STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,
Plaintiff- Respondent

vs.

Appeal No. 2016AP002201

Case No. 2012CF006098

LARRY L. GARNER,
Defendant- Appellant

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. DAVID L. BOROWSKI, PRESIDING, AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HON. DAVID L. BOROWSKI, PRESIDING

BRIEF OF DEFENDANT- APPELLANT

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STATEMENT OF ISSUES PRESENTED

1. Q. Was the defendant's constitutional right to confrontation violated when the Circuit Court ruled, over objection, that the testimony of a witness who had testified at defendant's first trial could be read to the jury at the second trial even though the witness had not been properly held to be unavailable to testify at the second trial?

   A. The Circuit Court answered no

2. Q. Should the Circuit Court not have allowed the state to file the Amended Information because it had not first obtained the consent of the Court to file it, and because the evidence had not supported the new charge?

   A. The Circuit Court answered no.

3. Q. Was the defendant's sentence of a total of 40 years based on inaccurate information regarding his role in the shooting of the victim and, therefore, is he entitled to be resentenced?

   A. The Circuit Court answered no.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

It is requested that this appeal be published and oral arguments be heard because the opinion in this case would clarify existing legal rules and because it would decide Issues of substantial and continuing public interest.

STATEMENT OF THE CASE- FACTUAL

A. The Robbery of Joseph G. on December 17, 2012 at 2673 N. 35th Street

On December 17, 2012, Joseph G. left work at 12:30 a.m. on December 17, 2012, and had taken a bus to his brother-in-law's house. When he got off the bus, he was walking down the sidewalk in the area of 2673 N. 35th Street in Milwaukee and talking on his cell phone when a white suburban drove past him. (R71, p. 41). There were three men in the vehicle and it made a U-turn and returned to his location.

The man sitting in the back seat jumped out of the vehicle, Joseph G. said, and pointed a silver, 9 millimeter semi-automatic gun at him. (R71, pp. 45-45). The man asked him to give him money but when Joseph G. told him that he did not have any, the man took his cell phone. (R71, p. 45). The man in the front passenger seat also had a gun, he said. (R71, p. 43). The cell phone was a Samsung black, touch screen phone. (R71, p. 40).

The man who had jumped out of the vehicle then jumped back into it, he said, and the three men left. When he continued walking and turned the corner, he saw some officers and told them what had happened. (R71, p. 47). He told the officers that the man who had jumped out of the vehicle and who had taken the phone was 5'5" tall and weighed about 130-140 pounds. He also said that he was about 19-20 years old, clean shaven, with a light complexion. (R71, p. 48).

However, Joseph G. also testified that he himself was African- American, 40 years old, and that he was about 5'4" tall. He also said that he had a dark complexion and that the man who had jumped out of the vehicle actually had a darker complexion than him. (R71, p. 61). He also said that that man had been wearing a dark-hooded sweatshirt with a hood over his head. (R71, p. 49). Since the man had been wearing a hood, Joseph G. said, he had not been able to identify him. (R71, p. 51).

B. The Robbery of Tycer L. on December 17, 2012 at 2920 W. Lisbon Ave.

Tycer L. testified that on December 17, 2012, at 2:00 a.m., he was walking with his fiance' and her cousin, Kim, to a gas station on Lisbon Ave. (R71, p. 71). As they were walking, he said, a white blazer style truck drove past them, and someone yelled out, "Tyson, what's up fam.?" (R71, p. 72). Tycer L. said that the man who had called out to him was someone he knew as "D". The vehicle then pulled over and three men got out of it. (R71, p. 74).

One of the men who had gotten out was a tall, light-skinned man with a tattoo on his neck, he said. (R71, p. 75). When these men got out of the vehicle, Tycer L. said that he started to walk away. As he did so, he said, the tall man with the tattoo pulled out a gun and said, "you run, I push your shit back." (R71, p. 76). Tycer L. said that when he turned around, he noticed that the gun was a .32 caliber, crome and silver gun. (R71, p.76). He said that he told the man that he did not have anything. Then the man took $61 from him, along with his cell phone and his identification card. (R71, 77).

Tycer L. described the man who had pulled out the gun as being African- American, about 6' tall, 26-27 years old, and slim, weighing about 190-210 pounds. (R71, p. 77). He said that the man had on a black hoodie and dark jeans. Besides the tattoo, he said, the man had a light complexion and was wearing a braid in his hair. (R71, p. 77). That was the man who had taken the items from him, he said. (R71, p.78). He said that he did not know him. (R71, p. 75). The second man, he said, was also African- American, about 5'10" tall, heavy set, bald, and with a dark complexion. He said that he did not know him either. (R71, p. 78).

The third man was the man he knew as "D". He said that "D" had taken Kim's purse, saying, "get her shit from her", as he did so. (R71, p. 78). As all of this was happening, Tycer L. said, his fiance' ran up the street and yelled at the man to "give my baby back her shit." One of

the men, he said, yelled, "shoot that bitch, man, kill that bitch." The three men then returned to their vehicle and left. (R71, p. 79).

At that point, Tycer L. said, he saw some officers driving down the street and waved them over. The police showed him three photo arrays and he identified "D" as being in one of the photos. (R71, p. 90). "D" had been seated in the rear passenger seat, he said, and he had not been the one who had the gun. (R71, p. 92). The man he knew as "D" was identified by the police as being John Eggars, a co-defendant in this case. (R71, p. 95). He also said that he could not identify any of the other men shown in the photos. (R71, p. 83).

C. The Shooting of Ronald C. on December 17, 2012 at 1706 N. 40th Street

The co-defendant, John Eggars, testified at the trial of the defendant. He said that he knew the defendant because he used to go to 3610 W. Galena Street in Milwaukee to drink and smoke marijuana with him. (R74, p. 7). Eggars said he was known as "Booster Man" because he used to steal goods from stores and then sell them. (R74, p. 8). He said that he was 5'11" tall and weighed about 200 pounds. He said the knew Ronald C. because he used to give him rides and would also smoke crack cocaine with him. (R74, p. 9).

During the night of December 16-17 , 2012, he said, he drove his girlfriend's white SUV to 3610 W. Galena Street to smoke marijuana. He said he was very intoxicated. He said that the defendant, co-defendant, Jeronne Brown, and co-defendant Vanetta C. Gholson-Wells (hereafter referred to as Wells) were present at the house, along with Renee Garner, who is the defendant's sister, and numerous children. (R74, p. 11). After he had smoked for awhile, he said, the defendant and Brown asked him to give them a ride to the store. Eggars said that he agreed to give them a ride to the gas station so they could buy cigarettes and blunts. (R74, p. 14).

