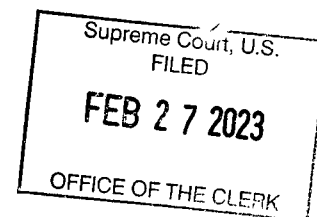


No. 22-6987 **ORIGINAL**

IN THE
SUPREME COURT OF THE UNITED STATES



Dennis J. Brookshire, pro se — PETITIONER
(Your Name)

vs.

State of Wisconsin — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Wisconsin Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Dennis J. Brookshire #653951
(Your Name)

P.O. Box 19033
(Address)

Green Bay, WI 54307
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

The Petitioner was found guilty of 1st Degree Intentional Homicide, Bail jumping, and 2 counts of 1st Degree Recklessly Endangering Safety all as party to a crime and sentenced to life imprisonment. In a post-conviction decision the Court of Appeals of Wisconsin held that trial counsel was not ineffective for not challenging the identifications at issue. And did not address the fairness of the identifications. The question presented is:

**WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO
SUPPRESS THE OUT OF COURT IDENTIFICATIONS AND DID SUCH
IDENTIFICATIONS DENY THE PETITIONER A FAIR TRIAL**

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below:

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☒ For cases from the **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the Wisconsin Supreme Court court appears at Appendix D to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was December 15, 2022. A copy of that decision appears at Appendix D.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U.S.C §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions, statutes and rules of practice and procedure involved are set forth in the Appendix to this brief. The constitutional provisions involved are: The Fifth Amendment of the constitution of the United States, Sixth Amendment of the constitution of the United States, Section 1 of the Fourteenth Amendment of the constitution of the United States, and Article I. Section 7 constitution of Wisconsin. The Federal Rules of Criminal Procedure involved are Rule 33 (a), ineffective assistance of counsel.

STATEMENT OF THE CASE

On or about October 3, 2016 a Criminal Complaint was issued charging Brookshire with one (1) count of first-degree reckless homicide with use of a dangerous weapon contrary to sec. 940.02 (1), 939.50 (3) (d), and 939.63 (1) (d), Wis. Stats. and one (1) count of felony bail jumping, contrary to sec. 946.4 9(1) (d) and 939.50 (3) (h), Stats.

On January 23, 2017, prior to trial the state filed a second amended information charging one (1) count to first-degree intentional homicide, as party to a crime with use of a dangerous weapon, contrary to sec. 940.01 (1) (a), 939.50 (3) (a), 939.05 and 939.63 (1) (d), Stats.; one count of felony bail jumping, contrary to sec. 946.49 (1) (b) and 939.50 (3) (h), Stats. and two (2) counts of first-degree recklessly endangering safety as party to a crime with use of a dangerous weapon, contrary to sec. 941.30 (1), 939.50 (3) (f), 939.05 and 939.63 (1) (b), Stats.

On January 24, 2017 a Jury Trial was held before the Honorable Mark A. Sanders. (R206:2) A jury convicted Brookshire of all charges following the close of evidence. (R159:1-4) (A:11-14)

On August 29, 2016, City of Milwaukee Police Officer Hemmings responded to a shooting at 2212 West Keefe Avenue. (R207:99-108) Upon arrival he saw an orange four-door vehicle with the victim, LR, slumped over the front seat on the floor. (R207:102-103) Hemmings then located two other individuals in the front yard of 2216 W. Keefe. (R207:103) One individual was seated on the grass in front of this location who appeared to have been shot in the right leg. (R207:103) Another individual was

seated on the stairs and was bleeding from his left forearm. (R207:103) These individuals were later identified JuL and JoL. (R207:105-106)

KW, a citizen witness testified at Trial. (R207:115) She testified that while walking in the area where the shooting took place, she heard gunshots. (R207:115) She began walking towards the area of the shooting and was almost run over by a vehicle. (R207:115) KW described the vehicle as a “white mid-sized truck, van” or “white SUV-type vehicle.” (R207:118) KW indicated that she did not see the shooting and could not identify the shooter in this case. (R207:118-119, 132)

She further testified that she continued walking up the street to where the shooting occurred. (R207:116) KW stated that she observed an individual, later identified as Brookshire talking on a cell phone. (R207:117-118) She told the jury that she heard Brookshire state, “I’m here. It’s done.” (R207:117-118) She also testified that while she could not be positive, she also believed that Brookshire looked similar to one of the individuals in the white vehicle that sped towards her almost striking her while she was walking in the area of the shooting. (R207:118)

