APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

No. 21-1402

JERRY S. WILSON,

Petitioner-Appellant,

v.

DAN CROMWELL,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 2:13-cv-01061 — **Nancy Joseph**, *Magistrate Judge*.

ARGUED SEPTEMBER 7, 2022 — DECIDED JANUARY 23, 2023
AMENDED JUNE 1, 2023

Before SYKES, *Chief Judge*, and HAMILTON and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. Melvin Williams was shot and killed on May 23, 2009, and two other men—Robert Taylor and Romero Davis—were injured in the same shooting. A Wisconsin jury found beyond a reasonable doubt that Jerry Wilson was the gunman. He appeals from the district court's denial of his habeas petition under 28 U.S.C. § 2254, claiming

that he received constitutionally ineffective assistance from his trial and postconviction counsel.

We do not reach the merits of Wilson's claims because both are procedurally defaulted. Wisconsin state courts disposed of Wilson's ineffective assistance of trial counsel claim on adequate and independent state procedural grounds. And Wilson failed to present his ineffective assistance of postconviction counsel claim for one complete round of state court review. The default of these claims is not excused by a sufficient showing of actual innocence, barring federal review of the merits. Accordingly, we affirm the district court's denial of habeas relief.

I

The Shooting, Investigation, and Charges. In the early morning hours of May 23, 2009, three people were shot during an "after-set" party[1] at a two-story duplex unit on North 44th Street in Milwaukee. The party was large enough that attendees were both inside the duplex and outside in the street.

Just before gunfire began, two vehicles passed through the crowded street in front of the duplex, and the cars' occupants exchanged insults with party attendees in the roadway. The drivers parked nearby, and the passengers—who included the three eventual victims—walked back to the party to find the people who had yelled at them. A fistfight broke out in the street, and then the shooting started.

Melvin Williams suffered a fatal gunshot wound to the chest and died that day. The two other victims survived. A

[1] According to witnesses at trial, an after-set party is like a house party or block party, where guests pay an admission fee and alcohol is served.

bullet struck Robert Taylor in the foot, and Romero Davis received wounds to his stomach and right calf. Neither Taylor nor Davis could identify who shot them.

Investigation of the crime scene yielded only a modest amount of physical evidence. Law enforcement recovered five .40 caliber bullet casings, four .38 caliber casings, a .40 caliber bullet, and several bullet fragments at the scene but never located the murder weapon. In general, the .38 caliber casings were damaged and flattened while the .40 caliber casings were in better condition.

Police spoke with eyewitnesses early in the investigation. Shakira King attended the after-set party and identified Wilson as the gunman to law enforcement. She also picked Wilson out of a photo lineup the day after the crime. Antwan Smith-Currin, who lived in the upstairs duplex unit at the time, also identified Wilson as the gunman in a photo array.

According to detective testimony, Samantha Coats and Sanntanna Ross identified Wilson as the shooter as well, although at trial the women either denied having made such identification or sharply qualified their prior statements. Officers arrested Wilson in July 2009, and the State charged him with one count of reckless homicide and two counts of reckless endangerment.

Smith-Currin testified at Wilson's preliminary hearing and identified him as the gunman. When asked whether he saw other gunmen besides Wilson, Smith-Currin answered, "No, sir," but acknowledged that "People w[ere] trying to say

that I was shooting because I was on the porch."[2] At the hearing, the trial court found probable cause to believe that Wilson committed a felony and ordered him bound over for trial.

Jury Trial. In August 2010, Wilson went to trial with attorney Glen Kulkoski as his counsel. Given the minimal physical evidence, the case centered on the testimony of four eyewitnesses. Smith-Currin took the stand and identified Wilson as the gunman, consistent with his previous statements to law enforcement. He testified to seeing Wilson walk between two houses, approach the crowd in the street, and open fire with a handgun. Yet Smith-Currin's testimony contained discrepancies. For instance, he testified to standing on the porch when he saw Wilson open fire, but he was cross-examined with his prior sworn statement that he had been in the street when he saw the shooting.

King also testified at trial and identified Wilson as the shooter. King's account largely mirrored Smith-Currin's: Wilson emerged from between two houses on the same side as the duplex and opened fire. But King also provided certain discrepant details. For example, she was neither consistent in describing her position relative to the gunman, nor certain of the distance between them. At trial, she first suggested that she was two feet from the gunman. But following a courtroom distance demonstration, she changed that estimate to fifteen feet. She also said that the shooter had a ponytail but had previously told police that he wore his hair in braids. Finally, King testified she was not involved in the street fight, but previously told officers that she had participated.

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[2] The two-story duplex has an upper and a lower porch. Smith-Currin testified at trial that he was on the lower porch at the time of the shooting.

The State also called two other eyewitnesses to testify. Sanntanna Ross said she did not see who shot because she was fighting in the street during the shooting. That prompted the State to try to impeach her with her prior statements to law enforcement inculpating Wilson. Per testimony from investigating detectives, Ross identified Wilson as the shooter and recognized his face in a photograph. In response to the impeachment evidence, Ross claimed she felt pressure from police to "get [her] to say things that [she] didn't want to say."

Samantha Coats testified that, in the seconds before the shooting, she was looking out of a nearby second-story window with a view of the street. She described seeing an individual come into the street near the duplex and start shooting. When asked at trial, she agreed that the gunman's silhouette fit Wilson's description, but she did not make an affirmative identification. As with Ross, the State tried to impeach Coats with prior statements. According to police documents and testimony, Coats selected Wilson's photograph during a photo lineup, indicated he was the shooter, and wrote "I'm sure is the shooter" on the photo lineup paper near her signature. In response, Coats explained she was "under a lot of pressure" from law enforcement and believed that she "was going to be taken into custody." Coats likewise agreed with defense counsel that her statements to police were made to please the detectives and to avoid getting herself in trouble.

The State called other witnesses to talk about the physical evidence. Detectives described where they found the different bullet casings and explained that the location of the .40 caliber casings was generally consistent with a gunman firing from an alleyway near the duplex. A firearm examiner opined that

the .38 caliber casings were all fired out of one gun while the .40 casings were all fired from a second weapon.

After the State rested, Wilson called three witnesses in his defense. Kawana Robinson, Aaron Lee, and Shantell Johnson all testified that they did not see Wilson at the after-set party the night of the shooting.

All in, the accounts of the trial witnesses varied. For instance, the shooter's height was described as five-foot-three by one witness, and five-foot-eleven by another. One witness said the shooter was wearing a fleece-style top with no hood, while others testified he was either wearing a baseball hat or had a hood up. There was also disagreement about whether the shooter wore his hair in a ponytail or in braids. Finally, at least two witnesses claimed it was too dark to discern any details about the gunman.

The jury found Wilson guilty on all three counts, and the court sentenced him to 28 years' imprisonment.

Wilson's § 974.02 Proceedings and Possible New Evidence. Post-judgment, two events unfolded simultaneously. In the fall of 2010, Wilson obtained postconviction counsel (Thomas Simon)[3] and challenged his conviction. Wilson began by pursuing a claim for ineffective assistance of trial counsel which, in Wisconsin, is brought as a § 974.02 motion in the trial court. *See* WIS. STAT. §§ 809.30, 974.02; *Lee-Kendrick v. Eckstein*, 38 F.4th 581, 586 (7th Cir. 2022). Wilson filed that motion in April

[3] Throughout we refer to Thomas Simon, who assisted Wilson during his § 974.02 proceeding, as Wilson's "postconviction counsel." "Postconviction counsel" refers exclusively to Simon and should not be confused with Christopher August, who assisted Wilson with his § 974.06 state collateral attack, or with Wilson's current federal habeas counsel.

2011, arguing that trial counsel had failed to properly investigate the case, raise a key defense, and thoroughly cross-examine a State witness.

Also during the fall of 2010, Wilson had been investigating new evidence. He alleges that three to four months after the trial concluded, he became aware of a new eyewitness through a fellow inmate named Deangelo Harvey. In late 2010, Harvey purportedly told Wilson that a woman living in the duplex was home on the night of the shooting, but he did not provide a name or any other specifics. Nonetheless, Wilson claims he eventually received a letter from that woman—Lakisha Wallace—sometime between March and June of 2011. Per Wilson, Wallace explained in her letter that she had "information about what happened that night" but provided no other details. Wilson said he wrote back asking if she would testify on his behalf and requesting her contact information. In a third letter, Wallace allegedly agreed and provided Wilson a post office box number.[4] Thereafter, Wilson claims that his mother got in touch with Wallace and that Wallace spoke with his postconviction counsel. Nonetheless, there is no evidence that Wilson's postconviction counsel ever obtained an affidavit from Wallace or involved her in the direct appeal.

The Wisconsin trial court denied Wilson's § 974.02 motion on April 18, 2011, and Wilson appealed. In 2012, the Wisconsin Court of Appeals denied relief, and the Wisconsin Supreme Court declined to grant review, ending Wilson's direct appeal.

Wilson's § 974.06 Proceedings. Almost a year after Wilson lost his direct appeal, he acquired a notarized statement from

[4] Wilson did not keep any of the letters nor did he make copies.

Wallace—the same individual with whom he had allegedly exchanged letters in 2011. In her July 1, 2013, statement, Wallace accused Smith-Currin of being the shooter and said that Wilson was innocent. Wilson then filed a pro se postconviction motion under § 974.06 in Wisconsin state court, alleging ineffective assistance of both trial and postconviction counsel. He also sought a hearing on the "newly discovered" Wallace testimonial evidence. The state trial court denied relief, and the appellate court affirmed.

Two years later, though, Wilson's state collateral challenge gained new life. In September 2016, he renewed his claims by petitioning the Wisconsin Supreme Court for review. That court ordered the State to submit a response, in which the State acknowledged that Wilson was entitled to an evidentiary hearing on the newly discovered evidence. As the Wisconsin Supreme Court summarized, the State conceded in its response that "if the allegation at issue is accepted as true, there is a reasonable probability that a jury, looking at the old evidence and the new evidence, would have a reasonable doubt as to Mr. Wilson's guilt." So, the Wisconsin Supreme Court granted the petition for review and remanded on the newly discovered evidence claim. It held in abeyance the other claims, including Wilson's ineffective assistance of postconviction counsel claim.

In August 2017, an evidentiary hearing was held at which Wallace testified to the information in her July 2013 statement. She explained that, on the night of the shooting, she was living on the first floor of the duplex, and there was a big party going on in the upstairs unit where Smith-Currin lived. In the hours leading up to the shooting, Wallace witnessed Smith-Currin drinking, smoking, and ingesting pills on the porch.

As a result, Wallace believed that Smith-Currin was under the influence at the time of the shooting: "Yeah, he was very much so under the influence. Like you could tell he was high, you know."

As the party ramped up, Wallace said she noticed commotion outside her unit and observed Smith-Currin ask his brother for a firearm. She next saw Smith-Currin go outside with the handgun and yell that the partygoers should move away from the house. According to Wallace, Smith-Currin then ran down the front steps and opened fire on the people in the street. During the shooting, Wallace claims to have heard multiple weapons firing: "It wasn't like it was just one gun. Like you could hear different guns going off. It wasn't like just one person shooting outside." Wallace testified further that, once the shooting stopped, Smith-Currin tried to come inside her unit. She refused him entry but overheard Smith-Currin tell his brother that he had just shot someone. Wallace also reported hearing Smith-Currin discuss pinning the crime on Wilson.

Wilson took the stand next. He explained how Wallace reached out to him after his conviction in 2011, and he described their alleged exchange of letters. Wilson also testified that, in the hours before the party, he had helped set up a music system for Wallace at the duplex.

Yet despite having been to Wallace's residence just hours before the shooting, Wilson said it never occurred to him that she might have information about the incident. Indeed, Wilson never brought Wallace to trial counsel's attention or otherwise reached out to her pretrial. Per Wilson, it was not until Wallace wrote to him that he realized she might have helpful information. And while Wilson claimed he notified

postconviction counsel about Wallace during his direct appeal, he could not explain why his counsel failed to act on the Wallace lead.

After the hearing, the state trial court denied Wilson's request for a new trial. In its oral ruling, the trial court found that, "[g]enerally, Miss Wallace's testimony was credible and worthy of belief."[5] But the judge assessed Wilson's statements differently, explaining, "Mr. Wilson's testimony is not credible. It is not worthy of belief. I give his testimony zero weight." The court observed that Wilson had recounted receiving letters from Wallace, yet Wallace testified she was illiterate. As the court explained, "Miss Wallace doesn't have the ability to correspond with the defendant. She can't read. She can't write." At bottom, the trial court held that Wilson was negligent in failing to present the newly discovered evidence to the jury and thus not entitled to a new trial.

Wilson then made a strategic decision to streamline his case. He voluntarily dismissed his petition for review (with his ineffective assistance of postconviction counsel claim), which the Wisconsin Supreme Court had held in abeyance, so that he could appeal the denial of his request for a new trial based on new evidence. Nonetheless, Wilson's appeal of his newly discovered evidence claim failed. The Wisconsin Court of Appeals agreed with the trial court that Wilson was negligent in not presenting the Wallace evidence earlier and denied relief. Soon after, the Wisconsin Supreme Court declined

[5] The trial court qualified this credibility finding somewhat, explaining, "Miss Wallace does have some limitations that undermine her credibility, not enormously, but there are areas where her testimony could be more credible." One such issue was that Wallace "ha[d] some difficulties in sequence of events."

review. Having lost on the newly discovered evidence claim and having voluntarily dismissed his other claims pending in the Wisconsin Supreme Court, the doors to state court relief closed for Wilson.

Habeas Corpus Petition. Wilson then turned to federal court. He had timely filed an original federal habeas petition on September 20, 2013, which the district court stayed pending exhaustion of state proceedings. After his state court path was foreclosed, he amended his habeas petition on July 30, 2019, alleging three grounds for relief: (1) ineffective assistance of trial counsel; (2) ineffective assistance of postconviction counsel; and (3) newly discovered evidence.

The district court ruled that Wilson procedurally defaulted his claim for ineffective assistance of trial counsel. Likewise, the court decided that the default was not excused because Wilson failed to make a sufficiently strong showing of actual innocence. On the ineffective assistance of postconviction counsel claim, the district court did not explicitly engage with procedural default. Instead, the court found that Wilson could not show constitutionally ineffective assistance on the merits. Finally, the district court disposed of the newly discovered evidence claim, finding that the discovery of new evidence alone does not qualify as grounds for federal habeas relief absent an independent constitutional violation. The district court also denied Wilson a certificate of appealability.

At Wilson's request, we granted a certificate of appealability under 28 U.S.C. § 2253(c)(2) for the following issues:

- Whether Wilson has established ineffective assistance of trial counsel;

- Whether Wilson has made a strong enough showing of actual innocence to excuse any procedural defaults;
- Whether the federal constitutional right to counsel applies to Wisconsin postconviction counsel's performance; and
- Whether, if the federal constitutional right to counsel applies to Wisconsin post-conviction counsel, the standard for ineffective assistance is met here.

After reviewing the petition and record, we affirm the district court's denial of Wilson's petition for federal habeas relief for the reasons that follow.[6]

II

As noted, the district court dismissed Wilson's habeas petition. "When reviewing a district court's ruling on a habeas corpus petition, we review the district court's factual findings for clear error and rulings on issues of law *de novo*." *Sanders v. Radtke*, 48 F.4th 502, 508 (7th Cir. 2022) (quoting *Lee-Kendrick*, 38 F.4th at 585–86). As to whether a claim is procedurally defaulted, our review is de novo. *Garcia v. Cromwell*, 28 F.4th 764, 771 (7th Cir. 2022) (citing *Johnson v. Thurmer*, 624 F.3d 786, 789 (7th Cir. 2010)).

[6] The court thanks Vladimir J. Semendyai, Esq., Andrew P. LeGrand, Esq., Pooja Patel, Esq., and Zachary T. Reynolds, Esq. of Gibson, Dunn & Crutcher LLP for accepting this appointment and for their fine representation of Wilson throughout this appeal.

A

We first consider whether Wilson's claim for ineffective assistance of trial counsel is procedurally defaulted. The State contends it is because the state court disposed of Wilson's claim on an adequate and independent state law ground. Wilson seems to acknowledge this but focuses instead on overcoming default through the actual innocence gateway. We hold that Wilson's claim for ineffective assistance of trial counsel is indeed procedurally defaulted.

"[A] state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (citing 28 U.S.C. § 2254(b)(1)(A)). A "corollary" to that rule is that federal courts may not review federal claims that the state court denied on an adequate and independent state procedural ground. *Id.* So, we begin by examining the state court's treatment of Wilson's claim for ineffective assistance of trial counsel.

The Wisconsin Court of Appeals was the final state court to evaluate Wilson's ineffective assistance of trial counsel claim, and it denied that claim as inadequately pleaded under *State v. Allen*, 682 N.W.2d 433 (Wis. 2004).[7] Per Wisconsin law, a defendant claiming ineffective assistance of counsel must plead "sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle him to the

[7] The Wisconsin Supreme Court denied Wilson's ensuing petition for review without comment. Therefore, we look to the Wisconsin Court of Appeals' decision. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (holding that federal courts on habeas review look to the "last related state-court decision that [ ] provide[s] a relevant rationale").

relief he seeks." *Id.* at 436; *see also id.* at 441–42; *State v. Bentley*, 548 N.W.2d 50, 53–54 (Wis. 1996). State trial courts may deny such a claim without a hearing based on a defendant's recitation of "conclusory allegations" or failure to "raise facts sufficient to entitle the movant to relief." *Allen*, 682 N.W.2d at 437; *see also Whyte v. Winkleski*, 34 F.4th 617, 622 (7th Cir. 2022) (describing the *Allen* pleading standard).

Applying that standard, the Wisconsin Court of Appeals determined that Wilson's ineffective assistance of counsel claim was insufficiently pleaded under *Allen*: "Despite a lengthy recitation of the standards set forth in *Bentley* and *Allen* for a sufficient postconviction motion, Wilson fails to make sufficient allegations to warrant relief." The state appellate court continued, "Because the allegations in the postconviction motion were insufficient under *Bentley* and *Allen*, whether to grant a hearing was committed to the [trial] court's discretion. We discern no erroneous exercise of that discretion." In denying Wilson's claim for ineffective assistance of trial counsel under the *Allen* standard, the state court of appeals relied on an adequate and independent state law ground.

As stated, federal courts "may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila*, 137 S. Ct. at 2064. The *Allen* standard at issue here is both adequate and independent. As to adequacy, "For a state-law ground to be 'adequate,' it must be 'firmly established and regularly followed.'" *Clemons v. Pfister*, 845 F.3d 816, 820 (7th Cir. 2017) (quoting *Walker v. Martin*, 562 U.S. 307, 316 (2011)). The state law ground also "must not have been applied in a manner that

'impose[s] novel and unforeseeable requirements without fair or substantial support in prior state law' or 'discriminate[s] against claims of federal rights.'" *Id.* (quoting *Walker*, 562 U.S. at 320–21). When examining the adequacy of a state law procedural ground, our review is limited to whether the procedural ground "is a firmly established and regularly followed state practice at the time it is applied, not whether the review by the state court was proper on the merits." *Lee v. Foster*, 750 F.3d 687, 694 (7th Cir. 2014).

