No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GENERAL GRANT WILSON

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition for Writ of Certiorari
to the Wisconsin Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the limitations that Wisconsin places on a criminal defendant seeking to introduce third-party-perpetrator evidence are consistent with the Due Process Clause.

2. Whether the standard applied by Wisconsin in assessing prejudice for a claim of ineffective assistance of counsel in the context of a third-party-perpetrator defense is constitutional.

PARTIES AND PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), petitioner states as follows:

(i) The parties to the proceeding below were Defendant-Appellant, General Grant Wilson, and Plaintiff-Respondent, State of Wisconsin.

(ii) No corporate disclosure statement is in order.

(iii) This case has involved only one "proceeding" in Wisconsin and one previous petition for certiorari (*General Grant Wilson v. Wisconsin*, No. 15-6520), which respondent explained not yet to involve a final decision under 28 U.S.C. § 1257(a). *See infra* pp. 13–14 (setting forth relevant background). *See also infra* p. 17 n.6 (explaining the case's different appellate numbers in Wisconsin reflected in various appendix documents, together with its single, continuous trial court number).

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PETITION FOR A WRIT OF CERTIORARI

For 28 years, petitioner has hoped to vindicate his federal constitutional rights in the Wisconsin court system. Despite some interim successes, those hopes ultimately have been frustrated by erroneous legal rulings concerning what may be required of a defendant seeking to present evidence to a jury that *someone else* committed the crime charged and, further, about the ineffectiveness of petitioner's trial counsel. This petition provides this Court an important opportunity to clarify the constitutional rights of a criminal defendant to present at trial such a "third-party-perpetrator defense," contrary to a prosecutor's objection.

For, to leave aside the length of time in the Wisconsin state courts, the general scenario presented here is not unusual in Wisconsin or elsewhere. As explained by a relatively recent law review article (which touched briefly upon petitioner's case among many others), "Forty-five states and ten federal circuits impose some type of disfavored treatment on a criminal defendant's evidence that a person other than himself committed the crime." David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 Wis. L. Rev. 337, 338. This is so even though such evidence "is relevant in the clearest sense." *Id*. Petitioner does *not* suggest that each of these jurisdictions proceeds unlawfully, but Wisconsin is "[o]n the stricter end of the spectrum," *id*. at 352, and in the specific and extreme form such as that approved here these "doctrines are unconstitutional." *Id*. at 339. They cannot be squared with this Court's unanimous

decision in *Holmes v. South Carolina*, 547 U.S. 319 (2006), elaborating on basic precepts of due process. This Court's intervention is essential.

Even apart from the unconstitutionality of Wisconsin's approach to a third-party-perpetrator defense, petitioner's trial counsel here failed to provide effective assistance of counsel, as required by the Constitution. This case presents a useful opportunity for this Court to elucidate what counsel presenting such a defense must do—or, at any rate (in the nature of case-by-case adjudication), what they must not do.

OPINIONS BELOW

The most recent decision of the Wisconsin Court of Appeals, not published in the *Wisconsin Reports*, is reproduced at App. 1–32, with the Wisconsin Supreme Court's order denying the petition for review at App. 136. The Wisconsin Supreme Court's earlier decision in this case appears at 2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52 and is reproduced at App. 47–114.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Wisconsin Supreme Court denied review on August 11, 2021. App. 136. On October 22, 2021, the Hon. Amy Coney Barrett extended the deadline for this petition from November 9 to November 29, 2021.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be

confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The U.S. Constitution guarantees a defendant in a criminal trial the right to a "meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal quotation marks omitted). This assurance of due process under the Fourteenth Amendment includes the right of the defendant to present relevant evidence. *See*, *e.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 294–95 (1973). This Court left no doubt in *Holmes* that relevant evidence includes testimony tending to demonstrate that a third party—not the defendant—perpetrated the crime.

In order to put this petition in context, it is useful to set forth the following: (1) the criminal trial of petitioner in 1993, (2) proceedings on direct appeal (initially vindicating petitioner's rights), which concluded more than 20 years later, (3) the subsequent ineffective-assistance-of-counsel hearing back in the trial court, and (4) the decision of a divided Wisconsin Court of Appeals that marked the end of the state court's system engagement with this case (apart from the state supreme court's subsequent denial of review).

1. Petitioner's Trial, Including the Theory of His Defense. General Grant Wilson, petitioner here, was arrested in Milwaukee on April 21, 1993.

App. 52–53. The arrest occurred at his place of work, Krause Milling Co., where petitioner was a long-standing employee and union steward. R.55:33.[1] The police acted on the accusation of one individual, Willie Friend, that petitioner was responsible for the shooting death of Eva Maric. App. 52. Petitioner was charged with first-degree intentional homicide while possessing a dangerous weapon and with attempted homicide. App. 54.

Trial occurred in the summer of 1993, scarcely more than two months after the arrest, App. 54, with Friend as the prosecution's star witness. He testified that, during the night in question, he had been sitting in a car with Maric, outside an "after-hours club" on Milwaukee's north side, run by Friend's brother. App. 56–57. A "neutral" witness (i.e., one neither involved in the scene nor charged with the crime), Carol Kidd-Edwards, testified that she heard five loud gunshots at approximately 5 a.m. App. 58. After hearing these loud gunshots, she then went to her bedroom window and saw Friend running from the passenger door of Maric's car. App. 58. Kidd-Edwards testified that "as I observed Willie running from the car [with Maric] across the street, I also saw a man . . . approach the car across the street [with Maric] where the car was still running." R.51:103. There was a gun in that man's hand, and he shot into the driver's side. R.51:103–04.

Friend told the police that petitioner was the shooter. App. 52. He purported to base this conclusion on aspects of the car involved, which he testified the victim had pointed out to him as the two drove around earlier in the evening. App. 56.

[1] While most citations are of material appearing in the Appendix ("App.") to this petition, some refer to material in the state court record ("R.")—more specifically, to the docket-entry number followed by the page number.

Unlike petitioner, Friend had been inside the after-hours club with Maric before her death. App. 123. In testifying to this, as noted by one of the courts below, "Friend admitted that he lied [about this] in his statement to the police and in his testimony at the preliminary hearing . . . ." App. 123.

