STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Milwaukee County Case No.
13-CF-3214

v.

MATTHEW TAYLOR,

Defendant-Appellant.

Appeal No.
2016-AP-682-CR

Appeal from the Judgment of Conviction and Denial of Post-Conviction Relief entered in the Circuit Court for Milwaukee County, The Honorable Stephanie M. Rothstein, Circuit Judge, Presiding

---

BRIEF OF DEFENDANT-APPELLANT MATTHEW TAYLOR

JEFFREY O. DAVIS
State Bar No. 1011425
JAMES E. GOLDSCHMIDT
State Bar No. 1090060
PATRICK PROCTOR-BROWN
State Bar No. 1091326

QUARLES & BRADY LLP
411 East Wisconsin Avenue
Suite 2350
Milwaukee, WI 53202-4426
(414) 277-5000

Attorneys for Defendant-Appellant Matthew Taylor

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Cases, cont.

Cases, cont.

Statutes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Taylor does not request oral argument in this matter, which appears to meet the criteria for submission on briefs pursuant to Wis. Stat. (Rule) § 809.22(2).

Because this appeal does not appear to meet any of the criteria for publication set forth in Wis. Stat. (Rule) § 809.23, Mr. Taylor does not request publication of the opinion in this matter.

ISSUES PRESENTED FOR REVIEW

1. Should Mr. Taylor's conviction have been overturned and a new trial granted on the basis of new evidence, or, in the alternative, should the trial court have granted Mr. Taylor's lesser request for an evidentiary hearing in light of the new evidence presented?

Answered below: Without holding any evidentiary hearing as requested, the trial court summarily denied Mr. Taylor's request for a new trial.

2. Should Mr. Taylor's conviction have been overturned and a new trial granted on the basis of ineffective assistance of counsel, or, in the alternative, should the trial court have granted Mr. Taylor's lesser request for a *Machner* hearing?

Answered below: Without holding a *Machner* hearing as requested, the trial court summarily denied Mr. Taylor's request for a new trial.

STATEMENT OF THE CASE

Mr. Matthew Taylor appeals from his convictions of first degree reckless homicide, first degree reckless injury, and adjudicated delinquent in possession of a firearm. The shooting underlying each of these convictions involved two eyewitnesses, whose testimony was the only direct evidence offered in support of the State's theory that Mr. Taylor was the shooter. No other direct evidence established that Mr. Taylor was the triggerman, and the remaining circumstantial evidence only showed that Mr. Taylor himself was shot—*not* that he was the shooter.

This distinction is critical because both eyewitnesses agreed that there were *two* men present when shooting began, but the bullets recovered at the scene showed that only one of the men shot a gun that night. Thus it was not enough for the State to prove that Mr. Taylor was injured near the crime scene; it was required to prove beyond a reasonable doubt that he pulled the trigger of the gun that killed one victim and injured another.

The State has not done that, so Mr. Taylor should be granted a new trial. Short of that, Mr. Taylor seeks an evidentiary hearing based on new, exonerating evidence, and a *Machner* hearing addressing his claim for ineffective assistance of counsel—both of which the trial court denied.

I. Mr. Taylor's Arrest, Trial, and Conviction

In the early morning hours of July 11, 2013, shots rang out near the intersection of 15th Street and Concordia Avenue on Milwaukee's North side. (R.69 at 7-9, 54-55). Three individuals in a gray 2010 Mazda had come to the neighborhood looking for drugs. (*Id*. at 22-24). After the gunfire, one of these individuals (Gabriel Contreras, the front-seat passenger) was dead, the second (Anthony Bachman, the driver and Gabriel's brother-in-law) was injured, and the third (Yujawana McClendon, apparently the men's guide to the neighborhood) was unharmed. (Trial Ex. 84; R.69 at 30, 63-65).

Police noticed a trail of blood leading away from the scene of the shooting, and they followed it. (R.69 at 95). A few steps along the trail, they found a baseball cap. The State later tested this cap for DNA and came up with only one match: Terry Singleton. (Trial Ex. 62; R.60, Ex. W). Further along the blood trail, the police found a black 9-millemeter pistol at the bottom of a trash can. (R.69 at 95; Trial Ex. 9). The State later tested the gun for fingerprints and came up with only one match: Terry Singleton. (R.69 at 27, 33).

The trail of blood ultimately led to a house located at 3254 N. 15th Street. There, police found Matthew Taylor, shot in the thigh. (R.69 at 107-10; R.60, Ex. B). With him was [redacted], and several others. (R.60, Ex. B; C). Terry Singleton was gone. Matthew Taylor was taken to the hospital, where he was subsequently arrested. (*Id.* Ex. L).

The police later caught up with Singleton and asked him about the shooting, and the gun, and his fingerprints on the gun. (R.60, Ex. M). At first Singleton told police he was sleeping at his girlfriend's house, blocks away from the shooting. (*Id.* at 1). But this was a lie: in a second interview, conducted the next day, Singleton gave the police a new story, claiming that he had been near the intersection of 15th and Concordia when he heard gunshots. (R.60, Ex. N). He said he waited until the shooting had stopped, then found Taylor lying on the ground, shot in the leg, with the black 9mm pistol nearby. (*Id.* at 1). He said he picked up the gun and threw it in the trash can, nothing more. (*Id.* at 2). The police chose not to charge Singleton, despite his fingerprint on the gun, his DNA on a hat recovered at the scene, and his inconsistent stories about his whereabouts and actions at the time of the incident. (R.60, Ex. O, W; Trial Ex. 62).

Meanwhile, the police questioned Mr. Bachman and Ms. McClendon, the only two eyewitnesses to the shooting. In their initial descriptions, each agreed they had been approached by two black males, and that one of them had been the shooter. They agreed on little else:

- Mr. Bachman described (1) a black male 6 feet tall, weighing 130-140 pounds, with clean-cut short hair and no facial hair, wearing white shorts and a black pullover-type hooded sweatshirt with red writing on the front; and (2) a black male, 5'10" tall, weighing 160 pounds, with shoulder-length tight braids and a close-cut beard, wearing a white t-shirt and white shorts. (R.60, Ex. P, Q, S).

- By contrast, Ms. McClendon described (1) a black male, 5'3" tall, weighing 145 pounds, with short hair and wearing blue jeans and a black zip-up hooded sweatshirt with white writing on it; and (2) a black male, between 5'5" and 5'7" tall, weighing 230 pounds, with wavy hair and wearing a white t-shirt, white jeans, white tennis shoes, and a black hat. She thought this suspect was armed. (R.60, Ex. R; *but see id.* Ex. S at 3 ("height and weight unknown")).

Mr. Bachman's initial description was taken by two different officers minutes after he had been shot—once as soon as police arrived on the scene (R.60, Ex. P), and once in the ambulance on the way to Froedtert Hospital (*id.* Ex. Q). Ms. McClendon's initial description was also taken by two different officers, once after being awakened in the middle of the night at St. Mary's Hospital 24 hours after the shooting (*id.* Ex. S), and once the evening after the shooting (*id.* Ex. R).

In a subsequent interview, Mr. Bachman told police that he needed glasses to see. (R.60, Ex. A at 0:06:00). At trial, Mr. Bachman would admit that as between the two individuals he recalled seeing, *he could not definitively say which one was the shooter*. (R.69 at 73). At trial, Ms. McClendon would admit that she had not been wearing her glasses at the time of the shooting, and that she observed the majority of the incident from behind an infant car seat as she crouched in the back seat of the Mazda. (*Id.* at 37, 41).

