STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	
Plaintiff-Appellee,	Supreme Court No.
-vs-	Court of Appeals No. **328532**
DIALLO CORLEY,	
Defendant-Appellant.	Lower Court No. **14-007466-01-FC**

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NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

APPENDIX

AND

PROOF OF SERVICE

STATE OF MICHIGAN

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NOTICE OF HEARING

TO: Wayne County Prosecutor's Office
Appellate Division
1441 St. Antoine
Detroit, Michigan 48226

PLEASE TAKE NOTICE that on **Tuesday, March 1, 2017** the undersigned will move this Honorable Court to grant the within Application for Leave to Appeal in the above entitled cause. Please note there will be no oral arguments unless otherwise ordered by the Court.

Respectfully submitted,

_____

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Dated: February 8, 2017

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APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

Page

Page

INDEX OF AUTHORITIES

Page

U.S. CONSTITUTIONAL PROVISIONS

FEDERAL CASES

Page

Page

Page

STATE CASES

Page

Page

MICHIGAN STATUTES AND COURT RULES

STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF REQUESTED

Defendant-Appellant, DIALLO CORLEY, seeks leave to appeal from the Court of Appeal's majority per curiam Opinion dated **December 27, 2016** (Appendix, Exhibit R).

This application shows that there are issues involving legal principles of major significance to the state's jurisprudence or the Court of Appeal's majority Opinion of **December 27, 2016** is clearly erroneous and will cause material injustice to the Defendant if not reversed. *MCR 7.302(b)(3) and (5)*.

Defendant Corley requests that this Court adopt the Court of Appeals dissent, reverse the convictions, and remand for a new trial.

STATEMENT OF MATERIAL PROCEEDINGS AND ORDERS BELOW

On **June 23, 2015**, the Honorable James A. Callahan, presiding, imposed sentences of 20 to 30 years, 2 to 4 years, 2 to 4 years, and the mandatory consecutive 2 year term, respectively.

On remand from the Court of Appeals, the trial court issued an Opinion and Order, dated March 28, 2015, denying a motion for new trial.

On **December 27, 2016**, the Court of Appeals majority entered a per curiam Opinion affirming the convictions (Jansen, P.J. *concurring in part and dissenting in part* would reverse and remand for a new trial based on newly discovered evidence) (Appendix, Exhibit R).

STATEMENT OF JURISDICTION

This Court has jurisdiction to grant leave to appeal from the Court of Appeal's Opinion of **December 27, 2016** pursuant to *MCR 7.302(C)(2)(b)*.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT AND MAJORITY COURT OF APPEALS COMMIT CLEAR ERROR BECAUSE THE NEWLY DISCOVERED EXCULPATORY EVIDENCE FROM AN INDEPENDENT EYEWITNESS ESTABLISHED THAT DEFENDANT CORLEY DID NOT COMMIT THE CRIME? DID THE LOWER COURTS CLEARLY ERR IN THEIR CONCLUSIONS THAT THE WITNESS WAS NOT CREDIBLE AND FAILED TO CONSIDER THAT THE PROSECUTION'S CASE RESTED ENTIRELY ON THE UNCORROBORATED TESTIMONY OF A SINGLE WITNESS? IN ORDER TO EFFECTUATE DEFENDANT'S RIGHT TO A TRIAL BY JURY AND DUE PROCESS, IS A NEW TRIAL WARRANTED?

Defendant-Appellant answers "yes"
Plaintiff-Appellee answers "no"

II. WAS DEFENDANT CORLEY DENIED DUE PROCESS AND A FAIR TRIAL UNDER BOTH THE FEDERAL AND STATE CONSTITUTION WHEN THE PROSECUTOR, (A) IMPROPERLY TRIED TO CREATE A MOTIVE FOR THE SHOOTING BY ASSOCIATING DEFENDANT WITH A GANG, AND (B) REPEATEDLY EXPRESSED HIS PERSONAL BELIEF IN THE STATE'S CASE?

Defendant-Appellant answers "yes"
Plaintiff-Appellee answers "no"

III. WAS DEFENDANT CORLEY DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY, (A) FAILED TO INVESTIGATE AND PRESENT KNOWN WITNESSES IN SUPPORT OF THE DEFENSE, AND (B) FAILED TO OBJECT TO PROSECUTORIAL MISCONDUCT?

Defendant-Appellant answers "yes"
Plaintiff-Appellee answers "no"

IV. WAS THE EVIDENCE INSUFFICIENT AND AGAINST THE GREAT WEIGHT OF EVIDENCE TO FIND DEFENDANT CORLEY GUILTY OF ASSAULT WITH INTENT TO COMMIT MURDER OR THE OTHER OFFENSES CHARGED GIVEN THE NUMEROUS INCONSISTENCIES IN THE TESTIMONY AND THE LACK OF EVIDENCE TO PROVE EACH AND EVERY ELEMENT BEYOND A REASONABLE DOUBT?

Defendant-Appellant answers "yes"
Plaintiff-Appellee answers "no"

STATEMENT OF FACTS

INTRODUCTION

On November 24, 2015, the Court of Appeals remanded this case for the trial court to hold an evidentiary hearing on two claims: (1) newly discovered evidence, and (2) ineffective assistance of counsel. The hearings were held on January 15, 19, 25, February 11 and 23, 2016. Defendant Corley ("Corley") presented Tarryl Johnson, Desiree Edwards, Stanley Davis, Jr. and Randall Upshaw. Defendant's Exhibits A through N were admitted and are attached to this Application. The prosecution called no witnesses. Two Exhibits on behalf of the prosecution were admitted.[1]

THE PROSECUTION'S CASE AT TRIAL

The only eyewitness presented at trial was the Complainant, Calvin Wray ("Wray") (Tr. 06/08/15, p. 158-191; EH 02/23/16, p. 22). According to Wray, Corley drove up in a red Mountaineer, and without saying a word, shot him multiple times and then drove off.

There was no physical or scientific evidence linking Corley to the crime (EH 02/23/16, p. 22-23, 74). There was no evidence that the red Mountaineer Corley

[1]People's Exhibit 1 is a color copy of Defendant's Exhibit F.

allegedly drove during the shooting was his vehicle or associated with him in any way (*id*). No firearm connecting Corley to the shooting was recovered (*id*).

The police report at the scene noted that the suspect of the shooting was "unknown," the race was "unknown," the sex was "unknown," and "eyes, hairs and ethnic" was "unknown" (Appendix, Exhibit B, EH 02/23/16, p. 12-13).

Although the shooting occurred on April 21, 2014, Wray did not identify Corley as the shooter until July 21, 2014, *three months later* (Tr. 06/08/15, p. 179, 181; EH 02/23/15, p. 23).

Wray admitted *lying under oath* at the preliminary examination claiming he lied because defense counsel "antagonized" him (Tr. 06/08/15, p. 193; EH 02/23/15, p. 23).

Wray told his physical therapist that he was *shot during a robbery*, which was completely inconsistent with his trial testimony (Tr. 06/08/15, p. 165, 189; EH 02/23/15, p. 23).

Wray gave inconsistent versions about whether there was a passenger in the red Mountaineer, at one time testifying there was only the driver (PET 08/26/14, p. 9; Tr. 06/08/15, p. 206) and then subsequently changing his testimony to seeing the legs of a passenger in the car (Tr. 06/08/15, p. 200, 206; EH 02/23/15, p. 23).

According to Wray's question and answer statement to Detective Thomas, Wray was shot with a "dark automatic" handgun (PET 08/26/14, p. 42; Tr. 06/08/15, p. 187; Tr. 06/09/15, p. 22). However, at trial, Wray *denied* ever telling Detective Thomas it was an automatic, claiming he was shot with a revolver (*id*.).[2]

Wray gave inconsistent testimony about whether he was a member of BTA, a rap group (Tr. 06/08/15, p. 184, 19-20; EH 02/23/16, p. 55-56).

Wray only "knew of" Defendant Corley. He had never spoken to Corley or had any contact with him, and never had any "beef" or conflict with Corley. He could only identify Corley by the name "Diablo," a name never associated with Corley (Tr. 6/08/15, p. 165, 175; EH 02/23/16, p. 23).

Wray testified he never had a "beef" or conflict with the Winona Boys, a group that Wray said Corley was associated with. Supposedly, the Winona group was "jealous" of Wray because seven years or more before the shooting, Wray was homecoming king at Highland Park High School (Tr. 06/08/15, p. 189; Tr. 06/09/15, p. 32-33; EH 02/23/16, p. 30-38).

Wray had previously been convicted of an offense involving theft (Tr. 06/09/15, p. 19, 33).[3]

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[2]That change from an automatic to a revolver would render Wray's testimony consistent with the fact that no shell casings were found at the scene.

