STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2023 AP 001480

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL MARIO MILLER, JR.,

Defendant- Appellant.

BRIEF-IN-CHIEF OF DEFENDANT-APPELLANT

APPEAL FROM A DECISION AND ORDER ENTERED ON JULY 25, 2023
The Honorable Jean Kies, Presiding
Circuit Court Case No. 2004 CF 599

Respectfully submitted:

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The trial court: Answered No.

II. **WHETHER THE SAME NEWLY-DISCOVERED EVIDENCE WARRANTS A NEW *MIRANDA-GOODCHILD* HEARING WHEN THE NEW EVIDENCE COMPLETELY ALTERS HOW THE DEFENDANT WOULD HAVE LITIGATED THE *MIRANDA-GOODCHILD* ISSUE, AND WILL FURTHER SADDLE THE STATE WITH SIGNIFICANT CREDIBILITY AND RELIABILITY ISSUES IN MEETING ITS BURDEN OF PROOF.**

The trial court: Answered No.

III. **WHETHER THE REAL CONTROVERSY SURROUNDING THE INTERROGATION AND ALLEGED "CONFESSION" HAVE NOT BEEN FULLY TRIED WHEN THE CIRCUIT COURT HYPOTHESIZES HOW THE *MIRANDA-GOODCHILD* HEARING *WOULD HAVE TURNED OUT* WITH THE NEWLY-DISCOVERED EVIDENCE.**

The trial court: Did not answer this question.

STATEMENT ON PUBLICATION

The appellant does not believe the Court's opinion in this case will meet the criteria for publication as the legal issues can be resolved by the application of existing legal principles to undisputed facts.

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument insofar as he believes the briefs will sufficiently explicate the facts and law necessary for this Court to decide the issues presented.

STATEMENT OF THE CASE AND FACTS

On June 12, 2003, Marques Messling was shot and killed while his car was stopped in slow-moving traffic near Capitol Drive and 31st Street. (R266-42-43, 123). Witnesses testified that two black males approached the car on foot and fired shots into the car with two different handguns, then fled on foot to an alley south of the location, where they took off in a car. (*Id.*). The shooting was believed to be gang-related. Law enforcement did not apprehend any suspects and 2003 ended with no arrest for the homicide.

Sometime during January of 2004, law enforcement began looking at the defendant-appellant, Michael Miller, as a person of interest. (R32-6). Miller heard law enforcement wished to question him about the Messling homicide and therefore hired Attorney Michael Jackelen to represent him on the matter. (*Id.*). So it was that on January 27, 2004, Attorney Jackelen called ADA William Molitor, assigned to the Messling homicide, and told him he represented Miller, and they discussed the case. (*Id.*). Attorney Jackelen apparently advised ADA Molitor that Miller should not be interrogated without his (Jackelen's) presence because ADA Molitor subsequently gave detectives that mandate. (*Id.* at 3).

Roughly one week later - February 3, 2004 - the police had Miller in custody on a municipal warrant when Detective Gilbert Hernandez decided to take a crack at interrogating Miller. (R270-10-11, 21). Detective Hernandez was not the first detective to attempt to get a statement from Miller. Two detectives had separately tried and failed before him. And it was not just that Miller refused to speak with them. Both of them described Miller as the most ill-mannered suspect they had ever attempted to interview. (*Id.* at 4-18).

Detective Hernandez, however, would claim that *his* interrogation of Miller (which contravened "no process" and "no interview" orders) was strangely different, as Miller was suddenly polite and respectful, and eager to confess. (*Id.* at 24, 28-29). Detective Hernandez covered the Attorney Jackelen problem by conceding Miller *did* tell him he was represented by Attorney Jackelen, but then immediately said he did not want Attorney Jackelen there, but instead, just wanted to tell

the truth. (*Id.* at 24). Then, Detective Hernandez claimed, Miller then placed himself at the scene of the crime with a handgun he emptied into a vehicle. (R272-36-65).[1]

On June 8, 2004, the trial court conducted a *Miranda* hearing at which Detective Hernandez testified. (R270). The court denied the motion, finding *Miranda* warnings were given, and nothing suggested the respectable Detective Hernandez engaged in any unlawful or unprofessional conduct. (*Id.* at 42-46). On June 27, 2005, a five-day jury trial followed. (R268). The State's theory was that the two culprits who witnesses saw shooting into Messling's vehicle were Dominic Addison and Miller. Of course, neither eyewitness identified Miller as a shooter, nor were any weapons ever recovered. Nor did any forensic evidence ever suggest Miller was a shooter.[2]

Enter Miller's "confession" courtesy of Detective Hernandez which the jury *did* hear. (R272-36-65). Given the absence of forensic evidence, a gun, or any witness to identify Miller as the shooter, this "confession" was the centerpiece of the State's case. And on July 1, 2005, the jury returned a guilty verdict. (R275-80). Then, on September 12, 2005, the court sentenced Miller to life in prison without eligibility for extended supervision for 50 years. (R276-21).

On December 15, 2021, Miller filed a motion for a new trial based on newly-discovered evidence. (R30). The newly-discovered evidence established that shortly before Detective Hernandez told Miller's jury that Miller had confessed to the offense, he had also lied to another jury about a confession he fabricated against a demonstrably innocent defendant in another cold case homicide. *Avery v. City of Milwaukee*, 847 F.3d 433 (7th Cir. 2017). This, Miller posited, coupled with the highly suspicious circumstances under which Detective Hernandez claimed to have taken his confession, so damaged

[1] Gilbert Hernandez is no longer a detective for any law enforcement agency for reasons addressed *infra*. Nevertheless, out of respect for the position, Miller will refer to him as "Detective Hernandez" on appeal.

[2] Addison pled guilty to Messling's homicide, but never implicated Miller as the other shooter. *State v. Addison,* Milwaukee County Case No. 2004 CF 600.

that central piece of evidence at Miller's trial that a new trial was warranted.

On November 17, 2022, the court conducted an evidentiary hearing on Miller's motion. (R51). Detective Hernandez testified. (*Id.*). On January 6, 2023, and over Miller's objection, the court continued the evidentiary hearing to take the testimony of Detective Katherine Hein as an offer of proof. (R57). Nevertheless, on April 13, 2023 the court agreed with Miller that Detective Hein's testimony should not, and thus would not, be considered in deciding Miller's motion. (R286). On July 25, 2023, the circuit court issued a written decision denying Miller's motion. (R65; App. A). This appeal followed. (R66).

