STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

RODERICK LOUIS PIPPEN
Defendant-Appellant
_____/

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

KATHERINE L. MARCUZ (P76625)
Attorney for Defendant-Appellant
_____

Supreme Court No. 161723

Court of Appeals No. 347729

Lower Court No. 10-6891-01 FC

Defendant-Appellant's Supplemental Brief

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Statement of Question Presented

I. Did the trial court abuse its discretion in finding that trial counsel's failure to investigate and present an exculpatory res gestae witness did not prejudice Mr. Pippen? Did Mr. Pippen make the necessary showing under the *Strickland* standard and is he entitled to a new trial?

Court of Appeals answers, "No."

Roderick Louis Pippen answers, "Yes."

Statement of Facts and Material Proceedings

Pre-trial Proceedings

Roderick Pippen was charged with felony murder, felon in possession of a firearm, and felony firearm. The charges arose from the murder of Brandon Sheffield on July 21, 2008, during what appeared to be an attempted carjacking.

The prosecution's case centered on the dubious testimony of Sean McDuffie, who claimed to be a witness to the crime, and who was absolved of his own legal troubles in exchange for his cooperation.

Mr. Pippen was bound over as charged notwithstanding the district court's concerns about the truthfulness of Mr. McDuffie's testimony. See 101a ("I wasn't impressed with his testimony but that's not the Court's decision to, you know, be the decider of fact here. . .). He was then arraigned on the information in the Wayne County Circuit Court before the Honorable Deborah Thomas. Judge Thomas later granted Mr. Pippen's Motion to Quash, finding that there were so many inconsistencies between the surviving victim and Mr. McDuffie's accounts of the incident that one could not reasonably conclude they witnessed the same shooting and, absent any other evidence that Mr. Pippen was involved, probable cause was not established. 111a-112a.

The Court of Appeals reversed the trial court's order and remanded for further proceedings. *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2011 (Docket No. 300171) (115a-116a).

Pertinent Trial Evidence

The Crime

In the early morning hours of July 21, 2008, Brandon Sheffield was parked outside a friend's home on the east side of Detroit. He and three friends—Adam McGrier, Camry

Larry, and Kyra Gregory—were seated in his Mercury Mountaineer, talking and watching rap videos on a laptop computer. 406a-407a. Ms. Larry was initially standing outside the Mountaineer and leaning in the open driver's side window, when a car passed by that caught her attention. 407a, 409a. She observed four individuals in the car and noted that the man in the front passenger seat was leaning out the window with his face covered from the nose down. 410a. Ms. Larry then got inside the Mountaineer and the friends continued watching the video. 411a.

About five minutes later a man approached the driver's side window. 411a. He had a "white thing" over his face, put a gun to Mr. Sheffield's head, and said "everybody get the fuck out the car." 411a-412a. Ms. Larry described the man as tall, thin, and black, but could not say anything else about his appearance or the weapon. 412a-413a, 418a-420a.

As Ms. Larry was attempting to get out of the car, she heard a shot. 420a-421a. The car moved a few feet while she was still halfway inside; when it hit a tree and came to a stop, she saw that Mr. Sheffield had been shot and she ran to safety. 414a, 423a-424a.

Ms. Gregory did not remember seeing a suspicious car before the shooting and she was unable to describe the shooter other than to say that he was a male. 441a-443a. When asked if the man was tall, she replied, "no." 436a. Mr. McGrier, who was in the front passenger seat at the time of the shooting, remembered a car pulling up alongside of them with four individuals inside, all of whom were dressed in all black, including black masks or scarves. 459a.

All four of the people in the shooter's car had weapons. 460a. Mr. McGrier testified that the individual in the front passenger seat exited the car and approached Mr. Sheffield with a black "normal size" handgun. 454a. He described the man as approximately six feet tall with a thin build and wearing a black "mask hat." 452a, 463a. When interviewed by police after the incident, Mr. McGrier told them that the man had a dark complexion. 464a. At trial he testified that he was unable to see the shooter's face thus could not comment on his race or complexion. 452a.

Ballistic Evidence

Three months later, on October 18, 2008, Sergeant Eric Bucy was patrolling Seven Mile and Fairport Road with three partners in a semi-marked police car when he saw Mr. Pippen standing with two other men, Michael Hudson and Norman Clark. 496a-497a. Sergeant Bucy testified that when Mr. Pippen saw him, he started walking east and the Sergeant was able to notice the butt of a handgun protruding from his waistband. 498a. Bucy testified that he then got out of his car and followed Mr. Pippen as he and Mr. Hudson stepped between two parked cars. 499a.

While between the cars, Bucy saw Mr. Pippen take a handgun with a large magazine from his waistband and kick it under the car. 499a. He also witnessed Mr. Hudson drop and kick a different handgun, "a 38." 499a. Thereafter, Mr. Pippen and Mr. Hudson split ways. 499a.

Police apprehended Mr. Pippen, Mr. Hudson, and Mr. Clark, and recovered two handguns from under the car, a black Glock nine-millimeter with an extended magazine and a Bersa Thunder 380. 499a-500a. Mr. Pippen was taken into custody. 502a. Mr. Hudson was also arrested. Mr. Clark was released without charges. 502a.

The parties stipulated that on January 27, 2009, Mr. Pippen admitted under oath to the Honorable Daniel Ryan that he was in possession of a firearm on October 18, 2008, in the area of Fairport and East Seven Mile Road in the City of Detroit. 120a.