Nevertheless, the police wasted no time putting photo arrays in front of Ms. McClendon and Mr. Bachman. After being interrogated until after 4:00 a.m. on the morning of July 11th, between 7:00 p.m. and 9:00 p.m. the same day Ms. McClendon was shown photo arrays targeting both Matthew Taylor and another suspect who had been arrested that morning. (R.60, Ex. R at 2-3). Between the end of her interrogation at 4:00 a.m. and the beginning of the photo array at 7:00 p.m., Ms. McClendon had also been taken to St. Mary's Hospital for medication. (*Id.* at 1). After McClendon viewed the photo array once and did not identify anyone, the police urged her to view it a second time; this time, she identified Taylor. (*Id.* at 2). Singleton was not included in the photo array, nor was he included in a

second photo array shown to McClendon approximately 15 minutes later. (*Id.* at 4; Trial Ex. 70-72). When McClendon was later given the opportunity to view Singleton in a live lineup, she told police that he resembled one of the perpetrators. (R.60, Ex. X at 1; *id.* Ex. Y at 1).

Mr. Bachman was first interrogated at 9:10 a.m. on July 11th, while still in a bed at Froedtert Hospital recovering from surgery. (R.60, Ex. T). Mr. Bachman was medicated with hydromorphone. (*Id.* at 3). He provided physical descriptions similar to his previous descriptions, but was not shown a photo array at that time. (*Id.*)

The next day, while Bachman was still medicated with hydromorphone, two detectives interviewed him a second time. (R.60, Ex. A, U). At the beginning of this interview, Mr. Bachman did not even know what day of the week it was. (R.60, Ex. A at 0:01:10). At the end of a nearly two-hour interview, Mr. Bachman was shown two photo arrays targeting Mr. Taylor and another suspect. (*Id.* at 1:39:40-1:54:00). The first photo array consisted of eight folders, two of which were blank. (*Id.*) After viewing the photo in Folder #1, Bachman said the photo looked like one of the perpetrators, but asked to come back to it. (*Id.*) He similarly expressed uncertainty as to Folder #2. (*Id.*) Folder #3 was a "definite no."

(*Id.*) Then Bachman came to Folder #4. He said: "That looks like the shooter." But then he hesitated: "His hair's a little longer . . ." (*Id.*) The detectives began prompting:

> *Mueller:* The hair in the picture looks a little longer than what you recall? But that looks like the guy you remember?
>
> *Villarreal:* With the black hoodie?
>
> *Mueller:* What looks so… is it his facial -- What about him looks so --?
>
> *Bachman:* His facial structure. . . like, his cheekbones and how his face is.
>
> *Mueller:* So that's the guy that shot you and Gabriel?
>
> *Bachman:* I think so.
>
> *Mueller:* By law, we have to show you the other ones, too…

(*Id.*) The officers went on to show Bachman the remaining folders; in less than thirty seconds, he circled "No" for Folder #5 and #6, and Folder #7 and #8 were blank. (*Id.*)

At the end of the array, Bachman was asked: "Now, Four is the guy that you identified. But you did indicate you wanted to go back to #1 and #2. Is there a need to go back to them?" (*Id.*) Bachman said there was, then went back and circled "No" for both. (*Id.*) The police told Bachman to sign and date the back of the photo in Folder #4. (*Id.*) They then told him to circle "I have (identified) / (not identified) a perpetrator in this

offense" on the photo array form, and to fill in "#4" in the blank following "The photo I identified was contained in folder . . ." (*Id.*)

The officers then prepared to show Mr. Bachman a second photo array. Before doing so, however, Detective Mueller spent time heavily reinforcing Bachman's previous identification:

> *Mueller:* We're almost done. I can see that you're getting pretty tired. I don't know if you noticed it, Anthony, but I observed that when you opened #4, you started breathing a lot faster, and you, like, gripped that thing extra tight. We watch for signs like that just because it kind of gives us an idea of -- sometimes we have people that don't want to identify somebody, or they're afraid or they're just not sure -- but I think Erik noticed it, too. . .
>
> *Villarreal:* Oh yeah.
>
> *Mueller:* When you saw that, I don't know if you even felt it, but your body started changing -- it was visible, your breathing got more rapid, and stuff. To us, that usually indicates somebody has a positive recollection.

(*Id.*) Then the second photo array began. Just as Bachman was about to open the first folder, Detective Mueller reiterated, "You don't have to identify anybody. I just wanted to make you aware that that's a normal response we see when that happens, with some people. Same rules apply now; here's #1." (*Id.*) Not surprisingly, within approximately ninety seconds, Bachman quickly worked his way through the second photo array, circling "No" for every folder. (*Id.*)

In the first photo array, the photo in Folder #4 was of Matthew Taylor. (R.49, Ex. 4; A-App. 094-096). Terry Singleton was not included in either photo array. (*Id.*; A-App. 097-099).

While the State would make much of these identifications at trial, subsequent statements by both Mr. Bachman and Ms. McClendon cast significant doubt on their reliability. On two separate occasions, Mr. Bachman identified two other individuals as involved in the shooting. First, on July 15, 2013, Bachman was shown a third photo array. He indicated that he believed the individual pictured in Folder #1 was involved in the shooting. (R.60, Ex. AA). That individual was a Maurice M. Gaillard, a filler. (*Id.*; R.49, Ex. 8). Later, on September 13, 2013, Bachman viewed a live lineup of six individuals. At that time, Bachman indicated that he believed the man in Position #1 was involved in the shooting. (R.60, Ex. BB). That individual was a Kristian A. Byrd, another filler. (*Id.* Ex. X). When Ms. McClendon viewed the same live lineup, she told police that the man in Position #4 resembled one of the perpetrators. (*Id.* Ex. Y). That man was Terry Singleton. (*Id.* Ex. X).

In short, by the time of trial, Mr. Bachman had identified—with equal confidence—at least three separate individuals as being involved in

this two-person crime, and Ms. McClendon had told police that Terry Singleton looked familiar to her from the night of the shooting.

But the police were already focused on Matthew Taylor. When they happened to find a black sweatshirt in the basement of the house where Taylor had gone after being shot, Taylor became their primary suspect. Later the State Crime Lab confirmed that the only blood and DNA on the sweatshirt were Taylor's; none of the victim's blood or DNA was found on the sweatshirt. (Trial Ex. 62). At trial, the lab technician could not confirm without speculating that the sweatshirt had merely been used to apply first aid to a wound. (R.70 at 69).

Along with the trail of blood (which only proved that Taylor had been shot), this black hooded sweatshirt became the focal point of trial—despite the fact that shortly after the shooting, several witnesses told police that Taylor had not been wearing a sweatshirt that night and indeed had not been wearing any shirt at all. Shatara Mobley, Lillie Jones, Jamari Holmes, and Ericka Johnson were all at the house when Taylor arrived after being shot, and told police he was not wearing a shirt that night. (R.60, Ex. C, D, E, F). Ms. Mobley, in particular, stated that Mr. Taylor "never seems to wear a shirt." (*Id.* Ex. C). Others, including Bobby Hill and Joel Davis-

Hill, said they saw Taylor wearing a white t-shirt, not a black hooded sweatshirt. (*Id*. Ex. H, I). That matched the eyewitnesses' description of the *non*-shooter. Ricky Collins and Joy Smith also saw Mr. Taylor that night and could have testified as to what he was wearing. (*Id.* Ex. J, K).