The physical descriptions of the shooter did not match petitioner. Friend described the shooter as a "medium" man with "gold-rimmed" glasses, who shot left-handed. R.51:61; App. 57–58. The neutral witness, Kidd-Edwards, said that the shooter was a "brown toned color black man," "roughly six feet," "wearing a black leather waist-fitted jacket that was tapered to the waist" and a "top fade" hairstyle. App. 59; R.51:107. Among other discrepancies, petitioner, a long-time member of the U.S. Army reserves, had never worn such glasses and was a right-handed shooter. R.53:8, 124, 128, 136–139, 148. In all events, there is no dispute that "Friend was the only person directly linking Wilson to the crime." App. 42.[2]

The relationships of both petitioner and Friend to the victim were important and are easily stated. Petitioner and Maric were involved in a relationship. For the other: Maric had been involved in prostitution, with Friend as her "pimp." App. 23, 35. Evidence was available that Maric wanted no longer to participate in prostitution and that Friend had threatened her about her wanting to get out, but counsel for petitioner did not introduce this evidence, and the trial court rejected considerable defense evidence, like this, that would support a third-party perpetrator defense. App. 34.

[2] Considerable other evidence—including but not limited to the testimony of petitioner, who took the stand at trial—diverged from or even contradicted Friend's testimony, but it is unnecessary to detail all of it here (i.e., as context for the reasons that the Court should grant this petition).

In addition, in an effort to support the contention that the offense had been committed by a third party, petitioner sought to ask questions of Friend, as well as other prosecution witnesses, about Friend's motive, opportunity, and direct connection to the shooting. *See*, *e.g.*, R.51:7–8, 231–33; R.56:13–24. In particular, counsel for petitioner argued to the trial court that petitioner should be permitted to elicit or introduce third-party-perpetrator evidence, as permitted (in theory) in Wisconsin under the case of *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). *See*, *e.g.*, R.51:7–8, 233; R.56:85–86. At first, the circuit court told counsel that he "should probably prepare an offer of proof." R.51:233. But the court dismissed counsel's verbal offer of proof with the comment that it "sounds to me like it's speculation." R.51:248. As a result, the circuit court prohibited the questions, including ones directed to Friend. *See*, *e.g.*, R.51:76–77, 92–93, 231–34.

This is scarcely to suggest that petitioner's trial counsel gets top marks—or anything close. The key evidence against petitioner was testimony *by Friend* (as straightforwardly summarized by the dissenting judge in the decision immediately below) that, as they sat in the car together, the victim "told Friend that Wilson had tried to run her off the road several hours before the murder, then pointed a gun at her and told her that if he saw her with Friend again, he was going to kill her." App. 27. Petitioner's trial counsel *successfully* objected to the introduction of this evidence—only then inexplicably to withdraw the objection. App. 27. With it now in evidence, the prosecutor repeated Friend's statement numerous times during the course of the trial. App. 27.

Petitioner's counsel made some efforts to support the third-party-perpetrator defense. App. 50. In particular, he sought to admit testimony of Mary Lee Larson, a friend of the victim (Maric), that Friend slapped and threatened Maric two weeks before her murder. In a partial offer of proof, Larson testified that she had seen this happen. She spoke, in the offer, further about Friend's threat to Maric:

> A. And Willie stated right to me and my girlfriend that he had to keep Eva in check. If—
> The Court: He said what?
> A. Eva. He said that he had to keep Eva in check.
> The Court: Oh.
> A. If he didn't keep—if she wouldn't be in check, he'd kill her, and she knew it.
> Q. Did Eva respond to that?
> A. She said yes, he would.

R.56:16. Another friend of the victim, Barbara Lange, was not permitted to testify even through an offer of proof. R.56:27–28. But petitioner's counsel informed the court that Lange would have testified that Friend had slapped Maric in the weeks before the shooting and threatened to kill her. App. 50.

The trial court rejected defense counsel's request to admit the third-party-perpetrator evidence, stating as follows:

> The evidence that the State has put in, in my view, is very strong[.] [T]o allow this witness [Ms. Larson] now to—who wasn't on the witness list, as I understand it, and came in as kind of an afterthought here after the defense had rested and the case reopened, seems to me is just going to lead to speculation.

R.56:22. Earlier, with respect to timing, the court told counsel for petitioner, "I assumed that with the three-day interval that you'd think of some witnesses to call,

so I assumed that we would reopen the defense and allow you to put them on." R.56:3.[3]

When the circuit court initially would not make a decision, counsel for petitioner went to the home of the longtime and well-respected then Milwaukee County District Attorney, E. Michael McCann, and made a direct appeal. R.57:2. The following day, counsel for petitioner explained to the court, based on that discussion, his impression that "[t]he State's position is now that they are not objecting to this evidence and we should put it in per Mr. McCann's instructions." R.57:4. The prosecutor told the court that "I do not agree on how Denn[y] applies to this case, but he is my boss and he has instructed me not to object." R.57:4–5. The prosecutor further informed the court that she would need to put in rebuttal evidence. R.57:5. Defense counsel did "not objec[t] [for the prosecutor] to have whatever time she needs." R.57:5.

The circuit court balked at this agreement of the parties. R.57:5. The court objected that, "Mr. McCann was not here, he's not the trial attorney. That puts the whole—the whole trial into a different posture. . . . It's going to take another couple of days to finish this case." R.57:6. The court continued, "I'm not just going to . . . let her be, you know . . . , hanging out there on a limb at the last minute just because Mr. McCann wants to play it completely safe." R.57:7.

[3] The testimony would not have been a surprise to the state, which was aware of Larson's evidence. Detective Michael Dubis later testified that "he had questioned Mary Larson and Barbara Lange in connection with the homicide and they had both told him that they observed Friend slapping Maric shortly before the murder and they both thought Friend was involved in Maric's death, not Wilson." App. 118–19.

Petitioner's counsel argued the third-party-perpetrator defense, based on *Denny*, to the circuit court. The court's response was to doubt *Denny*, expressing concern that this was merely a "Court of Appeals decision" and that it would "encourage claims that . . . don't even have to be substantiated." R.57:12–13.

At the request of the prosecutor, the court granted a recess, so that the prosecutor could confer again with District Attorney McCann. R.58:2. After that recess, she reported to the court the District Attorney's assessment of it as a "close call":

> I talked at some length with Mr. McCann about this, about the facts of the case. Mr. McCann instructed me to tell the Court as follows: that he as the District Attorney believes that this is a close call, that he is considering the sentence that this man faces and probably will result if convicted. He has read the Denny case. He [instructed] me not to object. But he's also indicated to me that I could convey to the Court that he and I disagree about this, and that we fully expect the Judge to make an independent ruling based on all the evidence that has come forth in this case at this point and all of the arguments that have been set forth in the record up until this point. He also indicated that I should say that we don't intend to confess error at a later time.

