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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2019AP1677-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

LAWRENCE C. PAINE,
Defendant-Appellant.

ON APPEAL FROM THE ORDER DENYING PAINE'S WIS. STAT. § 974.06 POSTCONVICTION MOTION, FILED ON JUNE 10, 2019, IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING. MILWAUKEE COUNTY CASE NO. 2004CF2380

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

Respectfully submitted by:

Michael G. Soukup, 1089707

PINIX & SOUKUP, LLC
1200 East Capitol Drive, Suite 360
Milwaukee, Wisconsin 53211
T: 414.963.6164
F: 414.967.9169
michael@pinixsoukup.com
www.pinixsoukup.com

Attorneys for Defendant-Appellant

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STATEMENT OF THE ISSUES

I. Whether the circuit court erred in denying Paine's postconviction motion without an evidentiary hearing where his claim set forth a claim of actual innocence based on newly discovered evidence that a firearm matching the characteristics of the murder weapon was found in the possession of an individual (Ronald Terry) who threatened an eyewitness to the case and whose DNA was present at the crime scene?

The circuit court "adopt[ed] the State's brief *in toto*," and concluded that: (1) the evidence it was not new; (2) the evidence was not clear and convincing that the firearm was involved in the homicides or that Terry possessed it.

II. Alternatively, to the extent trial or appellate counsel could have presented these facts earlier, whether Paine received the ineffective assistance of trial and appellate counsel?

The circuit "adopt[ed] the State's brief *in toto*" and concluded that for the same reasons given in Issue I, counsels were not ineffective either.

III. Whether Paine's motion was sufficient for the circuit court to hold an evidentiary hearing?

The circuit court dismissed the petition without a hearing.

IV. Whether the real controversy was not tried where the jury was not given the opportunity to hear important evidence about the most important question in the case; who committed the homicides?

The circuit court did not address this question because it is properly raised for the first time in this court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Lawrence Paine would welcome oral argument where this case involves a complex set of facts and argument would likely assist the panel to understand the issues presented or answer any questions that may arise, unbeknownst to counsel, during the panel's review of the briefing.

Paine does not believe the Court's opinion in the instant case will meet the criteria for publication because resolution of the issues will involve no more than the application of well-settled rules of law and controlling precedent, with no call to question or qualify said precedent.

STATEMENT OF THE CASE

On April 10, 2004, Janari Saddler and Aaron Harrington were shot to death in an upstairs flat of a Milwaukee duplex. (1:1-4). The central question in the homicides was identification. (190:103). Two individuals claimed that they were present, and that Lawrence Paine was the shooter. (1:2-4). But the State had no scientific evidence to support that Paine was the shooter. Despite DNA testing of several items located at the crime scene, Paine's DNA was nowhere to be found. (192:59). Paine also voluntarily went to the police to explain his whereabouts at the time of the offense. (193:48-49, 68). Despite the lack of scientific evidence and Paine's cooperation with the authorities, the State charged Paine with two charges of first-degree intentional homicide. (6:1).

Jury trials

Paine was tried before a jury in February of 2005. (180:3). Notably, one of the individuals who claimed Paine was the shooter, George Donald, refused to come to trial. (179:3-4). The trial ended in a mistrial when the jury was unable to reach a verdict. (186:2-3). Nonetheless, the State decided to retry Paine. (188:4-5).

The shootings that occurred in the upstairs apartment happened in the early morning hours of April 10, 2004. (190:105-06). Specifically, the shooting occurred around 4:00 a.m. (192:90-91). One of the first responding officers arrived shortly after receiving the call, which was around 4:20 a.m. or possibly earlier. (190:111).

George Donald again refused to appear at the second trial, but the State was permitted to present a video deposition that was taken after the first trial. (190:3-7). In the deposition, Donald explained that he knew Lawrence Paine, who went by the name Chan. (189:11). The day leading up the shooting, Donald was with Janari Saddler. (189:12). They parted ways later, but around 3:00 or 3:30 a.m. (189:18-19). Donald went to Saddler's apartment, along with Aaron Harrington and Donta Weddle (aka "Huey"). (189:19-20). Paine was present in the apartment as well as others. (189:19). Donald stated that not long after he arrived, Janari returned to the apartment along with someone known as "E.I." (189:21).

According to Donald, when Janari arrived the incident began. (189:22). Janari complained about a car parked in the back and Paine became upset about it. (189:22-24). Donald stated that Janari tried to end the conversation, but Paine went to another room and returned with a gun. (189:24). Donald heard a gunshot and Janari ran to another part of the apartment. (189:24-25). Paine followed and Janari heard more

gunshots. (189:25-26). Paine left out of the back and door, and then Donald left the apartment. (189:26-27).

Donald admitted that when he was first interviewed about the shooting he lied. (189:58). He told detectives that he just happened upon bodies in the apartment, without mentioning anything about knowing what happened. (189:58). He admitted making up many other details as well. (189:58-59, 62-63).

Donald claimed that he lied because he was scared. (189:34). Donald denied being threatened by Janari's brother Leroy Saddler. (189:65). He also denied that Leroy told Donald he was disappointed by not talking to police. (189:65). But at the same, Donald agreed that he did attend and speak with family at Janari's funeral about the shooting. (189:59-60).

The other individual who claimed Paine was the shooter, Eric Howard, testified again at the second trial. (191:132). Howard was very close with Janari Saddler. (191:133). Saddler picked up Howard and brought up to the apartment shortly before the shooting was about to occur. (191:137). Howard testified that there were multiple people in the apartment including Paine and Donald. (191:138-39). Unlike Donald's testimony, Howard denied seeking Donta Weddle. (189:20); (191:160)

Howard testified that Saddler and Paine began fighting about Paine being followed and questioned Paine about parking his car outside when Saddler believed he was "hot." (191:140). Derrick Reed, whose testimony from the first trial was read during the second trial, testified that the only car outside was his car. (191:127-28).

Howard did not know how, but he noticed that Paine had a gun and pointed it at Saddler. (191:141). Saddler ran into another room and Paine followed. (191:141-42). Howard ran to the porch door with

others. (191:142). Howard heard multiple shots and a voice, not Saddler, saying, "Please, Chan, don't." (191:143). Howard claimed that Paine said, "I'll kill you and your cousin." (191:143).

Howard testified that he observed Paine came back into the living and then leave through the back door. (191:144-45). At the second trial, Howard claimed for the first time that Paine said, "something like wipe off something." (191:169-70). The State had already presented a fingerprint expert who claimed that wiping a surface can affect the detection of prints later. (191:88).