After they had left the gas station, he said, he saw a man on the corner and Brown told him to pull over because he wanted to "grab something" from someone. When Eggars pulled over, he said, Brown jumped out of the vehicle and went around the corner. When he ran back to the vehicle, he said, Brown said, "we can go now, I got my phone." (R74, p. 15). Eggars insisted that he had not seen anything happen.

They then drove back to 3610 W. Galena Street and smoked more marijuana. (R74, p. 21). Then, he said, Brown and the defendant called him into the kitchen and Brown showed him a silver gun. (R74, p. 21). After about twenty minutes, he said, they told Eggars they wanted to buy more marijuana so he told them that his brother-in-law would sell them some. However, Eggars said, he felt that he was too intoxicated to drive so Wells agreed to drive them . (R74, p. 27).

The brother-in –law was not home but on the way back, as they were on 29th and Lisbon Street, he said, Brown told Wells to pull over. When she did so, Eggars said, the defendant and Brown got out of the vehicle and approached a man he knew as Tycer L. (R74, p. 30). Brown had a gun on him, he said. He said that he knew Tycer because he used to smoke crack cocaine with him. (R74, p. 36).

There were several other people there and when a commotion began, Eggars said he got out of the vehicle too. When he saw the crowd of people on the sidewalk, they all had their hands up so Eggars believed that Brown had been pointing his gun at them and robbing them. (R74, p. 33). Eggars said he approached Tycer L. and asked him for his money but Tycer told him that he only had $6.00, which he gave him. (R74, p. 32). Eggars said that the defendant took a purse from one of the women. (R74, p. 34). After that, he said, all three men got back into the vehicle and left.

As they were driving back to W. Galena Street, Eggars said, he saw the victim, Ronald C., who he knew. Eggars said that Ronald C. recognized him and waived down the vehicle. Eggars told Wells, who was still driving, to pull over to pick the man up. (R74, p. 47). Once she pulled over, Ronald C. got into the back seat of the vehicle and asked them if they could give him a ride to 50th and Lisbon. (R74, p. 38).

Eggars told him that they were not going that way, Ronald C. said, "All right, bro" and he started to get out of the car. However, Brown grabbed him to prevent him from leaving, and at that point, Eggars told Brown, "What the fuck you doing, let him go, that's my guy, let him go." (R74, p. 38).

Since the rear door was locked at that point, Eggars told Wells to "pop the lock, let him out." Someone then popped the lock and Ronald C. opened the door and got out. According to Eggars, Ronald C. then walked to the back of the vehicle. (R74, p. 39). When Ronald C. walked to the back of the vehicle, Eggars said, the defendant leaned out of the the vehicle and said, "fuck this shit." At that moment, Eggars said, the defendant pulled out a gun and shot Ronald C. (R74, p. 40). The defendant was then about eight feet from the victim, Eggars said. (R74, p. 41).

According to Eggars, Wells then drove down an alley and parked behind a house, running into a trash can. Eggars got into the driver's seat and drove the vehicle to a gas station on Vliet Street. At that point, Eggars said, he did not know that Ronald C. had been shot. (R74, p. 43). Wells, the defendant and Eggars went into the gas station, which a security camera verified. It was then 4:45 a.m. (R74, p. 44).

D. The Death of the Victim, Ronald L.

When the police arrived at 1706 N. 40th Street on December 17, 2012, they found the victim lying in the middle of N. 40th Street, with a single gunshot wound to his left shoulder.

The officers determined that he was dead. (R72, p. 83). The police found a .22 caliber casing. (R72, p. 83).

The medical examiner found a bullet inside the victim which had gone through his left lung and had lodged against his chest wall. (R76, p. 25). The cause of death, he said, was a gunshot wound to the back. (R76, p. 27).

E. The Problems with the Testimony of John Eggars

Even though John Eggars had originally been charged as a co-defendant with the defendant with Felony Murder in regard to the death of Ronald C., he was later also charged with two counts of Armed Robbery, PTAC, in regard to both Tycer L. and Joseph G. (R74, p. 47). He testified at the trial that a plea bargain agreement had been made with him in exchange for his testimony. He said he had been allowed to plead guilty only to Attempted Armed Robbery , in relation to Tycer L., in full satisfaction of the Felony Murder and the other Armed Robbery charge. (R74, p. 47).

As part of the plea bargain, he said, he agreed to testify truthfully at the defendant's trial. He was told that the plea bargain included a recommendation by the state of a sentence of 10 years of initial confinement, with no recommendation as to the amount of the extended supervision.

Eggars had entered his plea of guilty to Attempted Armed Robbery, a Class C felony, on August 14, 2013, eight months before he testified at the trial of the defendant. At that time, the state advised the Court that Tycer L. was in jail himself, charged with Armed Robbery, and that Eggars would be a key witness at the trial of the defendant. The state also told the Court that it would "greatly appreciate" the testimony of Eggars at that trial. The state then indicated that it would recommend a sentence of 10 years of initial confinement with no recommendation as to

the extended supervision. The Court accepted Eggars' plea of guilty and ordered a presentence report.

At the time of Eggars' testimony at the defendant's trial on April 10, 2014, his presentence report had been completed. During the middle of Eggars' testimony, the Court, outside the presence of the jury, reported that it had read Eggars' presentence report and that it contained an important statement that was inconsistent with Eggars' trial testimony. The Court said that Eggars had told the agent that, "Jerrone Brown grabbed Ronald C. And as Mr. C was exiting, a shot fired by *Jerrone Brown.*" (R74, p. 6). The next day, the agent testified at the defendant's trial that that was what Eggars had told her. (R77, p. 45).

In the end, Eggars was sentenced on June 6, 2014, after the defendant's trial had been completed and one day after the defendant had been sentenced. The Court noted that it believed Eggars had testified truthfully for the most part and that he had helped convict the defendant. The Court sentenced him to 15 years, with only 9 years of initial confinement and 6 years of extended supervision.

F. The Testimony of Vanetta C. Gholson-Wells

At the first trial in this matter, Vanetta C. Gholson-Wells testified. When she did not appear to testify at the second trial, her testimony from the first trial, for reasons that will be explained, was read in full to the jury in the second trial. In her testimony that was read to the jury at the second trial, she said that she used to date the defendant's brother, James, and that James, the defendant and their sister, Renee Garner, lived at 3610 W. Galena Street. (R76, p. 43). At the time of this incident, she said, she also lived there. She said that the defendant only stayed there on and off. (R76, pp. 43-44). She said that Jerrone Brown was then Renee's boyfriend and that he lived there too. (R76, p. 45).

