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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal NO.:2018AP00591

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO SIMMONS,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND ORDER DENYING POSTCONVICTION DNA TESTING, ENTERED JULY 21, 2017 IN THE CIRCUIT COURT FOR THE MILWAUKEE COUNTY, THE HONORABLE WILLIAM POCAN PRESIDING, AND FROM DECISIONS AND ORDERS DENYING MOTIONS FOR RECONSIDERATION AND SUPPLEMENTAL BRIEFING ENTERED ON FEBRUARY 20, 2018 AND MARCH 9, 2018 IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DAVID A. HANSHER PRESIDING

DEFENDANT-APPELLANT'S CHIEF BRIEF

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STATEMENT OF ISSUES

1. The circuit courts erroneously exercised their discretion when they determined the credibility of the 4 eyewitnesses from the appellant's trial was so great that the appellant could never overcome their identification of him as being the shooter, even if someone else's DNA and fingerprints are found on the evidence appellant seeks to have tested.

Answered below: Without holding any evidentiary hearing as requested, the trial court denied Mr. Simmons' request for post-conviction DNA testing.

2. The circuit courts erroneously exercised their discretion when they determined the credibility of the 4 eyewitnesses from the appellant's trial outweighed any DNA test results that could be obtained and would not have had any material impact on the prosecution or the outcome of the trial in this case, and by completely failing to consider what such DNA test results would have had upon the investigation and third party defense.

Answered below: Without holding any evidentiary hearing as requested, the trial court denied Simmons' request for post-conviction DNA testing.

3. The circuit courts decisions were also factually and legally flawed in three other respects.

Answered below: Without holding any evidentiary hearing as requested, the trial court denied Simmons' request for post-conviction DNA testing.

4. The circuit court's decision and order denying Simmons' motion for supplemental briefing is an erroneous exercise of discretion because it has entered its judgment contrary to due process.

Answered below: Without holding any evidentiary hearing as requested, the trial court denied Simmons' motion for supplemental briefing.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous arguments concerning which oral arguments may be denied under Rule 809.22(2)(a).

Publication likely is justified under Wis. Stat. 809.23 (Rule). Although Simmons' entitlement to relief is clear under the already established authority regarding the meaning of "Reasonable probability of a different result", it seems that 974.07 litigants have differing opinions as to what standard of review is appropriate in such cases as this one. Is it the old evidence and the new evidence standard under ***State v. McCallum***, 208 Wis.2d 463, 561 N.W.2d (1997)? Or is it the undermine confidence in the outcome of the case standard under ***Strickland v. Washington***, 466 U.S. 668 (1984)?

Additionally, the standard of review of the circuit courts decisions is also up for a decision on "*De novo* Review" or Deferential Review" and publication is further warranted as a guide for the circuit courts to follow in these line of cases and as a reminder that a party's arguments cannot be adopted without some explanation. Cutting corners by merely adopting a party's argument is not permitted. (In this case, the State's argument was adopted by the circuit court and that circuit court's factual and legal findings were adopted by a different circuit court). This activity obscures the reasoning process of those circuit court Judges and causes litigants to believe they did not get a fair shake from the courts. ***Walton v. United Consumers Club, Inc***, 786 F. 2d 303, 313 (7th Cir.1986); ***DiLeo v. Ernst & Young***, 901 F.2d 624, 626 (7th Cir.1990).

STATEMENT OF THE FACTS & CASE

On July 8, 2000, inside the Cap Tap bar, during the early morning hours, a scuffle between two men broke out as a pushing and shoving match wherein one patron, J.G., struck the other patron, Antonio Simmons, over the head with a glass bottle causing Simmons to bleed profusely from the head wound, into his face. (R.141:21, 41) and (R.143: 70) and (R.78 Exhibit 3) and (APP-100-106).

Security staff member, Tyrone Ramsey and other patrons quickly broke up the scuffle Ramsey ordered J.G., his sister P.G. and her friend A.C., to leave the tavern and Ramsey then escorted all three out of the bar to the parking lot area. (R.141:22-23, 39, 62-63, 94, 114-116) and (R.142:21, 33, 42, 58-59), (APP-105-106).

45 seconds after these individuals got into a black Pontiac Grand Am and drove to the intersection at 42nd and West Capitol Drive, a shooting occurred between a white car and the victim's car. Simmons was held inside the Cap Tap for 10 to 15 minutes by security before being released to leave. (R.142:133). J.G., P.G., A.C., and Ramsey described the shooting differently to the police and to the jury. Each police statement contradicts their trial testimony. See J.G. (APP 100-101, compare with (R.141:20-52); P.G (APP-101-102, compare with (R. 141:57-81); A.C. (App 103-105, compare with (R.142:112-125); Ramsey (App 105-106, compare with (R. 142:128-150).

The statements of the four eyewitnesses were made to the police during their investigation of the shooting. These are the official Police Reports of the

witnesses versions of the actual events that took place on July 8, 2000 (APP-100-106).

Immediately after the shooting, a citizen flagged down Officers Marlon Davis and Larry White, pointed to a white car and told them someone inside the white car shot someone in the black car and the Officers gave chase to the white car wherein they apprehended a female, black, known as Zakea Jones, sitting in the driver's seat, and that Jones told them her passenger, C-note, fled from the car (R.78: exhibit 1), (APP-119-120).

Jones told the police that she was driving the car and she was with C-Note who fled when she stopped the car. Jones also provided Simmons with an attorney Micheal Chernin and told Chernin that she was responsible for the shooting. When Chernin lied to Jones telling her Simmons did not want her to testify at trial Jones signed a confession in which she admitted doing the shooting (R.78: exhibits 1, 6), (APP-119-120).

On July 19, 2000, the prosecutor charged Simmons with 2 counts of first degree recklessly endangering safety while armed and 1 count of second degree recklessly endangering safety while armed (R.1).

Just before trial began, the prosecutions above 4 witnesses hadn't shown up and the prosecutor told the trial court that "they didn't show up for trial due to the fact that they all had given different versions as to what happened". (R.141:16). The witnesses then showed up and trial counsel immediately motioned the court to sequester the 4 witnesses to prevent them from shaping their testimony. The trial

court refused to sequester J.G., P.G., and A.C. but did sequester Ramsey (R.141: 81-84,97-99).

Simmons was arrested and willingly talked with detectives without counsel present. Simmons told them he went to the Cap Tap bar with his friend John Lindsey in Lindsey's red Cutlass and that while inside the bar, a huge guy he'd never seen struck him over the head with a bottle causing him to bleed and that he and Lindsey left the bar after the huge guy left and were going to the hospital but decided not to check in because he had open warrants out on him (R.78 exhibit 36 ¶¶ 1, 3, 7), (APP-140).

Prior to trial and prior to counsel obtaining discovery Simmons told counsel Toronto Wooten, Cleeburn Peel and Tawanda Jones were present at the Cap Tap bar and saw him leave the bar in a red car. (R.124 ¶¶1-4); (APP-129-130), (APP-131).

At trial, J.G., P.G., A.C., and Ramsey all testified to a whole different scenario than what they described shortly after the shooting (APP-100-106). These witnesses gave their versions of the shooting right after it took place, which is when their memories are at their freshest. However, 8 months later, at trial they completely changed almost everything they originally claimed and they did so without trial counsel challenging them with their police statements. It is not Simmons intent to relitigate these ineffective assistance of counsel claims in this action.