[3]Wray misrepresented to the judge and jury that his conviction was a misdemeanor (Tr. 06/09/15, p. 33). Wray was convicted of Attempt Financial Transaction Device - Stealing/

Anthony Day, Wray's friend, said at trial that when he went to Wray laying on the ground after being shot, Wray told him he was shot by "Diallo" (Tr. 06/09/15, p. 43). Prior to trial, Wray had *never told anyone* that Wray said it was "Diallo" who shot him (*id*., p. 53-58). When asked, under oath, at the prosecutor's subpoena hearing, "Q. Did he (Wray) say anything to you when you got out there?", Day answered, "A. *He just said*, "don't let me die, bro. Don't let me die" (Tr. 06/9/15, p. 53) (emphasis added). When questioned under oath at the preliminary examination, "Q. What does he (Wray) say?" Day answered "A. Don't let me die here." "Q. He said that to you? A. Yeah" (PET 08/26/14, p. 68). When asked why he had never told anyone before trial what Wray had allegedly said, Day answered "A. I don't know" (Tr. 06/09/15, p. 59).

Wray testified that after he was shot "my next door neighbor came out first and Anthony Day came running" (Tr. 06/08/15, p.75). Stanley Davis was the neighbor.[4] Davis testified at the evidentiary hearing that Wray said nothing and was in no condition to talk or say who shot him (EH, 02/11/16, p. 9, 16). According to Wray,

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Retaining Without Consent, MCL 750.157N, Case No. 11-87210-FH, a 2½ year *felony*. MCL 750.157 n(2).

[4]Wray's testimony at the prosecutor's subpoena hearing was: "the neighbor across the street was the first person on the scene" . . . "His name is Dino." "He stays directly across the street from me at, maybe 10 Avalon." (Hrg. 07/02/14, p. 21). Davis used the name Dino.

the *only* thing he said to Day was, "Just 'Don't let me die in the street'" (Tr. 06/08/15, p. 15, p. 176-177). *Wray did not tell Day that Diallo or Diablo shot him* (*id*.).

TESTIMONY AT THE EVIDENTIARY HEARING

TARRYL JOHNSON ("Johnson"), age 39, grew up in Detroit and was familiar with Highland Park because he lived at the Detroit Rescue Mission for about 14 months (EH 01/15/16, p. 6). The Mission was located on Woodward at Waverly. On April 21, 2014, Johnson was staying with a friend in Detroit in the Eight Mile and Dequindre area (*id.*, p. 8). On that date, Johnson had made arrangements to meet a person at a house on Buena Vista in Highland Park. Buena Vista is one street north of Avalon , where the shooting in this case occurred. Johnson rode the bus from the east side of Detroit to the area of the Rescue Mission (*id.*, p. 9). Not seeing anyone he knew at the Mission, he walked to the house on Buena Vista off of Hamilton, about three blocks away (*id.*, p. 10-12). Johnson identified Exhibit C, a Google map of the Buena Vista area that Investigator Cole from the Wayne County Prosecutor's Office had Johnson identify on January 4, 2016 during an interview. Johnson wrote on the map "white duplex where I met Big Moe" (*id.*, p. 13-14). Exhibit D, which Johnson had not previously seen, was a street view by Google map of 294 West Buena Vista, the white duplex, Johnson met Big Moe at (*id.*, p. 14-15). When Johnson arrived at the West Buena Vista address, Big Moe opened the door, but the

house was empty, except for a mattress (*id.*, p. 18). Johnson explained that this was a homosexual "greet and meet," but was not what he had expected (*id.*, p. 19, 63). Johnson gave a detailed physical description of Big Moe (*id.*, p. 19). Johnson had met Big Moe on a gay app called Jet (*id.*, p. 19-20, 43). Johnson left the West Buena Vista house and walked west to Avalon toward Woodward. Exhibit H depicted the path Johnson walked from 294 West Buena Vista to the area of 114 Avalon, where the shooting occurred (*id.*, p. 21-22). Exhibit F was the Google map that Investigator Cole had Johnson identify the scene of the shooting (*id.*, p. 20). Exhibit G was a Google map of 114 Avalon, where Mr. Wray lived (*id.*, p. 21).

While walking on the south side of Avalon, Johnson saw a young man coming between an abandoned house and another house, across the street on Avalon very close to Second Street (*id.*, p. 22-23). Johnson indicated on Exhibit I where the man came from between the houses (*id.*, p. 24). That man was moving quickly toward another man standing in front of 114 Avalon (*id.*, p. 25, 45). The two men looked at each other and the man in front of 114 Avalon looked scared (*id.*, p. 25-26). The shooter said something that was like taunting and challenging to the other man (*id.*, p. 56, 57). The man in front of 114 Avalon began to turn and run when the man who came from between the houses fired many shots (no less than three) (*id.*, p. 26). Johnson had an unobstructed view of the two men (*id.*, p. 45). Johnson ducked

behind a car (white Pontiac Grand Am) and saw the man shot on the ground (*id.*, p. 27). Johnson was directly across the street from where the man was shot. Looking through the window of the car he was behind, Johnson saw the shooter run back between the houses where he came from (*id.*, p. 28). The shooter had a dark handgun (*id.*, p. 75). Johnson saw the shooter's face and described the shooter as a black male, dark skinned, about 5'8", slim and a short hair style referred to as a 360's waive (*id.*, p. 29-30). He was wearing jeans and a dark shirt (*id.*, p. 57). The man did not have dread locks (*id.*, p. 30). Johnson testified there was a "good chance" he would be able to identify the shooter because he could clearly see him when the shooting occurred (*id.*, p. 65-66). Johnson did not see a red Mountaineer or any other vehicle driving by when the shooting occurred (*id.*, p. 61, 78). After the shooting, Johnson ran off toward Woodward to the bus stop (*id.*, p. 31-32). On the way Johnson called a person and told him briefly about the shooting (*id.*, p. 32). Johnson did not know Calvin Wray, Diallo Corley, or his family and first heard Corley's name when he saw his subpoena. He had never seen Corley before the hearing (*id.*, p. 33-34). Johnson said that he had seen the shooter's face and had not seen Corley before his testimony in court.

Johnson was first contacted in October of 2015 regarding the incident through his aunt (*id.*, p. 34). Johnson's Aunt Andrea had been contacted through Facebook,

who in turn contacted Johnson. Once his aunt explained what the investigator was asking about, he called Investigator Desiree Edwards (*id.*, p. 35-36). After meeting with Ms. Edwards, Johnson's statement was reduced to a signed affidavit (Appendix, Exhibit A) (*id.*, p. 36-37). The Facebook contact for Johnson was Yung.Ryl (*id.*, p. 37-38). Johnson also met with Investigator Cole, cooperated with him during a 1½ to 2 hour interview and signed a written statement for Cole (Appendix, Exhibit J) (*id.*, p. 38-40).

DESIREE EDWARDS, an investigator with Sunshine Investigations, received a request for investigation in August or September of 2015 (EH 1/19/16, p. 5). Regarding the witness Tarryl Johnson, Edwards said the investigation began only with a Facebook name, Yung.Ryl. She had no name, address, physical description, date of birth or friends or family of the person (*id.*, p. 15). The Facebook page was set on private and provided very little information about the user. By looking at postings on Facebook, such as where the person was, friends, etc. and piecing bits of information gathered, a prospective employer, the Produce Station was contacted to no avail (*id.*, p. 16-17). One posting was an Andrea Tribune, a cousin (*id.*, p. 17). Edwards contacted her, who put Edwards in contact with her mother and Edwards explained about the investigation who in turn contacted Mr. Johnson (*id.*, p. 17-18). When Johnson eventually called Edwards, they set up an appointment for an

interview, resulting in Johnson speaking with Edwards and executing the affidavit, Exhibit A (*id.*, p. 18-20). Edwards described the attempts and possibility of locating Johnson as "an extreme long shot" (*id.*, p. 21-22). The Facebook name for Mr. Johnson came from Corley's mother, who while attending a funeral was approached by a family friend and asked her how Diallo was doing. When she explained he was in prison for a shooting, the friend said he knew someone who may have seen the shooting and then proceeded to give the Facebook name to her (*id.*, p. 22).[5]

STANLEY DAVIS, JR. lived at 115 Avalon, Highland Park in April of 2014 (EH 02/11/16, p. 4). In the evening hours, he was putting spark plugs in his van in the backyard of his house (*id.*, p. 4-5). He heard about five shots, but considered it "pretty normal" for Highland Park (*id.*, p. 6). He initially got down in the van and when he stepped out of the van he saw people sitting on Calvin Wray's porch (*id.*, p. 6). Davis had done work for Calvin's mother in the past and knew Calvin by face (*id.*, p. 6, 36-37). After seeing the people on the porch, Davis "stood there for a minute" before running over to where Mr. Wray was to aid him (*id.*, p. 7). Mr. Wray "was dying" and in no condition to speak (*id.*, p. 8, 16). Davis said Mr. Wray "wasn't trying to say nothing" (*id.*, p. 16). He was in no condition to tell who shot him (*id.*, p. 9). No other civilians came to aid Mr. Wray (*id.*, p. 8, 28). He did not see a red

[5]Edward's report regarding Johnson and her rough notes were provided to the assistant prosecutor (EH 01/19/16, p. 26; EH 02/11/16, p. 45).