Wells said that on December 17, 2012, at about midnight- 1:00 a.m., Eggars went over to their house on Galena Street. At that time, she said, the defendant, Brown, Latrice Jenkins, Renee, and their grandmother, Florence, were there. After the defendant arrived, he, Brown and Eggars left the house and were gone about 30-45 minutes. (R76, p. 52). When they returned, she said, they only stayed a few minutes and then left again. When they returned this second time, she said, they had cigarettes and blunts and Eggars had a woman's purse. (R76, p. 53).

Wells said that she asked Eggars to take her to her grandmother's house so that she could get some food there. She said that since Eggars appeared to be intoxicated, she asked him if she could drive his vehicle and he agreed. (R76, p. 55). The vehicle was white. When she left the house in that vehicle, she said, Eggars, the defendant, and Brown went with her, with Eggars sitting in the front passenger seat, the defendant behind him, and Brown behind her. (R76, p. 56).

As they were driving, Eggars saw a man, Ronald C., walking down the street and Eggars told Wells to pull over. When they pulled over, Ronald C. got into the vehicle, sitting where Brown had been sitting, as Brown moved over to the middle seat in the back. (R76, p. 58). She said that Eggars asked him where he was going and Ronald C. said he was going to the Pick and Save on Lisbon.

Eggars asked him if he had any money and Ronald C. said, " I got nothing." (R76, p. 58). At that point, she said, Brown grabbed him and said, as he went through his pockets, "you got something, bitch ass, you got something." But Ronald C. said, "no, no, I'm telling you, I don't have nothing." (R76, p.59).

Ronald C. then tried to get out of the car but as he was jumping out of the car, Wells said, the defendant shot him. (R76, p. 59). Although she was driving at the time, she said, she saw

this happen in the rear view mirror. She said that she saw, out of the corner of her eye, that the defendant reached over and she heard a gunshot. (R76, pp. 59-60).The defendant had the gun, she said. Brown told her to keep driving, she said, so she drove back to their house on W. Galena Street. (R776 p 61). She cut through an alley and hit a garbage can. They all went into the house and a short time later, she walked to the gas station on Vliet with the defendant and Eggars. (R76, p. 63).

G. The Problems with Vanetta C. Gholson-Wells and her Testimony

Besides the fact that Wells had not actually testified at the second trial, there were numerous problems with Wells' testimony, even when she had testified at the first trial. First, she admitted that she had been interviewed by the police five times and that during the first four interviews, she had insisted that it had been Brown who had shot Ronald C., not the defendant. (R76, pp. 65, 72, 74). The last of those interviews was in February, 2013.

However, she said, on May 8, 2013, she had been in court regarding her own charge in this matter, Harboring or Aiding a felon. She appeared there with her attorney and Assistant District Attorney, Mark Williams. Mr. Williams told her that he did not believe that she had been cooperative and that if she did not cooperate, he would charge her with Felony Murder. (R76, pp. 88-89).

Wells had a two year old son as well as two other children who did not live with her, she said, and when she considered what would happen to them if she went to prison for Felony Murder, she changed her mind and decided to say that it had been the defendant who had shot Ronald C., and not Brown. (R76, p. 89; R77, p.98). Therefore, on May 10, 2013, she gave a statement to the police and told them it had been the defendant who had shot Ronald C., not Brown. (R76, p. 80).

Nicole Martin, Wells' mother, testified for the defense at the trial. She said that on December 18 or 19, 2012, Wells called her on the telephone and told her that she thought Brown had shot someone. (R77, p. 65). Martin told the police what Wells had told her. (R77, p 67). A few days later, she said, she took Wells to the police station to talk to the police about the incident. (R77, p. 77).

The second problem with Wells' testimony is that she was in jail at the time of her testimony at the first trial. She had pled guilty on August 29, 2013 to Harboring or Aiding a felon and in exchange for her testimony against the defendant, the state said it would recommend that she should receive probation. After she had pled guilty, she was released on bail. She was then four months pregnant. (R76, p. 67).

By the time of the defendant's first trial, Wells had violated the conditions of her bail and she had been taken into custody. When she testified at the defendant's first trial on November 6, 2013, she was in custody and she was still pregnant. (R77, p. 67). She said that she was aware that the Court would be sentencing her for her plea of guilty and she was aware that her testimony at the defendant's trial would be a factor in the Court's decision. (R77, p. 68).

After Wells had testified at the first trial, the Court agreed to allow her to post $750 cash bail and to be released from custody. (R69, p. 9). She was required to report to Justice Point and when she did so, she tested positive for cocaine and marijuana. (R69, p. 7). Wells told the staff that she wanted to contest that finding and they told her that there was a fee for that testing. Wells then asked to leave Justice Point to use an ATM to obtain the fee and the staff allowed her to leave. After she had left, she never returned to Justice Point, and went completely missing. (R69, pp. 7-8). On April 3, 2013, the Court issued a bench warrant for her. (R69, p. 8). She had

never been served with a subpoena to appear in court to testify at the second trial of this matter. (R69, p. 9).

Wells was never found before or during the second trial. As a result, as will be explained below, Wells' testimony from the first trial was allowed by the Court to be read in full to the jury at the second trial, over the objection of defense counsel. The second trial was held from April 7-14, 2014. She was finally located on April 19, just five days after the trial had ended and she was brought before the Court on June 6, 2014 to be sentenced in regard to the plea of guilty that she had previously entered. (R35; App. pp. A78- A102).

She was not sentenced to probation. Instead, she was sentenced to the maximum sentence for that offense of 3 years, with 1.5 years of initial confinement and 1.5 years of extended supervision. She was also sentenced to serve 200 hours of community service and to receive a mental health evaluation.

STATEMENT OF THE CASE- PROCEDURAL

1. The Criminal Complaint was filed in this matter on December 21, 2012, charging the defendant with Robbery, use of force, as PTAC, as it related to Jerome G. , and Felony Murder, as it related to Ronald C. There were three other co-defendants charged in the Criminal Complaint: Jeronne A. Brown and John A. Eggars were charged along with the defendant with Felony Murder, as it related to Ronald C., and Venetta C. Gholson-Wells, was charged with Harboring or Aiding a Felon. (Record 1, pp. 1-7; Appendix, pp. A1- A17).

2. The initial appearance for the defendant was on December 23, 2012. (R51, pp. 1-8). He waived the preliminary hearing on January 2, 2013. On that date, an Information was filed, charging the defendant and the three co-defendants with the same offenses that had been charged in the Criminal Complaint. (R4, pp. 1-2; App., pp. A8- A9).

