliminary hearing. The evidence Brooks relies on to support his position is a letter from the assistant district attorney to the administrative law judge which states that the witness had cooperated with the State by testifying truthfully at the preliminary hearing as to an admission that Brooks made to him in custody and that the State had

promised only to make the judge aware of the witness' cooperation. ECF No. 13-1. As the Court of Appeals noted, nothing in the letter suggests that the State presented knowingly false information at the preliminary hearing. ECF No. 10-11 at 7–8. It thus follows that Brooks' trial counsel was not ineffective for failing to preserve this claim. The court of appeals' decision was not contrary to clearly established federal law.

2. Appellate Counsel

Brooks claims that appellate counsel was ineffective for failing to investigate his claim that the State's witness had been paid by the victim's family to identify Brooks as the individual who committed the crime and for failing to investigate the footprint evidence. These claims were not exhausted in the state courts. A district court may not adjudicate a habeas petition that contains both claims that have been exhausted and claims that have not been exhausted. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Rather than dismiss a petition containing both exhausted and unexhausted claims, "a district court might stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims. Once the petitioner exhausts his state court remedies, the district court will lift the stay and allow the petitioner to proceed in federal court." *Rhines v. Weber*, 544 U.S. 269, 275–76 (2005). A stay should not be granted automatically, however:

> Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. It also undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition.

Id. at 277. A stay should not be granted when there is not good cause for the petitioner's failure to exhaust his claims first in state court or when the unexhausted claims are plainly meritless. *Id.*

In this case, Brooks' claims are plainly meritless. As an initial matter, Brooks claims that appellate counsel was ineffective for failing to investigate his claim that the State's witness had been paid by the victim's family to identify Brooks as the individual who committed the crime. Brooks asserts that he had an affidavit from Shawnrell Simmons who was in the Milwaukee County Jail with Turner, one of the State's eye witnesses to the events. Simmons averred that Turner told him that he did not want to testify because he did not even see his friend get murdered and he accepted cash from someone to testify against two men. Turner allegedly told Simmons that he took the money and went back to Texas. The Court of Appeals concluded the circuit court properly rejected Simmons' affidavit because it was based on hearsay and was not supported by corroborating evidence. It held that the evidence did not warrant a new trial on the ground of newly discovered evidence. As to his claim that his appellate counsel was ineffective for failing to investigate and undertake the development of the footprint forensic evidence, the Court of Appeals concluded that trial counsel was not ineffective in failing to investigate the footprint evidence because that evidence was not exculpatory. Appellate counsel cannot be ineffective for failing to raise issues in which the Court of Appeals finds no merit. In light of the Court of Appeals' conclusions, I find no merit to these claims. Accordingly, there is no reason to stay this petition to allow Brooks to exhaust these claims in state court and those claims will be dismissed.

C. Evidentiary Hearing

Finally, Brooks requests an evidentiary hearing in this court. A state court's factual findings are presumed correct unless the petitioner rebuts this presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Although Brooks asserts the state court's factual determination was unreasonable, he does not identify any particular finding as incorrect. Brooks has not submitted

clear and convincing evidence to rebut the presumption that the state court's findings were correct. Accordingly, Brooks is not entitled to an evidentiary hearing.

CONCLUSION

For the reasons given above, the petition is **DENIED**. A certificate of appealability will be denied. I do not believe that reasonable jurists would believe that Brooks has made a substantial showing of the denial of a constitutional right.

The Clerk is directed to enter judgment denying the petition and dismissing the action. A dissatisfied party may appeal this court's decision to the Court of Appeals for the Seventh Circuit by filing in this court a notice of appeal within 30 days of the entry of judgment. *See* Fed. R. App. P. 3, 4. In the event the petitioner decides to appeal, he should also request the court of appeals to issue a certificate of appealability. Fed. R. App. P. 22(b).

SO ORDERED this 11th day of March, 2019.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

United States District Court

EASTERN DISTRICT OF WISCONSIN

CYRUS LINTON BROOKS,

Petitioner,

v.

RANDALL R. HEPP,

Respondent.

JUDGMENT IN A CIVIL CASE
Case No. 17-C-1718

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that the petition is denied and this action is DISMISSED. A certificate of appealability will be denied.

Approved: s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

Dated: March 11, 2019

STEPHEN C. DRIES
Clerk of Court

s/ Mara A. Corpus
(By) Deputy Clerk

(Attachment -

ATE OF WISCONSIN | CIRCUIT COURT BRANCH 29 | MILWAUKEE COUNTY

For Official Use Only

ite of Wisconsin vs. Cyrus Linton Brooks

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Case No. 2011CF001651

FILED
11-21-2011
Clerk of Circuit Court
Milwaukee County, WI

te of Birth: 09-06-1984

t Aliases: AKA Cyros Brooks

The defendant was found guilty of the following crime(s):

Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
[939.05 Party to a Crime] 1st-Degree Reckless Homicide	940.02(1)	Not Guilty	Felony B	10-29-2005	Jury	10-13-2011

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Sent. Date	Sentence	Length	Agency	Comments
11-18-2011	State Prison w/ Ext. Supervision 38 YR			

tal Bifurcated Sentence Time

nement Period Years	Months	Days	Comments	Extended Supervision Years	Months	Days	Total Length of Sentence Years	Months	Days
30	0	0		8	0	0	38	0	0

t. Sent. Date	Sentence	Length	Agency	Comments
11-18-2011	Restitution			In the amount of $7,380.00 to Janice B.
11-18-2011	Costs			Provide DNA sample, pay surcharge. Pay all costs and surcharges. AS TO RESTITUTION/COSTS/SURCHARGES: To be paid from up to 25% of prison funds.
11-18-2011	Firearms/Weapons Restrict			Court advised defendant that as a convicted felon, he may not possess firearms.; his voting rights are suspended, he may not vote in any election until his civil rights are restored.

Sentence Concurrent With/Consecutive Information:

Ct.	Sentence	Type	Concurrent with/Consecutive To Comments
1	State prison	Consecutive	Consecutive to any other sentence.

onditions of Extended Supervision:

Ct.	Condition	Agency/Program	Comments
1	Employment / School		Seek/maintain full time employment.
1	Prohibitions		No further violations of the law. No weapons. No contact with Maurice Stokes, Xavier Bates or any member of the victim's family.
1	Other		Follow all rules.

onditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA An Surchar
	20.00		7,380.00	746.00	85.00	424.05	250.

Appendix - D.

(Att-

ATE OF WISCONSIN | CIRCUIT COURT BRANCH 29 | MILWAUKEE COUNTY

For Official Use Only

ite of Wisconsin vs. Cyrus Linton Brooks

e of Birth: 09-06-1984

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Case No. 2011CF001651

FILED
11-21-2011
Clerk of Circuit Court
Milwaukee County, WI

On count(s) _____ pursuant to §973.031 Wisconsin Statutes, the court determines the following:
That a risk reduction sentence is appropriate and the person agrees to cooperate in an assessment of his or her criminogenic factors and his or her risk of reoffending, and to participate in programming or treatment the department develops for the person under §302.042(1). The court imposes a Risk Reduction sentence.

rsuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:
e Defendant is ☐ is not ☒ eligible for the Challenge Incarceration Program.
e Defendant is ☐ is not ☒ eligible for the Earned Release Program.

IT IS ADJUDGED that **0** days sentence credit are due pursuant to §973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

Distribution:

Richard J. Sankovitz-29, Judge
Denis Stingl, District Attorney
Patrick B Flanagan, Defense Attorney

CIRCUIT COURT MILWAUKEE CO. WISCONSIN

BY THE COURT:

Electronically signed by John Barrett
Circuit Court ~~Judge~~/Clerk/~~Deputy Clerk~~

November 21, 2011
Date

(Attachment -

STATE OF WISCONSIN | CIRCUIT COURT Branch 38 | MILWAUKEE COUNTY

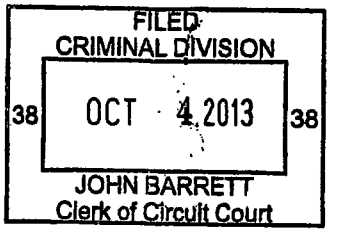
STATE OF WISCONSIN,

Plaintiff,

vs.

CYRUS BROOKS,

Defendant.



Case No. 11CF001651

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On August 12, 2013, the defendant by his attorney filed a motion for dismissal of the above case on grounds that his right to a speedy trial was violated. He also seeks a new trial on the basis of newly discovered evidence and ineffective assistance of counsel. He was charged with first degree reckless homicide as a party to a crime for the shooting death of Terry Baker. A jury trial was held before the Hon. Richard J. Sankovitz on October 10-13, 2011, after which the jury found the defendant guilty as charged. On November 18, 2011, the defendant was sentenced to 38 years in prison (thirty years of initial confinement and eight years of extended supervision). The case was assigned to this court as the successor to Judge Sankovitz's homicide calendar.

Defendants Cyrus Brooks and Maurice Stokes approached the victim, who ran from them and was shot twice in the back. Julius Turner testified that he was with Terry Baker on the morning just before he was killed. He testified that Baker had left his (Turner's) house around 11 a.m. on his bicycle. (Tr. 10/11/11, pp. 72-75). Turner got in his car, went in the same direction as Baker, and then heard three or four shots. (Id. at 76). He said he saw a green car

Appendix - E.

generally associated with the defendant and that both defendant Brooks and defendant Stokes were outside of the car taking aim at the victim with guns. (Id. at 77-79). He testified that he saw Brooks fire a shot at Baker as he was jumping a fence. (Id. at 79-80). He did not see Stokes fire his gun, but he saw him aiming a gun with his arm extended. (Id. at 81). On cross-examination, Turner admitted that he did not originally tell police about seeing Brooks chase the victim down the alley and shoot him. (Id. at 91). However, he told detectives that he knew Brooks and Stokes were responsible, even though he didn't want to admit he had actually seen the shooting. (Id. at 92). He explained that the reason he did not tell police everything originally was because he feared for his safety. (Id. at 67-68).