Mountaineer and never heard of the BTA or Winona Boys (*id.*, p. 9). Prior to the trial, Davis was not contacted by Randall Upshaw (*id.*, p. 27).[6] Davis had never seen Defendant Corley before the hearing (*id.*, p. 36).

The trial attorney, RANDALL UPSHAW, testified that had he been aware of Johnson's testimony, he would have "definitely" presented it to the jury at trial because "it totally contradicts the story of the victim at that point. It would have caused a reasonable doubt" (EH, 02/23/16, p. 10). Upshaw said that Defendant Corley did not fit the description of the shooter as testified to by Mr. Johnson because Corley had dread locks, was not slim, and not dark-skinned (*id.*, p. 10-11).

Upshaw recalled that there was no physical or scientific evidence linking Corley to the shooting, that Wray had lied at the preliminary examination, told a therapist that the shooting was part of a robbery and gave inconsistent stories about whether a passenger was in the vehicle and whether the weapon used was a revolver or automatic (*id.*, p. 22-24). Furthermore, there was no evidence linking Corley to a red Mountaineer or any type of weapon (*id.*, p. 74).

ARGUMENT

I. THE TRIAL COURT AND MAJORITY COURT OF APPEALS COMMITTED CLEAR ERROR BECAUSE THE NEWLY DIS-

[6]Regarding the time that elapsed between the gunshots and going to the front of the house, Davis testified "I had to wait for a minute because I didn't know what was going on" and then estimated it was about ten minutes (*id.*, p. 30). Later, Davis said "five minutes" (*id.*, p. 40).

COVERED EXCULPATORY EVIDENCE FROM AN INDEPENDENT EYEWITNESS ESTABLISHED THAT DEFENDANT CORLEY DID NOT COMMIT THE CRIME. THE LOWER COURTS CLEARLY ERRED IN THEIR CONCLUSIONS THAT THE WITNESS WAS NOT CREDIBLE AND FAILED TO CONSIDER THAT THE PROSECUTION'S CASE RESTED ENTIRELY ON THE UNCORROBORATED TESTIMONY OF A SINGLE WITNESS. IN ORDER TO EFFECTUATE DEFENDANT'S RIGHT TO A TRIAL BY JURY AND DUE PROCESS, A NEW TRIAL IS WARRANTED.

STANDARD OF REVIEW: The trial court's findings of facts are reviewed for clear error. *People v. Armstrong*, 490 Mich 281, 289 (2011)*; People v. Cress*, 468 Mich 678, 691 (2003); MCR 2.613(c). And the decision itself for an abuse of discretion (*id*.). Constitutional claims are reviewed *de novo*, *id*.

The lower courts and parties agree, that under the test for newly discovered evidence, the only issue on this appeal is whether the exculpatory eyewitness testimony makes a different result probable on retrial.

By law, a court is required to take into account *the entire record*, the strengths and weaknesses in the prosecution's case, as well as the newly discovered evidence in determining whether a new trial is warranted. The Court of Appeals majority and trial court committed a *legal* error by addressing the newly discovered evidence *in isolation*. Only the dissent properly analyzed the total record evidence in finding that a new trial was warranted, noting that the prosecution's sole eyewitness' testimony "raised numerous credibility concerns." Moreover, the lower courts affirming the

convictions failed to recognize there was no corroboration of the victim's version by any other eyewitness, physical or scientific evidence linking Defendant Corley to the shooting.

The majority opinion and the trial court also failed to recognize that the newly discovered evidence *in this case* represents the most powerful type of evidence: eyewitness testimony by Tarryl Johnson that exculpates the defendant because it *shows someone else committed the crime*. Johnson testified he saw the shooter's face and it was not Corley. In reviewing the witnesses' testimony, the majority misconstrued his testimony failing to recognize the true importance and substance of the witnesses' evidence. In doing so, the lower courts clearly erred in finding that the witnesses' testimony would not be considered credible by a jury.

Finally, the majority opinion, in concluding that there is a significant likelihood that a jury would find the witness not credible, deprived Defendant Corley of his right to a trial by jury and invaded the province of the jury to decide which version to believe, the prosecution's sole uncorroborated story, or Johnson's version. This Court should reverse.

The only witness to identify Corley as the shooter was the Complainant, Calvin Wray. According to Wray, as he walked to the liquor store to buy a pop, Corley drove up in a car, rolled the window down and without speaking a word, shot Wray

multiple times. The police reported that the suspect was "unknown" and there was no description of the shooter provided. Wray identified Corley as the shooter some *three months after the shooting*. There was no physical or scientific evidence supporting Wray's testimony. There was no evidence linking Corley to a red Mountaineer that Wray claimed Corley was driving during the shooting, or any evidence linking Corley to a firearm. Wray also admitted *lying under oath* at the preliminary examination and telling a therapist that he was shot *during a robbery*. Wray gave inconsistent testimony about a passenger being in the car and the type of weapon used. There was no *authentic* motive for the shooting, just a contrived theory that a group Corley was associated with the "Winona Boys" was jealous of Wray because he was the homecoming King *at least seven years or more before the shooting*. In fact, Wray had never had any history or contact with Corley, much less a conflict, prior to the shooting. Wray did not even know Corley's name, referring to him only as "Diablo". Wray was also impeached with his theft related conviction at trial.

An independent witness, Tarryl Johnson, testified that he was an eyewitness to the shooting. The shooter came from between the houses on Avalon, had a brief conversation with Wray before shooting, and then ran back between the houses. Johnson testified that Corley was not the shooter. Johnson's testimony directly

contradicts Wray's version of the events and *who* the shooter was and sets forth a complete defense to the charges. That newly discovered evidence clearly establishes Corley's innocence and that Wray lied under oath at trial. Johnson's testimony contradicts the very integrity and core of the prosecution's case.

Since Johnson's testimony makes a different result probable on retrial, a new trial should be granted. This Court should reverse and remand for a new trial because the trial court and Court of Appeals majority clearly erred and their opinion will cause material injustice.[7] A jury should now decide whether there is proof beyond a reasonable doubt that Corley was the shooter taking into consideration Johnson's testimony. Johnson's testimony implicates several of Corley's constitutional rights, including due process, the right not be convicted on false testimony, the right to present a defense and a right to trial by jury.

A. THE TEST FOR NEWLY DISCOVERED EVIDENCE.

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (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

[7]MCR 7.305(B)(5)(a).

retrial. *People v. Cress*, 468 Mich 678, 692 (2003). More recently, in *People v. Grissom*, 492 Mich 296 (2012), this Court clarified that newly discovered evidence, in the form of *impeachment* evidence, can form the basis of a newly discovered evidence if it satisfies the four-part test set forth in *Cress*. In the present case, the testimony of Johnson is *material exculpatory evidence* sufficient to meet the requirements for a new trial.

B. REVIEW MUST BE BASED ON THE ENTIRE RECORD.

This Court has made clear that the lower court must consider *all* the facts in the record, both the evidence at trial and the newly discovered evidence. *Grissom*, 492 Mich at 321 ("The only facts that the trial court should consider in deciding whether to grant a new trial are those in the newly discovered evidence and those in the record."); *Grissom*, 492 Mich at 341, Markman, J. concurring ("[T]he trial court should consider this newly discovered evidence in conjunction with the evidence, both inculpatory and exculpatory, that was previously offered at trial"); *Grissom*, 492 Mich at 350, Zahra, J. concurring in part and dissenting in part ("[N]ew impeachment evidence could make a different result probable on retrial only if it directly contradicts material trial testimony in a manner that exculpates the defendant.").

When the evidence, as here, has an exculpatory and material connection that contradicts the heart of the prosecution's case, which lack's substantial independent

corroboration, the Michigan appellate courts have granted a new trial. *People v. Clark*, 363 Mich 643, 647 (1961) ("The evidence was newly discovered and material, and not merely cumulative, and it is reasonable to assume it might effect a different result on a retrial of the cause. Therefore, the court was in error in refusing to grant the motion for new trial."); *People v. Mechura*, 205 Mich App 481 (1994) (trial court's finding that the newly discovered witness's testimony was "unreliable" was an abuse of discretion and the court could not say that the newly discovered evidence probably would not have resulted in a different verdict); *People v. Burton*, 74 Mich App 215, 223 (1977) ("In view of the witnesses of the trial testimony the newly discovered evidence could have a significant impact on a second jury."); *People v. McAllister*, 16 Mich App 217, 218 (1969) ("Johnson's statement was newly discovered and is not cumulative. It goes to the heart of McAllister's defense, which is that he did not commit the crime."); *People v. Jackson*, 91 Mich App 636, 638-640 (1979) ("[T]he only evidence connecting defendant to the crime was his identification by the victim . . . the lower court's finding that the evidence was too speculative to make a different result probable on retrial is, in our opinion, erroneous . . . the fact that he [the witness] could not assign a degree of certainty to his opinion *is a matter which can be weighed by the jury*.") (emphasis added); *People v. Olesky*, 21 Mich App 230 (1970); *People v. Presto*, 6 Mich App 318 (1968) (decision of trial court

denying new trial on newly discovered evidence reversed); *People v. Andre Hunter* _ Mich _, SC #146210, 05/13/2013) (Appendix, Exhibit P) ("The trial court clearly erred in finding that the defendant's attorney was credible."); *People v. Nelson*, unpublished per curiam, 2014 WL783464, Docket No. 301253, 02/25/2014 (Appendix, Exhibit O) (newly discovered evidence "implicates another person.") See also, *United States v. Garland*, 991 F2d 328 (CA 6, 1993) (newly discovered evidence from a disinterested witness who can supply evidence of vital importance, required a new trial.) *United States v. Taglia*, 922 F2d 413, 415 (CA 7, 1991) (new trial warranted when government's case rested on uncorroborated testimony of a single witness who had lied previously).