3. At a pretrial conference on May 31, 2013, the state indicated that if the defendant did not enter into a plea bargain agreement in this matter, and instead went to trial, it "may" file an Amended Information, charging him with another count of Armed Robbery. (R53, pp. 1-8). At no time had the state filed a motion requesting permission to file an Amended Information. Instead, on October 1, 2013, it filed an Amended Information, charging the defendant with the same counts as in the original Information but adding another count of Armed Robbery, PTAC, as it related to Tycer L. (R6, pp. 1-2; App. pp. A10-A11).

4. There were two jury trials in this matter. The first trial was held in the Circuit Court of Milwaukee County, the Hon. David L. Borowski, presiding, from October 28-November 7, 2013. It ended in a mistrial due to juror misconduct. The second trial was held in the same Court, the Hon. David L. Borowski, presiding, from April 7- April 14, 2014.

5. On October 28, 2013, just before the first trial was about to begin, the defendant was arraigned on the Amended Information. (R55, pp. 1-18; App. pp. A12- A15). At the time of the arraignment, defense counsel stated it had not even received a copy of the Amended Information. Once a copy of it had been given to him, he raised an objection to it on the ground that there was insufficient evidence to link the defendant to the new crime charged, the victim himself having been unable to identify the defendant as a participant in that robbery. The Court overruled the objection.

6. The Court also asked counsel if he was entering a not guilty plea and after counsel stated that he was, the Court accepted the not guilty plea. The defendant never indicated that he knew or understood the new charge in the Amended Information. The defendant was then tried on the Amended Information in both the first and second trials.

7. The second trial continued until April 14, 2014, at which time the jury rendered its verdicts in this matter. If found the defendant guilty of all three counts in the Amended Information. (R15, p. 1, R16, p. 1, R17, p. 1; App. pp. A48- A50).

8. On June 5, 2014, the defendant appeared in the Circuit Court of Milwaukee County, the Hon. David L. Borowski, presiding, for sentencing. (R81, pp. 1-52; App. pp. A51-A72). In regard to his conviction for Armed Robbery, relating to Joseph G., the Court sentenced the defendant to 8 years, with 5 years of initial confinement and 3 years of extended supervision. (R81, p.46; App. p. A68).

9. In regard to his conviction for Felony Murder, relating to Ronald C., the defendant was sentenced to 24 years, with 18 years of initial confinement and 6 years of extended supervision. (R81, p. 47; App. p. A69). In regard to his conviction for Armed Robbery, relating to Tycer L., he was sentenced to 8 years, with 5 years of initial confinement

and 3 years of extended supervision. All three sentences were run consecutively. (R81, p. 47; App. p. A69).

10. The total sentence was 40 years, with 28 years of initial confinement and 12 years of extended supervision. A Written Explanation of Determinate Sentence was filed. (R24, p.1; App. p. A73). An Amended Judgment of Conviction was filed on July 29, 2014. (R27, pp. 1-3; App. pp. A74- A76).

11. A Notice of Intent to pursue Postconviction Relief was filed on June 5, 2014. (R22; App. p. A77). On July 8, 2014, an Order Appointing Counsel was issued, assigning Esther Cohen Lee as appellate counsel in this matter.

12. A Postconviction Motion was filed on May 23, 2016 in the Circuit Court of Milwaukee County. (R35, pp. 1- 27; App. pp. A103- 129). The Exhibits accompanying the Postconviction Motion were also filed. (R35, pp. 28-116). The Motion was assigned to the Hon. David L. Borowski. The state filed a Response to the Postconviction Motion on September 21, 2016. (R46, pp. 1-24; App. pp. A130- 153). A Reply to that Response was filed on behalf of the defendant on October 3, 2016. R47, pp. 1-11; App. pp. A154- A164).

13. On October 17, 2016, a Decision and Order Denying Motion for Postconviction Relief was issued by the Hon. David L. Borowski. (R48, pp. 1- 7; App. pp. A165-A171). A Notice of Appeal was filed on November 4, 2016. (R49, p. 1; App. p. A172). An Order Appointing Counsel, assigning Esther Cohen Lee as appellate counsel to represent the defendant in the Court of Appeals, was issued on October 26, 2016. (R-----, App. p. A173).

POINT I

THE DEFENDANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE CIRCUIT COURT RULED, OVER OBJECTION, THAT THE TESTIMONY OF A WITNESS WHO HAD TESTIFIED AT DEFENDANT'S FIRST TRIAL COULD BE READ TO THE JURY AT THE SECOND TRIAL EVEN THOUGH THE WITNESS HAD NOT BEEN PROPERLY HELD TO BE UNAVAILABLE TO TESTIFY AT THE SECOND TRIAL.

In *Crawford v. Washington,* 541 U.s. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court of the United States held that testimonial hearsay may not be received in evidence at the trial of the defendant unless the witness was unavailable at the trial and unless the defendant had had an opportunity to cross-examine that witness at the prior proceeding. 541 U.S. at 68. The Court held that this "bedrock" rule of law is required by the Confrontation Clause of the Sixth Amendment to the United States Constitution. Id. at 42. The Sixth Amendment provides that, "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." The Confrontation Clause applies to the states. *Pointer v. Texas*, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L. Ed.2d 923 (1965).

The Court in *Crawford* held that testimonial hearsay includes the prior testimony of a witness at a previous proceeding or trial. Id. At 51. The state has the burden of establishing that that witness in unavailable to testify at the trial in question. Id. at 57.

In Wisconsin, Article I, §7 of the Constitution of the State of Wisconsin also guarantees accused persons the right of confrontation. It provides that, "In all criminal prosecutions the accused shall enjoy the right … to meet the witnesses face to face." In Wisconsin, "former testimony" is defined as testimony given as a witness at another hearing of the same or a different proceeding…". §908.045(1) Wis. Stats.

Former testimony is not excluded by the hearsay rule if "the declarant is unavailable as a witness." §908.04 Wis. Stats. That statute provides that "unavailability as a witness includes situations in which the declarant: (e) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means."

The factor of unavailability of the witness to testify at the trial has been part of the fabric of jurisprudence in Wisconsin long before *Crawford*. In *Philbook v. State,* 216 Wis. 206, 256bN.W.779 (1934), where a witness who had testified at a previous trial but who had not testified at the trial in question, the Wisconsin Supreme Court held that before the witness' prior testimony, which had been cross-examined, could be received in evidence at the trial, it must be shown that the witness was "unable to appear and testify because of physical or mental incapacity or absence from the jurisdiction." Id. at 213.

The Court held that before it may find a witness to be unavailable, it must have "sufficient facts before it to warrant this conclusion. These facts must consist of positive evidence of the absence of the witness from the state, or positive evidence that a thorough official search for the witness in the state has been made." Id. at 214. The Court further held that this evidence "should be definite and certain so that the court may see from the facts proven that further search would have been unavailing." Id. at 214.

