STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No.: 155276

vs.

DIALLO CORLEY,

Defendant-Appellant.

Circuit Court No.: 14-007466-FC
Court of Appeals No.: 328532

PEOPLE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTERSTATEMENT OF JURISDICTION

Defendant-Appellant did not include a statement of jurisdiction in his supplemental brief. This Court has jurisdiction to consider his application for leave to appeal pursuant to MCR 7.303(B)(1).

This Court has ordered the parties to brief the following issue:

> [Address] whether the trial court abused its discretion by declining to grant a new trial on grounds of newly discovered evidence…[particularly]…whether the trial court erred in concluding that the newly discovered evidence would not make a different result probable on retrial.[1]

[1] *People v. Diallo Corley*, order of the Michigan Supreme Court, entered June 29, 2018 (Docket No. 155276)

COUNTERSTATEMENT OF QUESTION PRESENTED

I.

To succeed on a newly discovered evidence claim, a defendant must show—in relevant part--that the new evidence is credible and would probably lead to an actual acquittal at retrial. Here, at the post-conviction evidentiary hearing, Defendant did not demonstrate that the presentation of new and incredible evidence from Tarryl Johnson would have lead to an actual acquittal at retrial. Although providing an incomplete analysis, did the trial court abuse its discretion by denying Defendant a new trial?

The People say: **No**

Defendant says: **Yes**

The trial court would say: **No**

A majority of the reviewing Court of Appeals panel said: **No**

COUNTERSTATEMENT OF FACTS

For this supplemental brief, the People accept the "Factual Background and Procedural History" pronounced by the Court of Appeals in this matter. Further factual citation to relevant transcript or exhibit will be provided as needed herein. Furthermore, the People stipulate to Defendant's appendices insofar as they represent segmented portions of transcriptual record and raw exhibits. The People do not stipulate, however, to any of the Defendant's arguments or conclusions drawn therefrom in support of his argument—unless otherwise noted herein.

In this matter, the Court of Appeals indicated the following:

> Calvin Wray testified that on April 21, 2014, at 8:40 p.m., he was walking eastbound on Avalon in Highland Park when he noticed a red Mountaineer driving on the wrong side of the street approach him from behind. Wray noted that the window was rolling down and that defendant, who had some facial hair and a "dreads" hairstyle, was the driver. Wray testified that the vehicle stopped, that it was close enough for him to almost touch it, and that defendant pointed a revolver out of the window and the gun fired five or six times. Wray was struck in his neck, right hand, upper chest, right leg, right thigh, and testicle. According to Wray, after the shooting, Anthony Day and a neighbor came out to assist him.
>
> Anthony Day testified that he had been at a barbeque at Wray's house when he heard five or six shots, ran to the front, and saw Wray sitting on the ground in front of a neighbor's house, bleeding. According to Day, Wray told him that "Diablo" had shot him. Wray also later identified defendant as the shooter in a photo lineup.
>
> Wray indicated that he "knew of" defendant, whom he knew as "Diablo," because they both lived in Highland Park, a small city, and were within the same age range. But Wray stated that he had never before talked to defendant and that he did not have any "beef" with defendant before the assault. Wray admitted, however, that he was associated with an organization called "BTA," which he described as a rap group; he denied that it was a gang. He noted that "BTA" stands for Buena Vista, Tyler, and Avalon, which are street names in Highland Park. Wray also testified that he knows of the Winona Boys, which, he stated, are a

gang. Wray explained that Tyler turns into Winona at Woodward Avenue. Wray explained that there is tension between the Winona Boys and the BTA, and that defendant was associated with the Winona Boys. Day testified that there was never a conflict between the two groups, although there were arguments.

After presenting Wray's and Day's testimony, the prosecution rested. Defendant did not present a case, choosing instead to argue that Wray was not a credible witness and that the prosecution had not established identity beyond a reasonable doubt. The jury deliberated and found defendant guilty of all counts.

While this appeal was pending, this Court granted defendant's motion to remand, remanding to the trial court "for an evidentiary hearing and decision whether defendant-appellant was denied the effective assistance of counsel or should be granted a new trial on the basis of newly discovered evidence." *People v Corley*, unpublished order of the Court of Appeals, entered November 24, 2015 (Docket No. 328532). Defendant had claimed that his trial counsel failed to investigate and present several witnesses, including Stanley Davis, Jr., and Justin Mason, who were listed as witnesses on the police report, and Detective Paul Thomas, who had indicated that Wray was shot with an automatic weapon, which Wray denied at trial. Defendant also alleged that his trial counsel was ineffective for failing to object to several instances of prosecutorial misconduct and for failing to object to unconstitutional judicial fact-finding. Finally, defendant asserted that a new witness would testify to a version of the shooting that would directly contradict Wray's trial testimony.