R.58:3–4. During the recess, the circuit court had had a conversation of its own:

> Well, in the interim, I also had an opportunity to confer informally with a Circuit Court Judge who's a long time member of the Criminal Jury Instructions committee, and his response was the same as mine, he thinks that this will lead to speculation, that it's not a proper procedure, and that if it is a close issue, which apparently everyone agrees it is, it should be decided by the Supreme Court sooner rather than later.

R.58:4–5. The court directed the parties to move to closing arguments. *Id.*

Petitioner proffered jury instructions setting out the third-party defense. The circuit court refused to give them and also denied petitioner's motions for a mistrial. R.12:1–3; R.58:5–25, 149–53. The case went to the jury. R.58:148.

The jury initially reached an "impasse." R.58:154. The court sent the jury back for deliberations; it returned a verdict against petitioner of first-degree homicide of Maric while possessing a dangerous weapon and of attempted homicide of Friend while possessing a dangerous weapon. App. 135. The circuit court sentenced petitioner to life imprisonment with a potential for eligibility for parole in 30 years from the date of sentencing and a consecutive sentence of an indeterminate term, not to exceed 20 years, for attempted first-degree intentional homicide. App. 135.

2. "Initial" Proceedings on Direct Appeal. Petitioner's counsel failed to file an appeal. In 1996, a motion for a new trial was denied. App. 132–34. In 2010, the Wisconsin Court of Appeals agreed with petitioner that counsel had "performed ineffectively and abandoned" petitioner after trial. App. 130. The court reinstated petitioner's post-conviction and appellate rights. App. 130. In 2011, petitioner's post-conviction motion was denied by the Milwaukee County Circuit Court without a hearing. App. 126–29.

In 2013, on direct appeal, more than 20 years after the trial, the Wisconsin Court of Appeals reversed petitioner's conviction. App. 115–25. The court relied on this Court's precedents in noting that "[t]he Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'" App. 117

(quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), which itself quoted *California v. Trombetta*, 467 U.S. 479, 485 (1984)). In this context, the court said, this principle means that "[e]vidence that a person other than the defendant committed the charged crime is relevant to the issues being tried, and thus admissible, 'as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances.'" App. 117 (quoting *Denny*, 120 Wis. 2d at 624, 357 N.W.2d at 17). Applying the principle here, the court held that petitioner "was denied his constitutional right to present a criminal defense during his criminal trial because the circuit court did not allow him to introduce evidence that Friend was involved in the murder despite having shown that Friend had a motive, the opportunity, and a direct connection to the crime." App. 124.

The Wisconsin Supreme Court reversed. In 2015, the court acknowledged (at a high level of generality) this Court's holding in *Crane*. App. 67. "Nevertheless," citing state law, it immediately identified a "tension between the defendant's [federal constitutional] rights and the [state law] relevancy requirement." App. 67. It set forth its solution thus: "*Denny* . . . created a 'bright line standard requiring that three factors be present, i.e., motive, opportunity, and direct connection' for a defendant to introduce third-party perpetrator evidence." App. 69 (quoting *Denny*, 120 Wis. 2d at 625, 357 N.W.2d at 17). The court "reaffirm[ed]" this as the "correct and constitutionally proper test." App. 70.

Because the state had conceded that with respect to the crime, including the victim, Friend had both motive and direct connection (the latter concession being to the Wisconsin Supreme Court's "regret," App. 77), the focus was on opportunity. App. 77–78. The court reasoned that foreclosing petitioner from offering a third-party-perpetrator defense was acceptable in part because petitioner had been able to cross-examine Friend on *aspects* of both his background and his testimony. App. 81. More generally, the court maintained, "Wilson has proffered no *evidence* demonstrating that Friend had the *opportunity* to arrange a hit on Maric during the relatively short time they were in Maric's car." App. 82. The court ordered that "the decision of the court of appeals is reversed." App. 85.[4]

Two of the court's seven justices dissented. Justice Shirley S. Abrahamson, joined by another justice, had no objection to *Denny* but rather to the court's treatment of it. App. 111. "The majority opinion struggles to clarify the *Denny* test and in doing so changes the test," the now late (and long legendary) justice wrote. "Under any reasonable interpretation of *Denny*, the defendant in the instant case prevails." App. 111.

After discussing motive (the first *Denny* prong), Justice Abrahamson addressed both direct connection and opportunity:

> ¶ 141 Second, the defendant argued that Willie Friend's undisputed "presence at the crime scene" constituted evidence of a direct connection between Willie Friend and the crime. Based on the totality of the evidence presented (including evidence of Willie Friend's relationship with the victim, evidence that Willie Friend had

[4] One member of the Court (Justice Annette K. Ziegler), while joining the court's opinion, wrote separately because, in her estimation, "the majority opinion may need some clarification." App. 88.

> previously hit and threatened to kill the victim, evidence that Willie Friend brought the victim to the location where she was murdered, and the undisputed fact that Willie Friend was present when the victim was shot), I conclude that the defendant has fulfilled the direct connection prong.
>
> ¶ 142 Third, the defendant argued that Willie Friend had the opportunity to hire the victim's killer(s) and set up the victim's murder. In assessing this argument, the court of appeals explained that evidence presented at trial "places [Willie] Friend at the scene when the first round of shots was fired, and is consistent with [the defendant's] contention that [Willie] Friend was involved in the murder by luring [the victim] to a place where she would be ambushed."

App. 112 (footnotes omitted). The dissent thus explained its agreement with the court of appeals' conclusion "that Willie Friend 'had the opportunity to commit this crime, either directly by firing the first weapon or in conjunction with others by luring [the victim] to the place where she was killed.'" App. 113.

Denny having been satisfied, Justice Abrahamson concluded, "[t]he defendant was therefore entitled to introduce the testimony of Larson and Lange to implicate Willie Friend in the victim's murder." App. 113.

The court's decision was on May 12, 2015, with rehearing denied on July 1, 2015, and the case was "remitted" (i.e., remanded) to the Clerk of the Milwaukee County Circuit Court on August 4, 2015. Petitioner filed a timely petition for certiorari in this Court on September 29, 2015 (No. 15-6520). The state thereupon notified the Wisconsin Supreme Court that it "believe[d] the remittitur was issued in error and that the case should have been remanded to the Wisconsin Court of Appeals to decide outstanding issues briefed in the intermediate appellate court that neither that court nor the Wisconsin Supreme Court has addressed or

resolved." Letter from Marguerite M. Moeller to Clerk of Wisconsin Supreme Court, at 1 (Oct. 6, 2015). On November 4, 2015, the state supreme court vacated its order of remittitur and directed the case to be returned to the Wisconsin Court of Appeals so that it might consider the remaining issues. On December 2, 2015, this Court requested that the state respond to the petition for certiorari.