In *Philbrook*, the state had served a subpoena on the witness. A hearing had been held at which witnesses testified as to the actions they had taken in an attempt to locate her. Those witnesses included an officer who had gone to several locations to find her and who talked to several people who might know where she was, and two people who said that the witness had told them he was moving to the west coast. The Court found that the state had established that

the witness was outside the court's jurisdiction, and, therefore, that her prior testimony could be read to the jury. Id. at 215. In doing so, the Court stated that if the only person who had testified at the hearing had been the officer, that would not have shown that the state had met its burden of "due diligence". Id. at 215.

In *State v. King*, 2005 WI App 224, 287 Wis. 2d 756, 707 N.W.2d 181, which was decided after *Crawford,* the witness had testified at the preliminary hearing but not at the trial, and the trial court had allowed her prior testimony to be read to the jury at the defendant's trial after the Court had found the witness to be unavailable. Before making that ruling, the state, which admitted that it had not served a subpoena on the witness, told the Court that it had sent a process server out to find the witness, that a victim's advocate had talked to the witness' grandmother, who told her that the witness did not want to testify at the trial, and that a police officer had actually talked to the witness but had failed to serve her with a subpoena. Id. at 766.

The Court held that since the witness had purposely absented herself from the trial, she was unavailable and her prior testimony could be read to the jury. The Court of Appeals, however, noted that no evidentiary hearing had been held to allow these people to testify and that the court had merely relied on the statements of the prosecutor. Id. at 767. The Court also noted that "a subpoena could have and should have been served. The district attorney my sign and issue a subpoena to require the attendance of witnesses. Id. at 769.

The Court held that the party seeking to introduce the witness' prior testimony "must specify the facts showing diligence and not rely on a mere assertion of perfunctory showing of some diligence." Id. at 769. The Court held that the state had not shown that the witness was "unconstitutionally unavailable" and, therefore, her prior testimony should not have been read to the jury." Id. at 769.

In this case, there had actually been two witnesses missing when the second trial had begun on April 7, 2014- Wells and Tycer L. In a conference held on that day, just before the second trial was about to begin, the state, represented by Grant Huebner, Assistant District Attorney, asked to use the transcripts of their testimony at the first trial if they did not appear for the trial. (R69, p. 4; App. p. A19). The state acknowledged that the transcripts constituted hearsay but that since Wells' testimony at the first trial had been cross-examined, it argued that the transcripts were admissible. (R69, p. 4; App. p. A19).

Defense counsel, Glenn O. Givens, obejctd to the use of the transcripts. (R69, p. 14; App. p. A29). He argued that, in regard to Wells, the state had to make a good faith effort to find her and that she had even been served with a subpoena. (R69, p. 5; App. p. A20). He advised the Court that the defendant had a Sixth Amendment right to confront the witness and to cross-examine her in the presence of the jury. (R69, p. 12; App. p. A27).

The Court indicated that it understood the problem. It noted that there were multiple defendants in the case, some of whom were cooperating with the state. (R69, p. 19; App. p. A34). The Court continued,

> I think that, you know, the state is correct on some of what they said, much of what the state argued relative to the transcripts and the fact that those witnesses were cross-examined at the initial trial…
>
> The reason you call witnesses in court, in person, is so that a jury can assess their credibility. That means rolling their eyes, copping an attitude, answering the state's questions one way and defense questions one way. Are they changing their story? Are they crying? Are they fake crying? Those are all things that the jury should, and in my experience, does assess in terms of assessing witness credibility.
>
> And you have a defendant who is charged with felony murder and obviously also armed robbery. He's facing decades and decades in prison.
>
> In terms of a right to confront one's accusers and in terms of ensuring a fair trial, I think we hopefully all agree that it's not the same to have somebody

> just sit and read a transcript that's faceless, nameless, frankly dull, boring as opposed to having a witness on the stand that a jury can view. Is that person lying? All the indicators are they looking down the whole time? Are they looking at the jury the whole time? Are they glaring at the defendant?
>
> All of those things that I've indicated are things that sometimes I use to assess credibility when I need to and I think jurors do in my experience of by now probably 200 jury trials that I have presided over. So that's a significant concern for the court. (R69, pp. 18-19; App. pp. A34- A36).

By that afternoon, Tycer L. had been located and was in custody. (R84, p. 3: App. p. 43). Wells had still not been located. The trial then proceeded. By April 10, it was time for Wells to testify but she still had not been located. The Court made the following statement to the jury:

> I am making a determination from a legal standpoint that Vanetta Gholson-Wells who testified at a prior proceeding related to this case in unavailable at this point in time and unavailable to testify.
>
> Both sides- the state and defense- have made efforts to procure her for this trial for live testimony. These efforts have been unsuccessful. So I'm making a determination that she s unavailable, and hence, I'm allowing this process where the state will ask the questions or reading a transcript from a prior testimony where Ms. Gholson-Wells was under oath, sworn to tell the truth, that the detective will be reading the answers and we'll proceed from there.
>
> But this is, obviously, the testimony of Ms. Gholson-Wells from a prior proceeding. You should weigh it and give it the appropriate consideration along with other testimony that you've heard during the last few days during the trial. (R76, pp. 40-41).

With that , Detective Gulbrandson read the direct testimony of Wells from the first trial. (R76, pp. 42-89). To make certain that the jury heard all of Wells' testimony, the defense had Tiffany Hofer, a private detective, read her cross-examination at the first trial. (R77, pp. 95-119).

Just eight days after her prior testimony had been read at the trial, on April 19, 2014, the police located Wells and arrested her on a bench warrant that the Court had issued on April 3, 2014. She was held in custody until Jun 6, 2014, when she was brought to Court to be sentenced

before the Hon. David L. Borowski. (App. A78- A102). That was one day after the defendant had been sentenced.

At Wells' sentencing, many facts about Wells were brought out that would have been brought out at the second trial, had she testified. All of those facts showed that her testimony had been completely untrustworthy. It was also noted that she had been purposely hiding from the authorities so she would not have to testify at the second trial. (App. p. A94).

First, it became clear that she was a drug addict, using marijuana and other drugs on a daily basis. The state itself told the Court that she had a "drug dependency issue." (App. p. A82). She had tested positive for marijuana in December, 2012 and January, 2013 and taken off from Justice Point because she had tested positive for marijuana and cocaine. (App. pp. A91-A92). She herself admitted that she had a drug problem and chose to "smoke" rather than come to court. (App. p. A90).