At the crime scene, KW approached Detective Terrence Wright and informed him that she had relevant information to the case. (R210:16) KW provided Detective Wright a description of the individual who she observed on the cell phone. (R210:17) She indicated that this individual possibly had gold teeth. (R210:17)

On September 1, Detective Timothy Graham went to interview KW. (R210:154) During this interview Detective Graham showed KW single photos of Brookshire and

another individual Deonta Ames. (R210:154) KW described the photos as “so little...I mean, you can’t identify somebody with a little, bitty picture...no bigger than an ID.” (R210:138-139) Detective Graham testified that KW only focused on Brookshire’s photo and indicated that the photo looked like the guy on the phone but that she would prefer to see the live person. (R210:170) KW told Detective Graham that this photo looked like a person in the SUV that nearly struck her. (R210:170).

KW was scheduled to attend a live lineup on September 30, 2016 but failed to appear. (R210:158) Graham indicated that when she did not appear, he created a photo array containing photos of the individuals in the live lineup, including Brookshire. KW identified Brookshire in this photo array.

The court sentenced Brookshire to life imprisonment. The court sentenced Brookshire on the first-degree intentional homicide charge to life imprisonment with eligibility for release to extended supervision after serving fifty (50) years. On the felony bail jumping charging, the court sentenced Brookshire to two (2) years in the Wisconsin State Prison System to be served in one-year initial confinement and one-year extended supervision. On each of the first-degree reckless endangerment safety charges, the court sentenced Brookshire to ten (10) years in the Wisconsin State Prison System to be served with five (5) years of initial confinement and five (5) years with extended supervision. The sentences of each charge are to be run consecutively to each other. (R159:1-4) (A 11-14)

Brookshire filed a post-conviction motion in the Trial court raising, in part, the issue identified in this petition. The Trial court denied his motion without a hearing. (R197:1-8) (A:15-22)

On August 16, 2022, the court of appeals denied Brookshire's request for relief and on December 15, 2022 the Wisconsin Supreme Court denied Brookshire's Petition for Review. With regard to the issues now raised in this Writ of Certiorari the court of appeals decision is summarized below.

With regards to the out of court identifications, the court turned to the prejudice prong of the ineffective assistance of counsel analysis. (A:8) The court concluded that even if Brookshire's trial counsel was presumed ineffective by not objecting to the suggestive nature of the out-of-court identifications made by KW, Brookshire was not prejudiced as the evidence of Brookshire's guilt was overwhelming. (A:8) The court of appeals adopted the state's argument regarding the strength of the evidence, citing to another identification of Brookshire made by a witness, JuL and the fact that the jury saw a video of a man setting the white SUV, allegedly used in the shooting, on fire and escaping in a Hyundai. (A:8) Four of Brookshire's fingerprints were recovered from the Hyundai. (A:8) Brookshire contends that JuL's identification was given much more credibility as a result of the other out-of-court identifications being admitted. Further, the fact that Brookshire's fingerprints were located on the Hyundai does not demonstrate that Brookshire was involved in the shooting in any way.

REASON FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO HELP BETTER CLARIFY THE USE OF OUT-OF-COURT PHOTO IDENTIFICATIONS WHERE MORE THAN ONE PHOTO LINEUP IS USED SHOWING THE DEFENDANT.

This court is in a position to clearly define the protection that should be afforded a criminal defendant where a witness identifies a defendant, only after being shown more than one photo lineup, where each lineup contains a photo of the defendant. Here, Brookshire contends that his trial counsel was ineffective for failing to object to the out-of-court identification made by KW where she was shown more than one photo lineup that contained a photo of the defendant.

A defendant claiming ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced him. **Strickland v. Washington**, 466 U.S. 668 (1984). Prejudice means that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Strickland**, 466 U.S. at 694.

"A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." **State v. Wilson**, 179 Wis.2d 660, 682, 508 N.W.2d 44, 52 (CT. App. 1993)

The analytical framework by which such claims are evaluated was set forth in **Powell v. State**:

The test for determining whether an out-of-court identification is admissible or, on review, whether the out-of-court identification was properly admitted has two facets. First, the court must determine whether the identification procedure was impermissibly suggestive. Second, it must decide whether under the totality of the circumstances the out-of-court identification was reliable, despite the suggestiveness of the procedure.