C. APPLICATION OF NEWLY DISCOVERED EVIDENCE.

Johnson's testimony is the most powerful type of newly discovered evidence. It is exculpatory. It is from an independent witness, who had no connection to the defendant or victim. It is eyewitness testimony that contradicted the heart of the prosecutor's case and advanced the defense that Corley did not commit the crime. The test is one of probabilities, not certainty. Both the trial court and the Court of Appeals engaged in role playing as oracles regarding what a jury *might* believe regarding the *credibility of Johnson* while failing to consider what the jury might consider about Wray's suspect testimony, in light of the new evidence.

1. THE POWERFUL INDEPENDENT EXCULPATORY TESTIMONY OF TARRYL JOHNSON.

Johnson's testimony is sufficient to allow a jury to reach a different conclusion about Corley's guilt or innocence. Thus, the sole contested issue is whether Johnson's testimony would make a different result probable on retrial. In that regard, the Sixth Circuit's definition of "reasonable probability" in *Matthews v. Abramajtys*, 319 F3d 780, 790 (CA 6, 2003) is instructive.

> Of course, a "reasonable probability" does not mean a certainty, or even a preponderant likelihood, *id*. at 694, 104 S Ct 2052, of a different outcome, nor, even more, that no rational juror could constitutionally find Matthews guilty.

Essentially, this is a case where a jury should be presented with the two versions and then allowed to decide, whether the prosecution's case is sufficient to sustain its burden of proof beyond a reasonable doubt.

Mr. Johnson's evidence was discovered for the first time in September 2015 when Sunshine Investigations received information that an eyewitness may have information about the shooting (EH 01-19-16, p. 14-15). The investigator, Desiree Edwards, testified that the only information she received from Ms. Tebu was a suspected Facebook contact using the name Yung.Ryl. She was not provided with any name, date of birth, address, phone number, description of the person or names of friends or family. Since the Facebook contact and profile did not provide a proper

name, the agency conducted an extensive search, including contacting an employer in Ann Arbor (that ended up to be unsuccessful) and using a database search through social media accounts, ultimately leading to possible relatives. Eventually contact was made with an aunt who lived in Warren, Michigan. Having obtained a telephone number, contact was made with the aunt who was informed of the investigation (*id*. at 17-18). She in turn contacted Johnson who called Ms. Edwards and agreed to be interviewed. The interview resulted in Johnson signing the affidavit dated October 13, 2015 (Appendix, Exhibit A, p. 18-20). Johnson was subpoenaed and appeared and testified on January 15, 2016. Ms. Edwards described the investigation as an "extreme long shot" (*id*. at 21-22). Locating Mr. Johnson was the result of hard work and determined investigators. Additionally, Johnson gave a *consistent* written witness statement, which was recorded, to Detective Cole (Appendix, Exhibits J & H).

Tarryl Johnson's testimony is compelling. He is an independent and neutral witness. He has no knowledge or connection to Corley or Wray (EH 01/15/16, p. 33-34). Johnson is familiar with the area, having lived nearby in the Detroit Rescue Mission in the past (*id*. at 6-8). Johnson openly admitted to personal matters that would be considered personally embarrassing. His testimony was detailed and convincing.

On April 24, 2014, Johnson was staying with a friend on the east side of Detroit in the 8 Mile/Van Dyke area (*id*. at 8). He had made arrangements to meet a person he met on a gay chat site, known to him as "Big Moe" at a house on Buena Vista in Highland Park. After leaving the house he was staying at that evening, he rode the bus to Woodward and Waverly, where the Detroit Rescue Mission was located, a place he had stayed before. Looking for some old friends and seeing none, he walked to the Buena Vista house, he described as a white duplex (*id*. at 10-18). Presented with several Google maps of the location (that Johnson had not seen before his testimony) he identified the white duplex at 294 W. Buena Vista, Highland Park (Appendix, Exhibits C, D, E). After entering the duplex and noticing only a mat in the house and seeing "Big Moe" (who Johnson physically described in detail), Johnson became upset, felt he had been set up and left (*id*. at 18-19). Johnson then walked up Avalon Street toward Woodward to the bus stop to return home (*id*. at 21-22). The path he took was set out in (Appendix, Exhibit H). Previous testimony at trial established the shooting occurred at 114 Avalon, Wray's home (Appendix, Exhibit G) (*id*. at 21). While walking on the south side of Avalon, Johnson saw Wray walk off the steps of his house and stand nearby on the sidewalk. Johnson then saw a man come from between the second or third house off of Second on the north side of Avalon moving quickly toward Wray (*id*. at 22-23). This man said something

to Wray, to the effect "what's up now?" and Wray and the man were face-to-face (*id*. at 56-57). When Wray turned to run, the shooter fired at least three shots from a dark semi-automatic handgun striking Wray. Johnson ducked behind a white Pontiac Grand Am (*id*. at 27). The shooter ran back between the houses where he initially came from while Wray lay wounded (*id*. at 28). When the shooting stopped, Johnson ran off and then walked to the bus stop where he caught the bus (*id*. at 31-32). Johnson described the shooter as about 5'8", slim, dark-skinned, wearing dark clothes and a short hairstyle, called a "360 Wave" (*id*. at 30).[8] Johnson testified he was right across the street when the shooting occurred, could *clearly* see the shooter and that there was a "good chance" he would be able to identify the shooter (*id*. at 65-66). Of importance, Johnson had never seen Corley before the hearing itself. On the way to the bus stop, he called "Big Moe" on his cell phone and angrily described what happened, telling him about the shooting. Johnson more than adequately, responded to extensive questions from the Court about his personal background (being a homosexual) and his past criminal history, as well as detailed information surrounding the shooting (*id*. at 61-78).

On January 4, 2016, Johnson gave a detailed interview to Detective Duane Cole of the Wayne County Prosecutor's Office that lasted approximately an hour and

[8]Wray described the shooter as having long dread locks.

a half, and resulted in a written signed statement (Appendix, Exhibit J) (*id*. at 38-40). That statement is consistent with both his affidavit (Appendix, Exhibit A) and his in-court testimony.

Finally, the testimony of Stanley Davis corroborates Tarryl Johnson's testimony on important facts. Davis, also a neutral witness,[9] testified consistent with Johnson *and contradicted* Wray's testimony that:

- There were people on Wray's porch (EH 02-11-16, p. 7).
- The people on the porch were looking in the direction of Second Street after the shooting, which is the direction the shooter left and ran between the houses after shooting Wray (EH 02-11-16, p. 7).
- That there was no red Mercury Mountaineer in the area at the time of the shooting (EH 02-11-16, p. 9).

A jury is likely to accept Johnson's testimony as his testimony is believable, consistent, makes sense and without motive to lie, unlike Wray's concocted story.

2. THE PROSECUTOR'S CASE AT TRIAL.

The prosecutor's case at trial had serious problems as it rested entirely on the uncorroborated testimony of a single witness who gave inconsistent versions and admitted lying. Wray's testimony was highly suspect and the State's case was weak because:

[9]Davis had worked for Wray's mother on her house and knew of Wray. He did not know Defendant Corley (EH 02-11-16, p. 6, 36-37).

- The prosecution's case rested on the *uncorroborated single eyewitness* testimony of Calvin Wray (EH 02-23-16, p. 22).

- There was *no physical or scientific evidence supporting the prosecutor's* case. There was no evidence that the red Mountaineer Corley allegedly drove during the shooting was his or associated with him. No firearm connecting Corley to the shooting was recovered (EH 02-23-16, p. 22-23, 74).

- Although the shooting occurred on April 21, 2014, Wray did not identify Corley until July 21, 2014 from a photo lineup, *some three months later* (Tr. 06/08/15, p. 179, 181; EH 02-23-16, p. 23).

- *Wray admitted lying at the preliminary examination*, giving the excuse that he lied because the defense attorney was "antagonizing him" (Tr. 06/08/15, p. 193; EH 02-23-16, p. 23).

- Wray told his physical therapist that he was shot *during a robbery*, claiming he thought if he lied he would be seen as a victim "and get the best treatment possible" (Tr. 06/08/15, p. 185-186; EH 02-23-16, p. 23).