A speedy trial demand was made on June 1, 2011. A trial date was scheduled for October 3, 2011 and adjourned to October 10, 2011. The defendant asserts that 123 days passed from the time a speedy trial demand was made until the actual trial took place, which he claims was without any articulated reason. He maintains that his speedy trial demand should have been honored before September 7, 2011.

The court issued a briefing schedule, to which the parties have responded. The State maintains that the defendant's June 1, 2011 speedy trial demand was made before the information was filed, and that sec. 971.10(2)(a), Wis. Stats., does not permit the defendant to assert a speedy trial demand until the information is filed. The information was filed on June 9, 2011,[1] and a speedy trial demand was not made after that date. The court concurs wholly with the State's overall analysis of this issue and finds that the defendant's right to a speedy trial was not violated. In addition, the court cannot find the defendant was prejudiced by the relatively short delay given the fact that he was sitting in prison in connection with another case through July of 2012. (*See Motion, p. 5*).

[1] The preliminary hearing with regard to Brooks had been adjourned from April 25, 2011 to June 1, 2011.

The defendant also asserts that newly discovered evidence exists in the form of two affidavits. One is from Brandon Brumfeld, who states that he was with Julius Turner when he was walking back from the gas station on 46th and Lisbon and that none of the men who approached them were either Cyrus Brooks or Maurice Stokes. He further states that the victim's family "wanted him to say that Mr. Brooks and Mr. Stokes were at the scene of the shooting" and offered him money to do so.[2] He also adds that he never saw Stokes or Brooks at the scene of the shooting.

The other affidavit is from Shawnrell Simmions, who states that he was in jail with Julius Turner, who testified against the defendant at his trial. Turner purportedly told Simmions that he did not want to testify because he did not see who had shot the victim. He said that he took money to testify against Brooks and Stokes and left for Texas.

Before a new trial may be awarded based on a claim of newly discovered evidence, the defendant must demonstrate (1) that new evidence was discovered after the trial; (2) that the defendant was not negligent in failing to discover the evidence before trial; (3) that the evidence is material; (4) that the evidence is not cumulative; and (5) that there exists a reasonable probability of a different result at a new trial. State v. Brunton, 203 Wis.2d 195, 200 (Ct. App. 1996); State v. Coogan, 154 Wis.2d 387, 394-95 (1990).

The State's position is that the affidavit of Brandon Brumfeld is "not inconsistent" [sic?][3] with the testimony of Julius Turner, but then argues that Brumfeld's statement does not line up with Turner's trial testimony. It doesn't, which gives it a certain degree of untrustworthiness and unreliability. Brumfeld says he was with Julius Turner walking from a gas station around 46th

[2] There are no further specifics in this regard as to who or what person from the victim's family offered him money to testify as he relates in his affidavit.

[3] The court believes the State intended to say "not consistent" rather than "not inconsistent" at page 4 of its brief.

and Lisbon when three men approached them asking for the whereabouts of Terry Baker. He says the men told them that Baker was going to get what he had coming, and that none of these men were Brooks or Stokes. He then says that "*within minutes*," he heard shots and, 45 minutes to an hour later learned that Baker had been killed. (*Brumfeld Affidavit, pp. 2-3*).

Turner, on the other hand, testified that *the night before the shooting*, he was walking back from a gas station on 46th and Lisbon when Brooks, Stokes and another man approached him looking for Terry Baker. (Tr. 10/12/11, a.m., pp. 31-32). The men told him that Baker was a dead man, and Brooks showed Turner a handgun. (Id. at 34). Brumfeld's statement is not plausible. Turner said he was *in his car* minutes before the shooting, not walking from the gas station on 46th and Lisbon. Turner is talking about his walk from the gas station the night before the shooting; Brumfeld is talking about a walk from the gas station on the day of the shooting, which is not consistent with Turner's version of events. It appears that he is attempting to help Brooks but has not gotten his facts straight. In any event, given that the two are talking about different days, Brumfeld's affidavit does nothing to detract from Turner's trial testimony about what happened with Brooks and Stokes approaching him *the night before* the shooting. Not only is it inherently unreliable based on its mismatched facts, but it is not evidence that would be reasonably probable to alter the outcome of the trial.

With regard to the affidavit of Shawnrell Simmions, the State contends that the affiant's name is actually Shawnrell Simmons who has an extensive prior record which calls his credibility into question. Without assessing credibility, the court finds that the affidavit is simply not sufficient for purposes of obtaining either a new trial or an evidentiary hearing. Simmion's (or Simmons') affidavit is based on hearsay and is not supported by any corroborating evidence. "A new trial may be based on an admission of perjury only if the facts in the affidavit are

corroborated by other newly discovered evidence." Nicholas v. State, 49 Wis. 2d 683, 694 (1971). The affidavit of "Simmions" essentially states that Turner perjured himself; however, there is no affidavit from Turner, only hearsay as to what Turner purportedly told "Simmion." The defendant has not presented any other evidence to corroborate the facts contained in Turner's cellmate's affidavit, and there are no inherent guarantees of the reliability of the statement that Turner purportedly made to cellmate "Simmion." Without more, "[e]vidence that merely impeaches the credibility of a witness does not warrant a new trial. . . . " Greer v. State, 40 Wis. 2d 72, 78 (1968). "Simmion's" affidavit is not sufficient for purposes of obtaining an evidentiary hearing.

Finally, the defendant contends that trial counsel was ineffective for failing to subpoena Michael Henderson, who originally testified in the first preliminary hearing held in which he stated that he did not see anyone else firing a gun except Maurice Stokes.at the time of the shooting.

Strickland v. Washington, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second prong, the defendant is required to show "'that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 694; also State v. Johnson, 153 Wis.2d 121, 128 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. State v. Moats, 156 Wis.2d 74, 101 (1990). "Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the

error, 'the result of the proceeding would have been different.' Strickland, 466 U.S. at 694 . . . . " State v. Erickson, 227 Wis.2d 758, 769 (1999).

Evidently, trial counsel thought the State was going to call Michael Henderson at trial, but the State indicated it could prove its case without him and didn't call him. The defendant now contends that additional testimony from Henderson or additional questioning of him would have made a difference in his case. This conclusion is predicated on Henderson's testimony at co-defendant Stokes' trial wherein he stated that two men were involved in the shooting incident, identifying one of the men as Stokes and the other as a "caramel skinned male with braids." (*Motion, p. 13, citing to the Stokes trial transcript from 6/27/12, p. 8*). He did not identify the second individual as the defendant because he said he did not see his face due to the particular clothes the person was wearing (hooded sweatshirt)(*see page two of police report attached to defendant's motion*). The defendant argues that if Henderson could not see the second man's face, Julius Turner's identification is suspect because of the kind of difficulty Henderson had in identifying the second individual.

As indicated previously, Julius Turner testified that the night before the shooting, Cyrus Brooks and Maurice Stokes approached him as he was walking back from a gas station on 46th and Lisbon. (Tr. 10/12/11, a.m., p. 32). He said they were looking for Terry Baker and that he (Turner) better stop hanging around Baker because he was a "dead man." (Id. at 34). Brooks then showed him a gun that he pointed in Turner's face while talking. (Id. at 34-35). When he was in his vehicle the next day, Turner heard shots and saw a green vehicle parked at the end of an alley. (Tr. 10/11/11, p. 77). He testified that he recognized the vehicle as usually being occupied by Cyrus Brooks and Maurice Stokes (Id.), and he said he saw both of those men with guns taking aim at Terry Baker and Brooks firing a shot. (Id. at 78-79). Turner had turned onto

Meinecke from 46th Street towards the area of the shots. (Id. at 76). Henderson was at a different location. He was on his porch at 2356 N. 47th Street. The shooting occurred at 2351 N. 46th Street, and Henderson testified at the preliminary hearing that he was about four houses away from 47th and Meinecke where the shooting took place. (Tr. 4/25/11, p. 8). Henderson testified that he heard shots and then lost sight of all the men. (Id. at 13).

Simply because Brooks could not be identified by Henderson from his porch as the man with Stokes does not mean that Turner could not identify him from his car on Meinecke. Henderson's preliminary hearing testimony was read to the jury in which he stated that he said he only saw one person involved in the shooting (Stokes). Although the defendant now contends that trial counsel was ineffective because Henderson could not be questioned as to what else he saw on the day of the shooting about the presence of another individual (*Motion, p. 13*), or his inability to identify the second man as Brooks,[4] he has not set forth anything to show that Henderson would have testified favorably in his case or any differently from the testimony that was read to the jury from the preliminary hearing. He hasn't shown what additional facts Henderson would have testified to at all, nor has he provided an affidavit from Michael Henderson indicating what else he might have seen that day, that would have been reasonably probable to undermine the result of the trial, and therefore, he has not established that he was prejudiced by counsel's failure to call Michael Henderson to testify at trial. Furthermore, the court agrees with the State that the preliminary hearing testimony as read to the jury strongly favored the defendant's case because Henderson singled out Stokes as the only person he saw

[4] When questioned by police, he said he saw two people involved in the shooting, one of whom was Stokes and the other with a dark hooded sweatshirt that he could not identify. (*Police report attached to defendant's motion, p. 2*).

that day, the only person he saw chasing Baker, and the only person who shot Baker.[5] Given Henderson's testimony in Stokes' trial, the jury would have heard that he also saw a second man – the "caramel skinned male with braids" (Tr. 6/27/12, p. 8, Stokes' trial). The jury could still have reasonably concluded from Turner's testimony that the second man was the defendant. Trial counsel cannot be deemed to be ineffective for failing to call Henderson.