Howard agreed that, despite being present when his close friend was shot to death, he did not go the police initially. (191:172-73). All that he did was call 911 and give a vague address. Howard claimed he was scared. (191:172). Similar to Donald, Howard testified that it was after attending Saddler's funeral and talking to Janari's brother that Howard agreed to talk to police. (191:173-74).

When Paine learned that he became the focus of the investigation, he voluntarily came to the police to explain his alibi. (193:68). Paine explained to detectives that he was at the Paradise Club the night of the shooting, specifically the evening of April 9th into the early hours of April 10th. (193:46-48). After leaving the Club, he drove to Minneapolis overnight. (193:59). It was Easter weekend and Paine wanted to visit his child who was living with the child's mother in the Minneapolis area. (193:56).

Paine provided the details he could regarding his whereabouts to the detectives later. (193:49, 70-71). Paine told the detectives that he was with someone at the time. (193:50-52). Paine declined initially to give details about this person because this person wanted to avoid contact with law enforcement due to that person's own legal troubles. (193:102). But

during a subsequent interview, Paine explained that the person was known as Skin. (193:82-83).

Paine also told detectives that he stayed at the Super 8 hotel and had arrived around 8:30 a.m. (193:63). Paine said that when he left Minneapolis he returned to Wisconsin and spent time in Whitewater with Zenobia Davis. (193:67-68).

During its closing argument, the prosecution focused on George Donald and Eric Howard, as well as attacking Paine's alibi defense. (193:159-86, 202-11). The prosecutor emphasized to the jury that Paine was probably lying because he did not give sufficient details about "Skin." (193:180-86, 202-11). The prosecutor also relied on otherwise inadmissible[1] evidence that Paine had been impeached about which basketball team was playing at the time he was in Minneapolis. (193:186).

After deliberating, the jury found Paine guilty on both counts of homicide. (194:4-5). Paine was sentenced to life imprisonment without the possibility of release. (101:1; App. 1); (195:40).

Direct Appeal

On appeal, Paine's appellate counsel argued, among other issues, that Paine's trial counsel was ineffective by failing to present alibi witnesses. (112:1-12). Specifically, trial counsel's failed to present Skin as a witness or Zenobia Davis as a witness to support Skin's existence. (112:9-11). The circuit court denied Paine's postconviction motion. (113:1-5).

However, this Court reversed the denial of the postconviction motion. *State v. Paine*, No. 2006AP2634-CR, slip op. at ¶¶16-18 (Ct. App. Nov. 6,

[1] The court of appeals determined later that the State's impeachment of Paine about the basketball game was prohibited. *State v. Paine*, No. 2006AP2634-CR, slip op. (Ct. App. Nov. 6, 2007); (119:11; App. 12).

2007); (119:9-10; App. 10-11). This Court determined that a determination of whether counsel was deficient for not calling the witnesses was premature. (119:9; App. 10). The Court also rejected the circuit court's view that there was no prejudice. (119:9-10; App. 10-11). The court concluded:

> "In this case, Paine's credibility was essential to his defense. There is no physical evidence tying Paine to the crime. This case had once resulted in a hung jury. Without a hearing at which trial counsel's reasons for not calling these significant witnesses can be fully examined, we cannot conclude that failure to call a corroborating witness is neither deficient performance nor prejudicial." (119:10; App. 11).

On remand, the circuit court held an evidentiary hearing regarding trial counsel's failure to call two alibi witnesses. (196:3); (197:3). Skin's mother, Ella Blackmon, testified about her son, Anthony Blackman, which by itself contradicted the argument the prosecutor made to the jury that Skin did not even exist. (197:5-9). She also explained that Skin had been shot in the chest and died on December 17, 2007, a month after this Court had ordered the case remanded. (197:5, 9)

The circuit court denied the petition again, finding that trial counsel was not deficient because despite counsel's efforts, Skin was difficult to find. (132:1-2). In addition, counsel's reasons for not calling Zenobia Davis about Skin were not objectively unreasonable. (132:1-2). The court of appeals affirmed. *State v. Paine*, No. 2008AP2307, slip op. (Ct. App. Nov. 24, 2009); (139:1-8; App. 15-22).

Postconviction petition

The following facts were argued by Paine in the petition he filed below that is part of the instant appeal. (151:1-20).

The firearm that was used to shoot Saddler and Harrington was not found at the scene. (193:208). Fired cartridge casings and a fired bullet were recovered; five silver "WIN" cartridge cases and one brass/gold "WCC" casing. (151:3). After the evidence was submitted to the Wisconsin crime lab, the report indicated that the casings were fired from the same firearm. (152:2; App. 27). The lab also indicated that the fired bullet was fired from a 9mm caliber firearm with six lands and grooves and a right-hand twist. (152:2; App. 27). In addition, the report noted that both the casings and bullet had characteristics similar to a very specific firearm; a 9mm Luger caliber, semi-automatic pistol manufactured by Sturm Ruger. (152:2; App. 27).

Months later, Milwaukee officers recovered a 9mm Luger caliber, semi-automatic pistol manufactured by Sturm Ruger. (152:2, 4, 16; App. 27, 29, 41). This firearm was obtained by the police during a drug raid on October 19, 2004. (152:3; App. 28). When officers entered the targeted residence, Ronald Q. Terry fled and ignored commands to stop. (152:3; App. 28). During Terry's flight up a flight of wooden stairs, the reporting officer indicated that he heard a distinct sound of metal striking wood. (152:3; App. 28). In the staircase, officers found the 9mm firearm, with one round in the chamber and nine more in the magazine, which were brass/gold and stamped "WIN." (152:3, 5; App. 28, 30).

Not only did the firearm was had the same characteristics identified by the crime lab months earlier, but Ronald Q. Terry was not a stranger to the case. (192:64-65). First, unlike Paine, Terry's DNA was found at the crime scene. (152:6-12; App. 31-37); (192:64-65). Second, as recounted in the following paragraphs, Terry intimidated a witness to the shooting, Sherika Ray. (152:13-15; App. 38-40).

Sherika Ray was one of the first persons to be questioned by the police about what she knew. (151:4). She lived directly below the apartment were the shooting occurred, and she home on April 10, 2004, at the time of the shooting. (152:14; App. 39).