On remand, Desiree Edwards, an investigator, testified that she received a request to investigate potential witnesses in this case and was able to locate and make contact with Stanley Davis, Jr., after obtaining his name and address in a police report. Edwards also contacted Tarryl Johnson even though the only information she had to find him was a Facebook name, Yung Ryl. She received that name from defendant's mother, who had learned that a family friend knew someone who may have witnessed the shooting.

Johnson testified that on April 21, 2014, as he was walking up Avalon, he saw a shooting. He testified that he saw a young man moving quickly between two houses and another young man on the same side of the street who had a "scared look," that the first man said something in a taunting manner and fired at least

three shots as the second man began to turn and run, and that the first man then ran back between the houses. Johnson described the gun as a black semiautomatic and the shooter as a black male with a dark complexion who was about 5'8" tall and had a close-cropped "waves" hairstyle. Johnson denied seeing a red Mountaineer on the street. Johnson also testified that he only told an acquaintance about the shooting and that he did not want to become involved because he "didn't trust the system." He admitted that he had previously been involved in a shooting and had been convicted of "second degree and armed robbery."

Stanley Davis, Jr., who lived on Avalon, testified that he was working on his van in his backyard on April 21, 2014, at approximately 8:30 p.m. when he heard about five shots. He said that 10 to 15 minutes later, he went to the front of his house and saw somebody lying on the curb. When he realized that it was his neighbor, Calvin Wray, he ran over to aid him. Davis testified that he saw people sitting on the porch of Wray's house, but that he was the only civilian to offer assistance to Wray, that nobody else tried to speak with Wray, and that Wray never said who shot him. Davis did not see a red Mountaineer. Davis further testified that he did not have any contact with defendant's trial attorney, Randall Upshaw, or an investigator for Upshaw, before the trial in June of 2015.

Upshaw testified that he was unaware of Johnson's potential testimony at the time of trial. As for Davis, Upshaw explained that he unsuccessfully tried to contact him by phone and by sending someone out to locate him. Regarding Detective Thomas's police report, in which Wray purportedly made a statement that the gun used was a dark automatic, Upshaw explained that he considered calling Thomas to contradict Wray's testimony but, concerned that Thomas would state that he may have made a mistake, determined that it was better strategy to simply impeach Wray with the report. Upshaw summed up his defense theory by saying that he thought he could create reasonable doubt by showing that Wray was not telling the truth.

The trial court denied defendant a new trial.[2]

[2] *People v. Diallo Corley*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2016 (Docket No. 328532), pages 1-3

ARGUMENT

I.

To succeed on a newly discovered evidence claim, a defendant must show—in relevant part--that the new evidence is credible and would probably lead to an actual acquittal at retrial. Here, at the post-conviction evidentiary hearing, Defendant did not demonstrate that the presentation of new and incredible evidence from Tarryl Johnson would have lead to an actual acquittal at retrial. Although providing an incomplete analysis, the trial court came to the right result and did not abuse its discretion by denying Defendant a new trial.

Standard of Review

This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion.[3] A mere difference in judicial opinion does not establish an abuse of discretion.[4] A trial court's factual findings are reviewed for clear error.[5] "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."[6]

Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.[7] A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or makes an error of law."[8]

Discussion

When the essential inquiry on a newly discovered evidence issue is whether that new evidence would make a different result probable on retrial—that is to say whether a defendant would be acquitted—a reviewing court must first determine whether the evidence presented is

[3] *People v. Cress*, 468 Mich. 678, 691 (2003)
[4] *Id.*
[5] *Id.*
[6] MCR 2.613(C); see also *People v. Hartwick*, 498 Mich. 192, 214 (2015)
[7] *People v. Armstrong*, 490 Mich. 281, 289 (2011)
[8] See *People v. Swain*, 288 Mich. App. 609, 628–629 (2010) (citations omitted).

credible. This Court has held that if the evidence or witness is so patently incredible that no reasonable juror would consciously entertain a reasonable belief in the witness, then the court should deny the motion.

Truly, it would have been better for Judge Callahan to articulate fully his analysis for review, but his failure to provide a detailed exegesis does not preclude a finding in accordance with his ultimate denial. This Court has frequently affirmed lower court decisions on the basis of "right result, wrong reasoning."[9] Here, Judge Callahan did not necessarily rely on the "wrong" reasoning to find Defendant's newly discovered witness patently incredible, or that the newly discovered evidence would acquit Defendant on retrial, but his analysis was merely incomplete. Although Judge Callahan primarily relied upon an incomplete MRE 609 impeachment analysis, the balance of the record supports the denial of Defendant's motion.

