STATE OF WISCONSIN

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

District I

Case No. 2018AP001115 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

RONDALE TENNER,

Defendant-Appellant

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION ENTERED ON OCTOBER 29, 2014, THE HONORABLE STEPHANIE ROTHSTEIN PRESIDING, AND THE ORDER DENYING MOTIONS FOR POSTCONVICTION RELIEF, ENTERED ON JUNE 11, 2018, THE HONORABLE MARK SANDERS PRESIDING, BOTH ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF AND APPENDIX OF THE APPELLANT

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TABLE OF CONTENTS

CASES CITED

OTHER CITED LAW

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ISSUES PRESENTED

I. Whether or not the trial court had erred in denying Defendant's Motion for Postconviction Relief that had argued that trial counsel had been prejudicially ineffective for failing to impeach a key State's witness with her eight prior criminal

convictions when her testimony had been key to the State's case and the relevant case law clearly indicates that prior criminal convictions are crucial to credibility determinations?

Trial Court Answered: No.

II. Whether or not the trial court had erred in denying Defendant's Motion for Postconviction Relief that had argued that a newly discovered defense witness, who had materially rebutted the key State's eyewitness and had presented a newly discovered motive for that witness to lie, had warranted a new jury trial?

Trial Court Answered: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This Appeal involves issues of law which are not settled. Arguments need to be presented in more detail in oral argument. Therefore, oral argument and publication are requested.

STATEMENT OF THE CASE

Mr. Rondale Tenner was charged in a three Count Criminal Complaint dated February 19, 2013. The three Counts charged Defendant with the following: Count One, First Degree Reckless Homicide, Use of a Dangerous Weapon, contrary to Wis. Stats. 940.02(1), 939.50(3)(b), and 939.63(1)(b); Count Two, Armed Robbery (Use of Force), contrary to Wis. Stats. 943.32(1)(a) and (2), and

939.50(3)c; and Count Three, Possession of Firearm by Felon, contrary to Wis. Stats. 941.29(2), and 939.50(3)(g). (1:1-3).

Defendant waived his preliminary hearing on February 28, 2013. He was bound over for trial. (4:1-1; 181:1-5).

Eventually, a jury trial began on September 15, 2014. Charles Glynn was Defendant's trial attorney. This was subsequent to an earlier jury trial that had resulted in a mistrial due to a hung jury. (142:Exhibit 2, 191:1-9).

On September 19, 2014, the jury found Defendant guilty of all three Counts in the Criminal Information. (201: 1-17).

On October 27, 2014, The trial court had sentenced the Defendant. Defendant had received twenty years of initial confinement plus ten years of extended supervision on Count One; a consecutive ten years of initial confinement and eight years of extended supervision on Count Two; and a consecutive five years of initial confinement and five years of extended supervision on Count Three. (126:1-2; A 101-102).

Subsequently, Defendant had filed his Motions for Postconviction Relief with attachments. This filing had occurred on June 22, 2017. By these Motions, he had argued that his trial counsel, Charles Glynn, had been prejudicially ineffective. Furthermore, Defendant had argued a second Motion, that being that a newly discovered witness would materially rebut the State's key witness, thereby mandating a new jury trial. The Defendant had requested an evidentiary hearing to determine both Motions. (142:1-40).

After Defendant had filed his Postconviction Motions, the trial court had issued an Order for Briefing Schedule. This had occurred after various State modification motions. This Order had occurred on October 10, 2017. (151:1-1). The State had filed its Response Brief on October 11, 2017. (152:1-10). Defendant had filed his Reply Brief on October 24, 2017. (153:1-8).

Subsequently, the trial court had conducted four days of hearings on Defendant's Postconviction Motions. These hearings had occurred on January 19, 2018, March 2, 2018, April 20, 2018, and June 8, 2018. Over the course of these hearings, the trial court took testimony from a number of witnesses.

On April 19, 2018, the State had filed a letter with the trial court indicating that a new Supreme Court case, State vs. McAlister, 2018 WI 34, could possibly affect the trial court's Decision. (169:1-5). On April 20, 2018, the trial court had adjourned the hearing to allow the Defendant to reply to the State's letter. (206:2-5). On May 31, 2018, the Defendant had filed his Response to the State's April 19, 2018 letter. (171:1-12).

On June 8, 2018, the trial court had orally denied both of Defendant's Postconviction Motions. (207:28-29). The trial court issued a written Order denying both of Defendant's Postconviction Motions on June 11, 2018. (174:1-1; A 108).

Defendant filed his Notice of Appeal in a timely manner. (175:1-2).

This Appeal has been filed within the schedule set by the Court.

STATEMENT OF THE FACTS

Mr. Rondale Tenner was charged in a three Count Criminal Complaint dated February 19, 2013. The three Counts charged Defendant with the following: Count One, First Degree Reckless Homicide, Use of a Dangerous Weapon, contrary to Wis. Stats. 940.02(1), 939.50(3)(b), and 939.63(1)(b); Count Two, Armed Robbery (Use of Force), contrary to Wis. Stats. 943.32(1)(a) and (2), and 939.50(3)c; and Count Three, Possession of Firearm by Felon, contrary to Wis. Stats. 941.29(2), and 939.50(3)(g). The charges alleged that Derrel Jenkins was a small time marijuana dealer in the city of Milwaukee. He had invited Defendant into his home and conducted a small marijuana deal. Later, Defendant had called Jenkins, wanting a larger amount of marijuana. Jenkins did not sell this amount of marijuana. So, he called the victim, Hank Hagen, to come over to his house. After the victim had arrived, Defendant then arrived. They all then went into the basement area of his home. After discussing the transaction in Jenkins' residence, Defendant pulled out a gun and took money from Jenkins. Subsequently, Defendant shot the victim one time in the back. Jenkins then indicated that the victim fired back at the Defendant with his own firearm. The victim then died as a result of Defendant's gunshot. All of this had occurred on February 14, 2013. (1:1-3).

Defendant waived his preliminary hearing on February 28, 2013. He was bound over for trial that day. (4:1-1; 181:1-5).

Eventually, a jury trial began on September 15, 2014. Charles Glynn was Defendant's trial attorney. This was subsequent to an earlier jury trial that had resulted in a mistrial due to a hung jury. (142:Exhibit 2, 191:1-9).

On the morning of September 16, 2014, Derrel Jenkins testified. He testified that Defendant fired the first shot at the victim. Then, the victim fired back with his own gun. This was different from the firearm that Defendant had. (197:53-55). He testified that he knew the victim, Hank Hagen, as Jeff. (197:79). At the time of the alleged homicide, only Defendant, the victim, Jenkins, and Jenkins' girlfriend Audreanna Meriweather were in the basement. Jenkins' was seeing Meriweather at the time. (197:37-38). Hence, the only surviving witnesses were Jenkins, his girlfriend, and the Defendant.

Jenkins further testified on September 16, 2014. He testified that Defendant pulled out his gun in a robbery. (197:100). Jeff shot back with the gun in his hands after he had been shot. According to Jenkins, he took the gun from Jeff. (197:104).

Gilbert Perry also testified for the State on the morning of September 16, 2014. He testified that he and Jeff were good friends. He drove Jeff to Jenkins' place. He stayed in the car after Jeff left and started dozing off. (197:129-130). Jeff goes into the house, then he heard a thump and sees a person running out of the house, who enters a vehicle. He did not hear gunshots. (197:132-134). He went to the house. Jenkins came out of the basement, upset, and had a gun in his hand. (197:136). When he saw

the person running out of the house, he the person was holding his stomach. He did not testify that he saw this person with a gun. (197:148). However, when he saw Jenkins come out of the basement, he was holding a big pistol. (197:150). Jenkins only came up from the basement after Perry had yelled several times. Then, he was standing at the top of the stairs with the gun. Perry did not know who shot Jeff in the basement. (197:151). Perry called 9-1-1. He did not ask Jenkins why he did not call 9-1-1. (197:153-154).