Argument

I. THE CIRCUIT COURT ERRED WHEN IT DENIED MILLER A NEW TRIAL BASED ON NEWLY-DISCOVERED EVIDENCE THAT DETECTIVE GILBERT HERNANDEZ WAS ENGAGED IN FALSIFYING CONFESSIONS AND MANUFACTURING EVIDENCE DURING THE SAME TIME FRAME HE CLAIMED TO HAVE TAKEN "A CONFESSION" FROM MILLER DURING AN INTERROGATION SURROUNDED BY RATHER SUSPICIOUS CIRCUMSTANCES.

A. Applicable Legal Standards.

To set aside a judgment of conviction based on newly-discovered evidence, the newly-discovered evidence must be sufficient to establish that a defendant's conviction is a manifest injustice. *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 750 N.W.2d 42. When moving for a new trial based on 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.

Id. at ¶¶ 32-33. Regarding these four criteria, this Court will review the circuit court's decision to determine whether there was an erroneous exercise of discretion. *Id.* at ¶ 31, *citing State v. Boyce*, 75 Wis.2d 452, 457, 249 N.W.2d 758 (1977).

If a defendant can prove all four *Plude* criteria, the circuit must then determine whether a reasonable probability exists that had the jury heard the newly-discovered evidence, there would have been a different outcome. *Id.* This determination presents a question of law this Court will review

de novo. Plude, at ¶ 33. A reasonable probability of a different outcome exists if there is a reasonable probability a jury, looking at both the old and the new evidence would have a reasonable doubt as to the defendant's guilt. *Id.* The "reasonable probability" test is not outcome determinative, however. It does not require Miller to prove a new trial would produce a different result. *State v. McCallum*, 208 Wis.2d 463, 490, 561 N.W.2d 707 (1997) (Abrahamson, C.J., concurring). Miller need only show a reasonable loss of confidence in the verdict, *Kyles v. Whitley,* 514 U.S. 419, 435 (1995), and does so here.

B. The Newly-Discovered Evidence Consists Of Detective Hernandez's Perjured Testimony About A "Confession" He Falsified Just Three Months Before He Testified Against Miller.

The newly-discovered evidence consists of proof that Detective Hernandez, during the same time frame he claimed to have taken Miller's confession, was engaged in fabricating confessions in unsolved homicide cases. *See Avery v. City of Milwaukee*, 847 F.3d 433 (7th Cir. 2017). In 2004, Avery was arrested and eventually convicted of the 1998 rape and murder of Maryetta Griffin, whose strangled body was found in an abandoned garage on Milwaukee's north side. Avery spent six years in prison before he was exonerated by DNA evidence proving Walter Ellis was the murderer. Avery filed a wrongful-conviction suit against Detective Hernandez for concocting a false confession, inducing three jailhouse informants to falsely incriminate him, and using this fabricated evidence to convict him. *Id.* at 435. A jury found Detective Hernandez liable for:

(1) fabricating evidence, including a confession, causing Avery's wrongful homicide conviction;

(2) conspiring to use fabricated evidence causing Avery's wrongful homicide conviction; and

> (3) failing to intervene to prohibit the use of fabricated evidence and causing Avery's wrongful homicide conviction.

(R50).[3]

The facts adduced during Avery's civil trial were remarkably similar to this case from the standpoint of the alleged confession. After Griffin was killed, Avery was asked to come to the station to speak with MPD detectives about the murder. *Id.* at 436. Avery complied, and like Miller, denied involvement in the homicide during two rounds of interrogations by different detectives, and like Miller was sent to a holding cell for the night. And once again, Detective Hernandez arrived to resume the interrogation the next day. Although Avery continued to deny involvement, Detective Hernandez continued to badger him, accusing him of killing Griffin. *Id.* He reminded him Griffin was last seen alive at his (Avery's) drug house, and suggested she had tried to steal from him, and a struggle or chase ensued, and maybe she fell down the stairs and broke her neck. Avery denied this happened. *Id.*

Ignoring Avery's persistent denials, Detective Hernandez prepared reports falsely claiming Avery confessed to the murder with the following account of events: Griffin was at Avery's drug house on the night in question; Avery fell asleep and woke up to find Griffin stealing cash from his pockets; he remembered fighting with her but could not recall what happened next, but remembered telling a third person he "killed this bitch" before finally admitting he killed Griffin, without remembering how he did it. *Id.* When Detective Hernandez gave Avery's reports to the chief homicide prosecutor, however, he deemed the evidence insufficient to support a homicide charge. Avery was thus convicted only of state drug offenses and began a short prison term. *Id.*

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[3] Avery also claimed Detective Hernandez failed to disclose, as required by *Brady v. Maryland*, 373 U.S. 83 (1963), impeachment evidence about how he obtained the false statements from the informants. *Id.* at 435. The Seventh Circuit reinstated this claim after the district court dismissed it on summary judgment and it appears Detective Hernandez settled this claim following remand. *Avery, supra* at 435.

This did not deter Detective Hernandez, however. While in prison Avery had met inmates Keith Randolph, Antron Kent, and Jeffrey Kimbrough, all of whom, with Detective Hernandez's prompting, became state witnesses at Avery's trial for Griffin's murder. In 2003, Detectives Hernandez and Hein interviewed Randolph in prison and supplied him with details about the Griffin homicide, told him to finger Avery, and promised to help him win a reduced sentence. Randolph eventually succumbed to the pressure and inducements and told them Avery had admitted he killed Griffin. *Id.*

Detective Hernandez then prepared reports to that effect but, of course, omitted facts about his "interview" that could have been used for impeachment purposes. Nevertheless, when Randolph was called as a state witness at Avery's murder trial, he refused to perjure himself by repeating statements he gave the detectives. Again, enter Detective Hernandez who was allowed to testify to his reports (as prior inconsistent statements) so the jury heard Randolph's incriminating statements anyway, without the details of the "interview" that may have caused jurors to doubt its reliability. *Id.*

The story line on Kent was similar. Detectives coached and pressured him on multiple occasions over several years: in phone calls from Detective Kevin Armbruster; in an interview with Detectives Armbruster and Timothy Heier; and in an interview with Detectives Hernandez and Hein. The upshot was that like Randolph, Kent eventually gave in and said Avery told him he strangled Griffin to death. Unlike Randolph, however, Kent stuck to that story during Avery's trial. *Id.*

Regarding Kimbrough, Detectives Hernandez and Hein conducted a follow-up interview to Detectives Armbruster and Heier. As with Randolph and Kent, the detectives fed Kimbrough details about the Griffin murder and pressured him to implicate Avery. *Id.* at 437. They eventually got what they were looking for: Kimbrough told them Avery admitted he killed Griffin. Kimbrough later recanted this statement and tried to back out of testifying at Avery's trial, but detectives told him he "had to" testify. Kimbrough then did as told: he took the stand and testified Avery told him he killed Griffin. *Id.*

The addition of these three prison informants was enough for the prosecutor to issue charges and Avery was therefore arrested shortly after he completed his narcotics sentence in 2004. During his trial in March of 2005, Detective Hernandez testified about Avery's confession and Avery was convicted. *Id.* at 436–37. Avery then served many years in prison before he was exonerated by evidence of Ellis's DNA and confession to Griffin's rape and murder.

