STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2013 AP001447

JESSE J. FRANKLIN, JR.,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE WILLIAM SOSNAY PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE TIMOTHY G. DUGAN PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

STEVEN P. COTTER
State Bar No. 1068476
Law Office of Steven P. Cotter
P.O. Box 510706
New Berlin, WI 53151-0706
(262) 309-4616
E-mail: cotter@spc-law.com
Attorney for Defendant-Appellant

TABLE OF CONTENTS

Cases Cited

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2013 AP001447

JESSE J. FRANKLIN, JR.,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ISSUE PRESENTED

In original and supplemental § 974.06 postconviction motions, Mr. Franklin alleged that newly discovered evidence supported Mr. Franklin's trial defense that the physical evidence, a gun and drugs, used against him at trial were not his, and he did not know how they got into the van. Mr. Franklin presented extensive documentary evidence in support of factual averments that at least one of the officers that arrested him had engaged in numerous acts of misconduct including involvement in attempts to frame other suspects.

Did the circuit court err by denying Mr. Franklin's postconviction motion without ordering a new trial or evidentiary hearing?

The circuit court denied the motion without a hearing.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Although the facts of the case are somewhat lengthy, the issue presented in this case is relatively simple and can be decided in accordance with legal principles set forth in ***State v. Missouri***, 2006 WI App 74, 291 Wis.2d 466, 714 N.W.2d 595. Therefore oral argument and publication are unnecessary.

STATEMENT OF THE CASE

A. Trial Proceedings

This case began on July 25, 2003, when the state charged Mr. Franklin with (1) Possession of THC with Intent to Distribute (>200-1000g), (2) Possession of Cocaine with Intent to Distribute (>15-40g), and (3) Felon in Possession of a Firearm (2:1-3).

According to the complaint and the testimony at trial, on July 23, 2003 at about 4 p.m., Officer Paul Lough

and Officer James Campbell, assigned to District III, were patrolling in an unmarked squad car traveling 15-20 m.p.h. westbound on Clybourn. (51:27-35, 46). Near the intersection of 29th Street and Clybourn, they saw Jesse Franklin standing in the middle of the street. Campbell claimed that he saw Franklin reaching his left hand into the window of a passing vehicle, leading him to suspect that a drug transaction was occurring. (51:35-36). They decided to circle the block and took a left onto 30th and two more lefts. They saw Franklin standing by the passenger window of a van parked in front of 423 N. 29th Street. The officers parked and exited their vehicle. Campbell testified that when he approached the van, Franklin reached his hand into the open window of the van, pulled it back quickly, stepped back, and threw down a set of keys. (51:40-46).

Campbell subjected Franklin to a pat-down frisk, which was negative for weapons. Franklin said "I didn't do anything. What is this all about?" Campbell told Franklin to relax. He asked Franklin who owned the van and Franklin allegedly first said that it was his mother's van, then said that it was Charlie's van. Campbell determined that the keys belonged to the van. (51:46-48).

Jesse Franklin testified that he got the keys to the van from his mother, Dorothy Franklin. On the afternoon of the incident, he gave the keys to a person that he played basketball with who asked to borrow the van to go get some clothes to play basketball. He received a call from this individual and they agreed that Mr. Franklin would pick up the van at 433 N. 29th Street. He arrived at the location and a woman gave him the keys. (53:120-126, 180-181).

As he was proceeding southbound on 29th street he saw Fred, a person he knew from playing basketball at Merrill Park on 35th and Clybourn. Fred was in his car parked at the curb on the corner of 29th and St. Paul. Jesse went over to Fred and talked to him. After he finished talking to Fred, he walked toward the van. The police squad car drove up and he could see the officers looking at him. The squad car swerved in front of him onto the sidewalk in front of 429 N. 29th Street. The officers exited the vehicle. Thinking that the officers were targeting him, Jesse took out the keys and cell phone, but dropped the keys. (53:126-134, 143). The officers began questioning him and made him sit on the curb. They took the keys to the van and searched the van. He heard one of the officer's say "Arrest him." Jesse said

"What for?" The officer said "You know what for." Jesse testified that he did not put the gun and the drugs in the van and said he did not know how the items got there. (53:136-139).