For all of the above reasons, the court denies the defendant's motion for dismissal or for a new trial. He has not established a speedy trial violation; he has not met the standard for obtaining a hearing for newly discovered evidence; and he has not established that trial counsel was ineffective for failing to timely subpoena Michael Henderson.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief (dismissal or a new trial) is **DENIED.**

Dated this 9th day of October, 2013, at Milwaukee, Wisconsin.

BY THE COURT:

Jeffrey A. Wagner
Circuit Court Judge

CIRCUIT COURT MILWAUKEE CO. WISCONSIN

[5] Q Okay. At no time did you see anyone else firing a gun other than Maurice Stokes? Is that what your testimony is, yes?
A Yes. (Tr. 10/12/11, p. 27).
Q Mr. Henderson, is it fair to say that you only saw Mr. Stokes chasing Mr. Baker and saw no other individuals involved in the chase of Mr. Baker?
A Yes. (Id. at p. 28).

COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2260-CR Cir. Ct. No. 2011CF1651

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CYRUS LINTON BROOKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: RICHARD SANKOVITZ and JEFFREY WAGNER, Judges. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Cyrus Brooks appeals a judgment convicting him of first degree reckless homicide as a party to a crime and an order denying his

postconviction motion.[1] He argues: (1) the case should have been dismissed because the State violated his constitutional right to a speedy trial; (2) he is entitled to a new trial based on newly discovered evidence; and (3) his trial counsel was ineffective. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Brooks and his co-defendant, Maurice Stokes, were charged with shooting and killing Terry Baker. They were tried separately. At Brooks' trial, Julius Turner described incidents that occurred the night before the shooting and on the day of the shooting. He said the night before the shooting, as he was walking back from a gas station, Brooks, Stokes and another man approached him looking for Baker. Brooks told Turner he had better stop hanging around Baker because Baker was a dead man. Brooks then showed Turner a handgun.

¶3 The next morning, Baker left Turner's house on his bicycle. Turner got in his car and traveled in the same direction. Turner then heard three or four gunshots and saw a green vehicle parked in an alley that he recognized as usually being occupied by Brooks and Stokes. He said he saw both Brooks and Stokes aim their guns at Baker, and Brooks fired at Baker as Baker was jumping a fence.

¶4 Michael Henderson's preliminary hearing testimony was read to the jury. He was at a different location than Turner at the time of the shooting, about two houses away. He testified he saw Stokes with a gun, chasing Baker, and saw

[1] Judge Sankovitz presided over the trial. Judge Wagner decided the postconviction motion.

Stokes fire toward Baker. He did not see anyone else chasing or shooting at Baker.

DISCUSSION

Speedy Trial

¶5 Brooks' argument regarding his speedy trial right conflates his constitutional right with his statutory right. He attempts to apply the remedy for a constitutional violation to the time limits set forth in WIS. STAT. § 971.10(4) (2011-12). We reject that approach. The remedy for violation of the statutory speedy trial right is discharge from custody prior to trial, not dismissal of the case. ***Day v. State***, 60 Wis. 2d 742, 744, 211 N.W.2d 466 (1973).

¶6 Brooks' constitutional right to a speedy trial was not violated. The threshold factor is the length of the delay from charging to trial. ***Norwood v. State***, 74 Wis. 2d 343, 353, 246 N.W.2d 801 (1976). The length of delay must be deemed "presumptively prejudicial" before it is necessary to inquire into any other factors. ***Id.*** Courts have generally found a delay that approaches one year to be presumptively prejudicial. ***Doggett v. United States***, 505 U.S. 647, 652, n.1 (1992). Here, the trial began less than seven months after the complaint was filed. A delay of seven months is not presumptively prejudicial. ***Beckett v. State***, 37 Wis. 2d 345, 350, 243 N.W.2d 472 (1976).

Newly Discovered Evidence

¶7 Whether to grant a new trial based on newly discovered evidence is committed to the circuit court's discretion. ***State v. Brunton***, 203 Wis. 2d 195, 201-02, 552 N.W.2d 452 (Ct. App. 1996). Motions for a new trial based on newly discovered evidence are entertained with great caution. ***State v. Terrance J. W.***,

202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996). This court will affirm the circuit court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and facts of record. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). A request for a new trial based on newly discovered evidence must be supported by proof that: (1) the evidence was discovered after the conviction; (2) the defendant was not negligent is seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not cumulative; and (5) it is reasonably probable that a new trial will reach a new result. ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989).

¶8 Brooks' claim of newly discovered evidence is based on two affidavits. First, Brandon Brumfeld averred that he was with Turner when Turner was walking back from the gas station. Three African-American men approached them and told them Baker was going to get what he had coming to him. Brumfeld knew Brooks and Stokes, and he stated they were not with the group that threatened Baker. A short time later, Brumfeld saw one of the men who was looking for Baker and soon after heard shots about one-half block away. Brumfeld also averred that the Baker family wanted him to say he saw Brooks and Stokes at the scene, and offered him money.

¶9 The circuit court properly concluded that Brumfeld's affidavit did not meet the test for newly discovered evidence. It is not reasonably probable that his testimony would result in a different verdict. Brumfeld does not claim to have witnessed the shooting. His testimony that other men were looking for Baker shortly before the shooting does not contradict Turner's testimony that he saw Brooks shoot at Baker or that Brooks was looking for Baker and threatened him

the night before the shooting. At best, Brumfeld's testimony would suggest a larger number of parties to the crime, but would not exonerate Brooks.

¶10 Brooks' second affidavit in support of his claim of newly discovered evidence came from Shawnrell Simmons who was in the Milwaukee County Jail with Turner. He averred that Turner told him he did not want to testify because he "didn't even see his friend being murdered," but that he accepted cash from someone to testify against two men. Turner allegedly told Simmons he took the money and went back to Texas.

¶11 The circuit court properly rejected Simmons' affidavit. It was based on hearsay and was not supported by any corroborating evidence. *See **Nicholas v. State***, 49 Wis. 2d 683, 694, 183 N.W.2d 11 (1971). Evidence that merely impeaches the credibility of a witness without corroborating evidence does not warrant a new trial on the ground of newly discovered evidence. ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968).

Ineffective Assistance of Counsel

¶12 Brooks contends his trial counsel was ineffective for failing to subpoena Michael Henderson. Henderson was on the State's witness list and Brooks' trial counsel believed he could rely on the State's subpoena to produce Henderson for trial. Henderson's preliminary hearing testimony was read to the jury. Henderson testified at Stokes' trial, contradicting his testimony at Brooks' preliminary hearing. At Stokes' trial, Henderson said he saw another person with "Reece," referring to Maurice Stokes. The other person was caramel-skinned with braids. Baker approached these two men on his bicycle, but then jumped off the bicycle and ran between the houses, out of Henderson's sight. Henderson then heard gunshots, but did not see who was shooting. Brooks claims he was

prejudiced by his counsel's failure to have Henderson testify about the caramel-skinned person involved in the shooting.

¶13 To establish ineffective assistance of counsel, Brooks must establish prejudice to his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). He must show a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. ***Id.*** at 694. A reasonable probability is one that undermines our confidence in the outcome. ***Id.*** The circuit court correctly concluded counsel's failure to subpoena Henderson did not prejudice Brooks' defense. The jury heard Henderson's preliminary hearing testimony in which he denied the existence of a second shooter. That evidence was more favorable to Brooks than Henderson's testimony at Stokes' trial. Henderson's testimony at Stokes' trial regarding the caramel-skinned man with braided hair whose face was partially obscured would not have excluded Brooks as the second shooter. Because Brooks' motion provided no basis for believing that, had his counsel subpoenaed Henderson, the result of the trial would have been different, the court properly rejected Brooks' claim of ineffective assistance of trial counsel.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

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February 10, 2015

To:

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Milwaukee, WI 53233

Hon. Jeffrey A. Wagner
Milwaukee County Circuit Court Judge
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You are hereby notified that the Court has entered the following order:

No. 2013AP2260-CR State v. Brooks L.C.#2011CF1651

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Cyrus Linton Brooks, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Diane M. Fremgen
Clerk of Supreme Court

Attachment -

Mr. Cyrus Brooks #356756-A.
Columbia Correctional Institution
Post Office Box 900 / CCI-Unit-#9.
Portage; Wisconsin., 53901-0900

§ Although The Constitution Does Not Ensure That Every Defendant Receives The Benefit Of Superior Advocacy--How Could It, Given That Half Of All Lawyers Are Below Average?-- It Does Entitle Every Defendant To The Benefits Of An Advocate: Castellanos v. United States, 26 F.3d 717, 719 (7th Cir. 1994)... §

July 02, 2013.

Atty-Ms. Sara Roemaat,
Attorney At Law;
D'Angelo & Jones, LLP.
N14W23775 Stone Ridge Drive
Stone Ridge I -- Suite #200
Waukesha; Wisconsin. 53188

Re: State Of Wisconsin v. Cyrus L. Brooks, Milwaukee County Case 2011-CF-1651.

Dear Attorney Roemaat:

Defendant, respectfully submits this instant legal address before your Appellate/Post-Conviction Counsel review undertaking In the above-entitled Criminal case 1st Appeal Of Right litigation. In Defendants follow-up to the recent Telephone calls discussions that have taken place between us, as well the points made in your letters dated June 17, 2013 and June 10, 2013.. As we have discussed, it is currently the Appellate Review objective, to have the necessary Section §974.02 Wis. Stats., Post-Conviction Motion Pleading along with the necessary Support pleadings, ready to be filed by the end of this month, before the Milwaukee County Circuit Courts, Clerk Of Courts Office... And thus, this discussion is in concern to matters I would like to ensure are meaningfully given the Professional consideration, that relevant case law acknowledges Appellate Counsel at the State level, should be concerned with.