As previously noted, following his exoneration and release from prison, Avery filed a wrongful conviction suit naming Detective Hernandez as a defendant. Hernandez was the only detective implicated in *all* of Avery's claims. Detective Hernandez falsely testified about Avery's putative confession in March of 2005. In June of 2005, he testified against Avery, and did the same thing. (R272-36-65).

C. Detective Hernandez's Testimony About The "Confession" He Claimed Miller Gave Was The Linchpin Of The State's Case, And Had Miller's Jury Known That Just Three Months Earlier Detective Hernandez Had Testified Falsely About A Confession He Had Fabricated To Convict An Innocent Man In Another Cold Case, It Is Reasonably Probable There Would Have Been A Different Outcome.

The jury's findings of fact against Detective Hernandez did not become final until 2017 when the Seventh Circuit issued its decision in *Avery.* Thus, Miller could not have discovered this evidence until after his conviction, nor could he be deemed negligent for not having sought it earlier. (R65-7). The circuit court also agreed Detective Hernandez's falsification of a confession is material to an issue in this case, (*id.*), which is evident from the fact the State presented Miller's "confession" to his jury and effectively leveraged it into a conviction. Finally, the circuit court agreed the evidence is not merely cumulative. (*Id.*). Indeed, there was no other evidence to establish, or even suggest, Detective Hernandez was capable of fabricating a confession, and there was no other evidence available to impeach the reliability of the putative confession.

Consequently, the only issue here is whether there is a reasonable probability of a different outcome at the new trial. This is an issue this Court reviews *de novo. Plude,* at ¶ 33.

It comes as no surprise that Detective Hernandez was the last witness the State called before resting, because his testimony was the glue holding together the other scattered pieces of the State's case. Two such pieces were the two eyewitnesses to the shooting who could not identify Miller as the shooter. Indeed, they could only provide a description of the assailants' complexions and clothing, but were unable to agree on those matters. (R275-28-30, 36). One of the witnesses said *both* shooters were dark-skinned, (*id.* at 61, 72), while Miller is light-skinned. One witness said the shooter was wearing a white t-shirt while the other said the shooter was dressed in dark clothing. (R266-65-66, 89). Again, neither could identify Miller as the shooter.

Other scattered pieces consisted of two other witnesses who allegedly gave statements placing Miller *near* the crime scene at the time of the shooting but could not say he was the shooter. During Miller's trial, however, these witnesses disavowed either having giving the statement or said they had simply affirmed facts the detective fed them, a proposition that now is no longer far-fetched. (*See, e.g.,* R265-19-53). The murder weapon was never recovered and no physical evidence (fingerprints, DNA, etc.) linked Miller to the crime. (*Id.* at 45, 69). Miller's "confession" was indeed the cornerstone of the State's case against him.

Typical of the witness testimony purporting to place Miller near the shooting was Brandon Burnside, who was arrested at his house at night and taken downtown and shown other witnesses' statements with which he was encouraged to agree. (R265-54-55). Burnside testified that he was scared as the detective considered him a suspect in the first-degree intentional homicide case which meant life in prison. (*Id.* at 30-31, 55-56). The Wisconsin supreme court has recognized, in the prejudice context, that witnesses who are arrested as suspects and then point the finger at a defendant inherently have credibility issues. *State v. Jackson*, 2023 WI 3, ¶ 19, 405 Wis. 2d 458, 983 N.W.2d 608.

When Detective Hernandez presented Miller's "confession" to his jury, he was cloaked with all the integrity and propriety his title carried. Detective Hernandez told the jury that Miller had placed himself at the crime scene and armed with a gun he emptied into a vehicle. Miller supposedly admitted he was a member of the "Two-Nine Hard Heads" gang, and was well aware of the bad blood between Messling and his (Miller's) gang, including specific past incidents at the heart of the feud. (R272-50- 52). Miller, Detective Hernandez claimed, further admitted having purchased the same caliber of gun used to kill Messling because he heard Messling had "a chopper." (*Id.* at 52-53). Miller also allegedly placed himself in a burgundy Chevy Lumina which other witnesses had already tied to the homicide, and in the back seat with Addison. (*Id.* at 53).

According to Detective Hernandez, Miller also agreed he had been with two witnesses they had already interrogated and who became State witnesses at Miller's trial: Ernest Knox and Jack Smith. (*Id.* at 53).Then, Detective Hernandez claimed, Miller placed himself at the scene of the shooting with Addison, with whom he had walked from the Lumina to talk to Messling. (*Id.* at 54). However, in what the State would eventually pan as laughably absurd, Miller said he suddenly heard shots while in the vicinity of Messling's vehicle, became scared he was a target, pulled his .357 caliber black revolver, and emptied it into a blue Chevy, whereupon he realized it was the wrong blue Chevy. (*Id.* at 56). Detective Hernandez claimed that Miller said Addison fired at the correct blue Chevy. (*Id.* at 57-58).

It is easy to see how damning were the words Detective Hernandez put in Miller's mouth. And the State's closing argument reveals the linchpin of its case were precisely those words:

> And he [Miller] gives the statement in which he admits to shooting a 357 revolver. He gets out of

> the car with Dominic Addison in the alley. He claims Dominic's just a few steps behind him as they head to Capitol. Somehow he travels the full 90 yards under here. Says he's by the second support pillar. So it would be a little more than that. He's underneath this bridge. And he hears shots. So he pulls out his revolver and starts shooting and empties the gun, turns around, never sees Dominic Addison and comes back and doesn't see Dominic again until the yield sign here.