The jury never heard about any misconduct committed by the arresting officers and convicted Mr. Franklin all counts. On January 25, 2006, Mr. Franklin was sentenced to two years confinement and two years extended supervision on Count 1, three years confinement and five years extended supervision on Count 2, consecutive to Count 1, and 18 months confinement and two years extended supervision on Count 3, consecutive to Count 2. (54).

B. Rule 809.30 Postconviction Motion and Subsequent Appeal.

On January 29, 2007, Attorney Lynn Hackbarth filed a Rule 809.30 postconviction motion which is not relevant to this appeal and which was ultimately unsuccessful. (31).

After one extension, Attorney Hackbarth filed a Notice of Appeal on April 20, 2007. (35). On appeal, Attorney Hackbarth raised issues relating to ineffective assistance of counsel for failure to investigate; denial of a

right to speedy trial; the trial court's denial of a suppression motion; and abuse of sentencing discretion. Attorney Hackbarth did not raise any of the issues discussed herein relating to the new evidence of the credibility and misconduct of the arresting officers. On May 20, 2008, the Court of Appeals issued a decision affirming the circuit court order denying the postconviction motion. (56). On April 3, 2009, Attorney Hackbarth was permitted to withdraw as Appellate Counsel and Attorney Melissa Fitzsimmons was appointed as successor counsel. (62, 63). Attorney Fitzsimmons then filed a No Merit petition for review. The petition for review was denied on May 8, 2009. (69).

C. The 974.06 Postconviction Motions

Undersigned counsel was assigned to represent Mr. Franklin in further postconviction proceedings. On January 15, 2013, Mr. Franklin filed a Wis. Stat. § 974.06 postconviction motion, alleging that (1) newly discovered evidence established that the officers in Mr. Franklin's case belonged to a group of rogue officers and previous convictions involving this group of officers have been overturned pursuant to ***Missouri***, 2006 WI App 74 291; and (2) in the interests of justice because the real controversy was not fully tried. Franklin also argued in the alternative that his postconviction counsel was ineffective should the state or trial court have argued that

Franklin's case failed the second prong of the ***McCallum*** test, requiring a finding that his trial (or postconviction) attorneys were not negligent in finding the newly discovered evidence. Such an argument was not advanced by either the State or the trial court. (70).

Mr. Franklin presented evidence in the form of publicly available information and named witnesses that would testify that between 2002 and 2005, a group of rogue patrol officers in District III were beating up suspects and planting evidence on them. This group of rogue officers included Officers Awadallah and Mucha, whose misconduct has been reported in the newspaper, but this rogue group also included other officers who worked with Awadallah and Mucha and this group included Officer Lough, one of the arresting officers in this case. (70). In his Reply brief, Franklin more specifically spelled out the names of witnesses he might subpoena to testify and how they might testify at a hearing or new trial based on said publicly available information attached to his Postconviction Motion and Reply brief, including Jermaine Cameron, Draylon Oliver, Raynard Jackson, Charles Griffin, Ronald Means, Peter Glover, and Walter T. Missouri. (79).

1. Jermaine Cameron

Jermaine Cameron complained that he was framed by Officer Timothy McNair, Officer Keith Dodd, and other District III police officers, including Officer Lough, in Milwaukee Case Number 2002-CF-6863. On December 5, 2002, police officers discovered a plastic bag containing 40 corner cuts of cocaine weighing less than 5 grams outside a three-story apartment building during a police sweep. Jermaine Cameron was on the third floor in his girlfriend's apartment playing video games with his friend David Young. The cocaine was found outside, under the living room window of the apartment. Officer Keith Dodd and other officers entered the apartment without a warrant and without consent and proceeded to question the occupants. When the police discovered that Mr. Cameron was on probation from a prior conviction for dealing a similar amount of cocaine in the same neighborhood they concluded that the cocaine found outside belonged to Cameron. Officer Timothy McNair then claimed that he was outside the building and saw Cameron throw the cocaine out the window. Cameron and his friends testified that the apartment windows were closed that afternoon and that Cameron had not thrown anything out the window. At a trial, where "other acts" evidence of Cameron's prior conviction was admitted and Dodd and McNair testified against Cameron, Cameron was convicted of possession of cocaine with intent to deliver. (70: Attachment C).