Former Detective-Sergeant Ronald Ainslie was qualified as an expert witness in the field of firearms and toolmark identification. 364a. Ainslie testified that in 2009 he examined a nine-millimeter Luger shell casing recovered from the inside of Mr. Sheffield's Mercury Mountaineer and then entered that shell casing into the Integrated Ballistics Identification System ("IBIS"). 364a-365a. He also test-fired the nine-millimeter Glock semiautomatic pistol obtained during the arrest of Mr. Pippen on October 18, 2008 and collected a shell casing. 367a-368a. He then compared that casing to the Luger casing and determined that the two casings were fired from the same gun. 368a.

The Testimony of Sean McDuffie

Sean McDuffie was friends with Roderick Pippen, Michael Hudson, and Norman Clark. 516a-517a. He testified at trial that on August 25, 2009, Officer Mullins of the Detroit Police Department showed up at his home and wanted to talk to him. 518a-519a, 538a. At that time Mr. McDuffie was on Holmes Youthful Trainee Act ("HYTA") status for carrying a concealed weapon and there was an open warrant for his arrest for violation of HYTA. 538a-539a. The police took him to the Homicide Department and asked him questions regarding "a whole bunch of shootings" and showed him pictures of homicide scenes. 539a-541a. He also testified that the police showed him a sketch of a person and asked him "which one of [his] friends did it look like." 551a.

At some point during this interview, Mr. McDuffie told police that one night in the summer of 2008 he was riding around in a car with Michael Hudson and Roderick Pippen—Mr. Hudson was driving, and Mr. Pippen was in the front passenger seat. 519a. No one in the car was wearing masks or hoods at any point. 527a, 542a-543a. Mr. McDuffie testified that Mr. Pippen said that he saw someone he knew and asked Mr. Hudson to stop the car. 519a. According to Mr. McDuffie, Mr. Pippen then got out, walked over to the driver of a truck as if he was going to talk to him, and then shot him. 519a-520a, 526a. He saw people run and estimated there were a total of four people in the truck. 524a-525a. Mr. McDuffie testified that Mr. Pippen got back in the car Mr. Hudson was driving and they drove to Mr. Hudson's cousin's house. 520a. Mr. McDuffie explained that he had no idea what prompted the shooting and that neither he nor Mr. Hudson knew it was going to happen. 543a-544a.

Mr. McDuffie could not remember the type of car that Mr. Hudson was allegedly driving that evening or whose car it was. 522a. Nor could he remember where or when this event happened but stated he believed it was near Morang, Kelly, or Houston Whittier Avenue and that it was sometime after 10:00 p.m., during the summer of 2008. 524a, 527a. When asked whether the victim's car rolled after the shooting or if it crashed into a tree, Mr. McDuffie testified that it did not. 546a, 551a.

Mr. McDuffie claimed that Mr. Pippen used a "Glock 9," but that it was not his gun – it actually belonged to someone named Darnell "Terry" Hicks who is now dead. 521a. When asked on cross-examination about his prior testimony that the gun belonged to Norman Clark, Mr. McDuffie responded that Norman bought the gun from Terry. 550a.

Mr. McDuffie was brought to Mr. Pippen's trial on a material witness warrant. 515a. On direct examination he first testified that he did not witness Mr. Pippen shoot anyone. 518a. The prosecution then sought to treat him as an adverse witness, and it was only after being shown his statement to police that Mr. McDuffie adopted the statements he previously made under oath inculpating Mr. Pippen. 518a-520a. In exchange for his agreement to testify against Mr. Pippen, Mr. McDuffie was released from HYTA probation. 516a. In Mr. McDuffie's words, they "cancelled" his CCW case. 544a.

Roderick Pippen was convicted as charged and sentenced to life without parole. 621a-622a.

Post-conviction Proceedings

Evidentiary Hearing

Mr. Pippen filed a timely motion for new trial asserting that trial counsel was ineffective for failing to investigate and present the testimony of Michael Hudson. A *Ginther*[1] hearing was held on February 23 and 24, 2015.

Attorney Luther Glenn was appointed to represent Mr. Pippen in this matter after the Court of Appeals reversed the circuit court's order granting Mr. Pippen's motion to quash the information and dismiss the charges. 633a. Mr. Glenn recalled that the prosecution's case against Mr. Pippen was circumstantial and that it "completely had to do with the credibility of [Sean McDuffie]." 639a. Mr. Glenn opined that Mr. McDuffie's testimony was the only testimony that pointed to Mr. Pippen, it was "dubious at best," and that he had "strong issues with Mr. McDuffie's credibility." 639a. His trial strategy for attacking Mr. McDuffie's credibility was to expose Mr. McDuffie's motivation for

[1] *People v Ginther*, 390 Mich 436 (1973).

providing the police with information, which Mr. Glenn believed extended beyond the deal he received in exchange for his testimony. 640a-641a.

Mr. Glenn prepared for trial by reading the police reports, the preliminary exam transcript, and the sworn testimony of Mr. McDuffie given during an investigative subpoena. 641a. He was aware that Mr. McDuffie claimed that Michael Hudson was a witness to the shooting, and that Mr. Hudson had spoken to a private investigator hired by the Pippen family, but he did not contact or interview Mr. Hudson prior to trial. 636a-637a.

Miguel Bruce is an experienced private investigator who was hired by the Pippen family prior to trial. 643a-645a. Before opening his own private investigation company in or around 2005, Mr. Bruce was an officer in the Detroit Police Department for ten years where he worked in patrol, homicide, and the non-fatal shooting team. 644a.

