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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff - Respondent,

v.

Case No. 2012AP000046-CR

JIMOTHY A. JENKINS,

Defendant – Appellant.

REPLY BRIEF OF THE DEFENDANT –
APPELLANT, JIMOTHY A. JENKINS

AN APPEAL FROM A JUDGMENT AND
ORDERS OF THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, THE HONORABLE
CARL ASHLEY AND REBECCA DALLET,
PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES II

ARGUMENTS 1

 I. JENKINS WAS DENIED HIS CONSTITUTIONAL RIGHTS TO COUNSEL WHEN HIS TRIAL COUNSEL’S DEFICIENT PERFORMANCE PREJUDICED HIS DEFENSE..... 1

 A. Jenkins Was Denied His Constitutional Rights To Counsel When His Trial Counsel’s Performance Was Deficient and Prejudicial to Jenkins’ Defense For Failing To Investigate, Subpoena, And Call Cera Jones To Testify As A Witness. 1

 1. Jenkins’ trial counsel’s performance was deficient. 1

 2. Counsel’s deficient performance was prejudicial to Jenkins’ defense. 2

 B. Jenkins Was Denied His Constitutional Rights To Counsel When His Trial Counsel’s Performance Was Deficient and Prejudicial to Jenkins’ Defense For Failing To Subpoena And Call Moore As Witnesses. 5

 1. Jenkins’ counsel’s performance was deficient. 5

 2. Jenkins’ counsel’s performance was prejudicial to Jenkins’ defense. 6

 II. THIS MATTER SHOULD BE REVERSED IN THE INTEREST OF JUSTICE. 7

CONCLUSION 7

CERTIFICATION 7

CERTIFICATION OF COMPLAINE WITH RULE 809.19(12) 8

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE#</u>
<u>Alexander, State v.</u> , 2005 WI App 231, 287 Wis.2d 645, 709 N.W.2d 191.....	6
<u>Brown v. Sternes</u> , 304 F.3d 677 (7 th Cir.2002).....	2
<u>Charolais Breeding Ranches v. FPC Secs. Corp.</u> , 90 Wis. 2d 97, 279 N.W.2d 493 (Ct.App.1979).....	6
<u>Goodman v. Bertrand</u> , 467 F.3d 1022 (7 th Cir.2006).....	2
<u>Leibach, U.S.</u> , 347 F.3d 219 (7 th Cir.2003).....	2
<u>Miller v. Anderson</u> , 255 F.3d 455 (7 th Cir.2001).....	4
<u>Ramonez v. Berghuis</u> , 490 F.3d 482 (6 th Cir.2007).....	3
<u>Vasquez v. Bradshaw</u> , 522 F.Supp 900 (N.D.Ohio 2007).....	3

ARGUMENTS

I. JENKINS WAS DENIED HIS CONSTITUTIONAL RIGHTS TO COUNSEL WHEN HIS TRIAL COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED HIS DEFENSE.

A. Jenkins Was Denied His Constitutional Rights To Counsel When His Trial Counsel's Performance Was Deficient and Prejudicial to Jenkins' Defense For Failing To Investigate, Subpoena, And Call Cera Jones To Testify As A Witness.

1. Jenkins' trial counsel's performance was deficient.

Despite spending the majority of its argument on trial counsel's failure to call Jones as a witness, the State fails to acknowledge that the postconviction court never made a factual finding as to trial counsel's performance in failing to call Jones as a witness. The court did not do so because trial counsel could give no explanation for his conduct regarding Jones. Counsel was uncertain if he met or talked to her. (R.77 at 16; A-Ap.p.134). Counsel could not recall if Jones was uncooperative. (R.77 at 25; A-Ap.p.143). From counsel's testimony, it appears that the decision not to call Jones was not a strategic trial decision, but simply an oversight or a misjudgment. As such, the court was unable to make a factual finding about counsel's performance in relation to Jones.

Because trial counsel gave no strategic reason for his actions, and because the court did not make a factual finding as to counsel's strategic decisions, the State begins to make rationalizations for counsel's conduct. However, "...it is not the role of a reviewing court to engage in a *post hoc* rationalization for an attorney's actions by constructing defenses that counsel does not offer..." Goodman v. Bertrand, 467 F.3d 1022, 1029 (7th Cir.2006) (quoting Brown v. Sternes, 304 F.3d 677, 691 (7th Cir. 2002)). The State

offers several potential reasons why counsel *could* have decided not to call Jones: Because trial counsel had trouble with several potential witnesses, and “Jones was undoubtedly one of them...” (State’s brief at 8); Because of inconsistencies in Jones’ description of the shooter (State’s brief at 9-10); And because the alibi testimony would be repetitive or better brought out by McFadden. (State’s brief at 11). This court should not accept the State’s construction of *post hoc* strategies not offered by trial counsel at the Machner hearing.