(R275-38-39). If Detective Hernandez were to be believed (and he was), Miller placed himself at the scene of the shooting, while armed, and said he emptied his gun. At least that is what Detective Hernandez claimed. Of course, this is the same Detective Hernandez who three months earlier also claimed Avery confessed he "killed the bitch" Griffin.

During rebuttal, the State again used portions of Miller's "confession," which it construed as incredible vis-à-vis other evidence (e.g., that he was not a member of the 29-Hardheads gang or close to Addison). (*Id.* at 63-64). The State went on, telling the jury:

> This defendant, after he talks to the police . . . a couple times, remember, that he said and he's confronted by the police the fact that all of his guys told on him. That may not be the specifics. But he knows at this point, well, I'm in trouble now. If my own guys are telling me, I better come up with something. Because he denied it before. I wasn't involved, had nothing to do with it.

(*Id.* at 68). This was an effective and particularly prejudicial use of "the confession" Detective Hernandez claimed to have taken after all others failed. By juxtaposing "the confession" to Miller's previous denials of any knowledge of the incident, the State established Miller as an individual disposed to lying to the police, and who lied again when he failed to *fully* own his role in the shooting.

D. The Circuit Court Failed To Analyze The Evidence Presented During Miller's Original Trial Vis-à-Vis The Newly-Discovered Evidence That Detective Hernandez Was Fabricating Confessions During That Same Time Frame.

The circuit court's legal analysis does not begin until the bottom of page 6 of its 10.5 page decision. Up to that point, the court reviewed the procedural history of this case and acknowledged the temporal connection between it and the *Avery* case. It noted it had determined that it would not consider the testimony of Detective Katherine Hein/Spano in analyzing the issues because despite knowledge of her involvement in this case, the State chose not to have her testify during Miller's original proceedings. (R65-5-6). Curiously, it also questioned whether Miller, by not filing his motion until 2022, waited too long to present his newly-discovered evidence, since the "widely publicized" verdict against Detective Hernandez came down in 2015. (R65-3-4). As Miller had pointed out, however, the verdict was then vacated by the district court before it was reinstated by the Seventh Circuit in 2017. In either event, the trial court "forgave" the lapse in time, (*id.* at 4), even though there was no deadline for which Miller needed to be forgiven.

The circuit court then began its legal analysis by noting that fabricated evidence, including false confessions or those obtained in violation of a defendant's constitutional rights, "impugn the integrity of the fact-finding process." (R65-6), *citing Stone v. Powell*, 428 U.S. 465, 479 (1976). The circuit court then noted that Detective Hernandez' egregious conduct in the Avery case, occurring as it did during the same time he was obtaining and presenting a putative confession by Miller, calls into question whether Miller received a fair trial. (*Id.*)., *citing State v. Samuel*, 2002 WI 34, ¶ 16, 252 Wis.2d 26, 643 N.W.2d 423. The circuit court then properly concluded that Miller satisfied all four of the *Plude* factors. (R65-7-8).

At that point, there remained two distinct issues for the circuit court to review. First, there was the question of whether

the newly-discovered evidence would have so badly impeached the reliability of Detective Hernandez's testimony of Miller's "confession" that a different outcome was reasonably probable. This issue focused on Miller's *trial.* Second, there was the question of how the newly-discovered evidence would impact the admissibility of Miller's confession in the first instance. This second issue focused on Miller's *Miranda-Goodchild hearing.*

When setting up the issues to be addressed, however, the circuit court blended them into a single issue:

> **This court will not order a new trial, as it seems the asserted controversy is, as it has been throughout Mr. Miller's challenges to his conviction, the admissibility of his 'confession' to Detective Hernandez and Detective Hein/Spano, introduced at trial.** The question becomes, that although Mr. Miller's confession rested entirely on the testimony of Detective Hernandez, and assuming that Detective Hernandez' conduct in the Avery case would be admitted at a new trial, would Detective Hernandez' (new) trial testimony be seen as utterly unworthy of being believed. **In other words, would the Avery conduct be sufficient to compromise Detective Hernandez' assertions that Mr. Miller decided to proceed in the interrogation without his lawyer. The court finds the answer to be, 'No.'**

(R65-8) (emphasis added).[4]

Here, the circuit court framed what it needs to examine. The emphasized portions pertain solely to the *Miranda-Goodchild* issue, while sandwiched between them is a roughly correct restatement of the other issue – the impact of the newly-discovered evidence in the *trial* setting. The problem is that

[4] The reference to Detective Katherine Hein/Spano in this passage suggests her involvement in Miller's case affected, to some degree, the court's analysis, despite the court's earlier determination that her testimony would not be considered in deciding Miller's legal issues.

after properly referencing the *trial* issue, the circuit court then reframed the *trial* issue back into the *Miranda-Goodchild* issue by saying that "in other words," it needed to examine whether the Avery conduct would be sufficient to compromise Detective Hernandez' assertions that Miller decided to proceed in the interrogation without his lawyer. The court then answered this *Miranda-Goodchild* question "No." It never properly analyzed, however, the *trial* question.

Thereafter, the circuit court opined that its *Miranda-Goodchild* determination was buttressed by a recitation of facts made by *this Court* during Miller's direct appeal:

> At 1 p.m. the day after his arrest, which was about eleven hours after the first interview ended, Miller was interviewed by Hernandez, who testified that he advised Miller of his Miranda rights. Hernandez said Miller indicated that he wanted to make a statement, even though he already had a lawyer (footnote omitted). Hernandez testified: "And I at that point asked him, well, you have the right to have them present. And he indicated no, that he … wanted to tell the truth and he wanted to cooperate." Hernandez testified that he included this information in his written report, *which Miller initialed after he was advised of his rights and agreed to speak with the detectives.* (italics supplied)

(R65-8), *citing State v. Miller,* Appeal No. 2010 AP 399-CR (Unpub. Slip. Op., March 15, 2011, ¶ 6).[5]

[5] With all due respect, this Court's treatment of facts thirteen years ago before the newly-discovered evidence came to light is not relevant to the issues presented. Indeed, these were "facts" *according to Detective Hernandez* at a point in time when his integrity was beyond question. Now that his willingness to fabricate evidence has been exposed, and particularly since it was during the same time frame as Miller's trial, reliance on this quoted passage is misplaced. Indeed, it merely begs the question. And interestingly, although Detective Hernandez claimed that Miller *initialed* the documents, it is conceded that he never *signed* the statement he allegedly was so eager to give. (R270-38).