We have previously held the *Allen* pleading standard is a firmly established and regularly followed state practice, and we do so here. In *Lee v. Foster*, the Wisconsin Court of Appeals denied Lee's claim for ineffective assistance of counsel and "found that the allegations regarding [Lee's] postconviction counsel's performance were conclusory and legally insufficient" under the *Allen* standard. *Id.* at 693. On federal habeas review, we held that Lee's claim was procedurally defaulted and that the *Allen* rule "is a well-rooted procedural requirement in Wisconsin and is therefore adequate." *Id.* at 694. So, the *Allen* standard functions as an adequate state law ground for denial of Wilson's ineffective assistance of trial counsel claim.

The *Allen* pleading standard is also independent. A state-law procedural ground satisfies the independence prong when "the court actually relied on the procedural bar as an independent basis for its disposition of the case." *Lee-Kendrick*, 38 F.4th at 587 (quoting *Garcia*, 28 F.4th at 774). Here, the Wisconsin Court of Appeals explicitly referenced and relied upon the *Allen* procedural rule in disposing of Wilson's claim for ineffective assistance of trial counsel. Thus, the *Allen* standard served as an independent state law ground for denying

Wilson's claim. We have reached the same conclusion in other cases implicating the *Allen* standard. *See, e.g.*, *Lee*, 750 F.3d at 693 (holding that the *Allen* rule "clearly served as an independent basis for the court's denial of [petitioner's] motion"); *Triplett v. McDermott*, 996 F.3d 825, 829–30 (7th Cir. 2021) (concluding that the *Allen* pleading standard is an adequate and independent basis for the state court's denial of petitioner's ineffectiveness claim). So, the district court properly ruled that Wilson's ineffective assistance of trial counsel claim was procedurally defaulted, and we affirm that decision.

B

Next up is Wilson's claim that his postconviction counsel rendered ineffective assistance during the § 974.02 proceeding. This claim implicates the proper classification of § 974.02 proceedings, but in *Lee-Kendrick* we already decided that: "[A] claim of ineffective assistance of counsel under [Wisconsin Statute] § 974.02 is part of a direct appeal rather than a request for collateral review." 38 F.4th at 587. So, 28 U.S.C. § 2254(i), which bars federal habeas relief for the ineffective assistance of counsel at collateral post-conviction proceedings, does not preclude Wilson's claim here.

With that, we move to whether Wilson procedurally defaulted his claim for ineffective assistance of postconviction counsel. The State argues that Wilson defaulted this claim by failing to present it for one complete round of state court review. Wilson does not vigorously contest that position, focusing instead on overcoming default.

Under 28 U.S.C. § 2254(b)(1)(A), a petition for federal habeas relief shall not be granted unless it appears that "the applicant has exhausted the remedies available in the courts of

the State." Applying that provision, we have held that "[t]o fairly present [a] federal claim, a petitioner must assert that claim throughout at least one complete round of state-court review, whether on direct appeal of his conviction or in post-conviction proceedings." *Richardson v. Lemke*, 745 F.3d 258, 268 (7th Cir. 2014) (citing *McDowell v. Lemke*, 737 F.3d 476, 482 (7th Cir. 2013)). The complete round rule "means that the petitioner must raise the issue at each and every level in the state court system, including levels at which review is discretionary rather than mandatory." *Id.* (citing *Lewis v. Sternes*, 390 F.3d 1019, 1025–26 (7th Cir. 2004)).

Wilson voluntarily dismissed his claim for ineffective assistance of postconviction counsel before the Wisconsin Supreme Court ruled on it. That voluntary dismissal effected the same outcome as not filing a petition in the first place—the Wisconsin Supreme Court never evaluated his claim for ineffective assistance of postconviction counsel. As a result, Wilson's claim for ineffective assistance of postconviction counsel is procedurally defaulted. *See Johnson v. Foster*, 786 F.3d 501, 504–05 (7th Cir. 2015) (holding that defendant's failure to file a petition for review with the Wisconsin Supreme Court violated the complete round of review rule). Without an entire round of state-court review, Wilson procedurally defaulted his claim.

III

Where, as here, a petitioner's claims are procedurally defaulted, federal habeas review is precluded unless the prisoner demonstrates either of two things. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The petitioner may demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law," or he may "demonstrate that

failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* Moreover, "[t]he miscarriage of justice exception 'applies only in the rare case where the petitioner can prove that he is actually innocent of the crime of which he has been convicted.'" *Blackmon v. Williams*, 823 F.3d 1088, 1099 (7th Cir. 2016) (quoting *McDowell*, 737 F.3d at 483); *see also Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). Wilson does not allege cause and prejudice,[8] so we focus on the actual innocence exception.

Wilson maintains that he has made a sufficient showing of actual innocence and urges us to review the merits of his claims. First, he suggests that the State has already admitted that statements made during state court proceedings would have given a jury reasonable doubt, and thus conceded the question of actual innocence. Wilson further asserts that Wallace's testimony is sufficiently compelling and thus "there can be little doubt that [he] has satisfied the actual innocence standard." More precisely, Wilson contends that the Wallace testimony is persuasively exculpatory and that Smith-Currin's preliminary hearing statements corroborate Wallace's account. He also tries to downplay the probative force of the inculpatory record evidence.

The State responds that the Wallace evidence—including when considered with the rest of the trial evidence—falls short of sufficiently establishing actual innocence. It contends Wallace's testimony is uncorroborated and in tension with other testimonial and physical evidence. It also highlights

[8] At oral argument Wilson's counsel informed us that Wilson was not pursuing relief on a cause-and-prejudice theory. *See* Oral Arg. at 6:12–7:02.

that, even if true, Wallace's account does not technically rule Wilson out as a potential gunman.

We start with whether the State conceded that Wilson has made a sufficient showing of actual innocence. Wilson is correct that the State previously admitted he was entitled to a hearing on the newly discovered evidence. After Wilson filed a pro se motion about that evidence, both the state trial and appellate courts declined his request for a hearing. Wilson appealed to the Wisconsin Supreme Court, and on that court's direction, the State filed a response conceding that Wilson was entitled to a hearing. Specifically, the State admitted it was "reasonably probable that if a jury were to find Wallace credible, her testimony would create a reasonable doubt about whether Wilson was the shooter."

Even so, the federal standard for a showing of actual innocence demands more than what the State conceded. When we evaluate an actual innocence claim for purposes of federal habeas review, the appropriate question is whether "it is more likely than not that no reasonable juror would have convicted [Wilson] in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324. The burden rests on the petitioner to make the requisite showing. *Id.* at 327. This is a more demanding standard than what is required to merit a hearing. The State's concession that Wilson was entitled to a state-court evidentiary hearing does not also serve as an admission that Wilson has shown actual innocence. Language from *Schlup* clarifies this point. There, the

Supreme Court explained that "[t]he meaning of actual innocence … does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id.* at 329. So, the State did not concede the question of actual innocence.

We further hold that Wallace's testimony does not sufficiently establish Wilson's actual innocence. At the outset, we acknowledge that this evidence is both new and credible, which are predicate requirements for the actual innocence gateway. *Id.* at 324. The evidence is new because it was not presented at Wilson's trial, and it is credible because the Wisconsin Court of Appeals found that Wallace's testimony was generally worthy of belief. In this appeal, the State also recognizes as much.

Yet the presentation of new and credible evidence does not automatically satisfy the *Schlup* standard for actual innocence. Instead, the new evidence must be considered along with the existing evidentiary record. "In applying this standard, we must consider all the evidence, both old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted at trial." *Blackmon*, 832 F.3d at 1101 (citing *House v. Bell*, 547 U.S. 518, 538 (2006)). From there, we make a probabilistic determination about what reasonable jurors would do. *House*, 547 U.S. at 538. The requisite probability is established only if Wilson shows that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. Finally, we always keep in mind that the "*Schlup* standard is demanding and permits review only in the 'extraordinary' case." *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327); *see also*

McQuiggin v. Perkins, 569 U.S. 383, 401 (2013) ("We stress once again that the *Schlup* standard is demanding.").

Adhering to the rigor of the *Schlup* standard for actual innocence, we cannot say that the Wallace evidence is so compelling and unequivocal that no reasonable juror would have convicted Wilson in the light of it.[9] Wallace's testimony just adds a new voice to a highly complex, and often inculpatory, evidentiary record. For instance, both Smith-Currin and King still unequivocally identified Wilson as the gunman and described him emerging from an alleyway and opening fire. We conclude that matching testimony from Smith-Currin and King, delivered at trial and without qualification, likely would prevent reasonable jurors from placing significant reliance on Wallace's account presented more than four years later[10]—especially since a detective testified that the location of the .40 bullet casings was generally consistent with a shooter coming from the alleyway. *See Schlup*, 513 U.S. at 332 ("[T]he court may consider how the timing of the submission … bear[s] on the probable reliability of that evidence.").

Other record evidence, when considered in conversation with the Wallace testimony, also stops us from concluding

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[9] In applying *Schlup*, we are mindful of the distinction between *Schlup*'s gateway actual-innocence standard and the *Jackson v. Virginia*, 443 U.S. 307 (1979), standard applicable to claims of insufficient evidence. As the amendments made to the majority opinion and dissent emphasize, the standards are not equivalent. *See House*, 547 U.S. at 538.

[10] Our dissenting colleague points out that King and Smith-Currin did not identify Wilson as the gunman the night of the shooting. But King identified Wilson in a photo array the following day, and Smith-Currin did the same less than a month later. Wallace, by contrast, waited years before coming forward with her version of events.

"that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538. The State's impeachment evidence of Samantha Coats and Sanntanna Ross—which included Coats' prior identification of Wilson as the gunman during a photo lineup—would similarly undercut, in the minds of reasonable jurors, Wallace's alternative account of the shooting. Wallace's testimony and the physical evidence also do not foreclose the existence of multiple shooters. Wallace testified she heard multiple guns firing, and detectives recovered two different sets of bullet casings. She explained "[i]t wasn't like it was just one gun. Like you could hear different guns going off. It wasn't like just one person shooting outside." So, a reasonable juror might consider Wallace's testimony and still find that Wilson was one of two (or more) shooters. Plus, no other witness's account of the shooting matches Wallace's. The closest corroboration of Wallace's version comes from Smith-Currin's preliminary hearing statement, in which he testified that people thought he was shooting. But that advances the ball little, because Wallace is still the only identified witness to accuse Smith-Currin of being the gunman.

The discrepancies in testimony do not end there. As mentioned, witnesses provided varied accounts of the shooting and the shooter. Whether it is the gunman's height, hair, or clothing, the witnesses' recollections differed. So, even with Wallace's testimony, we are left with a series of competing eyewitness accounts, the balance of which would strongly point to Wilson's guilt for reasonable jurors. When evaluating a claim of actual innocence, our role "is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538. As the dissent

emphasizes, a state court found Wallace's testimony to be credible. But that finding does not mean that reasonable jurors would necessarily credit Wallace's account of the shooting over that of any other witness, such as Smith-Currin or King. Compelling inculpatory record evidence remains, notwithstanding Wallace's credibility, so considering "all the evidence, old and new, incriminating and exculpatory," *id.* (cleaned up), we cannot say that it is more likely than not that no reasonable juror would have convicted Wilson in the light of the new evidence.

Our conclusion accords with relevant precedent. In *Blackmon*, the court heard competing eyewitness testimony. 823 F.3d 1088. There, two gunmen approached a victim and opened fire. *Id.* at 1092. The ensuing bench trial focused on the identity of the second gunman, and eyewitness testimony was paramount. *Id.* at 1092, 1095–96. Approximately two months after the shooting, two eyewitnesses identified Blackmon as one of the triggermen through photo lineups and in-person lineups. *Id.* at 1094. Those same witnesses identified Blackmon as the gunman at trial. *Id.* at 1093–95. In response, Blackmon called three defense witnesses. Two of those witnesses provided an alibi for Blackmon; the third claimed to have watched the shooting and testified that Blackmon was not present at the scene. *Id.* at 1095–96. The presiding judge determined that Blackmon was one of the shooters and found him guilty. *Id.* at 1096.

Like Wilson, Blackmon challenged his conviction through federal habeas and tried to pass through the actual innocence gateway for certain defaulted claims. *Id.* at 1100–01. To that end, Blackmon provided two new eyewitness affidavits. *Id.* at 1097. Each of the new witness affidavits claimed that

Blackmon was not one of the gunmen. *Id.* Reviewing all the evidence—old and new—this court concluded that Blackmon's showing of actual innocence was insufficient. *Id.* at 1101–02. In reaching that conclusion, this court noted that the new evidence merely contrasted with the State's two credible eyewitness accounts. *Id.* And the new eyewitnesses did not come forward until eight years after the shooting. *Id.* at 1102. So, the "balance between inculpatory and exculpatory witnesses [was] not enough to meet the demanding *Schlup* standard for actual innocence." *Id.*

The facts here track those in *Blackmon*. Like Blackmon, Wilson offers new eyewitness testimony into a factual record occupied by contrasting eyewitness statements. But as ruled in *Blackmon*, the introduction of new eyewitness testimony does not amount to a showing of actual innocence when strong and credible testimony to the contrary remains. Just as the two new affidavits in *Blackmon* merely added to the balance of inculpatory and exculpatory evidence, so too does Wallace's testimony. Even with the Wallace evidence, we are left with a complex factual record pointing in different directions.[11] We therefore hold that Wilson has not satisfied the *Schlup* standard for actual innocence. Other cases from this court also support our conclusion. *See, e.g.*, *Smith v. McKee*, 598 F.3d 374, 387–88 (7th Cir. 2010) (concluding insufficient showing of

[11] The dissent observes that, unlike in *Blackmon*, 823 F.3d at 1093, the inculpatory witnesses here knew Wilson before the shooting. For our dissenting colleague, that prior knowledge dilutes the weight of the photo lineup identifications by King and Smith-Currin. But Wallace was not a stranger to Wilson or Smith-Currin, either. Indeed, at the evidentiary hearing Wallace testified she had been around Smith-Currin "plenty of times" before the shooting, and Wilson helped set up the music at Wallace's apartment on the night of the crime.

actual innocence where petitioner's two new affidavits did not sufficiently counter the state's evidence, which included two eyewitness identifications and a self-inculpatory statement); *Hayes v. Battaglia*, 403 F.3d 935, 937–38 (7th Cir. 2005) (holding that a draw between the number of eyewitnesses for and against defendant—six new exculpatory witnesses versus the state's six inculpatory trial witnesses—"cannot establish that no reasonable factfinder would have found the applicant guilty") (cleaned up).

Finally, *Jones v. Calloway*, 842 F.3d 454 (7th Cir. 2016), is instructive as a rare case where we concluded that the defendant had made a sufficient showing of actual innocence. Jones was convicted of murder and sought federal habeas relief. The district court held his claims procedurally defaulted, forcing Jones to rely on the actual innocence gateway to excuse his default. *Id.* at 459. The new evidence Jones brought to bear on his case was exceptional. Michael Stone, another man present at the murder scene, provided new testimony that he was the lone shooter. *Id.* at 460. And his testimony was compelling. Stone had previously turned himself in for the crime, confessed to the shooting within days, identified the murder weapon, and given testimony that was consistent with the case's forensic evidence. *Id.* at 462. Stone's story of the shooting had also remained consistent for over a decade. *Id.* at 463. The district court found a sufficient showing of actual innocence, and this court agreed. *Id.* at 460, 462.

In *Jones*, the new witness took the stand and personally claimed sole responsibility for the crime. *Id.* at 462. His testimony was consistent with the physical evidence as well, whereas the testimony of prosecution witnesses in that case was often in tension with the forensics. *Id.* The Wallace

evidence is not so forceful. Her eyewitness testimony contrasts with that of Smith-Currin and King (and to a lesser degree, Coats and Ross), but likely would not overcome it in the minds of reasonable jurors. Reviewing all the facts, Wilson has not demonstrated "that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt." *House*, 547 U.S. at 538. Accordingly, Wilson has not sufficiently shown actual innocence.

IV

Given the unexcused procedural default, we do not reach the merits of Wilson's ineffective assistance of trial and postconviction counsel claims.

In summary, Wisconsin state courts disposed of Wilson's ineffective assistance of trial counsel claim on adequate and independent state grounds, and he failed to present his ineffective assistance of postconviction counsel claim for one complete round of state court review. So, both of his claims are procedurally defaulted. Wilson attempts to overcome these defaults, but he fails to make a sufficient showing of actual innocence. Even considering Wallace's testimony, we cannot conclude that it is more likely than not that no reasonable juror would have convicted Wilson. The *Schlup* standard for actual innocence is high and reserved for the exceptional case, a threshold Wilson does not clear here.

For these reasons, the district court's denial of Wilson's petition for federal habeas relief is AFFIRMED.

HAMILTON, *Circuit Judge*, dissenting. During post-conviction hearings in the state courts, Lakisha Wallace testified that the shooter was actually Antwan Smith-Currin, who was also the state's chief witness against petitioner Wilson. Ms. Wallace witnessed the incident from the bottom floor of the duplex where she lived downstairs from Smith-Currin. She testified that she heard Smith-Currin yell to his brother to give him a gun and then saw Smith-Currin wave a handgun on the front porch of the duplex, open fire, and run into the crowd while shooting. According to Ms. Wallace, Smith-Currin immediately came back inside and shouted to his brother that he had "just offed" someone. Ms. Wallace further testified that in the days after the shooting, she heard Smith-Currin say that he planned to blame the crime on Wilson. She also offered a plausible motive for the plan to blame Wilson. Smith-Currin had seen his girlfriend with Wilson on the duplex porch the day before the shooting and was angry about them being together.

The extraordinary feature of this habeas case is the combination of two facts. First, the state agreed during state court proceedings that "[i]t is reasonably probable that if a jury were to find Ms. Wallace credible, her testimony would create a reasonable doubt about whether Wilson was the shooter." Second, when Ms. Wallace actually testified before a state court judge, that judge found her credible. Under these unusual circumstances, and given other significant weaknesses in the state's case, we should find that Wilson has made a showing of innocence sufficient to excuse his procedural default. We should remand to the district court for an evidentiary hearing on his claims of ineffective assistance of counsel.

My colleagues and I agree on all but that one decisive issue. As the majority opinion explains, under Wisconsin's unusual procedures for post-conviction relief, Wilson had a federal constitutional right to effective assistance of counsel in post-trial proceedings under Wisconsin Statute § 974.02. Ante at 16, citing *Lee-Kendrick v. Eckstein*, 38 F.4th 581, 587 (7th Cir. 2022). We also agree that Wilson procedurally defaulted his ineffective assistance claims in the state courts. Ante at 17. Where we disagree is whether Wilson has shown "actual innocence" so as to excuse his procedural default.

To avoid the consequences of his procedural default, Wilson offers the testimony of Lakisha Wallace to show that he is actually innocent. See generally *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992); *Blackmon v. Williams*, 823 F.3d 1088, 1099 (7th Cir. 2016). To do so, Wilson must come forward with new evidence showing "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); see also *McQuiggin v. Perkins*, 569 U.S. 383, 386, 390 (2013). His evidence must be reliable and may take the form of "exculpatory scientific evidence, *trustworthy eyewitness accounts*, or critical physical evidence." *Gladney v. Pollard*, 799 F.3d 889, 896 (7th Cir. 2015) (emphasis added), quoting *Schlup*, 513 U.S. at 324.