The State forged ahead anyway. On July 13th, before receiving the lab analysis of any physical evidence, ADA Kevin Shomin charged Taylor with First Degree Reckless Homicide. (R.60, Ex. V). When the lab analysis later came in, *no physical evidence linked Taylor to the shooting*. Instead, it *excluded Taylor* and *identified only Singleton*:

- As noted above, when the black 9mm pistol was analyzed, Taylor's DNA was excluded, and the only legible print on the gun belonged to Terry Singleton. (Trial Ex. 62; R.60, Ex. EE).

- DNA recovered from a baseball hat dropped at the scene belonged to Terry Singleton and no one else. (Trial Ex. 62; R.60, Ex. W).

- Similarly, investigators lifted several fingerprints from the gray Mazda. (R.60, Ex. CC). Taylor was excluded as the source of any of those prints. (*Id.* Ex. DD). A palm print on the front passenger-side door of the Mazda, where the shooter would have been standing, was unidentified and entered into AFIS for possible future identification. (*Id.*) Before trial, police never compared this palm print to Mr. Singleton's.[1]

[1] Later, well after Mr. Taylor filed his motion for post-conviction relief, the State finally completed this comparison and represented to the trial court that the palm print did not belong to Mr. Singleton. R.43, ¶ 6. The State did not inform the Court whether the palm print belonged to Mr. Taylor, but naturally would have done so if there was a match. As such, there remains no evidence that Mr. Taylor was anywhere near the car.

Police did not report interviewing Mr. Singleton until September 12th, over two months after Mr. Taylor was arrested. (R.60, Ex. M). Ultimately Singleton was not charged at all; the police apparently accepted his "innocent bystander" version of events. (R.60, Ex. N, O).

By his counsel, Atty. Lori Kuehn, Taylor moved for a speedy trial, which was initially scheduled for November 18th, 2013. (R.65 at 2, 4). At the final pre-trial conference on October 23rd, however, the State was unable to proceed because much of the physical evidence still had not been tested. (R.66 at 2-3). The Court ordered that laboratory results be provided to the defense no later than November 12th. (*Id.* at 9-10). By a November 18th status conference, the State *still* had not provided complete discovery. (R.67 at 2:15-6:9). On December 2nd—two days prior to the speedy trial deadline—the jury trial commenced. (R.68).

Prior to the jury trial, trial counsel failed to move to exclude the questionable out-of-court identifications made by Ms. McClendon and Mr. Bachman. During the trial, Ms. Kuehn failed to object to a single question by the prosecutor or any testimony by prosecution witnesses—including extensive testimony by (1) Detective Mueller, who described Bachman's identification of Taylor when Bachman himself was available to testify

(R.69 at 139-156), and (2) Detective Goldberg, who described McClendon's identification of Taylor when McClendon herself was available to testify (R.70 at 71-113). And on December 5th, after three days of testimony for the State, Ms. Kuehn rested Mr. Taylor's case without calling a single witness on his behalf—not any of the individuals who could have contradicted the State's "black sweatshirt" theory, and not Singleton himself, who by that time was in jail on unrelated charges but had been included on the State's witness list and brought to court specifically to testify in this matter. (R.70 at 193; R.9; Order to Produce Terry Singleton dated December 2, 2013[2]; R.68 at 3-4).

On December 5, 2013, a jury found Taylor guilty of first degree reckless homicide, first degree reckless injury, and delinquent in possession of a firearm. (R.71 at 29). On January 17, 2014, Taylor was convicted and sentenced to a total of 30 years of incarceration plus 25 years of supervised release. (R.19; A-App. 001). On January 29, 2014, Taylor timely filed a notice of intent to pursue post-conviction relief. (R.17). The State Public

[2] It appears that this order was inadvertently omitted from the circuit court clerk's list of the record on appeal. It is included in the Appendix at A-App. 157.

Defender's office was appointed for the purpose, and in March of 2015 the undersigned was appointed counsel by the State Public Defender. (R.30).

II. Denial of Mr. Taylor's Motion for Post-Conviction Relief

In October of 2015, Mr. Taylor filed his motion for post-conviction relief with the Milwaukee County Circuit Court. (R.59, 60). In his motion, Mr. Taylor argued that his conviction should be set aside and a new trial granted because he received ineffective assistance of counsel in multiple respects, two of which he reiterates here: trial counsel failed to call any of several exculpatory witnesses on Singleton's behalf, and failed to object to out-of-court eyewitness identifications when eyewitness testimony was the only direct evidence offered against Mr. Taylor at trial. (R.59 at 12-25).

In addition, Mr. Taylor argued that his conviction should be set aside and a new trial granted on the basis of new evidence introduced with his post-conviction motion. (R.59 at 10-12). Specifically, Mr. Taylor introduced a confidential affidavit from [redacted]. (*Id.*; R.36; A-App. 051). Thereafter, Mr. Taylor introduced a second confidential affidavit

from [redacted]. (R.46; A-App. 053). Both of these individuals came forward to testify despite concerns for their personal safety because of their desire to see justice done. (R.36; R.46; A-App. 051-54).

While Mr. Taylor argued that each of the foregoing issues justified a reversal of his conviction and a new trial without further proceedings, he also specifically requested (1) a *Machner* hearing, with respect to his claim for ineffective assistance of counsel, and (2) an evidentiary hearing, with respect to his newly discovered evidence. (R.59 at 27-28; A-App. 048-49). Mr. Taylor emphasized that on a motion for post-conviction relief, the trial court must hold an evidentiary hearing if the movant has alleged sufficient facts that, if true, would entitle the movant to relief. (*Id., citing State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433).

However, following additional briefing, the trial court denied Mr. Taylor's motion without further proceedings. (R.56; A-App. 003).

Rejecting Mr. Taylor's argument from newly discovered evidence, the court rejected both new affidavits as hearsay. First, it dismissed [redacted]

[redacted] affidavit as "complete and utter speculation." (R.56 at 6; A-App. 008). Second, it dismissed [redacted] affidavit on two grounds: (1) the information in the affidavit would have been known to [redacted] and Mr. Taylor prior to trial; and (2) there was not a reasonable probability of a different result had [redacted] testified. (*Id.*)

The court did not elaborate on the first ground, which oddly referenced a prong of the newly discovered evidence test that had already been conceded the State. (*Id.*); *cf.* R.49 at 9 (State agreed that evidence was discovered after conviction and Mr. Taylor was not negligent in seeking the evidence). As to the reasonable probability of a different result, the court's analysis appeared to rest on its conclusion that [redacted] affidavit was hearsay because Terry Singleton himself had not submitted an affidavit confessing to the crime. (*Id.*) The court held (without citing any authority) that "[n]ewly discovered evidence claims may not be based on hearsay, and an evidentiary hearing is not warranted under these circumstances." (*Id.*) The court also concluded that even accepting both affidavits as true, "there is not a reasonable probability the result of the trial would have been any different" (*id.*), for three reasons: (1) again, the affidavits were hearsay; (2)

other evidence in the case pointed to Mr. Taylor; and (3) the new testimony merely went to the credibility of the eyewitness identifications. (*Id.*)

Turning to Mr. Taylor's claim of ineffective assistance of counsel, the trial court rejected each of the grounds cited by Mr. Taylor. Regarding counsel's failure to call any of several witnesses who could have testified about what Mr. Taylor was wearing in the moments immediately after the shooting, the court concluded that none of this testimony would have aided Mr. Taylor because none of these witnesses could have testified regarding what Mr. Taylor was wearing *during* the shooting. (R.56 at 8-9; A-App. 010-11). Similarly, regarding counsel's failure to call Mr. Singleton, the court concluded that Mr. Singleton simply would have repeated the same story he told police, so his testimony could not have altered the outcome of the trial. (*Id.* at 9; A-App. 011). And regarding counsel's failure to object to out-of-court identifications, the court conducted no analysis but simply adopted the State's argument wholesale. (*Id.*)

Following the trial court's decision and order, subject to permissive extensions (R.57, R.58), Mr. Taylor timely appealed his underlying conviction and the trial court's denial of post-conviction relief. (R.61).