- Wray only "knew of" Corley, having seen him before, but *never talked to Corley, never had any contact with him and never had a "beef" or conflict with Corley*. He identified Corley only by "Diablo," an alias not associated with Corley (Tr. 06/08/15, p. 165, 175, 189; EH 02-23-16, p. 23).

- Wray gave *inconsistent versions* about a passenger in the car, saying there was only one person, the driver, and then contradicting it saying he saw the legs of the passenger in the car (Tr. 06/08/15, p. 200, 206; EH 02-23-16, p. 23).

- Wray denied telling the police the shooter fired an automatic gun, although the police statement to Detective Thomas indicates he did say that (Tr. 06/08/15, p. 187; Tr. 06/09/15, p. 22; EH 02-23-16, p. 24).

- Wray gave *inconsistent statements* as to whether he was, or was not, a member of BTA, which he described only as a rap group, not a gang (Tr. 06/08/15, p. 184, 199-200; EH 02-23-16, p. 55-56).

- Wray admitted that he never had a "beef" or conflict with the Winona Boys, who Wray claimed Corley was associated with. Instead, Wray and Anthony Day said there was some jealousy and tension between the two groups because Wray was home coming King at Highland Park in 2007, at least seven years or more prior to the shooting. This became the "motive" for the shooting, according to the prosecution's theory. And in exacerbation of this contrivance of a motive, the prosecution painted the BTA as a group and the Winonas as a gang (Tr. 06/08/15, p. 189; Tr. 06/09/15, p. 32-33; EH 02-23-16, p. 30-38).

Motive is the lynch pin for the prosecution of any crime. Every prosecution is grounded in the motive or reason, the impetus for the crime, whether it be greed, money, revenge, or passion. Without it, the prosecution becomes hollow and un-convincing. In this case, there was no real motive, just a faux motive of some seven year old "jealousy" because Wray was "King of the Court" in highschool (Tr. 06/08/15, p. 189; 06/09/15, p. 32-33; EH 02-23-16, p. 37-38).

Attorney Upshaw, who was unaware of Johnson's testimony as it was newly discovered, testified he would have "definitely" presented it because "it totally contradicted the story of the victim at that point. It would have caused a reasonable doubt" (EH 02-23-16, p. 10).

Given the weaknesses in the state's case, Johnson's testimony at a new trial, would undermine any confidence in the verdict. Wray's suspect testimony is now

subject to serious dispute by Johnson's testimony that directly contradicts both how the shooting occurred and who the shooter was. Johnson's testimony now puts the whole case in a different light. It need not be a certainty that Corley would be acquitted on retrial, only that it is probable that a jury would acquit, finding Johnson's testimony sufficiently compelling to create a reasonable doubt.

D. NEWLY DISCOVERED EVIDENCE AND DEFENDANT'S CONSTITUTIONAL RIGHTS.

1. DUE PROCESS.

The refusal to grant a new trial based on newly discovered evidence may violate the Due Process Clause, where the evidence is, "so compelling that it would be a violation of . . . fundamental fairness . . . not to afford a defendant a new trial . . ." US Const Ams V, XIV; Const 1963, art 1 §17; *Moore v. Casperson*, 345 F3d 474, 491 (7th Cir. 2003), citing to *Coogan v. McCarthy*, 958 F2d 293, 801 (7th Cir. 1992).[10]

[10]The Sixth Circuit Court of Appeals has set forth a virtually identical test for newly discovered evidence. *United States v. Olender*, 338 F3d 629 (6th Cir. 2003); *United States v. Barlow*, 693 F2d 954, 966 (6th Cir. 1982), *cert denied*, 461 US 945, 103 S Ct 2124, 77 L Ed 2d 1304 (1983); *United States v. Gaitan-Acevado*, 148 F3d 577, 589 (6th Cir), *cert denied*, 525 US 912, 119 S Ct 256, 142 L Ed 2d 210 (1998); *United States v. Frost*, 125 F3d 346, 382 (6th Cir), *cert denied*, 525 US 810, 119 S Ct 40, 142 L Ed 2d 32 (1998).

2. PERJURED TESTIMONY.

"[T]he discovery that testimony introduced at trial was perjured may be grounds for a new trial." *People v. Barbara*, 400 Mich 352, 363 (1977); *Mechura*, 205 Mich App at 483.

The United States Supreme Court has long held that due process is violated when the State uses false testimony to secure a conviction. US Const Am XIV; *Napue v. Illinois*, 360 US 264 (1959); *Giglio v. United States*, 405 US 150 (1972); *Mooney v. Holohan*, 294 US 103 (1935). In accord, *People v. Atkins*, 397 Mich 163 (1976). In *Mooney, id.* at 112, the Court held that deliberate deception of the court or jury by the presentation of false evidence is incompatible with "rudimentary demands of justice . . ." In *Napue*, the Court rejected the Illinois Supreme Court's conclusion that "there was no constitutional infirmity by virtue of false statement."

A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . ." *Id*. at 271 (emphasis added).

Wray's false testimony clearly related directly to Defendant's conviction in this case.

3. RIGHT TO PRESENT A DEFENSE.

Every criminal defendant has a right, under the federal and state constitutions to present a defense. US Const Am VI, XIV, Const 1963, art 1, §13, §17; *People v.*

Antsey, 476 Mich 436, 460 (2006). "[A]t a minimum, . . . criminal defendants have the right to . . . put before the jury evidence that might influence the determination of guilt." (*id.*). The right to present a defense is a fundamental element of due process, *id*, citing to *People v. Hayes*, 421 Mich 271, 279 (1984); *Chambers v. Mississippi*, 410 US 284, 296, 302, 93 S Ct 1038, 35 L Ed 2d 297 (1973); *Crane v. Kentucky*, 476 US 683, 691, 106 S Ct 2142, 90 L Ed 2d 636 (1986); *Washington v. Texas*, 388 US 14, 19, 87 S Ct 1920, 18 L Ed 2d 1019 (1967) (right to present defense is essential because it allows the defendant to place his version of the facts "to the jury so it may decide where the truth lies"). The prosecutor's case must be subject to and :survive the crucible of meaningful adversarial tasking" in a search for the truth rather than a one-sided presentation by the prosecution. *California v. Trombella*, 467 US 479, 485, 104 S Ct 2528, 81 L Ed 2d 413 (1984).

Johnson's testimony falls squarely within this constitutional right.

4. RIGHT TO TRIAL BY JURY; INVADING THE PROVINCE OF THE JURY.

A criminal defendant charged with a serious crime has an absolute right to a trial by jury. US Const Am VI, XIV, Const 1963, art 1, §20. *Apprendi v. New Jersey*, 530 US 466, 477, 120 S Ct 2348, 147 L Ed 2d 435 (2000) (The Sixth and Fourteenth Amendment provide the right to a *jury* determination of every element beyond a reasonable doubt); *People v. Duncan*, 391 462 Mich 47, 54 (2000), citing to *Duncan*

v. Louisiana, 391 US 145, 156, 88 S Ct 1444, 20 L Ed 2d 491 (1968) (When a defendant invokes his right to trial by jury, "the jury, not the judge renders the verdict").

Whatever doubts a judge may harbor about Johnson's testimony, the Sixth Amendment prohibits the substitution of a court's judgment for that of a jury, as it improperly invades the province of the jury. *Barker v. Yukins*, 922 F2d 4413, 415 (CA 6, 1999), *cert den*, 530 US 1229, 120 S Ct 2658, 147 L Ed 2d (2000), citing to *United States v. United States Gypsum Co*, 438 US 422, 446, 98 S Ct 2864, 57 L Ed 2d 854 (1978). In short, the ultimate decision regarding Johnson's credibility, vis-a-vis Wray's, is a matter that must be left for a jury. *United States v. Piedrahita-Santiago*, 931 F2d 127, 130 (CA 1, 1991) ("It is the province of the jury, not this Court, to determine the credibility of the witnesses").

Ultimately, a jury should be presented with the two conflicting versions in this case and should decide the outcome, not a judge.