In applying this test, it is essential to remember that the hypothetical jurors would have to examine all the new and old evidence and be convinced of guilt *beyond a reasonable doubt*. The reasonable doubt lens was, after all, the point of the Supreme Court's decision in the canonical *Jackson v. Virginia*, 443 U.S. 307, 318–21 (1979) (issue in federal habeas review was not whether "any evidence" supported the state conviction

but whether evidence could support finding of guilt beyond a reasonable doubt).

The actual innocence standard for excusing procedural default also puts proof beyond a reasonable doubt front and center, but with one important difference. The issue here is not what a reasonable juror "could do," as in *Jackson*, but what a reasonable juror "would do" when applying the reasonable doubt test. The Supreme Court has rephrased the applicable standard ("to remove the double negative") as requiring new evidence making it "more likely than not [that] any reasonable juror *would* have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006) (emphasis added); accord, *Schlup*, 513 U.S. at 327. As I read this record, including Ms. Wallace's testimony credited by the state court, there is *some* evidence to support a finding of guilt, but, as required by *House* and *Schlup*, any reasonable juror would have a reasonable doubt once Ms. Wallace's testimony is added to the mix.[1]

As the majority opinion presents the facts, Wilson's trial for the fatal shooting of Melvin Williams presented testimony from four eyewitnesses who identified Wilson as the shooter. From that premise, the majority opinion relies on a portion of our decision in *Blackmon* where we held that new exculpatory testimony from two eyewitnesses was not enough to overcome procedural default. 823 F.3d at 1102. The key to that portion of *Blackmon* was that Blackmon had been identified as one

[1] The amendments to the majority opinion have changed several claims about what jurors "could" think in light of the new evidence to what they "would" think. Those changes do not adequately come to grips with the likelihood of a reasonable person reaching such conclusions or jurors' obligation to demand proof beyond a reasonable doubt.

of two killers independently, and consistently, by two utterly neutral witnesses. *Id*. at 1101–02.[2]

Unlike the *Blackmon* case, Wilson has also offered new evidence that not only exonerates him but identifies a different shooter, the state's chief witness. In applying the *Schlup* standard, which may be met by "trustworthy eyewitness accounts," keep in mind that the state judge who heard Ms. Wallace testify, subject to lengthy cross-examination, credited her testimony.

Plus, the original trial testimony here was far shakier than in *Blackmon*. *No witness consistently identified Wilson as the shooter.* The majority opinion leaves out the important fact that the two government witnesses who identified Wilson at trial, King and Smith-Currin, spoke to police on the night of the shooting. Both knew Wilson at the time. Yet neither claimed that night that they had even seen Wilson on the scene, let alone doing the shooting.[3]

That night, Shakira King told police that she had heard another woman claiming Wilson was the shooter. By the time of

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[2] We remanded *Blackmon* for an evidentiary hearing on other grounds, namely his claim that counsel was ineffective in failing to investigate adequately his alibi defense. 823 F.3d at 1104–07. After remand, Mr. Blackmon won habeas relief on that basis. *Blackmon v. Pfister*, 2018 WL 741390 (N.D. Ill. Feb. 7, 2018).

[3] The fact that both witnesses knew Wilson prior to the shooting is important. The majority opinion states correctly that King and Smith-Currin later identified Wilson as the gunman out of photo lineups, and the majority opinion treats this procedure as adding credibility to the identifications. The weight of those later lineups is undermined by the facts that both already knew him and that neither identified Wilson as the shooter when first interviewed by police.

trial, however, King's story had changed. She testified that she herself saw Wilson shooting, and she denied having told an officer on the night of the shooting that it was her friend who claimed to have recognized the shooter as Wilson. King's trial testimony also contradicted her first description of the shooter's hairstyle. Her description of the shooter's clothing did not match that given by any other witness. And at trial King denied having been part of the fight that preceded the shooting, though she had previously admitted involvement to police and other witnesses had confirmed her part in the melee.

Moving to Smith-Currin, he did not tell police that he saw Wilson shooting until a *month* after the crime. On the night of the shooting, Smith-Currin spoke with police but did not mention Wilson. Smith-Currin's trial testimony describing what he saw the shooter wearing was inconsistent. And at a preliminary hearing, Smith-Currin even testified that some people claimed they had seen him shooting from the duplex's porch.

The two other witnesses who the state argued had previously identified Wilson as the shooter strongly refuted or recanted such statements at trial. Sanntanna Ross told the jury that what police construed as her identifying Wilson as the shooter was simply her indicating that she knew Wilson. When asked on the stand whether she saw Wilson shooting, Ross unequivocally said no. Samantha Coats told the jury that her prior identification of Wilson as the shooter was based only on rumors. When Coats was pressed for an identification by police during the investigation, she said, her boyfriend was in custody and she had been threatened with arrest herself. She chose Wilson (whom she knew and recognized) in a

photo lineup to avoid arrest and in the hope that the police would release her boyfriend.

Only by failing to grapple with these details can the majority opinion describe the testimony implicating Wilson as "matching testimony … delivered at trial and without qualification … ." Ante at 21.

If a jury heard all the trial evidence and Ms. Wallace's testimony, there would of course still be the trial testimony of Smith-Currin and King identifying Wilson as the shooter. That's "some evidence"—but that low bar was the standard rejected even in *Jackson*. Given the problems with their testimony—including their delayed identifications of a person they knew as the shooter they claimed to have seen that night—the lack of any other evidence placing Wilson at the scene, and the consistent and credible testimony of Ms. Wallace, a conscientious juror could not and would not reasonably find Wilson guilty beyond a reasonable doubt.

The majority nevertheless insists that "even with Wallace's testimony, we are left with a series of competing eyewitness accounts, the balance of which would strongly point to Wilson's guilt for reasonable jurors." Ante at 22. With respect, that description of the "balance" of the prosecution's case overlooks three critical points: (1) no witness consistently identified Wilson as the shooter; (2) the prosecution witnesses gave widely varying descriptions of the shooter; and (3) no physical evidence pointed to Wilson as the shooter. When we add Ms. Wallace's credible (as the state court found) and consistent account in which Smith-Currin was the shooter and had a motive to blame Wilson, conscientious jurors would have to doubt whether Wilson was guilty.

The majority opinion also suggests that Ms. Wallace's testimony does not necessarily exculpate Wilson because there might have been more than one shooter. Ante at 22. Perhaps both Smith-Currin and Wilson, and even others, were armed and fired shots? The principal problem with this possibility is that it would make it even harder to convince a jury beyond a reasonable doubt that Wilson was the one who shot the victims. The state prosecuted Wilson on the theory that there was one shooter and that he was the one. The new, more complex, and untested theory of multiple shooters invites speculation. It does not offer a solid basis for denying relief.

The test for actual innocence is demanding, and cases of proven actual innocence are relatively rare. In my view, this is one of those rare cases. I am not saying that Wilson is entitled to a new trial based on his as-yet-unproven claims of ineffective assistance of counsel. But I believe he is entitled to a hearing to try to prove them. I respectfully dissent.

In the

United States Court of Appeals

For the Seventh Circuit

No. 21-1402

JERRY S. WILSON,

Petitioner-Appellant,

v.

DAN CROMWELL,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 2:13-cv-01061 — **Nancy Joseph**, *Magistrate Judge*.

ARGUED SEPTEMBER 7, 2022 — DECIDED JANUARY 23, 2023

Before SYKES, *Chief Judge*, and HAMILTON and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. Melvin Williams was shot and killed on May 23, 2009, and two other men—Robert Taylor and Romero Davis—were injured in the same shooting. A Wisconsin jury found beyond a reasonable doubt that Jerry Wilson was the gunman. He appeals from the district court's denial of his habeas petition under 28 U.S.C. § 2254, claiming

that he received constitutionally ineffective assistance from his trial and postconviction counsel.

We do not reach the merits of Wilson's claims because both are procedurally defaulted. Wisconsin state courts disposed of Wilson's ineffective assistance of trial counsel claim on adequate and independent state procedural grounds. And Wilson failed to present his ineffective assistance of postconviction counsel claim for one complete round of state court review. The default of these claims is not excused by a sufficient showing of actual innocence, barring federal review of the merits. Accordingly, we affirm the district court's denial of habeas relief.

I

The Shooting, Investigation, and Charges. In the early morning hours of May 23, 2009, three people were shot during an "after-set" party[1] at a two-story duplex unit on North 44th Street in Milwaukee. The party was large enough that attendees were both inside the duplex and outside in the street.

Just before gunfire began, two vehicles passed through the crowded street in front of the duplex, and the cars' occupants exchanged insults with party attendees in the roadway. The drivers parked nearby, and the passengers—who included the three eventual victims—walked back to the party to find the people who had yelled at them. A fistfight broke out in the street, and then the shooting started.

Melvin Williams suffered a fatal gunshot wound to the chest and died that day. The two other victims survived. A

[1] According to witnesses at trial, an after-set party is like a house party or block party, where guests pay an admission fee and alcohol is served.

bullet struck Robert Taylor in the foot, and Romero Davis received wounds to his stomach and right calf. Neither Taylor nor Davis could identify who shot them.

Investigation of the crime scene yielded only a modest amount of physical evidence. Law enforcement recovered five .40 caliber bullet casings, four .38 caliber casings, a .40 caliber bullet, and several bullet fragments at the scene but never located the murder weapon. In general, the .38 caliber casings were damaged and flattened while the .40 caliber casings were in better condition.

Police spoke with eyewitnesses early in the investigation. Shakira King attended the after-set party and identified Wilson as the gunman to law enforcement. She also picked Wilson out of a photo lineup. Antwan Smith-Currin, who lived in the upstairs duplex unit at the time, also identified Wilson as the gunman in a photo array.

According to detective testimony, Samantha Coats and Sanntanna Ross identified Wilson as the shooter as well, although at trial the women either denied having made such identification or sharply qualified their prior statements. Officers arrested Wilson in July 2009, and the State charged him with one count of reckless homicide and two counts of reckless endangerment.

Smith-Currin testified at Wilson's preliminary hearing and identified him as the gunman. When asked whether he saw other gunmen besides Wilson, Smith-Currin answered, "No, sir," but acknowledged that "People w[ere] trying to say

that I was shooting because I was on the porch."[2] At the hearing, the trial court found probable cause to believe that Wilson committed a felony and ordered him bound over for trial.

Jury Trial. In August 2010, Wilson went to trial with attorney Glen Kulkoski as his counsel. Given the minimal physical evidence, the case centered on the testimony of four eyewitnesses. Smith-Currin took the stand and identified Wilson as the gunman, consistent with his previous statements to law enforcement. He testified to seeing Wilson walk between two houses, approach the crowd in the street, and open fire with a handgun. Yet Smith-Currin's testimony contained discrepancies. For instance, he testified to standing on the porch when he saw Wilson open fire, but he was cross-examined with his prior sworn statement that he had been in the street when he saw the shooting.

King also testified at trial and identified Wilson as the shooter. King's account largely mirrored Smith-Currin's: Wilson emerged from between two houses on the same side as the duplex and opened fire. But King also provided certain discrepant details. For example, she was neither consistent in describing her position relative to the gunman, nor certain of the distance between them. At trial, she first suggested that she was two feet from the gunman. But following a courtroom distance demonstration, she changed that estimate to fifteen feet. She also said that the shooter had a ponytail but had previously told police that he wore his hair in braids. Finally, King testified she was not involved in the street fight, but previously told officers that she had participated.

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[2] The two-story duplex has an upper and a lower porch. Smith-Currin testified at trial that he was on the lower porch at the time of the shooting.

The State also called two other eyewitnesses to testify. Sanntanna Ross said she did not see who shot because she was fighting in the street during the shooting. That prompted the State to try to impeach her with her prior statements to law enforcement inculpating Wilson. Per testimony from investigating detectives, Ross identified Wilson as the shooter and recognized his face in a photograph. In response to the impeachment evidence, Ross claimed she felt pressure from police to "get [her] to say things that [she] didn't want to say."

Samantha Coats testified that, in the seconds before the shooting, she was looking out of a nearby second-story window with a view of the street. She described seeing an individual come into the street near the duplex and start shooting. When asked at trial, she agreed that the gunman's silhouette fit Wilson's description, but she did not make an affirmative identification. As with Ross, the State tried to impeach Coats with prior statements. According to police documents and testimony, Coats selected Wilson's photograph during a photo lineup, indicated he was the shooter, and wrote "I'm sure is the shooter" on the photo lineup paper near her signature. In response, Coats explained she was "under a lot of pressure" from law enforcement and believed that she "was going to be taken into custody." Coats likewise agreed with defense counsel that her statements to police were made to please the detectives and to avoid getting herself in trouble.

The State called other witnesses to talk about the physical evidence. Detectives described where they found the different bullet casings and explained that the location of the .40 caliber casings was generally consistent with a gunman firing from an alleyway near the duplex. A firearm examiner opined that

the .38 caliber casings were all fired out of one gun while the .40 casings were all fired from a second weapon.

After the State rested, Wilson called three witnesses in his defense. Kawana Robinson, Aaron Lee, and Shantell Johnson all testified that they did not see Wilson at the after-set party the night of the shooting.

All in, the accounts of the trial witnesses varied. For instance, the shooter's height was described as five-foot-three by one witness, and five-foot-eleven by another. One witness said the shooter was wearing a fleece-style top with no hood, while others testified he was either wearing a baseball hat or had a hood up. There was also disagreement about whether the shooter wore his hair in a ponytail or in braids. Finally, at least two witnesses claimed it was too dark to discern any details about the gunman.

The jury found Wilson guilty on all three counts, and the court sentenced him to 28 years' imprisonment.

Wilson's § 974.02 Proceedings and Possible New Evidence. Post-judgment, two events unfolded simultaneously. In the fall of 2010, Wilson obtained postconviction counsel (Thomas Simon)[3] and challenged his conviction. Wilson began by pursuing a claim for ineffective assistance of trial counsel which, in Wisconsin, is brought as a § 974.02 motion in the trial court. *See* WIS. STAT. §§ 809.30, 974.02; *Lee-Kendrick v. Eckstein*, 38 F.4th 581, 586 (7th Cir. 2022). Wilson filed that motion in April

[3] Throughout we refer to Thomas Simon, who assisted Wilson during his § 974.02 proceeding, as Wilson's "postconviction counsel." "Postconviction counsel" refers exclusively to Simon and should not be confused with Christopher August, who assisted Wilson with his § 974.06 state collateral attack, or with Wilson's current federal habeas counsel.

2011, arguing that trial counsel had failed to properly investigate the case, raise a key defense, and thoroughly cross-examine a State witness.

Also during the fall of 2010, Wilson had been investigating new evidence. He alleges that three to four months after the trial concluded, he became aware of a new eyewitness through a fellow inmate named Deangelo Harvey. In late 2010, Harvey purportedly told Wilson that a woman living in the duplex was home on the night of the shooting, but he did not provide a name or any other specifics. Nonetheless, Wilson claims he eventually received a letter from that woman—Lakisha Wallace—sometime between March and June of 2011. Per Wilson, Wallace explained in her letter that she had "information about what happened that night" but provided no other details. Wilson said he wrote back asking if she would testify on his behalf and requesting her contact information. In a third letter, Wallace allegedly agreed and provided Wilson a post office box number.[4] Thereafter, Wilson claims that his mother got in touch with Wallace and that Wallace spoke with his postconviction counsel. Nonetheless, there is no evidence that Wilson's postconviction counsel ever obtained an affidavit from Wallace or involved her in the direct appeal.

The Wisconsin trial court denied Wilson's § 974.02 motion on April 18, 2011, and Wilson appealed. In 2012, the Wisconsin Court of Appeals denied relief, and the Wisconsin Supreme Court declined to grant review, ending Wilson's direct appeal.

Wilson's § 974.06 Proceedings. Almost a year after Wilson lost his direct appeal, he acquired a notarized statement from

[4] Wilson did not keep any of the letters nor did he make copies.

Wallace—the same individual with whom he had allegedly exchanged letters in 2011. In her July 1, 2013, statement, Wallace accused Smith-Currin of being the shooter and said that Wilson was innocent. Wilson then filed a pro se postconviction motion under § 974.06 in Wisconsin state court, alleging ineffective assistance of both trial and postconviction counsel. He also sought a hearing on the "newly discovered" Wallace testimonial evidence. The state trial court denied relief, and the appellate court affirmed.

Two years later, though, Wilson's state collateral challenge gained new life. In September 2016, he renewed his claims by petitioning the Wisconsin Supreme Court for review. That court ordered the State to submit a response, in which the State acknowledged that Wilson was entitled to an evidentiary hearing on the newly discovered evidence. As the Wisconsin Supreme Court summarized, the State conceded in its response that "if the allegation at issue is accepted as true, there is a reasonable probability that a jury, looking at the old evidence and the new evidence, would have a reasonable doubt as to Mr. Wilson's guilt." So, the Wisconsin Supreme Court granted the petition for review and remanded on the newly discovered evidence claim. It held in abeyance the other claims, including Wilson's ineffective assistance of postconviction counsel claim.

In August 2017, an evidentiary hearing was held at which Wallace testified to the information in her July 2013 statement. She explained that, on the night of the shooting, she was living on the first floor of the duplex, and there was a big party going on in the upstairs unit where Smith-Currin lived. In the hours leading up to the shooting, Wallace witnessed Smith-Currin drinking, smoking, and ingesting pills on the porch.

As a result, Wallace believed that Smith-Currin was under the influence at the time of the shooting: "Yeah, he was very much so under the influence. Like you could tell he was high, you know."

As the party ramped up, Wallace said she noticed commotion outside her unit and observed Smith-Currin ask his brother for a firearm. She next saw Smith-Currin go outside with the handgun and yell that the partygoers should move away from the house. According to Wallace, Smith-Currin then ran down the front steps and opened fire on the people in the street. During the shooting, Wallace claims to have heard multiple weapons firing: "It wasn't like it was just one gun. Like you could hear different guns going off. It wasn't like just one person shooting outside." Wallace testified further that, once the shooting stopped, Smith-Currin tried to come inside her unit. She refused him entry but overheard Smith-Currin tell his brother that he had just shot someone. Wallace also reported hearing Smith-Currin discuss pinning the crime on Wilson.

Wilson took the stand next. He explained how Wallace reached out to him after his conviction in 2011, and he described their alleged exchange of letters. Wilson also testified that, in the hours before the party, he had helped set up a music system for Wallace at the duplex.

Yet despite having been to Wallace's residence just hours before the shooting, Wilson said it never occurred to him that she might have information about the incident. Indeed, Wilson never brought Wallace to trial counsel's attention or otherwise reached out to her pretrial. Per Wilson, it was not until Wallace wrote to him that he realized she might have helpful information. And while Wilson claimed he notified

postconviction counsel about Wallace during his direct appeal, he could not explain why his counsel failed to act on the Wallace lead.

After the hearing, the state trial court denied Wilson's request for a new trial. In its oral ruling, the trial court found that, "[g]enerally, Miss Wallace's testimony was credible and worthy of belief."[5] But the judge assessed Wilson's statements differently, explaining, "Mr. Wilson's testimony is not credible. It is not worthy of belief. I give his testimony zero weight." The court observed that Wilson had recounted receiving letters from Wallace, yet Wallace testified she was illiterate. As the court explained, "Miss Wallace doesn't have the ability to correspond with the defendant. She can't read. She can't write." At bottom, the trial court held that Wilson was negligent in failing to present the newly discovered evidence to the jury and thus not entitled to a new trial.