SUMMARY OF THE ARGUMENT

The trial court should have granted Mr. Taylor's motion for post-conviction relief and ordered a new trial. The affidavits submitted by Mr. Taylor met all the elements of the newly discovered evidence test, and probably would have resulted in a different outcome at trial. Similarly, Mr. Taylor demonstrated that he was prejudiced by ineffective assistance of counsel in several critical respects, each justifying a new trial.

Short of this, *at a minimum* the trial court should have granted Mr. Taylor's request for a *Machner* hearing and an evidentiary hearing because his proffer met the threshold requirements for such hearings under Wisconsin law. To deny these hearings was reversible error.

STANDARDS OF REVIEW

A. Requests for *Machner* and Evidentiary Hearings

Whether a defendant's post-conviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 568. First, this Court determines whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law, reviewed de novo. *Id.* If the motion raises such facts, the trial court must hold an evidentiary hearing. *Id.*

However, if as a matter of law the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court has the discretion to grant or deny a hearing. *Id.* In that case, this Court reviews the trial court's decision for erroneous exercise of discretion. *Id.*

B. Right to New Trial: Newly Discovered Evidence

This Court reviews a trial court's determination as to whether a defendant has established his right to a new trial based on newly discovered evidence for an erroneous exercise of discretion. *State v. Edmunds*, 2008

WI App 33, ¶ 8, 308 Wis. 2d 374, 746 N.W.2d 590. Under that standard, this Court will reverse if the trial court's factual findings are unsupported by the evidence or if the court applied an erroneous view of the law. *Id.*

C. Right to New Trial: Ineffective Assistance of Counsel

Where ineffective assistance of counsel is claimed, the analysis of performance and prejudice presents a mixed question of law and fact. The trial court's findings of fact will be overturned if clearly erroneous. The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this Court reviews independently, with no deference to the trial court. *State v. Johnson*, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990); *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985).

I. The trial court erroneously exercised its discretion in denying Mr. Taylor's motion for a new trial on the basis of newly discovered evidence, and at a minimum erred in denying the requested evidentiary hearing.

A. Newly discovered evidence establishes that Mr. Taylor's conviction was a manifest injustice, requiring a new trial.

In order to set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction was a "manifest injustice." *State v. Krieger*, 163 Wis. 2d 241, 255, 471 N.W.2d 599 (Ct. App. 1991). To meet this requirement, 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. *State v. McCallum*, 208 Wis. 2d 463, 561 N.W.2d 707 (1997). If these criteria are met, 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. *Id.*

Here, the State did not challenge the first two *McCallum* factors, conceding that Mr. Taylor's new evidence "meets the first two prongs" because "it was discovered after conviction and the Defendant was not

negligent in seeking the evidence." (R.49 at 9). Nevertheless, in finding [redacted] affidavit "insufficient to satisfy the newly discovered evidence standard," the trial court concluded that "this information would have been known to both [redacted] and the defendant prior to trial." R.56 at 6.

In doing so, the trial court erroneously exercised its discretion. First, as a matter of law, it does not matter whether [redacted] knew this information prior to trial; the question is whether Mr. Taylor did. *See, e.g.*, *Wilson v. Plank*, 41 Wis. 94, 96 (1876) (proponent of new evidence must satisfy court "that such evidence came to *his* knowledge after the trial") (emphasis added); *In re Commitment of Williams*, 2001 WI App 155, ¶ 12, 246 Wis. 2d 722, 631 N.W.2d 623 (test is not even "what counsel knows or is aware of, but what his or her client is or should be aware of").

To the extent the trial court made a factual finding as to Mr. Taylor's pre-trial knowledge, it was not supported by the evidence and was therefore an erroneous exercise of discretion. *Edmunds*, 2008 WI App 33, ¶ 8. There is no evidence in the record that Mr. Taylor heard [redacted] or learned about it before trial; to the contrary, [redacted] (R.36, ¶ 7; A-App. 052),

and contemporaneous police reports confirm that [redacted] (R.60, Ex. D).

The only other basis offered by the trial court for rejecting the newly discovered evidence was the final *McCallum* factor: whether there is a reasonable probability that, had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to Mr. Taylor's guilt. (R.56 at 6-7). The court's analysis here was more involved but no less dismissive, and was again an erroneous exercise of discretion.

First, the court seemed preoccupied with the notion that Terry Singleton's statements to both affiants constituted hearsay—an issue that arose at two points in the court's analysis. As a threshold matter, the court ruled that "[n]ewly discovered evidence claims may not be based on hearsay." R.56 at 9. Appellant is not aware of any such categorical bar under Wisconsin law, and the court cited none. But in any case, the court's hearsay conclusion was too hasty. Mr. Singleton's confessions [redacted] were statements against his interest. Wis. Stat. § 908.045(4). Each statement corroborates the other, and both are further corroborated by the physical evidence in the case, especially Mr. Singleton's DNA on a baseball cap left at the scene of the shooting, his

fingerprint on the murder weapon, and the fact that police later found the murder weapon [redacted]. This gives rise to an exception to the hearsay rule provided that Mr. Singleton himself is unavailable, *id.*, which he would be if (as expected) he refused to testify or claimed to have forgotten these events. Wis. Stat. § 908.04(1)(b), (c). If instead Mr. Singleton agreed to testify and denied making these statements, then he would be a witness and his prior statements, to the extent inconsistent with his testimony now, would not be hearsay at all. Wis. Stat. § 908.01(4)(a).[3]

The same analysis addresses the court's assumption that the jury could not have considered the affiants' statements for the truth of the matter asserted because they were hearsay. R.56 at 9. The nature of both statements—two independent confessions by an individual other than the defendant—is so helpful to Mr. Taylor that if these statements had been known at the time of trial, competent defense counsel would have ensured their admission, either by confirming Mr. Singleton's unavailability or arranging for his testimony at trial. The court's contrary conclusion

---

[3] Of course, all of this presumes an evidentiary hearing on this newly discovered evidence, which the trial court also rejected (without separate analysis). But that rejection was error under *Allen*, as discussed below.

assumes away the very exercise presented by the fourth statutory factor: imagining the effect of this new evidence upon the jury *had the jury heard it* together with the rest of the evidence actually presented.

The court further found that the newly presented evidence would not affect the outcome of trial because other evidence in the case already presented the possibility that Terry Singleton, rather than Mr. Taylor, was the shooter. (R.56 at 7). Specifically, the court emphasized that the jury already knew Mr. Singleton's prints (and not Mr. Taylor's) were found on the gun, but two eyewitnesses had identified Mr. Taylor and the police had found the telltale black hooded sweatshirt at the residence where Mr. Taylor was found. (*Id.*) However, this does not account for the irrelevance of the sweatshirt or the weakness and internal inconsistency of the eyewitness identifications, not to mention the fact that much of the so-called eyewitness "testimony" was improperly introduced through police officers or Mr. Taylor's own defense counsel, as discussed below.

More fundamentally, a direct confession moments after the shooting occurred cannot be dismissed as easily as the trial court did. In a case where unreliable eyewitness testimony was the *only* direct evidence that purported to establish Mr. Taylor was the shooter (as opposed to injured in

the vicinity of the shooting), it is *reasonably possible* that these two additional statements would have given the jury *reasonable doubt* as to Mr. Taylor's guilt. That is the test under *McCallum*, and it is satisfied here.