Audreanna Meriweather testified on the afternoon of September 16, 2014. She testified that she was Derrel Jenkins girlfriend. She spent a good portion of Valentine's Day of 2013 hanging out Derrel Jenkins' residence. They were celebrating Valentine's Day. (198:6-7). She testified that she never saw anyone besides the Defendant with a firearm in the basement. (198:37). She left school to go to Derrel's on February 14, 2013. She did not want her parents to find out. When she got to Derrel's, she eventually took off her clothes and lay down with him. She had physical interactions, and conversations, with him that day. (198:38-39). He told her that he wanted money to buy things like a car, studio equipment, stuff like that. He never told her how he was going to get the money. (198: 40). She was 16 at the time. (198:42). It was her intention after Jeff had been shot to get out of there. This was because she was not supposed to be there. She was worried about what her mom was going to do. (198:43).

Misty Beilke testified for the State on the afternoon of September 16, 2014. She testified that she had a male and female

relationship with the Defendant. This relationship began late January, beginning of February, 2013. He spent the night with her a few times. (198:90-91). On Valentine's Day, 2013, she and the Defendant were at her house that day. He left her residence in her car at about 8-9 that morning, and did not return until about 4 that afternoon. (198:93-94). When he returned, he was a little nervous. He took a shower and shaved. He shaved off his sideburns. He then left the residence. (198:95-96). She picked him up the next day on Hopkins. After she had picked him up, they went to her house. They smoked some week and the police then came. A whole lot of police were walking up her driveway. Defendant was staring around nervously when he saw this out the window. (198:97-98). He was staring around and hid a coat in the basement. This appeared strange to her. Her told her repeatedly not to open the door. He was scared, nervous. (198:99-100). He told her that he did not want to go back and that he would die before he goes back. He hid a black jacket in the basement. He was in other boyfriend-girlfriend type relationships at the time that he was in a relationship with her. (198:101-104). It would not have surprised her to learn that, on February 14 of 2013, he had left her residence to go out with another woman. (198:106).

At no time during Ms. Beilke's testimony did Defendant impeach her with her prior record. The State did not impeach her with his record either. Accordingly, the jury never learned of this prior criminal record.

After Beilke had testified, the State had indicated that she

had eight criminal convictions. This consisted of seven from Wisconsin and one from Texas. The State had indicated that it had discussed this record with Mr. Glynn and that he had agreed with this number. This, prior to her testimony. The State had indicated that it had turned this information over to Mr. Glynn prior to the jury trial. The trial court indicated that these criminal convictions had not been gone into. In response, Mr. Glynn simply indicated that he was not going to recall anybody and that he did not think that he would ask for a stipulation. (198:131).

Defendant had testified on September 18, 2014. He testified that when he returned to Derrel Jenkins house on February 14, 2013, he did not have a hoodie, sunglasses, hat, or doo rag. (200:36). He denied any involvement in shooting the victim. (200: 37-44). With respect to Misty's house, he indicated that when he got there, they rolled up a blunt. He took a quick little bath, a wash up, and shaved. He thought that it would look better. (200: 48-49). When he arrived back at Misty's house after she had picked him up the next day, he saw the police out of the window. He tried to put out a blunt. He was a little nervous because he was smoking weed and had seen his p.o.. He did not try to run and hide. He did not try to hide. He never instructed her never to open the door and tell the police that he wasn't there. (200:56-57).

On cross-examination, Defendant admitted that he had five prior criminal convictions. (200:61). He also testified that he never told Misty not to open the door. He testified that he opened the door. He never took off his jacket. He did not hide his jacket

in the Tote. He rebutted Misty's testimony that she had opened the door as well as her testimony that he told her not to open the door. He also rebutted her testimony concerning hiding his jacket in the Tote. He indicated that her testimony was not true about any of this alleged conduct. (200:99-100).

During jury instructions, the trial court had instructed the jury that Defendant had been convicted of crimes. The trial court had also instructed the jury that other witnesses had been convicted of crimes. The trial court further instructed the jury that this evidence was received solely because it bore upon their credibility as witnesses. (200:156). However, once again, Misty Beilke had never been so impeached with her lengthy prior criminal record.

On Closing Argument, the State had highlighted the testimony of Misty Beilke in order to support its case. Clearly, the State had considered her as a key witness. The State indicated the following:

> "...Consider what Miss Beilke also said. The fact that after this incident, she had this situation with the defendant. He comes home. He shaves. Okay. Maybe by itself innocent enough. The nervousness that he displayed that very next day. The fact that he went and hid something in this Tote when the police are coming: Don't open the door. Don't open the door, as you heard from Miss Beilke." (200:172).

On Defendant's Closing Argument, Mr. Glynn indicated that Ms. Meriweather was Jenkins' girlfriend. He indicated that she seemed rather calm, more like somebody who had seen her boyfriend do

something wrong and she wanted to help cover it up. (200:179). Trial counsel had argued on Closing Argument that Ms. Meriweather had been covering up for Jenkins. (200:179-180). Furthermore, trial counsel had argued that he had a girlfriend type relationship with Misty, as well as other women. (200:187). Trial counsel's entire position on Closing Argument was that Jenkins himself had killed Hagen.

On Closing Argument, Defendant pointed out that there had been potential hiding places in the basement that a Detective believed had not been checked out. (200:205). This basement is Jenkins' home turf. It is where he sells drugs out of. This is where he lives. No gun had ever been traced to the Defendant. (200:208).

Furthermore, the defense theory at trial had been summarized in the closing argument. "Now, something happened in that basement after Mr. Tenner left between Mr. Hagen and Mr. Jenkins." (200:189). Attorney Glynn had provided no other detail than this statement. Furthermore, there had been no detail provided during the trial.

Here, the State had never introduced any DNA, fingerprint, or other physical, evidence tying Defendant to the homicide. There was no video evidence. Defendant admitted to his presence at Jenkins' basement twice on February 14, 2013. However, there was no confession. As Defendant had indicated in Closing Argument, the police never tied Defendant to any firearm involved in the homicide of Jeff Hagen.

On September 19, 2014, the jury found Defendant guilty of all

three Counts in the Criminal Information. However, according to CCAP, the jury began deliberations at 4:55 p.m. on the afternoon of September 18, 2014. The jury continued its deliberations the next morning at 9:05 a.m.. However, the jury did not return its verdicts until 2:18 p.m. on the afternoon of September 19, 2014. This constitutes deliberations of over five hours. The jury had one question. (142:Exhibit 3: CCAP Printout, pages 10-11 of 15; 201:1-17).

On October 27, 2014, The trial court had sentenced the Defendant. Defendant had received twenty years of initial confinement plus ten years of extended supervision on Count One; a consecutive ten years of initial confinement and eight years of extended supervision on Count Two; and a consecutive five years of initial confinement and five years of extended supervision on Count Three. (126:1-2; A 101-102).

Subsequently, Defendant had filed his Motions for Postconviction Relief with attachments. This filing had occurred on June 22, 2017. By these Motions, he had argued that his trial counsel, Charles Glynn, had been prejudicially ineffective. Furthermore, Defendant had argued a second Motion, that being that a newly discovered witness would materially rebut the State's key witness, thereby mandating a new jury trial. The Defendant had requested an evidentiary hearing to determine both Motions. (142:1-40).