Wilson then made a strategic decision to streamline his case. He voluntarily dismissed his petition for review (with his ineffective assistance of postconviction counsel claim), which the Wisconsin Supreme Court had held in abeyance, so that he could appeal the denial of his request for a new trial based on new evidence. Nonetheless, Wilson's appeal of his newly discovered evidence claim failed. The Wisconsin Court of Appeals agreed with the trial court that Wilson was negligent in not presenting the Wallace evidence earlier and denied relief. Soon after, the Wisconsin Supreme Court declined

[5] The trial court qualified this credibility finding somewhat, explaining, "Miss Wallace does have some limitations that undermine her credibility, not enormously, but there are areas where her testimony could be more credible." One such issue was that Wallace "ha[d] some difficulties in sequence of events."

review. Having lost on the newly discovered evidence claim and having voluntarily dismissed his other claims pending in the Wisconsin Supreme Court, the doors to state court relief closed for Wilson.

Habeas Corpus Petition. Wilson then turned to federal court. He had timely filed an original federal habeas petition on September 20, 2013, which the district court stayed pending exhaustion of state proceedings. After his state court path was foreclosed, he amended his habeas petition on July 30, 2019, alleging three grounds for relief: (1) ineffective assistance of trial counsel; (2) ineffective assistance of postconviction counsel; and (3) newly discovered evidence.

The district court ruled that Wilson procedurally defaulted his claim for ineffective assistance of trial counsel. Likewise, the court decided that the default was not excused because Wilson failed to make a sufficiently strong showing of actual innocence. On the ineffective assistance of postconviction counsel claim, the district court did not explicitly engage with procedural default. Instead, the court found that Wilson could not show constitutionally ineffective assistance on the merits. Finally, the district court disposed of the newly discovered evidence claim, finding that the discovery of new evidence alone does not qualify as grounds for federal habeas relief absent an independent constitutional violation. The district court also denied Wilson a certificate of appealability.

At Wilson's request, we granted a certificate of appealability under 28 U.S.C. § 2253(c)(2) for the following issues:

- Whether Wilson has established ineffective assistance of trial counsel;

- Whether Wilson has made a strong enough showing of actual innocence to excuse any procedural defaults;
- Whether the federal constitutional right to counsel applies to Wisconsin postconviction counsel's performance; and
- Whether, if the federal constitutional right to counsel applies to Wisconsin post-conviction counsel, the standard for ineffective assistance is met here.

After reviewing the petition and record, we affirm the district court's denial of Wilson's petition for federal habeas relief for the reasons that follow.[6]

II

As noted, the district court dismissed Wilson's habeas petition. "When reviewing a district court's ruling on a habeas corpus petition, we review the district court's factual findings for clear error and rulings on issues of law *de novo*." *Sanders v. Radtke*, 48 F.4th 502, 508 (7th Cir. 2022) (quoting *Lee-Kendrick*, 38 F.4th at 585–86). As to whether a claim is procedurally defaulted, our review is de novo. *Garcia v. Cromwell*, 28 F.4th 764, 771 (7th Cir. 2022) (citing *Johnson v. Thurmer*, 624 F.3d 786, 789 (7th Cir. 2010)).

[6] The court thanks Vladimir J. Semendyai, Esq., Andrew P. LeGrand, Esq., Pooja Patel, Esq., and Zachary T. Reynolds, Esq. of Gibson, Dunn & Crutcher LLP for accepting this appointment and for their fine representation of Wilson throughout this appeal.

A

We first consider whether Wilson's claim for ineffective assistance of trial counsel is procedurally defaulted. The State contends it is because the state court disposed of Wilson's claim on an adequate and independent state law ground. Wilson seems to acknowledge this but focuses instead on overcoming default through the actual innocence gateway. We hold that Wilson's claim for ineffective assistance of trial counsel is indeed procedurally defaulted.

"[A] state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (citing 28 U.S.C. § 2254(b)(1)(A)). A "corollary" to that rule is that federal courts may not review federal claims that the state court denied on an adequate and independent state procedural ground. *Id.* So, we begin by examining the state court's treatment of Wilson's claim for ineffective assistance of trial counsel.

The Wisconsin Court of Appeals was the final state court to evaluate Wilson's ineffective assistance of trial counsel claim, and it denied that claim as inadequately pleaded under *State v. Allen*, 682 N.W.2d 433 (Wis. 2004).[7] Per Wisconsin law, a defendant claiming ineffective assistance of counsel must plead "sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle him to the

[7] The Wisconsin Supreme Court denied Wilson's ensuing petition for review without comment. Therefore, we look to the Wisconsin Court of Appeals' decision. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) (holding that federal courts on habeas review look to the "last related state-court decision that [ ] provide[s] a relevant rationale").

relief he seeks." *Id.* at 436; *see also id.* at 441–42; *State v. Bentley*, 548 N.W.2d 50, 53–54 (Wis. 1996). State trial courts may deny such a claim without a hearing based on a defendant's recitation of "conclusory allegations" or failure to "raise facts sufficient to entitle the movant to relief." *Allen*, 682 N.W.2d at 437; *see also Whyte v. Winkleski*, 34 F.4th 617, 622 (7th Cir. 2022) (describing the *Allen* pleading standard).

Applying that standard, the Wisconsin Court of Appeals determined that Wilson's ineffective assistance of counsel claim was insufficiently pleaded under *Allen*: "Despite a lengthy recitation of the standards set forth in *Bentley* and *Allen* for a sufficient postconviction motion, Wilson fails to make sufficient allegations to warrant relief." The state appellate court continued, "Because the allegations in the postconviction motion were insufficient under *Bentley* and *Allen*, whether to grant a hearing was committed to the [trial] court's discretion. We discern no erroneous exercise of that discretion." In denying Wilson's claim for ineffective assistance of trial counsel under the *Allen* standard, the state court of appeals relied on an adequate and independent state law ground.

As stated, federal courts "may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila*, 137 S. Ct. at 2064. The *Allen* standard at issue here is both adequate and independent. As to adequacy, "For a state-law ground to be 'adequate,' it must be 'firmly established and regularly followed.'" *Clemons v. Pfister*, 845 F.3d 816, 820 (7th Cir. 2017) (quoting *Walker v. Martin*, 562 U.S. 307, 316 (2011)). The state law ground also "must not have been applied in a manner that

'impose[s] novel and unforeseeable requirements without fair or substantial support in prior state law' or 'discriminate[s] against claims of federal rights.'" *Id.* (quoting *Walker*, 562 U.S. at 320–21). When examining the adequacy of a state law procedural ground, our review is limited to whether the procedural ground "is a firmly established and regularly followed state practice at the time it is applied, not whether the review by the state court was proper on the merits." *Lee v. Foster*, 750 F.3d 687, 694 (7th Cir. 2014).

We have previously held the *Allen* pleading standard is a firmly established and regularly followed state practice, and we do so here. In *Lee v. Foster*, the Wisconsin Court of Appeals denied Lee's claim for ineffective assistance of counsel and "found that the allegations regarding [Lee's] postconviction counsel's performance were conclusory and legally insufficient" under the *Allen* standard. *Id.* at 693. On federal habeas review, we held that Lee's claim was procedurally defaulted and that the *Allen* rule "is a well-rooted procedural requirement in Wisconsin and is therefore adequate." *Id.* at 694. So, the *Allen* standard functions as an adequate state law ground for denial of Wilson's ineffective assistance of trial counsel claim.

The *Allen* pleading standard is also independent. A state-law procedural ground satisfies the independence prong when "the court actually relied on the procedural bar as an independent basis for its disposition of the case." *Lee-Kendrick*, 38 F.4th at 587 (quoting *Garcia*, 28 F.4th at 774). Here, the Wisconsin Court of Appeals explicitly referenced and relied upon the *Allen* procedural rule in disposing of Wilson's claim for ineffective assistance of trial counsel. Thus, the *Allen* standard served as an independent state law ground for denying

Wilson's claim. We have reached the same conclusion in other cases implicating the *Allen* standard. *See, e.g.*, *Lee*, 750 F.3d at 693 (holding that the *Allen* rule "clearly served as an independent basis for the court's denial of [petitioner's] motion"); *Triplett v. McDermott*, 996 F.3d 825, 829–30 (7th Cir. 2021) (concluding that the *Allen* pleading standard is an adequate and independent basis for the state court's denial of petitioner's ineffectiveness claim). So, the district court properly ruled that Wilson's ineffective assistance of trial counsel claim was procedurally defaulted, and we affirm that decision.

B

Next up is Wilson's claim that his postconviction counsel rendered ineffective assistance during the § 974.02 proceeding. This claim implicates the proper classification of § 974.02 proceedings, but in *Lee-Kendrick* we already decided that: "[A] claim of ineffective assistance of counsel under [Wisconsin Statute] § 974.02 is part of a direct appeal rather than a request for collateral review." 38 F.4th at 587. So, 28 U.S.C. § 2254(i), which bars federal habeas relief for the ineffective assistance of counsel at collateral post-conviction proceedings, does not preclude Wilson's claim here.

With that, we move to whether Wilson procedurally defaulted his claim for ineffective assistance of postconviction counsel. The State argues that Wilson defaulted this claim by failing to present it for one complete round of state court review. Wilson does not vigorously contest that position, focusing instead on overcoming default.

Under 28 U.S.C. § 2254(b)(1)(A), a petition for federal habeas relief shall not be granted unless it appears that "the applicant has exhausted the remedies available in the courts of

the State." Applying that provision, we have held that "[t]o fairly present [a] federal claim, a petitioner must assert that claim throughout at least one complete round of state-court review, whether on direct appeal of his conviction or in post-conviction proceedings." *Richardson v. Lemke*, 745 F.3d 258, 268 (7th Cir. 2014) (citing *McDowell v. Lemke*, 737 F.3d 476, 482 (7th Cir. 2013)). The complete round rule "means that the petitioner must raise the issue at each and every level in the state court system, including levels at which review is discretionary rather than mandatory." *Id.* (citing *Lewis v. Sternes*, 390 F.3d 1019, 1025–26 (7th Cir. 2004)).

Wilson voluntarily dismissed his claim for ineffective assistance of postconviction counsel before the Wisconsin Supreme Court ruled on it. That voluntary dismissal effected the same outcome as not filing a petition in the first place—the Wisconsin Supreme Court never evaluated his claim for ineffective assistance of postconviction counsel. As a result, Wilson's claim for ineffective assistance of postconviction counsel is procedurally defaulted. *See Johnson v. Foster*, 786 F.3d 501, 504–05 (7th Cir. 2015) (holding that defendant's failure to file a petition for review with the Wisconsin Supreme Court violated the complete round of review rule). Without an entire round of state-court review, Wilson procedurally defaulted his claim.

III

Where, as here, a petitioner's claims are procedurally defaulted, federal habeas review is precluded unless the prisoner demonstrates either of two things. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The petitioner may demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law," or he may "demonstrate that

failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* Moreover, "[t]he miscarriage of justice exception 'applies only in the rare case where the petitioner can prove that he is actually innocent of the crime of which he has been convicted.'" *Blackmon v. Williams*, 823 F.3d 1088, 1099 (7th Cir. 2016) (quoting *McDowell*, 737 F.3d at 483); *see also Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). Wilson does not allege cause and prejudice,[8] so we focus on the actual innocence exception.

Wilson maintains that he has made a sufficient showing of actual innocence and urges us to review the merits of his claims. First, he suggests that the State has already admitted that statements made during state court proceedings would have given a jury reasonable doubt, and thus conceded the question of actual innocence. Wilson further asserts that Wallace's testimony is sufficiently compelling and thus "there can be little doubt that [he] has satisfied the actual innocence standard." More precisely, Wilson contends that the Wallace testimony is persuasively exculpatory and that Smith-Currin's preliminary hearing statements corroborate Wallace's account. He also tries to downplay the probative force of the inculpatory record evidence.

The State responds that the Wallace evidence—including when considered with the rest of the trial evidence—falls short of sufficiently establishing actual innocence. It contends Wallace's testimony is uncorroborated and in tension with other testimonial and physical evidence. It also highlights

[8] At oral argument Wilson's counsel informed us that Wilson was not pursuing relief on a cause-and-prejudice theory. *See* Oral Arg. at 6:12–7:02.

that, even if true, Wallace's account does not technically rule Wilson out as a potential gunman.

We start with whether the State conceded that Wilson has made a sufficient showing of actual innocence. Wilson is correct that the State previously admitted he was entitled to a hearing on the newly discovered evidence. After Wilson filed a pro se motion about that evidence, both the state trial and appellate courts declined his request for a hearing. Wilson appealed to the Wisconsin Supreme Court, and on that court's direction, the State filed a response conceding that Wilson was entitled to a hearing. Specifically, the State admitted it was "reasonably probable that if a jury were to find Wallace credible, her testimony would create a reasonable doubt about whether Wilson was the shooter."

Even so, the federal standard for a showing of actual innocence demands more than what the State conceded. When we evaluate an actual innocence claim for purposes of federal habeas review, the appropriate question is whether "it is more likely than not that no reasonable juror would have convicted [Wilson] in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324. The burden rests on the petitioner to make the requisite showing. *Id.* at 327. This is a more demanding standard than what is required to merit a hearing. The State's concession that Wilson was entitled to a state-court evidentiary hearing does not also serve as an admission that Wilson has shown actual innocence. Language from *Schlup* clarifies this point. There, the

Supreme Court explained that "[t]he meaning of actual innocence … does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id.* at 329. So, the State did not concede the question of actual innocence.

We further hold that Wallace's testimony does not sufficiently establish Wilson's actual innocence. At the outset, we acknowledge that this evidence is both new and credible, which are predicate requirements for the actual innocence gateway. *Id.* at 324. The evidence is new because it was not presented at Wilson's trial, and it is credible because the Wisconsin Court of Appeals found that Wallace's testimony was generally worthy of belief. In this appeal, the State also recognizes as much.

Yet the presentation of new and credible evidence does not automatically satisfy the *Schlup* standard for actual innocence. Instead, the new evidence must be considered along with the existing evidentiary record. "In applying this standard, we must consider all the evidence, both old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted at trial." *Blackmon*, 832 F.3d at 1101 (citing *House v. Bell*, 547 U.S. 518, 538 (2006)). From there, we make a probabilistic determination about what reasonable jurors would do. *House*, 547 U.S. at 538. The requisite probability is established only if Wilson shows that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. Finally, we always keep in mind that the "*Schlup* standard is demanding and permits review only in the 'extraordinary' case." *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327); *see also*

McQuiggin v. Perkins, 569 U.S. 383, 401 (2013) ("We stress once again that the *Schlup* standard is demanding.").

Adhering to the rigor of the *Schlup* standard for actual innocence, we cannot say that the Wallace evidence is so compelling and unequivocal that no reasonable juror would have convicted Wilson in the light of it. Wallace's testimony just adds a new voice to a highly complex, and often inculpatory, evidentiary record. For instance, both Smith-Currin and King still unequivocally identified Wilson as the gunman and described him emerging from an alleyway and opening fire. A reasonable juror could credit their testimony as honest and compelling—especially since a detective testified that the location of the .40 bullet casings was generally consistent with a shooter coming from the alleyway.

A reasonable juror could likewise find the State's impeachment evidence of Samantha Coats and Sanntanna Ross—which included Coats' prior identification of Wilson as the gunman during a photo lineup—persuasive. Plus, Wallace's testimony and the physical evidence do not foreclose the existence of multiple shooters. Wallace testified she heard multiple guns firing, and detectives recovered two different sets of bullet casings. She explained "[i]t wasn't like it was just one gun. Like you could hear different guns going off. It wasn't like just one person shooting outside." So, a reasonable juror could consider Wallace's testimony and still find that Wilson was one of two (or more) shooters. Plus, no other witness's account of the shooting matches Wallace's. The closest corroboration of Wallace's version comes from Smith-Currin's preliminary hearing statement, in which he testified that people thought he was shooting. But that advances the ball little,

because Wallace is still the only identified witness to accuse Smith-Currin of being the gunman.

The discrepancies in testimony do not end there. As mentioned, witnesses provided varied accounts of the shooting and the shooter. Whether it is the gunman's height, hair, or clothing, the witnesses' recollections differed. Reasonable jurors could draw different conclusions from this evidence. Even with Wallace's testimony, we are left with a series of competing eyewitness accounts. When evaluating a claim of actual innocence, our role "is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538. As the dissent emphasizes, a state court found Wallace's testimony to be credible. But that finding does not mean that a reasonable juror would necessarily credit Wallace's account of the shooting over that of any other witness, such as Smith-Currin or King. A conflict between trial testimony remains, notwithstanding Wallace's credibility, and we cannot say that it is more likely than not that no reasonable juror would have convicted Wilson in the light of the new evidence.

Our conclusion accords with relevant precedent. In *Blackmon*, the court heard competing eyewitness testimony. 823 F.3d 1088. There, two gunmen approached a victim and opened fire. *Id.* at 1092. The ensuing bench trial focused on the identity of the second gunman, and eyewitness testimony was paramount. *Id.* at 1092, 1095–96. Approximately two months after the shooting, two eyewitnesses identified Blackmon as one of the triggermen through photo lineups and in-person lineups. *Id.* at 1094. Those same witnesses identified Blackmon as the gunman at trial. *Id.* at 1093–95. In response,

Blackmon called three defense witnesses. Two of those witnesses provided an alibi for Blackmon; the third claimed to have watched the shooting and testified that Blackmon was not present at the scene. *Id.* at 1095–96. The presiding judge determined that Blackmon was one of the shooters and found him guilty. *Id.* at 1096.

Like Wilson, Blackmon challenged his conviction through federal habeas and tried to pass through the actual innocence gateway for certain defaulted claims. *Id.* at 1100–01. To that end, Blackmon provided two new eyewitness affidavits. *Id.* at 1097. Each of the new witness affidavits claimed that Blackmon was not one of the gunmen. *Id.* Reviewing all the evidence—old and new—this court concluded that Blackmon's showing of actual innocence was insufficient. *Id.* at 1101–02. In reaching that conclusion, this court noted that the new evidence merely contrasted with the State's two credible eyewitness accounts. *Id.* And the new eyewitnesses did not come forward until eight years after the shooting. *Id.* at 1102. So, the "balance between inculpatory and exculpatory witnesses [was] not enough to meet the demanding *Schlup* standard for actual innocence." *Id.*

The facts here track those in *Blackmon*. Like Blackmon, Wilson offers new eyewitness testimony into a factual record occupied by contrasting eyewitness statements. But as ruled in *Blackmon*, the introduction of new eyewitness testimony does not amount to a showing of actual innocence when strong and credible testimony to the contrary remains. Just as the two new affidavits in *Blackmon* merely added to the balance of inculpatory and exculpatory evidence, so too does Wallace's testimony. Even with the Wallace evidence, we are left with a

complex factual record pointing in different directions.[9] We therefore hold that Wilson has not satisfied the *Schlup* standard for actual innocence. Other cases from this court also support our conclusion. *See, e.g.*, *Smith v. McKee*, 598 F.3d 374, 387–88 (7th Cir. 2010) (concluding insufficient showing of actual innocence where petitioner's two new affidavits did not sufficiently counter the state's evidence, which included two eyewitness identifications and a self-inculpatory statement); *Hayes v. Battaglia*, 403 F.3d 935, 937–38 (7th Cir. 2005) (holding that a draw between the number of eyewitnesses for and against defendant—six new exculpatory witnesses versus the state's six inculpatory trial witnesses—"cannot establish that no reasonable factfinder would have found the applicant guilty") (cleaned up).