A. Analytical Standard

As this Court is very well aware, in order to warrant a new trial based on newly discovered evidence, a defendant must make the following showings:

1. The evidence itself, not merely its materiality, was newly discovered;
2. The newly discovered evidence was not cumulative;
3. The party could not, using reasonable diligence, have discovered and produced the evidence at trial; and
4. The new evidence makes a different result probable on retrial.[10]

1. Whether the new evidence would acquit the defendant at retrial requires an initial credibility analysis

Where the pivotal inquiry is on the fourth prong, a reviewing court must first determine if the evidence presented is credible.[11] In making this initial determination, the court should

[9] See *People v. Chapman*, 425 Mich. 245, 254 (1986) (a reviewing court may affirm a trial court's decision if the right result was reached for the wrong reason)

[10] *Cress*, 468 Mich. supra at 692

consider all relevant factors tending to bolster or diminish the veracity of the evidence—in this case, witness testimony.[12] As this Court recently stated in *People v. Johnson*,[13] —another instance where Judge James Callahan of the Third Circuit Court made a credibility determination in conjunction with the fourth prong of the *Cress* newly discovered evidence analysis in a post-conviction motion for new trial—"a trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible."[14]

This Court went on to examine the structure of the credibility determination in terms of another recent opinion from this Court—*People v. Anderson*.[15] Although not dealing with a credibility determination in a preliminary examination, this Court's use of *Anderson* in *Johnson*—dealing with a post-conviction hearing—suggests an intention to identify a rubric for credibility analyses to be applied throughout the life of a criminal case. It stands to reason, then, it would apply to this, instant, matter. In *Johnson*, this Court opined:

> If a witness's lack of credibility is such that *no* reasonable juror would consciously entertain a reasonable belief in the witness's veracity, then the trial court should deny a defendant's motion…. However, if a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide, were it the ultimate fact finder.[16]

The focus of the initial credibility determination, then, is whether a reasonable juror would find the testimony incredible. Under *Johnson*, if the evidence or witness is so patently incredible that no reasonable juror would consciously entertain a reasonable belief in the witness, then the court

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[11] *Cress*, 468 Mich. supra at 692-693

[12] See *Id.* at 692-694

[13] *People Johnson*, -- Mich. --- (2018) (Docket No. 154128)

[14] *Id.* at slip op at 21 citing to *Connelly v. United States*, 271 F2d 333 (CA 8, 1959), saying "The trial court has the right to determine the credibility of newly discovered evidence for which a new trial is asked, and if the court is satisfied that, on a new trial, such testimony would not be worthy of belief by the jury, the motion should be denied." (quotation marks and external citation omitted, emphasis added)

[15] *Id.* at 21-22, citing to *People v. Anderson*, 501 Mich. 175 (2018)

[16] *Id.* at 22

should deny the motion; if not, then a jury should decide. This Court's conclusion in *Johnson*, however, assumes that the credible evidence would automatically make a "different result" more probable. This is an inaccurate assumption. Although seeming straight-forward, whether the evidence makes a different result probable on retrial, itself, is an undeveloped inquiry.

2. Whether the evidence makes a different result probable at retrial means that a defendant must show that, with the benefit of the new evidence, a reasonable juror would acquit

Surprisingly, there is little discussion in the cases as to what is meant by the requirement that newly discovered evidence must make a different outcome—acquittal in this case, as Defendant was convicted at trial—"probable." It is, however, clear that the standard is different than the one required from relief under *Brady*—for example—and requires demonstration of an actual probability of acquittal. The United States Supreme Court has noted the difference between these two standards, thereby discussing the high hurdle a defendant claiming relief based upon newly discovered evidence must surmount:

> …the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. *For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.* If the standard applied to the usual motion for new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no significance to the prosecutor's obligation to serve the cause of justice.[17]

The "materiality" component for *Brady* requires a showing of a "reasonable probable" of a different result had the evidence been heard by the jury, meaning a showing sufficient to

[17] *United States v. Agurs*, 427 U.S. 97, 111 (1976) (emphasis supplied)

undermine confidence in the outcome,"[18] which is understood as a *lesser* requirement than that of newly discovered evidence where an *actual* probability of acquittal is required.