Defendant's Postconviction Motions had indicated that, subsequent to the sentencing hearing, Defendant had spoken with a

fellow inmate at Dodge Correctional Institution. This inmate was Ivan Boyd. Ivan Boyd had submitted an Affidavit supporting these Postconviction Motions. (142:Exhibit 5). In this Affidavit, Boyd had indicated that he and the Defendant had spoken at the Dodge Correctional Institution in April, 2016. At that time, Boyd had informed Defendant that Jenkins had told him that he had killed Hagen. Furthermore, Jenkins had told Boyd that he had told the Detectives that Defendant had committed this shooting. This conversation had occurred at the Milwaukee City jail shortly after February 14, 2013. Boyd's Affidavit had provided further details of this confession from Jenkins. Furthermore, the totality of the Affidavit had clearly indicated that Boyd was willing to help Defendant in this case. The Affidavit had also indicated that Boyd would testify as to the Affidavit's facts.

Furthermore, these Postconviction Motions had provided Milwaukee City jail records. These records had corroborate Boyd's attached Affidavit to the Motions. These records had shown that Boyd and Jenkins had been incarcerated at the Milwaukee City jail during the time period indicated in Boyd's Affidavit. (142:Exhibit 6).

Finally, these Postconviction Motions had provided printouts of Wisconsin inmate offender movement details. These printouts corroborate that Defendant and Boyd were both at Dodge Correctional Institution during the April, 2016 time period. (142:Exhibit 7).

After Defendant had filed his Postconviction Motions, the trial court had issued an Order for Briefing Schedule. This had

occurred after various State modification motions. This Order had occurred on October 10, 2017. (151:1-1). The State had filed its Response Brief on October 11, 2017. (152:1-10). Defendant had filed his Reply Brief on October 24, 2017. (153:1-8).

Subsequently, the trial court had conducted four days of hearings on Defendant's Postconviction Motions. These hearings had occurred on January 19, 2018, March 2, 2018, April 20, 2018, and June 8, 2018. Over the course of these hearings, the trial court took testimony from a number of witnesses.

On January 19, 2018, Ivan Boyd testified on behalf of the Defendant. He had testified that he had met the Defendant in the prison system. He had told the Defendant about what Jenkins had told him. Boyd had prepared an Affidavit and all of the facts in the Affidavit were true. This was hearing Exhibit 1. (158:1-5). This was the same Affidavit as attached to the Postconviction Motions. He had prepared and signed this Affidavit after having met with the Defendant's private investigator. Boyd had become involved with Darrel Jenkins because Boyd had gotten re-arrested and had been taken to the Milwaukee Police Administration Building on February 15 or 16 of 2013. (203:8-10). Boyd had been in the bullpen when Jenkins had approached him wanting to talk. (203:8-11). The testimony of what Jenkins had told him went as follows:

> A: "...Can I talk to you? And, you know, I was in my own thoughts and I said what's going on and he just blurted out, I shot my friend. I killed my friend, man.
>
> Q: Okay. What else did he tell you, if anything?

A: I told him to - I looked around because it was like three or four other people in the bullpen with me. I told him to, you know, keep it down. So we went to the corner and he just got to telling me everything and dropped it. He said that his sister's boyfriend came over and brought him some marijuana to sell somebody and he wanted to keep the money to take his girlfriend, it was Valentine's.

Q: Wait. So when you say he wanted to keep the money was he referring to himself or the victim wanted to keep the money or what?

A: Jarel wanted to keep the money.

Q: Okay.

A: That he had, so - that he made from the weed sale. It was Valentine's Day and he told me that he had been working for his sister's boyfriend selling weed for him and the guy wasn't paying him so this was - and that's where Tenner came involved. He said that he had met a guy by the name of Rock and Little General's and he sold him some weed and that's how he met Tenner. But on the day that the shooting happened he said that he had came and bought some weed, a couple ounces.

Q: Who did?

A: Tenner.

Q: Okay.

A: The Rock guy.

Q: All right.

A: So he said - so he called his sister's boyfriend who was his marijuana plug and he said that he wanted to keep the money. An argument ensued and he shot him. He said that he didn't want to do it but it was in the heat of the moment and he shot him.

Q: So just for clarification Jenkins told you that he shot the weed plug?

A: He shot the weed plug which was his sister's boyfriend.

Q: Okay. And then what else did he tell you, if anything?

A: He asked me what I should do. He said what should I do. He said I'm tying to say that - excuse me - the nigga

met at Little General's did the shooting which he was referring to the Rock guy, the Tenner guy.

Q: This guy sitting on my right?

A: Right. He said that this was – the shooting happened immediately. The Tenner guy left the house. So when he went back to the basement with the money the plug wanted the money, he wanted to keep it, and that's when the argument happened and the shooting.

Q: One again Jenkins told you that he's the one who shot the weed plug?

A: That's what he told me.

Q: Okay. And - and did he say anything about the victim doing a shooting or anybody shooting anybody?

A: He said when he was going up the stairs he - he shot at him.

Q: Who did?

A: The victim.

Q: Shot at who?

A: Shot at the Jarel guy.

Q: Okay. Now, did Jarel say what he did with the gun?

A: Yes, he did. I told the detectives the same thing when they came and he said that he hid the gun in the- the furnace or whatnot. He said he hid the gun in the basement.

Q: Did he tell you whether it was intentional or an accident?

A: He said from what I gather it was in the heat of the moment and he regretted it.

Q: Did he tell you what type of gun he used?

A: No, he didn't. (203:11-13).

Boyd had also testified that Jenkins was frantic. He was a young dude. For Jenkins to admit something like that in the bullpen

blew Boyd's mind. Jenkins had dreadlocks and was a younger guy. The meeting lasted about thirty minutes. He went out and talked to the police. The second time that he came back into the bullpen, Jenkins had said that now he thought that the police had believed that Tenner had done it and now they were looking at him. He did not meet Jenkins again. (203:13-14).

Boyd testified that he met Tenner at Dodge Correctional Institution. They were both working in the kitchen, on the line. This was in 2016. They had a conversation. Defendant had told Boyd why he was in prison, the relevant facts and the date. These facts and the date matched the information that Jenkins had provided to Boyd. Boyd told him about the facts of the case. Boyd told Tenner to have his lawyer speak to him. He then prepared and signed the Affidavit. (203:15-17). The Affidavit was the truth. (203:18).

Furthermore, Boyd had testified that two Milwaukee Detectives had met with him at prison in early January, 2018. These had been Detectives Jeremiah Jacks and Timothy Graham. Boyd had told them basically the same thing that he had stated in the Affidavit. The detectives had also showed him a photo array. Boyd had correctly picked out the picture of Derrel Jenkins. Prior to putting the Affidavit together, Boyd did not go through any paperwork, police reports, or try to make something up. No one had given him any money or anything of value in order to get him to do the Affidavit and testify. He had testified that he would be willing to testify at trial. He had testified, like he told the detectives, that "...this is not my forte, but if a man's life is on the line, it's

a total inconvenience to me, I've got my own problems, but of course I would if it would help free an innocent person." (203:19-21).