Second, she suffered from mental health issues ad had been refusing to take her medication. (App. p. A88). The Court itself found her demeanor to be unbearable. The Court stated that her "behavior while being monitored by this Court… is atrocious. It's abominable. It's pathetic. It's awful, bad, poor." (App. p. A91). The Court also said that, "She is an enormously bad actor who deserves to go to prison and is going to prison. Frankly, she deserves more time than I can give her. She's just the worst of the worst." (App. p. A93). The Court said that her behavior "during the pendency of this case… is the worst of any defendant that I can remember dealing with…". (App. p. A95).

The Court also noted that she had had numerous tantrums in the courtroom and that her behavior was "out of control" and "wildly belligerent". (App. p. A82). And while the case was pending, the Court noted, she had been arrested for disorderly conduct, domestic violence

charge. (App. p. A83). None of this had been known to the jury in the second trial. All they had before them was the testimony of witnesses who were reading Wells' testimony from the first trial. They had no opportunity to observe her demeanor and her personality. The Court even stated that, ''she could have jeopardized this entire case by not coming to court the second time, because it would have been very easy for the jury to say, well, I'm not going to believe that garbage from some written statement." (App. p. A92).

It was argued in the Postconviction Motion that by allowing Wells' testimony at the first trial to be read to the jury at the second trial, the defendant was denied his constitutional right to confrontation. Wells' testimony was testimonial and, therefore, under *Crawford*, it could not be admitted unless it had been subjected to cross-examination and unless she had been "unavailable" for the second trial. The issue in this case does not deal with cross-examination because she had been cross-examined at the first trial. Instead, it deals with the issue of unavailability.

Even in terms of the definition of unavailability in §908.04 Wis. Stats., the state certainly had had the opportunity to serve her with a subpoena after the first trial and before she had taken off from Justice Point. And the state had failed to establish that it had used reasonable means to procure her attendance.

In its Decision and Order denying the Postconviction Motion, the Court held that since the state had told the Court that Wells could not be located and had explained the efforts that had been made to find her, that was sufficient to find her to be unavailable. It pointed to efforts to find her set forth by the state in its Response to the Postconviciton Motion as adding to those facts. (R46, p. 3; App. p. A167). The Court held that, based on those facts, "the court concludes

unequivocally that it properly found the witness was unavailable and that her prior testimony could be admitted." (R46, pp. 3-4; App. pp. A167- A168).

However, the Court's ruling fundamentally failed to apply the rules set forth in *Philbrook* and *King* that are necessary to protect a defendant's constitutional right to confrontation when considering whether to admit the prior testimony of an absent witness. In both *Philbrook and King*, the Court had required the state to prove that it had "positive evidence" of the witness' absence from the state and that a thorough search for her had been made. That meant not merely the statement of the prosecutor or even the testimony of the officers who had searched for her, but the testimony of people who knew her and who could testify as to her whereabouts. In *King,* the Court made it clear that, at the very least, the state had to serve a subpoena on her if it had had the opportunity to do so.

In this case, the state had had ample opportunity to serve Wells with a subpoena before she had taken off from Justice Point. And although the state had advised the Court that the police had been diligently looking for her, no evidentiary hearing had ever been held to have those officers testify about their efforts, and to have people who knew her, such as her grandmother, testify about what they knew of her whereabouts.

It was noted in the Postconviction Motion that the best reasons for requiring a witness to testify in person and to allow the defendant to confront his accuser were set forth very eloquently by the Circuit Court itself. It pointed out in great detail the elements of a person's demeanor that the jury would be watching for in order to determine the witness' credibility. The defendant in this case never had the advantage of having the jurors at his second trial ascertain Wells' demeanor when she said that it had been the defendant, and not Brown, who had been the shooter.

Finally, it was argued in the Postconviction Motion that given what was revealed about Wells' personality and obvious mental health issues, her own criminal history and her constant drug use during the pendency of this case, it had been essential that the jury have an opportunity to see the witness' demeanor at the second trial. In denying the Postconviction Motion, the Court held that it could not be known which of the facts brought out at Wells' sentencing would have been brought out at the second trial and that her demeanor at that trial could not have been known.

However, there were certain facts which would certainly have been known about her had she testified at the second trial. The fact of her drug use, as verified by Justice Point, during the pendency of the case would have been known, and so would her arrest for disorderly conduct during the pendency of this case. Further, the Court took great pains at her sentencing to make it known that her conduct throughout the pendency of the case had been out of control, wildly belligerent and replete with tantrums. If that were the case, such conduct would have been made clear to the jury at the second trial as well.

For all of these reasons, the defense counsel's objection to the reading at the second trial of Wells' testimony at the first trial should have been sustained. Since it was not, the defendant's constitutional right to confrontation had been violated. The defendant was, therefore, entitled to have his convictions set aside by the Circuit Court and a new trial ordered. It is respectfully requested that this Court reverse the ruling of the Circuit Court denying the Postconviction Motion, reverse his convictions and order a new trial.

POINT II

THE CIRCUIT COURT SHOULD NOT HAVE ALLOWED THE STATE TO FILE THE AMENDED INFORMATION BECAUSE IT HAD NOT FIRST OBTAINED THE CONSENT OF THE COURT TO FILE IT, AND BECAUSE THE EVIDENCE HAD NOT SUPPPORTED THE NEW CHARGE.

Section 971.29(2) Wis. Stats. provides that, "A complaint or information may be amended at any time *prior* to arraignment without leave of the court." Once the defendant has been arraigned, however, the state is required to seek the consent of the Court, by filing a motion to Amend the Information, if it wishes to amend the Information by adding charges to it. *State v. Conger*, 2010 WI 56, 325 Wis. 2d 664, 797 N.W. 2d 341.

The Court held that "the legislature has granted prosecutors sole discretion to amend a charge *prior* to arraignment, without leave of the court." The Court further held that the statute means that "the prosecutor's unchecked discretion stops at the point of the arraignment." Id. at 683.

The statute does not make any exception to this rule. And there is a very important policy reason for that rule. In some states, the prosecutor is not given the sole authority to file felony charges against an individual in an Information, signed only by the prosecutor. Instead, a buffer between the state and its residents is built into the system. That buffer is the Grand Jury, which determines the charges, if any, that are to be filed against the defendant after a hearing is held before it.

In Wisconsin, the lawmakers did not chose to require that buffer. Instead, they gave broad authority to the prosecutors to carefully review the evidence in the case and to prepare and file a Criminal Complaint and then an Information, charging the defendant with whatever charges they found to be supported by the evidence. However, the legislature built in one buffer

to that authority and that is the requirement that once the Information has been filed, and once the defendant has been arraigned on it, the prosecutors are not allowed to simply add new charges by filing an Amended Information. The Court has held that §971.29(2) constitutes a check on the power of the state to file new charges after arraignment. *State v. Hooper*, 101 Wis. 2d 517, 305 N.W.2d 118 (1981).