Ray told officers that she heard fighting upstairs, then gunshots, and then she observed several people run from the residence. (151:4). A few days later, police went back to Ray to discuss what she knew. (151:4). Ray informed them that she was fearful for her and her children's safety because someone had tried to kick in her door and many people had come to her residence accusing her of knowing something about the incident. (151:4).

Months later, detectives went to Ray on February 1, 2005, to serve her with a subpoena for court. (152:13; App. 38). However, Ray immediately became upset and was "crying and shaking" due to the fear of coming to court. (152:13; App. 38). Ray informed the police that in October of 2004, she received a call from jail. (152:13; App. 38). October was also the time that officers recovered the firearm during the drug raid with Ronald Q. Terry present. (152:3; App. 38). The person who called Ray identified himself as "Q." (152:13; App. 38). This individual asked Ray what she knew about the double homicide. (152:13; App. 38). Out of fear, she told Q she did not witness anyone. (152:13; App. 38). This call led her to believe that something could happen to her if she cooperated with the police. (152:13; App. 38).

Ray told the police that her intimidation did not stop there. (152:13; App. 38). Not long after the call from Q, around Thanksgiving of 2004, Ronald Q. Terry came to Ray's mother's house, where Ray was staying because of her safety concerns. (152:13; App. 38). Terry drove her to the area of 22nd Street and entered a residence where others were present, including George

Donald (the person who testified against Paine). (152:13-14; App. 38-39).

When Ray was inside this residence, individuals were displaying weapons. (152:14; App. 39). Ray was scared. (152:14; App. 39). One of the individuals, named Hudson, questioned Ray about what she knew about the shooting and what she had told the police. (152:14; App. 39). She told the group that she never said anything to the police and only observed people running out of the house after some gunshots. (152:14; App. 39). A person named L.Z. Jolly, a.k.a. "Meaty," then said, "There are some people here that are playing both sides," which Ray took to mean that people thought she was betraying them. (152:14; App. 39). Ray felt intimated and left. (152:14; App. 39).

During that same interview on February 1, 2005, Ray also told the detectives more details regarding the shooting. (152:14; App. 39). She told them that at the time of the confrontation she heard, "Are you going to rob me." (152:14; App. 39). This contradicted witnesses who would testify at trial, as well as the State's theory that the shooting was not a robbery. (193:161). Ray also asked the detectives for protection, and they offered their personal phone numbers and to call 911 in case of emergency. (152:14; App. 39). No one was investigated or charged for the felony of witness intimidation. The State never presented this information to the jury either.

When Terry was arrested at the same time as the firearm was recovered, officers recognized that it should be tested against the evidence at the double-homicide crime scene. (152:16-17; App. 41-42). Detective Gilbert Hernandez, a lead detective in this case, asked the crime lab to compare the Terry firearm to the evidence from the double-homicide. (152:13, 16-17; App 41-42). The lab issued a report that stated, "none of the evidence [taken from the double-homicide crime scene] was fired [from the recovered firearm]."

(152:18; App 43). No explanation was given for that conclusion. Moreover, Mark Simonson, testified at Paine's trial that no gun was ever given to him during this case, even though the lab clearly had been given a gun. (192:35).

The same firearm was eventually returned to rightful owner Glen Hanson. (152:19-21; App. 44-46). Hanson agreed to have his firearm tested by Paine's current counsel. (152:20; App. 45). The test-fired bullets had, consistent with the characteristics of the crime scene evidence, six lands and grooves with a right-hand twist. (152:25; App. 50).

Before litigating the motion, Paine asked the District Attorney's office to release the underlying basis for the report that indicated the Hanson/Terry firearm was not used in the homicides. (168:1). The State refused. (168:1).

Paine filed a motion arguing that these facts that were unheard from the jury established his actual innocence, when considering the other evidence that established his innocence that had been presented. (151:6-17). Alternatively, he argued that if these facts were not new, they should have been pursued by his trial counsel and his appellate counsel should have argued the issue in his appeal. (151:17-19).

After briefing, the circuit court denied the motion without a hearing. (169:1-3; App. 23-25). The court adopted the State's brief *in toto*. (169:3; App. 25). The court found that it was not conclusively shown that the firearm matched, even though the State refused to provide the information. (169:2; App. 24). The court also found that it was not conclusive that Terry possessed the firearm. (169:2; App. 24).

Paine appealed. (170:1).

ARGUMENT

I. LAWRENCE PAINE'S CONVICTIONS AND SENTENCES SHOULD BE VACATED WHERE EVIDENCE NOT PRESENTED TO THE JURY SHOWS THAT: (1) A FIREARM MATCHES CHARACTERISTICS OF THE CRIME-SCENE FIREARM EVIDENCE; (2) THAT FIREARM WAS CONNECTED TO RONALD TERRY; (3) TERRY'S DNA WAS PRESENT AT THE CRIME SCENE UNLIKE PAINE; AND (4) TERRY INTIMIDATED A WITNESS.

The jury who found Paine guilty never heard the compelling evidence that Ronald Q. Terry and others intimidated Sherika Ray about testifying. Police reports document in detail Ray's multiple accounts of intimidation. Plus, the most chilling instance of intimidation occurred not long after the police arrested Terry for possession of the firearm, which despite the crime lab's statement it did not match, subsequent testing has shown it has characteristics consistent with the crime scene evidence. These facts, along with those supporting Paine's alibi, constitutes newly discovered evidence of Paine's innocence requiring vacating his convictions and sentences.

Paine's claim of innocence arises out of his constitutional right to due process. *Spencer v. Texas*, 385 U.S. 554, 563-64, 87 S.Ct. 648 (1967); *State v. Love*, 2005 WI 116, ¶43, n.18, 284 Wis.2d 111, 700 N.W.2d 62; *State v. Bembenek*, 140 Wis.2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987); *State v. Fosnow*, 2001 WI App 2, ¶8, 240 Wis.2d 699, 624 N.W.2d 883. The constitution provides that a conviction must be reversed outright if the evidence, viewed in a light favorable to the prosecution, fails to show that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781

(1979); *State v. DeLain*, 2005 WI 52, ¶11, 280 Wis.2d 51, 695 N.W.2d 484. "The correct legal standard when applying the 'reasonable probability of a different outcome' criteria is whether there is a reasonable probability that a jury, looking at both the [old and the new evidence], would have a reasonable doubt as to the defendant's guilt." *State v. McCallum*, 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997).