After the witnesses testified, the court held a discussion with counsels. It found that Detective Kevin Armbruster showed up at A.C.'s home at 3:30 AM and showed her a photo array and Armbruster did not file a supplemental report on the identification. (R.142:154).

A.C. testified that Armbruster came to her house at 3:30 AM, and showed her a photo array. (R.142:126-127). During the sidebar, trial counsel learned of the withheld evidence of the photo array and lack of a supplemental report being filed on it. The trial court allowed A.C.'s testimony in court/ out of court identification of Simmons to stand even though Det. Armbruster admitted he never filed a supplemental report or copy of the photo array (R.142:154-166). **MPD** protocol demands a supplemental report and copy of the photo array to be filed by the police. (APP 180-183).

The next witness to testify was Detective Armbruster. The prosecutor asked a question in a very peculiar way. A way that he did not duplicate with the other detective that testified. He asked Armbruster, "And, at this location did you recover any evidence that you inventoried and kept as police evidence?" Armbruster replied, "Yes I did". The prosecutor asked him, "What did you recover?" and Armbruster replied, "Casings". (R.143:13-14).

Looking at Armbruster's police report that he wrote, he asserts he observed a .380 casing behind the driver's seat on the floor. On the front passenger, side floor was a small bottle of champagne, along with a larger bottle of E&J Brandy, which was half-full, underneath the passenger's seat. Behind the passenger's seat

in the rear of the vehicle, was a black baseball cap, with a New York Mets symbol in blue. Just to the north of the vehicle, a silk head wrap had been lying there, along with two shoes. (APP-121).

Armbruster testified falsely when he said he only recovered casings. (R.143:13-14). In the same police report above, he also said that he summoned the police photographer and fingerprint analyst (APP-121), (APP-126). Armbruster's notes were confiscated by order of the trial court and within the notes was a diagram of the white car's resting spot and in it, Armbruster diagramed where the above evidence was located. Armbruster false testimony kept the defense from seeking, pretrial, DNA testing of the items found inside and outside the white car. (APP-137).

Armbruster further testified that when he arrived where the white car was he observed a black female 20 feet away from the car. (R.143:17). And that when Officer Davis arrived on the scene he only saw the woman and she was already outside the vehicle. (R.143:18).

Officer Marlon Davis asserted that when he chased the white car and came upon it, a black female was sitting in the driver's seat and she told him that a male passenger, C-note, had fled from the car (APP-122-123). Davis report and (APP-119-120). Jones confession to the shooting.

However, for some unknown reason, Armbruster asserted Davis told him Jones was 20 feet from the car, and we know that is a lie. Look at Armbruster's hand drawn diagram (APP-137). He write's "Driver" next to Jones name and

changed it to "Pass", which it must mean passenger, because the word "driver" is exed out! Davis report clearly identifies Jones as the lone occupant sitting in the driver's seat when he pulled up to the car. (APP-122-123).

Armbruster is a homicide detective, trained in evidence gathering techniques. He identifies a .380 casing in the rear seat area and seven 9mm casings, he finds 100 feet away from the white car as the evidence he inventoried and kept as police evidence. The liquor bottles, baseball hat, silk head wrap, and shoes are also inside and next to the car and Armbruster identified them in his police report and had an evidence tech photograph and fingerprint the items but fails to identify to the jury, all of the above items other than the casings he found. He keeps evidence found 100 feet away from the white car but not evidence found inside and near the white car. (APP-121,126,127).

Armbruster admits that Simmons' fingerprints were not found in or on the white car. (R.143:41-42).

Detective Micheal Dubis is sworn in and the prosecutor asked him: "Did you investigate the crime scene of that shooting?" Dubis replied "Yes." And the prosecutor asked, "What did you do specifically?" (R.143:44). The prosecutor didn't phrase his question about what Dubis found, in any way similar to what he did with Armbruster.

Dubis then testified that he discovered seven bullet holes in the opera window of the black car that J.G. was in and that these seven bullet holes were in a tight 6-inch diameter circle. (R.143:43-45).

The prosecutor then qualifies Dubis as an expert on crime scene investigation and preservations and comparisons between respective calibers. (R.143:48).

Dubis admits he recovered six shell casings, .380 caliber from the scene of the shooting and one .380 casing from the rear seat of the white car for a total of seven casings. (R.143:50). Dubis admits that Armbruster is his former partner and that it was Armbruster that found the seventh .380 casing in the white car. (R.143:51-52).

Dubis further testified that the shooter in this case fired all seven shots from a fixed position in a rapid succession.(142:55) That the shooter was either inside of the white car or right next to it when he or she fired the seven shots. (R.143:56). Simmons' fingerprints were not found on any of the casings submitted to the crime lab. (R.143:58).

The jury convicted Simmons. The trial court gave Simmons 15 yrs. on cts one and two, consecutive, bifurcated into 10 years initial confinement and five years ES. On ct. three he was sentenced to 9 years, bifurcated into 6 yrs initial confinement and 3 year ES (APP-112).

Simmons filed a demand pursuant to 974.07(6) and a motion for postconviction DNA testing pursuant to 974.07 (R.77). Judge Pocan stated that whether some of the evidence still exist is unclear and ordered the State to respond (R.79). The State replied (R.80). Simmons filed his response (R.87). Judge Pocan

denied the motion. He also did not order the State to preserve the evidence pursuant to 974.07(9) (R.90).

Simmons motioned for reconsideration (R.91). Judge Hansher stated that whether some of that evidence still exists for testing purposes is an issue that was raised by the defendant in his motion for DNA testing but was not addressed by the State or Judge Pocan and ordered supplemental briefing (R.92). The State filed an affidavit regarding the evidence that Simmons seeks DNA testing (R.93). Simmons replied to the surprise affidavit and asked for a hearing (R.115). Judge Hansher denied relief (R.128). Simmons sought supplemental briefing on the issue and requested a hearing but was denied (R.131 and 132). Simmons now appeals.

ARGUMENT

I. THE CIRCUIT COURTS ERRONESOULY EXERCISED THEIR DISCRETION WHEN THEY DETERMINED THE CREDIBILTY OF THE FOUR EYEWITNESSES FROM THE APPELLANT'S TRIAL WAS SO GREAT THAT THE APPELLANT COULD NEVER OVERCOME THEIR IDENTIFICATION OF HIM AS BEING THE SHOOTER, EVEN IF SOMEONE ELSES DNA IS FOUND ON THE EVIDENCE APPELLANT SEEKS TO HAVE TESTED.

On July 21, 2017, the circuit court issued its decision on the motion for postconviction DNA evidence testing filed by the appellant in this action (APP-107-109).

In the circuit court's decision, the court stated:

"Even assuming the defendant has satisfied the requirements of Section 974.07 (a)3., Stats. (Did it mean to state 974.07.07(a3?) the court is not persuaded that there is a reasonable probability that DNA testing of the bullet casings would

have had any material impact on the prosecution of this case or the outcome of the trial, *particularly given the eyewitness testimony.* (Emphasis added),

The jury was obviously satisfied about the defendant's guilt beyond a reasonable doubt, without the benefit of DNA evidence. (Emphasis added). The court finds that there is not a reasonable probability that DNA evidence relating to the bullet casings- - or any of the other items- -would have altered the verdict, and therefore, the defendant has not met his burden for DNA testing at public expense under Section 974.07(7)(a), Stats." (APP-108).