Mr. Bruce met with Mr. Pippen's father and sister, who provided him with information about the case. 645a. He reviewed Mr. Pippen's discovery materials, the preliminary exam transcript, and Sean McDuffie's investigative subpoena testimony. He familiarized himself with the facts of the crime, the prosecution's theory of the case, and Mr. McDuffie's version of events. 645a.

Mr. Bruce interviewed Mr. Hudson prior to trial. 647a. When Mr. Bruce asked Mr. Hudson about Mr. McDuffie's story, Mr. Hudson told him that Mr. McDuffie was lying and that, "[i]t did not happen. He was not the driver. He was not involved with it." 647a. Mr. Bruce found Mr. Hudson to be believable. 648a.

Mr. Bruce testified that Mr. Hudson was willing to be a witness for Mr. Pippen. 648a. He relayed this information to trial counsel. 649a. Based on his conversations with

Mr. Glenn, it was his impression that Mr. Glenn was going to contact Mr. Hudson. 650a.

In October 2008, Michael Hudson, a longtime friend of Mr. Pippen, was arrested with him on Seven Mile in Detroit. 655a. He testified that they had just left his house and were walking to the gas station across the street when the police pulled up. 660a.

The police got out of the car and said, "come here." 660a. Mr. Hudson kept walking across the street and dropped a .38 handgun underneath a car. 660a, 662a. He was charged with carrying a concealed weapon and pled guilty.[2] 655a. Mr. Hudson did not see Mr. Pippen throw a gun underneath the car, but he knew that Mr. Pippen was also arrested and charged with possessing a gun and that he had pled guilty as well. 665a, 660a, 662a.

Mr. Hudson has seen Mr. Pippen carry a gun before. 662a. Mr. Hudson carried a gun for protection, and he believed that Mr. Pippen did as well. 663a. Upon further questioning, Mr. Hudson explained that there is "a lot going on" in the neighborhood where they are from and that people carry guns to protect themselves and their family. 663a.

At some point after October 2008, Mr. Hudson learned that Mr. Pippen had been arrested and charged with a homicide. 655a. He also found out that Mr. McDuffie told police that he saw Mr. Pippen commit the crime. 656a. Additionally, Mr. Hudson learned that Mr. McDuffie told police that the night this crime occurred he [Hudson] was driving the car and witnessed the shooting. 656a. Mr. Hudson testified that none of this is true.

[2] Mr. Hudson has a prior criminal history. 665a. He acknowledged pleading guilty to three counts of larceny of a motor vehicle in 2005, one count of receiving and concealing stolen property motor vehicle in 2004, and one count of receiving and concealing stolen property motor vehicle in 2003. 667a-668a.

656a. He was never driving in a car with Mr. Pippen and Mr. McDuffie when Mr. Pippen got out and shot someone. 656a. Mr. Hudson has never seen Mr. Pippen shoot anyone, ever. 656a.

Mr. Hudson informed multiple people that Mr. McDuffie was lying. 657a. He told the private investigator when they spoke prior to trial. 657a. He also told trial counsel when he got a chance to speak to him in the hallway during trial. 657a. Mr. Pippen's trial attorney never contacted Mr. Hudson prior to trial or called him as a witness. 657a.

Likewise, Mr. Hudson was never contacted by the prosecution or the police. 657a. Mr. Hudson would have been willing to testify as a witness for Mr. Pippen. 658a. He attended Mr. Pippen's trial and he was present when Mr. McDuffie lied under oath. 659a.

At the time of the evidentiary hearing Mr. Hudson was on parole and had violated his parole by not reporting. 665a. He came to court to testify at the *Ginther* hearing, knowing that he would likely be arrested for the parole violation. 665a, 666a. When asked why he was willing to put himself at risk of arrest, Mr. Hudson replied, "Because I know what Shawn [sic] McDuffie had told them is a lie, and even though I'm not charged or didn't have nothing to do with it, it's just crazy for me to just sit up here and not tell them that this is a lie." 665a. Following Mr. Hudson's testimony, he was taken into custody by an investigator with the Absconder Recovery Team for the Michigan Department of Corrections. 667a.

On April 16, 2015, the trial court issued its decision from the bench and denied Mr. Pippen's motion for new trial. 702a-707a. It found that trial counsel's performance was not objectively unreasonable and did not address the prejudice prong of the *Strickland* standard at that time. 706a-707a.

Appeal to Court of Appeals and Michigan Supreme Court

The Court of Appeals issued a per curiam opinion affirming Mr. Pippen's convictions. *People v Pippen*, unpublished opinion per curiam of the Court of Appeals, decided January 14, 2016 (Docket No. 321487) (709a-712a).

Mr. Pippen then sought leave to appeal in this Court. The Court ordered oral argument on Mr. Pippen's application for leave to appeal the affirmance of his convictions and requested supplemental briefing regarding "whether the defendant was denied the effective assistance of counsel based on counsel's failure to adequately investigate and present testimony from a res gestae witness." *People v Pippen,* 500 Mich 937 (2017).

On October 27, 2017, after supplemental briefing by the parties and oral argument, this Court issued a unanimous order[3], stating in pertinent part:

> In lieu of granting leave to appeal, we REVERSE that part of the Court of Appeals judgment holding that the defendant's trial counsel's performance was objectively reasonable. Defense counsel failed to interview a witness who may have had information concerning his client's innocence prior to trial. The witness gave exculpatory statements to the defense investigator, and defense counsel was aware the witness spoke with the investigator. Failure to investigate such a witness is not a strategic decision entitled to deference. See *Wiggins v Smith*, 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003); and *Towns v Smith*, 395 F3d 251 (CA 6, 2005). We also VACATE that part of the Court of Appeals judgment holding that the defendant was not prejudiced by defense counsel's performance, and we REMAND this case to the Wayne Circuit Court for a determination whether, considering the totality of the evidence presented, there is a reasonable probability that the outcome of the trial was affected. See *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

People v Pippen, 501 Mich 902 (2017).

