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

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REPLY BRIEF OF DEFENDANT-APPELLANT MATTHEW TAYLOR

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INTRODUCTION

On the whole, the State's response brief leaves one with the distinct impression that something is amuck. If the State were truly confident in Mr. Taylor's conviction, one would not expect to see it arguing—as it does repeatedly—that it does not *really* matter whether Taylor *actually* shot anyone. One would not expect the State to concede that Terry Singleton, not Taylor, may be the man who shot and killed Gabriel Contreras. One would not expect the State to resort to speculation and hyperbole when the plain facts would do.

But the plain facts show serious holes in the State's case, and it will not do for the State to fall back on the facile, hypothetical assertion that it *could have* convicted Taylor of something else or *could still* do so if his conviction is reversed now. That assertion is as troubling as it is irrelevant. The question is whether Taylor's *existing* conviction should stand—and whether the trial court should have denied Taylor's motion for post-conviction relief without so much as an evidentiary hearing.

Tellingly, even the State makes very little effort to defend the trial court on this latter point. If this Court does not order a new trial outright, then certainly it should remand for evidentiary proceedings below.

ARGUMENT

I. Taylor's exculpatory affidavits warrant a new trial, or at the very least an evidentiary hearing.

A. The State now concedes all but the fifth *McCallum* factor.

The parties agree that to justify a new trial on the basis of new evidence, Taylor must show his conviction was a "manifest injustice" under the five factors set forth in *State v. McCallum*, 208 Wis. 2d 463, 561 N.W.2d 707 (1997). In the trial court, the State conceded the first two *McCallum* factors. (R.49:9). Now it concedes two more, limiting its argument to the fifth: 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. (Resp.Br. 7).

The State's silence on the third and fourth *McCallum* factors is telling: even the State no longer disputes that the affidavits offered by Taylor are material to an issue in the case and not merely cumulative. The mere fact that only one factor remains in dispute provides further justification for the minimal relief requested here: an evidentiary hearing, where the trial court could better evaluate the credibility of the affiants' testimony and its probable effect on a jury by seeing and hearing that testimony as jurors would have seen and heard it.

B. It is reasonably probable that a jury hearing the affiants' testimony would have had a reasonable doubt regarding Taylor's guilt.

Neither the trial court nor the State has offered any convincing argument that Terry Singleton's confessions, as relayed by the affiants, would do anything *but* give Taylor's jury reasonable doubt as to his guilt.

Again, the trial court offered only two grounds for ruling against Taylor on this factor: (1) the affidavits were hearsay—an error the State wisely declines to defend[1]—and (2) a credibility contest between Taylor's principal affiant and eyewitness Bachman would favor the latter. (R.56:7). In this, the trial court erred: "the court is not to base its decision solely on the credibility of the newly discovered evidence, unless it finds the new evidence to be incredible." *State v. Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60. The trial court did not and could not find the affiants' testimony incredible as a matter of law (*see* App.Br. 27-28). Short of that,

[1] The portion of the State's response brief addressing Mr. Taylor's newly discovered evidence (Resp.Br. 6-10) makes no effort to defend the trial court's erroneous characterization of the affidavits as inadmissible hearsay. Elsewhere in its brief, the State argues the second affidavit (but not the first) may not be a statement against interest "because it would not exculpate Taylor as a party to the crime" (*id.* at 20). But Wis. Stat. § 908.045(4) only requires that *if* a statement under this exception is *offered* to exculpate the accused (as it was here), it must be corroborated. The first affidavit (which the State does not challenge) strongly corroborates the second, as does significant physical evidence, so that requirement is satisfied. This ought to put to rest the hearsay issue—which the State never advanced below anyway.

"[l]ess credible is far from incredible," and a finding that the newly discovered evidence is less credible than other evidence "does not necessarily mean that a reasonable jury could not have a reasonable doubt." *McCallum*, ¶ 18. The trial court engaged with *McCallum*'s fifth factor only long enough to fall into the very error *McCallum* itself warns against.

Perhaps recognizing the trial court's analysis of this factor falls short, the State offers several alternative reasons why Taylor's newly discovered evidence would not be reasonably likely to cause reasonable doubt. All of these arguments fall short, too.