Addressing only the *Miranda* issue, and by extension only whether Miller's trial would have unfolded *without* any testimony from Detective Hernandez, is a fundamental problem with the circuit court's decision. No analysis is ever devoted to the outcome at a trial where the reliability of Detective Hernandez's claim of a confession would have been utterly destroyed with evidence of his falsification of confessions during that time frame, coupled with his suspicious claim of Miller's inexplicable transformation into "Mr. Nice Guy" when *he* went to interrogate him. The circuit court's decision only contains conclusory remarks on the issue. (*See, e.g.,* R65-9-10) ("[t]here is not a reasonable probability that introducing Detective Hernandez' Avery conduct, even though occurring at the same time as Mr. Miller's prosecution, would produce a different outcome").

The analysis missing from the decision is the analysis required by law. Courts are required to look at both the old evidence and the new evidence and consider whether a jury would find the newly-discovered evidence sufficiently impactful on the evidence that *was* presented at trial, such that a jury would have a reasonable doubt as to the defendant's guilt. *McCallum,* 208 Wis.2d at 474. This paradigm requires courts to juxtapose and analyze two records: (1) the old evidence; and (2) the old evidence plus the newly-discovered evidence. Here, however, the court never did this. This major hole in the decision is betrayed by the abject absence of any examination or discussion of the trial evidence.

It is possible this flaw is the product of the following remarks by the court, which are also troubling:

> Indeed, this court adopts the State's view that, in so many words, without Detective Hernandez' testimony, there was more than sufficient evidence for the jury to reach the same verdict. **Indeed, Mr. Miller does not argue that absent Detective Hernandez' testimony, the evidence presented at trial was insufficient to support the verdict.**

(R65-10) (emphasis added). The first sentence is another example of the *conclusory* treatment of Miller's *trial* issue,

sans any comparative analysis of the trial evidence. The emphasized portion, however, is more troubling still, because it imposes an improper burden of proof on Miller, while erroneously faulting him for not arguing his *trial* issue.

Miller was not required to establish (and therefore did not argue) that he would have been *acquitted* "absent Detective Hernandez' testimony." Miller *was* required to argue, and therefore *did* argue, and repeatedly throughout the lower court proceedings, (R31-6-14; R39-7-8; R60-11-15; R63-5-8), that the newly-discovered evidence of Detective Hernandez's falsification of confessions, especially when coupled with his dubious claim of a suddenly obeisant Miller, made a different outcome "reasonably probable." *Plude*, 2008 WI 58, at ¶ 33. Miller argued that in a trial with the putative reliability of his alleged confession cut down at its perjurious source, there was a "reasonable probability" of a different outcome. Here, however, the court yoked Miller with the wrong legal standard by requiring him to convince the court he would have been acquitted.

This erroneous burden of proof was far more onerous than the actual standard. Indeed, Miller was not even required to demonstrate a reasonable probability of *an acquittal,* only a reasonable probability of *a different outcome. Plude, supra* at ¶ 33. As the Seventh Circuit noted in an analogous situation, and when reviewing a state court's rejection of a defendant's claim because he failed to establish he would have been acquitted:

> That is precisely the standard which the *Williams* Court identified as diametrically different, opposite in character or nature, and mutually opposed to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a reasonable probability that . . . the result of the proceeding would have been different . . . [T]he court's opinion is "contrary to law" for an additional reason based on the burden it imposed to demonstrate whether the evidence "would have changed the outcome." That phrase has consistently been defined as requiring only a showing of a

> reasonable probability that at least one juror would possess a reasonable doubt. Thus, a defendant need not prove his actual innocence, but need only establish reasonable doubt in the mind of at least one juror in order to change the outcome of the trial.

Dunn v. Neal, 44 F.4th 696, 703–04 (7th Cir. 2022) (citations omitted).

Dunn therefore rejected the burden to which the circuit court held Miller in this case:

> [I]n order to meet the requirement of showing a reasonable probability that "the outcome would have been different," the court required Dunn to establish that a jury would have concluded that . . . [he] . . . was innocent. In order to demonstrate a reasonable probability that evidence would have changed the outcome, however, a defendant need not convince jurors of his version of events; the defendant must merely create a reasonable doubt as to whether the government has established its version. That is not a mere semantic difference. It is fundamental that the defendant does not bear the burden of proof to demonstrate his innocence. . . . If the evidence was sufficient to raise a reasonable doubt in the mind of one juror . . . that is sufficient to change the outcome. . . .That shifting of the burden is incompatible with the proper *Strickland* standard of establishing prejudice, and with the countless cases recognizing that the defendant need only demonstrate a reasonable probability that at least one juror will have reasonable doubt as to the state's case.

Id. at 704-05.[6]

[6] Additional proof that the circuit court applied the wrong legal standard is its apparent belief that Miller is required to show that Detective Hernandez would be "utterly unworthy of being believed." (R65-8). While there is a good argument to be made that Detective Hernandez *would have been* utterly unworthy of belief, that is not a standard Miller is required to meet.

The court's decision thus applied the wrong burden of proof. A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly-discovered evidence. *McCallum*, 208 Wis.2d at 474. The court also failed to examine Miller's *trial* issue, and merely ordained that the newly-discovered evidence would not have mattered, but without ever explaining why. That the circuit court never examined the evidence the State presented during Miller's trial, or where Miller's "confession" fit within that evidence, or how the State relied on the "confession" during closing argument, etc., reveals it never addressed Miller's *trial* issue. To fully appreciate the likely effect of new evidence at the trial, the evidence should not only be considered in terms of the strength it would afford the defense, but also in the context of the relative strength of the State's evidence of guilt. *People v. Hargrove*, 162 A.D.3d 25, 66 (N.Y. Sup. Ct. 2018). The circuit court never did this.

Hargrove also examined a detective involved in fabricating evidence in other cases. More specifically, Detective Scarcella had engaged in a pattern of facilitating false identification testimony during the same time frame as Hargrove's case. *Id.* And as here, there were unusual circumstances surrounding the identification, all of which led *Hargrove* to state:

> The irregular circumstances surrounding the identification would have reinforced the defendant's argument that the police had determined the defendant's guilt at the outset of their investigation, as reflected by their abbreviated forensic investigations. The evidence that Detective Scarcella had engaged in such practices in other cases would have been powerful support for the defense case and would have blunted any response by the prosecution that the defense was peddling conspiracy theories. Given this context, it is not difficult to imagine "the reactions of the jurors" if they had been made aware of the new evidence that Detective Scarcella had engaged in a pattern of facilitating false identification testimony during

> the period in question The new evidence would have provided a powerful new avenue to argue to the jury that the pretrial procedure was itself so suggestive as to create a reasonable doubt regarding the accuracy of that identification and of any subsequent in-court identification Accordingly, the effect of the new evidence at trial provides an additional ground for concluding that the newly discovered evidence would "create a probability" of a more favorable verdict.