A. Newly discovered evidence shows that Ronald Q. Terry intimidated a witness, had his DNA at the crime scene, and was arrested at the same time and location where a firearm was obtained by police that matched the characteristics of the crime scene evidence.

The new evidence in this case is the firearm testing results, and the implications that flow from it, including Ronald Q. Terry's connection to both the firearm and his intimidation of a witness to the shooting.

The State's expert Mark Simonson indicated that the murder weapon would possibly be a 9mm Luger semiautomatic caliber pistol manufactured by Sturm Ruger. (152:2; App. 27). A 9mm Ruger was recovered during a drug raid near Ronald Q. Terry as he fled from police. (152:3; App. 28). Not surprisingly, Detective Gil Hernandez asked the crime lab to test the firearm taken during Terry's arrest against the crime scene evidence in Paine's case. (152:16-17; App.41).

Unlike other reports coming from the crime lab in this case, the subsequent report about the Terry firearm was very limited in its description of its relationship to the crime-scene evidence. (152:2; App. 27); (152:18; App. 43). In fact, there was no mention at all about the rifling characteristics of the gun. It simply said the evidence was not fired from the Terry

firearm. (152:18; App. 43). However, subsequent testing has shown that the firearm shared the characteristics identified in the original report, namely, six lands and grooves with a right-hand twist. (152:25; App. 50).

Aside from the fact that the evidence matched the characteristics identified in by the lab report issued just after the shooting, Terry's actions say all one needs to know about the firearm's relevance to the case. Not long after his arrest with a weapon that matched the characteristics of the double-homicide ballistic evidence, Terry began intimidating the woman who lived downstairs from the shooting, Sherika Ray. (152:13-14; App. 38-39). Ray received a call from Q, the nickname of Ronald Q. Terry, who asked her what she witnessed the day of the shooting. (152:13; App. 38). She naturally became fearful and believed that something could happen to her if she cooperated with the police. (152:13; App. 38).

Terry did not merely call Sherika Ray either. Terry located her at her mother's house and Terry drove her to another residence. (152:13; App. 38). Inside she recognized Rodney Hudson, L.Z. Jolly, and George Donald, who would testify against Paine later. (152:13-14; App. 39). She observed weapons, she was questioned her about what she had observed and what she had told police, and she was asked if she wanted to see the basement. (152:14; App. 39). Why would Terry engage in intimating Ray unless he had a genuine concern that he and the gun recovered during his recent arrest would tie him to the murders?

After relating this intimidating behavior, Ray informed detectives that at the time of the shooting she heard voices saying, "Are you going to rob me," which was inconsistent with the State's theory at the trial. (152:14; App. 39); (193:161). Notably, the State never called Ray as a witness. Moreover, while Ray asked the detectives for protection, there is no

indication at all that Hudson, Terry, or Donald were investigated, much less charged, for intimidating a witness. Instead, the prosecution presented Donald's testimony against Paine, and was one of the two people who claimed that Paine was the shooter.

For the felonious actions of Terry, whose DNA was found at the scene unlike Paine, the intimidation of Sherika Ray is striking enough. But when those facts are combined with the fact that a weapon consistent with the crime scene evidence was recovered as Terry fled from police, it would have presented the jury with facts that established Paine was not the shooter.

B. The evidence regarding Terry constitutes newly discovered evidence and requires vacating Paine's convictions and sentences.

The Wisconsin Supreme Court has before explained the test for newly discovered evidence as follows:

> "When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." *McCallum*, 208 Wis. 2d at 473, 561 N.W.2d 707. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *Id.*" *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42.

First, this evidence was clearly discovered after conviction and secondly, Paine was not negligent in obtaining it. When questioning whether the defendant was negligent with regard to newly discovered

evidence, the relevant period of discovery is "prior to [the defendant's] trial." *See State v. Vollbrecht*, 2012 WI App 90, ¶22, 344 Wis. 2d 69, 820 N.W.2d 443 (when questioning whether defendant was negligent with regard to newly discovered evidence, court recognizes relevant period of discovery as "prior to [the defendant's] trial"). The firearm was returned to its rightful owner before the second trial began and State had asserted it was not a match. (152:18-21; App. 43-46). Under those circumstances, Paine cannot possibly be held to be negligent in obtaining the test results. It was only after Paine, through the assistance of devoted family and supporters, that he located the owner of the gun and obtained test fires from it. (151:12); (152:20-25; App. 45-50).

Secondly, the firearm results and its relationship to Ronald Q. Terry are not cumulative. "Evidence is cumulative when it supports a fact established by existing evidence." *State v. Thiel*, 2003 WI 111, ¶78, 264 Wis. 2d 571, 665 N.W.2d 305 (quotation marks and quoted authority omitted). The evidence is not cumulative where the jury heard nothing about Ronald Terry, whose DNA was at the scene, had intimidated a witness with George Donald, or was found in possession of firearm matching the characteristics of crime scene evidence.

Thirdly, the evidence is material. "Evidence is material if it is probative of a matter at issue." *State v. Gonzalez*, 2014 WI 124, ¶22, 359 Wis. 2d 1, 856 N.W.2d 580. Given the importance of identification in this case, the location of the murder weapon and whom is in control of it are clearly material facts.

Finally, the newly discovered requires vacating Paine's convictions and sentences. Paine maintains that the evidence that the firearm matched the characteristics of the crime scene evidence, the firearm was taken during Terry's arrest, that Terry intimidated a witness along with George Donald

shows his innocence. Specifically, that when this evidence is considered alongside the evidence presented at trial, no reasonable juror could find Paine's guilt beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319; and *see DeLain*, 2005 WI 52, ¶11. At the very least, this evidence requires vacating his convictions and sentences because it shows a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to Paine's guilt. *See Plude*, 2008 WI 58, ¶32.

This case has never been one where the State can claim that it has strong evidence that Paine was the shooter. While the State presented two witnesses, Paine had presented an alibi, there was no physical evidence tying him to the crime, and the case had previously ended in a hung jury. (1:2-4); (186:2-3); (192:59); (193:68). Paine acted consistent with innocence throughout this situation. When he learned that he was being accused of the double homicide, he voluntarily turned himself in and waived several rights in order to clear his name. (193:48-49, 68). He explained his whereabouts at the time. (193:46-46, 70-71). He contacted the Milwaukee Police Department's internal affairs department about his case. (151:13).