Challenging the first affidavit (Resp.Br. 8-10), the State asks why the affiant waited to so long to come forward. That question is answered in ¶ 7 of the affidavit. The State argues the affidavit bolsters *Singleton's* version of events, but of course it doesn't: it has Singleton confessing to the crime. The State claims Taylor's "skulk[ing]" and "flight to the house" show consciousness of guilt, as if Taylor should have lain bleeding in an alley instead of seeking help from nearby family and friends. The State returns to its favorite theme—the black hooded sweatshirt—apparently forgetting that beyond proving Taylor's own injury, the sweatshirt has no evidentiary value in its own right. Finally, and most egregiously, the State concludes that *even*

if this affidavit shows Singleton was actually the shooter, that doesn't matter: Taylor was still a party to the crime.

This last argument merits special attention. The State claims Taylor's actual guilt in the shooting is immaterial because he is just as guilty "if he had *any role at all* in this botched drug deal and shooting." (Resp.Br. 9). But this would be true only if the State had charged Taylor with aiding and abetting or conspiring with Singleton to commit this crime, *and* had proven beyond a reasonable doubt all the elements of that charge, including the requisite intent. *See State v. Zelenka*, 130 Wis. 2d 34, 48 fn.3, 387 N.W.2d 55 (1986) (setting forth separate intent elements for both charges). At trial, the State hung its hat on the theory that Taylor was the shooter. Whether it could prove he was anything else is entirely speculative.

Moreover, this argument is irrelevant to the question here: whether Taylor's new evidence warrants a new trial on the charges underlying his *existing* conviction. Given the State's concession of all but the final *McCallum* factor, the analysis reduces to whether a jury hearing all the State's evidence but *also* hearing Singleton's multiple confessions would be reasonably likely to reasonably doubt Taylor was the shooter. It begs credulity to suggest the answer to that question is anything but yes.

The State's more limited arguments against the second affidavit fare no better. The State again argues (without support) that the affiant's delay in coming forward undermines his credibility, and again pivots to re-casting Taylor as a party to the crime. The State's cavalier approach to the actual identity of the shooter and to the troubling implications of Mr. Singleton's repeated confessions is no doubt a byproduct of its desire to uphold a conviction that is itself a product of the same methods. But one thing is clear: the State introduced no evidence that the bullets which injured Mr. Bachman and killed Mr. Contreras came from some unrecovered, "phantom" gun. There was only one shooter at this scene, and new evidence shows it was Mr. Singleton. Unless there is no reasonable probability that a jury hearing this new evidence would reasonably doubt Taylor's guilt, this Court should vacate Taylor's conviction and remand for a new trial.

C. Even the State does not defend the trial court's refusal to hold an evidentiary hearing, which *Allen* required under the circumstances.

In his initial brief, Taylor argued that under *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, his newly presented evidence merited an evidentiary hearing—particularly because the trial court's primary basis for denying the motion appeared to be the affiants' credibility.

(App.Br. 28-30). The State presented no argument in response (*cf.* Resp.Br. 6-10), so this argument is deemed admitted. *See Charcolais Breeding Ranches, Ltd. V. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 93 (Ct. App. 1979). If nothing else, then, this Court should remand to the trial court with instructions to conduct a hearing on Taylor's new evidence.

II. Trial counsel's deficient performance also warrants a new trial, or at the very least a *Machner* hearing.

A. The State fails to squarely address the import of the witnesses trial counsel failed to call.

In addressing trial counsel's deficient performance to call *any* witnesses on Taylor's behalf, the State appears willing to discuss anything but the critical point: witnesses in the home where Taylor arrived after being shot could have testified as to whether the now-familiar black hooded sweatshirt was already in the home when Taylor arrived there. If it was, then Taylor could not have been wearing it at the time of the shooting, defeating its essential role in the State's theory.

The State notes the witnesses in the home could not testify about what Taylor was wearing at the moment of the shooting (Resp.Br. 16-17), but that misses the point, as Taylor already explained (App.Br. 34-35). The State also claims Taylor has taken inconsistent positions on the evidentiary value

of the sweatshirt. (Resp.Br. 16-17). This, too, misses or deliberately misunderstands the point: the sweatshirt has no evidentiary value in its own right (it only proves Taylor was shot), but the *State* used it as the critical link between Taylor and the shooter, which is why trial counsel's failure to break that link through witness testimony was so deficient and so prejudicial.