Cindy Papka testified next for the Defendant on January 19, 2018. She had testified that she had met with Boyd and he had signed the Affidavit in front of her. He had told her that everything was correct and that there were no errors. She had met him at prison. (203:34-36). She had also testified that she had put an open records request for the Milwaukee Police Department to find out what particular days Boyd and Jenkins had been in custody. She had identified hearing Exhibit 2 as being those records. This also had a booking photo of Boyd. (Exhibit 159:1-5). This was the same Exhibit as Postconviction Motions Exhibit 6. Derrel Jenkins movement records had shown that he had arrived at the Milwaukee police jail on February 14, 2013 at 18:56. He had been in the jail for three days. His release date had been February 16, 2013. Boyd's records had shown that he had arrived at the jail on February 15, 2013 at 9:50 in the morning, and that he had been released the next day at 9:23. The jail records had indicated that Boyd and Jenkins stays at the jail had overlapped for a couple of days. Boyd's booking photo was for February 15, 2013. (203:36-39).

Cindy Papka continued to testify. She had testified that she had done movement records for the Defendant and Boyd in the prison system. These were hearing Exhibit 3. (160:1-2). They were Department of Corrections movement records that had shown where they had been while in the custody of the Department of

Corrections. These were the same records that Defendant had attached to his Postconviction Motions as Exhibit 7. The records for Boyd had shown that he had been admitted to the Dodge Correctional Institution on October 7, 2015 and had transferred out in December of 2016. The records for Defendant had shown that he had been transferred back to Dodge Correctional Institution in August of 2016 from the Milwaukee Secure Detention. Hence, there had been a fairly significant period of time in 2016 when Defendant and Boyd had both been in the Dodge Correctional Institution. (203:40-42).

Detective Timothy Graham had testified next on January 19, 2018. He had testified for the State. He had testified, in part, that he and Detective Jeremiah Jacks had met with Boyd at his prison on January 8, 2018. At that time, Graham had shown Boyd a photo array that had contained Jenkins. Boyd had identified Jenkins. Furthermore, the Detectives had the prison staff perform a cell search of Boyd's cell for letters, paperwork, correspondence, documentation, and computer files. They could not find anything regarding this case. They could not find any police reports or anything like that. This was about a year after he had given the Affidavit. They were with him for about an hour and a half. (203:61-63). Boyd's version of the events at the hearing had been essentially consistent with Boyd's Affidavit. Boyd had never told him that he had gotten paid or any money or any value had been transferred between Defendant and the family to hire him for this issue. Boyd had told Graham that basically Boyd believed that God

is the reason why he had met Tenner. (203:63-64). Graham had also testified that he had met Jenkins. Jenkins had admitted to him that he was in the bullpen and may have made statements to individuals in the bullpen. (203:65).

The trial court had continued the Postconviction Motions hearing until March 2, 2018. On that date, trial counsel Charles Glynn had testified for the Defendant. Glynn had testified that he had handled both of Defendant's jury trials. The first trial was a hung jury. The second trial was a guilty verdict but the jury was out for about six hours. (204:5). One of the State's witnesses was Misty Beilke. She was one of the Defendant's girlfriends. She had only testified at the second trial. At the second trial, she had made some incriminating statements about Defendant's conduct the next morning. She had talked about how he had shaved and had put away a jacket in a Tupperware tub. The State had relied upon her in its closing argument. No one had impeached her on her prior record. Glynn did indicate that she had eight prior criminal convictions. He agreed that after her testimony, he did not want to introduce that prior record as a stipulation. He did not want to have her prior record, even though she had been an incriminating witness against Defendant. (204:5-7). He was aware that prior convictions are crucial to credibility in Wisconsin. Also, one of his arguments during Closing Arguments was that the Detectives had not thoroughly checked out the basement. The shooting had occurred in a basement that had belonged to Derrell Jenkins. (204:7-8). He testified that the sooner that she had gotten off of the stand the better. She had

a good deal of damaging testimony. The State had relied upon her testimony in closing argument. (204:15-16).

Detective Dalland testified next on March 2, 2018. He had been a homicide detective for about three years prior to April, 2015 until he had retired at that time. On February 15, 2013, he had an opportunity to interview Derrell Jenkins. The Detective took him from his cell at about 1:48 p.m. that afternoon and had returned him at about 2:22 p.m.. He testified that his report would be correct that he returned him to the bullpen. Jenkins had complained that the cell was too hot and he had asked to be put in the bullpen. (204:18-20). The report had indicated that Dalland took Jenkins back to the bullpen and had left in that bullpen. The bullpen was part of Central Booking. (204:20-21).

Detective Hutchinson next testified on March 2, 2018. He testified that he was a Milwaukee police department detective. He had been assigned to the homicide unit on February 15, 2013. He had been partnered with Detective Gulbrandson. At about 9:51 p.m. that night, he and Gulbrandson had intended to interview Jenkins. Gulbrandson had brought him from the male bullpen of Central Booking. The interview was short. Jenkins had been returned to Central Booking and left there. To the Detective's understanding, Jenkins had never wanted to go to a cell. (204:22-25).

The final evidentiary hearing witness was Margarita Diaz-Berg. She was a Milwaukee police officer who worked in the city jail. She was familiar with the way that records are maintained and kept in the jail. (204:27).

On April 19, 2018, the State had filed a letter with the trial court indicating that a new Supreme Court case, State vs. McAlister, 2018 WI 34, could possibly affect the trial court's Decision. (169:1-5). On April 20, 2018, the trial court had adjourned the hearing to allow the Defendant to reply to the State's letter. (206:2-5). On May 31, 2018, the Defendant had filed his Response to the State's April 19, 2018 letter. (171:1-12).

On June 8, 2018, the trial court had allowed the parties to orally argue the matter. This, prior to the court's issuance of an oral decision. Defendant had argued that Boyd's statement had been consistent with the facts. Both Boyd and Jenkins had been together in the jail on the 15th and/or 16th, as Boyd had testified. This, based upon the testimony of both Dalland and Hutchinson. Boyd had no motive to lie. Law enforcement had searched his cell in prison and had found nothing. Boyd's credibility had been corroborated. The State had not provided any reason for Boyd to lie. (174:3-5).

With respect to the issue concerning Glynn's prejudicial ineffectiveness of counsel, Defendant had argued that simply because Glynn had chosen his course of conduct did not make the conduct reasonable. Miss Beilke was crucial to the State's case. The State had put her on and had relied upon her in closing arguments. Her testimony had been corroborative of the State's case. This had been a weak case, with the jury hung the first time and out for six hours at the second trial. Defendant had argued that her testimony had been the straw that had broken the camel's back with respect to the second trial. She had testified the second

time and not the first. The law was pretty clear that impeachment by prior convictions was very important to credibility. Eight prior convictions was a very large number. (207:5-6).

Defendant had further argued that there had been no evidence that Boyd had been friends with the Defendant. All that Boyd had said during his testimony was that he did not want to see an innocent man get incarcerated for something that he did not do. Boyd had testified that he was not getting paid anything for this. They had searched his cell thoroughly. They did a photo array with Jenkins and Boyd had identified Jenkins. This was very significant because how could Boyd have known that Jenkins was who he was if Boyd had not met him before. McAlister did not apply. There had been no motive explored during the trial. All that Glynn had testified during closing argument was that we don't know what happened. There had been no way to bring out any facts. However, Boyd had testified that the motive had been brought out as newly discovered evidence because Jenkins had told him that he had wanted the money that Hagen had, they had a squabble, and then they had a shooting. This was all newly discovered, and that had never come out at trial. The first time that we had heard that was during the hearing. Boyd had a mandatory release date of 2030, which is different than the affiants in McAlister who had life without parole sentences. Boyd would be less than fifty when he got out. (207:8-11).

On June 8, 2018, the trial court had orally denied both of Defendant's Postconviction Motions. (207:28-29). The trial court

issued a written Order denying both of Defendant's Postconviction Motions on June 11, 2018. (174:1-1; A 108).