Emphasis on the underlined above relates to the Circuit Court's misinterpretation of the law, and/or to its erroneous exercise of its discretion by improperly applying facts to a statute that does not allow for such determinations to be made[1].

Judge Pocan made the decision spoken above. His many findings and conclusions were adopted by Judge Hansher (APP-107-118). Neither Judge was the trial court Judge and this Court reviews their decisions *de novo*. ***State v. Herfel***, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (Wis. 1971). ***Oceans v. State***, 70 Wis.2d 179, 187, 233 N.W.2d 457 (1975).

The circuit courts interpreted 974.07 (7)(a)1,2,3 Stats., to mean

"***assuming*** the defendant has satisfied the requirements of Section 974.07 (a)3, the court is not persuaded that there is a reasonable probability that DNA testing of the bullet casings would have any material impact on the prosecution or the outcome due to the eyewitnesses testimony in this case." (APP-108).

If the court ***assumes*** this defendant met the requirements of the statute, then it must order DNA testing of the evidence. The Statute states this to be true:

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[1] Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. ***McClearly v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512. This process must depend upon facts that are of the record or that are reasonably derived by inference from the record and conclusion based on logical rationale founded upon proper legal standards

"A court in which a motion under sub 2 is filed *shall order* DNA testing *if* all the following apply." 974.07(7)(a)1,2,3.

On top of this, the courts statement that:

"*DNA testing of the bullet casings would not have any material impact on the prosecution of this case or the outcome of the trial particularly given the eyewitness testimony*". (APP-109,114-115).

is severely flawed in its application of facts to the Statute.

The Statute does not require the DNA evidence to "materially impact" anything. It requires the evidence to be relevant. 974.07(2)(a). The Statute cited above states the evidence must be relevant to the "investigation, or prosecution that resulted in the conviction", and the circuit courts application of the Statute in the described manner herein, leads to the conclusion that "No DNA evidence would undermine eyewitness testimony". (APP-109,114-115).

Judge Pocan's decision denying Simmons motion is a footnote #1 at APP-107. Judge Pocan placed a lot of emphasis on small portions of the 4 eyewitnesses testimony. The footnote is nowhere near, what was fully stated at the trial. A simple reading of the four witnesses trial testimony and the statements that they gave to the police (APP-100-106) prove they did lie to the jury and the police. Compare their statements to the police with what they testified to at trial and it is very clear that all four witnesses are fabricating their testimony in an effort to get Simmons convicted. Three of the four witnesses were allowed to sit in the courtroom while each one testified. Amazingly, all four witnesses identified Simmons as the shooter in the white Chevy *Beretta*. (R.90:1-3 at pg. 1 fn.

However, Zakea Jones was arrested in a White Chevy *Cavalier* not a Berretta that the witnesses swore to. Based upon the fact that Judge Hansher adopted Judge Pocan's findings and conclusions completely, Simmons argues that "Both the circuit courts erroneously exercised their discretion" under one caption for the claims.

Both circuit courts had the trial testimony of all four eyewitnesses and the police reports that correspond with each witness, by name. (APP-100-106) attached to the appendix of this brief and attached to the 974.07 motion filed by Simmons and in the appeal of that action (R.77,78), (R.54:1-113), (R.145:1-19), (R.146:1-32), (R.147:1-79), (APP-141-152).

At trial, Ramsey testified that he had one conviction. (R.142:145). (Ramsey actually has seven convictions (APP-191-192)). Ramsey told the police that "Tone sped eastbound on Capitol toward a pedestrian Tone believed was J.G., realized it was not J.G., drove to 41st made a u-turn and sped back up west Capitol Drive toward 42nd St. where the victims black car was and he seen Tone firing a handgun at the black car". (APP-106).

At trial Ramsey claimed he seen Simmons leave in the white car heading east out of the alley toward 42nd St. (R.142:136). That Simmons parked the white car by the currency exchange and shoot about 4 or 5 times at the island where the Gray's car was. (R.142:138-139). That Simmons then sped off down 42nd St. (R.142:142). Ramsey testified that the 3 of them got into their car and he told them

to drive off so they don't have any problems and they said okay. He said he kept Simmons in the bar for 10 to 15 minutes. (R.142:133).

P.G. testified that she drove into the island area on 42nd and W. Capitol dr. and 45 seconds to a minute later Simmons pulled up and started shooting. (R.141:102).

With that time line, Ramsey's testimony of holding Simmons for 10 to 15 minutes, makes it an impossibility for Simmons to be the shooter. Its 10 to 15 minutes. 10 minutes minus 45 seconds is 9 minutes, 15 seconds that Simmons is still held inside the Cap Tap.

Who's a reliable witness in this case? All four witnesses constantly contradict each other and the evidence contradicts all four of them. If one witness is telling the truth, the other three are lying.

The circuit courts both claim that no DNA testing results could possibly exculpate Simmons, when in fact, there are a number of possible exculpatory DNA testing results that would create a reasonable probability of a different outcome[2]. See Argument II.

The circuit courts erred not only in its application of the statutory requirements to the facts but in their interpretation of the statutory language. If exculpatory DNA testing results would have been available before or during trial,

[2] It is likely that Jones and or C-Note in loading the gun touched the casings leaving touch DNA on the evidence. It is likely that Jones and or C-Note were drinking from the bottles of alcohol, which would have touch DNA and saliva on them. It is likely that Jones and or C-Note wore the hat, head wrap, and shoes, which would have, sweat DNA on them. (APP-186-190).

there is indeed a reasonable probability that Simmons would not have been prosecuted, or, if he were, the jury would not have found Simmons guilty.

We have trial testimony from three eyewitnesses that show there was another person inside the white car. A female person according to P.G. (R.141:66). Although these witnesses claim Simmons was the driver, their testimony on that specific point is controversial. P.G. told the police she seen Simmons as the driver in the white car but A.C. told the police her and P.G. ducked down right away. They could not have seen the driver since they are ducked down. (APP-105).

These four eyewitnesses gave different stories to the police and then testified to something different than their statements said. P.G. stated:

> "She and A.C. jumped out of the car and start running, at which time she ran to the Cap Tap to call the police. She stated that just as she got to the Cap Tap that the white car had a made a u-turn from Capitol Drive and West Sherman and came back past them, stopped, at which time she saw the driver "Tone" and an unknown passenger in the car and he told her 'that's how I do it." (APP-102).

P.G.'s trial testimony is much different from her police statement on the subject. But, first we will show what A.C. said:

> "She became aware of a white car on their right side of their vehicle and at that time, she heard approximately eight gunshots. A.C. said that both she and P.G. ducked down and P.G. opened the driver's side door of the car and rolled out and that she, A.C. rolled out the passenger side of the car. A.C. said their car continued northbound with no driver and that she saw the white car drive northbound on 42nd street from the scene. A.C. said that she then ran to the Cap Tap bar to call 9-1-1, before she returned to the car and discovered J.G. had been struck by gunfire." (APP-105).

A.C.'s trial testimony is much different than her police statement on this subject. *Id. Supra*.