Lough was on the scene and participated in the investigation and arrest of Cameron, although Lough was not called directly at trial. After Cameron's conviction, a postconviction investigation revealed that two days before Cameron's arrest, Freddy Lovett and Demochio Boone were arrested for dealing drugs out of the first floor apartment, directly under the apartment where Cameron was arrested. According to Lovett's girlfriend and Lovett himself, Lovett and Boone hid cocaine in the same location where the cocaine used to convict Cameron was found. Cameron filed a postconviction motion based on newly discovered evidence which was denied by Judge Lamelas. The court of appeals, in an unpublished decision which has no precedential value as legal authority, reversed and remanded the case for a hearing. After remand, the parties reached a settlement where the conviction was vacated and Mr. Cameron entered a No Contest plea to a misdemeanor and received time served. (70: Attachment C).

2. Draylon Oliver

Draylon Oliver accused officers Joseph Warren, Paul Lough, Dean Newport and Michael Lutz of beating him during a 2003 arrest. (70: Attachment D).

3. Raynard Jackson

Milwaukee Police Officers Ala Awadallah, Paul Lough and Thomas Dineen were on patrol when they saw Raynard Jackson and his co-defendant Morris Rash outside the Guru Food Store. Jackson and Rash entered the store. The squad car circled the block and when it returned, the officers saw Jackson and Rash walking down the street. When they saw the police, they ran in opposite directions; both Jackson and Rash were subject to outstanding warrants. Lough chased Jackson; Awadallah chased Rash. Lough testified that while he was chasing Jackson, he "saw him take his right hand and reach in the area of his right waistband and kind of turn and then he discarded what appeared to be a black firearm, semiautomatic pistol." Lough testified that he recovered a forty caliber Glock pistol while pursuing Jackson, and admitted that this was the same type of gun issued to police officers. Jackson was ultimately apprehended by Officer Keith Dodd. Lough also testified that he placed the Glock he recovered in inventory; however, police inventory reports indicate that it was actually Awadallah, not Lough, who placed the Glock in inventory. The pistol did not bear Jackson's fingerprints and had not been reported as stolen. Jackson's defense was that he was framed by police.

A jury found Jackson guilty of possessing a firearm as a felon, carrying a concealed weapon, and resisting an officer, in violation of WIS. STAT. §§

941.29(2)(a) (amended Feb. 1, 2003), 941.23 (2003-04) and 946.41(1) (2003-04). After initial post-conviction proceedings that failed to raise any of the issues of misconduct involving the rogue officers, Jackson's second postconviction counsel raised the issues as to whether that original postconviction counsel was deficient for failing to raise the publicly disclosed misconduct of the same officers involved in Jackson's apprehension. The Hon. Jeffrey A. Kremers summarily denied Jackson's postconviction motion for a new trial based on ineffective assistance of his original postconviction counsel. The Court of Appeals, in an unpublished decision which has no precedential value as legal authority, reversed and remanded the case for a hearing. After remand, the parties reached a settlement where the State agreed to dismiss Counts 1 & 2 of possessing a firearm as a felon and carrying a concealed weapon. At an evidentiary hearing or new trial, Jackson's testimony would clearly give rise to an inference that Lough had planted the forty caliber police-issued Glock pistol during the same time period of Franklin's arrest under similar circumstances. (70: Attachment E; App. 131-142).

4. Charles Griffin

On May 5, 2005, Charles Michael Griffin – a soldier on leave from Iraq – named Officer Paul Lough in

a Complaint filed in the U.S. District Court for the Eastern District of Wisconsin. Specifically, Griffen claimed that he had not committed an act contrary to the laws of the State of Wisconsin and the officers used excessive force, beat him several times, and falsely arreseted him. (70: Attachment K).

5. Ronald Means (and Peter Glover, et al.)

On January 7, 2004, Eastern District Judge Adelman suppressed the evidence secured by police in the arrest of Ronald Means on the same date and in the same investigation that resulted in the arrest of Walter T. Missouri and eventually lead to the published *Missouri* decision. Lough did, in fact, testify in that case. Officer James Cambell, Lough's partner in Franklin's case, was also involved in the investigation, but it's unclear whether he testified at the hearing. Remarkably, two years before the Missouri decision, Judge Adelman found the testimony of Means and Glover more credible than the "evasive" and "contradictory" testimony of a number of officers involved in the investigation, including Lough.