The State spends only a footnote on counsel’s performance for failing to investigate Jones’ side of the story and to subpoena her. But there can be no explanation for failing to conduct a complete investigation of a neutral eyewitness, with no association to Jenkins or Kimber, who was standing next to Kimber and Weaver when the shooting started. From the very beginning counsel should have realized that this was a person critical to the case. And as shown in the prejudice section, the failure to investigate Jones harmed the case since Jones disputes the police reports and provides additional information about Jenkins’ location after the shooting. While counsel may have spoken to Jones, his investigation was incomplete, and Jones’ presence at trial was crucial. Thus counsel’s performance fell below an objective standard in failing to investigate and subpoena Jones.

2. Counsel’s deficient performance was prejudicial to Jenkins’ defense.

The State disputes Jenkins’ assertion that the postconviction court applied the wrong standard in deciding prong two of the Strickland test. Jenkins’s believes the court erred when it made a credibility determination as to whether the jury would have believed Jones. The State argues that in assessing whether there was a reasonable probability that the result would have been different includes “assessing whether the witness’s testimony would have been subject to impeachment by inconsistent testimony.” (State’s brief at 7). The State is incorrect, as this determination by the postconviction court invaded the province of the jury.

The State argues that the Federal cases cited for persuasion by Jenkins are flawed because they are Habeas Corpus reviews. However, the Habeas cases determine if the State court properly applied the Sixth Amendment – an Amendment that applies to all States. The cases correctly declare what the postconviction court should determine under Strickland when deciding if a defendant was denied his Sixth Amendment Rights to Counsel. Credibility determination as to the defendant and prior counsel, relating to trial strategy, are properly assessed by the court. Vasquez v. Bradshaw, 522 F.Supp.2d 900, 927 (N.D. Ohio 2007). But a credibility determination of a witness, who the defendant claims should have testified if not for counsel’s error, is not to be made by the postconviction court. “The critical point, however, is not whether the Court believes or disbelieves the testimony that the post-conviction hearing witness provided; it is simply a question of what testimony those witnesses would have provided at trial had [trial counsel]’s performance been effective, and whether their testimony, had the jury heard it, might reasonably have changed the outcome of the trial.” Id. See also Ramonez v. Berghuis, 490 F.3d 482, 490 (6th Cir. 2007) (“While there would have been plenty of grist for the cross-examination mill as to Ramonez’s three witnesses, the question whether those witnesses were believable for purposes of evaluating Ramonez’s guilt is properly a jury question.”).

Thus it is irrelevant whether the posconviction court believed Jones. The question is whether, with Jones’ testimony, there is a reasonable probability that the jury would have come to different result. “Even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, prejudice has been established so long as the chances of acquittal are better than negligible.” U.S. v. Leibach, 347 F.3d 219, 246 (7th Cir.2003) (quoting Miller v. Anderson, 255 F.3d 455, 459 (7th Cir.2001)). There certainly would have been ripe grounds for the State to cross-examine Jones, but one cannot say the chance of acquittal with Jones’ testimony was less than negligible, given the State’s weak evidence on the identification of Jenkins as the shooter.

The sole issue in this case was identification – who was the person who shot Kimber and Weaver. The State’s identification was less than iron clad as there was no physical evidence linking Jenkins to the shooting. Rather, its entire case rested on eyewitness identification by one of the victims: Kimber, whose identification of Jenkins, and his general credibility (nine criminal convictions and personal biases against Jenkins), was less than stellar. In fact the responding Officer testified that moments after the shooting, Kimber stated he was unaware who shot him.

The State argues that “it is unlikely that her testimony would have persuaded the jury” and “Jones’ credibility would also have been easily undermined.” (State’s brief at 12-13). The State even goes so far as to argue that the jury would have thought that Jones was lying to protect Jenkins. (State’s brief at 14). However, the State is making the credibility determination for the jury, and not assessing whether this information, in totality with Jenkins’ theory of defense and the weakness of the State’s case, whether there is a less than negligible chance that the jury would have acquitted if Jones would have testified.