The distinction is recognized not only in *Agurs*, but in other cases applying the principles of newly discovered evidence. It is said that "the fourth prong of the [newly discovered evidence] test requires an 'actual probability that an acquittal would have resulted if the evidence had been available'"[19]; "[i]n the absence of a *Brady* violation…the defendant must meet *the more onerous standard* of showing an 'actual probability that an acquittal would have resulted if the evidence had been available'"[20]; [i]f, however, the motion is…based on newly discovered evidence that does not involve an alleged *Brady* violation, then the standard is *more onerous* for defendants, and defendant must show that the new material evidence 'will probably result in an acquittal." …This means an 'actual probability that an acquittal would have resulted if the evidence had been available.'"[21] If, then, there must be shown an "actual probability" of an acquittal had the new evidence been presented, this means more than the evidence *could* have raised a reasonable doubt. Put differently, it must be shown that it is more likely than not that no reasonable juror would have convicted (if not, an acquittal based upon the new evidence is simply not improbable). It is, as this Court stated in *People v. Grissom*,[22] "Whatever exculpatory theory defendant might offer to explain the newly discovered evidence, he simply has not established that a jury would accept that theory than the prosecution's explanation…."[23]

[18] *United States v. Bagley*, 473 U.S. 667, 682 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

[19] *United States v. Del-Valle*, 566 F.3d 31, 38 (CA 1, 2009)

[20] *United States v. Casas*, 425 F.3d 23, 53 (CA 1, 2005)

[21] *United States v. Gonzalez-Gonzalez*, 258 F3d 16, 20 (CA 1, 2001) (emphasis added)

[22] *People v. Grissom*, 492 Mich. 296 (2012)

[23] *Id.* at 352

3. Analytical summary

Accordingly, when *Cress*'s fourth prong is analyzed, a defendant must demonstrate an actual probability that, with the benefit of the new evidence, acquittal at retrial will occur. Where the newly discovered evidence is a witness, that witness's credibility must first be determined. If the evidence is such that a reasonable juror would credit the evidence, and it provides an actual probability that acquittal would occur, then the matter must be sent to a jury for retrial. If, however, the evidence is so patently incredible that no reasonable juror would credit it, then there is no way for the defendant do show that acquittal would occur and defendant is not entitled to a new trial.

B. Judge Callahan's decision, although his reasoning appears incomplete, is not clearly erroneous

Over the course of a five-day evidentiary hearing spanning two months,[24] Judge Callahan inquired into whether Defendant's trial counsel rendered ineffective assistance of counsel and whether newly discovered evidence by way of a new witness—Tarryl Johnson—entitled Defendant to a new trial.[25] Ultimately, Judge Callahan denied Defendant's Motion for New Trial and Motion for Resentencing, finding both grounds asserted to be unworthy of relief.[26] Regarding the newly discovered evidence issue, Judge Callahan found the following based upon the testimony taken:

- On April 21, 2014, complaining witness Calvin Wray was shot in front of 114 Avalon Street, Highland Park, Michigan, at or near dusk.[27]

- [Alleged] Newly discovered witness Tarryl Johnson testified that after an "aborted meeting that he had planned with a homosexual friend, whom he had only known as 'Big Moe,'" Johnson returned home by walking down Avalon Street.[28]

[24] During which Judge Callahan's wife passed away.
[25] Circuit Court Opinion and Order, page 1
[26] Id. at page 8
[27] Id. at page 2
[28] Id.

- As he walked down Avalon Street, across from 114 Avalon Street, Johnson allegedly saw complaining witness Wray outside of 114 Avalon Street with another individual.

- The other individual "was an African American male, approximately 5'8" tall, came from a gangway [sic] between two houses who approached Mr. Wray" and said something "to the effect of, "What's up now?"[29]

- The individual shot Mr. Wray approximately three times, utilizing a dark, semi-automatic handgun.[30]

- At the time, Johnson was "cowering" behind a parked automobile across the street, did not render assistance to Mr. Wray, fled down the street, and resumed his regular activities.[31]

With Johnson's shooting-specific testimony as a foundation, Judge Callahan summarized Defendant's argument in terms of Wray's trial testimony[32]:

> The defendant contends that Mr. Johnson's impartiality and his favorable testimony contradicts the testimony of Mr. Wray, that he was shot by "Diablo" from a moving red Mountaineer. Mr. Johnson knew neither Mr. Wray, nor Mr. Corley, the defendant.[33]

The Court next addressed Johnson's other testimony:

- Johnson was familiar with "Winona Boys" or "BTA" and the symbols or names were written on building walls in the neighborhood.[34]

- Johnson had witnessed several shootings before, including the one in which he was convicted as an aider-and-abettor of Second Degree Murder and Armed Robbery.[35]
- Upon conviction, Johnson had been incarcerated until 2011.[36]

Judge Callahan again summarized Defendant's argument in light of this additional information *and* the relevant testimony of complaining witness Wray and People's witness Day:

> The defendant contends that Mr. Johnson's testimony is not only credible, but it is 180-degree juxtaposed with the testimony of

[29] Circuit Court Opinion and Order, page 3
[30] Id. at page 3
[31] Id.
[32] Testimony that Judge Callahan heard and, ostensibly, remembered, see *People v. Diallo Corley*, Jury Trial Transcripts, June 8 and June 9, 2015
[33] Circuit Court Opinion and Order, page 3
[34] Id.
[35] Id.
[36] Id.