Lough and Campbell were part of an "area saturation patrol" ("ASP"), a special unit that handles complaints of drug dealing, prostitution and the illegal use of weapons in Police District 3. On January 7, 2004, Officers Ray Harris and Virgil Cotton were traveling

south on North 38th Street with Lough and Campbell following in a squad behind them. At a suppression hearing, the officers testified that Means ran a stop sign at the intersection of North 38th Street and West Lloyd Street. They stopped the vehicle in front of 2015 North 36th Street, a building owned by Means' family, when they discovered an outstanding municipal warrant. The officers arrested Means, discovered a bag of cocaine and a gun, and spent the next three plus hours searching the 36th Street building and another building associated with Means located on North 38th Street.

Means testified at his suppression hearing that he and Glover had been doing rehab work on several properties owned by his family, including 2201-03 North 38th Street. He stated that after completing their work they picked up his thirteen-year-old son from school and were proceeding to the property at 2015 North 36th Street (where Glover lived) to retrieve some tools and talk about the next day's work schedule. En route, Glover asked Means to pull over and let him out at a store on the corner of 38th and Lloyd so that he could buy some beer and talk to two people in the store. Means and Glover both testified that defendant came to a complete stop and let Glover out before turning left onto Lloyd.

While proceeding east on Lloyd, Means saw an unmarked police car approaching from the opposite direction. After it passed, Means observed the vehicle pull into an alley between 38th and 39th Streets and turn around as if to follow him. Means turned onto 36th Street, pulled over in front of 2015 North 36th and exited the vehicle. He then heard someone shout, “put your hands up,” and turned and saw Harris. Means asked Harris why the police had stopped him, and Harris said that they were looking for a tan vehicle. Means testified that Harris then took various sets of keys from his person and tried to use them to open the door of the 36th Street property. Unsuccessful, Harris asked Means, "MF, what keys go to what?" Means did not respond. It became apparent from the “evasive” and “contradictory” testimony of Lough and the other officers at the hearing that what the officers claimed was a routine traffic stop of Means was fabricated by the various officers in order to justify a pretextual stop, unsupported by probable cause, in order to further an ongoing drug investigation of Means and the property on 36th Street.

Lough’s police report claimed that someone entered the 36th Street property, causing officers to clear the building of trespassers. Cotton, on the other hand, testified at the suppression hearing that the investigation evolved into something more when the officers saw

Walter T. Missouri run out of the 36th Street property. Various officers, including Lough, entered the property and began searching multiple apartment units. Although the testimony of an apparent tenant, Sevell Robey, and Officer Chris Brown, supported by a photograph of Robey's kicked in door, revealed that at least two to four doors in the property had been kicked in, Lough's report (ostensibly the only report prepared regarding the search) stated incredibly that "all of the apartment doors" were "ajar" when the officers entered the property. Ultimately Judge Adelman suppressed the evidence against Means, finding Means' testimony more credible than the various officers in spite of his prior felony record, stating Means' "status as a felon does not automatically render suspect anything he says." (79: Attachment X; App. 143-149).

6. Walter T. Missouri

The published Missouri decision reveals exactly what Walter T. Missouri testified to at his own trial and what he could testify to on Franklin's behalf. It is undisputed that on January 7, 2004, three police officers, Jason Mucha, Paul Lough and Brad Westergard were conducting a drug search near 2162 North 41st Street. ***Missouri***, 2006 WI App 74 291 at ¶ 2. According to Missouri, he was sitting in his girlfriend's parked car in front of her friend's home, and his girlfriend had just run in to return a video. *Id*. at ¶ 3. Missouri "then noticed the

police approaching the car with their weapons drawn." *Id*. Although the decision does not name the officers included in the group now referred to as "the police," it is implied that this group includes Lough participating directly or indirectly in the investigation and arrest. "[Missouri] then heard [the police] say: 'Don't you f'ing move or I'll shoot you in the f'ing face.'" *Id*. Missouri was hit in the back of the head by on object before he began honking the horn of the vehicle in order to draw attention. *Id*. Missouri testified that Mucha in particular put a pistol to the back of his neck and threatened him. *Id*. "Missouri testified that he was then violently pulled from the vehicle, beaten by the police, and that while he was on the ground, they put the baggie of cocaine in his mouth." *Id*.