Rather than address this issue head-on, the State resorts to speculation. It claims to know how the uncalled witnesses would have testified (Resp.Br. 17), when trial counsel's deficient failure to call them (together with the trial court's more recent refusal to hold an evidentiary hearing) is the very reason the State *cannot* know that. The State claims Taylor's "theory" "does not explain why someone (perhaps Singleton) would hide the bloody sweatshirt in the basement" (*id.*), when it knows full well that a non-suspect (Jamari Holmes) recalled moving the sweatshirt near where it was found. (R.60, Ex. F at 2-3). And the State opines that a sweatshirt would make a bad bandage (*id.*), whereas the sheer amount of blood found on the inside and outside of the sweatshirt is *only* consistent with such use or with wiping up blood.

Further abandoning logic, the State claims Taylor had been seen wearing the sweatshirt days before the shooting and others had seen it around the house a few months before. (Resp.Br. 17). But this either bolsters

Taylor's argument that the sweatshirt was just a passed-around item lying around the house when he returned there on the night of the shooting, or it contradicts the State's own argument that what Taylor wore before and after the shooting doesn't matter.

The State rounds off with still more speculation: "Taylor likely entered the house shirtless because he pulled off the bloody sweatshirt as he entered the house and told someone to hide it." (Resp.Br. 18). Actually, police also found a discarded white T-shirt outside the home where Taylor was found. (R.48, Ex. 2 at 3). That white T-shirt, combined with the white shorts Taylor was still wearing when police found him, would comprise all-white attire, which matches *both* eyewitnesses' descriptions of the *non*-shooter. (App.Br. 4). This bolsters the probability that the black sweatshirt was used to stanch Taylor's bleeding after he arrived back at the house.

No matter how much the State speculates, the fact remains that the testimony of the witnesses at the home where Taylor arrived moments after the shooting would have shed critical light on the State's primary link between Taylor and eyewitness descriptions of the shooter. To say that trial counsel's failure to call these witnesses was harmless is to ignore the very theory by which the State won its case.

The State's treatment of trial counsel's failure to call Singleton similarly fails to engage with Taylor's arguments. Taylor does not claim Singleton would have cracked and confessed to murder. Instead, he argues competent questioning of Singleton would have exposed the contradictions in Singleton's own story, which would have appeared particularly suspicious in light of all the physical evidence linking him to the shooting. (App.Br. 36-37). If instead Singleton had invoked the Fifth Amendment, as the State now surmises (Resp.Br. 19), this would have appeared no less suspicious to a jury. Either way, the likely nature of Singleton's testimony is sufficient to undermine confidence in the outcome of Taylor's trial, which is sufficient to show prejudice under Wisconsin law.

B. The out-of-court eyewitness identifications never should have been introduced at trial.

The State presents a well-scrubbed version of the out-of-court identifications challenged by Taylor as impermissibly suggestive. (Resp.Br. 24-26). Taylor presented a more detailed review. (App.Br. 5-10, 39-41). The Court can decide for itself which depiction is more accurate; however, certain elements of the State's response merit further discussion and show both photo arrays were anything *but* "textbook."

First, the State repeatedly describes the photo arrays at issue as "double blind." Wrong: "double blind" means neither the eyewitness nor the administrator knows the suspect's photo is in one of the folders, whereas here, the photo array was conducted by investigating officers who knew just that, without any "safeguards to ensure that [they were] not in a position to unintentionally influence the witness's selection," as protocol requires in such cases. *See Model Policy and Procedure* (Resp.Br. 26) at 3, 13. Here, this was particularly problematic in Yujwana McClendon's photo array, where investigators not only *told* her that the suspect was in one of the folders (another violation of protocol, *id.* at 3), but had a clear view of the photos in the folders throughout (yet *another* violation of protocol, *id.*). (R.48, Ex. 12 at 19:35-19:45).