On June 8, 2018, the trial court had indicated that it had believed that Boyd was a "pure hustler." The trial court had believed that it did not believe a word that Boyd had said. His manner had conveyed a lack of believability. According to the court, his credibility was "near zero." (207:15-16). However, the trial court could not identify a single fact to base this conclusion on with respect to the case. This conclusion was without any legal or factual justification or basis.

With respect to the prejudicial ineffectiveness of counsel claim, the trial court on June 8, 2018 had indicated that Glynn had expressed a concern that the character of a witness could splash over onto the Defendant and that was Glynn's concern in this case. Furthermore, the trial court had indicated that Glynn had thought that Beilke was helpful. According to the court, Glynn believed that he had gotten more good out of her than he had ever thought. It was his professional sense that she did not hurt their position. The choice not to stipulate was an intentional choice. According to the court, that choice was not an unreasonable choice. Hence, the court did not find Glynn's performance with respect to the failure to impeach Beilke to be ineffective. (207:19-21).

With respect to the newly discovered evidence standard, the trial court had indicated that State vs. McAlister was in many respects identical to the present situation. (207:23). The trial court had indicated, as in McAlister, that newly discovered

recantation evidence must be corroborated by other newly discovered evidence. Corroboration requires newly discovered evidence of both, one, a feasibly motive of the initially false statement, and two, circumstantial guarantees of trustworthiness of the recantation. (207:25).

The trial court had found that the delay in submitting the affidavit counts against credibility. However, the trial court had found that this factor had been balanced by the other corroborating evidence, such as the movements of Jenkins, which had provided circumstantial guarantees of trustworthiness. However, with respect to the feasibility motive, the court found that this motive had been consistent. The motive had been to get away with it, to get away with the killing and the money. The court found that motive not new. The court also found that Boyd's credibility was near zero. The court had denied the Defendant's Motion. (207:26-29).

Here, the trial court had erroneously concluded that the motive proffered by Boyd had been newly discovered. However, as indicated, the first time that this motive had been proffered had been during Boyd's testimony at the hearing. Furthermore, as discussed, the actual, multiple, evidence had corroborated Boyd's testimony. On the contrary, the trial court's "feeling" that Boyd was a hustler had not been corroborated in any way.

Defendant filed his Notice of Appeal in a timely manner. (175:1-2).

This Appeal has been filed within the schedule set by the Court.

ARGUMENT

I. TRIAL COUNSEL GLYNN WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO CROSS-EXAMINE MISTY BEILKE AS TO HER PRIOR CRIMINAL CONVICTIONS. FURTHERMORE, UNDER THE CIRCUMSTANCES, HIS TACTICAL AND/OR STRATEGIC REASON WAS UNREASONABLE. DEFENDANT IS ENTITLED TO A NEW JURY TRIAL. THE TRIAL COURT'S ORAL DECISION DENYING THIS POSTCONVICTION RELIEF DOES NOT ADEQUATELY REBUT THIS CONCLUSION.

A. The Constitutional Standard and Procedural Requirements

The right to effective assistance of counsel stems from the Sixth Amendment of the United States Constitution and Article I, Section 7, of the Wisconsin Constitution, which guarantee a Defendant a fair trial and effective assistance of counsel. The test for ineffective assistance of counsel is two pronged. First, the Defendant must demonstrate that his trial counsel's performance was deficient; and second, the Defendant must demonstrate that the deficient performance prejudiced him. Strickland vs. Washington, 104 S.Ct. 2052, 466 U.S. 668 (1984); State vs. Sanchez, 201 Wis.2d 219, 227-228, 548 N.W.2d 69 (1996). In order to show prejudice, the Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State vs. Sanchez, 201 Wis.2d 219 at 236 citing Strickland vs. Washington, 466 U.S. at 694. This showing of prejudice does not rise to a level of beyond a reasonable doubt or even by a preponderance of the evidence. State vs. Traylor, 170 Wis.2d 393, 489 N.W.2d 626 (Ct. App. 1992), citing State vs. Pitsch, 124 Wis.2d 628, 369 N.W.2d 711 (1985).

Once the Defendant shows prejudicial ineffectiveness of his

counsel in his Motion papers, then the trial court must conduct an evidentiary hearing to determine whether or not counsel's representation was deficient and fell below an objective standard of reasonableness. State vs. Machner, 92 Wis.2d 797 (Ct.App. 1979); State vs. Curtis, 218 Wis.2d 550 (Ct.App. 1998).

The Court of Appeals will not second-guess a reasonable trial strategy, but the Court may conclude that an attorney's performance was deficient if based upon an "irrational trial tactic." State vs. Felton, 110 Wis.2d 485, 329 N.W.2d 161 (1983).

B. Defense Counsel's Failure to Impeach Beilke by Evidence of Her Prior Criminal Convictions was Prejudicially Ineffective.The trial court had Materially Erred in Determining Otherwise.

The fact of a witness's prior convictions and the number thereof is relevant evidence because the law in Wisconsin presumes that one who has been convicted of a crime is less likely to be truthful than one who has not, and the number of convictions is relevant on the issue of credibility because the more often one has been convicted, the less truthful he is presumed to be. State vs. Gary M.B., 270 Wis.2d 62, 676 N.W.2d 475 (2004); Nicholas vs. State, 49 Wis.2d 683; 183 N.W.2d 11 (1971); Scott vs. State, 64 Wis.2d 54; 218 N.W.2d 350 (1974); Tyacke vs. State, 65 Wis.2d 513; 223 N.W.2d 595 (1974); State vs. Smith, 203 Wis.2d 288, 553 N.W.2d 824 (Ct.App. 1996).

All criminal convictions have some probative value regarding truthfulness. State vs. Kuntz, 160 Wis.2d 722; 467 N.W.2d 531 (1990). In Kuntz, the Wisconsin Supreme Court had determined that

even one prior conviction had some probative value regarding truthfulness. State vs. Kuntz, 160 Wis.2d 722 at 753.

In Gyrion vs. Bauer, 132 Wis.2d 434; 393 N.W.2d 107 (Ct. App. 1986), the Court of Appeals found that the matter of prior convictions of crimes, under Wis. Stats. 906.09, was so important to a witness's credibility that a mistrial was warranted when this Statute was improperly used. Gyrion vs Bauer, 132 Wis.2d 434 at 439. This holding shows that impeachment by use of prior convictions of crimes under Wis. Stats. 906.09 is an extremely important tool to attack a witness's credibility.

Failure to adequately impeach a key witness is ineffective assistance of counsel. State vs. Delgado, 194 Wis.2d 737; 535 N.W.2d 450 (Ct. App. 1995); State vs. Marty, 137 Wis.2d 352; 404 N.W.2d 120 (Ct. App. 1987).

Here, defense counsel had failed to impeach Misty Beilke on the basis of her several prior criminal convictions under Wis. Stats. 906.09. As previously indicated, Wisconsin has indicated that such impeachment is very important in judging the credibility of a witness. Accordingly, defense counsel's failure to so impeach was ineffective. This, despite any assertion of "trial tactic" that trial counsel might have claimed.

Furthermore, Misty Beilke was a crucial State's witness. Her testimony was critical to convicting the Defendant. She had testified that he had tried to hide an incriminating coat, had tried to change his appearance by shaving, had been nervous at 4:00 p.m. on the day of the incident, and he was extremely scared and

nervous when the police had arrived at her residence. She had also testified that he had told her not to let in the police and had indicated that he would die before he would go back. Clearly, this was highly inculpatory testimony. The State had relied upon this testimony greatly. Furthermore, the State had relied upon her testimony during Closing Argument.