D. The Circuit Court's Ruling

The circuit court denied Franklin's 974.06 motion without conducting an evidentiary hearing (80; App. XXX). The court's reasoning was as follows:

> The defendant alleges that there is newly-discovered evidence that between 2002 and 2005, there was in District Three of the Milwaukee Police Department a group of rogue officers, including Officer Lough, who were beating up suspects and planting evidence on them. The defendant's claim is predicated upon other prosecutions or incidents occurring during the same time period and involving Officer Lough, all of which he alleges places Officer Lough's credibility in question. Before a new trial may be awarded based on a claim of newly-discovered evidence, the defendant must demonstrate (1) that new evidence was discovered after

the trial; (2) that the defendant was not negligent in failing to discover the evidence before trial; (3) that the evidence is material; (4) that the evidence is not cumulative; and (5) that there exists a reasonable probability of a different result at a new trial. The court ordered a briefing schedule in this matter, to which the parties have responded. The court fully agrees with the State's analysis of the issues and finds that the defendant had not met his burden of demonstrating newly-discovered evidence or ineffective assistance of counsel.

None of the proffered newly-discovered evidence is material to the issues in this case because the defendant never asserted that he was framed by the arresting officers or that they had planted any of the evidence. Nor did the defendant assert that he was mistreated or beaten by the officers. The defense was simply that the gun and drugs found in the van did not belong to the defendant. Even if the other incidents involving Officer Lough raise an inference with regard to his credibility, none of them are sufficiently similar in nature to meet the *Sullivan* standard for the admissibility of other acts evidence. The court concurs with the State's analysis as to each of these incidents. Although the defendant claims these incidents would be admissible under *State v. Missouri*, *Missouri* makes clear that impeaching evidence of this type is subject to a *Sullivan* "other acts" analysis.

Alternatively, the defendant alleges that former postconviction counsel were ineffective for failing to notice Officer Lough's membership in the group of rogue officers. *Strickland v. Washington*, 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." A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. "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."

The court agrees with the State that the defendant's ineffective assistance claim is insufficient.

> There was no claim prior to the current litigation that Officers Lough or Campbell planted evidence in this case. The defendant still makes no such claim. The court fails to perceive how former postconviction counsel were deficient for not pursuing such a theory when the defendant made no such claim during the trial or prior postconviction proceedings. The defendant seeks to present the other acts involving Officer Lough at a second trial merely to challenge his credibility. None of these incidents provides any significant substantiation for any "other acts" of planting evidence. Even if these incidents were presented at a new trial, there is no reasonable probability that the jury would believe that Officer Lough planted any of the evidence in this case. At trial, the defendant had no explanation for the shopping bag in the van, but he admitted to handling the box of sandwich baggies, which was found in the shopping bag. That bag also contained the marijuana, cocaine and digital scale. This court could not find that a reasonable jury would accept the defendant's position that he had no idea what was in the bag or where the bag came from, particularly in light of his demeanor with the officers and his eight prior convictions. Consequently, even assuming that former counsel were deficient, the defendant was not prejudiced as a result. Moreover, the court agrees and adopts the State's argument that the real controversy in this action was fully tried. (80:2-4; App. XXX-XXX) (footnotes and citations omitted).

This appeal follows.

SUMMARY OF ARGUMENT

In his Rule 974.06 postconviction motions (70; 79), Mr. Franklin presented a substantial amount of newly-discovered police misconduct evidence supporting Mr. Franklin's trial defense that someone other than himself was responsible for the gun and drugs the police found in his fan. *See generally*, ***Missouri***, 2006 WI App 74.

In denying Mr. Franklin's § 974.06 postconviction motion, the circuit court summarily dismissed the other acts of misconduct, including at least one instance where Lough may have actually planted a gun on a defendant, solely because the defendant never previously asserted that he was framed by the arresting officers, and thus failed to adhere to the precedent established in ***Missouri***, 2006 WI App 74.