E. THE TRIAL COURT CLEARLY ERRED IN ITS FINDINGS AND APPLICATION OF LAW.

Judge Callahan gave a conclusory opinion that Johnson's testimony would not make a different result probable on retrial, saying a different result was "untenable" and "not feasible." That opinion is unsubstantiated. While the trial judge *did not explicitly find Johnson's testimony incredible*, the primary factor relied upon by Judge

Callahan was that Johnson could be impeached by his armed robbery conviction (Op., p. 5). While technically correct, the trial judge does not explain why a jury would reject Johnson's *entire detailed description* of the shooting because of this single prior conviction, especially in light of the fact that Johnson did not know Corley or Wray and had no motive to lie. Judge Callahan gave no thought to the fact that Wray was impeached with a theft conviction and that Wray misrepresented his felony conviction to the jury as a misdemeanor. Judge Callahan gave no consideration to the fact that the verdict was based solely on the uncontradicted version presented by the prosecution and that Johnson's testimony exonerates Defendant Corley and bears directly on the sole issue, i.e. who shot the Complainant. *People v. Nelson*, unpublished per curiam, (2014 WL 783464, Docket No. 301253, decided 02/25/14) (the newly discovered evidence "implicates another person as the perpetrator of Thomas's death," thus, "it is probable that a trier of fact would entertain a reasonable doubt about defendant's guilt." (Appendix, Exhibit O). Judge Callahan gave no consideration to the fact that Wray lied under oath, told an entirely inconsistent story that he had been robbed and shot, gave inconsistent versions about whether there was a passenger and the type of weapon used, and that Corley had no reason or motive to shoot him. And that Day's testimony was contradicted by his two previous sworn testimony (at the preliminary examination and the prosecutor's exam) and Wray's

own testimony that he did not tell Day who shot him and did not know Corley as "Diallo," the name Day claimed for the first time, he was told was the shooter. In short, there was no objective evidence, physical or scientific, that corroborates Corley's conviction.

Judge Callahan's opinion fails to analyze the entire case, the totality of the evidence and circumstances, and therefore represents a hollow, unsubstantiated conclusion. It appears that Judge Callahan's ruling is no more than an attempt to foreclose presentation of the exonerating evidence to a jury now that it has been discovered.

F. THE COURT OF APPEALS MAJORITY IS CLEARLY ERRONEOUS.

As noted, the Court of Appeals majority focused exclusively on Johnson's testimony to erroneously conclude that there was "a significant likelihood that the jury would conclude that his testimony was not credible" (Op., p. 12). The dissent correctly concluded:

> [T]he trial court abused its discretion by basing its decision on Johnson's prior criminal history, rather than on the substance of Johnson's testimony. Indeed, Johnson's testimony was consistent with regard to the facts of the shooting. Johnson testified that he saw the shooting, the shooting occurred in a different manner than Wray described, and defendant was not the shooter." JANSEN, P.J. (concurring in part and dissenting in part) (Op., p. 1).

The dissent then correctly assessed the erroneous analysis of each factors relied on by the majority: (1) Johnson left without rendering assistance and only mentioned it to one other person at that time, (2) Johnson's prior armed robbery conviction which could be used to impeach him, (3) Johnson's distrust of the criminal justice system, (4) Johnson's "minimal information" of the shooter and lack of information that Wray was the victim of the shooting Johnson witnessed. Each of these arguments are misplaced or unsupported by the *entire* record.

1. FAILURE TO BE A GOOD SAMARITAN.

The majority raises a moral issue regarding Johnson's failure to provide assistance to Wray.[11] People's refusal to get involved in criminal activity among complete strangers is well documented as a historical fact. Johnson explained he did not want to get involved because of his past, a believable explanation. However, the majority overlooks an important fact. As soon as Wray was shot, people came out of his house at 114 Avalon and assisted him (EH, 01/15/16, p. 28).[12] As such, there was no need for Johnson to assist Wray. As the dissent correctly stated, "[T]his is a factor for the jury to consider during a new trial." (Appendix, Exhibit R, Dissent Op., p. 2).

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[11]Although the trial judge in his "underlying facts" *noted* that Johnson left "without rendering assistance to Mr. Wray," the trial judge did *not* discredit Johnson's testimony on this basis (Appendix, Exhibit Q, Opinion and Order, p. 3-6).

[12]Anthony Day testified at trial he was in the backyard of 114 Avalon and as soon as he heard shots, he ran to the front of the house to Wray's assistance (Tr. Vol. II, 06/09/15, p. 40-41).

2. JOHNSON'S PRIOR CONVICTION.

The trial court virtually relied exclusively on Johnson's conviction for armed robbery in denying the motion, stating "certainly his testimony could be impeached" (Appendix, Exhibit Q, Opinion and Order, p. 51). While Johnson would be subject to impeachment, the dissent correctly analyzed this argument.

> [T]he jury is not bound to discredit Johnson for the sole reason that he has a prior armed robbery conviction (Appendix, Exhibit R, Dissent, p. 2).

The jury instructions on impeachment with a prior conviction is instructive:

> **M Crim JI 5.1 Witnesses—Impeachment by Prior Conviction**
>
> (1) You have heard that one witness, _____, has been convicted of a crime in the past.
>
> (2) You should judge this witness's testimony the same way you judge the testimony of any other witness. You may consider [his/her] past criminal convictions, along with all the other evidence, when you decide whether you believe [his/her] testimony and how important you think it is.

In this case, the instruction would apply to Wray and Johnson, as Wray had been convicted of a theft offense (Tr. 06/09/15, p. 19, 33).[13] The majority ignores this

[13]Wray misrepresented to the judge and jury that his conviction was a misdemeanor (Tr. 06/09/15, p. 33). Wray was convicted of Attempt Financial Transaction Device-Stealing/ Retaining Without Consent, MCL 750.157N, Case No. 11-87210-FH, a 2½ year *felony*. MCL 750.157n(2).

significant fact. Moreover, the instruction correctly informs the jury they "may" consider this evidence and determine for themselves "how important you think it is."

3. DISTRUST OF THE CRIMINAL JUSTICE SYSTEM.

Once again, while the trial court did *not* factor this into his reasons for denying the new trial, the majority locked onto this factor and then draws the conclusion that this made Johnson unreliable.[14] The dissent accurately points out the disconnect between Johnson's distrust of the system and the *substance* of his testimony. Specifically, this would not be the basis of rejecting Johnson's testimony as he was not accused of being the shooter, he did not know Wray or Corley and simply had "no dog in the fight."

4. JOHNSON'S DESCRIPTION OF THE SHOOTING.

The majority engages in a fanciful tour of possibilities by suggesting that Johnson may have witnessed a different shooting. In fact, Johnson testified that on April 21, 2014, in the evening hours, after walking to a hour on Buena Vista, he returned to Woodward, walking on Avalon (EH, 01/15/16, p. 8-11). Johnson, looking at Google Map of the area (Appendix, Exhibits F, G, H) identified the address of 114 Avalon, Highland Park, as the location of the shooting which is between Second and

[14]Both the majority and dissent misconstrued this as a *reason* that the trial judge determined that Johnson was not credible. The trial judge simply did not say that.

third (*id.* at 21-23). Wray lived at 114 Avalon. Johnson described *in detail* both the events of the shooting and the shooter. A person came from between the houses just east of 114 Avalon, "Moving kind of quick," the victim ("Wray") was standing in front of his house, turned and faced the other man. The victim had a "scared look" on his face. The shooter "said something, kind of like taunting" the victim before shooting. Johnson heard at least three shots and then saw the victim laying on the ground. He described the shooter as a "black man my complexion," 5'8", "slim but kind of muscular" with "shot hair," he described as "waves" (not dread locks) often called "360's meaning in circles around the head." Johnson testified he could identify the shooter if he saw him again. Most importantly, the shooter was not Corley.

The actual record clearly shows, contrary to the majority opinion, that Johnson testified to much more than "minimal information" or just "general physical features." Of significance, the majority completely misconstrued the importance of Johnson's testimony as having "numerous discrepancies" with Wray's version. That is, in fact, the essence of the value of Johnson's testimony. The shooter was *not* driving a red Mountaineer and did *not* fit the description of Corley. And of importance, the shooter was not Corley.

It appears that the majority is suggesting that on April 21, 2014 at Wray's home at 114 Avalon, just before nightfall, there were more than one shooting and Johnson

is simply describing a different shooting. That position is rather fantastical. As the dissent correctly points out "[T]here is no basis to conclude that Johnson observed another shooting in the area" (Appendix, Exhibit R, Dissent, p. 3).

Finally, the trial court and majority opinion fail to give consideration to the weaknesses in the prosecution's case, and simply turns a blind eye to it. The prosecution's case was not overwhelming. It was based on the testimony of a sole eyewitness (Wray), without any corroboration that Corley was the shooter. Wray had lied about *how* the incident occurred, did not identify Corley for three months *after* the shooting, which gave him time to fabricate, there was no independent evidence that corroborated Wray's identification of Corley.

Having failed to assess the "*entirety* of the available evidence"[15] the trial court and majority Court of Appeal's opinions are clearly erroneous.

II. DEFENDANT CORLEY WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER BOTH THE FEDERAL AND STATE CONSTITUTION WHEN THE PROSECUTOR, (A) IMPROPERLY TRIED TO CREATE A MOTIVE FOR THE SHOOTING BY ASSOCIATING DEFENDANT WITH A GANG, AND (B) REPEATEDLY EXPRESSED HIS PERSONAL BELIEF IN THE STATE'S CASE.

STANDARD OF REVIEW: Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed *de novo*. *People v. Pfaffle,* 246 Mich App 282, 288

[15] *Grissom*, Markman, J. (concurring, p.)

(2001). Unpreserved allegations of prosecutorial misconduct are reviewed for plain error. *People v. Brown*, 279 Mich App 116, 134 (2008).