[3] Wilder, J. did not participate because he was on the Court of Appeals panel.

Proceedings on Remand

Nearly a year after supplemental briefing and argument[4] on remand and five years after hearing Mr. Hudson's testimony, the trial court again denied the motion for new trial. *Trial Court Opinion & Order* (755a-760a).[5] The court found that "Michael Hudson was not a believable witness and based upon his testimony regarding the circumstances of the discarding of the firearm, his five theft-related felony convictions and his lengthy friendship with the defendant, a reasonable jury would not credit his testimony." 758a. It further found that the testimony of Sean McDuffie was "corroborated by other surviving witnesses at the scene," and there was "strong circumstantial evidence that less than 90 days after the murder, defendant Pippen was in possession of the murder weapon." 759a.

Ultimately, the court concluded that the totality of the evidence presented did not persuade the court of a reasonable probability of a different outcome. 760a. The court did not cite any authorities or the record in support of its findings.

Mr. Pippen timely filed a brief in the Court of Appeals. On April 30, 2020, the Court of Appeals issued an unpublished opinion affirming Mr. Pippen's convictions. *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, decided April 30, 2020 (Docket NO. 347729). 761a-764a.

This Court has ordered oral argument on Mr. Pippen's application for leave to appeal the affirmance of his convictions. *People v Pippen*, __ Mich __; 952 NW2d 909 (January 20, 2021) (Docket No. 161723). At issue is "whether there is a reasonable

[4] Transcript of 1/5/18 hearing (738a-754a).

[5] The court reissued the opinion on December 19, 2018, because it was not served on counsel until December 18, 2018.

probability that, but for trial defense counsel's failure to investigate and present Michael Hudson's testimony, the outcome of this trial would have been different. *Strickland v Washington*, 466 US 688, 694 (1984)." *Id*.

Argument

I. The trial court abused its discretion in finding that trial counsel's failure to investigate and present an exculpatory res gestae witness did not prejudice Mr. Pippen. Mr. Pippen made the necessary showing under the *Strickland* standard and is entitled to a new trial.

Issue Preservation and Standard of Review

Mr. Pippen filed a timely motion for new trial on the issue of ineffective assistance of counsel and thus preserved this issue for appellate review. *People v Wilson*, 242 Mich App 350, 352 (2000).

Mr. Pippen has the right under the federal and state constitutions to the effective assistance of counsel. US Const Am VI; Const 1963, Art 1, § 20; *Strickland v Washington,* 466 US 668 (1984). Ineffectiveness claims present mixed questions of law and fact. *Strickland*, 466 US at 698; *People v LeBlanc,* 465 Mich 575, 579 (2002). Questions of law are reviewed de novo. *Id*. Questions of fact are reviewed for clear error. *Id*.; MCR 2.613(C). A trial court's decision to grant or deny a new trial is reviewed for an abuse of discretion. *People v Terrell*, 269 Mich App 553, 558 (2010).

Introduction

The testimony proffered by Michael Hudson, the substance of which was available to defense counsel at the time of trial, exculpates Mr. Pippen. It also directly impeaches the prosecution's untrustworthy key witness who had a personal interest in testifying against Mr. Pippen. As this Court concluded, trial counsel's failure to investigate and call Mr. Hudson was objectively unreasonable

The remaining question before the trial court on remand was whether, "considering the totality of the evidence presented, there is a reasonable probability that the outcome of the trial was affected." *People v Pippen,* 501 Mich 902 (2017); see also

Strickland, 466 US at 694. *Strickland* stated that a reasonable probability is "probability sufficient to undermine confidence in the outcome." *Id*. A reasonable probability need not rise to the level of making it more likely than not that the outcome would have been different. *Id*. at 693.[6]

Mr. Pippen made the showing required to obtain a new trial under the *Strickland* standard. The trial court failed to engage in a proper holistic review which entails weighing all the evidence in the record, favorable and unfavorable, and its denial of relief on this basis constituted an abuse of discretion.

In its short opinion that never once cited to the record or case law, the trial court below made two significant analytical errors. First, in concluding that "Mr. Hudson was not a believable witness,"[7] the trial court considered only the factors that tended to diminish the veracity of Mr. Hudson's testimony and ignored those that pointed to his truthfulness. As a result, the court over-stepped its gatekeeping role and concluded that no reasonable juror could find Mr. Hudson's testimony credible, though Mr. Hudson was not a patently incredible witness.

This is the exactly what courts are cautioned not to do in materiality analysis. See *People v Johnson*, 502 Mich 541, 566–567 (2018). Though *Johnson* directly concerned the trial court's role when making credibility determinations in assessing a newly discovered

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[6] And the Sixth Circuit noted in another context that under Michigan law, a "reasonable probability" equates to a "fairly good chance." *Bell v United States*, 854 F2d 881, 889 (CA 6, 1988); *id.* at 889-90 ("the Michigan standard . . . does not require [a] mathematically exact . . . better than 50% chance of a successful outcome. Instead, evidence that there was a reasonable probability of such outcome, that the probability was . . . 'fairly good,' is sufficient.").