Once the state has made a motion to amend the Information to add a new crime, the Court then has a duty to make a determination as to whether or not to allow the state to file the Amended Information adding the new crime. The Court may not simply rubberstamp the motion. It must make a determination as to whether the amendment would prejudice the defendant's rights, including his right to notice, his right to a speedy trial, and his right to have the opportunity to defend the charges. *Whitaker v. State*, 83 Wis. 2d 368, 265 N.W. 2d 575 (1978); *State v. Neudorff*, 170 Wis. 2d 608, 489 N.W.2d 689 (1992).

In *Whitaker*, the Court held that in making its determination as to whether the state should be allowed to amend an Information, the trial court must take into consideration that, "The purpose of the Information is to inform the defendant of the charges against him. Notice is the key factor." Id. at 373. The Court noted that Article I, §7 of the Wisconsin Constitution provides that, "In all criminal prosecutions the accused shall enjoy the right… to demand the nature and cause of the accusation against him…". The right to notice in regard to amending the Information is, therefore, of constitutional proportions. Id. at 373.

Further, there is no precedent that allows the state to charge a new crime against the defendant in an Amended Information for the sole purpose of pressuring him to plead guilty to the original charges against him and to waive his right to a trial in the matter. In *Hooper*, the

Court held that, "the charging decision of a district attorney is not unlimited, it has bounds." Id. at 537-538.

Specifically, the Court held that the state may not bring new charges "of doubtful merit for the purpose of coercing a defendant to plead guilty to a less serious offense." Id. at 538. The Court held that the duties of the District Attorney " should be discharged fairly; so discharged that persons accused of crime will not be deprived of their fundamental rights." Id. at 538. The fundamental right in the case of an Amended Information is the right to due process of law.

In this case, the original Information was filed on January 2, 2013 after the defendant had waived the preliminary examination. (R4, pp. 1-2; App. p. A8- A9). At that time, the defendant was arraigned on the Information and entered a plea of not guilty to the two counts. On May 31, 2013, when it had become clear that the defendant was not going to enter a plea of guilty and, instead, insisted on a jury trial, the prosecutor told the Court that the state "may" file an Amended Information charging another count of Armed Robbery.

The reason that the new charge was being added by way of an Amended Information had been made very clear by the prosecutor during that pretrial conference. Mr. Huebner told the Court at that conference that the state had a question as to whether the defendant would be charged with the Armed Robbery relating to Tycer L. He told the Court, "… the state may file an amended Information including armed robbery *if this were to proceed to trial.*" (R53, p. 3).

When the defendant refused to accept the plea bargain and insisted on going to trial, the state went ahead on October 1, 2013 and filed the Amended Information charging the new crime. (R6, pp. 1-2; App. pp. A10 – A11). At no time before filing the Amended Information had the state filed a motion beforehand requesting leave of the trial court to file the Amended

Information. And at no time had the Court made any determination as to whether the Amended Information should be allowed to be filed.

At the pretrial conference on October 1, 2013, at which the state announced it was filing the Amended Information, the Court merely noted that the state was adding a new charge which would increase the defendant's prison time. (R54, p. 5).

On October 28, 2013, just before the first trial was about to begin, the Court stated that the state had filed an Amended Information. The Court also noted that the defendant had never been arraigned on it. (R55, p. 3; App. p. A13). Defense counsel, Mr. Givens, stated that he had received the Amended Information and that he objected to the new charge relating to an alleged Armed Robbery of Tycer L. being added to the Information. He stated that, "I am objecting to the charge, as there is no basis for the initial charge of armed robbery." (R55, p. 4; App. p. A14).

Mr. Givens stated that he had read the Criminal Complaint, the police reports and all of the other information in the case and noted that Tycer L. had never been able to identify any of the individuals who had allegedly robbed him. (R55, p. 3; App. p. A14). The Court stated that it was noting the objection of defense counsel but that it was going to allow the charge to be tried by the jury. (R55, p. 5; p. A15).

The Court then proceeded to attempt to arraign the defendant on the Amended Information. Without making any inquiry of the defendant, the Court merely turned to defense counsel and stated, "Counsel, you're waiving reading and entering a not guilty plea, is that correct?" Mr. Givens answered, "That's correct." (R55, p. 5; App. p. A15). The defendant was then tried on the three Counts in the Amended Information.

In its Decision and Order denying the Postconviction Motion, the Circuit Court merely held that, "The Court stands by its original decision on this issue based on the facts of record."

(R48, p. 5; App. p. A169). It also made a finding that even though Tycer L. had never identified the defendant as being involved in the armed robbery of him, the Court believed that the other facts in the Criminal Complaint had given the defendant sufficient notice that he could be charged with the armed robbery of Tycer L. The other facts in the Criminal Complaint, however, had never given any indication that the defendant had been involved in that crime.

When the Court stated that it was standing by its original decision on the issue of the filing of the Amended Information and allowing the trial to proceed on the charges in it, the fact of the matter is that the Court had never made a ruling on whether the Amended Information should be allowed to be filed strictly for the purpose of attempting to pressure the defendant to enter a plea of guilty in the case. Further, it never made a ruling as to whether the filing of it would prejudice the defendant's right to notice of the crime, his right to a speedy trial, or his right to have an opportunity to defend against the charge.

As it was argued in the Circuit Court by appellate counsel, the proceedings in this case regarding the filing of the Amended Information failed to accomplish the goal of the legislature in enacting §971.29(2) Wis. Stats. to act as a buffer between the state and its residents. The proceedings allowed the prosecutor to attempt to pressure the defendant to accept the plea bargain by simply coming to the Court a few weeks before the first trial was about to begin and filing the Amended Information. There was no attempt made to reign in the prosecutor's power to charge the defendant with a new crime after he had already be arraigned on the original Information.

For all of these reasons, the denial of the Postconviction Motion on this ground should be reversed. Further, the defendant's conviction in regard to the Armed Robbery of Tycer L. should be reversed and that charge should be dismissed.

POINT III

THE DEFENDANT'S SENTENCE OF A TOTAL OF 40 YEARS WAS BASED ON INACCURATE INFORMATION REGARDING HIS ROLE IN THE SHOOTING OF THE VICTIM AND, THEREFORE, HE IS ENTITLED TO BE RESENTENCED.