Further, counsel’s performance was prejudicial for failing to conduct a complete investigation. If counsel would have spoken to Jones, he would have discovered factual information not in the police reports, specifically: This neutral eyewitness’ testimony corroborates Jenkins’ testimony that Jenkins was in the house across the street when the shooting occurred; Jones specifically told the officers that Jenkins was in the lineup but was not the shooter; The police mistakenly reported that Jones did not see the shooter’s face; And, Jones would have been able to testify that she believed the police were trying to influence her to say that Jenkins was the shooter and his sister’s car was the vehicle he shot from. All of this information would have furthered Jenkins’ defense. Because trial counsel did not investigate Jones, counsel was not able to ascertain valuable facts that were outside of the police reports. Given the importance of these facts to offset the only other identification witness the jury heard from, counsel’s actions prejudiced the defense. Given the importance of this witness, counsel needed to subpoena Jones to insure her presence in court.

Without Cera Jones, the jury had only Kimber's testimony to assess the heart of the matter: the identification of the shooter. Even if Jones had flaws as a witness, the jury never heard from a neutral eyewitness, standing in the same spot as the State's witness, about the shooter's identification. And the State was able to use this fact in the closing, emphasizing that: Kimber "was there, that he was shot, and he identified who did the shooting." (R.74 at 55) and "if you believe Toy Kimber; then certainly what you have here, beyond any doubt is the fact Jimothy Jenkins is guilty of each and every one of these crimes." (R.74 at 56). Without Jones, the adversary system was not functioning as the jury had but one witnesses to assess the identity of the shooter.

Can it be said with confidence, after assessing the inconsistent identification by Kimber, with his criminal convictions and his biases, that there is not a reasonable probability that the outcome would have been different with Jones' testimony? With this witness, are the chances of acquittal really less than negligible? Are we comfortable with this verdict, without Jones testifying, that put a young man in prison for life? The State's case against Jenkins was far from unassailable and the verdict is only weakly supported by the record with no physical evidence linking Jenkins to the shooting. There is a reasonable probability that the jury would have reached a different verdict had it heard from Jones. Because of such, Jenkins was denied his Rights to Counsel, and must be awarded a new trial.

B. Jenkins Was Denied His Constitutional Rights To Counsel When His Trial Counsel's Performance Was Deficient and Prejudicial to Jenkins' Defense For Failing To Subpoena And Call Moore As Witnesses.

1. Jenkins' counsel's performance was deficient.

The State argues that Jenkins' trial counsel was reasonable in deciding not to call Moore as a witness, despite counsel's concession that Moore would be credible and a good witness, because counsel does not have to raise every non frivolous defense. (State's brief at 16-17). However,

given the fact that counsel thought the witness was credible, excluding a credible witnesses is an unreasonable trial strategy when it would have led to complete exoneration of the defendant. Thus counsel's performance fell below the expected standard of representation.

2. Jenkins' counsel's performance was prejudicial to Jenkins' defense.

First of all, the State has neglected to respond to Jenkins' contention that Moore/Blunt's testimony would have been admissible, thus it has conceded that argument. Arguments not refuted are deemed admitted. State v. Alexander, 2005 WI App 231, ¶15, 287 Wis.2d 645, 706 N.W.2d 191, (citing Charolais Breeding Ranches v. FPC Secs. Corp., 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App.1979)). Thus the only issue left then is whether there is a reasonable probability of a different result with Moore's testimony.

The State argues the Moore's testimony is implausible.¹ (State's brief at 17). However, this again is a situation where the State is asking the postconviction court to usurp the jury's role. Again, there is certainly ample information for cross examination of Moore. However, given what Moore had to say, it can be said with confidence that there is a reasonable probability that the outcome would have been different with Moore's testimony. As such, Jenkins must be awarded a new trial.

¹ It is interesting to note that the State does not make the "implausibility" argument in the section involving Jones. Thus it inherently makes that argument that Jones testimony would not be believed because of impeaching factors and inconsistencies, but Moore would not be believed because it is simply incredible.

II. THIS MATTER SHOULD BE REVERSED IN THE INTEREST OF JUSTICE.

The State argues that the real controversy was fully tried because the jury fully explored the identity of the shooter, stating: “While it is true that Kimber’s identification had some flaws, Jones’ description of the shooter had more.” (State’s brief at 21). Aside from usurping the jury’s role in assessing credibility, the State fails to acknowledge is that the jury did not get to use Jones’ “flawed” testimony at all in assessing the identity of the shooter. Without that opportunity, the real controversy of the shooter’s identity was not fully tried.

CONCLUSION

Jenkins must be granted a new trial.

Dated this 25th day of June, 2012.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b)&(c) for a brief and appendix produced with proportional serif font. Brief length is 7 pages and ____ words.

Signed: _____

Joseph E. Redding

**CERTIFICATION OF COMPLAINE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this reply brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated June 25, 2012.

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