Finally, the trial court characterized Mr. Taylor's newly discovered evidence as merely impeaching the credibility of another witness—namely Anthony Bachman, the injured victim who survived the shooting. (R.56 at 7).[4] This mistakes the nature of the new evidence. It would impeach Mr. Bachman's credibility to point out that at various times he identified three different individuals as involved in this two-person incident (R.60, Ex. U, X, Z, AA, BB; R.49, Ex. 4, 8), or that at the time of the shooting, he wasn't wearing glasses he needed to see (R.60, Ex. A at 0:06:00), or that at trial, he admitted he did not see Mr. Taylor shoot anyone (R.70 at 74), "never saw *anybody* shoot" (*id.* at 74), and could not definitively say which of the two men standing outside his car was the shooter (*id.* at 73)—all of which the evidence already showed. But the new evidence does not establish a credibility contest between Mr. Bachman and the affiants; it introduces a

---

[4] Notably, even the trial court did not attempt to defend the reliability of Ms. McClendon's eyewitness identification, which it conceded "may not have been as strong as Bachman's." (R.56 at 7; A-App. 009).

contemporaneous confession, rendering eyewitness identifications (credible or otherwise) altogether less relevant.

Moreover, the trial court's focus on credibility ignores *McCallum*'s emphasis on reasonable doubt as the touchstone for new evidence. "When faced with competing credible evidence, . . . [a] jury does not necessarily have to accept [testimony] as true, nor believe it, in order to have a reasonable doubt." *Edmunds*, 2008 WI App 33, ¶ 17 (applying *McCallum* in the context of recantation). Instead, if there is a reasonable probability that a jury, comparing the new evidence to existing testimony, would have a reasonable doubt as to the defendant's guilt, then the trial court must grant a new trial. *Id.* That is, the only way for a credibility determination to short-circuit the "reasonable probability analysis is if the Court finds the affiants' testimony *wholly* incredible as a matter of law. *Id.*

Here, the State invited the trial court to make such a finding (R.49 at 11), but the court did not do so. Nor could it: "Incredible evidence is evidence in conflict with the uniform course of nature or with fully established or conceded facts." *Simos v. State*, 53 Wis. 2d 493, 495-96, 192 N.W.2d 877 (1972). This does not describe the affiants' testimony, which was credible, mutually reinforcing, and corroborated by existing physical

evidence that also pointed to Terry Singleton as the shooter. Because it is probable that a reasonable jury hearing the affiants' testimony would have reasonably doubted Mr. Taylor's guilt, the new evidence satisfies the fifth and final element of *McCallum*, and should have resulted in a new trial for Mr. Taylor.

B. At the very least, the trial court erred in denying Mr. Taylor's request for an evidentiary hearing.

While the compelling nature of the newly discovered evidence meets the standard for a new trial, at a minimum, the Court should remand this case to the trial court for an evidentiary hearing The threshold for such an outcome is significantly lower than that for a new trial: under *Allen*, the trial court *must* hold an evidentiary hearing if the movant has alleged sufficient facts that, if true, would entitle the movant to relief. *Allen*, 2004 WI 106, ¶ 9.

Here, the trial court did not apply the *Allen* test but instead conflated the request for an evidentiary hearing with the more stringent test for a new trial dictated by *McCallum*, concluding, without any separate analysis, that Mr. Taylor was not entitled to a new trial *or* an evidentiary hearing (R.56 at 7; A-App. 009). This was itself error, but was compounded by the

court's implicit conclusion that the new evidence presented by Mr. Taylor would not satisfy *Allen*.

Under *Allen*, the facts alleged by Mr. Taylor are taken as true, not second-guessed as the trial court did here. *Allen*, ¶ 12 fn. 6 ("If the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing") (*citing State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis. 2d 195, 633 N.W.2d 207 (stating that when credibility is an issue, it is best resolved by live testimony)). In other words, all of the concerns cited by the trial court in its *McCallum* analysis—hearsay, competing evidence, and comparative credibility—are not grounds for denying an evidentiary hearing under *Allen*; they are reasons to *hold* the requested hearing.

Indeed, here even the State "request[ed] an evidentiary hearing to address credibility and whether this evidence creates a reasonable probability of a different result at trial." (R.49 at 11). But the State improperly qualified this request on a finding by the trial court that Mr. Taylor fulfilled the newly discovered evidence test. (*Id.*) This reverses the order of inquiry under *Allen* and *McCallum*, just as the trial court ended up doing. In the proper analysis, the first question is whether, under *Allen*, the

post-conviction motion qualifies for a hearing. If it does, the hearing is held, and the trial court then makes its *McCallum* determination on the basis of the evidence proffered with the motion and any additional evidence gleaned from the hearing. Here, by contrast, the trial court started with the last step of the analysis, deciding—without the benefit of any evidentiary proceeding—that Mr. Taylor could not satisfy *McCallum*, then bootstrapped its decision to deny a hearing on the basis of the very merits determination that the evidentiary hearing should have informed.

Mr. Taylor recognizes that the courts are burdened with countless post-trial motions, many of them frivolous or insufficiently developed. *See Allen*, ¶ 15 (collecting examples). But this is not one of those cases. Like the hypothetical example in *Allen* (*id.* ¶ 24), here Mr. Taylor "presented sufficient material facts, i.e., the name of the witness[es] (who), the reason the witness[es] [are] important (why, how), and facts that can be proven (what, where, when)"—all of which, if taken as true, would entitle Mr. Taylor to a hearing. The trial court erred in denying him that modicum of process before resolving his motion for a new trial.

II. The trial court erred in denying Mr. Taylor's motion for a new trial on the basis of ineffective assistance of counsel, and at a minimum erred in denying the requested *Machner* hearing.

Both the United States and Wisconsin Constitutions guarantee criminal defendants the right to counsel. *State v. Carter*, 2010 WI 40, ¶ 20, 324 Wis. 2d 640, 782 N.W.2d 695 (citing U.S. CONST. amend. VI; WIS. CONST. art. I, § 7). The United States Supreme Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *Id.* (*citing Strickland v. Washington*, 466 U.S. 668, 686 (1984)). *Strickland* establishes a two-prong test for identifying ineffective assistance of counsel. First, the representation must have been deficient. *Id.* at ¶ 21. Second, counsel's deficient performance must have prejudiced the defense. *Id.*

Mr. Taylor's trial counsel was ineffective for several reasons, two of which Mr. Taylor emphasizes on appeal. First, trial counsel failed to call any of several witnesses who could have undermined the State's attempt to tie Mr. Taylor to a black hooded sweatshirt associated by eyewitnesses with the shooter. Second, trial counsel failed to object to out-of-court identifications offered by the State when eyewitness testimony was the only direct evidence offered against Taylor at trial.

In his post-conviction motion, Mr. Taylor devoted a significant portion of his argument to his claim of ineffective assistance of counsel. (R.59 at 12-26; A-App. 033-47). The trial court's considerably shorter treatment of the issue did not address Mr. Taylor's arguments in any depth and at times adopted the State's analysis rather than conducting its own. (R.56 at 8-10). Instead, the court limited its analysis to whether Mr. Taylor was prejudiced by the deficiencies he identified; in each case, the court concluded that he was not. (*Id.*) Accordingly, in this appeal, Mr. Taylor will briefly explain the ways in which counsel was deficient, but will focus primarily on the prejudice prong of the *Strickland* test.