> Calvin Wray, who described the shooter as being "Diablo," that he had been shot with a black revolver, and that Mr. Calvin Wray had known of Mr. Diallo Corley, but he had no personal relationship with him. Further, that there was no automobile involved in this assault.
>
> Whereas Mr. Wray said that the shooting took place while Diallo Corley was driving a red Mountaineer. The testimony of Mr. Anthony Day reflected that immediately after this shooting took place, he came to the assistance of Mr. Calvin Wray and that at that juncture, Mr. Wray said that "Diallo" shot him. Mr. Day is a friend of Mr. Wray.[37]

Judge Callahan also briefly skimmed-over the manner in which Johnson came to Defendant's attention:

> Mr. Johnson's aunt supposedly telephoned Mr. Johnson, stating that she had been contacted by an investigator through Face Book [sic] and that the investigator was seeking Mr. Johnson's whereabouts. Mr. Johnson then purportedly called the investigator and the rest is history.[38]

Judge Callahan's brief treatment of the witness's discovery did not appear to be part of his eventual credibility analysis in this matter. Instead, the trial court focused solely on Johnson's testimony in light of the People's trial evidence—as demonstrated by the prior summaries of Day and Wray's testimony and the use of the phrase "If [Johnson] had given testimony at the time of trial as has been suggested by defendant's counsel…."[39] The court first noted that Johnson's conviction for armed robbery would have been used to impeach him, pursuant to MRE 609. In light of this impeachment, Judge Callahan concluded, Johnson's testimony could not be as believable as Wray and Day. Judge Callahan, however, indicated this colloquially when he said that "to put his [Johnson] on par with that of Calvin Wray and Anthony Day is a stretch."[40] Thus, Judge Callahan found Johnson to be incredible on the basis

[37] Circuit Court Opinion and Order, page 4
[38] Id. at page 3
[39] Id. at page 5
[40] Id.

of his prior armed robbery arrest. After making this credibility determination, the court went on to discuss the fourth prong of the *Cress* analysis—whether this evidence would make a different result probable on retrial.[41]

As Judge Callahan correctly articulated the *Cress* standard, the court indicated that Defendant could make out the three of the four bases—that the evidence was newly discovered, the newly discovered evidence is not cumulative, the evidence could not have been discovered for trial.[42] Defendant, however, fell short of meeting the final inquiry—that the new evidence "makes a different result probable on retrial."[43] Judge Callahan found that Defendant's position on this point would be "untenable," and "not feasible."[44] Specifically, he opined "that had Mr. Johnson given testimony during the course of the original trial, a result, other than that which was ultimately arrived at by the jury in this case, would not be probable."[45] Stated differently—and in terms of both the question this Court has posed and the standard set out above—Judge Callahan found newly discovered witness Johnson so patently incredible that no reasonable juror would entertain a reasonable belief in the witness's veracity. Without credible evidence, there could be no showing that, with its benefit, Defendant would obtain acquittal at retrial. The trial court properly denied Defendant's motion.

Judge Callahan's order denying Defendant's Motion for New Trial is not clearly erroneous, though it would appear to be incomplete. The People recognize that to use Johnson's conviction for armed robbery for impeachment purposes under MRE 609, the court would have had have engaged in additional on-the-record analyses to determine the age of the conviction and

[41] Circuit Court Opinion and Order, page 6
[42] Id.
[43] Id.
[44] Id.
[45] Id.

the degree to which the crime is indicative of veracity.[46] The People further recognize, as Defendant contends, that a conviction for armed robbery is not, alone, dispositive or "inherently more probative than prejudicial on the issue of credibility."[47] Although Judge Callahan did not provide the necessary on-the-record analysis on this factor, there is no doubt that when the record evidence is reviewed in light of the analytical structure noted above, the court came to the right result, albeit for the wrong—or incomplete—reasoning.

C. Johnson is patently incredible

As noted before in the Court of Appeals, Johnson's testimony was patently incredible. Aside from the sheer coincidentally convenient nature of Johnson's account[48] and a glaring discrepancy regarding the spent firearm evidence,[49] Johnson's story is incredible because the key point of his account—the alleged movement of the on-foot shooter—changed since the first record of what he allegedly witnessed, but it substantially changed when confronted with the physical reality of the scene. This, of course, was overshadowed by the witness's distrust of the justice system; a distrust that suggests bias.