[7] 758a.

evidence claim, this Court looked to other contexts in which the trial court's function is similarly limited because it is not the ultimate fact finder. *Id.* at 567-568, citing *People v Anderson*, 501 Mich 175 (2018).[8] Additionally, *Johnson's* holding followed clearly from a series of cases that evaluated "the reasonable probability of a different outcome standard"[9] in various contexts, including ineffective assistance of counsel claims. See *Johnson*, 502 Mich at 576 n 16 (stating that *Brady* and *Strickland* cases are instructive in assessing materiality because both "require an assessment as to whether the new evidence or ineffective assistance calls into question the validity of a prior conviction.").

Second, the trial court failed to consider whether Mr. Hudson was sufficiently credible when considered in combination with the evidence presented at trial, instead viewing the new evidence in isolation. Rather than examining the "totality of the evidence presented" at trial, as it purported to,[10] the court focused only on the inculpatory evidence and completely failed to consider weaknesses in the prosecution's case – most significantly Mr. McDuffie's significant credibility problems.

As explained below, there are many reasons a jury could credit Mr. Hudson's exculpatory information over the flawed, incentivized testimony of Mr. McDuffie at trial, which one judge found so dubious that she quashed the bindover and dismissed the

[8] *Johnson*, 502 Mich 541, 568 (2018) ("Although *Anderson* does not control in this context, as we are not now dealing with a preliminary examination, a trial court similarly plays a preliminary gatekeeping role in assessing a defendant's motion for relief from judgment, in both situations, the trial court is contemplating a future trial and the role of a future fact-finder.").

[9] While different legal claims, the tests for ineffective assistance of counsel and newly-discovered evidence employ the same prejudice standard: the defendant must show a reasonable probability of a different outcome. See *Strickland*, 466 US at 694; see *Johnson*, 502 Mich at 577, citing *People v Tyner*, 497 Mich 1001 (2003) (applying *Cress*).

[10] 759a.

information. And in this case, where a new trial would boil down to a credibility contest between Mr. McDuffie and Mr. Hudson, the question of whether Mr. Hudson was believable for purposes of evaluating Mr. Pippen's guilt or innocence is properly a jury question. See *Ramonez v Berghuis*, 490 F3d 482, 490 (CA 6, 2007). Therefore, there is a reasonable probability of a different outcome upon retrial, and the trial court abused its discretion in denying the motion for new trial.

A. The trial court erred in asserting that no reasonable juror could find Mr. Hudson credible because it failed to consider the factors that bolstered the veracity of Mr. Hudson's testimony, placed undue emphasis on his criminal history, and mischaracterized his testimony at the evidentiary hearing.

To assess whether there would be a reasonable probability of a different outcome upon retrial, the trial court must first determine whether the evidence is credible, by considering "all relevant factors tending to either bolster or diminish the veracity of the witness's testimony." *Johnson*, 502 Mich at 566–567. At this initial credibility determination stage, a trial court may only deny the motion if the testimony is so unbelievable, that no reasonable juror "could find the testimony credible on retrial." *Id.*; see also *Ramonez*, 490 F3d at 491 ("[e]ven though the jury could have discredited the potential witnesses here based on factors such as bias and inconsistencies in their respective stories, there certainly remained a reasonable probability that the jury would not have."). Importantly, "the trial court's function is limited" at this stage. It is to determine *not whether the court itself finds* the new evidence credible, rather "whether a *reasonable juror* could" do so. *Johnson*, 502 Mich at 566–67 (emphasis in original); see also *Kotteakos v United States*, 328 US 750, 764 (1946) ("The crucial thing is the impact of the [error] on the minds of other men, not one's own, in the total setting.").

The court's function is necessarily limited at this stage because the ultimate determination of a witness's credibility is to be left for a jury upon retrial. *Johnson*, 502 Mich at 567–68; *Ramonez*, 490 F3d at 490 ("[O]ur Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence."); *Matthews v Abramajtys*, 319 F3d 780, 790 (CA 6, 2003) ("The actual resolution of the conflicting evidence, the credibility of witnesses, and the plausibility of competing explanations is exactly the task to be performed by a rational jury, considering a case presented by competent counsel on both sides."); *Barker v Yukins*, 199 F3d 867, 874–75 (CA 6, 1999) (Post-conviction court should not "stand in the place of the jury, weighing competing evidence and deciding that some evidence is more believable than others. Rather, it is for the jury . . . to decide [whom to believe]."); *People v Grissom*, 492 Mich 296, 317 (2012) (citing *White v Coplan*, 399 F3d 18, 24–25 (CA 1, 2005) and *Napue v Illinois*, 360 US 264 (1959), which discuss the need to consider how a *jury on retrial* might view new impeachment evidence).

Here, the trial court overstepped its gatekeeper role. It considered only those factors it believed detracted from Mr. Hudson's credibility and ignored those that bolstered it. Moreover, it gave undue weight to Hudson's ten-year old prior convictions and adopted the prosecutor's baseless argument that Hudson's testimony concerning Mr. Pippen's discarding of a firearm on October 18, 2008, was incredible. Michael Hudson is not patently incredible. In finding him to be so, the trial court clearly erred.

Furthermore, the trial court ignored the reality that, according to the prosecution, Hudson is a key res gestae witness. 276a, 278a, 279a, 286a. The trial court's function at the initial credibility determination stage is "limited," *Johnson*, 502 Mich at 567, and its

"gatekeeping role" cannot be used to exclude such an obvious material witness. Cf. *People v Mardlin*, 487 Mich 609, 626 (2010) ("Indeed, 'a basic premise of our judicial system [is that] providing more, rather than less, information will generally assist the jury in discovering the truth.'") (internal citation omitted).