Initially, in your June 10, 2013 dated letter, you make it a point to assert: "I am not going to hire an investigator in this case because the public defender's office is not going to re-interview everybody who has already been interviewed by the police." And it is this "Mind Set" demonstration, that causes me to pause; in light of the Constitutional Duties a Professional Attorney owe to a Client/Defendant in circumstances such as those that exist in my Case Prosecution and Trial Counsels defense there against execution(s).. This was an Inner-City Citezen's witnessed case situation, and any competent attorney would be well aware of the relevent fact; that African-American's in "General" Do Not interact with Police, and particularly, white Police Officers' openly and/or honestly.. Most Inner-City Blacks' do not view Police as our Friend(s) and/or Pro-

tectors. They are viewed as our Enemies, and Oppressor(s). And thus, for you to assert, that reliance on Policr Contacts/Report(s) thereof; instead of undertaking Defense Investigation/Contacts of Witnesses Trial Counsel failed to Interview. To me, is simply a continuation of Trial Counsel's "Information Defective" decision making execution(s) of my Defense presentation; **Strickland v. Washington,** 466 U.S. 668, 104 S.Ct. 2052, 2066 (1984)("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes a particular investigation unnecessary"); **United States v. Williamson,** 183 F.3d 458, 462 (5th Cir. 1999)("In review of a claim of Ineffective Assistance of Counsel, Court of Appeals Judges counsel's appellate performance under the same two-prong test of Strickland v. Washington." ... "Reasonable attorney, for purposes of claim of ineffective assistance of appellate counsel, has an obligation to research relevant facts and law, or make an informed decision that certain avenues will not prove fruitful").

In the execution of this minimum duty owed a client, the United States Supreme Court has noted: "Inquiry into counsel's conversations with defendant may be critical to proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions;" **Strickland v. Washington, supra,** 104 S.Ct. at 2066. Thus, at the Post-Conviction/Appellate level of such Issue(s) as those we have discussed presenting in my 1st Appeal of Right litigation, the relevant case law precedent is clear on what our burden mandates: **Hardamon v. United States,** 319 F.3d 943 (7th Cir. 2003)("A petitioner alleging ineffective assistance as a result of counsel's failure to adequately investigate the case has the burden of providing the court with sufficiently precise information as to what the investigation would have produced"). I.e., **State v. Leighton,** 2000 WI App. ___, Appeal No. 99-2704 (Wis. App., Dist-#1; 07-27-2000)("To show ineffective assistance of counsel for failure to investigate, Defendant must prove what evidence should have been discovered"). This "burden" can't be fulfilled via total reliance on contact information written in Police Report(s), and even more so, when that contact involves African-American "Inner-City" Witnesses; **Jones v. Jones,** 988 F.Supp. 1000, 1002-1003 (E.D. La. 1997) ("Ineffectiveness of counsel is clear if attorney fails to investigate plausible line of defense or interview available witnesses; these can hardly be considered strategic choices since counsel by his failure has not obtained facts upon which such tactical decisions could reasonably be made"); **Hall v. Washington,** 106 F.3d 742, 749 (7th Cir. 1997)("To be upheld as reasonable, counsel's decision not to call a particular witness must be made "only after some inquiry or investigation by defense counsel"; the "attorney must look into readily available sources of evidence""). To date, that really hasn't happen in my case defense preparation by Trial Counsel, nor at the Appellate Review "Issue(s)" development stage, within the mandated minimum of Federal Constitution Effective Assistance receipt undertakings; **Montgomery v. Petersen,** 846 F.2d 407, 412 (7th Cir. 1988)("Nonstrategic decision not to investigate is inadequate performance"). All i'm hearing, is lets rely on the Police Contact/Reports; which are well documented unreliable records for "Defense" Investigation decisions undertakings regarding witnesses "Exculpatory" value to the Defendant's defense: **Jones v. v. Jones, supra,** 988 F.Supp. at 1002 ("To provide effective assistance

defense counsel must engage in reasonable amount of pretrial investigation and at minimum interview potential witnesses and make independent investigation of facts and circumstances of the case. Strickland v. Washington, 466 U.S. 668, 690-691, 104 S.Ct. 2052, 2065-66, 80 L.Ed.2d 674 (1984)").

Secondly here, is the conversation we have been having lately, regarding the Case Law consideration(s), and my belief that my State Appellate Review Filing(s), need to clearly set forth the Federal Law "Due Process" underpinning(s) of my Claim(s); especially, the Evidentiary Issue(s), that are raised in a few of my Claim(s) that are to be included in the upcoming §974.02 Post-Conviction Motion pleading. The law regarding Federal §2254 Petition For Writs of Habeas Corpus "Issues" exhaustion at the State Court(s) Level is getting to be more restrictive every year lately, and it is not my intent to allow myself to allow for the closing of meaningful eventual §2254 review of my Conviction and Sentence situation(s), if my 1st Appeal of Right review, fails to achieve the redress I desire. Indeed, it is clearly acknowledged in law, that; "'Fair' presentment requires the petitioner to give the state courts a meaningful opportunity to pass upon the substance of the claims later presented in federal court:" **Anderson v. Benik**, 471 F.3d 811, 814 (7th Cir. 2006)(citing Rodriguez v. Scillia, 193 F.3d 913, 916 (7th Cir. 1999). Thus, "In the interests of federal-state comity, both the operative facts and controlling law must be put before the state courts;" Id. 471 F.3d at 814.

See also **Reese v. Baldwin**, 282 F.3d 1184, 1192-1193 (9th Cir. 2002)("Citation to federal authority for one claim in a postconviction petition is not transferred to all the other claims contained in the petition, for purposes of determining whether state court remedies were exhausted in a manner sufficient to permit federal habeas corpus review; rather, to fairly present a federal habeas claim to a state court, it is essential that the petitioner must in some way provide a reference to federal authority to support that particular claim"). I.e., **Riggins v. McGinnis**, 50 F.3d 492, 494 (7th Cir. 1995)("Riggins' brief not only omits a citation to any case decided by a federal court but also expresses his argument in the terms of Reddick itself: that the pattern jury instructions misstate the law of Illinois. Arguments based on state law are some distance from arguments based on the Constitution. ... 'A lawyer need not develop a constitutional argument at length, but he must make one; the words "due process" are not an argument'"). Thus, your assertion contained in the June 17, 2013 letter, that cases from the Federal system are not binding in Wisconsin Courts, while technically correct; is yet a misrepresentation of my interest I am seeking to employ them for: **Rudolph v. Parke**, 856 F.2d 738, 739 (6th Cir. 1988)("It is settled law in this circuit that a constitutional claim which is presented to the state courts, regardless of whether they address and dispose of it, will satisfy the exhaustion requirement"); **Wallace v. Duckworth**, 778 F.2d 1215, 1223 (7th Cir. 1985)("For purposes of requirement that state prisoner exhaust state remedies before he can petition for writ of habeas corpus in federal court, it is not necessary that state court explicitly rule on the issue raised, but only that state court be given the opportunity".).

In conclusion of this 2nd Issue address, I also want to point out, that any Case(s) other than Wisconsin Court case(s), that I have requested that you review, particularly regarding "Evidentiary" Issue(s), I believe are capable of being argued as "Persuasive" authorities, under State of Wisconsin, case law precedent holdings, such as: **State v. Evans,** 238 Wis.2d 411, 415, 617 N.W.2d 220, 222 n.2 (Wis. App. 2000)("Where a State rule mirrors the federal rule, we consider federal cases interpreting the rule to be persuasive authority. See State v. Cardenas-Hernandez, 219 Wis.2d 516, 528, 579 N.W.2d 678 (1998)"); and **State v. Seay,** 250 Wis.2d 761, 767, 641 N.W.2d 437, 439 n.4 (Wis. App. 2002)("All of the federal rules under consideration in Becker have substantially similar counterparts in Wisconsin. Therefore, we conclude that the Supreme Court's analysis in Becker is persuasive"). As you know, Wisconsin's Rules Of Evidence, were almost verbatim adopted from the Federal Rules Of Evidence; and therefore, Federal case(s) addressing "Constitutional" violation(s) regarding these similar Rules Of Evidence exercises by the Court(s) at the Federal Level can be argued as "Persuasive" authorities in support of such Evidentiary Issue(s) of prosecution creation in my case situation; **Brown v. O'Dea,** 187 F.3d 572, 578 (6th Cir. 1999)("The standard in determining whether the admission of prejudice--evidence constitutes a denial of fundamental fairness is whether the evidence is 'material in the sense of a crucial, critical highly sugnificant factor'"). I.e., **Alvarez v. O'Sullivan,** 58 F.Supp.2d 882, 886 (N.D. Ill. 1999)("Our task is not to 'second-guess' the correctness of the trial court's rulings based on state evidentiary rules; rather, we are only to decide if a constitutional right has been violated by those determinations. Koo v. McBride, 124 F.3d 869, 874-75 (7th Cir. 1997)").