A. Mr. Taylor was prejudiced by trial counsel's failure to call any witnesses in his defense.

Wisconsin courts have held, on numerous occasions, that a failure of trial counsel to call potential witnesses constitutes deficient performance. *See, e.g., State v. White*, 2004 WI App 78, 271 Wis. 2d 742, 680 N.W.2d 362. In *White*, as here, trial counsel failed to call witnesses who would have brought in evidence that "went to the core of [the] defense." *Id.* at ¶¶ 20-21. Similarly, in *State v. Jenkins*, trial counsel was found deficient because he failed to call a well-known witness who would have been able to contradict or impeach the testimony of the eyewitness upon whom the

prosecution's entire case rested. *State v. Jenkins*, 2014 WI 59, ¶ 45, 355 Wis. 2d 180, 848 N.W.2d 786. In Wisconsin, the failure to call any witnesses who are known and whose testimony would undermine the prosecution's case, constitutes deficient performance by trial counsel.

The Seventh Circuit Court of Appeals has also held that the failure to call witnesses constitutes deficient performance. In one case, the court found that counsel's failure to call two useful, corroborating witnesses, despite potential bias as a result of a family relationship, was deficient performance. *Toliver v. Pollard*, 688 F.3d 853, 862 (7th Cir. 2012). The same was true when trial counsel failed to call a witness who could corroborate the defendant's own testimony. *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006). In this regard, testimony corroborating the defense is just as important as testimony undermining the prosecution.

Here, Mr. Taylor's trial counsel did not call any witnesses—not a single one. Police reports in this case indicate that no fewer than *seven* witnesses could have been called to undermine the State's theory that Mr. Taylor was wearing a black hooded sweatshirt at the time of the shooting. Shatara Mobley, Lillie Jenkins, and Jamari Holmes all told police that Mr. Taylor was not wearing a shirt when they saw him. (R.60, Ex. C, D, E, F).

Shatara Mobley told police that Mr. Taylor rarely wore a shirt. (*Id.* Ex. C). Bobby Hill and Joel Davis-Hill both told police that Mr. Taylor was wearing a white T-shirt, not a black hooded sweatshirt. (*Id.* Ex. H, I). And Ricky Collins and Joy Smith told police that they were at the home Taylor came to after being shot; they, too, could have been called to testify as to what Taylor was wearing in the moments after the shooting. (*Id.* Ex. J, K).

While in some cases the defendant's attire might be a minor detail, in this case it was crucial. A full review of the trial record shows a persistent preoccupation with the black hooded sweatshirt. To be clear, the black sweatshirt found by police had no evidentiary value in its own right. The only blood on the sweatshirt was Taylor's, which merely proves that Taylor was shot. The State attempted to lend circumstantial significance to the sweatshirt by tying it to eyewitness descriptions of the shooter. Trial counsel's failure to call any of several available witnesses in rebuttal left the State's testimony unchallenged, severely prejudicing Taylor's defense.

The State and the trial court both dismissed this argument by emphasizing that it does not matter what Mr. Taylor was wearing shortly before or after the shooting; what matters is what Mr. Taylor was wearing at the moment the shooting occurred. (R.49 at 16; R.56 at 9). This misses

the point. At trial, *no one* testified that they saw Mr. Taylor wearing a black hooded sweatshirt on the night of the shooting, whether beforehand or afterward. Instead, the sweatshirt formed the crucial link between Mr. Taylor and the shooter *only* because it was found in the same house as Mr. Taylor and eyewitnesses described the shooter as wearing a black hooded sweatshirt. Thus the critical question is whether Mr. Taylor brought the sweatshirt back to the house with him (wearing it or not), or instead whether the sweatshirt was *already* in the home when Mr. Taylor appeared there and was simply retrieved and used to apply first aid to his wound.

If even one of the witnesses in the home when Mr. Taylor arrived there had testified that the latter was true, then the infamous black sweatshirt—the only piece of circumstantial evidence physically linking Mr. Taylor to eyewitness descriptions of the shooter—would have lost all meaning. In effect, these witnesses could have offered an alibi for the sweatshirt, establishing that it was in the house and not on Mr. Taylor's person at the time of the shooting. Accordingly, trial counsel's failure to call these witnesses was both deficient and prejudicial.

In addition, trial counsel failed to call Terry Singleton, the only person linked by physical evidence to the shooting death of Gabriel

Contreras. Mr. Singleton was included on the State's witness list and ordered to be produced for trial, but inexplicably was not called by counsel for Taylor. The significance of Singleton's testimony to Taylor's defense was clear. As trial counsel explained in her opening statement to the jury, "the evidence will show there is scientific evidence of who touched this gun. Scientific evidence will show it's not my client. It's a guy named Terry Singleton." (R.68 at 150-151). But by failing to *call* Mr. Singleton, trial counsel forfeited the opportunity to confront Singleton with the physical evidence against him. Singleton's attempts to explain away his fingerprint on the gun, the presence of his baseball cap at the scene of the shooting, and the contradictions in his stories to police may well have brought the jury to doubt the State's version of events. Trial counsel's failure to call Singleton destroyed this opportunity, prejudicing Mr. Taylor's defense.

The trial court dismissed this argument by reiterating its view that Mr. Singleton's testimony would have repeated his story to police and would not have changed what the jury already knew. (R.56 at 9). This entirely fails to account for the potential value of adverse examination and its effect on a jury. Effective counsel would have identified that Mr. Singleton's first story to police was a lie, contradicted as it was by his more

recent story, and that this more recent story was equally improbable. If Mr. Singleton had been called to the stand, the jury would have heard him attempt to explain holes in his stories to police, and would have heard him testify that on the night of the shooting, he (unlike Mr. Taylor) was wearing blue jeans—just as Ms. McClendon testified the shooter was. If he had denied that, the jury would have heard him impeached, doing further damage to his credibility. The trial court's analysis accounted for none of this, too easily reaching the conclusion that Mr. Taylor was not prejudiced by counsel's failure to call Mr. Singleton to the stand. This was error.

B. Mr. Taylor was prejudiced by trial counsel's failure to object to the admission of out-of-court identifications.

Failure to object to suggestive and unreliable out-of-court identifications constitutes deficient performance. Unreliable out-of-court identifications implicate both the Confrontation Clause of the Fifth Amendment and the Due Process clause of the Fourteenth Amendment. *See Stovall v. Denmo*, 338 U.S. 293, 302 (1967); *see also Manson v. Brathwaite*, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting). Such constitutionally invalid identifications are rightfully excluded from trial. *See State v. Dubose*, 2005 WI 126, ¶ 18, 285 Wis. 2d 143, 699 N.W.2d 582.

Identification from either a lineup or a photo array can violate a defendant's due process rights. *Dubose*, 2005 WI App 126, ¶¶ 36-37. To determine whether an identification procedure is constitutionally deficient and should be excluded from trial, a court must make two related inquiries: "First, the court must determine whether the identification procedure was impermissibly suggestive. Second, it must decide whether under the totality of the circumstances the out-of-court identification was reliable, despite the suggestiveness of the procedures." *Powell v. State*, 86 Wis.2d 51, 65, 271 N.W.2d 610 (1978). After the defendant shows the out-of-court identification was impermissibly suggestive, the burden of proof shifts to the State to show "that the identification was nonetheless reliable under the totality of the circumstances." *Id.* at 66.

Here, trial counsel failed to object to the introduction of two out-of-court identifications: one by Yujwana McClendon, and one by Anthony Bachman. Trial counsel did not object to the State's introduction of either one. Indeed, with respect to Ms. McClendon's identification, trial counsel not only failed to object to its introduction through Detective Mueller, but in fact inadvertently *introduced* the identification in cross-examining McClendon at trial. (R.69 at 39-40).