1. Mr. Hudson's criminal history has little bearing on his credibility regarding the facts at issue.

In concluding that Mr. Hudson was not a credible witness, the court relied heavily on the fact that he had a criminal history: "At the time of his testimony, Mr. Hudson was a parole absconder and someone with five theft-related convictions which seriously impacted his credibility." 758a.

Although it is appropriate for a trial court to take into account weaknesses in a witness's testimony, the trial court here failed to determine whether a reasonable juror might conclude that Mr. Hudson was nonetheless credible with regard to the facts at issue. As this Court has recently and repeatedly acknowledged, it is error to conclude that the existence of prior convictions inevitably makes a new witness incredible in the eyes of a fact-finder. See *People v Corley*, 503 Mich 1004 (2019) (holding that the trial court's finding that a witness's criminal history made him not credible as a general matter was erroneous); see also *Johnson*, 502 Mich at 570 (witnesses' prior conviction for perjury did not make him incredible per se and trial court erred in failing to determine whether a reasonable juror might conclude that the witness was nonetheless credible with regard to the facts at issue). Rather, the focus must be on whether a reasonable juror might conclude that the witness was nonetheless credible.

Mr. Hudson had not violated his parole at the time of Mr. Pippen's trial,[11] see EH, 43, and at a retrial, that fact would not be admissible. MRE 609; MRE 608; MRE 404. Nor is it clear that, had Mr. Hudson testified at the trial his testimony could have been impeached with his prior theft-related convictions pursuant to MRE 609. MRE 609(a)(2)(B) only allows a prior conviction for a theft offense to be used to impeach a witness if "the court determines that the evidence has significant probative value on the issue of credibility . . ." In making the probative value determination as required by subrule (a)(2)(b), "the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity." MRE 609(b).

Mr. Hudson's prior convictions are theft-crimes and were 9 to 11 years old at the time of Mr. Pippen's trial. 657a-658a. Our courts have held that "theft crimes are minimally probative on the issue of credibility," *People v Meshell*, 265 Mich App 616, 635 (2005), or at most, are "moderately probative of veracity . . ." *People v Allen*, 429 Mich 558, 610-11 (1988).[12] And as a general matter, the older a prior theft-crime conviction, the less probative it is on the issue of a witness's credibility. *People v Snyder*, 301 Mich App 99, 106 (2013). Even assuming all five of Mr. Hudson's prior convictions fell within the 10-year time limit proscribed by MRE 609, their nature and vintage make them of minimal probative value and thus of little bearing on Mr. Hudson's character for truthfulness and likely inadmissible. See MRE 609(a)(2)(b).

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[11] Moreover, it is undisputed that Mr. Hudson willingly testified at the hearing, despite knowing that by coming to court he would likely be arrested for violating his parole by failing to report. 665a. And, as he anticipated, he was arrested in the courthouse following the hearing. 667-669a.

[12] Indeed, in *Allen*, this Court explained that the only factor that counseled in favor of increasing the probative value of a theft-crime was its recentness. *Allen*, 429 Mich at 610-611.

The trial court's emphasis on these convictions and their bearing on credibility stands in stark contrast with its complete lack of analysis of similar considerations vis-à-vis Sean McDuffie. As discussed in detail, *infra*, any potential impeachment of Mr. Hudson because of his prior convictions must be weighed against the credibility of Mr. McDuffie, who, as the jury learned, had a criminal history as well. In sum, the trial court erred in finding no reasonable juror would credit Mr. Hudson because of his prior convictions.

2. Mr. Hudson's testimony at the evidentiary hearing is consistent with the statements he made to an investigator prior to Mr. Pippen's trial.

The trial court also ignored critical evidence that Mr. Hudson's testimony at the evidentiary hearing was consistent with his statements made pre-trial, and not a last-ditch effort to help his friend, as the judge insinuated. See 760a.[13] Mr. Hudson has consistently asserted that McDuffie was lying from the very first time he learned of the accusations, long before trial. At the evidentiary hearing, private investigator Miguel Bruce testified that he interviewed Mr. Hudson prior to trial and that Mr. Hudson had told him that what Mr. McDuffie was saying was not true and that he was not present or a witness to what Mr. McDuffie claimed occurred. 647a. Mr. Hudson was also willing to testify to this at trial. 648a.

That Mr. Hudson has been consistent in disputing Mr. McDuffie's allegations is important. He did not appear with the exculpatory information only after Mr. Pippen was convicted for the crime. Compare *People v Barbara*, 400 Mich 352, 362-363 (1977) (where newly discovered evidence takes the form of recantation testimony, it is traditionally

[13] The trial court wrote, "Efforts on the part of Michael Hudson to provide some exculpatory evidence he was not with Mr. Sean McDuffie and did not see the defendant throw the murder weapon under the vehicle were unconvincing." 760a.

regarded as suspect and untrustworthy). He talked to Mr. Pippen's family, he met with the private investigator they hired, and he spoke with trial counsel at the courthouse during the trial. Though never questioned by the police or prosecutor's office about a homicide where, by Mr. McDuffie's account, he was the getaway driver, Mr. Hudson was willing to get involved and to testify under oath. Moreover, Mr. Bruce, an experienced investigator and former Detroit Police Officer, found Mr. Hudson to be believable. These facts bolstered Mr. Hudson's veracity and the trial court erred in failing to consider them.

3. The record does not support a claim that Mr. Hudson attempted to deny that Mr. Pippen was in possession of a firearm at the time of his arrest on Seven Mile. The trial court's finding to the contrary was clearly erroneous.