Hopefully, the discussion contained in these preceding Three and a half pages, will help put us both on the same page, regarding the objective(s) and ultimate goal sought via this upcoming State Post-Conviction/Appellate Review litigation of your Professional Appellate Counsel guidance. However, I have learned since my recent incarceration on this Conviction and sentence, that, it is in my Appellate litigation undertaking, to have short range (State Level) as well as long range (Federal Level) Relief Obtainment Goals. And therefore, I am required to insure that all "Facts" I may eventually need to argue at the later stages of this case Appellate Review are of the State Court Record inclusion; and were diligently pursued by us; **Cullen v. Pinholster,** 131 S.Ct. ___ (2011)("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of sec. 2254(d)(1) on the record that was before that state court"). It is now, almost impossible to receive an "Evidentiary Hearing" before the Federal District Courts, thus, State Defendants' must take full and complete advantage of any such Evidentiary Development opportunity at the State level, during their 1st Appeal of Right litigation exercises; as the Wisconsin State Supreme Court empathized in their June 19, 2011 decision of **Balliette v. State,** 336 Wis.2d 358, 805 N.W.2d 334, 337-339 (Wis. 2011). Thus, as the Seventh Circuit Court of Appeals, made clear in its holding of **Freeman v. Lane, 962** F.2d 1252 (7th Cir. 1992), "Counsel has a duty to preserve potentially meritorious Issue, that may not be recognized until the later stages of the appellate review--wether or not--he will not or need not accompany the defendant on the complete journey." See

also **United States ex rel. Bernard v. Lane**, 819 F.2d 798 (7th Cir. 1987), for a similar position assertion of the Seventh Circuit Court of Appeals, regarding this Issue.

This, in Conclusion, I simply wish to attempt to get us both on the same page, regarding the upcoming litigation of my 1st Appeal of Right, Wisconsin Appellate Rules, required §974.02 Post-Conviction execution(s). For with the current state of Wisconsin Law limitations and the Federal Law fast re-embracement of the "Hands Off" Doctrine, the only meaningful opportunity I will have to create the underlying "Facts and/or Evidentiary" foundation for my Claim(s) and Issue(s) to be built upon, is with this §974.02 Wis. Stats., Post-Conviction litigation, Evidentiary Hearing opportunity; and I do plan to take full and meaningful opportunity of this procedural venue to do just that. Please review; **Trevino v. Thaler**, 133 S.Ct. 1911, 2013 U.S. LEXIS 3980 (2013, 05-28)["Headnote #6, in Particular"].

Additionally here, I also have been informed that the "Other" Legal Papers were recently dropped off at your Law Office by my Family, regarding the discussed "Issues" that I believe may be relevant. And thereon, I will look forward to out next telephone conversation, and hearing your perspective thereon; **State v. Redmond**, 203 Wis.2d 13, 552 N.W.2d 115, 118 (Wis. App. 1996)("Supreme Court Rule 20:1.2 requires that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued." While an attorney is not required to raise every nonfrivolous issue suggested by a client, Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct. 3308, 3314, 77 L.Ed.2d 987 (1983), implicit in the Rules of Professional Conduct is a requirement to involve a client in any matter relating to his or her representation. By engaging the client, an attorney may forestall a client's perceived need to pursue "overlooked" issues through pro se presentation").

Thank You, Attorney Roemaat for your time and attention hereto.

CB-OBM/File.

Respectfully Submitted By:

Cyrus Brooks

Cyrus Brooks #356756-A
[Defendant-Appellant].

(Attachment -

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DISTRICT I/IV

To:

August 3, 2017

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P.O. Box 7857
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Cyrus Linton Brooks 356756-A
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

You are hereby notified that the Court has entered the following opinion and order:

2016AP974 State of Wisconsin v. Cyrus Linton Brooks (L.C. #2011CF1651)

Before Lundsten, P.J., Sherman and Blanchard, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Cyrus Brooks, pro se, appeals an order that denied Brooks' postconviction motion under WIS. STAT. § 974.06 (2015-16).[1] Brooks contends that his trial counsel was ineffective by failing to: (1) object to testimony by a medical examiner as to the victim's cause of death on the ground

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

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Appendix - K.
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that the testimony violated Brooks' confrontation rights because a different medical examiner had performed the autopsy of the victim; (2) investigate footprint evidence obtained from the hood of a car at the crime scene; and (3) preserve Brooks' claim that the State presented knowingly false information at Brooks' preliminary hearing. Brooks contends that his postconviction counsel was ineffective by failing to raise those arguments in Brooks' direct postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

In March 2011, the State charged Brooks with first-degree reckless homicide as a party to the crime for the shooting death of Terry Baker in October 2005. Brooks was convicted following a jury trial. Brooks, by counsel, filed a postconviction motion arguing that: (1) Brooks was denied his constitutional speedy trial rights; (2) Brooks was entitled to a new trial based on newly discovered evidence, in the form of affidavits of individuals claiming knowledge of the shooting and indicating that others were involved and that a State's witness had been paid to implicate Brooks; and (3) Brooks' trial counsel was ineffective by failing to subpoena Michael Henderson to testify at trial, following Henderson's testimony at the preliminary hearing that Henderson witnessed only Brooks' codefendant Maurice Stokes at the scene of the shooting. The circuit court denied the motion, and we affirmed on appeal.

In April 2016, Brooks initiated this action by filing a pro se motion for postconviction relief under WIS. STAT. § 974.06. The circuit court denied the motion without a hearing.

If a WIS. STAT. § 974.06 motion sets forth sufficient material facts that, if true, would entitle the defendant to relief, the defendant is entitled to a hearing on the motion. *State v.*

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#7

Balliette, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. We independently review whether a defendant is entitled to a hearing on a § 974.06 motion. *Id.* "[I]f the motion does not raise such facts, 'or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief,' the grant or denial of the motion is a matter of discretion entrusted to the circuit court." *Id.* (quoted source omitted).

When, as here, a WIS. STAT. § 974.06 motion follows a prior postconviction motion, a defendant must show a "sufficient reason" for failing to previously raise the issues in the current motion. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994). Ineffective assistance of postconviction counsel may, in some circumstances, be a "sufficient reason" as to why an issue was not raised earlier. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996). To demonstrate ineffective assistance of postconviction counsel, a defendant must show that the issues the defendant believes that counsel should have raised were clearly stronger than the claims counsel pursued in a postconviction motion, "by alleging 'sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle him to the relief he seeks.'" *State v. Romero-Georgana*, 2014 WI 83, ¶58, 360 Wis. 2d 522, 849 N.W.2d 668 (quoted source omitted). Whether a § 974.06 motion alleges a sufficient reason for failing to raise an issue earlier is a question of law that we review independently. *State v. Kletzien*, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

A claim of ineffective assistance of counsel must establish that counsel's performance was deficient and that the defendant was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must identify specific acts or omissions of counsel that "were outside the wide range of professionally competent assistance." *Id.* at 690. To establish prejudice, a defendant must show that there is "a

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reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. When a defendant alleges that postconviction counsel was ineffective by failing to pursue a claim of ineffective assistance of trial counsel, the defendant must establish that trial counsel was, in fact, ineffective. ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. A claim that trial counsel was ineffective must set forth the relevant facts as to the "who, what, where, when, why and how" counsel was ineffective. ***State v. Allen***, 2004 WI 106, ¶36, 274 Wis. 2d 568, 682 N.W.2d 433. Moreover, "a defendant who alleges in a [WIS. STAT.] § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought." ***Romero-Georgana***, 360 Wis. 2d 522, ¶4.

Brooks contends that he need not demonstrate that his current issues are "clearly stronger" than the issues his postconviction counsel pursued in order to demonstrate that his postconviction counsel was ineffective. He argues that the "clearly stronger" test is not the only means of establishing ineffective assistance of counsel. In support, Brooks cites federal case law setting forth the standard for overcoming the procedural bar to obtain review in a federal habeas corpus action. *See, e.g.*, ***Freeman v. Lane***, 962 F.2d 1252 (7th Cir. 1992) (petitioner not barred from raising claims in federal habeas corpus action despite failing to raise claims in earlier state appeal; petitioner's direct appeal counsel was ineffective by failing to raise issue in direct state appeal that warranted relief in federal court). We are not persuaded. Our supreme court stated in ***Romero-Georgana*** that the "clearly stronger" standard applies to claims of ineffective assistance of postconviction counsel following a direct postconviction motion. *See* ***Romero-Georgana***, 360

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Wis. 2d 522, ¶46 ("The 'clearly stronger' standard is appropriate when postconviction counsel raised other issues before the circuit court, thereby making it possible to compare the arguments now proposed against the arguments previously made."). Nothing in the federal cases that Brooks cites provides a different standard for a WIS. STAT. § 974.06 motion following an earlier direct postconviction motion. Thus, at the outset, Brooks has failed to overcome the *Escalona-Naranjo* procedural bar because he has not attempted to demonstrate that the issues he raises now are "clearly stronger" than the issues his postconviction counsel pursued on his behalf. *See Romero-Georgana*, 360 Wis. 2d 522, ¶46.

Moreover, Brooks has not set forth sufficient material facts that, if true, would entitle him to relief. Brooks contends first that his trial counsel should have objected to testimony by the medical examiner called by the State to testify as to the cause of Baker's death. Brooks asserts that he was denied his constitutional right of confrontation because the medical examiner who testified to Baker's cause of death was not the medical examiner who performed Baker's autopsy. Brooks contends that, before the results of the autopsy could be used against him, he had a constitutional right to confront the medical examiner who performed the autopsy. *See State v. Manuel*, 2005 WI 75, ¶36, 281 Wis. 2d 554, 697 N.W.2d 811 ("'The Confrontation Clauses of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront the witnesses against them.'" (quoted source omitted)). Brooks asserts that the testifying medical examiner merely acted as a conduit for the opinion of the examiner who performed the autopsy and thus violated Brooks' confrontation rights. *See Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (crime lab report admitted through the testimony of an analyst, who played no part in the underlying lab analysis and had no independent opinion about analysis, presented confrontation problem); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009)

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(admission of test results through notarized "certificates of analysis" rather than the performing analyst's testimony violated the Confrontation Clause). Brooks contends that the State did not prove that the medical examiner who performed the autopsy was "unavailable," and thus the testimony by a different medical examiner was impermissible. *See* ***Manuel***, 281 Wis. 2d 554, ¶¶23, 36 ("'[W]here testimonial hearsay evidence is at issue, the Sixth Amendment demands what the common law required: (1) unavailability and (2) a prior opportunity for cross-examination.'" (quoted source omitted; internal quotation marks omitted)). We do not agree with Brooks that his confrontation rights were violated.

In ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, our supreme court held "that the presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion," satisfies a defendant's confrontation rights, "despite the fact that the expert was not the person who performed the mechanics of the original tests." ***Id.***, ¶20. In ***State v. Griep***, 2015 WI 40, ¶¶3, 47-57, 361 Wis. 2d 657, 863 N.W.2d 567, the court reiterated that an expert's testimony as to the expert's independent opinion based on a review of the results of tests performed by another analyst does not violate a defendant's confrontation rights.[2] *See id.*, ¶47 ("[E]xpert testimony based in part on tests conducted by a non-testifying analyst satisfies a defendant's right of confrontation if the expert witness: (1) reviewed the analyst's tests, and (2) formed an independent opinion to which he testified at trial."). Here, the testifying medical examiner explained that she was a forensic pathologist for the Milwaukee

[2] To the extent that Brooks contends that *State v. Griep*, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, was wrongly decided, we note that only the supreme court may overrule or modify supreme court opinions. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

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County Medical Examiner's Office and had performed about 1,300 autopsies. She testified that she reviewed Baker's file, including the autopsy report and photographs, and had reached an independent opinion concerning Baker's cause of death. She testified that it was her opinion, to a reasonable degree of medical certainty, that Baker's cause of death was gunshot wounds to his chest. Also, while Brooks contends that the medical examiner who performed the autopsy was not "unavailable," the testifying examiner testified that the examiner who performed the autopsy had retired. Brooks has not shown that more was required. Thus, Brooks has not established that he was denied his right to confrontation.

Next, Brooks contends that his trial counsel was ineffective by failing to investigate footprint evidence obtained from the hood of a car at the crime scene. He contends that, had his counsel obtained that evidence, it would have shown that the footprints were not his. *See* ***State v. Thiel***, 2003 WI 111, ¶44, 264 Wis. 2d 571, 665 N.W.2d 305 (counsel's performance is deficient if failure to investigate was unreasonable). However, as the State points out, the evidence at trial was that there were *two* men with guns, Brooks and Stokes, chasing Baker before he was killed. Thus, evidence that the footprints did not belong to Brooks would not have been exculpatory.

Finally, Brooks contends that his trial counsel was ineffective by failing to preserve Brooks' claim that the State presented knowingly false information at Brooks' preliminary hearing. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991) (a defendant claiming error at a preliminary hearing can only obtain relief before trial; a fair and errorless trial essentially cures any defect in the preliminary hearing). Brooks asserts that the State "purchased" the testimony of a witness at the preliminary hearing to state that Brooks admitted his involvement in the shooting. However, the evidence that Brooks relies upon is a letter from the assistant district attorney to an administrative law judge (ALJ) stating that the witness had

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cooperated with the State by testifying truthfully at the preliminary hearing, and that the State had promised only to make the ALJ aware of the witness's cooperation. Nothing in the letter indicates that the State presented knowingly false information at the preliminary hearing.

Because Brooks has not demonstrated that the claims in his WIS. STAT. § 974.06 motion were clearly stronger than the issues raised in his first postconviction motion, Brooks has not shown that his postconviction counsel was ineffective. Moreover, the facts set forth in Brooks' motion do not establish that Brooks is entitled to relief. Accordingly, the circuit court properly denied Brooks' motion without a hearing.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals

(Attachment -

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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November 13, 2017

To:

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Cyrus Linton Brooks 356756-A
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P.O. Box 200
Fox Lake, WI 53933-0200

You are hereby notified that the Court has entered the following order:

No. 2016AP974 State v. Brooks L.C.#2011CF1651

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Cyrus Linton Brooks, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Diane M. Fremgen
Clerk of Supreme Court

Appendix - M.

Attachment - [R.59:Ex-#9].

PC-15A 3/98 SUPPLEMENTAL REPORT MILWAUKEE POLICE DEPARTMENT	INCIDENT SUPPLEMENT ACCIDENT SUPPLEMENT JUVENILE SUPPLEMENT		DATE OF REPORT	INCIDENT/ACCIDENT #
			10/29/05	05-302-0135/M4372

INCIDENT INFORMATION	INCIDENT	DATE OF INCIDENT/ACCIDENT	
	HOMICIDE SHOOTING	10/29/05	
	VICTIM	LOCATION OF INCIDENT/ACCIDENT	DIST. #
	BAKER, Terry J.	2351 N. 46th St.	3

JUVENILE LAST NAME	FIRST	MIDDLE	DATE OF BIRTH	DETAINED ORDERED TO MCCC OTHER

QUANTITY	TYPE OF PROPERTY	DESCRIPTION	SERIAL #	CODE #	VALUE

This report is dictated by **Detective Randolph OLSON**, assigned to Squad 123 Day Shift, of the Criminal Investigation Bureau.

On Saturday, 10/29/05, at approximately 10:23 a. m., I responded to 2351 N. 46th St. regarding the report of a Homicide shooting. Upon arrival at that location, I met **Lieutenant of Detectives Ray RICHARDS,** and Squad 124, **Detective Lawrence DEVALKENAERE,** who advised me that **Terry J. BAKER,** B/M, DOB: 5/27/84, was found dead at the alley fence line for the property located at 2351 N. 46th St. BAKER had suffered a gunshot wound (through and through, from his side to side) and died at the scene.

Per Lieutenant RICHARDS, I learned that investigation and evidence indicated that BAKER had been involved in an argument in the area of 47th & Meinecke. During the argument, actors produced guns and numerous gunshots were fired. BAKER fled through the yard eastbound while being pursued by an unknown person with a possible sawed off rifle. Casings for a 30.30 caliber rifle were found along the route that BAKER fled. BAKER was found dead at the fence line and evidence indicated that numerous gunshots were fired in the area to the point where his body was recovered. Per Lieutenant RICHARDS, I was to assist in the scene investigation with Detective DEVALKENAERE.

While at 2351 N. 46th St., I was advised by **Detective John REESMAN** that the resident of 2345 N. 46th St. stated that an unknown actor armed with a sawed off rifle fled through the back yard at that location. The witness stated that the witness heard the sound of gunshots from the immediate area rear of their residence and then observed an unknown male armed with a sawed-off rifle jump over the fence on the north side of the rear of their property. That unknown male with the rifle then ran southbound across the property towards a black Lincoln Town car that was parked in the back yard close to the residence. Because of the close proximity of the car to the house, the witness was unable to see where the person with the rifle ran after that person left the witness's sight.

A check of the rear yard at 2355 N. 46th St. revealed a fenced back yard with a 6'10" high fence going east to west on the south side of the residence and a 5'9" high wooden fence going east to west on the north side of the back yard for the residence. Parked in the southeast corner of the back yard approximately 2'-3' from the southwest corner of the house for 2345 N. 46th St., was a black Lincoln Town car. This vehicle was a 4 door vehicle, black in color, with Wisconsin '06 license plate 700-JEZ. It had a VIN 1LJBP96F6FY707969. The vehicle was dirty and covered with dust. The 1985 Lincoln Town car listed to **Kathleen TRAMELL** of 2345 N. 46th St.

The 1985 Lincoln Town car was approximately 70" wide X 21' long. The vehicle was parked facing eastbound and the doors were unlocked. Based on the information supplied by the witness at 2345 N. 46th St., the suspect jumped over the fence on the north side of the back yard at 2345 N. 46th St. and proceeded directly southbound towards the south fence line of the backyard property. The hood to the 1985 Lincoln Town car was directly in the path of a hole in that fence. An inspection of the hood of that vehicle showed what appeared to be three sets of footprints crossing the hood of the car. The hood of the car is approximately 3' high and the first print starts at the left front quarter panel on the top at the hood. All three prints are prints that resemble a circle with smaller circles inside and proceed directly south across the hood of the car. The second print is then in the center of the hood, but close to the windshield and the third print is on the right front quarter panel, right at the edge of the hood. A measurement of the prints showed that each one of the prints extended from the center circle out 3" to the outside ring of the print. Photographs of all three prints were taken by **I.D. Tech Michelle HOFFMAN,** including to-scale prints with a tape measure beside them.

Directly south of these footprints was an 11" hole in the fence. This fence was 7' south of the limousine which was 26' south of the north fence. The hole in the south fence had two planks that had been kicked out by the suspect. Those planks were 5½" wide each and laying on the ground on the south side of the fence. It appears based on the path of the suspect, he jumped the fence on the north side of the property, ran the 26' to the Lincoln, ran across the hood of the Lincoln, landed on the ground and then went 7' to the south fence where he kicked out the planks and then went through the 11" opening continuing southbound into the next yard.

During the course of photographing the prints on the vehicle and checking the area for further evidence, a cartridge casing for a 30-30 caliber rifle was found approximately 14" west of the right

Attachment -

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(Attachment -)

OFFICE OF THE DISTRICT ATTORNEY
Milwaukee County
JOHN T. CHISHOLM · District Attorney
Chief Deputy Kent L. Lovern, Deputies James J. Martin, Patrick J. Kenney, Lovell Johnson, Jr., Jeffrey J. Altenburg

June 7, 2011

ALJ Margaret Beckwith
Division of Hearing and Appeals,

RE: Doniel Carter 05 CF 6973

Dear Judge Beckwith,

I am writing to let you know about the cooperation provided by Mr. Carter. In 2006, Mr. Carter debriefed with members of the Milwaukee Police Department Homicide Unit in regards to a homicide committed by Cyrus Brooks.