Finally, *Jones v. Calloway*, 842 F.3d 454 (7th Cir. 2016), is instructive as a rare case where we concluded that the defendant had made a sufficient showing of actual innocence. Jones was convicted of murder and sought federal habeas relief. The district court held his claims procedurally defaulted, forcing Jones to rely on the actual innocence gateway to excuse his default. *Id.* at 459. The new evidence Jones brought to bear on his case was exceptional. Michael Stone, another man present at the murder scene, provided new testimony that he was the lone shooter. *Id.* at 460. And his testimony was compelling.

[9] The dissent observes that, unlike in *Blackmon*, 823 F.3d at 1093, the inculpatory witnesses here knew Wilson before the shooting. For our dissenting colleague, that prior knowledge dilutes the weight of the photo lineup identifications by King and Smith-Currin. But Wallace was not a stranger to Wilson or Smith-Currin, either. Indeed, at the evidentiary hearing Wallace testified she had been around Smith-Currin "plenty of times" before the shooting, and Wilson helped set up the music at Wallace's apartment on the night of the crime.

Stone had previously turned himself in for the crime, confessed to the shooting within days, identified the murder weapon, and given testimony that was consistent with the case's forensic evidence. *Id.* at 462. Stone's story of the shooting had also remained consistent for over a decade. *Id.* at 463. The district court found a sufficient showing of actual innocence, and this court agreed. *Id.* at 460, 462.

In *Jones*, the new witness took the stand and personally claimed sole responsibility for the crime. *Id.* at 462. His testimony was consistent with the physical evidence as well, whereas the testimony of prosecution witnesses in that case was often in tension with the forensics. *Id.* The Wallace evidence is not so forceful. Her eyewitness testimony merely contrasts with that of Smith-Currin and King (and to a lesser degree, Coats and Ross). Reviewing all the facts, a reasonable juror could still conclude that Wilson was the shooter. Accordingly, Wilson has not sufficiently shown actual innocence.

IV

Given the unexcused procedural default, we do not reach the merits of Wilson's ineffective assistance of trial and postconviction counsel claims.

In summary, Wisconsin state courts disposed of Wilson's ineffective assistance of trial counsel claim on adequate and independent state grounds, and he failed to present his ineffective assistance of postconviction counsel claim for one complete round of state court review. So, both of his claims are procedurally defaulted. Wilson attempts to overcome these defaults, but he fails to make a sufficient showing of actual innocence. Even considering Wallace's testimony, we

cannot conclude that it is more likely than not that no reasonable juror would have convicted Wilson. The *Schlup* standard for actual innocence is high and reserved for the exceptional case, a threshold Wilson does not clear here.

For these reasons, the district court's denial of Wilson's petition for federal habeas relief is AFFIRMED.

HAMILTON, *Circuit Judge*, dissenting. During post-conviction hearings in the state courts, Lakisha Wallace testified that the shooter was actually Antwan Smith-Currin, who was also the state's chief witness against petitioner Wilson. Ms. Wallace witnessed the incident from the bottom floor of the duplex where she lived downstairs from Smith-Currin. She testified that she heard Smith-Currin yell to his brother to give him a gun and then saw Smith-Currin wave a handgun on the front porch of the duplex, open fire, and run into the crowd while shooting. According to Ms. Wallace, Smith-Currin immediately came back inside and shouted to his brother that he had "just offed" someone. Ms. Wallace further testified that in the days after the shooting, she heard Smith-Currin say that he planned to blame the crime on Wilson. She also offered a plausible motive for the plan to blame Wilson. Smith-Currin had seen his girlfriend with Wilson on the duplex porch the day before the shooting and was angry about them being together.

The extraordinary feature of this habeas case is the combination of two facts. First, the state agreed during state court proceedings that "[i]t is reasonably probable that if a jury were to find Ms. Wallace credible, her testimony would create a reasonable doubt about whether Wilson was the shooter." Second, when Ms. Wallace actually testified before a state court judge, that judge found her credible. Under these unusual circumstances, and given other significant weaknesses in the state's case, we should find that Wilson has made a showing of innocence sufficient to excuse his procedural default. We should remand to the district court for an evidentiary hearing on his claims of ineffective assistance of counsel.

My colleagues and I agree on all but that one decisive issue. As the majority opinion explains, under Wisconsin's unusual procedures for post-conviction relief, Wilson had a federal constitutional right to effective assistance of counsel in post-trial proceedings under Wisconsin Statute § 974.02. Ante at 16, citing *Lee-Kendrick v. Eckstein*, 38 F.4th 581, 587 (7th Cir. 2022). We also agree that Wilson procedurally defaulted his ineffective assistance claims in the state courts. Ante at 17. Where we disagree is whether Wilson has shown "actual innocence" so as to excuse his procedural default.

To avoid the consequences of his procedural default, Wilson offers the testimony of Lakisha Wallace to show that he is actually innocent. See generally *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992); *Blackmon v. Williams*, 823 F.3d 1088, 1099 (7th Cir. 2016). To do so, Wilson must come forward with new evidence showing "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); see also *McQuiggin v. Perkins*, 569 U.S. 383, 386, 390 (2013). His evidence must be reliable and may take the form of "exculpatory scientific evidence, *trustworthy eyewitness accounts*, or critical physical evidence." *Gladney v. Pollard*, 799 F.3d 889, 896 (7th Cir. 2015) (emphasis added), quoting *Schlup*, 513 U.S. at 324.

In applying this test, it is essential to remember that the hypothetical jurors would have to examine all the new and old evidence and be convinced of guilt *beyond a reasonable doubt*. That was, after all, the point of the Supreme Court's decision in the canonical *Jackson v. Virginia*, 443 U.S. 307, 318–21 (1979) (issue in federal habeas review was not whether "any evidence" supported the state conviction but whether evidence could support finding of guilt beyond a reasonable

doubt). The Supreme Court has rephrased the relevant standard ("to remove the double negative") as requiring new evidence making it "more likely than not [that] any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006). As I read this record, including Ms. Wallace's testimony credited by the state court, there is *some* evidence to support a finding of guilt, but, per *Jackson v. Virginia* and *House v. Bell*, any reasonable juror would have a reasonable doubt once Ms. Wallace's testimony is added to the mix.

As the majority opinion presents the facts, Wilson's trial for the fatal shooting of Melvin Williams presented testimony from four eyewitnesses who identified Wilson as the shooter. From that premise, the majority opinion relies on a portion of our decision in *Blackmon* where we held that new exculpatory testimony from two eyewitnesses was not enough to overcome procedural default. 823 F.3d at 1102. The key to that portion of *Blackmon* was that Blackmon had been identified as one of two killers independently, and consistently, by two utterly neutral witnesses. *Id*. at 1101–02.[1]

The case here was far shakier. *No witness consistently identified Wilson as the shooter.* The two government witnesses who identified Wilson at trial spoke to police on the night of the shooting. Both knew Wilson at the time. They did not claim

[1] We remanded *Blackmon* for an evidentiary hearing on other grounds, namely his claim that counsel was ineffective in failing to investigate adequately his alibi defense. 823 F.3d at 1104–07. After remand, Mr. Blackmon won habeas relief on that basis. *Blackmon v. Pfister*, 2018 WL 741390 (N.D. Ill. Feb. 7, 2018).

that night that they saw Wilson was present, let alone shooting.[2]

That night, Shakira King told police that she had heard another woman claiming Wilson was the shooter. By the time of trial, however, King's story had changed. She testified that she herself saw Wilson shooting, and she denied having told an officer on the night of the shooting that it was her friend who claimed to have recognized the shooter as Wilson. King's trial testimony also contradicted her contemporaneous description of the shooter's hairstyle. Her description of the shooter's clothing did not match that given by any other witness. And at trial King denied being part of the fight that preceded the shooting, though she had previously admitted involvement to police and other witnesses had confirmed her part in the melee.

Moving to Smith-Currin, he did not tell police that he saw Wilson shooting until a month after the crime. On the night of the shooting, Smith-Currin spoke with police but did not mention Wilson. Smith-Currin's trial testimony describing what he saw the shooter wearing was inconsistent. And at a preliminary hearing, Smith-Currin even testified that some people claimed they had seen him shooting from the duplex's porch.

[2] The fact that both witnesses knew Wilson prior to the shooting is important. The majority opinion states correctly that King and Smith-Currin identified Wilson as the gunman out of photo lineups. This procedure seems to add credibility to the identifications but its weight is diluted by the fact that both already knew him.

The two other witnesses who the state argued had previously identified Wilson as the shooter strongly refuted or recanted such statements at trial. Sanntanna Ross told the jury that what police construed as her identifying Wilson as the shooter was simply her indicating that she knew Wilson. When asked on the stand whether she saw Wilson shooting, Ross unequivocally said no. Samantha Coats told the jury that her prior identification of Wilson as the shooter was based only on rumors. When Coats was pressed for an identification by police during the investigation, she said, her boyfriend was in custody and she had been threatened with arrest herself. She chose Wilson (whom she knew and recognized) in a photo lineup to avoid arrest and in the hope that the police would release her boyfriend.

Unlike the *Blackmon* case, Wilson has also offered new evidence that not only exonerates him but identifies a different shooter, the state's chief witness. In applying the *Schlup* standard, which may be met by "trustworthy eyewitness accounts," keep in mind that the state judge who heard Ms. Wallace testify, subject to lengthy cross-examination, credited her testimony.

If a jury heard all the trial evidence and Ms. Wallace's testimony, there would of course still be the trial testimony of Smith-Currin and King identifying Wilson as the shooter. That's "some evidence"—but that low bar was the standard rejected in *Jackson*. Given the problems with their testimony—including their delayed identifications of a person they knew as the shooter they claimed to have seen that night—the lack of any other evidence placing Wilson at the scene, and the

consistent and credible testimony of Ms. Wallace, a conscientious juror could not reasonably find Wilson guilty beyond a reasonable doubt.

The majority opinion also suggests that Ms. Wallace's testimony does not necessarily exculpate Wilson because there might have been more than one shooter. Perhaps both Smith-Currin and Wilson, and even others, were armed and fired shots? The principal problem with this possibility is that it would make it even harder to convince a jury beyond a reasonable doubt that Wilson was the one who shot the victims. The state prosecuted Wilson on the theory that there was one shooter and that he was the one. The new, more complex, and untested theory of multiple shooters does not offer a solid basis for denying relief.

The test for actual innocence is demanding, and cases of proven actual innocence are relatively rare. In my view, this is one of those rare cases. I am not saying that Wilson is entitled to a new trial based on his as-yet-unproven claims of ineffective assistance of counsel. But I believe he is entitled to a hearing to try to prove them. I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JERRY SIMONE WILSON,

Petitioner,

v. **Case No. 13-CV-1061**

MICHAEL MEISNER,

Respondent.

DECISION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Jerry Simone Wilson, a prisoner in Wisconsin custody, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Wilson was convicted of first-degree reckless homicide-use of a dangerous weapon and two counts of first-degree recklessly endangering safety-use of a dangerous weapon. (Am. Habeas Pet. at 2, Docket # 34.) He was sentenced to forty years of incarceration, consisting of twenty-eight years of initial confinement followed by twelve years of extended supervision. (*Id.*) Wilson alleges that his conviction and sentence are unconstitutional. For the reasons stated below, the petition for writ of habeas corpus will be denied and the case dismissed.

BACKGROUND

Wilson was charged in June 2009 with first-degree reckless homicide and first-degree recklessly endangering safety stemming from a shooting at a house party in the City of Milwaukee on May 23, 2009, that left one person dead and two people injured. (Decision and Order Denying Motion for Postconviction Relief in Milwaukee County Case No.

09CF002976, Docket # 34 at 26–27.) A jury trial was held in August 2010 and Wilson was found guilty on all charges. (*Id.* at 27.)

In April 2011, Wilson, by post-conviction counsel, filed a Wis. Stat. § 974.02 motion for post-conviction relief claiming that his trial counsel was ineffective for: failure to corroborate a possible alibi; failure to sufficiently investigate the possible misidentification of Wilson as the perpetrator; and failure to thoroughly cross-examine the State's key witness, Antwan Smith-Curran. (*State v. Wilson*, Appeal No. 2011AP1043 (Wis. Ct. of App. May 15, 2012) at ¶ 3, Docket # 34 at 20.) The trial court denied Wilson's motion without a hearing, finding Wilson's allegations conclusory and insufficient. (*Id.*) The court of appeals affirmed (Docket # 34 at 19–24) and the Wisconsin Supreme Court denied Wilson's petition for review (Docket # 34 at 25).

On September 16, 2013, Wilson filed a petition for a writ of habeas corpus in this court, alleging his conviction and sentence were unconstitutional on five grounds: (1) ineffective assistance of trial counsel; (2) conviction on insufficient evidence; (3) juror bias; (4) exclusion of courtroom identification; and (5) ineffective assistance of postconviction counsel. (Docket # 1.) Wilson also moved to stay and hold his petition in abeyance while he exhausted his state court remedies. (Docket # 2.) The court granted the motion, and the case was stayed on October 9, 2013. (Docket # 11.)

On November 4, 2013, Wilson filed a *pro se* motion for post-conviction relief pursuant to Wis. Stat. § 974.06 in state court, alleging that his post-conviction counsel was ineffective during the § 974.02 proceedings by failing to raise various issues related to trial

counsel's performance, including: (1) failure to investigate an allegedly exculpatory witness, Lakisha Wallace (newly discovered evidence); (2) failing to argue that he was convicted on insufficient evidence; (3) failure to argue juror bias; and (4) failure to challenge the identification process utilized by police. (Docket # 34 at 27–31.) The trial court denied Wilson's motion without a hearing. (*Id.*) The court of appeals affirmed. (*State v. Wilson*, Appeal No. 2013AP2590 (Wis. Ct. App. Sept. 16, 2014), Docket # 34 at 32–39.) Wilson filed a petition for review to the Wisconsin Supreme Court. (Docket # 34 at 41.) The supreme court ordered the State to file a response to Wilson's petition for review and to address arguments made by the Wisconsin Association of Criminal Defense Lawyers in an *amicus* brief. (*Id.*) The State responded by conceding that Wilson should have been granted an evidentiary hearing on his newly discovered evidence claim. (Docket # 34 at 42.) The supreme court reversed the portion of the court of appeals' decision affirming the denial of a hearing as to the newly discovered evidence claim and remanded to the trial court for an evidentiary hearing on that issue. (*Id.*) The supreme court further held the remainder of the proceedings in abeyance pending the outcome of the remand. (*Id.*) Wilson was appointed counsel to assist on remand.

An evidentiary hearing was held on Wilson's newly discovered evidence claim in August 2017 at which both Wilson and Wallace testified. (Answer, Ex. 42, Tr. of Aug. 11, 2017 Evid. Hearing, Docket # 42-58.) The trial court denied Wilson's motion in November. (Docket # 34 at 43.) On January 30, 2018, Wilson wrote to his appointed counsel, asking for a status update and inquiring as to the next steps in the process. (Docket # 53-1 at 2.) In

a letter dated the next day, Wilson's appointed counsel wrote to the supreme court stating that it was his position, given the trial court's ruling, that there was merit to an appeal of the trial court's denial of relief; thus, Wilson requested the supreme court to dismiss his petition for review and allow Wilson 30 days to file his notice of appeal. (Docket # 53-1 at 3.) On February 1, 2018, appointed counsel wrote to Wilson stating that he believed there was grounds to appeal the trial court's ruling and stated that he would be asking the supreme court to dismiss the petition for review so that they could begin the process of appealing the trial court's ruling. (Docket # 53-1 at 4.) Wilson responded on February 20, 2018, asking what the benefit was of dismissing the petition for review. (Docket # 53-1 at 5.) Wilson stated that "I don't what [sic] you to take this letter or any letter from me as, though I'm going against you. I just what [sic] to understand what you know." (*Id.*) Counsel responded on February 27, 2018, stating that he believed the court of appeals was the "right" venue for Wilson's claim and he was "skeptical that the Wisconsin Supreme Court would hold onto the matter, effectively bypassing the Court of Appeals on the matter." (Docket # 53-1 at 6.) Counsel explained that "I believe our best move is to join in the [State's] request to dismiss the petition, with the condition that we be allowed to file a timely notice of appeal so we can keep litigating for a new trial in the Court of Appeals." (*Id.*) Wilson did appeal the trial court's order denying his postconviction motion for relief based on newly discovered evidence, and the court of appeals affirmed the trial court's order. (*State v. Wilson*, Appeal No. 2018AP534 (Wis. Ct. App. Mar. 12, 2019), Docket # 34 at 45–60.) The Wisconsin Supreme Court denied Wilson's petition for review on July 10, 2019. (Docket # 34 at 62.)

The stay in this court was lifted on July 30, 2019 (Docket # 33) and Wilson filed an amended habeas petition (Docket # 34). In his amended petition, Wilson alleges three grounds for habeas relief: (1) ineffective assistance of trial counsel; (2) ineffective assistance of post-conviction counsel; and (3) newly discovered evidence. (Docket # 34 at 6–8.)

STANDARD OF REVIEW

Wilson's petition is governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, a writ of habeas corpus may be granted if the state court decision on the merits of the petitioner's claim (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

A state court's decision is "contrary to . . . clearly established Federal law as established by the United States Supreme Court" if it is "substantially different from relevant [Supreme Court] precedent." *Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). The court of appeals for this circuit recognized the narrow application of the "contrary to" clause:

> [U]nder the "contrary to" clause of § 2254(d)(1), [a court] could grant a writ of habeas corpus . . . where the state court applied a rule that contradicts the governing law as expounded in Supreme Court cases or where the state court confronts facts materially indistinguishable from a Supreme Court case and nevertheless arrives at a different result.

Washington, 219 F.3d at 628. The court further explained that the "unreasonable application of" clause was broader and "allows a federal habeas court to grant habeas relief whenever the state court 'unreasonably applied [a clearly established] principle to the facts of the prisoner's case.'" *Id.* (quoting *Williams*, 529 U.S. at 413).

To be unreasonable, a state court ruling must be more than simply "erroneous" and perhaps more than "clearly erroneous." *Hennon v. Cooper*, 109 F.3d 330, 334 (7th Cir. 1997). Under the "unreasonableness" standard, a state court's decision will stand "if it is one of several equally plausible outcomes." *Hall v. Washington*, 106 F.3d 742, 748–49 (7th Cir. 1997). In *Morgan v. Krenke*, the court explained that:

> Unreasonableness is judged by an objective standard, and under the "unreasonable application" clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."

232 F.3d 562, 565–66 (7th Cir. 2000) (quoting *Williams*, 529 U.S. at 411), *cert. denied*, 532 U.S. 951 (2001). Accordingly, before a court may issue a writ of habeas corpus, it must determine that the state court decision was both incorrect and unreasonable. *Washington*, 219 F.3d at 627.