1. The out-of-court identifications of Mr. Taylor were impermissibly suggestive.

If an identification procedure creates a "very substantial likelihood of irreparable misidentification," it is impermissibly suggestive and constitutionally deficient. *Simmons v. U.S.*, 390 U.S. 377, 390 (1968) (*quoted in Powell*, 86 Wis. 2d at 64). Although "there can be an infinite variety of differing situations involved" in an out-of-court identification, "[t]he police authorities are required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification." *Wright v. State*, 46 Wis.2d 75, 86 (1970). After all, eyewitness misidentification is the number one reason for wrongful conviction overturned by DNA exoneration.[5]

Here, Mr. Taylor provided extensive support for his argument that the photo arrays introduced through police officers' testimony at trial were impermissibly suggestive because they were conducted when both Ms. McClendon and Mr. Bachman were substantially stressed, did not follow procedures established by the Milwaukee Police Department to prevent

---

[5] *See* The Innocence Project, *The Causes of Wrongful Convictions*, The Innocence Project (Sept. 22, 2015), http://www.innocenceproject.org/causes-wrongful-conviction; *see also Dubose*, *supra*, 2005 WI 126 at ¶ 30 ("eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined").

false identification, and the officers conducting the photo arrays pressured both Ms. McClendon and Mr. Bachman to identify a subject despite the witnesses saying they were unsure. *See* R.59 at 16-19; A-App. 037-040.

The State's response, which the Court adopted as its own analysis (R.56 at 9), attempted to recast concerns with the witnesses' mental and physical condition as mere issues of witness credibility. (R.49 at 19). However, as Mr. Taylor pointed out in reply, the first prong of the *Powell* analysis asks whether the procedures used by police were unduly suggestive. Part of that analysis must be whether the witnesses' mental and physical condition rendered them susceptible to impermissible suggestion in the first place. The trial court did not address this elision in its opinion.

Similarly, the State quickly passed over investigators' failure to follow mandatory Standard Operating Procedures in several key respects. (R.49 at 19). But even the State conceded that these procedures were not *fully* followed, and entirely ignored the mandatory division between an "investigating officer," who is to *compose* the photo array, and the "administrator," who is to *conduct* the photo array. *See* R.55 at 6. This division necessarily ensures neutrality because an administrator who knows nothing about the investigation logically cannot be suggestive. Here, the

police violated this division of roles, and impermissible suggestiveness was the inevitable result. Again, the trial court did not address these arguments in its opinion because the State did not in its response.

Finally, the State's response devoted almost no attention to the most flagrant evidence of impermissible suggestion here: investigators' *actual suggestions* to the eyewitnesses. (R.49 at 20). With respect to Mr. Bachman, the prompting and praise offered throughout his photo array are textbook impermissible suggestions. The State simply asserted these examples did not constitute impermissible suggestions when considered in context. (*Id.*) But in fact, investigators' comments during Mr. Bachman's photo array strengthened a suggested connection between "the black hoodie," "the guy that shot you and Gabriel," and the identified photo subject, then *told* Bachman that he had correctly identified the shooter even before he began the second photo array. These comments by police were in themselves sufficient to fail the first prong of the *Powell* test: they created a "very substantial likelihood of irreparable misidentification," rendering the identification procedure impermissibly suggestive. *Powell* at 64. Yet again, the trial court's opinion did not address these points.

2. The State cannot show the identifications were nonetheless reliable.

In *Neil v. Biggers*, 409 U.S. 188 (1972), followed by the Wisconsin Supreme Court in *Powell*, the U.S. Supreme Court identified five factors for courts to consider when evaluating the likelihood of misidentification:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil, 409 U.S. at 199-200. Wisconsin courts evaluate out-of-court identifications using these factors. *Powell*, 86 Wis. 2d at 64-65.

Here, again, Mr. Taylor provided extensive support for his argument that the out-of-court eyewitness identifications were *not* reliable, notwithstanding that it was in fact the State's burden to make this showing. (R.59 at 19-23; A-App. 040-44). Mr. Taylor explained how each of the five *Neil* factors cut against Ms. McClendon's photo array identification and Mr. Bachman's. (*Id.*) Over and above the numerous indicia of unreliability evident from the photo arrays themselves, perhaps the most damaging testimony came at trial. There, detectives acknowledged that Ms. McClendon told them she didn't really see the shooter's face (R.70 at 105-06), and Mr. Bachman (according to the trial court, the *stronger* of the

two eyewitnesses) admitted he did not see Mr. Taylor shoot anyone (R.70 at 74), "never saw *anybody* shoot" (*id.* at 74), and could not definitively say which of the two men standing outside his car was the shooter (*id.* at 73).

The State's response to the extensive criticisms offered by Mr. Taylor did not directly address the majority of the identified weaknesses, contradictions, and discrepancies, but merely presented a glossy, sanitized view of the out-of-court identifications. (R.49 at 21-22). Most egregiously, the State claimed that "Mr. Bachman and Ms. McClendon were *certain* in their identifications" (*id.* at 22), a finding the trial court adopted by reference (R.56 at 9) despite the fact that Mr. Bachman directly contradicted this assertion at trial and the trial court viewed Mr. Bachman's identification as *stronger* than Ms. McClendon's. The State did not come close to meeting its burden of establishing the reliability of the out-of-court identifications, and in adopting the State's analysis, the trial court erred.

Citing *Powell* at 67-68, the State also argued (R.49 at 22) that Mr. Taylor cannot use discrepancies in the eyewitnesses' trial testimony to argue their identifications were unreliable. But in the cited passage, the *Powell* court had already concluded that the eyewitness identifications at issue were *not* impermissibly suggestive, so there was no need to consider

reliability. Moreover, this argument does not account for the fact that "the accuracy of the witness[es]' prior description of the criminal" *is* one of the five reliability factors set forth in *Powell*. In adopting the State's reasoning as its own on this point, the trial court further erred.

3. The out-of-court identifications prejudiced Mr. Taylor's defense.

The prejudice to Mr. Taylor from the out-of-court identifications is best shown by the totality of the State's evidence *without* these identifications. If they had properly been excluded, the jury would not have heard Detectives Goldberg and Mueller describe how Bachman and McClendon had picked Mr. Taylor out of a photo array. These identifications would not have been invested with the imprimatur of law enforcement, and could not have come in except via the witnesses themselves. And we know how those witnesses would have testified, because they *did* testify: they were uncertain in their identifications, could not definitely identify the shooter, and either didn't see the shooter's face (McClendon) or didn't see anyone shoot (Bachman). Other than these witnesses, the State's evidence amounted to one man (Taylor) *being shot*—not shooting—and the fingerprint of another man (Singleton) on the gun.

The State (and therefore the trial court) dismissed all of this by claiming that "[t]he correct test for prejudice in this case is whether, but for counsel's failure to object to the out of court identification, the trial court would have deemed the identifications inadmissible." (R.49 at 23). The State cited no authority for this proposition, and Mr. Taylor is aware of none. Nor is this formulation consistent with *Strickland*: it would require Mr. Taylor to show that the trial court necessarily would have excluded the identifications under *all* circumstances *except* where (as here) his counsel failed to object. *Strickland* is not nearly so stringent; the appropriate legal test for prejudice is instead whether there is a "reasonable probability that, 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." *Strickland v. Washington*, 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

The State concluded that the answer to this question must be no, because the eyewitness identifications were neither impermissibly suggestive nor unreliable, and thus the trial court never would have granted a motion to exclude the identifications. (R.49 at 23). In other words, the trial court's entire analysis of the prejudice question started and stopped

with its conclusion that the eyewitness identifications were proper. But the State (and therefore the trial court) never addressed the gaping hole in this logic: if the eyewitness identifications *were* impermissibly suggestive or unreliable, and the trial court therefore should have excluded them, then trial counsel's failure to object to their introduction *was* prejudicial. In their silence, the State and the trial court apparently concede this point.