Cyrus Brooks was later charged in Milwaukee County Case 11 CF 1651 with First Degree Reckless Homicide. On June 1, 2011, this case was set for preliminary hearing for the third time. Commissioner Dennis Cook indicated that no final adjournments would be given to the State and that if the State could not proceed on that date, the case would be dismissed. Mr. Carter testified and testified truthfully as to an admission that Mr. Brooks made to him in custody. Following Mr. Carter's testimony, the State was successful in getting bindover.

Mr. Carter testified for the State with no promises other than the State would make Your Honor aware of his cooperation. At this time, the State is taking no position as to what credit should be awarded for his cooperation. Further negotiations will continue in regards to hopeful truthful testimony at trial, if that occurs.

The State is writing this letter to notify Your Honor as to Mr. Carter's cooperation with the State that allowed a homicide case to proceed through preliminary hearing. Again, the State is not taking any position, at this time, as to revocation or sentence.

Sincerely,

Grant Huebner
Assistant District Attorney
821 West State St., Room 405
Milwaukee, WI 53233

Appendix - I.

(Attachment -

STATE OF WISCONSIN | CIRCUIT COURT Branch 15 | MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

CYRUS L. BROOKS,

Defendant.

FILED
CRIMINAL DIVISION
15 APR 18 2016 15
JOHN BARRETT
CLERK OF CIRCUIT COURT

Case No. 11CF001651

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On April 8, 2016, the defendant filed a *pro se* motion for postconviction relief pursuant to section 974.06, Wis. Stats., and ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675 (Ct. App. 1996). Under ***Rothering***, a defendant may bring a claim under section 974.06, Wis. Stats., before the trial court alleging that postconviction counsel was ineffective. The ***Rothering*** court indicates that the ineffective assistance of postconviction counsel may be sufficient cause under ***State v. Escalona-Naranjo***, 185 Wis.2d 169 (1994), for failing to raise an issue previously. Both sec. 974.06(4), Wis. Stats., and ***Escalona*** require a defendant to raise all issues in his or her original postconviction motion or appeal. In addition, when arguing that postconviction counsel was ineffective for failing to raise the ineffectiveness of trial counsel, a defendant must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought. ***State v. Starks***, 349 Wis. 2d 274 (2013).

The defendant Brooks and co-defendant Maurice Stokes were charged with first degree reckless homicide as parties to a crime in the shooting death of Terry James Baker on October 29, 2005. A jury trial was held before the Hon. Richard J. Sankovitz on October 10-13, 2011, after

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which the jury found the defendant guilty as charged. On November 18, 2011, Judge Sankovitz sentenced him to 38 years in prison (30 years of initial confinement and eight years of extended supervision). Postconviction counsel filed a motion for new trial on August 12, 2013 which was denied by Judge Sankovitz's successor, the Hon. Jeffrey A. Wagner. An appeal was filed, and the Court of Appeals affirmed the postconviction order and judgment of conviction on September 30, 2014.

The defendant now claims that postconviction counsel failed to raise meritorious issues on appeal which he (the defendant) had specifically instructed counsel to raise. (*Motion, p. 12*). First, he claims that counsel should have raised the following issues with respect to the ineffective assistance of trial counsel:

- Trial counsel should have objected when someone else other than the medical examiner who performed the autopsy was permitted to testify.
- Trial counsel should have investigated the footprint evidence left by the shooter because if he had done a comparison between the footprints found on the hood and fender of an automobile that the shooter allegedly ran across after the shooting, it would have exculpated him.
- Trial counsel failed to appeal his bindover after the preliminary hearing.

None of these claims are clearly stronger than the claims postconviction counsel actually raised.

Strickland v. Washington, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second prong, the defendant is required to show "'that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding

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Afterwards, several United States Supreme Court cases were decided which produced different scenarios, and cases such as ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009) and ***Bullcoming v. New Mexico***, 561 U.S. 1058 (2010), produced a different result (finding that the defendant's confrontation rights were violated). Both of these cases involved the introduction of laboratory reports, which were deemed testimonial. In ***Melendez-Diaz***, the United States Supreme Court found that a forensic lab report could not be offered without a live witness competent to testify as to the truth of the report's contents; and in ***Bullcoming***, the same court held that since the analyst who presented the report did not participate in, observe, or review the testing of the defendant's blood sample, the prosecution must produce the analyst(s) who wrote the report for confrontation purposes. The defendant relies on both ***Melendez-Diaz*** and ***Bullcoming*** to support his argument that his right to confrontation of the witness, Dr. Stormo, was violated.

In ***State v. Griep***, 361 Wis. 2d 657 (2015), the Wisconsin Supreme Court analyzed all of the above cases, noting that the testimony in ***Bullcoming*** was "not the independent opinion of an expert." ***Griep*** at 675. It stated, "Therefore, when an expert witness reviews data yielded by laboratory tests and reaches his or her own independent opinion based on that data and his or her own knowledge. ***Williams*** applies and ***Bullcoming*** provides no guidance." ***Id.*** The ***Griep*** court found that "an expert may form an independent opinion based in part on the work of others without acting as a 'conduit.'" ***Id.*** at 689. That is what occurred in ***Griep***, and that is what occurred here.

It was undisputed that the victim had been shot. Dr. Wieslawa Tlomak testified that she had been with the Medical Examiner's office for five years and had performed approximately 1300 autopsies. (Tr. 10/11/11, p. 67). She stated that Dr. Stormo had retired, that she had

App. J/3. Copy

reviewed the file, and that she had reached her own independent opinion regarding the cause and manner of death of the victim. (***Id.*** at 68). Clearly, this is a ***Williams*** situation, and the defendant's right to confrontation was not violated. Not only was Dr. Tlomak's testimony based on her independent opinion, but the defendant does not indicate in his motion how anything in Dr. Tlomak's testimony affected his defense. The court questions how confrontation of the *original* medical examiner would have assisted in the defendant's particular defense. He has not shown what difference it would have made to his case or how his ability to question the *original* medical examiner would have altered the outcome. In short, Dr. Tlomak was qualified to present testimony on the autopsy that Dr. Stormo had performed and to reach an independent opinion with regard to the findings that were made. The defendant has not set forth a viable claim for relief with respect to this issue.

The defendant's footprint evidence argument also fails to pass muster. No evidence of this nature (an expert's comparison of footprints) has been presented in support of the defendant's claim, although he indicates that police officials have refused to respond to his requests to turn over the evidence for a forensic comparison. (*Motion at p. 18*). However, even if he could show that the footprints did not match his feet, it would not necessarily be exculpatory because there is not a reasonable probability that the outcome of the trial would have been any different given the compelling testimony of the witnesses, especially Julius Turner. As indicated in Judge Wagner's prior decision, Turner testified that both Brooks and Stokes had approached him and told him to stop hanging around with the victim because he was a "dead man." (*Decision and order dated October 4, 2013, p. 6*). He also testified that he saw both defendants with guns taking aim at the victim at the time of the incident. (*Id.*). He said he saw Brooks fire a shot at the victim and he saw Stokes aiming a gun with his arm extended. (Tr. 10/11/11, pp. 79-81). Given the

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overwhelming eyewitness testimony against the defendant, the size of the footprints would not have carried much weight.

Finally, the defendant's argument that trial counsel should have appealed the bindover on June 1, 2011 is not clearly stronger than the issues raised by postconviction counsel. In sum, the defendant has not demonstrated that postconviction counsel provided ineffective assistance in his case.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is **DENIED.**

Dated this 14th day of April, 2016 at Milwaukee, Wisconsin.

BY THE COURT:

J. D. Watts
Circuit Court Judge

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

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Attachment -

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DISTRICT I

July 28, 2016

To:

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You are hereby notified that the Court has entered the following order:

2016AP974 State v. Cyrus Linton Brooks (L.C. # 2011CF1651)

Before Curley, P.J.

Cyrus Linton Brooks, pro se, moves to supplement the record to include photographs taken by Milwaukee Police Department employee Michelle Hoffman of the crime scene; in particular, three sets of footprints crossing the hood of the 1985 Lincoln Town Car, including to-scale versions of these photographs with a tape measure beside them. The State has not objected or otherwise responded to the motion.

The record on appeal may include "[e]xhibits material to the appeal whether or not received in evidence." *See* WIS. STAT. RULE 809.15(1)(a)9 (2013-14).[1] Because it appears that the footprints are relevant to the collateral postconviction order from which this appeal is taken,

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Appendix - L.

we conclude that good cause is shown to supplement the record if the photographs, which were not filed in the circuit court, can be located.

Because the photographs were taken by the Milwaukee Police Department, and should therefore be in the Department's custody, we will direct the district attorney to cause the above-listed photographs to be filed with the clerk of the circuit court.

IT IS ORDERED that the motion to supplement the record is granted.

IT IS FURTHER ORDERED that the district attorney shall obtain the above-listed photographs from the Milwaukee Police Department and cause them to be filed with the clerk of the circuit court no later than August 15, 2016.

IT IS FURTHER ORDERED that the clerk of the circuit court shall file a supplemental return to include the photographs no later than five days from the date they are filed in the circuit court.

IT IS FURTHER ORDERED that the appellant's brief shall be filed no later than fifteen days after the date the record is supplemented.

Diane M. Fremgen
Clerk of Court of Appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

CYRUS LINTON BROOKS,

Petitioner,

v. Case No. 17-C-1718

RANDY HEPP,

Respondent.