In its opposition, the state's primary argument was that "this Court does not have jurisdiction over this case because the decision of the Supreme Court of Wisconsin is not a '[f]inal judgment[ ] or decree[ ] rendered by the highest court of a State in which a decision could be had.'" Brief in Opposition, No. 15-6520, at 2 (quoting 28 U.S.C. § 1257(a)). The state pointed to the intervening events just noted, including its October 2015 suggestion to the Wisconsin Supreme Court and that court's November 2015 order. It maintained to this Court that none of the four exceptions to § 1257's finality requirement as set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), was applicable. While petitioner briefly suggested otherwise, *see* Petitioner's Reply Brief, No. 15-6520, at 2–4 (suggesting the presence of the fourth *Cox* exception in which a deferral of review "might seriously erode federal policy," 420 U.S. at 482–83), this Court denied certiorari.

3. Proceedings on Remand in the Wisconsin Court of Appeals and the Trial Court. The Wisconsin Court of Appeals took up the case on the remand by the state supreme court. App. 41–46. It began its analysis with a "brie[f] recap":

> . . . Maric was repeatedly shot with two different guns while seated in a parked car in front of an illegal "after hours" club owned by Larnell Friend around 5:10 a.m. on April 21, 1993. Willie Friend, Larnell's brother, was dating Maric and was with her in the car when she was

> shot, but fled without being injured. Willie Friend told the police that Wilson, who had also been dating Maric, opened fire on both of them, killing Maric. Willie Friend was the only person linking Wilson directly to the crime. Wilson adamantly denied killing Maric and said that he was at home asleep when the murder occurred. At trial, Wilson's lawyer, Peter Kovac, attempted to present evidence implicating Willie Friend and/or his brother Larnell Friend, in Maric's murder. The circuit court did not allow the evidence.

App. 42–43. The court now focused on petitioner's claim that that his trial counsel had provided ineffective assistance. App. 43. The first question under *Strickland v. Washington*, 466 U.S. 668 (1984), was whether counsel's performance was deficient; the second involved prejudice. After recounting some of petitioner's allegations, the court stated that counsel's "alleged failure to adequately investigate and prepare an offer of proof before or at trial regarding the third-party perpetrator evidence, and his failure to clearly explain why the evidence was admissible, if true, meet the deficient performance prong of the *Strickland* test." App. 44. After noting other alleged deficiencies on this front, the court explained that petitioner has "alleged sufficient facts that, if true, show that he was prejudiced." App. 45. After all, the court noted, the Wisconsin Supreme Court's previous decision established that trial counsel's "failure to adequately investigate and make an adequate offer of proof prior to or at trial *resulted in*" the exclusion of "third-party perpetrator evidence pointing to Willie Friend or [his brother] Larnell Friend." App. 45.

The court of appeals therefore remanded to the Milwaukee County Circuit Court for a hearing on petitioner's ineffective-assistance-of-counsel claim.[5] App. 45.

[5] This is known as a *Machner* hearing in Wisconsin, after *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979). "A *Machner* hearing is a prerequisite for consideration of an ineffective assistance claim" and should occur when a defendant's "motion alleges sufficient facts

The hearing occurred over a three-day period in May, June, and July of 2017. App. 33. The deficiency of trial counsel's representation became well established. App. 37. This included, most remarkably because entirely inexplicably, counsel's withdrawing a *successful* objection to the *key* testimony, by Willie Friend, that linked petitioner to the crime—in a case where the defense was that a third-party perpetrator unconnected with the defendant had committed the crime and where that excluded-then-admitted testimony came from just such a third party, whom defendant believed to be involved in the crime. *See* App. 33–34, 37.

The evidence included testimony of the sort that trial counsel had failed to introduce. For example, Barbara Lange (now Streeter) testified to Friend's threat to the victim. This witness gave evidence as follows: "[They] were all talking about [Eva's] prostitution. And she was saying how she didn't want to be in it. She was kind of done with it. She wanted to stop. He said, 'Well you ain't stopping. I'm gonna keep all my bitches in check.'" R.193:25, 29. Mary Larson, too, provided evidence at the ineffectiveness hearing, testifying that Friend uttered his threat to Eva while standing in Larson's kitchen with a gun "sticking out of his pants." R.192:26–27; App. 34. As Larson further testified, Friend vowed as follows: "She [Eva] gonna do as I say or I'll pop her and I won't think twice about it" (Larson understood "pop her" as directed at Eva to mean "shoot her"). R.192:19, 28–29; App. 34.

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which, if true, would entitle him to relief." *State v. Sholar*, 2018 WI 53, ¶50, 381 Wis. 2d 560, 593, 912 N.W.2d 89, 105.

Nonetheless, despite the deficient representation, the court, focusing on "[t]he evidence presented by the State at trial," found no *prejudice* to petitioner from trial counsel's performance. App. 38.

The case returned to the court of appeals, where it awaited decision from 2018 to early 2021.[6] Petitioner sought to demonstrate that trial counsel's deficiencies had, in fact, cost him dearly—i.e., that they had prejudiced him. App. 7. One of the judges agreed, but the other two did not, and the court thus ruled against petitioner. App. 13. The majority framed the "ultimate question" this way: "whether there was a substantial likelihood of a different outcome but for . . . the deficient performance." App. 13. It concluded that there was not, relying on such grounds as that the inconsistencies in Friend's testimony did not make his testimony "incredible" and that his testimony, even "if disproven," might not have been "discount[ed] . . . *entirely*" by the jury. App. 10–11 (emphasis added).