ANALYSIS

Wilson argues he is entitled to habeas relief on three grounds: (1) ineffective assistance of trial counsel; (2) ineffective assistance of post-conviction counsel; and (3) newly discovered evidence. More specifically, Wilson argues his trial counsel was

ineffective for failing to undertake an investigation of Smith-Curran's credibility and meaningfully cross-examine him. (Docket # 34 at 6.) Wilson argues his post-conviction counsel was ineffective for failing to raise trial counsel's ineffectiveness regarding: his ground one claims for relief; the investigation of Wallace; sufficiency of the evidence; identification procedures by police; and juror bias. (*Id.* at 7; Petitioner's Br. at 11, Docket # 45.) Finally, Wilson argues he is entitled to relief based on newly discovered evidence that Smith-Curran actually committed the crime Wilson was convicted of. (Docket # 34 at 8.) I will address each argument in turn.

1. Ineffective Assistance of Trial Counsel

Wilson argues his trial counsel was ineffective for failing to properly investigate Smith-Curran's credibility and meaningfully cross-examine him. The respondent argues that Wilson procedurally defaulted this claim because the Wisconsin Court of Appeals denied it on the adequate and independent state procedural ground that it was inadequately pled. (Resp. Br. at 24, Docket # 50.)

A federal court will not review a question of federal law decided by a state court if the decision of the state court rests on a state procedural ground that is independent of the federal question and adequate to support the judgment. *Moore v. Bryant*, 295 F.3d 771, 774 (7th Cir. 2002). The independent and adequate state ground doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Id.* (internal quotation and citation omitted). But this doctrine will not bar habeas review unless the state court actually

relied on the procedural default as an independent basis for its decision. Thus, "if the decision of the last state court to which the petitioner presented his federal claims fairly appears to rest primarily on the resolution of those claims, or to be interwoven with those claims, and does not clearly and expressly rely on the procedural default, we may conclude that there is no independent and adequate state ground and proceed to hear the federal claims." *Id.* A state court may reach the merits of a federal claim in an alternative holding; if it does so explicitly, then the independent and adequate state ground doctrine "curtails reconsideration of the federal issue on federal habeas." *Id.* (internal quotation and citation omitted).

In this case, the trial court denied Wilson's motion for postconviction relief without a hearing, finding that his allegations of ineffective assistance were conclusory and insufficient to warrant a hearing. (Docket # 34 at 16–18.) The Wisconsin Court of Appeals affirmed, stating that under *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433 and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), a hearing on a postconviction motion like Wilson's is only warranted when the movant states sufficient material facts that, if true, would entitle him to relief. (Docket # 34 at 21.) The court found that despite "a lengthy recitation of the standards set forth in *Bentley* and *Allen* . . . Wilson fail[ed] to make sufficient allegations to warrant relief." (*Id.* at 22.) As to the misidentification defense, the court of appeals found that while Wilson alleged trial counsel failed to investigate the possibility that he was misidentified as the perpetrator, Wilson "does not identify *who* the additional witnesses might be, *what* evidence they would have contributed, or *how* any of it would have

made a different result at trial a reasonable possibility." (*Id.* at 22–23.) As to Wilson's argument that trial counsel failed to reveal to the jury the "bad blood" between Smith-Curran and Wilson during Smith-Curran's cross-examination, the court of appeals found that Wilson's statements were conclusory and self-serving and he failed to "identify the source of the bias or ill-will, the reason Smith-Curran had to lie, or the basis for the 'bad blood' between the two men." (*Id.* at 23.) The court of appeals concluded that because the allegations in Wilson's post-conviction motion were insufficient under *Bentley* and *Allen*, the trial court did not erroneously exercise its discretion in denying a hearing. (*Id.* at 24.)

In *Lee v. Foster*, 750 F.3d 687 (7th Cir. 2014), the court held that the rule set forth by the Wisconsin Supreme Court in *State v. Allen*, requiring specific allegations of fact needed to show relief in order to obtain an evidentiary hearing, is an adequate and independent state law basis that precludes federal review under § 2254. The court explained:

> The rule requires a petitioner to provide sufficient material facts, "e.g., who, what, where, when, why, and how-that, if true, would entitle him to the relief he seeks." *Allen*, 682 N.W.2d at 436. Lee contends that the level of specificity in his postconviction motion—as an incarcerated defendant who was purportedly represented by ineffective counsel at both the trial and appellate levels—should be sufficient to withstand review under the *Allen* rule. Yet our review of the adequacy of a state ground is limited to whether it is a firmly established and regularly followed state practice at the time it is applied, not whether the review by the state court was proper on the merits. And the *Allen* rule is a well-rooted procedural requirement in Wisconsin and is therefore adequate. *See, e.g.*, *State v. Negrete*, 343 Wis. 2d 1, 819 N.W.2d 749, 755 (2012); *State v. Balliette*, 336 Wis. 2d 358, 805 N.W.2d 334, 339 (2011); *State v. Love*, 284 Wis. 2d 111, 700 N.W.2d 62, 68–69 (2005); *State v. McDougle*, 347 Wis. 2d 302, 830 N.W.2d 243, 247–48 (Ct. App. 2013). Consequently, we find the state procedural requirement relied upon by the Wisconsin Court of Appeals both independent and adequate. Lee's ineffective assistance claim is procedurally defaulted.

Id. at 693–94. Thus, the *Bentley/Allen* rule is adequate to support the judgment. Further, it is clear from the decisions that the state courts actually relied on the procedural default as an independent basis for their decisions. For these reasons, Wilson procedurally defaulted ground one of his petition. While a procedural default can be excused if a petitioner can show cause and prejudice or that failure to review the claim would result in a miscarriage of justice, *see Coleman v. Thompson*, 501 U.S. 722, 750 (1991), Wilson does not make such a showing. As such, Wilson is not entitled to relief on ground one of his amended habeas petition.

2. Ineffective Assistance of Postconviction Counsel

Wilson argues his postconviction counsel was ineffective for failing to present claims of ineffective assistance of trial counsel. Specifically, trial counsel's failure to raise: (1) his ground one claims for relief, (2) the investigation of Wallace, (3) sufficiency of the evidence, (4) the identification procedures used by police, and (5) juror bias. I will address each argument in turn.

2.1 Legal Standard

As an initial matter, I must address whether I can even consider Wilson's claim of ineffective assistance of postconviction counsel. Section 2254(i) provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

Under Wisconsin criminal procedure, issues involving the ineffective assistance of trial counsel are raised in Wis. Stat. § 974.02 motions before the trial court and issues of ineffective assistance of postconviction counsel are raised in Wis. Stat. § 974.06 motions before the trial court. Wilson argues that postconviction counsel, who filed the initial motion pursuant to Wis. Stat. § 974.02, was ineffective for failing to raise additional grounds of ineffective assistance of trial counsel. Courts in this district have found that challenging postconviction counsel's failure to preserve the issue of ineffective assistance of trial counsel for direct appeal does not regard counsel's performance during a collateral proceeding, and thus is not precluded by 28 U.S.C. § 2254(i). *Nelson v. Huibregtse*, No. 07-C-1022, 2009 WL 73149, at *4 n.1 (E.D. Wis. Jan. 6, 2009); *McCloud v. Jenkins*, No. 07-C-1050, 2007 WL 4561108, at *4 n.1 (E.D. Wis. Dec. 21, 2007).

Subsequent to those cases, however, the Seventh Circuit decided *Huusko v. Jenkins*, 556 F.3d 633, 635 (7th Cir. 2009), and questioned whether Wisconsin's procedure in § 974.02 should be deemed "collateral," noting that in federal court and most state courts, a hearing to inquire into the effectiveness of trial counsel is normally a collateral proceeding. *Id.* at 635–36. The court noted that if Wisconsin's § 974.02 proceeding was deemed non-collateral and therefore outside the scope of § 2254(i), then "Wisconsin's prisoners will enjoy a right to effective assistance of counsel in pursuing ineffective-assistance contentions, even though prisoners in Indiana, Illinois, and most other states do not enjoy such a right." *Id.* at 636. Having posed the question, the court decided not to answer it, noting that the state had waived it and petitioner's claim failed on the merits. *Id.* at 635.

In a later unpublished decision, the Seventh Circuit noted that while it had previously raised the question of whether a posttrial motion under § 974.02 was considered collateral, "more recently—as advocated by Wisconsin—we have understood a § 974.02 motion to be a step toward a defendant's direct appeal, *see Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014). And for a direct appeal the assistance of counsel is constitutionally guaranteed." *London v. Clements*, 600 F. App'x 462, 466 (7th Cir. 2015). Given the Seventh Circuit's more recent position (albeit stated in a nonprecedential disposition) and the respondent's failure to raise the issue, I will assume, without deciding, that Wilson's ineffective assistance of postconviction counsel claims are not barred by § 2254(i).

The Sixth Amendment, made applicable to the states by way of the Due Process Clause of the Fourteenth Amendment, *see Gideon v. Wainwright*, 372 U.S. 335 (1963), entitles a criminal defendant to the effective assistance of counsel not only at trial, but during his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). The appropriate standard for evaluating a claim of ineffective assistance of appellate counsel is the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Winters v. Miller*, 274 F.3d 1161, 1167 (7th Cir. 2001).[1] The general *Strickland* standard governs claims of ineffective assistance of appellate counsel as well as trial counsel, "but with a special gloss when the challenge is aimed at the selection of issues to present on appeal." *Makiel v. Butler*, 782 F.3d

[1]Although Wilson does not challenge postconviction counsel's performance in the court of appeals, but in the § 974.02 proceeding in the trial court (which is how claims of how ineffective assistance of trial counsel must be made in Wisconsin), given the nature of the proceedings (i.e., Wilson challenges post-conviction counsel's failure to raise specific arguments), I consider counsel's performance using the appellate attorney "clearly stronger" standard of *Strickland*. *See Hipler v. Hepp*, No. 09-CV-371, 2010 WL 1687873, at *6 n.2 (E.D. Wis. Apr. 23, 2010).

882, 897 (7th Cir. 2015). Because appellate counsel is not required to raise every non-frivolous issue on appeal, appellate counsel's performance is deficient under *Strickland* only if she fails to argue an issue that is both "obvious" and "clearly stronger" than the issues actually raised. *Id.* at 898. Proving that an unraised claim is clearly stronger than a claim that was raised is generally difficult "because the comparative strength of two claims is usually debatable." *Id.* (internal quotation and citation omitted).

2.2 Application to this Case

As stated above, Wilson's post-conviction counsel filed a Wis. Stat. § 974.02 motion claiming that trial counsel was ineffective for: failure to corroborate a possible alibi, failure to sufficiently investigate the possible misidentification of Wilson as the perpetrator, and failure to thoroughly cross-examine the State's key witness, Antwan Smith-Curran. (*State v. Wilson*, Appeal No. 2011AP1043 (Wis. Ct. of App. May 15, 2012) at ¶ 3, Docket # 34 at 20.) Wilson argues that his post-conviction counsel should have raised the following claims of ineffective assistance of trial counsel: (1) his ground one claims for relief (identification and cross-examination of Smith-Curran); (2) the investigation of Wallace; (3) sufficiency of the evidence; (4) the identification procedures used by police; and (5) juror bias.

As to Wilson's first argument, post-conviction counsel *did* raise Wilson's ground one claims for relief in his § 974.02 motion, thus, post-conviction counsel clearly was not ineffective for this reason. Regarding Wilson's claims on sufficiency of the evidence, juror bias, and police identification procedure, the Respondent argues that they are procedurally defaulted because Wilson failed to raise them before the Wisconsin Supreme Court. As

recounted above, Wilson initially did raise these issues before the Wisconsin Supreme Court. Wilson's counsel dismissed the petition for review (containing the sufficiency of the evidence, juror bias, and police identification procedure claims) so that Wilson could pursue an appeal of what he believed was Wilson's best argument—a new trial based on the newly discovered evidence of Wallace's statement. Wilson now argues that he never agreed to the dismissal of his petition for review, and again moves to stay his habeas petition and hold it in abeyance to raise the claim of postconviction counsel's ineffectiveness for dismissing Wilson's petition for review. (Docket # 51.) I will not grant Wilson a second stay and abeyance. A stay and abeyance is inappropriate when an unexhausted claim is plainly meritless. *Rhines v. Weber*, 544 U.S. 269, 277 (2005). Beyond making the conclusory statement that he has established a "'clearly stronger' issue," (Petitioner's Reply Br. at 7, Docket # 53), Wilson does not explain or otherwise demonstrate how the sufficiency of the evidence, juror bias, and police identification procedure issues he now raises are both "obvious" and "clearly stronger" than the issues post-conviction counsel actually raised. Thus, Wilson has not shown post-conviction counsel was ineffective for failing to raise those issues.

Wilson also does not show that post-conviction counsel erred as to Wallace's testimony. Wilson did raise the issue before the state trial court that his post-conviction counsel was ineffective for failing to investigate Wallace as a potentially exculpatory witness. (Docket # 34 at 27.) Wilson presented Wallace's affidavit to the trial court, in which she stated that she saw Smith-Curran with a gun the night of the shooting and saw

him run into the large crowd outside her duplex shooting the gun. (*Id.* at 28.) She also stated, however, that she heard others shooting as well. (*Id.*) Wallace also recounted Smith-Curran's alleged statement to his brother that he "just popped" someone and her cousin's statement to the police that Wilson was not there when the shooting took place. (*Id.* at 29.) The trial court found that Wallace's statements with respect to Smith-Curran and others are hearsay and would not have been admissible to show that Smith-Curran shot any of the victims. (*Id.*) Thus, the court found Wilson was not entitled to a new trial because the result would not be different. (*Id.*) The court of appeals agreed, finding that Wallace's statements were hearsay, and inadmissible evidence is insufficient to challenge a conviction. (*Id.* at 36, ¶ 10.)

Although the Supreme Court reversed the court of appeals' decision and ordered an evidentiary hearing as to Wallace's affidavit, after the trial court conducted an evidentiary hearing and the case was again before the court of appeals, the court did not even reach the issue of whether a reasonable probability existed that a different result would be reached at trial. Rather, the court of appeals found that Wilson failed to even meet the threshold showing required for a new trial that he was not negligent in seeking the evidence. (*Id.* at 59, ¶ 40.) But even considering Wallace's testimony, she continued to assert that while she saw Smith-Curran shooting on the night in question, she also heard more than one person shooting. (*Id.* at 52, ¶ 21.) She also continued to rely on the hearsay statements of what she heard Smith-Curran tell his brother about "popping" someone. (*Id.*) Again, the trial court, as affirmed by the court of appeals, determined that Wilson did not show a reasonable

probability of a different result with Wallace's testimony. The court found that because Wilson could not establish prejudice from trial counsel's failure to pursue Wallace, post-conviction counsel was not ineffective for failing to challenge trial counsel on this issue. The state courts' original conclusions that Wilson failed to establish post-conviction counsel was ineffective still hold true, even after hearing Wallace's testimony. On this record, Wilson has not demonstrated that he is entitled to habeas relief as to ground two of his amended petition.

3. Newly Discovered Evidence

Finally, Wilson asserts Wallace's statement is newly discovered evidence that establishes that Smith-Curran committed the crime Wilson was convicted of. (Docket # 34 at 8.) Claims of actual innocence based on newly discovered evidence are generally not grounds for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. *See Arnold v. Dittmann*, 901 F.3d 830, 837 (7th Cir. 2018) ("To date, an assertion of actual innocence based on evidence post-dating a conviction has not been held to present a viable claim of constitutional error."); *Herrera v. Collins*, 506 U.S. 390, 400 (1993). While Wilson argues that the "independent constitutional violation" is the ineffective assistance of his trial and post-conviction counsel (Petitioner's Reply Br. at 7), these claims are rejected as explained above. Thus, Wilson is not entitled to habeas relief on ground three of his amended petition.

CONCLUSION

Wilson alleges he is entitled to habeas relief due to ineffective assistance of both trial and post-conviction counsel. He also alleges newly discovered evidence establishes his actual innocence. I find that none of these grounds entitle Wilson to habeas relief. Thus, Wilson's amended petition for a writ of habeas corpus is denied.

CERTIFICATE OF APPEALABILITY

According to Rule 11(a) of the Rules Governing § 2254 Cases, the court must issue or deny a certificate of appealability "when it enters a final order adverse to the applicant." A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, the petitioner must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 and n.4).

When issues are resolved on procedural grounds, a certificate of appealability "should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Each showing is a threshold inquiry; thus, the court need only address one component if that particular showing will resolve the issue. *Id.* at 485.

Jurists of reason would not find it debatable that Wilson is not entitled to habeas relief. Thus, I will deny Wilson a certificate of appealability. Of course, Wilson retains the right to seek a certificate of appealability from the Court of Appeals pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petitioner's amended petition for a writ of habeas corpus (Docket # 34) is **DENIED**.

IT IS FURTHER ORDERED that petitioner's motion to stay (Docket # 51) is **DENIED**.

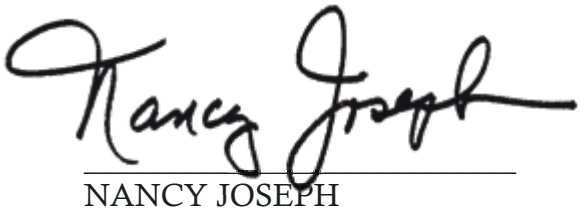
IT IS FURTHER ORDERED that this action be and hereby is **DISMISSED**.

IT IS ALSO ORDERED that a certificate of appealability shall not issue.

FINALLY, IT IS ORDERED that the Clerk of Court enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 22nd day of February, 2021.

BY THE COURT:



NANCY JOSEPH
United States Magistrate Judge

OFFICE OF THE CLERK

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July 10, 2019

To:

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

No. 2018AP534 State v. Wilson L.C.#2009CF2976

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

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

ANN WALSH BRADLEY, J., dissents.

SHIRLEY S. ABRAHAMSON and REBECCA FRANK DALLET, JJ., did not participate.

Sheila T. Reiff
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND FILED

March 12, 2019

Sheila T. Reiff
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. 2018AP534 **Cir. Ct. No. 2009CF2976**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY SIMONE WILSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MARK A. SANDERS, Judge. *Affirmed*.

Before Kessler, P.J., Brennan and Dugan, JJ.

¶1 DUGAN, J. Jerry Simone Wilson appeals the order denying his motion for postconviction relief based on newly discovered evidence. Wilson was convicted of first-degree reckless homicide with use of a dangerous weapon and

two counts of recklessly endangering safety with use of a dangerous weapon, following a jury trial.

¶2 Wilson argues that the postconviction court erroneously exercised its discretion when it denied his motion for a new trial based upon newly discovered evidence that could be provided by a witness who did not testify at trial. We conclude that the postconviction court properly determined that Wilson did not meet his burden of proving that he was not negligent in seeking that evidence. Therefore, we affirm.

BACKGROUND

The incident

¶3 During the early morning hours of May 23, 2009, three men, Melvin Williams, R.D., and R.T., were shot in the 2300 block of North 44th Street in Milwaukee. Williams was shot in the chest and died as a result.

¶4 The shootings occurred in front of a duplex on the west side of North 44th Street, where after-hours parties were taking place in the upper and lower units. A large number of people were outside. Some people were fighting outside the duplex. A man, later identified as Wilson, came out of an open space between two residences on the same side of the street as the duplex and began shooting into the crowd.

¶5 Police were dispatched to the scene at about 3:26 a.m. and observed a large group of people. R.T. told the police that he had been shot and that his uncle, Williams, also had been shot. Prior to police arriving, Williams was transported to a hospital by R.D. and others in a Dodge Durango. R.D. was treated at the hospital for bullet graze wounds.