ARGUMENT

THIS COURT SHOULD REMAND THIS CASE FOR AN EVIDENTIARY HEARING OR NEW TRIAL WITH DIRECTIONS TO THE TRIAL COURT TO PERMIT ADMISSION OF THE OTHER-ACTS EVIDENCE.

A. General Principles and Standard of Review

Wis. Stat. § 974.06(3) states that: "Unless the motion and the files and records of the action conclusively show that the person is entitled to no relief, the court shall," *inter alia*, "(c) Grant a prompt hearing." Credibility assessments are improper at this point. If a postconviction motion alleges facts which, *if true*, would entitle a defendant to relief, the circuit court must conduct a hearing. ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

A motion for a new trial based on newly discovered evidence should be granted if the defendant can show by clear and convincing evidence that:

> (1) the evidence was discovered after conviction;
>
> (2) the defendant was not negligent in seeking evidence;
>
> (3) the evidence is material;
>
> (4) the evidence is not merely cumulative
>
> (5) it is reasonably probable that a new trial will reach a different result.

State v. McCallum, 208 Wis. 2d 463, 473, 561 N.W. 2d 707 (1997); ***State v. Kaster***, 148 Wis. 2d 789, 801, 436 N.W. 2d 891 (Ct. App. 1989).

Where, as here, the circuit judge who denied the postconviction motion did not preside over the trial, this court reviews the newly discovered evidence claim *de novo*. ***State v. Herfel***, 49 Wis. 2d 513, 521182 N.W.2d 232 (1971).

B. The Newly Discovered Evidence of Police Misconduct is Material, Supports Mr. Franklin's Defense, and Creates a Reasonable Probability of a Different Result at a Retrial.

Mr. Franklin's trial attorney was not negligent for failing to discover police misconduct evidence which only came to light after Franklin's conviction.

The trial court rests its reasoning primarily in the idea that the newly discovered evidence fails the "materiality" prong. The trial court summarily concludes that "[e]ven if the other incidents involving Officer Lough raise an inference with regard to his credibility, none of them are sufficiently similar in nature to meet the *Sullivan* standard for the admissibility of other acts evidence."

"In Wis. Stat. § (Rule) 904.01 the concept of consequential facts replaces the common law term 'materiality.'" ***State v. Sullivan***, 216 Wis. 2d 768, n.15, 576 N.W.2d 30 (1998) (citing 7 Daniel Blinka, Wisconsin Practice: Evidence § 401.1, at 64 (1991)). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. Clearly, evidence that Lough had in other arrests during this timeframe planted or assisted other rogue officers in planting guns or drugs on other black defendants makes Franklin's defense that someone other

than himself was responsible for the placement of drugs and gun in the van more probable.

"The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely." ***State v. Williamson***, 84 Wis. 2d 370, 383, 267 N.W.2d 337 (1978). Therefore, the evidence that one of the two arresting officers in this case had been involved in attempts to frame suspects was relevant to prove that all of the arresting officers had a motive to testify falsely.

Missouri, 2006 WI App 74 291, is highly relevant, both for its facts, which shed light on the pattern of police misconduct by this *same* group of rogue officers, and for the holding, which clearly controverts the basis of the circuit court's decision denying Mr. Franklin's postconviction motion.

Missouri claimed that Officer Mucha and other officers beat him up and planted cocaine on him. Missouri wanted to present testimony from Booker Scull that Officers Mucha and Dineen beat Scull up because Scull was trying to shield his son from a police investigation. The trial court ruled that Scull's testimony would not be admissible because of the danger of unfair prejudice under the third part of the "other acts" evidence

test set forth in ***Sullivan***, 216 Wis. 2d at 772-73. Missouri also presented newly discovered evidence of misconduct by the officers who arrested him in his postconviction motion.

This court reversed Missouri's conviction and remanded the case for a new trial with instructions to admit *all* the other acts evidence. This court concluded that Scull's testimony was relevant to show that Mucha had a motive to lie and cover up what he had done and that this was intentional, not the result of mistake or accident and that it was relevant in questioning his credibility and truthfulness. ***Missouri***, *supra,* ¶¶ 15-16, 291 Wis. 2d at 475-476.