Finally, there is a critical distinction between trial counsel's *failure to object* to the introduction of out-of-court identifications by the State, and trial counsel's *own inculpation* of her client during her cross-examination of Ms. McClendon. The State had questioned Ms. McClendon about her photo array, but stopped short of asking her whether she had identified the shooter during that photo array. (R.69 at 31-32). On cross-examination, defense counsel inexplicably took that next step, asking McClendon to confirm *in front of the jury* whether Taylor was the one she identified in the photo array. (*Id.* at 39). Of this we can only say what the Eighth Circuit Court of Appeals said in finding prejudicial performance in a similar case:

> We reject the state's argument, and agree with the district court that defense counsel's offering of the report that contained a hearsay statement [inculpating her client] was not a reasonable trial strategy. By offering the written statement into evidence, defense counsel presented the jury with documentary evidence

> containing a statement that Freeman stole the automobile. Her action in doing so is almost incredible.

Freeman v. Class, 95 F.3d 639, 642 (8th Cir. 1996) (internal citation omitted). Even setting aside trial counsel's failure to make appropriate objections, there can be no question that her *own introduction* of an out-of-court identification *inculpating her own client* was both deficient and prejudicial. The trial court erred in adopting the State's contrary position.

C. At a minimum, the trial court erred in denying Mr. Taylor's request for a *Machner* hearing.

What was said of Mr. Taylor's request for a hearing on his new evidence can also be said here: Mr. Taylor's proffer to the trial court on the issue of ineffective assistance of counsel was sufficient to entitle him to an evidentiary hearing under *State v. Allen*.

This Court gives special scrutiny to a defendant's claim that he was prejudiced by what his lawyer did or did not do when, as here, the case is close. *State v. Smith*, 2003 WI App 234, ¶ 22, 268 Wis. 2d 138, 671 N.W.2d 854; *see also State v. White*, 2004 WI App 78, ¶¶ 11-12, 271 Wis. 2d 742, 680 N.W.2d 362 (citing *Smith* and upholding ineffective assistance claim where the critical conduct was viewed by only two eyewitnesses). Moreover, this Court has held that wherever a colorable claim of ineffective

assistance of counsel is raised, its decision in *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979) requires an evidentiary hearing prior to the determination of the claim. *State v. Curtis*, 218 Wis. 2d 550, 554 and fn.3, 582 N.W.2d 409 (Ct. App. 1998).

Here, as with Mr. Taylor's proffer of new evidence, the trial court did not independently assess the propriety of a hearing, as distinct from the merits of the claim for post-conviction relief. (R.56). Indeed, the court's opinion contains no mention of *Machner* at all. (*Id.*) So the trial court must have implicitly concluded that Mr. Taylor's claim was so "cursory or meritless" as to fall short of the minimal requirements of *Allen* and not even require a hearing. *Curtis*, 218 Wis. 2d at 554, fn.3. But if so, this was error. Mr. Taylor's post-conviction motion alleged sufficient facts that, if true, would entitle him to relief. *Allen*, ¶ 9. Mr. Taylor's trial lawyer failed to introduce any witnesses on his behalf (including several who could have testified to the origins of the black hooded sweatshirt relied on so heavily by the State), failed to object to a single question by the State, failed to object to dubious out-of-court identifications, and even introduced one such identification herself—all to Mr. Taylor's significant prejudice. At a minimum, Mr. Taylor is entitled to question his former lawyer about that.

CONCLUSION

In key respects, one could argue that this appeal has come before this Court prematurely. While the rules of appellate procedure require Mr. Taylor to make his best post-conviction arguments in this appeal, in reality those arguments must remain half-formed in the absence of the evidentiary hearings that are meant to precede them. As this Court has emphasized before, trial courts' failure to conduct such hearings thwarts effective appellate review. *See, e.g.*, *Curtis*, 218 Wis. 2d at 555 ("the lack of a *Machner* hearing prevents our review of trial counsel's performance").

In that respect, Mr. Taylor's interests and this Court's are aligned: both would benefit from the more fulsome factual development that Mr. Taylor requested in the first place. Thus, while Mr. Taylor certainly urges this Court to grant him a new trial on the merits of his new evidence and ineffective assistance claim, even a remand for further proceedings would be an improvement on the trial court's ruling, which erroneously denied Mr. Taylor the evidentiary hearings that he requested and that the law requires. Accordingly, Mr. Taylor respectfully requests that this Court remand for a new trial or, failing that, for the evidentiary proceedings requested in his motion for post-conviction relief.

Dated this 13th day of July, 2016.

Respectfully submitted,

Jeffrey O. Davis
State Bar No. 1011425
jeffrey.davis@quarles.com
James E. Goldschmidt
State Bar No. 1090060
james.goldschmidt@quarles.com
Patrick Proctor-Brown
State Bar No. 1091326
patrick.proctor-brown@quarles.com

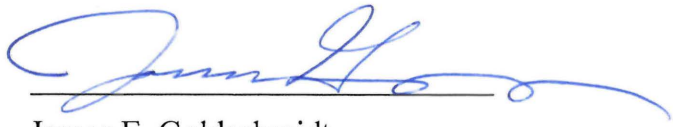
QUARLES & BRADY LLP
411 East Wisconsin Avenue
Suite 2350
Milwaukee, WI 53202-4426
(414) 277-5000

Attorneys for Defendant-Appellant
Matthew Taylor

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,691 words.

Signed:



James E. Goldschmidt

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Signed:

James E. Goldschmidt

RULE 809.19(13)(f) CERTIFICATION

I hereby certify that the content of the electronic copy of the appendix filed with this brief is identical to the content of the paper copy of the appendix filed with this brief.

Signed:

James E. Goldschmidt

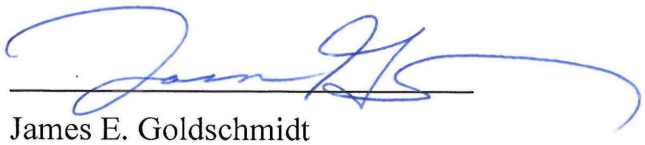
RULE 809.19(2)(b) CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. (Rule) § 809.12(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 Wis. Stat. (Rule) § 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 the 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 the first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that portions of the record have been so reproduced as to preserve confidentiality and with appropriate references to the record.

Signed:



James E. Goldschmidt

CERTIFICATE OF MAILING

I hereby certify, pursuant to Wis. Stat. (Rule) § 809.80(4) that, on this 13th day of July, 2016, I caused three copies of the [redacted] Brief and Appendix of Defendant-Appellant Matthew Taylor to be mailed, properly addressed and postage prepaid, to each of the following individuals:

BRAD D. SCHIMEL
Attorney General
BY: GREGORY M. WEBER
Assistant Attorney General
Department of Justice
Post Office Box 7857
Madison, WI 53707-7857

JOHN CHISHOLM
District Attorney
BY: KAREN LOEBEL
Assistant District Attorney
Safety Building
821 West State Street
Milwaukee, WI 53233

Signed:

James E. Goldschmidt