The dissent engaged in a considerably lengthier analysis than did the majority. It concluded "the cumulative effect of [trial counsel's] deficiencies was prejudicial to Wilson's defense and, had they not been committed, there is a reasonable probability that the outcome of Wilson's trial would have been different." App. 15. The dissent sought to demonstrate that trial counsel "did not adequately

[6] Although the appeal was assigned a different number from the previous one, this remained the same case in Wisconsin. *Compare*, *e.g.*, App. 1 (reflecting original and continuing circuit court case number 1993CF931541 and appellate docket number 2018-AP-183) *with* App. 48 (2015 Wisconsin Supreme Court decision showing same circuit court number but 2011-AP-1803 for appellate number). *See also* App. 130 (order with further-different appellate number for still-earlier proceedings in the Wisconsin Court of Appeals with respect to restoration of petitioner's appellate and post-conviction rights in this same case, yet reflecting the 1993 trial court number), App. 16 n.1 (reflecting that appellate number).

investigate and prepare [Wilson's] third-party perpetrator defense before trial" and that his "other deficiencies" were grave, such that petitioner suffered prejudice. App. 20, 27 (capitalization removed). This included counsel's withdrawing his objection to key evidence against petitioner: specifically, testimony by Willie Friend that the victim "told Friend that Wilson had tried to run her off the road several hours before the murder, then pointed a gun at her and told her that if he saw her with Friend again, he was going to kill her." App. 27. Counsel's action was inexplicable in any way consistent with competent representation, in the dissent's estimation: For he made the move "[a]fter the circuit court ruled *in favor of the defense excluding the statement*." App. 27 (emphasis in original). The bottom line for the dissent was that petitioner "did not receive a fair trial." App. 32.

Petitioner sought review in the Wisconsin Supreme Court. The court ordered the state to respond to the petition for review but ultimately denied review. App. 136. That brings the case to this timely petition for certiorari.

REASONS FOR GRANTING THE PETITION

I. WISCONSIN'S TEST FOR ADMITTING A DEFENDANT'S THIRD-PARTY-PERPETRATOR EVIDENCE IS INCONSISTENT WITH DUE PROCESS REQUIREMENTS, AS REFLECTED IN THIS COURT'S DECISION IN *HOLMES V. SOUTH CAROLINA*.

In *Holmes v. South Carolina*, 547 U.S. 319 (2006), this Court recognized the third-party-perpetrator defense as encompassed within the "meaningful opportunity for a complete defense" guaranteed to criminal defendants in appropriate cases. *Id.* at 330–31 (internal quotation marks omitted). In ruling for Holmes that his constitutional rights were violated, the Court explained that a state's test cannot

effectively foreclose a third-party-perpetrator defense through an "arbitrary" rule: that is, a "rul[e] that serve[s] no legitimate purpose or that [is] disproportionate to the ends that [it is] asserted to promote," particularly when there are not concerns of "unfair prejudice, confusion of the issues, or potential to mislead the jury." *Id.* at 324–26. Yet that is precisely the sort of rule that Wisconsin applied and upheld here.

The Wisconsin Supreme Court announced that it was reaffirming the test forth in *State v. Denny*, 120 Wis. 2d 614, 357 NW.2d 12 (Ct. App. 1984). App. 70. Whether the rule applied was a true application of *Denny* (as Justice Abrahamson did not agree), the court stated a rigid test requiring that a defendant prove each of "*three* factors" to be able to introduce the third-party-perpetrator defense: motive, opportunity, and direct connection. App. 70, 73 (emphasis in original). This approach suffers from multiple defects. For one, it requires proof from a defendant of motive—something that even the state need not show, which suggests the rule's arbitrariness. *Cf. Mullaney v. Wilbur*, 421 U.S. 684, 702–03 (1975) (where state law required malice aforethought for murder conviction, it was unconstitutional to put the burden on defendant of disproving this element by his instead having to prove the "inconsistent thin[g]" of heat of passion). For another, under the Wisconsin Supreme Court's application of the test, a defendant must provide evidence to "engineer . . . a scenario" to implicate the third party in the crime with a degree of specificity ordinarily expected of the prosecution. App. 84. The unreasonable

restrictions included in the court's test wrongly deprived petitioner of his opportunity to be heard in his defense. *See Crane*, 476 U.S. at 691.

To begin by elaborating briefly with respect to motive: The Wisconsin Supreme Court acknowledged that the state does *not* have to prove motive in its case-in-chief. *See* App. 72; *see also State v. Berby*, 81 Wis. 2d 677, 686, 260 N.W.2d 798, 803 (1978). For "motive is not an element of crime, and thus cannot determine guilt or innocence." *Kelly v. State*, 75 Wis. 2d 303, 320, 249 NW.2d 800, 809 (1977); *see also Pointer v. United States*, 151 U.S. 396, 414 (1894) ("proof of motive is never indispensable to conviction"). Yet the test here *requires* that a defendant show motive in order to suggest a third-party perpetrator. It is true that a defendant is not required to show motive "beyond a reasonable doubt," as a prosecutor would have to prove an element, or, as the Wisconsin Supreme Court noted, with "substantial certainty." App. 72. Nonetheless, to introduce this evidence remains a requirement not correspondingly imposed on the prosecution.

In fact, petitioner met that burden—and further demonstrated *direct connection*, as the state here conceded in the Wisconsin Supreme Court. No more than the latter should have been required. A rule requiring evidence of a direct connection between an alleged third-party perpetrator and the crime charged would adequately protect the state's interest in "exclud[ing] evidence that is 'repetitive, . . . only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Holmes*, 547 U.S. at 326–27 (quoting *Crane*, 476 U.S. at

689–90) (internal quotation marks omitted). The "latitude [to exclude relevant evidence] has limits" under the Constitution. *Id*. at 324.

Yet the Wisconsin Supreme Court applied its rigid three-part test in one final respect and found petitioner's showing to be insufficient because he did not "make an adequate offer of proof as to Friend's opportunity" for involvement in the crime. App. 83. In this part, the court improperly required defendant to separately prove opportunity of a third-party perpetrator with a degree of detail and an approach more suited to the prosecution. *See, e.g.,* App. 82. Specifically, the court improperly demanded that petitioner produce third-party-perpetrator evidence beyond that sufficient to cast doubt on petitioner's having committed the crime—e.g., stating of petitioner that "[h]e has not identified any individuals as being the shooter or shooters possibly employed by Friend." App. 82. Yet it was not for petitioner to prove the particular someone else who pulled the trigger. The sort of burden imposed by Wisconsin on petitioner here cannot be grounded in some need to resolve a "tension between the defendant's rights and the relevancy requirement," as the Wisconsin Supreme Court maintained. *See* App. 67.

This becomes even clearer when one considers how the Wisconsin Supreme Court analyzed what it meant by *opportunity*. It began well enough (assuming that there must be such a component of the test): "[C]ould the alleged third-party perpetrator have committed the crime, directly or indirectly? In other words, does the evidence create a practical possibility that the third party committed the crime?" App. 71. And, in fact, Willie Friend's presence and actions at the scene

seemed to answer that question "yes." But the Wisconsin Supreme Court continued by reasoning that "opportunity . . . *here* must mean more than presence." App. 78 (emphasis in original). Its objection was not that Willie Friend had been incapable (because, for instance, of age or incapacitation) of committing the homicide. Rather, the Wisconsin Supreme Court found petitioner's showing to be lacking because he did not "engineer [the] scenario" that showed Willie Friend's involvement in perpetrating the crime. App. 51, 84.