The person who shot the victim, Ronald L., was Jeronne Brown, not the defendant. That is exactly what John Eggars told the agent who had prepared his presentence report. It is also exactly what Vanetta Gholson- Wells told the police on four separate occasions before she had been pressured into changing her story or be faced with being charged with felony murder herself. And that is exactly what Wells had told her mother over the telephone shortly after the shooting had taken place.

It is not known whether the jury had made a finding that Jeronne Brown had shot and killed the victim or whether the defendant had done so. The reason for that is because the defendant had been convicted of Felony Murder as party to a crime, and there was no indication by the jury as to whether they had found the defendant guilty as being the actual shooter or whether they had found him guilty as a party to the shooting of the victim by Jeronne Brown.

Nevertheless, when the Court was making its determination as to the appropriate sentence to be given to the defendant for the three crimes for which he had been convicted, it mattered a great deal as to whether the Court itself believed that it had been the defendant and not Jeronne Brown who had shot the victim, Ronald C.

Although the Court did not explicitly state at the defendant's sentencing on June 5, 2014 that it believed the defendant had been the actual shooter, it made it very clear the next day when it sentenced Vanetta Gholson- Wells in regard to her conviction. At Wells' sentencing on June 6, 2014, the Court stated, "Frankly, I think the jury got it right. I think Mr. Garner was guilty as

could be. He was the shooter. He got 40 years in prison. He deserves every day of it. (App. p. A96).

Further, it was obvious that the Court had found that the defendant had been the shooter based on the fact that the other co-defendants who had originally been charged with Felony Murder, John Eggars and Jerrone Brown, had received much lower sentences for their roles in this incident. Eggars was sentenced on June 6, 2014, upon his plea of guilty to attempted Armed Robbery of Tycer L., to 15 years, with 9 years of initial confinement and 6 years of extended supervision. Brown was sentenced on June 6, 2014, upon his plea of guilty to attempted Armed Robbery of Ronald C., to the same sentence as Eggars had received.

When it sentenced the defendant to a total of 40 years, the Court stated that it had determined the defendant's sentence based on various factors. These included the fact that, "This defendant is a menace to society. He's done nothing productive in his life except break the law: drugs, robberies, guns and now a killing. There's no reason for this defendant to be on the street, ever, at least arguably." (R81, p. 34; App. p. A56). The Court noted that, "The defendant certainly is a danger to the community. He's a significant, serious, high risk to the community." (R81, p. 39; App. p. A61).

It was also significant that the Court had taken into account that the defendant had insisted on taking the case to trial, which ended up being two trials, rather than entering a plea of guilty. The Court stated, "… he had a chance to take a deal in this case. He chose not to take the deal. He was offered the exact same things as the other… defendants. He could have maybe saved himself time in prison…". (R81, p. 42; App. p. 64). The defendant had been offered a sentence of 10 years if he had pled guilty. By going to trial, he received, instead, 40 years.

The problem with the Court's sentencing determination was that it was based on inaccurate information. It was based on information provided at the trial by John Eggars and the prior testimony of Vanetta Gholson-Wells that the defendant had been the actual shooter. For the reasons set forth above, the testimony of Eggars at the trial and the prior testimony of Wells that had been read to the jury had been completely untrustworthy and should never have been the basis for finding the defendant guilty of Felony Murder beyond a reasonable doubt. It was argued in the Postconviction Motion that the Court's reliance of their testimony in finding that the defendant had been the actual shooter meant that its sentencing determination had been based on inaccurate information.

In *State v. Tiepleman*, 2006 WI 66, 291 Wis. 2d 179, 181, 717 N.W.2d 1, the Court held that a defendant is entitled to be resentenced if the Court relied on inaccurate information at the defendant's sentence. In order to be entitled to be resentenced, the Court held, "a defendant must establish that there was information before the sentencing court that was inaccurate, and that the court had actually relied on the inappropriate information." Id. at 182. The Court also held that reliance on inaccurate information violates the defendant's right to due process of law. Id. at 184.

In its Decision and Order denying the Postconviction Motion, the Circuit Court held that when it stated that it believed that the defendant had been the shooter, that was merely its "opinion" and the Court had the right to rely on the testimony of those witnesses to formulate its opinion. (R48, p. 6; App. p. A170). Further, the Court held that the if the defendant could not prove that the information that the Court had relied on had, in fact, been inaccurate, he is not entitled to be resentenced. (R48, p. 6; App. p. A170).

The burden of the defendant in showing that the information that the Court had relied on had been inaccurate is not to prove that beyond a reasonable doubt. Instead, he has a much less weighty burden – he merely has to prove by clear and convincing evidence that the information had been inaccurate. *Tiepelman,* id. at 184. In this case, the evidence calling into question the truthfulness of Eggar's testimony at the trial that the defendant had been the shooter and not Brown, and the truthfulness of Wells' prior testimony that had been read to the jury that the defendant had been the shooter and not Brown constituted clear and convincing evidence that that information, which the Court had relied on in making its sentencing determination of the defendant, had been inaccurate.

It had also been argued in the Postconviciton Motion that it constituted an erroneous exercise of the Court's sentencing discretion to sentence the defendant to a sentence four times greater than the sentence he had been offered had he not taken the case to trial, and that the total sentence of 40 years had been unduly harsh and severe. The Circuit Court made light of that argument, stating it could have given him any sentence up to the maximums sentence of 115 years for the three convictions, and it had not done so. The fact that the Court had not given him the maximum sentence does not excuse the fact that at one point, before the defendant had demanded a jury trial, the state had believed 10 years would be sufficient for these crimes and the Court had, itself, found that 15 years would be sufficient for the codefendants.

For these reasons, the decision of the Circuit Court denying the defendant's Postconviction Motion to be resentenced should be reversed and it should be ordered that the defendant be resentenced.

CONCLUSION

The defendant respectfully requests that this Court reverse the denial of the Postconviction Motion, reverse the defendant's convictions for Felony Murder and two counts of Armed Robbery, PTAC, and order a new trial, or, in the alternative, at least reverse the defendant's conviction for Armed Robbery, PTAC, as it relates to Count 3 of the Amended Information.

If the defendant's convictions are not reversed, then the defendant respectfully requests that this Court reverse the denial of the Postconviction Motion as it related to the defendant's total sentence of 40 years, and order that he be resentenced.

Dated: April 10, 2017
Milwaukee, Wisconsin

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) Wis. Stats. for a brief produced with a proportional serif font.

The brief contains 10,934 words.

Dated: April 10, 2017

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Esther Cohen Lee
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CERTIFICATION AS TO COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic brief 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 paper copies of this brief filed with the court and served on all opposing parties.

Dated: April 10, 2017

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