Here, the State's case was not so strong as to make trial counsel's conduct harmless. The State's case relied solely upon the credibility of its witnesses. Furthermore, trial counsel had argued that Jenkins was a credible suspect himself. He possessed a handgun as he went up the stairs to meet Gilbert Perry. This, only after a delay from when Perry had yelled several times down into the basement. Meriweather was in a physical, boyfriend-girlfriend, relationship with Jenkins. There was no corroborating physical evidence, such as fingerprints or DNA. There was no video evidence. Defendant had not confessed to anyone. Clearly, the fact that the jury in the 2013 jury trial was unable to reach a verdict, and the fact that the present jury had taken over six hours to reach its verdicts, show that the State's case was not strong. Hence, Beilke's corroborative testimony was crucial to the State's convictions.

True, trial counsel had pointed out that Beilke was not happy that Defendant was seeing other women. He pointed out this fact as motive for her to lie. However, clearly, this tactic indicates that he knew that her testimony was harmful to his client. Also, clearly, the relevant and applicable case law indicates that her

eight prior criminal convictions would have been devastating to her credibility. Trial counsel's conduct for failing to so impeach her was prejudicially ineffective.

Furthermore, Defendant had testified on his own. His testimony materially contradicted Beilke's testimony. However, the State impeached him with his five criminal convictions. Furthermore, the trial court had instructed the jury that it could consider the prior records of witnesses they affected credibility. Because trial counsel had not impeached Beilke with her extensive record, there was no such affect on her credibility. Since this situation was a "he said, she said" situation, trial counsel's failure was material.

Here, the trial court had attempted to negate the damage caused against the Defendant by Misty Beilke's testimony. This, by simply indicating that trial counsel had obtained favorable information from her during his cross examination; and (2) to avoid a "splash effect" of her credibility upon the Defendant. However, there had been no legal basis provided for such a "splash effect." Furthermore, as indicated at the evidentiary hearing and in Defendant's Postconviction Motions, she had provided ample damaging testimony against the Defendant on her direct examination. The court had failed to adequately indicate such damaging testimony, or even the existence of such testimony. As indicated at the hearing and in the Motions, she had testified consistent with the State's time line as to the homicide. She had testified that Defendant had left on the day of the homicide at about 8-9 a.m. that morning and

had not returned until about 4 that afternoon. She had testified that, upon his return, he was nervous and had, after his arrival, shaved his sideburns. According to the reasonable inference, he had shaved his sideburns in order to change his appearance. When the police had arrived the next day, he was scared and nervous and hid his coat in the basement. This appeared strange to her. He told her repeatedly not to open the door. He told her that he did not want to go back and would die before he went back. Clearly, contrary to the State, all of this testimony was extremely damaging to the Defendant.

Furthermore, the trial court had failed to indicate in its oral decision that the State had argued Beilke's damaging and inculpatory testimony during its initial Closing Argument. As discussed during at the postconviction hearings, the State had clearly believed that she was a key State's witness. The State had presented her to the jury as a highly material and relevant witness. The State had repeated her damaging testimony during its Closing Argument.

Furthermore, trial counsel had never argued Misty Beilke's testimony during his Closing Arguments. (200:173-214). This fact materially contradicts and rebuts the trial court's position. This, that trial counsel had used her testimony to his advantage. Clearly and logically, if trial counsel had concluded that her testimony was so helpful, he would have utilized it during her testimony. However, this utilization did not occur. This, especially after the State had utilized her testimony during its own Closing Argument.

Finally, with respect to the Closing Arguments, the State itself had again utilized Beilke's testimony during its Rebuttal Closing Argument. The State had utilized this testimony in order to rebut trial counsel's use of the Defendant's testimony during the Defense Closing Argument. The State had utilized Beilke's testimony in order to rebut Defendant's testimony concerning any statements that he might have made while the police were outside of the door the day after the homicide. Furthermore, the State had also utilized Beilke's testimony to rebut any testimony concerning his hiding a jacket in a Tote, a Tote that she had later pointed out to the detectives. (200:223-224). Here, the trial court had failed to mention this Rebuttal Closing Argument by the State during the trial.

Furthermore, the failure to impeach Beilke's testimony was not harmless error. Although the trial court had not considered the prejudice prong, such a discussion is necessary here. This, in order to fully satisfy Defendant's argument that both prongs of Strickland had been met. As Defendant had argued in his Postconviction Motions and at the postconviction hearing, the evidence was far from overwhelming as to Defendant's guilt. Defendant had argued that the witness Darrel Jenkins had himself killed the victim. There were potential hiding places in the basement that the detectives had not checked out. No gun had ever been traced to the Defendant. There were no DNA, fingerprint, video, or other physical evidence tying Defendant to the homicide. Defendant had admitted to being at Darrel Jenkins' residence twice

that afternoon. This clearly rebuts any inculpatory inference from the admission of the phone records. There was no confession. The police had never tied the Defendant to any firearm involved in the homicide. The State's witness Gilbert Perry had testified that he saw a person running from the residence into a vehicle. However, he also testified that the only person that he saw that day with a firearm was Jenkins. This was very shortly after the shooting. Jenkins was coming up from the basement. The State's sole case rested upon Jenkins' and his girlfriend, Audreanna Meriweather, credibility and testimony. The Defendant's Motions for Postconviction Relief has addressed the credibility issues concerning these two witnesses.

Clearly, the evidence was far from harmless. If the State's case was so strong without Beilke, then why did they utilize her testimony and refer to her twice during their Closing Arguments? Clearly, Beilke's testimony was highly corroborative. Her testimony had been highly necessary and material. Here, although the trial court had not considered the prejudice prong, attorney Glynn's conduct had been both ineffective and prejudicial.

Furthermore, as discussed at the hearing, if the State's case was so overwhelming, then the jury would not have deliberated for over five hours in this present trial. Also, the jury in the 2013 trial could not reach a verdict.

Contrary to the trial court, trial counsel's failure to impeach Beilke's testimony with her prior criminal record was prejudicially ineffective. Her testimony was crucial to the State's

case. Furthermore, she had eight criminal convictions. As discussed in Defendant's Postconviction Motions, the relevant and applicable case law indicates that prior convictions, and the number thereof, are highly relevant credibility evidence in Wisconsin. Furthermore, the more often that a person has been convicted, the less truthful he is presumed to be. The trial court had instructed the jury as to the effect of prior criminal convictions upon credibility. Hence, her impeachment by this prior record would have been material to impeaching her credibility. Her credibility was crucial to the State's case. Furthermore, such impeachment would have helped negate the negative impact of Defendant's five convictions. As argued, trial counsel's failure to impeach her with her prior criminal record was prejudicially ineffective.

Based upon the foregoing, trial counsel's conduct in failing to impeach Beilke with her eight prior criminal convictions was prejudicially ineffective. There was no sound trial tactic for this failure. The trial court had materially erred in deciding otherwise. This decision must be reversed.

II. THE AFFIDAVIT AND TESTIMONY OF IVAN BOYD IS NEWLY DISCOVERED EVIDENCE THAT UNDERMINES THE OUTCOME OF THE TRIAL. HENCE, A NEW TRIAL IS MANDATORY. STATE VS. MCALISTER DOES NOT ADEQUATELY REBUT THIS CONCLUSION. THE TRIAL COURT HAD MATERIALLY ERRED IN DETERMINING OTHERWISE. THIS DETERMINATION MUST BE REVERSED.