The circuit courts do not recite any differences between these witnesses testimony and the police statements. Rather than consider all of the relevant

evidence, these Courts recited small bits that had appeal to them as being 'substantial" and "compelling" evidence that would over-come any kind of DNA test results. (APP-108) and (APP-109), (R.90:2-3) and (APP-114-115), (R.128:4-5). Statements given to the police by the victims and witnesses, that tell us what these witnesses saw and heard, but end up being inconsistent to what the witnesses claim happened, in their trial testimony, can and should be used as impeachment tools, as permitted by Wisconsin State Statutes. Wisconsin law as long held that impeachment evidence may be enough to warrant a new trial. ***Birdsall v. Fraenzel***, 154 Wis. 48, 52 142 N.W.2d 274 (1913); §901.04(5) Weight and credibility; §904.02; §906.13 prior statements of witnesses; ***State v. Smith***, 254 Wis. 2d 654, 648 N.W.2d 15 (Ct. App. 2002)

P.G. claims "Tone" drove back to where they stood and told her "That's how I do it". A.C. does not say anything like that, and she directly calls into question P.G.'s statement when she, A.C. stated, "the white car drove northbound on 42nd away from the scene." (APP-102) versus (APP-105). This is a huge difference between two witnesses standing together, that J.G. said Tone drove off in an unknown direction. (APP-100-101).

P.G. stated that she seen her brother J.G. strike Tone across the head with a glass. (APP-101). J.G. claimed it was a bottle. (APP-100). A.C. describes the incident as "at this time I became aware of a person I know as "Tone", walk over to J.G. say something to him which I could not hear and I saw J.G. throw a punch at Tone. (APP-104). Nothing matches!

P.G. and A.C. don't claim that the driver of the white car said any words such as what J.G. has described. Both of their assertions are that when the white car pulled up to them the ***driver started shooting right away***. No words were spoken according to both of them.

The circuit courts did not make any mention of this evidence, other than briefly stating what each witness claimed, and stale affidavits (APP-108-109) and the briefs filed during the prior postconviction litigation (APP-110) and a prior motion submitted at sentencing in which an affidavit from Jones admitted she was the shooter, along with a friend named "C-Note" (APP-111), and an excerpt from the Court of Appeals decision stating the eyewitnesses evidence was substantial and compelling (APP-112), and an extensive *pro se* postconviction motion filed in December 2005 and additional affidavits from people that were attached to that action, were all reviewed prior to making their decisions (APP-113).

The Appellate Court on 7-30-04 stated:

> "The evidence-testimony from the three occupants of the G's car and from Ramsey; Simmons obvious motive for retaliation; Simmons' telling [J.G] to die as he was shooting [him]," followed by Simmons circling of the car and taunting G's sister, "yeah that's how I do it" –is substantial and compelling. Thus, at most, Simmons has established a possibility that a new trial could produce a different result (APP-168).

The arguments and facts presented herein undermine this court's 2004 decision by proving none of the above could be true.

The police statements are significant to this action because it proves that the eyewitness's versions of events differ from each other and significantly differ

from their trial testimony. A jury looking at this evidence, Jones statement that she made to Officer Davis, directly after the shooting, and the fact that Davis found her in the driver's seat of the white car when it came to a stop after the police chase, the fact that nothing from Simmons was found in the white car, DNA, fingerprints, or blood that should have been found, had Simmons been in that car, would not convict Simmons today. J.G. is asked if Simmons is bleeding from his head and J.G. said yes (R.141:52). If Simmons is inside of that white car, there should be blood drops, smears, etc, in, on and around the car itself, or on the items inside of that car.

However, if Simmons blood, DNA and fingerprints are not in, or on any items in or around that car, it makes it more likely that he was not the driver of that car or the shooter. Furthermore, if any DNA evidence or any fingerprints are found that would identify "C-Note" and place him inside of that car, along with evidence showing Jones' DNA and or fingerprints are on the bullet casings, would have allowed the jury to give much less weight to the 4 eyewitnesses testimony, and allow Simmons to prove a 3rd party committed the crime, not Simmons.

Additionally, if C-Notes DNA or fingerprints are on the bullet casings it would also be relevant to the outcome of the proceedings because it would place him with Jones as having involvement in the shooting.

We also are showing this Court that the circuit courts did not take into consideration the fact that Simmons description given by eyewitness A.C. and Ramsey were very different to how Simmons looks and was wearing the night in

question. Keeping in mind that the witnesses are describing a person, they know as "Tone" and have seen him around and as a patron in the bar on different occasions. First, A.C. describes "Tone" 5'7" tall, slim build, dark complexion, wearing a *multi-colored shirt light and dark in color*, and early 20s, low cut hairstyle, mustache and goatee and crooked teeth. Ramsey describes Tone as 25 to 27 years old, 5'2" tall, 150-160 lbs, average build, medium complexion with a slight mustache and goatee, wearing a *dark blue shirt* and has a short hairstyle. (APP-104,106). Tone's description is different than Simmons description taken at trial. J.G at trial states that Simmons is about 5'2" and 130 lbs. (R.141:39-41).

With all of these different descriptions of what took place in the bar and during the shooting, and comparing them to trial testimony, one can only conclude that something occurred between the 4 eyewitnesses, such as rehearsing their testimony and or having been allowed by Judge Crawford to remain inside the courtroom while each other testified allowed them to tailor their testimony. It's just so different from what their police statements are, and too close to each other's trial testimony. The State withheld the photo array and the investigating detectives failed to make a supplemental report about the identification procedure. (APP-180-183). These facts all render their identification of Simmons as being questionable. Its most certainly proof that their testimony doesn't deserve the rating of "substantial or compelling" and allows for DNA testing to be done on the evidence requested by Simmons. It certainly shows the circuit courts placed too much emphasis on the 4 eyewitness's testimony when determining their testimony

outweighs Simmons' right to DNA testing and a 3rd party defense, which was prevented from being raised at trial due to police and prosecutorial misconduct in withholding the evidence and failing to test it. The items are listed in Armbruster's report, but not on his inventory sheet. The proof of this is contained in Armbruster's report, attached as (APP-121).

The reliability of the four eyewitnesses testimony would be severely hampered by DNA test results that lead to the conclusion that a third person acted alone and Simmons was in a completely different car.

In this case we have evidence from inside of the white car and outside of the white car (APP-121), which could reasonably affect the judgment of the jury and the "credibility" of those 4 eyewitnesses. ***Napue v. Illinois***, 360 U.S. 264, 271 (1959).

If Jones and or C-Note's DNA and or fingerprints are on the bullet casings, alcohol bottles, head wrap, shoes, hat, car parts, etc, it would give rise to Simmons due process right to present a third party defense as well as evidence to impeach those 4 eyewitnesses.

Furthermore, that evidence would reasonably undermine the investigation because Armbruster documented the evidence, had a police photographer take photos of all that evidence, take fingerprints of the evidence, and based on the record, never took the evidence to the crime lab. This evidence is what appellant seeks to have DNA testing on. This evidence would have assisted him in preparing his defense and trial counsel's trial strategies. ***Kyles v. Whitley***, 514 U.S. 419

(1995). In ***Kyles***, we must remember that he too had four eyewitnesses that were at the scene of the crime, three of which had picked ***Kyles*** out of a photo array. All four of them identified ***Kyles*** to the jury during their testimony, pointing to him and stating he is the shooter. ***Kyles*** was convicted in second trial after the first trial ended in a mistrial. ***Kyles***, at 430-431.