Since Wray had never had a confrontation, or even met, Defendant Corley before the shooting, the prosecutor manufactured a motive by eliciting testimony that Corley was a member of the Winona Street Boys, a *gang* on the other side of Woodward from where Wray and his friend Day lived. On the other hand, the prosecutor elicited testimony that Wray was associated with a rap *group*, not a gang, called BTA. According to Wray, BTA were a group of neighborhood friends who got together just singing, but were not involved in gang activity, such as robberies or drugs. Wray testified that he had "no beef" with the Winona Boys, but had "confrontations" (not physical) back in 2007 eight years before the shooting incident. Day testified that there were "not really" conflicts between the two groups, just "arguments" not "hard tensions." There was no evidence that the shooting itself was gang related.

In his closing argument, the prosecutor capitalized on this speculative and remote evidence of Corley's gang membership and the shooting telling the jury that the Winona Boys "is a gang," rhetorically asking "Were they up to no good?"

Initially, the evidence was inadmissible because the prosecutor failed to file the required notice under the rules of evidence. The gang activity was so tenuous and

remote to render it irrelevant. There was *no evidence* that the shooting itself was related to any gang activity. Associating Corley with a gang was clearly more prejudicial than any perceived relevancy and ended up being impermissible character evidence. Without this contrived motive for the shooting, the prosecutor's case was substantially weakened, as it went to the very issue at trial, who shot Wray. Reversal is required. US Const Am XIV; Const 1963, art 1, §17.

Prosecutor's must "refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 US 78, 88, 55 S Ct 629, 79 L Ed 1314 (1935).

The federal courts have enforced a defendant's right to due process when prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 US 637, 642-643, 94 S Ct 1868, 40 L Ed 2d 431 (1974); *United States v. Young*, 470 US 1, 11, 105 S Ct 1038, 84 L Ed 2d 1 (1985); *Kincade v. Sparkman*, 175 F3d 444, 446 (CA 6, 1999).

The prosecutor must refrain from any argument or remark that even creates the appearance of an improper remark. *People v. Bennett*, 393 Mich 445, 451 (1975). A Michigan court, in reviewing a question of prosecutorial abuse or misconduct, must examine the record and evaluate the alleged wrongful acts in context on a case-by-

case basis, with the decision depending heavily upon the particular facts. *People v. Mann*, 288 Mich App 114, 119 (2010). The appropriate question is whether the prosecutorial misconduct denied the defendant a fair and impartial trial. *People v. Bahoda*, 448 Mich 261, 266-67 (1995).

A. GANG ACTIVITY.

To be admissible, evidence of gang activity must meet the requirements of MRE 404(b), 402 and 403. The state bears the burden of proving admissibility under the rules. *United States v. Huddleston*, 485 US 681, 105 S Ct 1496, 99 L Ed 2d 771 (1988).

Under 404(b), while proof of motive is not an element, it may be relevant. However, before it is admitted, the evidence itself must support its relevancy, in terms of being connected to the charge itself. In *People v. Wells*, 102 Mich App 122 (1980), the court rejected the theory that any evidence remotely connecting the accused or his social acquaintances is admissible to show motive. When relevancy is tenuous, the court explained, it becomes impermissible evidence of character to prove conduct in the charged criminal case, citing to well-established authority. In reversing the defendant's conviction, the court noted the lack of evidence linking the membership in the Devil's Disciples motorcycle gang to the charge and that the evidence inflamed the passion and prejudice of the jury. Specifically, the court held,

"we cannot condone the admission of evidence of past episodes of motorcycle gang rivalry to prove defendant's motive for the murder." *Id.* at 129. The court noted that there was no showing that *the defendant* was even aware of the past activities creating the rivalry or that it had "any bearing whatsoever on his conduct." The court concluded:

> [N]ot withstanding the broad definition of relevance under MRE 401, the evidence had no tendency to prove defendant's intent or motive.

There can be little argument that evidence of gang affiliation must be treated cautiously because of its inherent prejudicial nature under MRE 403. See, *People v. Ho*, 231 Mich App 178, 183-184 (1998); *United States v. Irvin*, 87 F3d 860, 864 (7th Cir. 1996). In the present case, the gang activity evidence did not meet the requirements of Rule 402, 403 and 404.

Wray essentially testified that there was absolutely no reason for Corley to shoot him.[16] Wray testified he "knew of " Corley, but "never talked to Mr. Corley or had a conversation with him a day in my life" (Tr. 6-08-15, p. 175). He never shook his hand, "not even a hi-bye" *id*. The only thing Wray, who was 24, could say about Corley was, "He's younger than me" (*id*. at 170). Thus, the prosecutor was confronted with a serious obstacle of establishing a motive for the shooting, which also addressed the key issue, Wray's identification of Corley as the shooter.

[16]Wray told the probation officer that Corley "had no reason to shoot him" (PSI, p. 3).

Confronted with this insurmountable task, the prosecutor manufactured a motive through possible gang activity, allegedly associated with Corley, while juxtaposing it to Wray's association with a rap or singing group, not a gang (*id*. at 184). The prosecutor then went on to introduce the jury to the Winona Boys, a gang across Woodward who did not like BTA because of "jealousy." However, Wray added he did not have a beef with the Winona Boys other than "confrontations *in 2007 or before*," although they were never physical confrontations (*id*. at 189).

Finally, the prosecutor's misconduct extended to his closing argument, where he disclosed the real value of this inadmissible evidence, i.e. that Corley was connected to the Winona Boys, "a gang" and that the shooting happened because they were up to no good (*id*., p. 73).

> *The Winona Boys* on the side of Woodward where Tyler -- remember where Tyler turns into Winona on the east side of Woodward, *is a gang . . . where they up to no good*? (Tr. 06-09-15, p. 73).

In the end, this evidence became nothing more than "bad character" evidence which was inadmissible and highly prejudicial. *Michelson v. United States*, 335 US 469, 476, 69 S Ct 213, 93 L Ed 168 (1948) ("stating improper character evidence "weigh[s] to much with the jury and . . . over persuade[s] them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge").

B. REPEATED IMPROPER ARGUMENTS OF PERSONAL BELIEF IN THE STATE'S CASE.

In his initial argument to the jury, the prosecutor repeatedly and deliberately misled the jury with his personal expressions of his belief in the case, which became a form of prohibited unsworn, unchecked testimony, exploiting the prosecutor's office to support a conviction.

On the central question of who the shooter was, the prosecutor told the jury:

> And *in the People's belief, it is no doubt that Mr. Diallo Corley was the shooter* that evening; that those five or six shots all took effect. (Tr. 6-9-15, p. 71) (emphasis added).

On the issue of Wray's credibility, the prosecutor told the jury:

> This is going to be credibility. Whom do you believe and why? And *the answer, I think*, really is, is *that Mr. Calvin Wray bore testimony as accurately and as correctly and as politely as he could*. (*id*., p. 74) (emphasis added).

Returning to the question of who the shooter was, the prosecutor finished up with this:

> Ladies and gentlemen, *I believe that the case is overwhelming that Mr. Diallo Corley was the shooter* (*id*., p. 75) (emphasis added).

There could hardly be anymore direct or persuasive expressions of a prosecutor's personal belief, using his office ("The People's belief") to improperly influence a jury verdict.

Historically, Michigan courts have condemned and reversed for this type of misconduct. *People v. McCoy*, 392 Mich 231, 240 (1974); *People v. Smith*, 158 Mich App 220, 231 (1987); *People v. Erb*, 48 Mich App 622, 631 (1973); *People v. Tarpley*, 41 Mich App 227, 237 (1972); *People v. Humphreys*, 24 Mich App 411, 418 (1970). In *People v. Kulick*, 209 Mich App 258, 260 (1995), *remanded*, 449 Mich 85 (1995), the court reversed on the basis of prosecutor misconduct when the prosecutor improperly vouched for the credibility of the witnesses and vouched for the defendant's guilt in his closing argument.

The federal courts have consistently ruled that the prosecutor is not permitted to express his personal belief in the evidence he presented, the credibility of his witnesses, or the defendant's guilt. *United States v. Young*, 470 US 1, 17-19, 105 S Ct 1038, 84 L Ed 2d 1 (1985); *Bates v. Bell*, 402 F3d 635, 646 (CA 6, 2005); *United States v. Roberts*, 618 F2d 530, 533 (CA 9, 1980), *cert den*, 452 US 942 (1981).

In *Hodge v. Hurley*, 426 F3d 368, fn 20 (CA 6, 2005), the Court noted that it is not even necessary for the prosecutor to actually use the words "I believe" or any similar phrase for a comment to be improper regarding a witnesses credibility, citing to *United States v. Bass*, 593 F2d 757 fn 10 (CA 6, 1979) (quoting with approval, *United States v. Morris*, 568 F2d 396, 402 (CA 5, 1978).

These combined instances of prosecutorial misconduct deprived Defendant Corley of a fair trial and due process. The prosecutor's obvious misconduct resulted in the conviction of an innocent man and directly and seriously affected the fairness and integrity of the proceedings. *People v. Carines*, 460 Mich 750 (1999). A new trial is warranted.