Second, the State repeatedly misinforms the Court that McClendon viewed the photo array a second time only "at her request," (Resp.Br. 26, 27 fn.3), which would not be a violation of protocol. In fact, the video of this photo array shows McClendon made no such request; instead, after McClendon reviewed the photo array once *and circled 'yes' for no one*, the administering detective—unprompted—directed her to "take a look at all of them again." (R.48, Ex. 12 at 19:35-19:45). The remainder of this photo

array is characterized by extensive coaching, with particular badgering around Folder 2, which of course contained Taylor's photo. (*Id.*)

Third, the State claims "Bachman had a physiological reaction" when he came to the folder containing Taylor's photo. (Resp.Br. 25). There is no support in the record for this statement. Investigators *told* him he'd had such a reaction as a way of praising him and locking in his choice after the fact. (App.Br. 8). Now the State attempts the same trick in this Court.

When the State tries to meet its own burden of showing that the impermissibly suggestive identifications were nevertheless reliable, its discussion of the five reliability factors (Resp.Br. 27-29) echoes its performance below, as foreshadowed in Taylor's initial brief (App.Br. 42-44). Yet again, the State fails to engage with Taylor's actual arguments (*cf.* R-59:19-23; A-App. 040-044) and rests on the assertion that both witnesses were "quite certain" in their identifications, when that hyperbole is wholly undermined by recordings of the photo arrays and—more importantly—the same witnesses' testimony at trial.

These witnesses' in-court identifications were close to worthless *without* the bolstering effect of the out-of-court identifications delivered through the testimony of police officers. Again, *at trial*, the witnesses 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). (App.Br. 5, 44). So even if these in-court identifications were free of the taint of the others, as the State argues (Resp.Br. 29-30), they had no value in their own right. More likely, though, the bolstering relationship between the two warrants suppressing or excluding both—or at least a *Machner* hearing on trial counsel's deficient and prejudicial failure to object to *any* of the identifications. *Cf. State v. Roberson*, 2006 WI 80, ¶¶ 70-72, 292 Wis. 2d 280, 717 N.W.2d 111 (Abrahamson, C.J., dissenting) (same).

C. Again, the State does not seriously dispute that Taylor was entitled to a *Machner* hearing.

As with the newly discovered evidence, the State barely attempts to argue that Taylor failed to make the minimum showing needed to justify a *Machner* hearing. The State lists various circumstances under which an evidentiary hearing is not required (Resp.Br. 12) (trial court may deny hearing if motion is facially insufficient or record conclusively establishes movant is not entitled to relief), but never actually argues that (much less how) Taylor's motion falls into either of those categories. The State's analysis echoes the trial court's, which failed to independently assess whether an evidentiary hearing (as distinct from a new trial) was warranted.

Again, the bar is lower for an evidentiary hearing than for a new trial, requiring separate analysis. If Taylor alleged specific facts which, if true, would entitle him to relief, then the trial court must order an evidentiary hearing to determine the truth of those facts. *Allen*, ¶ 9. Taylor certainly has met that minimal burden here.

CONCLUSION

For the foregoing reasons, this Court should vacate Mr. Taylor's conviction and remand for a new trial, or, in the alternative, remand for the evidentiary hearings requested in his post-conviction motion.

Dated this 11th day of October, 2016.

Respectfully submitted,

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I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,996 words.

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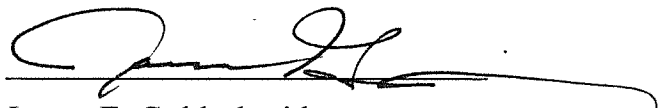

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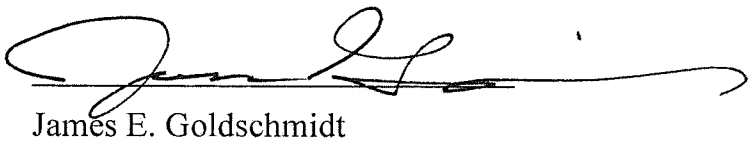

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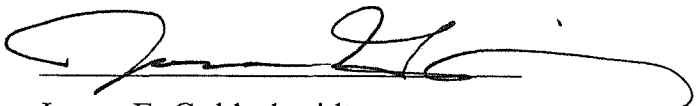

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