ANSWER OPPOSING A PETITION FOR WRIT OF HABEAS CORPUS

Respondent, Randy Hepp, by his undersigned attorney, Sara Lynn Shaeffer, answers petitioner Cyrus Linton Brooks' petition for a writ of habeas corpus under 28 U.S.C. § 2254 as follows:

CUSTODY, JURISDICTION, VENUE, and TIMELINESS

The subject of Brooks' habeas petition concerns his judgment of conviction in Case No. 2011CF1651, entered in Milwaukee County Circuit Court. (Dkt. 1:2.) In that case, a jury found Brooks guilty of first-degree reckless homicide as a party to a crime (PTAC). Respondent attaches a copy of the judgment of conviction in Brooks' case as Exhibit A.

Brooks, a person held in custody at Fox Lake Correctional Institution, claims that his custody is in violation of the United States Constitution. His

petition for a writ of habeas corpus is properly brought pursuant to 28 U.S.C. § 2254.

The federal habeas corpus petition in this case is the first Brooks has filed challenging his conviction in Case No. 2011CF1651. It is not a second or successive petition. Respondent concedes that this Court has jurisdiction over Brooks' habeas petition.

Brooks is serving a sentence imposed by a state court within the same federal district. This case is properly venued in this Court. 28 U.S.C. § 2241(d).

As will be described below, direct review of Brooks' judgment of conviction in the Wisconsin courts began on May 11, 2015, which is ninety days from February 10, 2015, when the Wisconsin Supreme Court denied his petition for review.

Respondent concedes that Brooks' habeas corpus petition was timely filed in this Court within the one-year limitations period specified by 28 U.S.C. § 2244(d)(1)(A).

STATE COURT PROCEDURAL HISTORY

A jury convicted Brooks of first-degree reckless homicide (PTAC) on October 13, 2011. (Exhibit A.) As described in the court of appeals' direct appeal decision, some of the facts are as follows:

> ¶2 Brooks and his co-defendant, Maurice Stokes, were charged with shooting and killing Terry Baker. They were tried separately. At Brooks' trial, Julius Turner described incidents that occurred the night before the shooting and on the day of the shooting. He said the night

(Exhibit K:2–3, 5.) Habeas relief is only available if a petitioner can demonstrate he is in custody in violation of the Constitution, laws, or treatises of the United States. 28 U.S.C. § 2254(a). Because Brooks has not identified any such violation, habeas relief is unavailable.

Ground Seven. Respondent denies that Brooks is entitled to relief on his claim that his postconviction counsel was ineffective for failing to raise claims "As Instructed To Do So By Defendant." (Dkt. 1:23.) According to Brooks, the standard is not "clearly stronger," but "cause and prejudice." (Dkt. 1:23.) The court of appeals rejected this argument in Brooks' collateral appeal:

> When a defendant alleges that postconviction counsel was ineffective by failing to pursue a claim of ineffective assistance of trial counsel, the defendant must establish that trial counsel was, in fact, ineffective. *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. A claim that trial counsel was ineffective must set forth the relevant facts as to the "who, what, where, when, why and how" counsel was ineffective. *State v. Allen*, 2004 WI 106, ¶36, 274 Wis. 2d 568, 682 N.W.2d 433. Moreover, "a defendant who alleges in a [WIS. STAT.] § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought." *RomeroGeorgana*, 360 Wis. 2d 522, ¶4.
>
> Brooks contends that he need not demonstrate that his current issues are "clearly stronger" than the issues his postconviction counsel pursued in order to demonstrate that his postconviction counsel was ineffective. He argues that the "clearly stronger" test is not the only means of establishing ineffective assistance of counsel. In support, Brooks cites federal case law setting forth the standard for overcoming the procedural bar to obtain review in a federal habeas corpus action. *See, e.g., Freeman v. Lane*, 962 F.2d 1252 (7th Cir. 1992) (petitioner not barred from raising claims in federal habeas corpus action despite failing to raise claims in earlier state appeal; petitioner's direct appeal counsel was ineffective by failing to raise issue in direct state appeal that warranted relief in federal court). We are not persuaded. Our

> supreme court stated in *Romero-Georgana* that the "clearly stronger" standard applies to claims of ineffective assistance of postconviction counsel following a direct postconviction motion. *See Romero-Georgana*, 360 No. 2016AP974 5 Wis. 2d 522, ¶46 ("The 'clearly stronger' standard is appropriate when postconviction counsel raised other issues before the circuit court, thereby making it possible to compare the arguments now proposed against the arguments previously made."). Nothing in the federal cases that Brooks cites provides a different standard for a WIS. STAT. § 974.06 motion following an earlier direct postconviction motion. Thus, at the outset, Brooks has failed to overcome the *Escalona-Naranjo* procedural bar because he has not attempted to demonstrate that the issues he raises now are "clearly stronger" than the issues his postconviction counsel pursued on his behalf. *See Romero-Georgana*, 360 Wis. 2d 522, ¶46.

(Exhibit K:4–5.) Brooks has procedurally defaulted because the court of appeals determined this issue of state law procedural grounds. He is not entitled to relief on this claim.

Ground Eight. Finally, Respondent denies that Brooks is entitled to relief on his claim that he is actually innocent. (Dkt. 1:26.) Brooks uses the "gateway claim" of ineffective assistance of counsel to argue actual innocence. (Dkt. 1:27.) However, because Brooks cannot prove that he received ineffective assistance of counsel, his actual innocence claim fails. Additionally, Brooks fails to identify any "new reliable evidence" as required by *Schlup v. Delo*, 513 U.S. 298 (1995).

AFFIRMATIVE DEFENSES

This Court can address the merits of Brooks' claims only if he exhausted state remedies and if his claims are not procedurally defaulted. Has procedurally defaulted on **Ground Three**, that his trial counsel was

App. N/3.

05-04396 BAKER, TERRY J.

Milwaukee County Medical Examiner
933 West Highland
Milwaukee, Wisconsin 53233

AUTOPSY PROTOCOL

NAME: BAKER, TERRY J. SEX: MALE AGE: 21 YEARS

DOB: 05/27/1984

DATE OF DEATH: OCTOBER 29, 2005 TIME: 1240 HOURS

DATE OF AUTOPSY: OCTOBER 30, 2005 TIME: 1000 HOURS

PLACE OF AUTOPSY: Milwaukee County Medical Examiner's Office

PERFORMED BY: K. Alan Stormo, M.D.
Assistant Medical Examiner

WITNESSED BY: Amanda Arndt
Forensic Pathology Assistant

Detective Djordje Rankovic
Milwaukee Police Department

Identification Technician Sylvia Filapek
Milwaukee Police Department

CAUSE OF DEATH: Exsanguination
DUE TO: Gunshot Wound to Chest

Signed _____ 12-2-05
K. Alan Stormo, M.D. Date Signed
Assistant Medical Examiner

NOTES BY: WE TYPE/CSD, MEDICAL TRANSCRIBER

M 4372 SEC 11

Attachment -

STATE OF WISCONSIN | CIRCUIT COURT CRIMINAL DIVISION | MILWAUKEE COUNTY

STATE OF WISCONSIN

Plaintiff,

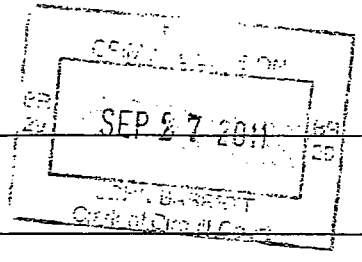
vs.

Cyrus Linton Brooks

Defendant,

DA Case No.: 2011ML005159

Court Case No.: 2011CF001651



STATE'S WITNESS LIST

The State of Wisconsin does hereby give notice that the following witnesses may be called in the state's case-in-chief at the trial of the above-entitled matter:

POLICE
Det. David Chavez
Det. Billy Ball
Det. Mark Peterson
Det. James Hutchinson
Lt. Randy Olson
Lt. David Salazar
Det. Erik Villarreal
Det. Louis Johnson
Det. Thomas Fischer
Det. Larry DeValkenaere
Det. Djordje Rankovic
Det. Carl Buschmann
PO Gregory Heaney
PO Maurice Woulfe

CITIZENS
Julius Turner
Michael Henderson
Daniel Carter
Lt. Linda Mattrisch
Janice Baker
Dr. Brian Peterson
Mark Simonson

Dated at Milwaukee, Wisconsin, this 27th day of September, 2011.

Respectfully submitted,

Denis J. Stingl
Assistant District Attorney
1009627

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Attachment - #3.

STATE OF WISCONSIN	CIRCUIT COURT CRIMINAL DIVISION	MILWAUKEE COUNTY

STATE OF WISCONSIN

Plaintiff,

vs.

Cyrus Linton Brooks

Defendant,

DA Case No.: 2011ML005159

Court Case No.: 2011CF001651

NOTICE OF EXPERT TESTIMONY

Pursuant to Wisconsin Statutes section 971.23(1)(e), the State of Wisconsin offers the following summary of the testimony of expert witnesses:

1) Milwaukee County Medical Examiner, Dr. Brian Peterson.

Doctor will testify to the autopsy and the contents of the written autopsy protocol. Should the defendant require a copy of the curriculum vitae or resume of Dr. Brian Peterson, a copy may be obtained at the office of the Milwaukee County Medical Examiner's office, 933 W. Highland Avenue, Milwaukee, Wisconsin.

2) State Crime Laboratory-Milwaukee Analyst Mark Simonson

Analyst will testify to the findings in the crime lab pertaining to the above case.

Dated at Milwaukee, Wisconsin, this 27 day of September, 2011.

Respectfully submitted,

Denis J. Stingl
Assistant District Attorney
State Bar No. 1009627

P.O. Mailing Address
District Attorney's Office
Safety Building, Room 405
Milwaukee, WI 53233
Voice: (414) 278-4646

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