III. DEFENDANT CORLEY WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY, (A) FAILED TO INVESTIGATE AND PRESENT KNOWN WITNESSES IN SUPPORT OF THE DEFENSE, AND (B) FAILED TO OBJECT TO PROSECUTORIAL MISCONDUCT.

STANDARD OF REVIEW: Ineffective assistance of counsel is a mixed question of law and fact. *People v. Trakhtenberg*, 493 Mich 38, 47 (2012); *People v. Petri*, 279 Mich App 407, 410 (2008).

There were several witnesses listed on the initial police reports that were never investigated by defense counsel, as well as a neighbor who came to Wray's assistance after the shooting. The prosecutor did not call these known witnesses, and instead relied exclusively on the testimony of Wray and his friend Day. When the prosecutor improperly introduced and argued gang activity evidence as a motive defense failed to object. These failures rendered trial counsel's representation deficient and prejudiced Corley's rights to the extent that there is a reasonable probability of a

different outcome with competent representation. A new trial should be ordered. US Const Ams VI, XIV; Const 1963, art 1, §17 & §20.

A. LEGAL STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms, and (2) a reasonable probability that, but for the attorney's error, a different outcome reasonable would have resulted. *Strickland v. Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *People v. Carbin*, 463 Mich 590, 599-600 (2001); *People v. Harmon*, 248 Mich App 252, 531 (2001).

Prejudice is established if there is "reasonable probability" that but for counsel's unprofessional errors, the result would have been different, a reasonable probability being one that undermines confidence in the outcome of the trial. *Id.* 466 at 694; *People v. Carbin, supra*, at 600; *People v. Watkins*, 247 Mich App 14, 30 (2001); *Austin v. Bell*, 126 F3d 843, 847 (CA 6, 1997). The likelihood of a different result need only be reasonable. Regarding a claim of trial strategy, a defendant must overcome the presumption that the challenged conduct or omission could be "considered *sound* trial strategy," *Strickland, supra*, at 689 (emphasis added); *People v. Knapp*, 244 Mich App 361, 385 (2001). A mere claim of "trial strategy" cannot defeat a claim of ineffective assistance when the "strategy" is not reasonable or is a

matter of negligence. *Trakhtenberg*, 493 Mich at 52; *Cone v. Bell*, 243 F3d 961 (CA 6, 2001); *Combs v. Coyle*, 205 F3d 269 (CA 6, 2000).

1. THE DUTY TO INVESTIGATE AND PRODUCE KNOWN WITNESSES.

One of the primary functions of competent counsel is to investigate "all apparently substantial defenses" since "counsel has a *duty* to make *reasonable investigations* or to make a reasonable decision that makes particular investigations unnecessary." *Strickland, supra*, 466 US at 691 (emphasis added). "This duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt." *Towns v. Smith*, 395 F3d 251, 258 (CA 6, 2005); *Combs v. Coyle*, 205 F3d 269, 278 (CA 6, 2000), *cert denied*, 531 US 1035 (2000); *Blackburn v. Foltz*, 828 F2d 1177, 1183 (CA 6, 1987). The duty to investigate derives from counsel's basic function, which is, *"to make the adversarial testing process work in the particular case*." *Kimmelman v. Morrison*, 477 US 365, 384 (1986) (quoting *Strickland*, 466 US at 690).

In *People v. Grant*, 470 Mich 477, 493 (2004), the Michigan Supreme Court held "[t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." See also, *People v. Dixon*, 263 Mich App 393, 398 (2004); *People v. Hoyt*, 185 Mich App 531, 537-538

(1990) (a defendant is entitled to have counsel "prepare, investigate and present all substantial defenses").

In the present case, trial counsel failed to conduct any investigation of Justin Mason, Stanley Davis, who were in the initial police report as "witnesses" (Appendix, Exhibit B, Highland Park Police Department Report, 04/21/14). Additionally, trial counsel failed to call Detective Paul Thomas to impeach Wray when he testified he *never told* Thomas that the weapon used was an automatic, when Thomas' report reflected that Wray did tell him that (Tr. 06/08/15, p. 187-188) These witnesses could have provided critical information in support of the defense and Corley's innocence.

2. FAILURE TO OBJECT TO PROSECUTORIAL MIS-CONDUCT.

There were several egregious instances of prosecutorial misconduct involving both the evidence and argument of counsel. See Argument II (A) and (B). *Washington v. Hofbauer*, 228 F3d 689 (CA 6, 2000); *Combs v. Coyle*, 205 F3d 269 (CA 6, 2000); *People v. Means*, 97 Mich App 641, 647 fn 1 (1980).

Trial counsel had a duty to protect his client by timely objecting to the inadmissible and prejudicial gang activity evidence, the prosecutor's closing argument that the shooting was related to gang activity and the prosecutor's repeated expressions of his personal belief in the State's case. Timely objections would have

prevailed and there is a reasonable probability of a different outcome without this misconduct.

IV. THE EVIDENCE WAS INSUFFICIENT AND AGAINST THE GREAT WEIGHT OF EVIDENCE TO FIND DEFENDANT CORLEY GUILTY OF ASSAULT WITH INTENT TO COMMIT MURDER OR THE OTHER OFFENSES CHARGED GIVEN THE NUMEROUS INCONSISTENCIES IN THE TESTIMONY AND THE LACK OF EVIDENCE TO PROVE EACH AND EVERY ELEMENT BEYOND A REASONABLE DOUBT.

STANDARD OF REVIEW: A motion for a judgment notwithstanding the verdict presents a question of law. When determining if a verdict is against the great weight of the evidence the trial court must review the whole body of proofs. *People v. Herbert*, 444 Mich 466, 475 (1993), overruled in part on other grounds in *People v. Lemmon*, 456 Mich. 625 (1998). The test is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v. Musser*, 259 Mich App 215, 218-219 (2003). Sufficiency of the evidence is reviewed *de novo*. *People v. Lueth*, 253 Mich App 670 (2002).[17]

Corley was convicted after a jury trial of assault with intent to commit murder, assault with a dangerous weapon, discharge of a firearm from a vehicle and felony firearm. The only evidence of identification presented at trial was the testimony of

[17]A motion for new trial was made in the trial court and therefore the great weight of the evidence is preserved. *People v. Unger*, 278 Mich 210 (2008).

the complainant which was inconclusive, contradictory and based on faulty identification and insufficient evidence to support the jury's verdict.

The Michigan and United States Supreme Courts have adopted a standard for reviewing the sufficiency of the evidence at trial consistent with the requirement that there be proof beyond a reasonable doubt. US Const Am VI, XIV; Const 1963, art 1, §17 & 20; *People v. Petrella*, 424 Mich 221 (1985); *People v. Hampton*, 407 Mich 354, 368 (1979), *cert den*, 499 US 885, 101 S Ct 239, 66 L Ed 2d 110 (1986); *Jackson v. Virginia*, 443 US 307, 316-319, 99 S Ct 2781, 61 L Ed 2d 560 (1979). In the present case, there was insufficient evidence for which the trier of fact could reasonably conclude that the prosecution had proven, beyond a reasonable doubt that Corley had the necessary state of mind for an intent to murder.

Regarding the great weight of the evidence, a trial judge has the inherent authority to grant a new trial following a jury verdict. This authority is expressed in both statutory law and in the Michigan Court Rules. MCL 770.1, MSA 28.1098, reads as follows:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

MCR 6.431(B) reads:

> On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

As the Court in *Lemmon*[18] accurately stated, "[I]n motions for new trial on the claim that the verdict is against the great weight of the evidence, the issue of credibility of the witness is implicit in determining great weight or overwhelming weight of that evidence." 456 Mich at 135 (citations omitted). Thus, if the "testimony contradicts indisputable physical facts or laws" or "[w]here testimony is patently incredible or defies physical realities" or "[w]here a witnesses' testimony is material and is so inherently implausible that it could not be believed by a reasonable juror," or where the witnesses testimony has been seriously "impeached" and the case is marked by "uncertainties and discrepancies," a new trial is warranted. *Id*. at 137.

Wray's testimony at trial was "inherently implausible," "patently incredible" and full of "uncertainties and discrepancies." It defies logic that Corley would try to kill Wray for absolutely no reason (other than the contrived gang evidence). Wray did not identify Corley until three months after the shooting. There was no physical or scientific evidence at trial supporting Wray's testimony that Corley was the shooter, including firearm evidence or vehicles associated with Corley. Wray told his

[18]456 Mich 625 (1998).

therapist that he was shot in a robbery and lied when he said he never told the officer in charge that the weapon was an automatic. No shell casing were found at the scene. Wray gave conflicting versions about a passenger in the vehicle as well. Finally, Wray began his testimony by admitting he perjured himself at the preliminary examination about his name.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant, DIALLO CORLEY, requests this court to reverse the Court of Appeals and grant a new trial.

Respectfully submitted,

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