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[46] MRE 609(a)(2)(b); MRE 609(B)

[47] *People v. Allen*, 429 Mich. 558, 605 (1988)

[48] Namely that he just so happened to be walking down a street, in a neighborhood not his own, at precisely the right time to witness a shooting that exculpates the Defendant.

[49] Defendant, throughout his appeal, has emphasized the fact that no firearms evidence—spent casings or projectiles or live cartridges was recovered from the crime scene for analysis. It is near axiomatic in criminal courts that a semi-automatic, or automatically reloading pistol, will eject a spent cartridge casing upon its discharge. A revolving pistol, on the other hand, will not automatically eject spent cartridge casings unless manually unloaded. Given the victim's medical records and the objective evidence of the victims gunshot wounds, it cannot be denied that the victim was shot with a firearm, thus showing that a firearm was present at the crime scene. The lack of spent firearm evidence suggests either that the weapon used was a revolver—thus keeping the spent cartridge casings inside the weapon itself—or was discharged from some movable container—that being a vehicle. Thus, the lack of spent firearms evidence tangentially bolsters victim Wray's account of the shooting. Simultaneously, the lack of firearm evidence contradicts Johnson's veracity. Although Johnson first said that the weapon was a generic handgun, under oath, and some time later, Johnson claimed to have clearly seen the alleged shooter use a semi-automatic pistol. (See *People v. Diallo Corley, Ginther* Hearing Transcript – January 15, 2016, page 78). Had the shooter actually used a semi-automatic weapon, as claimed, the empty casings would have been ejected and likely found. Perhaps, Johnson's ability to witness the event was not as clear as claimed or, maybe, he did not witness the shooting at all.

The first incarnation of Johnson's tale came in his phone call to mystery person "Big Mo." At the *Ginther* Hearing on this matter, Johnson indicated that, after the shooting, he called Big Mo. Big Mo was Johnson's date the day he witnessed the shooting.[50] When safe, Johnson inexplicably called Big Mo[51] – a person he had met for the first time that day – to report that a shooting occurred "in that general area;"[52] Johnson gave no details.[53] On cross-examination, the witness confirmed that he did not give any details about the shooting,[54] but then amended his statement to Big Mo. He added that somebody had gotten shot "over here where you stay at." According to Johnson, he was to meet Big Mo at a home at 294 West Buena Vista Street,[55] under a half-mile from the Avalon Street crime scene.[56] Johnson did not "identify anybody" in the call[57] and the generality is understandable given—as the court summed up the call—that it was akin to a "…you got me in a mess of trouble…" complaint.[58]

Johnson next recounted his story to defense investigator Desiree Edwards near the time he executed the October 13, 2015, affidavit. In Defense Exhibit K-A—*Ginther* Hearing Exhibit A—Johnson offered far more detail than he did to "Big Mo" and made sure to give a description of the on-foot shooter he allegedly saw. Though offering explicit detail elsewhere, Johnson at paragraphs 5, 6, and 7, only stated the man came between two houses; he did not indicate which houses. The lack of any specifics about where the shooter emerged is noteworthy as it shows the witness did not have any first-hand knowledge of what should have been a simple fact to recount. As previously briefed, Johnson failed to include any reference to what should have

[50] *People v. Diallo Corley, Ginther* Hearing Transcript – January 19, 2016, page 18
[51] The January 19, 2016, *Ginther* Hearing Transcript says the witness called "Big Mama" at page 32; however, at page 42, on cross-examination, Johnson confirms that he had called "Big Mo."
[52] *People v. Diallo Corley, Ginther* Hearing Transcript – January 19, 2016, page 33
[53] *Id.* at page 32
[54] *Id.* at page 42
[55] *Id.* at page pages 11-18
[56] Please see Defendant's Exhibit K-H
[57] *People v. Diallo Corley, Ginther* Hearing Transcript – January 19, 2016, page 42
[58] See *Id.* at page 75

been a plainly obvious fence blocking the alleged route of the on-foot shooter. This failure became readily apparent when Johnson spoke with Wayne County Prosecutor's Office Investigator Duane Cole on January 4, 2016.[59]

During the talk with Inv. Cole, Johnson generally repeated what appeared in the affidavit, doing, so with the aid of several maps; one of these was admitted as People's Exhibit 1.[60] The notable difference between the affidavit and the conversation with Cole was the repeated identification of where, exactly, the shooter had appeared. People's Exhibit 1 shows an arrow marked "shooter" between the second and third houses—when counted moving east to west from the first house at the intersection of Avalon St. and Second Avenue. Beginning at the 23 minute mark (23:00) of the audio recording, Johnson gave considerable verbal description to accompany the visual aid.