Addressing the third part of the *Sullivan* test, the court held:

> The State, like this court operates with the priority of searching for truth and justice. Our system depends on all witnesses being forthright and truthful and taking seriously the oath to tell the truth when testifying in a legal proceeding. Evidence that challenges the credibility of a State's witness promotes that goal and cannot be summarily dismissed as overly prejudicial.
>
> . . .
>
> It is not appropriate for this court, nor was it appropriate for the trial court, to assume that the defendant was lying and the officer was telling the truth. Resolution of credibility issues and questions of fact must be determined by the factfinder.

Missouri, ¶17, 291 Wis.2d pp. 476-477.

The newly discovered other acts evidence presented in this case is relevant for exactly the same reasons that it was admissible in *Missouri* – to show that Lough had a motive to lie and cover up what they had done and that this was intentional, not the result of mistake or accident, and to impeach the credibility and truthfulness of both the officers at the scene. The other acts evidence is also admissible to show that the officers had a plan, a *modus operandi*, to plant drugs or weapons on black males as a means of taking people they believed were thugs or criminals off the streets.

The trial court claims that "[a]lthough the defendant claims these incidents would be admissible under *State v. Missouri*, *Missouri* makes clear that impeaching evidence of this type is subject to a Sullivan 'other acts' analysis." Ignoring the fact that *Missouri* overturned a trial court's misapplication of *Sullivan*, the trial court again concludes summarily that "none of [the instances of misconduct by Lough] are sufficiently similar in nature to meet the *Sullivan* standard for the admissibility of other acts evidence."

"Other-acts" character evidence can be admitted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." WIS. STAT. § 904.04(2). See also ***Missouri***, 2006 WI App 74 291 at ¶ 15. Like in Missouri, a number of permissible purposes for Franklin's purported testimony exist. The testimony of prior acts reveals a motive by Officer Lough to advance his own career by lying, planting evidence and acquiescing to the conduct of other rouge officers' conduct. It is permissible, just as was noted in *Missouri*, to show that the planting of the evidence in the van was not the result of mistake or accident. See ***Missouri***, 2006 WI App 74 291 at ¶ 15 ("[T]he defense wanted to introduce Scull's testimony to show [. . .] that this was intentional, not the result of mistake or accident."). It is also permissible to show a common plan and *modus operandi* with the other incidents where Officer Lough was complacent or actively participated in the beating of or planting evidence on suspects in other cases.

Like in *Missouri*, the newly discovered evidence is also relevant to a consequential fact. *Id*. at ¶ 16. All of the incidents take place during the time period from 2002 to 2005. The Missouri, Means and Jackson incidents in particular are similar in substance to the facts in Franklin's case insofar as they involve Lough directly or

assisting others in the falsification of evidence with the intent to procure a conviction. Like in Means' and Missouri's cases, Officers Lough and Campbell were patrolling an area in Police District 3 as part of an "area saturation patrol" ("ASP") intended to "combat the city's gang problem, gun-related violence and drug dealing." (52:15). Like in the Missouri, Means and Jackson incidents, all involving Lough, Franklin claimed he was stopped without probable cause, the police used his keys to search a van nearby, and claimed to have found drugs and a gun. (53:120-139). In the Missouri and Jackson incidents, such evidence found under similar circumstances was revealed to have been planted directly by or with the agreement of Lough. The evidence in all of these other acts remains relevant to show Lough's intent as part of the ASP to conduct searches without probable cause, plant evidence and support fellow officers by lying and or acquiescing to one-another's conduct. Likewise, the evidence is relevant to show Lough's conduct was not the result of an accident or mistake. See ***Missouri***, 2006 WI App 74 291 at ¶ 16 ("It would be relevant to show [. . .] that Mucha had the intent to frame Missouri for a crime he did not commit, and that Mucha's conduct was not an accident.").

Franklin's case is distinctive because someone other than himself and the police may have had control

over the van during the timeframe when the gun and drugs were placed in the van. There is no legal or policy reason to deny Franklin the right to present this newly discovered evidence today merely because, at the time of his trial, Franklin did not so boldly assert – without evidence – that the police, rather than another individual in possession of the van, planted the gun and drugs. As was held in *Missouri,* "where the primary resolution rides on the credibility of a police officer verses the credibility of the defendant, we cannot foreclose the defense from calling the witnesses it needs to present its case." ***Missouri***, 2006 WI App 74 291 at ¶ 25.