Powell v. State, 86 Wis.2d 51, 65, 271 N.W.2d 610, 617 (1978). The defendant has the initial burden to prove that the photo identification was impermissibly suggestive. See **State v. Mosley**, 102 Wis.2d 636, 652, 307 N.W.2d 200 (1981). “If this burden is not met, no further inquiry is necessary.” *Id.* “If it is met, however, the burden shifts to the State to show that despite the improper suggestiveness, the identification was nonetheless reliable under the totality of the circumstances.” *Id.*

“The validity of any photographic identification requires a case-by-case application of the rule to the particular facts of each case....” **Powell**, 86 Wis.2d at 63, 271 N.W.2d at 616. “Suggestiveness in photographic arrays may arise in several ways- the manner in which the photos are presented or displayed, the words or actions of the law enforcement official overseeing the viewing, or some aspect of the photographs themselves.” **Mosley**, 102 Wis.2d at 652, 307 N.W.2d at 210. Here, the suggestiveness arises from the fact that Brookshire’s photo was shown to KW on

more than one occasion. It was only after KW was shown Brookshire's photo in a second lineup did KW identify Brookshire.

Once the identification procedure has been shown to be impermissibly suggestive, the burden shifts to the State to show the reliability of the procedure through the totality of the circumstances. **State v. Haynes**, 118 Wis.2d 21, 31, 345 N.W.2d 892, 897 (Ct. App. 1984). There are several factors to consider under this facet of the analysis:

“the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation.” **Powell**, 86 Wis.2d at 65, 271 N.W.2d at 617 (quoting **Neil v. Biggers**, 409 U.S. 188, 199-200 (1972))

In **Foster v. California**, 394 U.S. 440 (1969), the victim of an armed robbery could not identify the suspect after a three-person lineup. However, after a second lineup containing all different people except for the suspect, the victim picked the suspect as the robber. Such an identification was called “a compelling example of unfair lineup procedure.” **Foster**, 394 U.S. at 442. The court went on to say such a procedure “made it all but inevitable that [the victim] would identify [the suspect] whether or not [the suspect] was in fact ‘the man.’ In effect, the police repeatedly said to the witness, ‘this is the man.’” (Emphasis in original). **Foster**, 394 U.S. at 443.

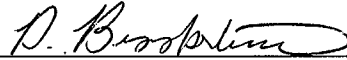
Under the **Foster** analysis, the showing of two photo arrays with one constant is just as unconstitutional as two lineups with one constant. Here, there were out-of-court identifications made by KW, KW testified that she identified Brookshire as the individual that she believed drove the vehicle that was described as the alleged vehicle involved in the shooting, and the individual that she later overheard talking on his cell phone. She was first shown two photos of potential suspects, one of those photos being that of Brookshire and another of Deonta Ames. (R207:122-123) Detective Timothy Graham confirmed that two photos were shown to KW, with one of those being a photo of Brookshire. (R208:154) Two days later she was shown a photo which did not contain the defendant and she could not identify the individual. (R207:124) Detective Graham showed KW this photo lineup. (R207:154) Approximately thirty days later she was shown an additional photo lineup and identified Brookshire in this lineup. (R207:130) In these photos all individuals were wearing bandanas to cover neck tattoos, however there was some individuals showing tattoos on their arms while others did not. (R208:159) In identifying Brookshire, a photo of Deonta Ames was not included in this lineup. (R208:169) Again, under the Foster analysis, the photo lineups made it inevitable that KW would pick Brookshire out of the lineup. An individual shown a picture of one individual where other photos differ logically makes it more likely that an individual will choose that photo. A procedure which suggests the result is fundamentally unfair – and such is a violation of the due process clauses of the 5th and 14th Amendments to the United States

Constitution, and a violation of Article I of the Wisconsin Constitution. Simmons v. United States, 390 U.S. 377, 384 (1968).

This court can clarify that the type of identifications, whether photo or lineups, that occurred here and in the Foster are unduly suggestive and that a witness subject to multiple lineups with the defendant appearing in each of those lineups is improper and cannot be admissible in court to prove the identity of the defendant. This basic protection is required especially in homicide cases.

CONCLUSION

For the above reasons, the petitioner humbly request that the petition for a Writ of Certiorari be granted.

A handwritten signature in cursive script, appearing to read "D. Brookshire", is written over a horizontal line.

Dennis J. Brookshire #653951

Defendant – Appellant

Green Bay Correctional Institution

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