A. Boyd's Testimony and the Other Evidence Adduced at the Postconviction Hearings meets the Legal Standards for Newly Discovered Evidence.

Due process requires a new trial if the defendant satisfies the following criteria: (1) the evidence was discovered after the

conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue; (4) the evidence is not merely cumulative to the evidence presented at trial; (5) a reasonable probability exists of a different result in a new trial. State vs. Plude, 310 Wis.2d 28, 750 N.W.2d 42 (2008); State vs. Love, 284 Wis.2d 111, 700 N.W.2d 62 (2005); State vs. McCallum, 208 Wis.2d 463, 561 N.W.2d 707 (1997); State vs. Coogan, 154 Wis.2d 387, 453 N.W.2d 186 (Ct.App. 1989); State vs. Kaster, 148 Wis.2d 789, 436 N.W.2d 891 (Ct.App. 1989).

Trial court findings of fact will be affirmed unless they are clearly erroneous. Wis. Stats. 805.17(2). Trial court findings must not be against the great weight and clear preponderance of the evidence. Noll vs. Dimiceli's Inc., 115 Wis.2d 641, 340 N.W.2d 575 (Ct.App. 1983).

In the present instance, Boyd's testimony meets all of the criteria required under the aforementioned case law. First, the evidence was discovered after the trial. The Affidavit itself indicates that the information leading to the preparation of the Affidavit did not occur until April, 2016 when both Defendant and Boyd were at Dodge Correctional Institution. This was after the date of conviction.

Second, Defendant was not negligent in seeking the evidence. Defendant, was totally unaware of the fact that Jenkins had confessed to Boyd because these facts were not known to the Defendant at the time of the conviction.

Third, the evidence is material to the issue. Boyd's testimony

had clearly supported and corroborated Defendant's position at trial that Jenkins had shot Hagen. The testimony had been totally material to Defendant's innocence because it further corroborated the fact, and his testimony, that someone other than he had committed the crime.

Fourth, the evidence must not be merely cumulative to the trial testimony. The testimony had been corroborative, not cumulative. No other individual had testified that Defendant did not commit the crime. Defendant, himself, did not have any corroborating evidence to support his position. Furthermore, there is no other evidence, other than Boyd's testimony, to support the fact that Jenkins had confessed to shooting Hagen. Hence, the testimony had not been cumulative.

Fifth, the introduction of the Boyd's testimonial evidence at a new trial would lead to a different result by a reasonably probability standard. Here, as previously discussed, there was no other eyewitness evidence other than Jenkins and his girlfriend linking Defendant to the homicide. Defendant had not confessed to anyone. There was no corroborating physical evidence. Jenkins, and his girlfriend's, credibility was totally at issue here. If the jury had chosen not to believe Jenkins, then Defendant would have been acquitted. Interestingly, as discussed, the fact that two juries had difficulty reaching verdicts, with the first one unable to do so, clearly shows the weakness of the State's case.

Finally, Defendant had provided corroborating evidence to bolster Boyd's testimony. This, in Milwaukee City jail records and

the evidentiary hearing testimony and exhibits, as previously discussed in this Brief.

Here, the trial court had summarily dismissed Boyd's testimony. Without any substantiation or reference to any facts or particular details about his testimony, the court had simply indicated that he was not credible, and that he was a "hustler." However, based upon the facts and evidence adduced at the hearing, and as further detailed later in this Brief, this dismissal had been clearly erroneous. The ample corroboration of Boyd's testimony materially rebuts this unsubstantiated conclusion by the trial court.

Based upon the foregoing, viewing the evidence, particularly in light of the strength of the State's case, there is a reasonable probability that a jury, under the circumstances, would have a reasonable doubt as to Defendant's guilt. Therefore, Boyd's testimony entitles Defendant to a new jury trial. Boyd's testimony meets all of the legal standards for newly discovered evidence. The trial court had materially erred in determining otherwise.

B. The Trial Court had Materially Erred in Determining that State vs. McAlister is applicable to the present situation. This Case does not Alter the Conclusion that Boyd's Newly Discovered Evidence Warrants a New Jury Trial.

Contrary to the trial court, State vs. McAlister is inapplicable to the present situation. State vs. McAlister, 380 Wis.2d 684, 911 N.W.2d 77 (2018).

The facts in McAlister were that at McAlister's trial, two codefendants had testified against him. These two individuals were

Jefferson and Waters. State vs. McAlister, 380 Wis.2d 684 at 690. They had each testified pursuant to plea agreements. Id. at 690-691. Subsequent to his conviction, McAlister had filed a Motion, pursuant to Wis. Stats. 974.06, that had contained affidavits of three men who had alleged that Jefferson and Waters had lied when they had testified that McAlister had been involved in the crimes for which he had been convicted. The circuit court had denied McAlister's motion without a hearing. Id. at 690.

At McAlister's trial, his defense counsel had cross-examined both Jefferson and Waters about their history of lying to police as well as the plea bargains. Both of these individuals had provided differing versions of the events to the police than their testimony. Each had also testified pursuant to plea agreements in exchange for their testimony. Id. at 691-695; 697.

In McAlister, Each of the three men that had provided affidavits for McAlister had stated that Jefferson and Waters had admitted prior to trial that they had intended to falsely accuse McAlister of involvement in the crimes in order to reduce their own punishment. Id. at 699. The three affiants were Wendell McPherson, Corey Prince, and Antonio Shannon. Id. at 699-701.

In McAlister, the Supreme Court had analyzed the facts under the law applicable to newly discovered evidence and recantations. The Court had correctly concluded that a claim of newly discovered evidence that is based upon recantation also requires corroboration of the recantation with additional newly discovered evidence. State vs. McCallum, 208 Wis.2d 463, 561 N.W.2d 707 (1997).

Furthermore, in McAlister, the Supreme Court had concluded that the proferred affidavits of McPherson, Prince, and Shannon had been cumulative of the trial evidence that had attacked Jefferson's and Waters' credibility. Here, the Supreme Court had indicated that the Court of Appeals' decision in that matter had concluded that the affidavits were "merely an attempt to retry the credibility of Waters and Jefferson, whose credibility was well-aired at trial. Id. at 706. The Supreme Court had analyzed the three affidavits. The Court had concluded that the affidavits were of the same general character and drawn to the same point as the trial testimony, that Jefferson and Waters had lied about McAlister to benefit themselves. The Court found that the affidavits were cumulative. Id. at 711.

Furthermore, the Court had analyzed the matter as a recantation and had analyzed the requirement of corroboration. The Court first had indicated that all three affidavits were attested to years after McAlister's trial. Id. at 711-712. The Court had again stated that corroboration is required because recantation is inherently unreliable; the recanting witness is admitting he or she had lied under oath. Either the original testimony or the recantation is false. Gehlin vs. Wis. Grp. Ins. Bd., 2005 WI 16 (Para. 98), 278 Wis.2d 111, 692 N.W.2d 572 (2005). The corroboration requirement requires newly discovered evidence of both: (1) a feasible motive for the initial false statement; and (2) circumstantial guarantees of the trustworthiness of the recantation. State vs. McCallum, 208 Wis.2d 463 at 477-478.

Also, in McAlister, with respect to the credibility of the three affiants, the Supreme Court had found that two had been sentenced to life without the possibility of parole. Accordingly, they could face no actual, additional incarceration if found guilty of perjury for the affidavits that they had signed. Also, the Court found that the affidavits had material differences with the trial testimony, thereby negating their credibility. None of the affidavits had mentioned a key participant, McAlister's niece, and Shannon's affidavit had asserted that Jefferson had told him that he and Waters were the only participants in the robbery. However, trial testimony had clearly shown the niece's active participation in the robbery. State vs. McAlister, 380 Wis.2d 680 at 714.