But the manner in which the Wisconsin Supreme Court applied the test—in which it required the "scenario" to be demonstrated by petitioner—was unreasonable. The court demanded from petitioner evidence that amounted to a specific showing that Willie Friend committed or directed the commission of the crime. It wanted "evidence" of Friend's "contacts, influence, and finances to quickly hire or engage a shooter or shooters to gun down a woman on a public street"; or (or perhaps, as is not clear, it meant this in the conjunctive) of "telephone records from Friend or Friend's brother's house that could have set up the time and place of the hit on short notice"; or (or and?) "evidence of the ownership by Friend or his family of .44 and .25 caliber weapons," to quote a few examples. App. 82. It wanted (alternatively or additionally, again, it is not clear) petitioner to identify "the shooter or shooters possibly employed by Friend." App. 82. This degree of specificity is beyond what should be required of a defendant. And the court's demand for Willie Friend's *part* in the crime, not just a showing of involvement in a direct or indirect capacity, was wrong. In Wisconsin (as elsewhere), even the state

is not required to specify the role of an individual in the crime (e.g., shooter or accomplice) to prove that an individual is responsible for a crime. *See State v. Holland*, 91 Wis. 2d 134, 144, 280 N.W. 2d 288, 293 (1979).

This is, if you will, not Hoyle; indeed, for all practical purposes, it is (the South Carolina Supreme Court in) *Holmes*, redux. There, this Court struck down a state rule that, like the one here, purported to permit a third-party-perpetrator defense in certain instances but, in practice, foreclosed the introduction of critical defense evidence. There the third-party-perpetrator evidence was excluded "where there [was] strong evidence of an appellant's guilt, especially where there [was] strong forensic evidence." *Holmes*, 547 U.S. at 324 (internal quotation marks omitted). The result of the rule placed an unacceptable burden on the defendant, who was not given an opportunity to offer critical evidence in his defense.

So, too, here. The Wisconsin Supreme Court's application of the third-party-perpetrator rule arbitrarily deprived petitioner of the opportunity to present a substantial defense. The court said that its concern was to resolve the "tension between the defendant's [constitutional] rights and the relevancy requirement." App. 67. The court's answer was extreme. Petitioner could have met—did meet—any relevancy standard: the evidence sought to be admitted about Friend was highly relevant. Willie Friend was at the scene of the crime. He admitted this, and his identity at the scene was confirmed by the testimony of a neutral witness, Carol Kidd Edwards. The state conceded that Willie Friend had a "direct connection" to the crime based on this evidence. App. 77.

It could scarcely have maintained otherwise. By his own testimony, Willie Friend was intimately involved with Maric, and they spent hours together in front of an illegal after-hours club (owned by Willie Friend's brother) before the shooting happened there. In fact, Willie Friend's testimony placed him in the passenger side of the car and the gunman approaching the driver's side, which would have meant that Maric was sandwiched in the car. Thus, unlike the victim, Friend could run from the vehicle without being shot.

Yet, at petitioner's trial, with the presiding judge having rejected the third-party-perpetrator defense,[7] petitioner was unable to fully confront trial witnesses to develop the detailed evidence identified subsequently by the Wisconsin Supreme Court. Willie Friend had eight prior convictions and was enmeshed with the victim in a number of ways. R.51:18. Yet, without the ability to proceed with a third-party-perpetrator defense, petitioner could not ask the specific questions of Willie Friend for which the Wisconsin Supreme Court would require answers. Petitioner

[7] It may be helpful to appreciate that (unhelpfully) the trial judge (in the Wisconsin Court of Appeals' succinct phrase) "express[ed] skepticism," App. 119, about *Denny*, denigrating it as a "Court of Appeals decision" and suggesting that the Wisconsin Supreme Court should resolve the issue. *See supra* p. 9. *But cf. Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246, 254 (1997) (reaffirming that decisions of the court of appeals establish statewide precedent in Wisconsin). So, when the direct appeal came to the state supreme court, some 22 years later (the delay being no fault of petitioner), that court was reviewing the ruling of a trial judge whose core intuition was the same as that which had guided the South Carolina courts in *Holmes—compare* 547 U.S. at 324 ("the State Supreme Court held that 'where there is strong evidence of an appellant's guilt . . . , the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence'") *with supra* p. 7 (quoting trial judge here as beginning his ruling to reject third-party-perpetrator defense by saying "[t]he evidence that the State has put in, in my view, is very strong")—although, in his "defense," it may be acknowledged that the judge here (in 1993) was ruling before *Holmes* (in 1996). In any event, whatever might be said about *Denny*, whether in terms of its authoritativeness in 1993 or its initial correctness under *Holmes*, the salient point is that, in affirming here, the Wisconsin Supreme Court "struggle[d] to clarify the *Denny* test and in doing so change[d] the test." App. 111 (Abrahamson, J., dissenting). The result is to leave Wisconsin at the extreme—and unconstitutional—end of the spectrum with respect to the admissibility of third-party-perpetrator evidence.

was deprived of the opportunity to fully confront Willie Friend in cross-examination, *compare Davis v. Alaska*, 415 U.S. 308, 315–16, 319–20 (1974), not only to ascertain bias (or a sweetheart deal with the government) but also to elicit the details sought here by the Wisconsin Supreme Court. Petitioner was denied the ability, for example, to establish which of Willie Friend's convictions involved crimes of violence and thus whether Friend had the weapons, influence, and "contacts" that might satisfy the specificity requirements of the Wisconsin Supreme Court. *See* App. 82.

Prohibiting petitioner from introducing the third-party-perpetrator evidence was devastating to petitioner's defense. For example, this was not a situation where forensic evidence linked the defendant to the crime. *Compare Holmes*, 547 U.S. at 329–30. The context here helps demonstrate the importance of this Court's reviewing this issue and the suitability of this case as a vehicle for that review.

It is true that petitioner is aware of two cases, since the Wisconsin Supreme Court's decision here, in which lower courts in Wisconsin have permitted a third-party-perpetrator defense to be pursued at trial. In each of those cases, the defense introduced DNA evidence to meet the test set out by the Wisconsin Supreme Court. *See State v. Ramsey*, 2019 WI App 33, 388 Wis. 2d 143, 930 N.W.2d 273; *State v Scheidell*, 2017 WI App 30, 375 Wis. 2d 325, 897 N.W.2d 67. A need to produce DNA evidence about some other person simply cannot be the standard to which defendants are held in raising a third-party-perpetrator defense.