Johnson initially expressed confusion over the map's orientation, however, by 29:26, the confusion was gone and the "victim was at the fourth or fifth house and the guy [the shooter] cut in between the second or third…I wanna say he cut in between the second and third house… I wanna say he cut in between the second and third house…." At 30:00, Johnson said, "[H]e came in between right where I got the arrows…." At 31:56, Cole asked Johnson to draw on the map to give a visual representation of what he saw and did—as evidenced by People's Exhibit 1; Johnson verbally and physically asserted and affirmed that the shooter came between the *second* and *third* houses. By 35:05, Johnson stated that the shooter fled the way he came; that being between the second and third houses.

While testifying on January 15, 2016, Johnson gave a basic facsimile of his conversation with Cole, but changed the location of the shooter. Defense Exhibit I, an overhead photograph

[59] Cole recorded the conversation with Johnson, so, this Court is able to hear the tone, inflection, and aural circumstances of the interview. (See Defendant's instant appendix, Exhibit K-K).

[60] See Defendant's Exhibit K-F or People's Exhibit 1—a colorized version of Defendant's K-F

from Google[61] showed at least one obstacle – a fence – between the second and third houses. At the January 15th hearing, Johnson marked the map where he saw the shooter emerge onto Avalon; he did so and indicated that it was between the first and second houses.[62] Obviously, this was different from what he told Investigator Cole. Johnson was confronted with People's Exhibit 1 and the witness attempted to explain that the difference existed because of his confusion with the map and that the "actual Google Map" – the overhead view of Defense Exhibit I—instant Exhibit K-K—gave a clearer understanding of the street.[63] Had Johnson actually seen an on-foot shooter on Avalon Street, Johnson would not have needed any clearer understanding of the street.

The only fact that became clearer to Johnson was the impossibility of his prior statement to investigator Cole and the need to change the pro-Defendant fact. The shooter could not have come through the gap between the second and third houses as Johnson claimed on January 4th because the path was blocked by at least one fence. Defense Exhibit I established that the third house, adjacent to the fence is 114 Avalon. Johnson conveniently amended his claim accordingly.

The trial record shows that the fence existed, there, on the day of the crime. Victim Wray testified that his address is 114 Avalon[64] and Anthony Day testified that at Mr. Wray's home:

> A. There's fencing all the way around, but there's a wooden fence in the front, and it's like a regular fence along the side.
>
> Q. Again, we're going to try to explain this a little bit better. Would the wooden fence then face Avalon?

[61] The January 15, 2016, transcript refers to Defense Hearing Exhibit I as a map while the Defense Hearing exhibit List refers to the item as a "Google Satellite." While origin cannot be exactly determined, the document Defense Hearing Exhibit I is clearly an overhead photograph from Google.

[62] *People v. Diallo Corley, Ginther* Hearing Transcript – January 19, 2016, pages 23-25

[63] *Id.* at pages 42-52

[64] *Id.* at page 7

A. Yes.

Q. And then would the - - you say the regular fence. Would that be a cyclone fence?

A. It's a metal fence.

Q. With the kind of like - -

A. Yes.

Q. A cyclone fence. Does that then go to the Woodward side of the property?

A. Yes.

Q. That would be the east or to the - - away from[65] Woodward to the west or both? I don't know.

A. It's along the side so I should - - it's like going from - - how Second is, it's going like in that angle.

Q. So it's going parallel to Second?

A. Yes.[66]

Though Johnson ostensibly saw Defense Hearing Exhibit I for the first time during the hearing,[67] had he been on Avalon Street on the day he claimed, he would have already known the fence existed and a Google photograph would have been unnecessary. Moreover, had Johnson seen the fence—as he claimed—he would have mentioned this fact to Inv. Cole during his interview and, importantly, not said that the shooter came between the second and third houses without accounting for the obstacle. Johnson's failure, here, to account for such a key elementary detail about the crime scene and the on-foot shooter's pathway[68] rendered his testimony suspect.