Here, in the present instance, the defense theory at trial had been summarized at the closing argument. "Now, something happened in that basement after Mr. Tenner left between Mr. Hagen and Mr. Jenkins." (200:189). Also, the cross-examination of Jenkins at trial had not provided any details of a specific defense theory relating to the victim's death. (197:72-108). There had been no indication as to what the defense theory had been at trial concerning what "..something happened.." Simply, the defense theory was that the Defendant had left the Darrell Jenkins' basement peaceably, with the victim alive. There had been no indication at the trial, either during closing argument or during the evidentiary portion, that there had been a robbery or a dispute about money or drugs. As a matter of fact, Jenkins had testified at trial that during his entire drug dealing history, to include the homicide in

question, he had never carried a gun. (197:78). Boyd's newly discovered testimony had materially rebutted such a statement.

However, as previously discussed, Ivan Boyd had testified at the evidentiary motion hearing in this matter that Jenkins had provided him with a great deal of detail concerning how he had shot and killed the victim. This testimony concerned Jenkins having told Boyd that Jenkins had wanted the money from Hagen ("the weed plug"), but that Hagen had refused to give it to Jenkins. A argument had then ensued, followed by a shooting. Jenkins had told Boyd that he had shot Hagen. The victim had shot at Jenkins. Jenkins had hid the gun in the basement furnace. It had been an accident.

Here, none of Boyd's testimony, as detailed above and previously within this Brief, had been detailed, or even alluded to, at Defendant's jury trial. Clearly, all of Boyd's testimony was newly discovered evidence, with a newly discovered motive and newly discovered facts.

Also, corroborations are present with respect to Boyd's testimony. These corroborations also rebut the trial court's conclusion that Boyd had near zero credibility. Based upon these corroborations, this conclusion had been clearly erroneous.

(1) Detective Graham had testified at the January 19, 2018 hearing. He had testified that he and Detective Jacks had traveled to Boscobel to visit with Boyd concerning this matter. Boyd had correctly identified Jenkins in a photo array. This would only be possible if Boyd had previously met Jenkins. Furthermore, Graham

had testified that prison staff had thoroughly searched Boyd's cell for letters, paperwork, correspondence, documentation, and computer files. Nothing regarding this case had been found. No police reports or anything like that. (203:62). This was several years after Boyd's conversation with Jenkins.

(2) Boyd had testified that he had not gotten paid any money or anything of value from Tenner or his family for this issue. (203:64). No one had given him money or promised him anything to get him to do the affidavit and testify. He did this because a man's life is on the line and it would help an innocent person. (203:21). Very importantly, the State had not shown any motive for Boyd to lie in the present matter. The trial court had ignored this fact.

(3) The facts of the present matter mirror Boyd's testimony. This was a marijuana deal. Tenner had done a marijuana deal from Jenkins' basement. The subsequent marijuana deal involving the victim had involved three ounces. (197:43). The victim was a marijuana dealer. He had been dating Jenkins's sister. (197:44). Jenkins had met Tenner at the Fast and Friendly neighborhood store prior to any marijuana deals. (197:38). The shooting had happened in the basement with the victim going up the stairs. (197:46, 54-55). Although Boyd had referred to this at the "Little General," this could easily refer generically to the "little general store," such as the "little gas station" could refer to the small neighborhood gas station and not to the proper name of a gas station. The shooting had happened on Valentine's Day, 2013. (197:

35).

(4) With respect to Jenkins hiding a gun in the furnace, the lead detective at the scene had indicated that there was a gas furnace in the basement. This was Detective Matthew Goldberg. He did not indicate that anyone had checked the filter area where someone could pull it out and put something in it. He merely stated that he did not know if officers would dismantle it or go into somebody's furnace on a consent search. (199:87). On Closing Argument, trial counsel had indicated that the detective had indicated that he did not think that the police had checked the furnace filter area. (200:205).

(5) Detective Goldberg had also testified that two guns had been used in the shooting. One, the .380, had not been recovered. (199:88).

(6) Boyd had testified that he and Jenkins had been together on in the Milwaukee jail bullpen on February 15-16 of 2013. This was when Jenkins had made his confession to him. Furthermore, Boyd had testified that Jenkins had been removed from the bullpen, and then had returned after having met with the police. The testimony of both Detectives Dalland and Hutchinson had corroborated that Jenkins had been in that bullpen during these times, as well as his movement for interrogation. The jail movement records had also shown that Boyd had been in the bullpen during these times.

Furthermore, the present situation differs materially from that in McAlister. First, unlike in that case, Boyd's testimony had mirrored the trial facts. There had been no material omissions,

such as the affidavits in the McAlister case omitting a key participant, McAlister's niece.

A second material difference between the present situation and McAlister is that the Supreme Court in that case had negated the credibility of two of the affiants in the McAlister case because they were serving life without parole sentences. Hence, they had nothing to lose. However, in the present situation, the Wisconsin inmate locator and CCAP indicate that Ivan Boyd is 37 years old, having been born on July 8, 1980. His mandatory release/e.s. date is July 5, 2030. His maximum discharge date is July 5, 2040. Hence, unlike the affiants in McAlister, he will be less than fifty years old when he is released to extended supervision. Accordingly, unlike those other affiants, he has a great deal to lose with any false testimony/false affidavit. Furthermore, as indicated, he had testified under oath that he had not received any money or thing/promise of value in exchange for this testimony. Very importantly, the State has not shown any such motive on Boyd's part to testify falsely.

Finally, the cumulative evidence in McAlister had been based upon plea bargains given to both Jefferson and Waters. Id. at 711. This is not the present situation. Here, also, there had not been any impeachment based upon prior inconsistent statements to the police.

For the reasons indicated herein, McAlister does not defeat this conclusion. The trial court had materially erred in determining that State vs. McAlister is relevant and applicable to

the present situation. This case does not defeat the conclusion that Boyd's testimony warrants a new jury trial.

CONCLUSION

Based upon the reasons presented within this Brief, the trial court had erred in denying Defendant's Postconviction Motions. Trial counsel had been prejudicially ineffective for failing to impeach Misty Beilke with her prior criminal record. Furthermore, Ivan Boyd's testimony meets all of the requirements for newly discovered evidence. This, notwithstanding State vs. McAlister. For both argued reasons in this Brief, this Court should reverse that oral decision and remand this matter for a new jury trial.

Respectfully Submitted,

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INDEX TO APPENDIX

CERTIFICATION

I hereby certify that the Appellant's Brief of Defendant-Appellant in the matter of State of Wisconsin vs. Rondale Tenner, 2018AP001115 CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is forty five (45) pages.

Dated this 23rd day of July, 2018, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that filed with this Brief, either as a separate document or as a part of this Brief, is an appendix that complies with Wis. Stats. 809.19(2)(a) and that contains:

(1) a table of contents;

(2) relevant trial court record entries;

(3) the findings or opinion of the trial court; and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the trial court's reasoning regarding those issues.

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

Dated this 23rd day of July, 2018, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-
Appellant

CERTIFICATION

I hereby certify that the text of the e-brief of Defendant-Appellant's Appellant's Brief in the matter of State of Wisconsin vs. Rondale Tenner, Case No. 2018AP001115 CR is identical to the text of the paper Brief in this same case.

Dated this 23th day of July, 2018, in Waukesha, Wisconsin.

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