In short, the Wisconsin Supreme Court places an unconstitutionally heavy burden on a defendant pursuing a third-party-perpetrator defense. This approach

cannot be squared with the Due Process Clause. This Court's review is not just appropriate but essential.

II. WISCONSIN'S THIRD-PARTY-PERPETRATOR TEST IS AT ODDS WITH THE APPROACHES OF A NUMBER OF OTHER STATE SUPREME COURTS THAT DO NOT CONTRAVENE DUE PROCESS.

The Wisconsin Supreme Court's insistence on a rigid three-part test requiring separate proof of motive, opportunity, and direct connection, with a specificity disproportionate to any legitimate concern, differs from the more flexible and balanced tests applied by a number of other states; this helps lay bare the unconstitutionality of Wisconsin's approach.

In many of these states, courts apply a typical evidentiary inquiry: relevancy balanced against "unfair prejudice." *See, e.g., Holmes*, 547 U.S. at 326. In applying a third-party-perpetrator test, these state courts—as with any other evidentiary question—weigh whether the important interest in admission of relevant evidence is outweighed by any undue prejudice. *See, e.g., People v. Hall*, 41 Cal. 3d 826, 834, 718 P.2d 99, 104 (1986) (considering third-party-perpetrator evidence and explaining state's precedents under which "if relevant it is admissible unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion") (citation omitted); *Commonwealth v. Scott*, 408 Mass. 811, 816–17, 564 N.E. 2d 370, 375 (1990) (to similar effect); *Winfield v. United States*, 676 A.2d 1, 3–5 (D.C. 1996) (rejecting previous "clearly linked" requirement for admission of third-party-perpetrator evidence in favor of ordinary standard of relevance, i.e., "link, connection, or nexus between the proffered evidence and the crime at issue," with

probative value balanced against risk of undue prejudice) (internal quotation marks omitted); *State v. Jones*, 678 N.W.2d 1, 16–17 (Minn. 2004) ("exculpatory evidence based on an alternative perpetrator theory" must be evaluated "under the ordinary evidentiary rules"); *State v. West*, 274 Conn. 605, 625, 877 A.2d 787, 802 (2005) (along similar lines); *Wiley v. State*, 74 S.W.3d 399, 407–08 (Tex. Crim. App. 2002) (ordinary "balancing test under Rule 403"); *State v. DeChaine*, 572 A.2d 130, 134 (Me. 1990) (applying ordinary evidence rules); *State v. Gibson*, 202 Ariz. 321, 324, 44 P.3d 1001, 1004 (2002) ("hold[ing] that Rules 401, 402, and 403, Arizona Rules of Evidence, set forth the proper test for determining the admissibility of third-party culpability evidence" and explaining that, for the relevancy component, the evidence "need only tend to create a reasonable doubt as to the defendant's guilt"). By adhering to well-established principles, these courts have avoided a conflict with the Constitution.

Thus, for example, the Kentucky Supreme Court has recently admonished that trial courts in the state were wrong to have begun treating a defendant's demonstration that "an alternate perpetrator had both the motive *and* the opportunity to commit the crime" as "the only path [and] an absolute prerequisite for admission into evidence." *Gray v. Commonwealth*, 480 S.W.3d 253, 267–68 (Ky. 2016). "[A]ll KRE 403 requires is evidence of some logical, qualifying information to enhance the proffered evidence beyond speculative, farfetched theories that may potentially confuse the issues or mislead the jury." *Id.* at 268.

That Wisconsin is an outlier is not merely petitioner's suggestion. Just last year, in *State v. Kato,* 465 P.3d 925 (Haw. 2020), the Hawaii Supreme Court rejected a "legitimate tendency" test—which in 1995 it had expressly derived from Wisconsin's *Denny* case. Under this previous approach, Hawaii had required the defense to "directly connec[t]," or "clearly lin[k]," or show a "nexus" between, the third party and the commission of the offense. *Id.* at 937–38. The revised standard is one of "relevancy" under Hawaii Rule of Evidence 401, which makes admissible "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." *Id.* at 938. More specifically in this context, "[a] defendant need not place the third party at or near the scene of the crime; it is sufficient for relevancy considerations that the defendant has provided direct or circumstantial evidence tending to show that the third person committed the crime." *Id.* at 941. As the Hawaii court in *Kato* explained, "we hold that the admissibility of third-party culpability evidence should be understood as applying the same relevancy test that is applied for all other evidence, whether it is offered by the State or by the defendant." *Id.* at 938. Whether or not that is *Denny* (the Hawaii Supreme Court specifically said that it was not), it is not the test now prevailing in Wisconsin under the decision below here.

The Court of Appeals of New York in *People v. Primo*, 96 N.Y.2d 351, 357, 753 N.E.2d 164, 168 (2001), similarly made clear that it will not require "a special or exotic category of proof" for third-party-culpability claims. Yet that is what is

required in Wisconsin for a defendant, such as petitioner, to advance a third-party perpetrator defense.

There is another difference in Wisconsin as well: the required proof of *all* three separate elements—that "[a] defendant always is required to prevail on all three prongs of the *Denny* test in order to introduce evidence of an alleged third-party perpetrator," as the concurrence correctly characterized the majority opinion, in order to emphasize the point (App. 91)—sets the disproportionate Wisconsin test apart from those state courts that examine whether there is a "direct link" or "direct connection" between the third-party perpetrator and the crime. Any number of courts explain that, under their state law, it is not enough for a defendant to show a third party with the motive or opportunity to commit the crime charged, but rather there must be a direct connection of the third party and the crime. *See, e.g.*, *State v. Chaney*, 967 S.W.2d 47, 55 (Mo. 1998) (opportunity or motive, without direct connection, not enough to require admission of third-party-perpetrator evidence); *Shields v. State*, 357 Ark. 283, 288, 166 S.W.3d 28, 32 (2004) (same); *People v. Mulligan*, 193 Colo. 509, 518, 568 P.2d 449, 456 (1977) (same); *see also State v. Adams*, 280 Kan. 494, 504–05, 124 P.3d 19, 28 (2004) (in elaborating on relevance requirement, explaining that totality of circumstances must be reviewed to determine whether "the defense's proffered evidence effectively connects the third party to the crime charged"). Yet this differs materially from Wisconsin's extraordinary rule requiring the demonstration of three things and permitting

third-party-perpetrator evidence to be excluded even where the direct link or connection between that perpetrator and the crime is acknowledged all around.