In finding fault with Mr. Hudson's testimony about the incident on Seven Mile, the trial court mischaracterized the facts and drew conclusions that were unsupported by the record. 758a. The trial court stated that "Mr. Hudson had an inability to recall the details of Mr. Pippen's conduct with regards to the possession or lack of possession of a firearm" and concluded that "Mr. Hudson conveniently was forceful and emphatic in proclaiming witness McDuffie was not truthful, but was vague and without much recall ability when it came to a description of the defendant's conduct." 758a.

Mr. Hudson's testimony about his and Mr. Pippen's conduct at the time of their arrest on Seven Mile was neither "vague" nor "without much recall ability." 758a.[14] Mr. Hudson readily acknowledged that he was carrying a gun that evening, that he ran from police when they attempted to stop him, that he knew Mr. Pippen to carry a gun, and that he was aware Mr. Pippen also pled guilty to gun charges related to their arrest that day. 655a, 659a-662a. Indeed, the only part of the incident on Seven Mile that Mr.

[14] See 653a-666a for the full transcript of Mr. Hudson's testimony.

Hudson could not recall in detail was what Mr. Pippen was doing while Mr. Hudson was running from the police and kicking his own gun under a car. He by no means suggested that Mr. Pippen did not discard a firearm—he merely stated that he did not see it happen because they parted ways when the police commanded them to stop. 661a-662a.

As Chief Justice McCormack (then Justice McCormack) noted when the prosecutor took this same position at oral argument on Mr. Pippen's prior application for leave to appeal, the record simply does not support a claim that Mr. Hudson attempted to deny that Mr. Pippen possessed a firearm.[15] Indeed, Mr. Pippen's possession of the firearm is not in dispute.

Michael Hudson is not a choir boy and his testimony certainly would have provided some "grist for the cross-examination mill." *Ramonez*, 490 F3d at 490. But it also contained many reliable aspects, which the trial court failed to acknowledge. When considering Mr. Hudson's testimony in its entirety, it is clear it is not wholly incredible, as the trial court found. To the contrary, any reasonable juror could find it worthy of belief on retrial. See *Johnson*, 502 Mich 570-568. Therefore, the trial court clearly erred when it concluded that Mr. Hudson was not a believable witness. *Id*.

[15] After the prosecutor argued, "Well . . . the police officer testified that . . . the two of them, defendant and Hudson, walked in between these two cars, then it was defendant that first kicked his gun under a car, then it was Hudson that followed suit . . I don't think a jury would have believed that Hudson didn't see the defendant kick the gun under the car when he kicked his gun under the same car that the defendant kicked his gun under," Justice McCormack said, "But Hudson said later that he knew the defendant pled guilty to possession of that gun, so he was fully aware and fully admitted at the hearing that the defendant had that gun." Transcribed from the video recording of the October 12, 2017 oral argument, available at: https://www.youtube.com/watch?v=02W9TZUGbvQ (accessed May 27, 2019).

B. In determining that trial counsel's deficient performance did not create a reasonable probability of a different outcome, the trial court erred in failing to consider Mr. Hudson's testimony within the context of all the favorable and unfavorable evidence presented at trial.

Mr. Hudson's potential testimony must be viewed against the evidence presented at trial. *Strickland*, 466 US at 685 (in assessing prejudice, the court must evaluate "the totality of the evidence before the judge or jury."); see also *Johnson*, 502 Mich at 571. When conducting the *Strickland* prejudice inquiry, a reviewing court must consider whether a reasonable juror would find the new evidence sufficiently credible, when considered in combination with the old evidence, to create a reasonable probability of a different outcome. See, e.g., *Wiggins v Smith*, 539 US 510, 513 (2003) (emphasizing that the new evidence, *taken as a whole*, might well have influenced the jury's decision) (emphasis added).

This murder case boiled down to whether Sean McDuffie was telling the truth. It rested on the uncorroborated testimony of a single witness who had to be brought to court on a material witness warrant, who received consideration in exchange for his testimony, who waffled on the stand, and whose account of the shooting contradicted the other witnesses. 515a, 536a. Michael Hudson's testimony that he never saw Mr. Pippen shoot anyone is exculpatory and directly contradicts Mr. McDuffie's trial testimony. 656a. Because trial counsel failed to investigate and call Mr. Hudson as a witness, the questionable testimony of Mr. McDuffie went largely unchallenged. Furthermore, counsel's failure to present Mr. Hudson, especially considering the role Mr. Hudson played in the prosecution's narrative, allowed the jury to draw a negative inference against Mr. Pippen based on Mr. Hudson's absence.

Despite paying lip service to this Court's directive to consider the "totality of the evidence presented," the trial court failed to properly assess the effect of Mr. Hudson's testimony in conjunction with the evidence that was presented at trial. *Strickland*, 466 US at 695; *Williams v Taylor*, 529 US 362, 397-398 (2000) (The "State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced the habeas proceeding in reweighing it against the evidence in aggravation."); *Johnson*, 502 Mich at 571-579. Not only did the court completely ignore Mr. McDuffie's many credibility problems including his inherent bias as an incentivized witness, its finding that Mr. McDuffie's trial testimony was corroborated by the other witnesses is not supported by the record.