Paine explained that the early part of the evening of the shooting he was at Paradise strip club on the south side of the city. (193:46-48). He was with a person named Skin Blackman. (193:45). When Paine volunteered to speak with the authorities about the shooting, he provided several details about that night at the strip club, including that he thought he saw two officers at the club. (193:68-70, 82-83).

Paine also explained that after the strip club, he decided to drive to Minneapolis. (193:59). It was the Easter holiday that weekend, and he wanted to see his son. (193:56). When he reached the city, it was still the early morning hours, and attempts to reach people he knew he could stay were not home, so he went to a

Super 8 where he had stayed before. (193:63). When he arrived at the hotel, he was told that he would only have the room for a few hours before he would have to leave. (193:64-65). Therefore, the hotel booked him in around 11:00 a.m. to avoid having to pay double. (193:64-65).

The State's attempts to discount his alibi illustrate how much they believed they needed to overcome their own problems, in order to convince the jurors that Paine was the shooter. Instead of calling the employee who was present at the time, Michael Humphrey, the State called a person who did not even work at the hotel until later. (151:14); (193:19). Clearly, her testimony's relevance was limited because she could not testify about what how the hotel operated at the time Paine visited, much less what happened the morning Paine arrived. The person who was working at that time, Michael Humphrey, was not present. If he had been, the jury would have heard that attempts are made to accommodate the guests needs, and when a guest arrives, at attempt can be made to avoid double-charging a guest who arrives only hours before check-out time. (151:14). While the State's witness claimed that this was not policy, she frankly does not know what the policies were at the time when Paine was a guest, or more important, what the practices were at the hotel at that time. While there are polices, exceptions occur. Moreover, Humphrey would have told the jury, contrary to the State's witness, that while a room may be marked as clean, it would still be marked dirty. (151:14). The jury never had the benefit to consider these points because Humphrey was not called as a witness.

The State also tried to show that Paine was incorrect about his testimony regarding the basketball game that occurred while he was in Minneapolis. (193:137-39). He testified that he remembered it was busy one of the nights he was in Minneapolis because there was a Timberwolves game on May 1st. (193:97).

While Paine testified that they were playing the Lakers, it turned out that there was a game against the Denver Nuggets on April 30th. Paine can explain now that such an error about the team was really no error at all considering the throwback uniforms used by the Nuggets is similar to the Lakers uniform. (151:15). The court of appeals concluded that this issue was minor in light of the other issues of the case, but nonetheless, the State used it against Paine in its closing argument. (119:12; App. 13).

Paine also told the detectives investigating his case that he had been to a strip club the night of the shooting. Officers recovered a VHS tape of the security footage in the club, but notably there was no report regarding its contents. (151:15). Defense counsel testified at a later *Machner* hearing that the footage was not helpful, but explicitly stated that the videos he watched were difficult to tell whether Paine was there or not. (196:31-32). Paine's investigator later obtained a statement from the club owner, who indicated that the copy he viewed was not correct at all, suggesting that a copy possessed by the police was not accurate. (151:15).

In combination with trying to poke holes into Paine's alibi, the State relied on the testimony of George Donald and Erick Howard, but both of these witnesses have serious flaws. Donald refused to show up for the first trial and did not appear at the second trial either. (179:3-4); (190:3-7). The State, desperately needing his testimony, took a deposition before the second trial. (189:3). During the deposition, Donald accuses Paine of being the shooter, but Donald's involvement in the case is not merely as an "eyewitness" as he claims. As explained above, he was present when Ronald Q. Terry intimidated downstairs neighbor Sherika Ray. *See supra* at 8-10. A person who went so far as to intimidate a witness has serious concerns about their believability, which the jury never had the opportunity to consider.

Erick Howard might not have been caught up with Ronald Q. Terry like Donald, but his problem is just as significant due to his very notable statement at the second trial about the forensic evidence. The police scoured the apartments for DNA evidence to determine who was present at the scene. They took swabs off of beer bottles, water bottles, cans of soda, and cigarette butts. (152:31-32); (191:28-29). None of these items had Paine's DNA, but it did have Howard and Terry's DNA, among other individuals. (192:64-65). The State knew that, after trying unsuccessfully to convict Paine before, the absence of Paine's DNA at the scene was a problem for their theory that Paine was shooter. An evidence technician testified that fingerprints might be lost if they were wiped away. (152:7-11; App. 32-36). Later the same day of trial, Howard testified to something that that he had never said to the police or during the first trial. He testified that he remembered Paine "saying something like wipe off something." (191:169-70).

Howard's statement, coupled with the State's prior witnesses who said that wiping could case fingerprints to go away, could have unfairly provided an answer to any jurors who would naturally doubt Paine's guilt given there his DNA was not found at the scene. Unfortunately, Paine's defense counsel did nothing to fix this problem, and let it linger for the jury to consider. But Howard's statement is, on its face, utterly incredible. It is not consistent with human experience to believe that Paine said something like "wipe off" when the shooter supposedly fled right away, and no one observed anything as significant as him wiping something down. Instead, the witnesses were clear about one thing, which is that when the shots ended, everyone fled immediately. (189:26-27); (191:144-45). Why then would Howard say something like this at trial? There is only one clear conclusion which is it illustrates Howard's intention to say whatever it took to have Paine convicted.

If this Court previously remanded when Paine was denied a hearing about his alibi witnesses, it certainly should remand here where he has presented (in addition to the evidence that was available previously) evidence supported his innocence.

C. In addition to supporting Paine's innocence, Ronald Q. Terry's connection to a firearm that matches the characteristics of the crime scene evidence constitutes third-party perpetrator evidence.

Where evidence about Terry and the firearm could have been admitted, it is material to the issue of Paine's innocence. *Vollbrecht*, 2012 WI App 90, ¶25. Evidence of third-party culpability is admissible where so long as there just a legitimate tendency that someone else committed it. *State v. Denny*, 120 Wis.2d 614, 623-25, 357 N.W.2d 12 (Ct. App. 1984). A legitimate tendency is demonstrated where the defendant can show: (1) the motive; (2) the opportunity to commit the charged crime; (3) can provide some evidence to directly connect the third person to the crime charged which is not remote in time, place or circumstance." *Denny*, 120 Wis. 2d at 623-24. Strong evidence implicating the third-party perpetrator on one prong may impact the evaluation of the other prongs, although all factors remain important. *See State v. Wilson*, 2015 WI 48, ¶64, 362 Wis.2d 193, 864 N.W.2d 52.