¶6 Antwan Smith-Currin told a detective that he saw the shooter emerge from an open area between two residences on the west side of the street, two houses north of the duplex. He also said that he knew who did the shooting and identified the shooter as "Simone."[1] The police showed Smith-Currin a photo array. He identified Wilson as the shooter and said that he was 100% sure that the person he identified was the shooter. Smith-Currin said that Wilson shot one victim, later identified as Williams, three times, and that Williams fell down, did not get up, and was eventually put into a dark-colored sports utility vehicle. He also told the police that he thought the shooter shot another victim in the foot.

The charges

¶7 The State charged Wilson with first-degree reckless homicide with use of a dangerous weapon, and two counts of recklessly endangering safety with use of a dangerous weapon.

The trial and sentencing

¶8 The trial court presided over a six-day trial in August 2010. The State's theory of the case was that there was a single shooter, Wilson. Wilson's defense was that the witnesses misidentified him as the shooter. Trial witnesses included Smith-Currin, R.T., R.D., and several bystanders.

¶9 The shooting was preceded by a large fight. R.T. testified that on May 23, 2009, he had been at a tavern with his sister, Tiffany Taylor; his cousins, Williams and Shatina Williams; and two other men, R.D. and his brother. When

[1] Smith-Currin knew Wilson as "Simone." Other witnesses also knew Wilson as Simone and another referred to him as "Mone."

the tavern closed, all the men drove to the 2400 block of 44th Street, where R.T. lived. Taylor followed, driving a van with some other women who had been at the tavern.

¶10 When they arrived at the 2300 block of 44th Street, there was an after-hours party going on. There were many people outside, and R.T. heard someone on the street call Taylor "a bitch." R.T. and the other men saw that Taylor had parked and that she went over to find out who had called her "a bitch." Taylor and the women from her van started arguing with people outside the duplex. R.T. and Williams went over to them and tried to break up the argument, but a man in the crowd "started talking crazy" and tried to punch R.T. Then, R.T. and R.D. started fighting with some men in the crowd while Williams was trying to end the fight. While R.T. was standing next to Williams, he heard gunshots and "[e]verybody started running." R.T. stated he heard three or four gunshots and saw the fire from the gun, which was about thirteen feet away from him.

¶11 R.D. testified that he was with Williams when Williams grabbed Taylor to try to get her to go home. Then R.D. heard about six gunshots and the next thing he knew, Williams was on the ground. R.D.'s brother then pulled up in the Durango; and R.D., his brother, and Taylor placed Williams in the vehicle. They then drove Williams to the hospital. At the hospital, R.D. noticed that he had been shot.

¶12 Smith-Currin, who lived in the upper unit of the duplex, knew Wilson prior to the shooting, identified Wilson as the shooter in a photo array and in the courtroom, and described the shooting in detail. He was on the lower porch of the duplex and saw women fighting in front of the duplex. Williams tried to break up the fight, but another man would not let him. The men then began

fighting. Smith-Currin saw Wilson come from an open space between two houses that were on the same side of the street as the duplex, go into the street, and start shooting at Williams and R.T. Smith-Currin saw Wilson move toward R.T. and shoot at him two times from about seven to eight feet away. Then he saw Williams come from behind a car. Smith-Currin saw Wilson shoot at Williams three times from about nine feet away, and Williams fell toward the front of the car into the street. He saw Wilson fire two more shots and then run back through the open space. Smith-Currin saw a truck pull up, saw people put Williams inside, and saw them drive away. He did not see or hear anyone else shooting at the time, and all the shots sounded the same.

¶13 Shakira King, a bystander, testified that she had seen Wilson twenty or more times before May 23, 2009. During the incident, she saw him come out of the open space between two houses on the same side of the street as the duplex. She was two feet away from Wilson when he started shooting toward the people who were fighting. King stated that she identified Wilson as the shooter in a photo array that police showed her the day after the shooting. She also identified Wilson in the courtroom as the shooter. There was "no doubt in her mind" that Wilson was the shooter.

¶14 Samantha Coats and Sanntanna Ross, who were called as witnesses by the State, testified that Wilson was not the shooter. However, Detectives Matthew Goldberg and Charles Mueller testified that when Coats and Ross had been interviewed by the police, each had previously identified Wilson as the shooter.

¶15 The jury returned guilty verdicts on all three charges. The trial court imposed a global sentence of twenty-eight years of initial confinement and twelve years of extended supervision.

Wilson's postconviction motion based on new evidence

¶16 On November 11, 2013, Wilson filed a *pro se* WIS. STAT. § 974.06 (2013-14)[2] motion, asserting as germane to this appeal, that he had newly discovered evidence in the form of a statement from Lakisha Wallace that showed Smith-Currin was the shooter.[3] The postconviction court denied the motion without a hearing. Wilson appealed.

First appeal and petition for review

¶17 This court affirmed the postconviction court. We concluded that most of Wallace's proof that Smith-Currin was the shooter was based on statements that Smith-Currin purportedly made to others, which were hearsay and, therefore, generally not admissible at trial. We also noted Wallace's statements that she saw Smith-Currin drinking and using drugs during the party, thereby undermining his credibility, and that Smith-Currin had a motive to identify Wilson as the shooter. We stated that such evidence was merely impeachment evidence

[2] All other references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[3] Previously, Wilson filed a postconviction motion, which was denied without a hearing. He then appealed the judgment and the denial of that motion. On appeal, Wilson contended that trial counsel was ineffective because he did not track down alibi witness, "Patricia," who Wilson claimed he was with when the shootings occurred; did not investigate the possibility that Wilson was misidentified; and did not elicit evidence to show the jury Smith-Currin's bias and ill will toward Wilson. On May 15, 2012, this court affirmed holding that the allegations of Wilson's motion were insufficient to warrant a hearing.

that required corroboration. On August 23, 2016, this court denied Wilson's request for reconsideration.

¶18 Wilson filed a petition for review.[4] On February 17, 2017, our supreme court granted Wilson's petition for review, summarily reversed the relevant portion of this court's decision regarding Wilson's newly discovered evidence claim, and remanded the matter to the postconviction court for an evidentiary hearing. The order noted that the matter was remanded to the postconviction court "for further proceedings in light of the State's concession that [Wilson] is entitled to an evidentiary hearing on his newly discovered evidence claim."

Post-remand evidentiary hearing

¶19 The postconviction court held an evidentiary hearing on August 11, 2017. Wallace and Wilson testified at the hearing.

Wallace's testimony

¶20 Wallace testified that she lived in the lower unit of the duplex, she knew and is related to Barbara Smith, who resides in the upper unit, and knew Smith's sons, Smith-Currin and James Currin. On the night of the shooting, Wallace was having a small party downstairs and Smith was having a big party upstairs. Wallace, whose unit had a front porch with large windows overlooking it, saw Smith-Currin on the front porch smoking marijuana, drinking, and taking Ecstasy. She testified that she heard a commotion outside and then she had "seen"

[4] Wilson's petition for review is not included in the record.

Smith-Currin asking his brother for a gun. Smith-Currin then came to her back door, and she shut the door and went to the front of her home. She then saw a "whole bunch of fights breaking out, people screaming," and heard Smith-Currin yelling and using expletives indicating that people should move away from his mother's house. Then Smith-Currin "ran down like a couple stairs and he was shooting. He started shooting a gun." She also testified that Smith-Currin "ran down like probably like two stairs and started shootin' into the crowd, and then he ran back on the porch" and tried to enter her home, and she told him "no."

¶21 Wallace locked her door, told her guests to leave, and she left through the back door. As she was leaving, she heard Smith-Currin state, "Yeah I popped that [person]" and she heard James Currin state, "Shut the [expletive] up. I told you to stop taking these pills … Look what you got yourself into." Wallace heard more than one person shooting that night. She testified that Smith-Currin was wearing black tight jeans and his hair was braided at the back.[5] Additionally, Wallace stated that Smith-Currin might dislike Wilson because Smith-Currin was currently dating Wallace's cousin, Tamika Wallace, and that Wilson had beaten up Wallace's cousin in the past. Wallace also testified that she overheard Smith-Currin tell Tamika Wallace, "Ima put this all on [Wilson.]" Tamika Wallace also repeated the statement to Wallace.

¶22 Wallace testified that she was present at the time of the shootings, but the police never talked to her. She did not go to the police because they had not questioned her, she was scared, and she did not want to deal with the police.

[5] This description differs from King's description of what the shooter was wearing.

¶23 Wallace further testified that in 2011 or 2012, Wilson's mother called Wallace, stating she heard that Wallace had information about the shooting. Wallace told her that she did. Then, on July 1, 2013, Wallace told Wilson's mother about the shooting and Wilson's mother typed a statement to reflect what Wallace told her and they had it notarized. Because Wallace cannot read or write, Wilson's mother read the typed statement to her. Wallace's friend, Bobby Simmons, also read the statement to her. Wallace had the statement notarized and said that she relied upon what they read to her as reflecting the statement's content when she swore that her statement was true.

Wilson's testimony

¶24 Wilson testified that he knew Wallace through the 44th Street community and that he set up the sound system for Wallace's party on the night of the shootings. He testified that sometime between March and May 2011, Wallace reached out to him by letter, stating that she had information about what happened the night of the shooting. Wilson said that he had his mother follow up with Wallace. He also said that after Wallace had written him, he sent Wallace a letter asking her if she would testify and what information she had. Wallace wrote back "yes," and gave Wilson her contact information. Wilson testified that he did not save the first or second letter from Wallace and did not make a copy of the letter he sent to her.

The postconviction court's post-remand decision

¶25 The postconviction court found that Wallace's testimony was generally credible. It determined that Wilson's testimony was wholly incredible because it was "designed to achieve a particular end rather than designed to just relay what it is that happened." The postconviction court found it totally

incredible that Wallace, an illiterate person, would spontaneously begin a written correspondence with Wilson. It also found that the contact information that Wilson testified Wallace had provided in the second letter would have been unnecessary if Wallace had written him earlier and Wilson had been able to write back to Wallace. The postconviction court found that none of the letters were consistent with Wallace's testimony and that the existence of any correspondence between Wallace and Wilson was inconsistent with Wallace's testimony.

¶26 The postconviction court further concluded that Wilson had not proved that he could not have discovered Wallace's testimony until after trial. It noted that Wilson knew that Wallace was a potential witness because he had been at her home mere hours before the shooting to help her set up the music for the party, and that when Wilson was charged, he would have learned the location of the shooting. The postconviction court also concluded that for the same reasons, Wilson was negligent in not obtaining Wallace's testimony. Based on those findings, the postconviction court denied the motion and did not address whether Wilson showed a reasonable probability that the result of his trial would have been different if Wallace testified.

¶27 This appeal followed.

DISCUSSION

¶28 Wilson argues the postconviction court erroneously exercised its discretion in denying his motion for a new trial because contrary to its determination, he met his burden of proof with respect to the first four prongs of the newly discovered evidence test. He also contends that because Wallace's evidence undermines the State's theory of the case, the evidence creates a reasonable probability of a different outcome. In response, the State argues that

the postconviction court correctly determined that Wilson was negligent in seeking Wallace's testimony and that Wallace's testimony does not create a reasonable probability of a different result. The State's response states that "the State does not assert that Wilson did not discover Wallace's testimony until after trial, that it was not material, or that it was cumulative."

I. Standard of review

¶29 The decision to grant a motion for a new trial based on newly discovered evidence is committed to the postconviction court's discretion. ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60. We review the postconviction court's determination for an erroneous exercise of discretion. *See* ***id.***

¶30 To be entitled to a new trial based on newly discovered evidence

> a defendant must prove: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt.

State v. Plude, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citations omitted). A defendant has the burden of proving prongs one through four by clear and convincing evidence. *See* ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98.

¶31 On appeal, we do not disturb the postconviction court's credibility determinations. *See* ***State v. Turner***, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983) (stating that, "[w]hen required to make a finding of fact, the

[postconviction] court determines the credibility of the witnesses and the weight to be given to their testimony and its determination will not be disturbed by this court on appeal where more than one inference may be drawn from the evidence."). *See also* WIS. STAT. § 805.17(2) (stating that,"[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [postconviction] court to judge the credibility of the witnesses") (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)).

II. The postconviction court properly concluded that Wilson was negligent in seeking the evidence from Wallace

¶32 Wilson argues that the postconviction court's determination that Wilson was negligent placed an unreasonable burden on him. He points to the facts that Wallace was never interviewed by the police and that she did not provide her information to the police. He also argues that the postconviction court erred in relying on ***State v. Boyce***, 75 Wis. 2d 452, 249 N.W.2d 758 (1977), and ***Sheehan v. State***, 65 Wis. 2d 757, 223 N.W.2d 600 (1974), because both of those cases involved persons who were identified as witnesses prior to trial.

¶33 Wilson's arguments are not persuasive. The issue is not whether the State could have found Wallace or whether Wallace could have contacted the police and provided the information. The issue was whether Wilson was negligent in seeking the evidence. *See* ***Armstrong***, 283 Wis. 2d 639, ¶161. The record supports the postconviction court's finding that prior to trial, Wilson knew about Wallace and the fact that she might have relevant evidence. At the evidentiary hearing, Wilson also stated that he asked trial counsel to go to the neighborhood and investigate individuals of that neighborhood. However, he admitted that he never provided Wallace's name to his attorney even though he knew that "this" had happened in front of Wallace's residence and he knew that she had been there

because he set up the sound system for the party. A court cannot grant a new trial based on new evidence when the defendant knew about the evidence before trial but did not tell his lawyer. *See* ***State v. Albright***, 98 Wis. 2d 663, 674, 298 N.W.2d 196 (1980).

¶34 Furthermore, the postconviction court concluded that Wilson was negligent in seeking to discover Wallace's testimony and that determination is supported by the evidence. Wilson had sufficient information before his trial that Wallace was a potential witness to the shooting. Wilson and Wallace knew each other from the neighborhood before the shooting and Wilson also knew that Wallace had a party at her home the night of the shooting because he helped her set up the music for the party. As a result, he knew her address and, after the State charged him with the crimes, Wilson knew that the party at Wallace's home was relevant to the allegations against him. The complaint specifically references the party and provides the address of the duplex where it occurred. Wilson should have known that Wallace was a potential witness to the shootings and could have sought to learn what she knew.

¶35 Wilson contends that no one contemplated that Wallace would be a witness at the trial and that she deliberately withheld information about the shooting. He also states that the postconviction court made no findings about Wallace's availability before trial and that although Wilson was at Wallace's home earlier in the day and helped her set up music for her party, that does not necessarily mean that she would have still been in the area when the shooting occurred, that she would have been in a position to see it, or that she was even awake and aware of what was going on. He argues that at best, Wilson knew Wallace may have been one of at least 100 people who may have been in the

general vicinity of an otherwise random street shooting, and that the postconviction court imposed an onerous pretrial discovery burden on him.

¶36 We are not persuaded by Wilson's arguments. Wallace was not merely one of at least 100 people who may have been in the general vicinity of the shooting. She lived in one of two units in a duplex, both of which were having an after-hours party that was ongoing in the street outside the duplex. Wilson knew there was going to be a party. He set up the music for it and, therefore, knew the address. When Wilson read the complaint specifying the address of Wallace's home, he clearly should have known and, in fact, did know that Wallace was having a party at the location, and that the shooting occurred during the party. Moreover, Wallace did not withhold her information. As she testified, she did not give a statement to anyone because no one interviewed her. There is nothing in the record to suggest that she would not have testified if someone had interviewed her before trial. In fact, her postconviction willingness to cooperate with Wilson's family, sign a statement, and testify at the hearing indicates that she would have testified.

¶37 Wilson further argues that Wallace's testimony could not have been reasonably foreseen, that the State's zealous investigation failed to uncover her, and that a reasonable person might expect that someone like Wallace would come forward. However, Wallace testified that after the shooting, she left the residence and she was not present during the police investigation. She also testified that the police were "arresting everybody" around her, but "they didn't arrest [her] or they didn't come knock on [her] door," or ask her any questions. By contrast, Wilson knew that Wallace lived in one of the duplex units where the shooting occurred, and offers no evidence that she was not available to be contacted immediately upon his discovery of the factual basis for the charges. Nor does he offer any

evidence suggesting that Wallace was not available to testify. Wallace testified that at the time of the trial no lawyer contacted her, she was "waitin' on a lawyer … to contact [her]. They didn't never contact [her.]"

¶38 Wilson had the burden to prove by clear and convincing evidence that he was not negligent in seeking to obtain this evidence. Wallace was a specific, identifiable person, with an obvious connection to the events, Wilson knew her personally, and he could reasonably assume she might know something about the shooting. Wilson admitted that he asked trial counsel to go to the neighborhood and investigate individuals of that neighborhood but that he never provided Wallace's name to his trial counsel.

¶39 Wilson has not established that the postconviction court erred as a matter of law in determining that he failed to establish by clear and convincing evidence that he was not negligent in obtaining the evidence from Wallace. The postconviction court's decision has a reasonable basis and its findings of fact are supported by the evidence and, therefore, are not clearly erroneous. Therefore, we must uphold its determination on appeal.

III. We need not address the remaining prong of the newly discovered evidence test

¶40 Because Wilson did not establish the first four prongs of the newly discovered evidence test, we do not address the final prong. *See* ***Avery***, 345 Wis. 2d 407, ¶25.

CONCLUSION

¶41 For the foregoing reasons, we affirm the postconviction court's denial of Wilson's motion for a new trial.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 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. 2013AP2590 **Cir. Ct. No. 2009CF2976**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY SIMONE WILSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: STEPHANIE G. ROTHSTEIN, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Jerry Simone Wilson, *pro se*, appeals an order of the circuit court denying his WIS. STAT. § 974.06 (2011-12)[1] motion without a

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

hearing. Wilson claimed he was entitled to a new trial because of (1) newly discovered evidence; (2) insufficient evidence; (3) jury bias; and (4) ineffective counsel. We conclude the circuit court properly denied the motion, so we affirm the order.

BACKGROUND

¶2 A jury convicted Wilson on one count of first-degree reckless homicide and two counts of first-degree recklessly endangering safety for firing a handgun into a group of people. He was given consecutive sentences totaling twenty-eight years' initial confinement and twelve years' extended supervision. Wilson, by postconviction counsel, then filed a postconviction motion seeking a new trial, alleging that trial counsel had been ineffective for failing to confirm a possible alibi, investigate possible misidentification of Wilson as the shooter, and adequately cross-examine Antwan Smith-Curran, the State's primary witness. The circuit court denied the motion, deeming the allegations conclusory and insufficient. Wilson appealed; we affirmed. *See* ***State v. Wilson***, No. 2011AP1043-CR, unpublished slip op. (WI App May 15, 2012).

¶3 In November 2013, Wilson filed a *pro se* motion under WIS. STAT. § 974.06, seeking "the entry of an order vacating the judgment of conviction and sentence or ordering a new trial" or other relief. He grouped various arguments under the four headings briefly described above. The circuit court, perceiving Wilson's motion to allege ineffective assistance of postconviction counsel as a sufficient reason for avoiding the procedural bar against successive attempts at postconviction relief, reviewed the claims in the context of ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).