[65] *People v. Diallo Corley*, Jury Trial Transcript – June 9, 2015, page 38
[66] *Id.* at page 39
[67] *People v. Diallo Corley, Ginther* Hearing Transcript – January 15, 2016, page 23
[68] Especially when he provided such detail about the alleged shooter's description

Additionally, Johnson's bias towards the justice system distorted the veracity of his testimony. Leaving the "bad Samaritan"-styled position aside for the moment, Johnson's admitted distrust[69] of the system as a result of his own history casts a pall over his testimony. Although Judge Callahan did not cite this as a reason to find Johnson incredible, such position was made plain to him via the record evidence he took and the argument provided. The majority opinion of the reviewing Court of Appeals panel took up Johnson's distrust of the system as a factor which undercut his credibility. The dissenting opinion criticized this position, finding no rational basis for Johnson to make-up facts about a shooting to aid a stranger. The dissent's position is flawed in that it assumes that Johnson would only create his account out of self-interest or to avoid inculpating himself. The dissent failed to examine Johnson's bias on its own terms. Johnson testified that he distrusted the justice system. A failure to trust the justice system concurrently breeds disrespect for the system. Although Johnson testified and cooperated according to proper decorum, such behavior does not preclude the demonstration of animus toward the justice system by complicating substantive matters with the benefit of hindsight-driven story telling. Resistance against such an unfair and unbalanced system warrants opposition by any means necessary—including creating accounts from whole cloth.

It is true that there was no evidence the witness saw trial documentation or spoke to individuals who attended the trial, but who would admit to passing those documents or having those conversations? What proof could be investigated and presented to evidence such possibility where the likely suspects would be supporters of the person who would benefit from keeping such communications secret? Instead, the only way to critique positions such as these is to impugn the credibility of the witness in the minutest of ways. Here, with Johnson's admitted distrust and inherent bias as a foundation, his failure to account for key objectively corroborative

[69] *People v. Diallo Corley, Ginther* Hearing Transcript – January 15, 2016, pages 74-75

details—the firearms evidence and the alleged shooter's footpath—and the very convenient nature of the directly contradictory and exculpatory narrative renders the witness patently unworthy of belief by Judge Callahan or, more importantly, a reasonable juror.

D. Defendant's newly discovered witness testimony cannot demonstrate an actual probability of acquittal

As evidenced above,[70] Judge Callahan was aware of the People's trial evidence and provided his credibility determination with the testimony of victim Calvin Wray and Anthony Day in mind. A detailed discussion from the court would surely have assisted in appellate review. In the absence of this fully-developed discussion, to provide any semblance of opposition to Defendant's position before this Court, one must, and may, examine the record to find if Judge Callahan could have supported his denial and the record supports this finding. A review of the record shows this to be the case.

Victim Wray and People's witness Day were not—by any means—perfect witnesses; they had their share of credibility issues[71] that the jury heard and dealt with. Ultimately, these reasonable jurors credited the People's witnesses despite trial counsel's vigorous attempts to impeach and discredit. The same cannot be said of Johnson's testimony. Although the witness was not presented to a trier of fact, as shown in the foregoing section, there was sufficient record evidence elicited to substantiate a finding that Defendant's newly discovered witness is patently incredible. Accordingly, a patently incredible witness could not be expected to surmount even the People's witnesses, here.

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[70] Section B, supra

[71] Defendant provides a generally correct summary of these issues beginning at page 31 of his supplemental brief—Wray lied under oath at the preliminary examination about his name when antagonized by defense counsel (See *People v. Diallo Corley*, Jury Trial Transcript – June 8, 2015, page 158), told a differing account of the shooting to a physical therapist to avoid familial embarrassment (See *People v. Diallo Corley*, Jury Trial Transcript – June 8, 2015, pages 185-186), prior contradictions in sworn testimony, and a discrepancy—involving Day—in identifying Defendant as the shooter (Day testified that Wray told him Defendant shot him while Wray testified that he did not).

Alternatively, even if one were to outright contradict Judge Callahan's conclusion that putting Wray and Day's testimony on par with Johnson's would be "a stretch" and do just that, such a finding would still be insufficient to grant Defendant a new trial. Discounting, for the sake of argument that reasonable jurors credited the People's witnesses despite their credibility issues, were the People's and Defendant's witnesses credibility questions laid bare, at best they would share a credibility—or incredibility—equivalency. Broadly discussed, here, on-the-record misstatements, inconsistencies, factual inaccuracies, and prior convictions—properly admitted—would likely balance the credibility equation. Such a credibility "wash" between the parties' witnesses does not warrant relief. To break this equivalency and warrant relief, Defendant must show an actual probability of acquittal at retrial beyond just a showing of reasonable doubt.[72] To do this, Defendant must show that Johnson's testimony is credible to the extent that a reasonable juror would credit it. As argued above, he cannot. Thus, Defendant cannot show an actual probability of acquittal.

Again, Judge Callahan's opinion in this matter could have been better and, perhaps, should have been. When the record is reviewed, however, one may conclude that he came to the right result for—not the wrong reason—but an incompletely articulated reason. The denial of Defendant's motion based on Johnson's incredibility was not an error of law or an abuse of discretion.

[72] Section A(2), supra

RELIEF

WHEREFORE this Court should DENY Defendant's relief and affirm his convictions.

Respectfully Submitted,

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