Paine's postconviction motion shows that more than a legitimate tendency that Terry was a third-party perpetrator to the offense. Motive was an issue at Paine's trial. The State's theory was that Paine had a temper tantrum about where his car was parked that he decided to shoot two people. (193:167-68). The defense's theory based on evidence in the case was that the house was involved in drug activity, which can involve shootings over drug trafficking. (193:187, 193,

203). Sherika Ray had told police that she heard "Are you going to rob me," just before the shooting. (152:14; App. 39). Terry was arrested in a similar location, so this factor weighs in Paine's favor. (152:3-4; App. 28-29).

Moreover, motive is demonstrated by the significant intimidation by Terry against Sherika Ray. Terry not only called Ray after he was arrested with the firearm that police tested against the crime scene evidence, he took her to a house and intimidated her with others, including George Donald. (152:13-14; App. 38-39). This supports Terry's motive in this case given his significant interest in controlling what Ray told police.

An opportunity to commit the crime charged is s supported by the fact that Terry's DNA, unlike Paine's, was at the crime scene. (192:64-65). While DNA does not say when someone was there, it is certainly evidence that Terry had opportunity because he shows he accessed the apartment.

Finally, even aside from the DNA or the intimidation, there are multiple facts connecting Terry to the crime charged that are not remote in time, place, or circumstance. As explained above, the firearm recovered during Terry's arrest matched the make and model of the firearm Simonson specifically mentioned based on his review of the evidence at the crime scene. (152:2, 25; App. 27, 50). It is no surprise then that Detective Gil Hernandez, one of the lead detectives in the case against Paine, wanted to have the firearm tested. (152:16-17; App. 41-42). This shows that even the police understood the connection.

These facts demonstrate more than a legitimate tendency of Paine's involvement. The State disagreed below, but their arguments fail easily.

The State argued below that there was nothing erroneous about Mark Simonson's conclusion that the

Terry firearm did not match. (154:8-12). It is disingenuous for the State to claim that Paine has failed to show a flaw in the report that says the Terry firearm did not match, when the State barred Paine from obtaining anything to explain that conclusion. (168:1).

The State's argument is misplaced as well. Paine argued below that the lands, grooves, and twists was significant enough by itself to demonstrate a connection between Terry and the firearm. (167:4-6). Paine supported this point with the fact that scientific studies have shown that beyond lands, groves, and twist, the science underlying firearm toolmark evidence is flawed. (151:10). While firearm evidence may claim that it can show a firearm to the exclusion of all others, scientific literature says otherwise. (151:10). In other words, accepted scientific criticism of firearm identification undermines Simonson's claim that the firearm did not match the crime scene evidence (assuming he actually did the testing)[2], especially where the State has refused to show more. It is clear and convincing enough therefore, that a firearm matching all the general characteristics, including make and model, lands and grooves, and twist direction, was found in connection with Terry.

The State below made another outrageous claim, which is contrary to its duty to pursue justice

[2] While withholding or misleading the defense about the firearm report may seem difficult to believe, this would unfortunately not be the first time. Milwaukee Police officers and detectives, including those involved here have faced allegations of such problems, and around the same timeframe. For example, in *Avery v. City of Milwaukee*, the Seventh Circuit recently allowed litigation to continue against detectives in a case investigated in 2003 and 2004, and which involved the same detectives here, Detectives Hein and Hernandez. *Avery v. City of Milwaukee*, 847 F.3d 433 (7th Cir. 2017). In the *Avery* case, detectives faced claims of fabricating incriminating statements against the defendant and failing to disclose facts that would have shown the pressure the witnesses faced.

and maintain convictions at all cost. *See State v. Bell*, 2018 WI 28, ¶16, 380 Wis.2d 616, 909 N.W.2d 750, *quoting Berger v. U.S.*, 295 U.S. 78, 88, 55 S.Ct. 629 (1935) (A fundamental principle guiding the conduct of the prosecutor is "not that it shall win a case, but that justice shall be done."). The State argued that, "Even if the Ruger P85, serial number 300-73310, *was connected to the homicides*…the defendant has failed to establish by clear and convincing evidence that Ronald Terry ever possessed the Ruger P85, serial number 300-73310." (154:6) (emphasis added). In other words, the State is arguing that the recovery of the murder weapon during the arrest of Ronald Terry is not relevant because the State believes that the Terry never actually possessed the firearm. To accept the State's myopic view is to ignore the facts indicated in the police report, assume without proof that an officer planted the firearm, and ignore the fact that Terry was no stranger to this case.

The State argued below that Terry did not possess the firearm because the author of the report, Officer Awadallah, was convicted in federal court of civil rights violations. (154:7). But what facts show that Awadallah did something wrong in this case? Nothing. Prior to an evidentiary hearing, facts cannot be assumed against Paine, and there are reasons already in the record to suggest there was no reason to deny a hearing.

The report shows compelling evidence that Terry possessed it, or the very least, had a connection to it. Specifically, the police report indicates that six police officers (not just Officer Awadallah) had a plan to enter the upper unit of a house known for drug dealing. (152:3-4; App. 28-29). Upon arrival two individuals were observed outside. Both fled, one to the front of the house and the other individual, later identified as Ronald Terry, into the house through the side door. (152:3; App. 28). Multiple officers commanded Terry to stop, but he ran through the

common hallway. (152:3; App. 28). Awadallah heard footsteps upstairs, and on his way up the stairs he heard a distinct sound of metal striking wood. Awadallah observed a Ruger P85 9mm firearm on the staircase and another officer recovered it. (152:3; App. 28). Awadallah heard a door locking and officers forced their way into the upstairs unit. (152:3; App. 28). Inside the unit were four individuals, including Terry. (152:3-4; App. 28-29). The firearm had "WIN" brand rounds, as did five of the cases found at the double homicide scene. (152:5; App. 30).

Considering other officers were involved in this raid on the house, and it was another officer who picked up the firearm, is the State claiming that all of these officers were corrupt? The State would have this Court believe it was more likely that a Milwaukee Police Department officer planted a gun then it being found on the foot heels of Terry as he fled. The reasonable view of the facts, and the relevant conclusion regarding them, is that Terry dropped the firearm and thus a connection of it to him. At the very least, considering Detective Hernandez request to have it tested, a connection between Terry and the firearm is sufficient enough to support a legitimate tendency that Terry was the perpetrator.