Hargrove, at 65-66. (Citations omitted). *Hargrove* had noted how doubt could also bleed over into the larger police investigation. *Id.* at 64–65.

The circuit court was also apparently persuaded by the idea that unlike *Avery,* Miller had no claim that any other witness was tampered with, or any other evidence ignored. (R65-11). The relevance of this idea to the issue before the court is lost on Miller. Evidence of Detective Hernandez's willingness to go beyond falsifying a confession in another case would hardly have inured to the State's benefit at Miller's trial. If the idea is that Detective Hernandez did not falsify Miller's confession because, if he had, he would have followed up and developed some false jailhouse snitches, Miller invites such an argument at his new trial.[7]

[7] The circuit court's belief that Detective Hernandez did not "ignore" any other evidence, in contrapose to *Avery*, (R65-11), again simply begs the question. If, as Miller will credibly argue, his claim that an inexplicably and suddenly respectful Miller eagerly confessed is patently false given his parallel behavior in the *Avery* case, then Detective Hernandez absolutely withheld evidence, just as he did in the *Avery* case.

II. THE CIRCUIT COURT ERRED WHEN IT DID NOT GRANT MILLER A NEW *MIRANDA-GOODCHILD* HEARING.

Prior to Miller's trial there was a *Miranda-Goodchild* hearing at which Detective Hernandez was the only witness claiming Miller had waived his right to counsel and freely, even eagerly, confessed. Of course, that was before it was known that Detective Hernandez was capable of fabricating evidence. The absence of that information, of course, was a product of Detective Hernandez not disclosing it. He had not yet been caught. And the absence of that information affected how Miller chose to approach that hearing. A series of suspicious circumstances surrounding the interrogation either were not explored, because Detective Hernandez was presumed credible, or were deflected by Detective Hernandez who, again, was presumed credible.

Miller was in custody on a municipal warrant. (R270-10-11). The first interrogator was Detective Steven Gastrow who testified that Miller, who he described as combative, uncooperative and rude, was read his rights and never confessed any involvement in the homicide. (R270-4-8). The second was Detective Mark Walton who interviewed Miller beginning at 11:00 p.m. on February 2, 2004, and ending on February 3, 2004, at around 2:10 a.m. (*Id.* at 11-12). Detective Walton, for his part, did not merely describe Miller as uncooperative. Miller was also defiant and rude, and the most distasteful person he had ever talked to in 18 years. (*Id.* at 13-18). Miller, he said, tried to provoke him with vulgar language. (*Id.*). Once again, Miller denied any involvement in the homicide, and ADA William Molitor signed a "no process" order. (*Id.* at 34-35).

When measured against his conduct in *Avery,* it is unsurprising that Detective Hernandez, in contravention of ADA Molitor's "no process" order, began a third interrogation of Miller less than twelve hours later, around the time Miller would be waking up, an interrogation that lasted 7.5 hours. (*Id.* at 21-30). Without elaboration, Detective Hernandez described Miller as cooperative and willing to freely confess his involvement in the homicide. (*Id.* at 21-30). Indeed, Detective Hernandez claimed, Miller was ready to confess his guilt from

the outset of the interrogation, though for reasons never explained, he did not actually confess until hours later. (*Id.*). This was suspicious, but absent knowledge that Detective Hernandez was predisposed to perjure himself on the subject of confessions, it was overlooked and not argued by Miller.

Miller had also been unwilling to initial or sign any document, including acknowledging the reading of his Miranda rights, for either Detectives Gastrow or Walton. (R270-9, 13-16). For Detective Hernandez, however, Miller was willing to "initial" everything, although curiously, Miller was unwilling to "sign" anything, including the statement he allegedly gave. (R270-25-28). Detective Hernandez had an answer for that too. Miller, he said, had a splint on one of his fingers and so it was easier "to just do the MM." (*Id.* at 38).

When asked about the "no process" order, Detective Hernandez said he did not become aware of it until roughly halfway through Miller's interrogation. (R270-33). Detective Hernandez claimed, however, that when he became aware of the "no process" order, Miller was just beginning to admit his involvement in the homicide. (*Id.*). Consequently, Detective Hernandez said, he decided to just ignore the "no process" order and continue the interrogation. (R270-35).

Also suspicious was how Detective Hernandez deflected Miller's immediate reference to his attorney after he was read his Miranda rights. Detective Hernandez, who knew or should have known that Miller already Attorney Michael Jackelen as counsel, had a way around that obstacle as well. He conceded Miller referenced Attorney Jackelen when read his *Miranda* rights. Detective Hernandez, however, claimed Miller then nonchalantly waived any right to have Attorney Jackelen present for the interrogation. (*Id.* at 24-31). After all, Hernandez said, Miller just wanted to confess, though he did not do so for the next 3.5 hours.

Adding further intrigue is that Detective Hernandez acted while a no-interview order issued by ADA Molitor was also in place. This no-interview order was an outgrowth of a conversation ADA Molitor had just one week earlier with Attorney Jackelen about the Messling homicide investigation. During that teleconference, Attorney Jackelen advised ADA

Molitor that he was representing Miller for purposes of the Messling homicide. (R32-3, 6). This prompted ADA Molitor to call Detective Louis Johnson, once Miller was in custody, to tell him Miller had counsel and should not be interviewed. (*Id.* at 3-6; R277-50-51). ADA Molitor had also faxed a copy of the "no process" order to Detective Jason Smith. (R32-4). For his part, Detective Hernandez claimed he was unaware of that order. (R270-31).

Detective Hernandez, as things have now turned out, is an adjudicated liar, but not just any adjudicated liar. Detective Hernandez is an adjudicated liar on the subject of "confessions" he claims to have taken, "confessions" that made him appear to be "that guy" who could "solve" cold homicide cases. As this was unknown in 2004, however, the motion was treated as a simple *Miranda* issue and immediately denied because *Miranda* warnings appeared to have been read at each interview, and there was:

> nothing to suggest that the detectives engaged in each of those interviews in any unlawful or unprofessional conduct. Anything that would constrain or act upon the free will of the defendant. . . . [Miller] was in fact presented with circumstances during each of those interviews which demonstrated a free, voluntary, consciousness of choice … [and] nothing that the officers did during the course of those interviews interfered with the free and voluntary statements being made by [Miller].