In ***Kyles***, the prosecutor withheld the four eyewitnesses statements that they had made to the police. These statements would have weakened the State's case against ***Kyles***. ***Kyles*** at 440-441. ***Kyles*** involves the withholding of those four statements. Simmons involves trial counsel himself as withholding those 4 eyewitnesses statements from the jury, although he did use some of the facts in their statements as "question", he failed to present those statements to the jury in a fashion that would have undermined their credibility, and Simmons' presentation of a third party defense, with evidence to support it, would reasonably result in a different result at Simmons' trial. (APP-119-120) and (APP-100-106).

We must now look at the impact of why these witnesses would lie about Simmons. First, we know every one of them are related by blood and or friendship. P.G. and J.G. are brother and sister. Ramsey is their cousin and A.C. is their friend. All of their police statements contradict each other's and their trial testimony isn't close to what they verbally told to the police in their police statements. These are credible witnesses with compelling evidence of Simmons' guilt?

J.G., P.G., A.C., and Ramsey communicated to the prosecutor that they didn't want to testify because they'd all given inconsistent statements to the police when the shooting occurred. The prosecutor related this fact to the trial court, stating, "They didn't show up for trial due to the fact that they all had given different versions as to what happened." (R.141:16).

With the knowledge of the above facts and the facts that do prove they gave different versions of what took place during the shooting, when they related it to the detectives, combined with A.C.'s very troubling admission at trial that she J.G., and P.G. all talked about the shooting after it happened but as time went on, they talked of it less and less (R.142:123-124). It is easy to make the conclusion that together they rehearsed their testimony to make it more consistent and more believable. Thereby corrupting the trial process itself and rendering their credibility questionable.

We further know that Det. Armbruster, a known forger of what witnesses need to say at trial, visited A.C. at 3:30 AM, on or around July 10, 2000 and purportedly showed her a photo array that allegedly contained Simmons' photo in it. For all we know, the detective only showed her one photo or 6 different photos of the same person, Mr. Simmons. Why? Because Armbruster never filed any supplemental report or the photo array identification number or of his visit with A.C. at 3:30 in A.M (R.143:5).

Combine the above information with the fact that on the night of the shooting, A.C. could not identify any person because she made the statement that

she only became aware of a white car, heard shots and ducked down. She never seen Simmons or anyone else. (APP-104-105).

After this trial and a short time ago, the appellant became aware of a case decided by the Seventh Circuit. ***Avery v. City Of Milwaukee***, (APP-153-161). In this case, multiple detectives of the MPD were found to have forced witnesses to testify falsely at Avery's trial for homicide. **Armbruster** was one of those detectives specifically named by the Seventh Circuit as making witnesses testify falsely, including given them instructions on what they had to testify to at Avery's trial.

Avery's case took place between 1998 and 2004, during Simmons' case which began in 2000. Is it a stretch to believe that Armbruster spoke with A.C., and told her he "knows" who did the shooting and then he showed her a photo of Simmons and told her he is the man that shot at her friends. Nothing else explains how A.C., whom we know did not see the driver of the white car, suddenly, at trial, claimed she clearly saw Simmons face that night and knows his name?

To the police, A.C. stated she heard about 8 gunshots. (APP-104-105). At trial, she said 10 to 12 shots fired (R.142:118-121). To the police she said she became aware of a white car alongside of them and heard about eight shots and ducked down and rolled out the passenger door and ran back to the Cap Tap bar. (APP-104-105). At trial, she said she heard burning rubber of car wheels and she turned to her right side and seen Antonio Simmons with a gun, shooting. *Id.* (R.142:117). These are significant differences and they don't stop here.

To the police she only became aware of a white car but at trial she asserts that the white car is so close she can reach out and touch it and that its close enough she can see Simmons clearly. (R.142:118).

At trial, she also admits to learning things about the shooting. (R.142:123-124). To the police she said she became aware of a white car, but at trial, she described the car identically to how P.G. said the car looked and what make it was. Both women said it's a ***Beretta***, Chevy 2 door. (R.142:124). The car is actually a Cavalier, Chevy 2 door. (R.142:124). To further her outright lies, she states the burning rubber was not a car braking. (R.142:124). P.G. also makes this same claim in her testimony at trial, but on re-examination she is clear when she said the car came upon them in a rush and tried to stop immediately. Braking, not accelerating. (R.142:107).

A.C. claimed the white car was burning rubber, as in accelerating, and P.G. claimed the white car was skidding to a stop (R.142:124), (R.142:107). But, consider J.G.'s version of the white car and their car. J.G. said he "saw a little white car pull up next to her on the passenger side and then the only thing he heard was the window shatter." (R.141:25). We have yet another version of the white car by the Currency Exchange, next door to the Cap Tap bar, got out of his car, ran to the intersection/island area and started shooting then ran back to his white car and sped off northbound. (R.142:139, 142).

J.G. described the position of the white car as being in their "blind spot" on the rear, passenger side of their car, so Simmons was firing through the Opera

window of their car, Simmons would have to be at least a couple feet away from their car for the proper angle to fit J.G. and P.G.'s description of the shooting. (R.141:48-52). Interesting theory. If the shooter is in that spot, he'd never be able to open his own car door and get out to continue shooting at J.G. We already know, from the expert that the shooter fired seven rapid shots into a 6-inch diameter circle in the Opera window, from a *fixed position*. (R.143:55) (Emphasis added).

A fixed position is not "running alongside of their car" such as J.G. attempts to make the jury believe when he claimed Simmons put his car in park, got out and ran alongside him, firing shots and telling him "die mother fucker, die". (R.141:49-51). (Again, words no else heard and different words than he claimed to the police).

A.C.'s explanation of the white car, at trial, is even more astounding. "I turned to my right side and I seen Antonio Simmons with a gun shooting." (R.142:117). She then claims she was only one to two feet away from him, about arm distance. (R.142:118). She then claims nothing obstructed her view of Simmons. (R.142:118).

Her next act is to duck and go out through the driver's side door with P.G. (R.142:119). She then said the reason she went out the door with P.G is she was afraid he was going to shoot her. (R.142:119). These statements are nothing like she stated to the police right after the shooting "I became aware of a white car, heard about 8 shots and ducked down and rolled out the passenger side door and

P.G. went out the driver's side door." (APP-104-105). J.G. testified that once he was shot and the shooter left, he fell half way outside of the car passenger's side door, that the passenger door was open. (R.141:29). "Half my body was in the car, half was out" and when asked if he opened the door, no, my sister and them opened the door they jumped out and rolled out, the doors was still open as the car was moving." (R.141:29).