The *Missouri* Court further proclaimed that "at a minimum, defense counsel should be allowed to cross-examine Officer Mucha about each of these four incidents." *Id*. at ¶ 24. Even if the testimony of the State's witnesses were unchanged at a retrial, all of the State's witnesses would be subject to cross-examination about other acts of misconduct and the defense would be seeking to call a parade of witnesses including Jermaine Cameron, Draylon Oliver, Raynard Jackson, Charles Griffin, Ronald Means, Peter Glover, and Walter T. Missouri, to support the inference that the police, not Mr. Franklin, were responsible for the gun and drugs in the van. Therefore, there is a substantial probability of a different result at a retrial.

C. Alternative Argument for Ineffective Assistance of Counsel

To demonstrate entitlement to a ***Machner*** hearing, Franklin must allege a prima facie claim of ineffective assistance of counsel, showing that postconviction counsel's performance was deficient, and that this deficient performance prejudiced the result of his postconviction motion. See ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that counsel's representation was below objective standards of reasonableness. See ***State v. McMahon***, 186 Wis. 2d 68, 80, 519 N.W.2d 621 (Ct. App. 1994). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

Franklin argued primarily that he was entitled to a new trial based on newly discovered under the ***McCallum*** test, discussed *supra*. However, he advanced a claim for ineffective assistance of counsel in order to hedge against the possibility that the trial court might deny him relief solely on the basis of the second prong of the ***McCallum*** test, requiring that his postconviction counsel not have been negligent in failing to find and advance the newly

discovered evidence in previous postconviction motions and appeals. For the same reasons, Franklin preserves this alternative argument on appeal.

With respect to the prejudice prong, the analysis is nearly identical to the arguments Franklin has advanced *supra*. For brevity, the analysis supporting Franklin's argument that the other acts evidence of police misconduct is material, supports Franklin's defense, and creates a reasonable probability of a different result at retrial is incorporated by reference as if fully set forth herein.

The only issue remaining is whether prior postconviction counsel's failure to bring forth this evidence on direct appeal amounts to deficient performance under the *Strickland* test. Franklin argues all five prong of the McCallum test have been met, including the second prong that "the defendant was not negligent in seeking the evidence." The State and trial court in the current postconviction proceedings seemed to concede that Franklin has met the second prong of the McCallum test. Franklin, however, reiterates that if this appeal ultimately failed solely due prior appellate counsel's negligence in failing to discover and bring forth this evidence during his previous direct appeal, then this is necessarily an instance where but for his postconviction

counsel's unprofessional errors, the result of the proceeding would have been different.

CONCLUSION

Mr. Franklin's postconviction motions were based on detailed facts supported by substantial documentary evidence showing that there is newly discovered evidence that supports the idea that he was framed by a group of rogue police officers. Mr. Franklin has more than met the burden required to get a hearing or new trial.

Appellant Jesse Franklin, Jr. respectfully requests that this court issue an order remanding the case to the circuit court for an evidentiary hearing or new trial with directions to the trial court to permit admission of the other-acts evidence.

Dated this 8th day of November, 2013.

Respectfully submitted,

_____

STEVEN P. COTTER
State Bar No. 1068476
Law Office of Steven P. Cotter
P.O. Box 510706
New Berlin, WI 53151-0706
(262) 309-4616
E-mail: cotter@spc-law.com
Attorney for Defendant-Appellant

A P P E N D I X

INDEX TO APPENDIX

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6327 words.

I further certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I further certify that:

I have submitted an electronic copy of the Brief and Appendix of Defendant-Appellant, excluding the

appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

The electronic Brief and Appendix of Defendant-Appellant is identical in content and format to the printed form of the brief filed on or after 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 this 8th day of November, 2013.

Respectfully submitted,

_____

STEVEN P. COTTER
State Bar No. 1068476
Law Office of Steven P. Cotter
P.O. Box 510706
New Berlin, WI 53151-0706
(262) 309-4616
E-mail: cotter@spc-law.com
Attorney for Defendant-Appellant