¶4 The circuit court concluded that Wilson's newly discovered evidence was "based on rank hearsay and lacks corroborating evidence" so it would not have been admitted, meaning neither trial counsel nor postconviction counsel was ineffective for failing to pursue that issue. The circuit court concluded that Wilson's issues of sufficient evidence and juror bias/mistrial would have to be raised in this court by way of a petition for a writ of *habeas corpus* under ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). Finally, the circuit court rejected Wilson's challenge to trial counsel's "failure" to seek suppression of out-of-court identifications of Wilson made with photo lineups, explaining why that challenge would have failed. Accordingly, the circuit court denied the motion without a hearing, and Wilson appeals.

DISCUSSION

¶5 To be entitled to a hearing on his motion, Wilson had to allege sufficient material facts which, if true, would entitle him to relief. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. However, if the record conclusively demonstrates that the movant is not entitled to relief, the circuit court may deny the motion without a hearing. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996). The sufficiency of a postconviction motion is question of law. *See* ***Balliette***, 336 Wis. 2d 358, ¶18.

¶6 "[A]ny claim that could have been raised on direct appeal" or in in a prior postconviction motion is barred from being raised in a WIS. STAT. § 974.06 motion absent a sufficient reason for not raising it earlier. *See* ***State v. Lo***, 2003 WI 107, ¶2, 264 Wis. 2d 1, 665 N.W.2d 756; *see also* ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Whether a procedural bar applies

is a question of law. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997).

¶7 In some instances, ineffective assistance of postconviction counsel may constitute a "sufficient reason." *See* ***Rothering***, 205 Wis. 2d at 682. A defendant claiming postconviction counsel was ineffective for not challenging trial counsel's effectiveness must establish that trial counsel actually was ineffective. *See* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369. Demonstrating ineffectiveness requires a showing that counsel performed deficiently and that the deficiency was prejudicial. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. These are also questions of law. *See* ***Ziebart***, 268 Wis. 2d 468, ¶17.

I. Newly Discovered Evidence

¶8 Wilson's first argument is that trial counsel was ineffective for failing to investigate "exculpatory" witness Lakisha Wallace, who purportedly could "confirm" that Smith-Curran was the shooter. Relatedly, Wilson claims postconviction counsel was ineffective for not raising an issue of trial counsel's failure to present Wallace in time for trial. Wilson further asserts that he has newly discovered evidence, in the form of an affidavit[2] from Wallace, to confirm that Smith-Curran was the shooter; to prove Smith-Curran was drinking and doing

[2] The circuit court noted that Wilson had submitted only a copy of Wallace's affidavit, not the original. We note that Wallace's statement does not appear to be an actual affidavit. "An affidavit is any voluntary ex parte statement reduced to writing *and sworn to or affirmed* before a person legally authorized to administer an oath or affirmation." *See* 3 AM. JUR. 2D *Affidavits* § 1 (1986) (emphasis added). It is essential to an affidavit's validity that it be sworn or affirmed. While Wallace's statement was notarized, the notarial statement merely indicates that the document was "signed before" the notary on July 1, 2013; there is no indication that Wallace's statement was given under oath.

drugs that night, thereby undermining his credibility; and to provide a motive for Smith-Curran to falsely implicate Wilson.

¶9 When moving for a new trial based on newly discovered evidence, the defendant must show by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Avery***, 2013 WI 13, ¶25, 345 Wis. 2d 407, 826 N.W.2d 60 (quotation marks and citation omitted). "If the defendant is able to make this showing, then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" ***Id.*** (citation omitted). Here, the circuit court noted that Wilson "arguably satisfies the first four of the general requirements" but concluded that he had failed to show a reasonable probability of a different result because Wallace's statement was "based on rank hearsay and lacks corroborating evidence."

¶10 Most of Wallace's "proof" that Smith-Curran was the shooter is based on things he supposedly said to others. This is hearsay, and hearsay evidence is generally not admissible at trial. *See* WIS. STAT. § 908.02. Inadmissible evidence cannot provide a basis for challenging a conviction. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 253, 409 N.W.2d 432 (Ct. App. 1987). Also, Wallace claimed she saw Smith-Curran drinking and doing drugs and offered a motive for him to identify Wilson as the shooter. However, this evidence is merely impeachment evidence, which requires corroboration. *See* ***Greer v. State***, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968).

¶11 We therefore agree with the circuit court's conclusion that Wilson has not established a reasonable probability of a different result with Wallace's

testimony. Accordingly, he cannot establish prejudice from trial counsel's failure to pursue Wallace, *see* ***Allen***, 274 Wis. 2d 568, ¶26 (prejudice requires showing reasonable probability of different result but for counsel's error), and he cannot establish postconviction counsel was ineffective for failing to challenge trial counsel's performance regarding Wallace, *see* ***Ziebart***, 268 Wis. 2d 468, ¶14 (counsel is neither deficient nor prejudicial for failing to pursue a legal challenge that would have been rejected).

II. Sufficiency of the Evidence and Jury Bias

¶12 Wilson's second argument is that "the State simply failed to present even a particle of evidence" to support his convictions. His third argument is that the trial court "failed to protect his right to an impartial jury by not fully inquiring into what impact … threats had on the jury" when concerns were raised during trial.[3] The circuit court declined to grant relief on either issue, holding that "[a] record already exists" on those issues and, thus, "these claims must be raised in the context of a habeas corpus petition in the Court of Appeals" under ***Knight***.

¶13 In many circumstances, postconviction counsel will need to file a postconviction motion to raise and preserve issues as a precursor to raising them on appeal. *See, e.g.*, ***Rothering***, 205 Wis. 2d at 677-78 (postconviction motion necessary to preserve claims of ineffective trial counsel). However, a postconviction motion is not a necessary predicate for appellate challenges to sufficiency-of-the-evidence challenges or to issues that have already been raised and, thus, preserved in the trial court. *See* WIS. STAT. § 974.02(2); ***Rothering***, 205

[3] Nowhere in the postconviction motion or the appellate brief does Wilson identify the substance of the threats.

Wis. 2d at 678 n.3. Therefore, both sufficiency of the evidence and jury bias could have been raised in Wilson's appeal.

¶14 To the extent that Wilson believes that appellate counsel was ineffective for failing to raise those issues, the circuit court correctly noted that the remedy for such claims is a petition for a writ of *habeas corpus* filed in this court, not a WIS. STAT. § 974.06 motion. *See* ***State v. Starks***, 2013 WI 69, ¶35, 349 Wis. 2d 274, 833 N.W.2d 146; ***Knight***, 168 Wis. 2d at 520. The circuit court therefore appropriately refused to grant relief on these two issues by way of the postconviction motion.[4]

III. Ineffective Trial and Postconviction Counsel

¶15 Wilson's final argument is that trial counsel was ineffective for not seeking to suppress identifications of him made by four witnesses viewing photo arrays. Wilson further contends that postconviction counsel was ineffective because he did not pursue and preserve this issue for appeal.

¶16 The circuit court explained why Wilson's arguments regarding the photo arrays were erroneous. The six-photo reference sheets had Wilson's photo in one of six positions but, for each array, the individual photographs were printed, placed in folders, and shuffled, before being shown to witnesses. This meant that

[4] In his postconviction motion and brief, Wilson argues that his sufficiency of the evidence issue cannot be subject to the procedural bar of ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994), because "[e]ven though the issue might properly have been raised on appeal, it presents an issue of significant constitutional proportions and, therefore, must be considered in this motion for post-conviction relief." Although ***Escalona*** is not the reason for rejecting Wilson's sufficiency argument, we note that the language Wilson quoted comes from ***Bergenthal v. State***, 72 Wis. 2d 740, 748, 242 N.W.2d 199 (1976), and was expressly overruled in ***Escalona***. *See* ***Escalona***, 185 Wis. 2d at 181.

"the order of the photographs on the [reference] charge do not necessarily correspond with the order of the folders[.]" Wilson suggests that he was misidentified because the photo numbers from the reference sheets do not match the numbers for the individual photos in which he was identified.

¶17 However, the individual used by the circuit court in its example had initialed Wilson's single photograph, clearly identifying him, even though that photo was in a different numbered folder (four) than its spot in the reference sheet (three). This method of presenting photo arrays to witnesses is common and was well-explained by police testimony at trial. As the circuit court concluded, a motion to suppress would have been a meritless challenge, so neither trial counsel nor postconviction counsel was ineffective for failing to pursue it. The circuit court properly denied Wilson's motion without a hearing.

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

COURT OF APPEALS
DECISION
DATED AND FILED

May 15, 2012

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. 2011AP1043-CR **Cir. Ct. No. 2009CF2976**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY SIMONE WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Jerry Simone Wilson appeals from a judgment of conviction, entered upon a jury's verdict, on one count of first-degree reckless homicide and two counts of first-degree recklessly endangering safety, all with the dangerous weapon enhancer. Wilson also appeals from an order denying without

a hearing his motion for a new trial on the basis of ineffective assistance of counsel. We agree with the circuit court that Wilson's motion was insufficient to garner relief; therefore, we affirm the judgment and order.

BACKGROUND

¶2 Wilson was alleged to have killed one person and wounded two others when he ran up to a large group of people outside a residence and fired seven or eight shots from a handgun. Wilson was identified by Antwan Smith-Curran, one of the State's main witnesses at trial. The matter was tried to a jury, which convicted Wilson of all three counts identified above. He was sentenced to twenty years' initial confinement and eight years' extended supervision for the homicide and four years' initial confinement and two years' extended supervision for each endangering safety count, all to be served consecutively.[1]

¶3 Postconviction counsel moved for a new trial, alleging ineffective assistance of trial counsel in three areas: failure to corroborate a possible alibi, failure to sufficiently investigate the possible misidentification of Wilson as the perpetrator, and failure to thoroughly cross-examine Smith-Curran.[2] The circuit

[1] Contrary to the representation made to this court, Wilson was not given the maximum sentences. The reckless homicide count is a Class B felony, punishable by up to sixty years' imprisonment, forty of which can be initial confinement. *See* WIS. STAT. §§ 940.02(1), 939.50(3)(b), & 973.01(2)(b)1. (2009-10). Recklessly endangering safety is a Class F felony, punishable by up to twelve years and six months' imprisonment, seven years and six months of which can be initial confinement. *See* WIS. STAT. §§ 941.30(1), 939.50(3)(f), & 973.01(2)(b)6m. (2009-10). The "dangerous weapon" enhancer, WIS. STAT. § 939.63(1)(b) (2009-10), increases the maximum possible imprisonment for each of these counts by five years.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] Counsel indicated that the motion was brought pursuant to WIS. STAT. § 974.06. The circuit court properly construed the motion as one brought under WIS. STAT. RULE 809.30 instead.

court rejected the motion without a hearing, deeming the allegations conclusory and insufficient. We address each of the three claims in turn.

DISCUSSION

¶4 We utilize a two-part test for ineffective-assistance claims. *See* ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433; *see also* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. ***Id.*** Prejudice is defined as "'a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.'" ***Id.*** (citation omitted). Wilson must prevail on both prongs to secure relief. ***Id.***

¶5 A hearing on a postconviction motion like Wilson's is required "only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***Id.***, ¶14; *see also* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the motion does not state sufficient material facts, or presents only conclusory allegations, the circuit court may in its discretion deny a hearing. ***Allen***, 274 Wis. 2d 568, ¶9. Whether a motion alleges sufficient facts on its face is a question of law we review *de novo*. ***Id.***

I. The Alibi Witness

¶6 Wilson's postconviction motion alleged that trial counsel was ineffective for failing to track down alibi witness "Patricia," a woman Wilson claimed to have been with at the time of the shooting. Though Wilson gave counsel Patricia's approximate address and his family was willing to help counsel track her down, trial counsel did not investigate Patricia's whereabouts. This issue, however, is not raised on appeal. Therefore, it is waived. *See* ***Reiman***

Assocs., Inc. v. R/A Advert., Inc., 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1991) (issues not briefed deemed abandoned).[3]

II. The Misidentification Defense

¶7 Wilson complains that trial counsel "failed to investigate the possibility that he was misidentified" and "did not provide ample witnesses to support this [misidentification] theory, even in spite of the large number of people who witnessed the events that transpired."[4] He also asserts that there "is no doubt that but for [trial counsel's] failure to conduct a thorough investigation and interview witnesses with possible exculpatory information that there is a reasonable probability that the result of the trial would have been different."

¶8 Despite a lengthy recitation of the standards set forth in ***Bentley*** and ***Allen*** for a sufficient postconviction motion, Wilson fails to make sufficient allegations to warrant relief. A defendant alleging ineffective assistance of counsel for counsel's failure to investigate "'must allege *with specificity* what the investigation would have revealed.'" ***State v. Thiel***, 2003 WI 111, ¶44, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted, emphasis added). Wilson does not identify *who* the additional witnesses might be, *what* evidence they would

[3] We agree with the State that a vague argument about trial counsel's "failure to follow-up and interview witnesses believed to have valuable and credible information" is ambiguous as to whether it is meant to refer to the potential alibi witness or the misidentification defense. To the extent it was meant to refer to "Patricia," it is undeveloped. We will not consider it further.

[4] Wilson also complained that counsel "ignored his client's wishes to add material witnesses to the defense's witness list." Aside from the fact that counsel is not required to call a witness or otherwise present evidence merely because his client desires it, Wilson does not identify who these witnesses were or why they were "material."

have contributed, or *how* any of it would have made a different result at trial a reasonable possibility.[5]

¶9 Indeed, the jury had already heard: evidence that one victim could not identify the shooter because of dark conditions; trial counsel's cross-examination of Smith-Curran on his ability to identify Wilson; that there was no physical evidence, like DNA or fingerprints to link Wilson to the crime; and that a ballistics report indicated that more than one gun may have been used. Despite that evidence, the jury convicted Wilson. Thus, even if we accepted Wilson's conclusory allegations as sufficiently establishing a deficiency by trial counsel, he has not sufficiently alleged what prejudice exists to justify relief.

III. Cross-Examination of Smith-Curran

¶10 Finally, Wilson complains that trial counsel failed to reveal to the jury the "bias and ill-will" that eyewitness Smith-Curran had toward Wilson. Wilson also asserts that Smith-Curran had a reason to lie when he identified Wilson as the perpetrator, but trial counsel failed to show the "bad blood" between the two men to the jury.

¶11 We agree with the circuit court that this claim is undeveloped. On its face, it is conclusory and self-serving. Even on appeal, Wilson does not identify the source of the bias or ill-will, the reason Smith-Curran had to lie, or the basis for the "bad blood" between the two men. The motion in this respect is wholly inadequate.

[5] The description of *possible* exculpatory evidence suggests that Wilson himself has no knowledge of what the witnesses could contribute.

¶12 Because the allegations in the postconviction motion were insufficient under ***Bentley*** and ***Allen***, whether to grant a hearing was committed to the circuit court's discretion. We discern no erroneous exercise of that discretion.

By the Court.—Judgment and order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

STATE OF WISCONSIN | CIRCUIT COURT Branch 19 | MILWAUKEE COUNTY

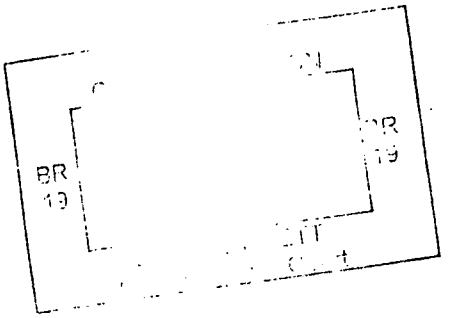
STATE OF WISCONSIN,

Plaintiff,

vs.

JERRY SIMONE WILSON,

Defendant.



Case No. 09CF002976

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On April 11, 2011, the defendant by his attorney filed a motion for a new trial based upon the ineffective assistance of trial counsel.[1] A jury convicted the defendant of first-degree reckless homicide by use of a dangerous weapon and two counts of first-degree recklessly endangering safety by use of a dangerous weapon. The court sentenced the defendant on October 15, 2010. The defendant alleges that trial counsel was ineffective for (1) failing to raise a possible alibi defense; (2) failing to investigate the possibility that he was misidentified; and (3) failing to conduct a thorough cross-examination of State's witness, Antwan Smith-Curran. ***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

[1] The motion is purportedly filed under section 974.06, Stats. Postconviction counsel was appointed under Rule 809.30, and therefore the court construes the motion under Rule 809.30.

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).

The defendant's first claim is that counsel failed to raise a *possible* alibi defense. Specifically, he alleges that he was with a woman named "Patricia" during the commission of the crimes. He states that he provided counsel with the approximate location of "Patricia's" residence and that his family was willing to assist in locating her but that counsel made no effort to locate this woman or hire an investigator to assist him. The defendant's ineffective assistance claim is insufficient because has not demonstrated that he had a viable alibi defense. He has not shown that he has been able to locate "Patricia", he has not shown that she would have testified on his behalf at trial and he has not shown what her testimony would have been or that it would have provided him with an alibi defense. Under the circumstance, the court cannot find that trial counsel was ineffective for failing to pursue an alibi defense.

Next, the defendant argues that counsel was ineffective for failing to investigate the possibility that he was misidentified. The record shows that counsel's entire theory of defense in this case was that the defendant was misidentified. During his closing argument, counsel questioned the ability of the State's witnesses to observe the shooting. He pointed out that one of the shooting victims, Robert Taylor, was unable to identify the shooter from a short distance because of the dark conditions, that there was no physical evidence (i.e. DNA, fingerprints) pointing to the defendant and that the ballistics evidence suggested that more than one gun may have been fired. The defendant has not alleged what further investigation counsel should have

conducted to support a misidentification defense. His allegations of ineffective assistance in this regard are conclusory and insufficient to warrant a hearing. *See* ***Nelson v. State***, 54 Wis. 2d 489, 497-98 (1972) ("If the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing.")

Finally, the defendant argues that counsel failed to conduct a thorough cross-examination of Antwan Smith-Curran. Smith-Curran testified for the State and was one of the witnesses who identified the defendant as the shooter. The defendant argues that Smith-Curran had a reason to lie when he identified the defendant and that counsel should have questioned this witness about his bias or his relationship with the defendant. The record shows that counsel thoroughly cross-examined Smith-Curran about his ability to observe the shooting. The defendant's claim that counsel should have questioned this witness about his bias or relationship to the defendant is vague and undeveloped. In sum, the court finds that defendant has not demonstrated that counsel's performance was deficient in this regard or that he was prejudiced by counsel's cross-examination of this witness.

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

Dated this 15th day of April 2011 at Milwaukee, Wisconsin.

BY THE COURT:

Dennis R. Cimpl
Circuit Court Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 6, 2023

Before

DIANE S. SYKES, *Chief Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 21-1402

JERRY S. WILSON,
Petitioner-Appellant,

v.

DAN CROMWELL,
Respondent-Appellee.

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

No. 2:13-cv-01061

Nancy Joseph,
Magistrate Judge.

O R D E R

On consideration of the petition for rehearing and for rehearing en banc filed by Petitioner-Appellant on March 8, 2023, no judge in active service has requested a vote on the petition for rehearing en banc, and the majority of judges on the original panel have voted to deny the petition for panel rehearing[1] and to issue an amended opinion.

Accordingly, IT IS HEREBY ORDERED that this court's opinion dated January 23, 2023, is amended in the separately filed opinion released June 1, 2023.

The petition for panel rehearing and rehearing en banc is DENIED.

[1] Judge Hamilton voted to grant the petition for panel rehearing.

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.