A.C. originally told the police that she went out the passenger side door and P.G. went out the driver's side door. (APP-105). At trial, her whole story changed in such a way that it semi-supports P.G. in some ways. Whatever we read about in the transcripts and police reports varies in so many ways as to call into question, the 4 witness's credibility. A.C.'s identification of Simmons is truly a lie. The descriptions of the white car's placement compared to their black car, make it impossible for each witness to accurately identify any person driving that white car. The fight in the bar made these witnesses believe it has to be Simmons. To them, it only makes sense so they embellish their stories to convict Simmons

What they did not know was that Simmons and Jones are a couple and that Jones is a very protective woman whom is known to carry a gun at all times. What they also did not know is that Jones confessed to the crime they blamed Simmons for. Her confession was given to Det. Armbruster who told her she didn't do it, Simmons did so Jones left it alone until Simmons was convicted. Jones did tell Simmons trial counsel that she did the shooting and counsel told her to leave it alone. (APP-119-120). Jones watched her man get hit in the head with a bottle and

get knocked to the floor, bleeding from his head wound. Simmons tells Jones he's going to the hospital with his friend Lindsey in Lindsey's car because Jones had been drinking and he didn't want her to be drinking and driving. Jones had motive to do the shooting, did the shooting and confessed to her actions but to this date, Simmons remains convicted.

J.G. got hit first, across the right cheek by a bullet fired from a .380 caliber weapon. It seems logical that his head gets spun to the left and he ducks down to avoid bullets. Its not logical that he would be looking at a person shooting at him when all 6 of the other bullets went in from back to front and the 7th bullet, which is the first shot, hits him from the right to left side. He cannot possibly be in any position to watch the shooter. P.G. got hit by the bullet that went through her brother's cheek and she immediately ducked down with A.C. None of these people seen "who" the shooter was. They simply think it was Simmons due to the fight.

Over the past decade, there have been extensive studies on the issue of identification evidence, research that is impossible to ignore. These studies confirm that eyewitnesses testimony is often "hopelessly unreliable". ***Commonwealth v. Johnson***, 650 N.E.2d. 1257, 1262 (Mass.1995). The research strongly supports the conclusion that 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. ***Wells, Eyewitness Identification Procedures, 22L. & Human behavior***, at 6. See also

Christopher Ochoa, National Registry Of Exonerations. Htpp://www.law.umich.edu/special/exoneration/pages/casedetail.aspxcaseid=3511

See also ***Godschalk v. Montgomery Co. Dist. Atty Office***, 177 F. Supp.2d 366, (E.D. Pa.2001). The federal court ordered postconviction DNA testing even though the evidence against ***Godschalk*** was overwhelming. *Id* at 370.

The circuit courts findings that the four eyewitnesses credibility was overwhelming evidence of Simmons' guilt that outweigh DNA tests results, no matter if they are exculpatory, was an erroneous exercise of their discretion. The courts decisions are in conflict with the record facts in this case and as such, do not comport with proper legal standards. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

Further evidence that was disregarded by the circuit courts are the affidavits presented to those courts. See Kina Jackson's affidavit (APP-124-125). Wherein she avers that *Simmons was struck in the head and she observed him leave with a male individual, that Simmons got into the passenger seat and the car went eastbound.*

See also the affidavit of Sherie Purifoy, (APP-127-128), in which she avers that *she seen Simmons get hit over the head and shortly after she seen him leave as a passenger in a red car driven by a man she knows as "John".*

See also, Toronto Wooten's affidavit that avers that *he saw a guy smack Simmons over the head with a glass, and* ***Wooten held Simmons for 15 minutes till the guy that hit him left with two females****. That Simmons had blood pouring*

from his head and he let him go, at that time he saw Simmons leave with a guy name John in a red car. (APP-129). Supported by Ramsey's testimony of Simmons held in the bar for 10 to 15 minutes (R.142:133).(Emphasis added).

See also, Cleeburn Peel's affidavit wherein he avers that *he seen Simmons get hit over the head and start bleeding. Simmons left with a guy friend he knows as John, in a red Cutlass two door.* (APP-130). The others affidavits also state the red car is a Cutlass. These affidavits describe events these witnesses observed.

Tawanda Jones affidavit stated that *she seen Simmons get hit in the head and start bleeding,* ***that another guy held onto him for about 15 minutes*** *and she seen Simmons then get into a red car as a passenger and another guy was driving them eastbound.* (APP-131). Ramsey's testimony at (R.142:133).

Elijah Brooks described these same events. *Simmons gets hit in the head, bleeds and leaves in a red car and further stated that he watched a white car shoot several times at a black car and that he seen Simmons going eastbound in a red car.* (APP-132-133).

All of these witnesses observed the same incident inside the bar and all of them seen the red car leaving with Simmons in an eastbound route and that a white car was shooting at a black car. With all of the knowledge gathered from the above facts and arguments, Simmons believes that the circuit courts erroneously exercised their discretion by not properly applying §974.07(7).

The evidence sought to be tested meet three requirements under Sub. (2):

(a) The evidence is relevant to the investigation or prosecution that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect.
(b) The evidence is in actual or constructive possession of a government agency.

(c) The evidence has not previously been subjected to forensic DNA testing or, if the evidence has been previously tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results. §974.07(2)(a)

Both avenues to testing require that the evidence to be tested meets conditions under sub. (2)(a) to (c), set forth above. §974.07(7) (a)3., (b)2. Both also require that the:

"Chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence." §974.07(7)(a)4., (b)3.

The two sets of requirements differ in two crucial respects. First, a court "*may order*" testing if, among other things:

It is reasonably probable that the outcome of the proceedings that resulted in the conviction, the finding of guilt by reason of mental disease or defect, or the delinquency adjudication from the offense at issue in the motion under Sub. (2), or the terms of the sentence, the commitment under s. 971.17, or the disposition under ch. 938, would have been more favorable before he or she was prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense. §974.07 (7)(b)1.

In contrast, a court "*shall order*" testing if, among other things:

It is reasonably probable that the movant would not have been prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense at issue in the motion under sub. (2), if exculpatory

DNA testing results had been available before the prosecution, conviction, finding of not guilty, or adjudication for the offense. 974.07(7)(a)2.

The eyewitnesses in this case have been shown to be complicit with each other in obtaining a conviction of Simmons. They believe Simmons was the shooter and therefore they swear it is him. We know A.C. never identified Simmons the night of the shooting. She only "became aware of a white car, heard shots and ducked down and opened her door and rolled out ran back to the Cap Tap to call for help:" (APP-105). Then, after receiving a visit from Armbruster at 3:30 AM, she is alleged to have selected Simmons photo array. The 3:30 visit and failure to file a supplemental report in which the photo array number is listed and what A.C. said during the look she had at the photo array, all show a pattern of police misconduct, at least on the part of Armbruster.

A reading of the police reports and trial testimony further show that the prosecutor identified Simmons to Ramsey at trial. Rather than ask the witness to identify the person he seen doing the shooting, the prosecutor hem-haws around with the witness and tells him, in a very leading "question", "Is the guy you refer to, the frequent customer, the gentlemen in front of me wearing a gray T-shirt?" Ramsey said "Yes". Then, for some unknown reason trial counsel said, "I'll stipulate to the identification." (R.142:130). We have two of the four eyewitnesses getting help to identify the shooter. One from a detective and one from the prosecutor and all three discussing the case before trial. These are not credible witnesses for the reasons asserted.

II. THE CIRCUIT COURTS ERRONEOUSLY EXERCISED THEIR DISCRETION WHEN THEY DETERMINED THE CREDIBILTY OF THE 4 EYEWITNESSES FROM THE APPELLANT'S TRIAL OUTWEIGHED ANY DNA TEST RESULTS THAT COULD BE OBTAINED AND WOULD NOT HAVE ANY MATERIAL IMPACT ON THE PROSECUTION OR THE OUTCOME OF THE TRIAL, AND BY COMPLETELY FAILING TO CONSIDER WHAT SUCH DNA TEST RESULTS WOULD HAVE HAD UPON THE INVESTIGATION AND THIRD PARTY DEFENSE.