(*Id.* at 42-46).

In other words, in 2004 there was no reason to believe Detective Hernandez capable of committing perjury and/or completely fabricating a confession. Accordingly, such a fact did not enter the analysis when the defense litigated, and the court analyzed, and denied, Miller's *Miranda* motion. The stark discrepancy between the belligerent, uncooperative, and intransigent Miller the first two detectives encountered, and the polite, cooperating, and eager-to-confess Miller Detective Hernandez claimed *he* met was written off as something like a "change of heart" by Miller. It is now an established fact,

however, that Detective Hernandez falsified confessions and other evidence during this time frame. Since the court's ruling that Miller voluntarily confessed was based entirely on Hernandez's testimony, Miller should be granted a new *Miranda* motion.[8]

The main reason Miller should receive a new *Miranda-Goodchild* hearing is because the newly-discovered evidence alters how he would have approached litigation of those issues. In *People v. Plummer*, 191 N.E.3d 619, 642 (Ill. App. 2021), newly-discovered evidence of the interrogating detective's abuse of other suspects during interrogations warranted a remand for a new *Miranda-Goodchild* hearing. *Id.* at 642-44. *Plummer* recognized that the newly-discovered evidence "could change the defense's case entirely." *Id.* at 642. *Plummer* later remarked:

> Accordingly, we find that defendant's newly discovered evidence is likely to change the result of the motion to suppress and possibly the outcome of the underlying trial.

Id. at 644. Moreover, the circuit court judge called upon to gauge the impact of Miller's newly-discovered evidence was *not* the same judge who presided over his *Miranda-Goodchild* hearing.

In another case where a defendant/petitioner presented newly-discovered evidence revealing a pattern of abusive tactics employed by an officer who denied coercing a confession from the petitioner, the court stated:

> However, the credibility findings made by the court were not relevant to the issue of whether Detective Switski's credibility at the suppression hearing might have been impeached as a result of

[8] A sad footnote in the history of this case is that Miller's interrogation took place shortly before Wisconsin required all felony custodial interrogations to be recorded. This case, now a relic of the wild west when suspects were left to live with the marshal's account of things, is a textbook example of why the legislature came to view mandatory recording as indispensable to a search for the truth.

> the new evidence that Detective Switski participated in systematic abuse. Rather, the questions were whether any of the officers who interrogated petitioner may have participated in systematic and methodical interrogation abuse and whether those officers' credibility at petitioner's suppression hearing or at trial might have been impeached as a result. Here, without petitioner's confession, the State's case was nonexistent. The witnesses all testified at the evidentiary hearing that they did not gain anything in exchange for their testimony, and several of the witnesses testified that while their convictions were reversed, they plead guilty as a direct result of the State's offer of a lesser sentence. The new evidence presented at the postconviction hearing, when weighed against the State's original evidence, was conclusive enough that **the outcome of the suppression hearing likely would have been different if Detective Switski had been subject to impeachment based on evidence of abusive tactics he employed in the interrogation of others.** Therefore, the trial court's opposite conclusion was manifestly erroneous, and **we reverse and remand with directions that petitioner receive a new suppression hearing** and, if necessary, a new trial.

People v. Galvan, 133 N.E.3d 42, 59–60 (Ill. App. 2019) (emphasis added; citations omitted).

This issue was also examined in. *Hargrove*, *supra,* where the detective who presided over the identification of the defendant in a line-up subsequently came under scrutiny due to substantiated allegations of manufacturing confessions and unlawfully suggestive identifications. *Id.* at 41-42. Just like Detective Hernandez with Avery, the detective's misconduct had resulted in a prior and unrelated criminal conviction being overturned. *Id. Hargrove* also reversed the defendant's conviction and remanded for a new suppression hearing, stating:

> In light of the foregoing, we conclude that **evidence showing that Detective Scarcella had engaged in a pattern of falsifying evidence and facilitating false identification testimony would have had a powerful effect at the suppression hearing.** The irregular circumstances and irreconcilable testimony surrounding the identification procedures would be difficult to ignore in the face of this new evidence. If the suppression court refused to credit the police testimony about the events leading to Crosson's identification, the pretrial identifications would have been suppressed. Indeed, if the police were not credited, Crosson may very well have been precluded from even identifying the defendant *at trial.*

Hargrove, at 64. (Emphasis added; citations omitted). *See also Fahy v. State of Conn*., 375 U.S. 85, 86–87 (1963) ("We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To decide this question, it is necessary to review the facts of the case and the evidence adduced at trial").

There is another version of what actually went down when Detective Hernandez interrogated Miller, and it is a version that would have got little traction before the newly-discovered evidence. It is also a version that now makes complete sense with the knowledge that Detective Hernandez committed perjury about an interrogation in a cold case, fabricated a confession of a defendant, and then suborned perjury to fabricate additional confessions by a defendant. In this version, "no process" and "no interview" orders were ignored. In this version, Miller did *not* suddenly and mysteriously transmogrify into a pleasant individual who immediately said Attorney Jackelen was representing him in this case, only to then say he did not want the attorney he had paid precisely for this purpose to be summoned to the interrogation. This version also explains why only an "MM,"

but no signature, appears on the alleged statement and other documents.

Once again, the circuit court's reliance on this Court's factual recitation, on direct appeal, to how the interrogation went down, is misplaced and merely begs the question because that recitation set forth facts *according to Detective Hernandez.* Miller should be permitted to relitigate the *Miranda-Goodchild* issues because the newly-discovered evidence, for obvious reasons, changes *how* he would litigate those issues. Indeed, Miller may have been reticent to testify at the original hearing understandably assuming that, dressed in an orange jail outfit, he could never win a credibility battle against a detective in uniform. Miller should be allowed the opportunity to modify his strategy now that the newly-discovered evidence demands it. *Plummer, supra* at 642 (recognizing that newly-discovered evidence "could change the defense's case entirely").[9]