The court in *Smithart v. Alaska*, 988 P.2d 583 (Alaska 1999), which requires a "direct connection," has made clear that the appropriate office of a defendant's third-party evidence is to "create a reasonable doubt as to the *defendant's* guilt," not to have to "establis[h] the guilt of the *third party* beyond a reasonable doubt." *Id.* at 588. One might debate whether the test in Wisconsin truly respects the second part of that statement. Yet, in all events, for the salient point, judged (as it ultimately must be) as a matter of constitutional law, the Wisconsin Supreme Court's approach is "arbitrary" and "disproportionate," *see Holmes*, 547 U.S. at 324, in its requirements. The Court's review is warranted.

III. THE WISCONSIN COURTS MISAPPLIED THE *STRICKLAND* STANDARD, AND THIS COURT'S REVIEW WOULD BE INSTRUCTIVE FOR LOWER COURTS.

In its most recent decision (this one by a 2–1 vote), the Wisconsin Court of Appeals misapprehended and misstated the law of prejudice with respect to claims under *Strickland v. Washington*, 466 U.S. 668 (1984). It is not just that the court was wrong in its result, although it was. The dissenter listed the numerous *unreasonable* errors of defense counsel. App. 24–32. For the leading example, there was no trial strategy, present at the time or articulable later, that could support withdrawing a *successful* objection to the state's *key* testimony against petitioner. App. 27. Trial counsel's decision to inexplicably withdraw what had been a

successful objection was both incompetent *and* prejudicial: "The State went on to repeatedly use the statement against Wilson," as the dissent lays out. App. 27.

To be sure, that is only an *example*, albeit the leading one.[8] Trial counsel's deficiencies, more broadly, are well catalogued by the dissent—as is the harm wrought upon petitioner. *See* App. 29–32.

But the court was *also* wrong in its application of the law of prejudice more generally. It did not look at the cumulative effect of the multiple errors on the proceeding, as it was required to do. *See*, *e.g.*, *Washington v. Smith*, 219 F.3d 620, 634–35 (7th Cir. 2000) ("considering the 'totality of the evidence before the . . . jury'" and finding prejudice) (quoting *Strickland*, 466 U.S. at 695). Rather, it recapitulated the evidence against petitioner, however indirect it may have been, asserting, for example, that the result here must have been fair because of the testimony of one witness (Carol Kidd-Edwards). App. 11–12. The opinion was reduced to shrugging off (ignoring, really) the incisive point made by the dissent about the evidence, *missing* because of trial counsel's ineffectiveness, concerning the *key* witness (Friend)—specifically, that it was harmful to petitioner Wilson that the testimony of this individual would be received without that evidence:

> . . . Friend's credibility was paramount to the State's case: he was the person who identified Wilson as the shooter; he provided the connection of the car seen at the shooting to Wilson; and he was the one who provided the motive for Wilson to commit the shootings, based on the purported statement of Maric [the victim] that Wilson had

[8] *See* App. 28 ("[T]his emotionally charged evidence damaged Wilson's defense because it was the only evidence that Wilson ever threatened Maric and it bolstered the State's theory that Wilson killed Maric and attempted to kill Friend in a crime of passion.") (dissent).

> threatened to kill Maric and Friend if he saw them together. In contrast, Kidd-Edwards, the State's witness who both the circuit court and the Majority found compelling, could not identify the shooter or corroborate the license plate.

App. 31 (dissent). Instead, the court of appeals placed weight on testimony of a witness (Kidd-Edwards, who was unable to identify petitioner) as corroborating certain *incidental* aspects of the testimony of the state's only witness (Friend, who had never met petitioner) purporting to tie petitioner to the crime.

However, in this reweighing of the existing testimony to consider prejudice, the court of appeals could look at only so much. For defense counsel failed—as he admitted—to conduct the reasonably complete investigation that would have aided in persuading the trial court to permit the introduction of evidence going to the motive and opportunity of that key witness (again, Friend) *himself* to have been involved in the crime. Professional performance by defense counsel involves the "duty to investigate." *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

With its approach, the court of appeals appears to have nudged the standard for evaluating prejudice in an erroneously more onerous direction. "The ultimate question," it stated, "is whether there was a substantial likelihood of a different outcome but for trial counsel's presumed deficient performance." App. 13. The ordinary and standard phrasing is that "*Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (quoting *Strickland*, 466 U.S. at 696). "This does *not* require a showing that counsel's actions 'more likely than not altered the outcome.'" *Id.* at 111–12 (quoting 466 U.S. at 693) (emphasis added). While common-law terms such as

"reasonably" and "substantial" do not lend themselves to mathematical exposition or translation, and one may find both terms used by this Court, *see*, *e.g.*, *id.*, the combination of the court of appeals' conception of the "ultimate" question and its *application* of the standard, however articulated, set the bar inappropriately high. For the Wisconsin court seems to have demanded a showing under "a more-probable-than-not standard," contrary to the law. *Id.*

Petitioner was entitled to competent counsel. The court of appeals acknowledged that there were "inconsistencies in the record about what occurred during the hours before the shooting." App. 10–11. It was wrong for the court to conclude that petitioner's inability to use those inconsistencies was not prejudicial because he could not prove "Friend's testimony incredible or, if disproven, that a reasonable jury could only discount his account entirely." App. 11.

The dissent below, by contrast, understood the substantive law of third-party-perpetrator defenses and its connection with an ineffective-assistance-of-counsel claim:

> ¶56 Another factor to consider in a *Denny* analysis is that "[o]verwhelming evidence against the defendant may not serve as the basis for excluding evidence of a third party's opportunity" to commit the crime. *Wilson*, 362 Wis. 2d 193, ¶69. "[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *See Wilson*, 362 Wis. 2d 193, ¶69 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006)).
>
> ¶57 This legal framework under which the additional evidence adduced at the *Machner* [ineffectiveness of counsel] hearing is analyzed is key. We must focus on the probative value of the evidence *to the defense*; that is, we look at whether the evidence would have helped cast reasonable doubt on the State's case. *See Wilson*, 362 Wis. 2d 193, ¶69.

> Clearly, the third-party perpetrator evidence would have helped to cast doubt on the State's narrative that this was a crime of passion committed by a spurned lover.

App. 26.

The understanding by the Wisconsin Court of Appeals majority of the defense's responsibility and thus of defense counsel's role cannot be squared with this Court's precedent.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 29, 2021