The fact is, no circuit court made any determination regarding favorable DNA test results and how they'd impact the investigation and the appellant's right to present a third party defense at trial, and how that would have impacted upon the "end result".

Jones confessed to the shootings that Simmons is convicted of. She told the police that she was with a friend known as C-Note and that when she stopped the white car, C-Note fled from the vehicle and an Officer named Davis caught her in that car, as she was the driver. If DNA tests can be run on that hat, the head wrap, the bottles of alcohol and bullet casings, we can learn C-Note's identify and quite possibly Jones total involvement in this case. The weapon was not found, making it likely that C-Note took it with him when he ran from the white car. He could still have that gun, and with his identity known, we can track him down and get his story on what happened that night.

Furthermore, C-Note could tell us if he or Jones was the shooter, and that would substantiate Simmons innocence. What's just as important is that the DNA

test results would have allowed Simmons to present a third party defense. §§904.01, 904.02, and ***State v. Denny***,120 Wis.2d 614, 618, 357 N.W.2d 12 (Ct.App.1984).

EVIDENCE OF A LEGITMATE TENDENCY:

J.G. and P.G. stated that J.G. was talking to a female, that Simmons was watching the female and J.G. from the other side of the bar, that the female was Simmons girlfriend. (R.141:19-21),(R.141:42,57-58). They claimed Simmons approached J.G. and asked him why is he talking to his girl and that a fight then took place, with J.G. hitting Simmons over the head with a glass bottle, causing Simmons to bleed from the forehead.

We know that Jones was the subject of the discussion between the two men. We know she is standing right there when J.G. smashes a glass bottle over Simmons head and he falls to the floor, bleeding from the head wound. We know Jones is angry about J.G. hitting her man with a weapon making him bleed. Jones stated that she shot J.G. because she seen he had a weapon aimed at her and she was in fear for her life. No guns were ever found. (APP-120).

We also know that six .380 casings were found at the scene of the shooting and that, most importantly to the third party defense, 1 more .380 casing was found inside of the white car Jones was driving, that was later linked to the six shell casings from the crime scene.

We know that Jones watched her man get a head wound and that he left the bar with John Lindsey to go to the hospital. We know Jones leaves the Cap Tap with C-Note in the white car because she confessed these facts. We have many witnesses saying someone in the white car shot up the black car. We have Jones running from the scene and an officer, Davis, catches her in the driver's seat of that white car that witnesses just said shot up the black car and Jones tells the officer that C-Note fled from the car.

MOTIVE AND OPPORTUNITY:

The same facts found under the evidence of a legitimate tendency also establishes motive and opportunity. Simmons gets smashed in the head with a glass bottle, falls to the floor, bleeding from his head wound. Jones is Simmons girlfriend and she is right by J.G. when he hits her man in the head with the glass bottle and her man has to go to the hospital. This establishes a motive to get back at JG.

The opportunity to get back at J.G. arise when the victims leave the Cap Tap bar and get into their car, driving away from the bar and Jones jumps at the chance to get even. Is her behavior rational behavior? Under the circumstances, she must believe that what she is going to do is possibly expected of her in such a scene. It doesn't matter under the law, what her justifications are as long as the evidence is admissible under §§904.01 and 904.02. She has motive to do the shooting and opportunity to do the shooting, and all of her actions are not remote in time, they are within minutes of her man getting beaten up.

EVIDENCE CONNECTING JONES TO THE CRIME:

A .380 casing was found inside of Jones car. The same exact type identical to the other 6 shell casings found by the police at the scene of the shooting which is 11 blocks away from where Jones is stopped by the police. The .380 casing cannot be claimed to be remote in time, place or circumstance. Its direct evidence from the scene of the shooting just minutes earlier and Jones is caught inside the white car and she confessed to the shooting and to having another person with her the whole time. C-Note, the man that fled. (APP-121,126).

The identity of C-Note is crucial to the "**INVESTIGATION**" because C-Note would testify to the fact that Jones shot up the black car the victims were in. He'd further testify that Simmons was not even in the white car with C-Note and Jones when the shooting occurred

Would the impact of C-Note's testimony allow for a different result at trial, along with Jones confessing to the shooting? Absolutely, has to be our answer. The police did a shoddy investigation in this case. They hear its Simmons and focused solely on Simmons as the culprit. They were no longer neutral and detached investigators. They developed tunnel vision and at that point, our famous detective, Armbruster does what he's known best for. He improperly influences the investigation by the photo array situation with A.C., does not file a supplemental report, something of which, he'd file if he's on the up & up.

Kyles facts are almost identical to the facts in this case. Armbruster, apparently inventoried the crucial evidence now sought (APP-121) but did not

submit it to the crime lab for DNA testing, which violates every MPD policy on the subject. He is a veteran homicide detective and the fact that he acted this way in this case shows that he was shoddy and fraudulent. "When probative force of the evidence depends on the circumstances under which it was obtained and those circumstances raise possibility of fraud, indication of conscientious police work will enhance probative force and slovenly work will diminish". ***Kyles*** at 446. Determining whether evidence of sloppiness of police investigation is material. These facts were supposed to be considered by the circuit courts "investigation" analysis.

The fact that Armbruster never filed a proper "Police Evidence Inventory sheet" further shows that his involvement in this case makes the entire case suspect. He knows that he is required to do an inventory of all the evidence, collect it and have it sent to or brought to the crime lab for further analysis. ***MPD SOP'S*** (APP-134-136),(APP-193-199).

When this court looks at the affidavits presented in this case, that look should be done like the ***Kyles*** Court did. The affidavits were not suppressed per se, but in the scheme of showing what a shoddy investigation was performed by the MPD, Simmons had to seek out the evidence postconviction, rather than reading police reports containing their interviews. A review of the suppressed statements of the eyewitnesses-whose testimony identifying ***Kyles*** as the killer was the essence of the State's case-reveals that their disclosure not only would have resulted in a markedly weaker case for the prosecution and a markedly stronger

one for the defense, but also would have substantially reduced or destroyed the value of the State's two best witnesses. ***Kyles*** at 1559.

The above excerpt from ***Kyles*** is what Simmons believes would be appropriate in this 974.07 action due to the credibility determinations made by the circuit courts. If the MPD had done a thorough job investigating, it would have known from Ramsey that he could identify at least 25 of the patrons in the Cap Tap bar that were present for the bar fight and subsequent shooting. Ramsey did tell the detectives that he has 25 patrons in the bar and that he had no concerns because everyone was regular patrons. The police also had a video tape from inside the bar, but never followed up on it. (APP-105).

So, the MPD does not seek a list of the 25 people. Who knows? Maybe the MPD did but Simmons has never been privy to that information. Simmons trial attorney sure didn't investigate them either so Simmons was left to investigate the witnesses postconviction because the law requires him to be diligent in seeking the evidence he sought, and he found multiple patrons from the bar that night and they all provided affidavits of their observations. (APP-119-133).