Under these facts, whether prosecutors decided to charge Terry with possession of the firearm has nothing to do with whether he actually possessed it. It is also worth noting that while the State claims that Terry's DNA was not found on the gun, the State provides no report to support this claim. All that needs to be shown to support Paine's claim is whether he was connected to it, and it is clear he was connected to it. Moreover, at this stage, prior to an evidentiary hearing, it is not possible to construe inferences against Paine's claim. *See State v. Reynolds*, 2005 WI App 222, ¶17, 287 Wis.2d 653, 705 N.W.2d 900 (an evidentiary hearing is needed to resolve most credibility issues).

These arguments by the State below fail in the face of the standard that all Paine would have had to show at trial was some legitimate "tendency," as opposed to ironclad proof. Thus, this Court should, as it had to do before, reverse the dismissal of Paine's petition and remand for an evidentiary hearing.

II. ALTERNATIVELY, TO THE EXTENT DEFENSE COUNSEL HAD THE OBLIGATION TO INVESTIGATE AND PRESENT THE FACTS RAISED IN THIS PETITION THAT WERE UNKNOWN TO THE JURY, APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY NOT ARGUING TRIAL COUNSEL'S INEFFECTIVENESS.

Paine maintains that these facts and points argued in Issue I, none of which were heard by the jury, show his innocence and require vacating his convictions. But to the extent that this failure may fall on Paine's trial counsel to present it and direct appeal counsel's failure to argue trial counsel's failure during Paine's direct appeal, Paine was denied his right to effective counsel.

The right to effective assistance of counsel is constitutionally guaranteed. U.S. Const. Amend. VI, Wis. Const. Art. I, § 7, *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984), *State v. Thiel*, 2003 WI 111, ¶11, 264 Wis.2d 595, 665 N.W.2d 305. The rules governing ineffective assistance are well settled. *See State v. McDowell*, 2004 WI 70, ¶30, 272 Wis.2d 488, 681 N.W.2d 500. To prove ineffective assistance, the defendant must prove deficient performance by counsel and resulting prejudice. *Strickland*, 466 U.S. at 687. The effectiveness of appellate counsel is judged by the same standard. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746 (2000).

Deficiency occurs when counsel performs below "an objective standard of reasonableness." *State v. Franklin*, 2001 WI 104, ¶13, 245 Wis.2d 582, 629 N.W.2d 289 (quotation and quoted authority omitted). An attorney's decision, even if "strategic," must nonetheless be valid and have a basis in law and fact. *State v. Domke*, 2011 WI 95, ¶41, 337 Wis.2d 268; *State v. Thiel*, 2003 WI 111, ¶51. Thus, "[l]awyers have a duty...to explore all avenues leading to facts relevant to the merits." *State v. Mayo*, 2007 WI 78, ¶59, 301 Wis.2d 642, 805 N.W.2d 364 (quotation and quoted authority omitted). The Wisconsin Supreme Court has suggested an additional requirement to the deficiency inquiry heretofore unrecognized by the United States Supreme Court: proof "that the claims [the defendant] believes should have been raised on appeal were 'clearly stronger' than the claims that were raised." *State v. Starks*, 2013 WI 69, ¶6, 349 Wis.2d 274, 833 N.W.2d 146.

Prejudice is shown if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Franklin*, 2001 WI 104, ¶14 (quotation and quoted authority omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694. In the context of the appellate process, the prejudice component requires the defendant to "show a reasonable probability that, but for his counsel's unreasonable failure to" pursue the claimed grounds for relief he would have prevailed on his appeal. *Robbins*, 528 U.S. at 285.

In this case, it is possible that counsel, whether trial or appellate counsel, might not have looked into facts raised above because the crime lab concluded the Terry firearm was not a match, even assuming counsel was given that report. Only an evidentiary hearing can elicit the answer. But if one were to conclude that trial counsel should have investigated whether the crime

lab was wrong in their conclusion, counsels' performances were deficient; trial counsel for not presenting this evidence for the jury, and appellate counsel for not arguing that trial counsel was ineffective on that basis.

There cannot be any objectively reasonable decision for trial counsel, if he had realized the significance of these facts, to forgo presenting this evidence to the jury. By presenting the jury with evidence that Ronald Terry was arrested along with a weapon that matched the characteristics of the crime scene evidence, doubt that Paine was involved increases. It was significant evidence that another person had the weapon that could have committed the crime, especially when he later threatened a witness. There was no reason not to present this evidence where it did nothing but help Paine and was entirely consistent with trial counsel's theory of the case. Moreover, its absence clearly affected the outcome of the trial, for all the reasons fully set forth above. *See supra* at 17-25.

While prior counsel might have succeeded in obtaining a *Machner* hearing regarding trial counsel's failure to call an alibi witness, that issue was not ultimately successful. (119:8-10; App. 9-11); (139:5-8; App. 19-22). The claim presented here, again assuming that counsel should have known to investigate the facts set forth above, is clearly stronger where the jury heard no evidence regarding it, unlike Paine's alibi. For these reasons, this Court should find that if counsel was obligated to investigate Terry and the firearm closer, he rendered ineffective assistance, and postconviction counsel rendered ineffective assistance by not raising the issue.

In the end, the jury never heard this compelling evidence undermining Paine's guilt, there is nothing in the record to explain why, and there is more than a reasonable probability that Paine would be found not

guilty had this evidence been presented. Unlike merely supporting an alibi, which this Court recognized as significant enough previously, this evidence would have shown Terry's guilt and undermined Donald's claim that Paine was the shooter.

III. AT THE VERY LEAST, PAINE'S MOTION REQUIRED AN EVIDENTIARY HEARING.

Given the arguments above, this Court should at least remand for an evidentiary hearing, where the circuit court erred in denying one. On appeal, the question is whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. *State v. Bentley*, 201 Wis.2d 303, 309-10, 548 N.W.2d 50 (1996). "[A] postconviction motion will be sufficient [to trigger a hearing] if it alleges within the four corners of the document itself 'the five "w's" and one "h"; that is who, what, where, when, why, and how.'" *State v. Love*, 2005 WI 116, ¶ 27, 284 Wis. 2d 111, 700 N.W.2d 62 (quoting *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis.2d 568, 682 N.W.2d 433). If the motion raises such facts, the circuit court *must* hold an evidentiary hearing. *Id*. at 310 (emphasis added); *Nelson v. State*, 54 Wis.2d 489, 497, 195 N.W.2d 629 (1972). This is a question of law that this Court reviews *de novo*. *Bentley*, 201 Wis.2d at 309-10.