III. THE REAL CONTROVERSIES SURROUNDING THE INTERROGATION AND MILLER'S ALLEGED "CONFESSION" HAVE NOT BEEN FULLY TRIED.

The circuit court's denial of a new *Miranda-Goodchild* hearing was further tantamount to deciding several controversies without them having been tried. Here, the circuit court pretended to resolve the controversy of how a *Miranda-Goodchild* hearing will play out when Miller, now armed with the newly-discovered evidence, pursues a different strategy. And that strategy, as the court *did* understand, will indeed be to argue that if Detective Hernandez continues to claim Miller brought up Attorney Jackelen only to waive his assistance, he

[9] If a suspect requests counsel at any time during the interview, he or she is not subject to further questioning until a lawyer has been made available or the suspect himself or herself reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981). The State will have both the burden of production and the burden of persuasion at the new *Miranda-Goodchild* hearing to establish that Miller waived his right to counsel. *State v. Cole*, 2008 WI App 178, ¶ 40, 315 Wis. 2d 75, 762 N.W.2d 711. And it will be totally reliant on testimony from a detective whose credibility on the question of obtaining a voluntary confession is shot, and where the interrogation unfolded under very dubious circumstances.

will again be committing perjury about the outcome of an interrogation. The circuit court has now purported to resolve that issue in Detective Hernandez's favor, but without a hearing.

The problem is that controversy, and the controversies surrounding it, have not been fully tried. And there are a multitude of reasons why this is so, not the least of which is that Detective Hernandez has never been fully cross-examined on a host of issues brought into focus by the newly-discovered evidence. These issues include: (1) his claimed unawareness of a DA order not to interview Miller without the presence of Attorney Jackelen; (2) his claimed tardy awareness of the DA's "no process" order and serendipitously just when Miller began to confess; (3) the magical transformation of Miller into a quasi-choir boy; and (4) the claim that the real reason Miller did not sign his putative statement was because of a finger injury. Indeed, Detective Hernandez has not even been fully cross-examined on the newly-discovered evidence itself, in the context of a contested suppression hearing.

Another reason these real controversies have not been tried are because Miller has been denied the opportunity to alter his strategy and testify at his *Miranda-Goodchild* hearing. The circuit court purported to rectify this problem by borrowing from testimony he gave during a *Machner* hearing:

> Mr. Miller (at his postconviction hearing, held December 4, 2009, before the Hon. Jeffrey Conen) initially claimed that he told his attorney that he had requested counsel before Detective Hernandez interviewed him, but conceded on cross-examination that he never told his attorney that he had invoked his right to counsel before making his statement to Detective Hernandez.

(R65-10). If these remarks signify, as they seem to, that the circuit court concluded Miller equivocated about having invoked his right to counsel (with Detective Hernandez), the court is wrong. Miller never vacillated that he *did* tell Detective Hernandez he had retained Attorney Jackelen and wanted him present for any interrogation. (R277-23) ("I seened the

detective, and I told the detective I got a lawyer, I don't want to talk to no detective").

The problem here is that the court examined the wrong factual issue. Its reference to Miller's "claim" on direct examination followed by his "concession" on cross-examination at the *Machner* hearing did not pertain to whether he invoked his right to counsel. This alleged "claim" and "concession" pertained instead to whether he told trial counsel he had done so. This is a different issue that was neither before the court nor will be relevant at a new *Miranda-Goodchild* hearing. On the real controversy that needs to be tried – whether Miller invoked his right to counsel with Detective Hernandez – Miller has not wavered in saying he did.[10]

This Court possesses the discretion to reverse the circuit court where it appears the real controversy has not been tried:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

[10] The circuit court was also wrong when it believed Miller flip-flopped as to what he told trial counsel. During *direct examination,* Miller explained that in the moments just before his preliminary hearing, he began to tell counsel about Attorney Jackelen when she told him not to worry because his statement could actually help the defense. (R277-79). Cross-examination just covered more of how, and why, Miller admitted he never really talked to counsel more about the issue after that. (*See* R277-33-36). Thus, the court negatively assessed Miller's credibility, without actually seeing him testify, based on a perceived flip-flop that was actually consistent, even if more nuanced. This also is not an adequate substitute for actually "trying" the real controversy.

Section 752.35, Stats.

Here, the circuit court hypothesized the outcome of a *Miranda-Goodchild* hearing that never happened by cobbling together testimony from prior proceedings that took place before the newly-discovered evidence was unearthed. Consequently, and once again, those proceedings did not address a multitude of issues that have now come to the fore as a result of the new evidence. Only with a new *Miranda-Goodchild* hearing where Detective Hernandez is subject to full cross-examination on the newly-discovered evidence and the additional issues now made relevant by that evidence, where Miller testifies, and where all of the suspicious circumstances surrounding the interrogation are fully developed, can the real controversy be fully tried.[11]

Conclusion and Relief Requested

For all the foregoing reasons, Miller respectfully requests that this Court vacate his judgment of conviction and remand for a new trial. At a minimum, Miller requests that this Court remand this case for a new *Miranda-Goodchild* so that the real controversies surrounding that issue can be fully tried.

[11] The court also incorporated *Machner* hearing testimony from Miller's original trial counsel, a hearing which ended with a ruling of no ineffective assistance of counsel (IAC). (R65-10). Aside from the fact the court here did not hear that testimony either, how the *Machner* issue was resolved is further proof the real controversies have not been fully tried. The *Machner* court never found that Miller did not invoke his right to counsel, but instead, that there had been "a meeting of the minds . . . between Ms. Bowe and Mr. Miller of a strategy to use [his] statement to proceed with a self-defense argument." (R284-8). IAC will not be an issue during the new *Miranda-Goodchild* hearing and the relevant credibility battle will pit Miller against Detective Hernandez, not trial counsel. If the State wishes to call trial counsel at the new *Miranda-Goodchild* hearing, Miller will cross-examine her with evidence that has since surfaced to establish that during roughly that same time frame, she repeatedly made misrepresentations to the court in another case, having given into the pressure of just wanting to get the case over. *In re Disciplinary Proc. Against Bowe*, 2011 WI 48, ¶¶ 18, 28, 334 Wis. 2d 360, 800 N.W.2d 367 ("Attorney Bowe's repeated misrepresentations to the court are a serious breach of her obligations as an officer of the court"). Miller will also point out that she erroneously believed Attorney Jackelen had not been retained for the homicide case, but only on an unrelated case. (R277-59-60).

Dated this 30th day of November, 2023.

Electronically signed by: Rex Anderegg
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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 9,286 words, as counted by Microsoft Office 365.

I further hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) 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.

Finally 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 one or more initials or other appropriate pseudonym or designation 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 30th day of November, 2023.

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