The courts were also required to make findings on the investigation in this case and take into consideration all of the evidence that supports the "investigation" and "prosecution" and "conviction" requirements stated within 974.07 stats. How does all of the evidence in this case, old, new and assumed, apply to the investigation, prosecution and conviction in this case? We don't know because the circuit courts did not obey the mandates within 974.07.

Had the original jury heard all the inconsistencies in the eyewitnesses police statements and actually debated the inconsistencies in their trial testimony, heard the testimony of all the people identified in the affidavits, heard the results of the DNA testing, saw the crime scene photos, and the presentation of Jones to testify that she was the actual shooter, and C-Note's testimony that he was in the car with Jones, not Simmons, the jury would never convicted this appellant of any charges.

III. THE CIRCUIT COURTS DECISIONS WERE ALSO FACTUALLY AND LEGALLY FLAWED IN THREE OTHER IMPORTANT RESPECTS:

First, the circuit court weighed the eyewitness identification evidence and unknown eyewitness identification not presented at the trial, against the potentially exculpatory DNA evidence. The court stated: *five eyewitnesses positively identified Simmons as the shooter* (APP-107).

Five eyewitnesses? Only four people testified at trial as eyewitnesses. If there exists another eyewitness, he or she has never sworn out an affidavit, never testified in trial, never testified at any hearing held in this case, so to whom is the circuit court referring to and why is it considering information outside of the circuit court or the trial court record?

This does not answer any questions about the role of Simmons or the credibility of J.G., P.G., A.C., and Ramsey. It does, however, illustrate the substantial risk of erroneous analysis when a circuit court attempts to measure the

impact of exculpatory DNA evidence, not in relation to the trial evidence, but rather, in relation to possible testimony from a potentially critical witness who never testified to identify Simmons as the gunman. See ***Pharr*** supra.

The circuit court then stated that:

"*Even if touch DNA from the person who loaded* the gun was found, *it would not tend to make it any less probable that the defendant was the shooter*." (APP-108).

The whole paragraph is pure speculation by the court. The only DNA testing result possible here is to "show somebody else loaded the gun"? That is a very narrow view from a court that is expected to consider the apparently exculpatory evidence against the trial evidence and weigh all of that evidence to determine if the end result could be different. It even states that no DNA test results would discredit the statements of multiple witnesses. The basis for saying someone else loaded the gun derives from Judge Hansher wrongfully finding Simmons got a .25 caliber gun at the bar.

Discovering that Jones and or C-Note's DNA is on the evidence sought to be tested would have multiple applications to this case. Yes, it could lead one to conclude that the person loaded the gun. If its Jones DNA on the evidence, it would support or corroborate her confession to the crime; it would lead the defense to C-Note's identity; it could even lead to evidence that someone in the black car had a gun and fired that gun at the white car. This is based upon Jones assertion "Because I seen the victims gun and I thought that he was going to shoot

at us because he thought Antonio was in the car and I acted out of reaction". (APP-120).

Again, the circuit court considered unknown witness identification not presented at trial by asserting that "The defendant was immediately identified as the shooter by occupants of the vehicle and John and Tyrone Ramsey." (APP-112). John never testified, never submitted an affidavit, yet the circuit court analyzed DNA evidence favorable results against, in part, John Ramsey's identification of Simmons? We know from reading Tyrone's version of what happened that evening that he told the police the scenario of what he saw and then, at trial, he created an entirely new scenario and neither scenario was supported by the police expert's replay of what took place. (APP-112), (R.143:55).

The circuit court measured Jones statement not according to substantial corroboration in the trial evidence but in relation to speculation about unknown information from a person that never testified or swore out an affidavit. (APP-113-114). See ***Pharr*** supra.

Most importantly, the circuit court stated:

"DNA from Jones or C-Note may arguably supports Jones' (and the defendant's) particular version of events, but again even if it did, there is still not a reasonable probability in light of the eyewitnesses testimony that the jurors would have believed the defendant had been in any other car except the white car." (APP-114-115).

The Circuit courts did not analyze the affidavit of Jones by looking for evidence in the trial record that corroborated her confession, or considering that, DNA testing could provide further evidence of corroboration of Jones' confession.

(R.143:3, 18-24); (R.145:3, 8-14);(R.146:3, 5); (R.147:43, 46-47, 50-64). Instead, it rejects the notion that her confession and evidence corroborating it would not make any difference to the jury because of the eyewitnesses testimony identifying Simmons as the shooter. That analysis is fatally flawed because, in part, John Ramsey cannot constitute evidence against Simmons. Nothing in the record from him. Secondly, regardless of the confession, the third party defense theory would apply and these circuit courts gave no consideration to that, even though the Statute demands it. §974.07(2)(a)."The evidence is relevant to the investigation or prosecution that resulted in the conviction…" The investigation is what discovers the potential defense of a third party. Neither court addressed this.

IV. THE CIRCUIT COURT'S DECISION AND ORDER DENYING SIMMONS' MOTION FOR SUPPLEMENTAL BRIEFING IS AN ERRONEOUS EXERCISE OF DISCRETION BECAUSE IT HAS ENTERED ITS JUDGMENT CONTRARY TO DUE PROCESS.

Simmons filed a motion for supplemental briefing seeking an Order to allow the State to respond to Simmons' response to the State's assertion that the evidence had been destroyed, and allow the State to respond to that, in order to comply with due process procedures announced in ***State v. Greenwold***, 189 Wis.2d 59, 525 N .W.2d 294 (Wis.App.1994).

Judge Hansher made a ***Greenwold*** analysis and decision without an actual claim before it. Simmons wanted a hearing and or briefing on the destroyed evidence so he could gather the facts surrounding the allegedly destroyed

evidence. Instead of a simple yes or no, the court actually made factual findings on issues not before it. Simmons had no fact-finding hearing in which to establish what facts to argue in the circuit court, which is why he asked for supplemental briefing. The circuit court's action must be declared null and void as a matter of law. ***Wengerd v. Rinehart***, 114 Wis. 2d 575, 587, 338 N.W.2d 861 (Ct. App. 1983).

This Court denied Simmons' request to remand the record (APP-184-185). Simmons was never given an opportunity to properly address the issue of whether the evidence sought to be tested, still existed or was actually destroyed by the MPD. He was given no actual notice of intent to destroy the evidence. He was given no notice (properly) that the evidence was destroyed and he was never afforded the opportunity to object and defend his rights in a proper manner. Therefore, the circuit court erroneously exercised its discretion and its judgment is void. ***Neylan v. Vorwald***, 124 Wis.2d 85, 368 N.W.2d 648 (1985).

CONCLUSIONS

Based upon the issues presented herein and the arguments supporting the appellant's claims the appellant respectfully request the Court to remand the case with an Order to the circuit court to order DNA testing on the items sought to be tested for DNA and upon final results, issue an Order for a hearing upon those results, consistent with §974.07(10)(a).

Respectfully submitted this 21 day of October, 2019

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CERTIFICATION AS TO FORM AND LENGHTH

I hereby certify that this brief conforms to the ruled contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,726 words.

Dated this 21 day of October, 2019.

Robert N. Meyeroff

ROBERT N. MEYEROFF

CERTIFICATION AS TO COMPLIANCE WITH 809.19(12)

I hereby that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in the content and format to the printed form of the brief file as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21 day of October, 2019

Robert N. Meyeroff

ROBERT N. MEYEROFF