While this court applies the *de novo* when considering whether Paine's petition was sufficient for an evidentiary hearing, it is notable that the circuit court's decision below did none of this analysis. A circuit court should "form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Nelson*, 54 Wis.2d at 498, 195 N.W.2d 629. The circuit court did not even discuss the *Bentley* standard. It barely exercised its own judgment too, where it adopted the State's response "*in toto*". *State v. McDermott*, 2012 WI

App 14, ¶9, 339 Wis.2d 316, 810 N.W.2d 237 ("We agree with [the defendant] that this is inappropriate—judges must not only make their independent analyses of issues presented to them for decision, but should also explain *their* rationale to the parties and to the public.").

But in addition to the circuit court's failure to exercising its own judgment, for the reasons given above, in issues I and II, Paine has met this standard even when reviewing this case *de novo*. *See supra* at 12-29. In short, Paine presented significant details about not just the what and the who involved in his issues, but where, when, why, and how. In short, Ronald Terry was found in connection with the firearm that had specific similarities to the crime scene evidence, Terry intimidated a witness on multiple occasions, and Terry's DNA was at the crime scene, unlike Paine. His trial counsel did not present any of this evidence, and his appellate counsel never brough up this evidence either. If those two attorneys were hindered in their investigation by the fact that the State asserted there was no connection between the firearm, perhaps that justifies their decision. But that does not justify the fact that Paine was tried and convicted without the jury hearing a word about it. This clearly set forth the standard for a hearing, and while Paine should have his conviction vacated, at the very least this Court should reverse the circuit court's decision to deny Paine an evidentiary hearing.

IV. IN LIGHT OF ALL THE CIRCUMSTANCES THE JURY DID NOT HEAR, THE REAL CONTROVERSY OVER WHO COMMITTED THIS SHOOTING WAS NOT FULLY TRIED, WHICH PROVIDES THIS COURT WITH ANOTHER BASIS TO REVERSE PAINE'S CONVICTION.

Paine's first trial ended in a mistrial. The State's second attempt to convict Paine was successful for them, but the jury never heard several key pieces of evidence, as explained above. As Paine continues to serve his life sentence, the totality of circumstances shows that jurors who convicted him did not know these key facts. Justice demands that this Court exercise its power to reverse his convictions and remand for further proceedings, or at the very least, that an evidentiary hearing be held.

This Court possesses a broad power of discretionary reversal under Wis. Stat. § 752.35 (2019). The statute provides authority to achieve justice in individual cases when it appears from the record that the real controversy has not been fully tried. *Vollmer v. Luety*, 156 Wis.2d 1, 19, 456 N.W.2d 797 (1990); *see also State v. Peters*, 2002 WI App 243, ¶18, 258 Wis. 2d 148, 653 N.W.2d 300. This Court considers the totality of the circumstances to determine whether a new trial is required to accomplish the ends of justice. *See State v. Wyss*, 124 Wis.2d 681, 735-36, 370 N.W.2d 745 (1985), *overruled on other grounds*, *State v. Poellinger*, 153 Wis.2d 493, 505-06, n.6, 451 N.W.2d 752 (1990).

Paine asks this Court to reverse the circuit court's denial on the basis that "the real controversy was not fully tried." Wis. Stat. § 752.35. Such a situation arises "when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case." *State v. Hicks*, 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996). Such a situation arises when "the jury was not given

the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial." *State v. Maloney*, 2006 WI 15, ¶14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436 (citation omitted).

An exercise of this power does not require a determination that a new trial likely would yield a different result. *State v. Watkins*, 2002 WI 101, ¶97, 255 Wis. 2d 265, 647 N.W.2d 244; *State v. Jeffrey A.W.*, 2010 WI App 29, ¶14, 323 Wis.2d 541, 780 N.W.2d 231. "Instead, we reverse to maintain the integrity of our system of criminal justice and so that we can say with confidence that justice has prevailed." *Jeffrey A.W.*, 2010 WI App 29, ¶14; *see also Hicks*, 202 Wis.2d at 160 (*quoting State v. Wyss*, 124 Wis.2d 681, 735–36, 370 N.W.2d 745 (1985), for similar propositions).

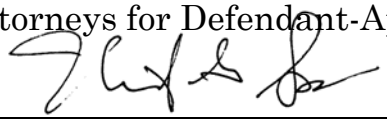
While this Court's power to reverse under Wis. Stat. § 752.35 is reserved for "exceptional cases," and should be granted "infrequently and judiciously" this, with its closeness and compelling evidence of innocence, is an exceptional case. The various facts and points raised in issue I and II were clearly not presented for the jury. *See supra* at 12-29. Moreover, these issues are perhaps the most important type of evidence, considering they do not just go to impeachment, but bear on the most important question of who did the shooting. For these reasons, Paine asks this Court to reverse under Wis. Stat. § 752.35 as well.

CONCLUSION

For the aforementioned reasons, Paine asks this Court to reverse his conviction, or at the very least, remand for further proceedings.

Dated this 23rd day of December, 2019.

PINIX & SOUKUP, LLC
Attorneys for Defendant-Appellant



By: Michael G. Soukup

CERTIFICATION

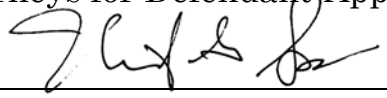
I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 9602 words, as counted by the commercially available word processor Microsoft Word.

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

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed 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 23rd day of December, 2019.

PINIX & SOUKUP, LLC
Attorneys for Defendant-Appellant



By: Michael G. Soukup

CERTIFICATION OF APPENDIX CONTENT

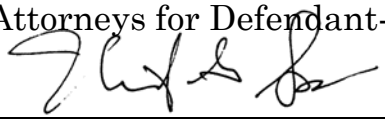
I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using 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 December, 2019.

PINIX & SOUKUP, LLC
Attorneys for Defendant-Appellant



By: Michael G. Soukup

CERTIFICATION OF FILING BY THIRD-PARTY COMMERCIAL CARRIER

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this this Appellant's Brief and Appendix will be delivered to a FedEx, a third-party commercial carrier, on December 23, 2019, for delivery to the Clerk of the Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin 53703, within three calendar days. I further certify that the brief will be correctly addressed and delivery charges prepaid. Copies will be served on the parties by the same method.

Dated this 23rd day of December, 2019.

PINIX & SOUKUP, LLC
Attorneys for Defendant-Appellant

By: Michael G. Soukup