1. *The trial court failed to consider Mr. Hudson's credibility against the credibility of Mr. McDuffie and in doing so abused its discretion. This Court should have grave reservations about Mr. McDuffie's testimony.*

Foremost, any potential impeachment of Mr. Hudson because of his prior convictions or friendship with Mr. Pippen must be weighed against the credibility of Sean McDuffie. Detroit Police went to Mr. McDuffie, who had a warrant for his arrest (and who they were familiar with due to his cooperation with police on another homicide), and interrogated him about "a whole bunch of shootings." 60a, 64a-65a, 540a-541a, 560a. They showed him pictures of homicide scenes and a picture of Mr. Pippen and asked for information about Mr. Pippen's involvement in the Sheffield homicide, which Mr. McDuffie then provided. 540a-541a, 559a-560a. Mr. McDuffie later tried to withdraw his

cooperation and was threatened with perjury.[16]

Mr. McDuffie's lack of credibility was so palpable that the judge who conducted the preliminary exam, after reviewing the substance of his testimony, stated, "I wasn't impressed with his testimony but that's not the Court's decision to, you know, be the decider of fact here. . . ." 101a. Then, the initial trial judge quashed the bindover and dismissed the case after concluding it was unclear whether Mr. McDuffie was describing the same crime as the other witnesses. 111a-113a.

Ultimately, Mr. McDuffie had to be brought to Mr. Pippen's trial on a material witness warrant. On direct examination he denied witnessing Mr. Pippen shoot anyone, and it was only after being shown his statement to police that he inculpated Mr. Pippen in this crime.

The jury learned that Mr. McDuffie had a prior conviction for carrying a concealed weapon for which he received HYTA probation, that he ultimately violated his probation and had a warrant out for his arrest, and that he was receiving a benefit for his testimony. 535a-536a, 538a-539a. In short, as the prosecutor acknowledged previously in this Court, "Sean McDuffie, did have credibility issues." 732a.

Unlike Mr. McDuffie who was forced to testify and who did so in exchange for a benefit that involved "cancelling" his existing felony case, Michael Hudson would have testified willingly and without obligation or incentive. Indeed, Mr. Hudson testified willingly at the evidentiary hearing despite knowing that he was likely to be arrested for an unrelated warrant. 665a-666a. Moreover, unlike Mr. McDuffie's prior conviction for

[16] Mr. McDuffie testified at the Preliminary Exam: "when I told them I wasn't telling them nothing they had took me down to Judge Kinny [sic]. And then he said they would lock me up for a year. And then after that they was going to charge me with perjury or something, which carries the same amount as the crime committed." 49a.

carrying a concealed weapon which the jury learned about, Mr. Hudson's prior theft convictions occurred roughly ten years before Mr. Pippen's 2014 trial.

The trial court failed to consider Mr. Hudson's demerits in relation to Mr. McDuffie's and in doing so abused its discretion. Had trial counsel called Mr. Hudson as a witness at trial, "[a]ll it would have taken is for 'one juror [to] have struck a different balance' between the competing stories." *Ramonez,* 490 F3d at 491, citing *Wiggins v Smith,* 539 US 510, 537 (2003).

The trial court also ignored or downplayed the problems with Mr. McDuffie's trial testimony. In fact, Mr. McDuffie's testimony about the crime itself was fraught with problems. For one, it often lacked corroborating detail:

- Mr. McDuffie could not remember the type or color of car that he alleged Mr. Hudson was driving or whose car it was. 522a.
- Mr. McDuffie could not remember what he, or Mr. Pippen, or Mr. Hudson were wearing. 527a.
- Mr. McDuffie could not remember where or when this event happened, but stated that he believed it was near Morang, Kelly, or Houston Whittier [streets] and that it was sometime after 10:00 p.m. sometime during the summer of 2008. 524a, 527a.
- Mr. McDuffie could not say how far Mr. Hudson's car was from the victim's car when the crime occurred. 543a.
- Mr. McDuffie did not remember the victim's car rolling into a tree. 546a.

The trial court also erroneously concluded that Mr. McDuffie's testimony was corroborated by other witnesses at the scene. 758a-759a. In fact, his testimony conflicted with those witnesses in many ways, as detailed in the table below:

	Sean McDuffie	Other Witnesses
The number of people in the car	Mr. McDuffie testified that there were three people in the car: Mr. Hudson, Mr. Pippen, and himself. 544a.	Ms. Larry and Mr. McGrier observed four individuals in the shooter's car. 410a, 459a.
Whether the people in the car wore masks or bandanas	Mr. McDuffie testified that no one in his car was wearing a mask or a bandanna and that no one in the car leaned out a window. 542a.	Ms. Larry testified that when the car first drove by the man in the front passenger seat was leaning out of the car and his face was covered from the nose down. 410a. She further stated that he was still masked when he approached the car a few minutes later. 411a. Mr. McGrier testified that the shooter and the three other men in the shooter's car had their faces covered with bandannas or scarves. 459a-460a.
Whether the people in the car displayed weapons	Mr. McDuffie testified that no one in the car displayed a weapon. 542a.	Mr. McGrier testified that all four of the men in the car had handguns. 459a-460a.

At trial, defense counsel attempted to establish that Mr. McDuffie was a self-interested liar and that his account of the shooting could not be believed. 590a ("What the people have brought to you is Mr. Sean – Mr. McDuffie, who was given a deal to close out his HYTA on a CCW, every reason to buy that would take away that case for him. That is not justice."); see also 636a. But the jury heard no direct evidence refuting Mr. McDuffie's version of events. Instead, defense counsel was relegated to attacking Mr. McDuffie's credibility on cross-examination by questioning him about the benefit he received in exchange for his testimony and eliciting the details of his story that contradicted the witnesses in the victim's car. 538a-567a. In his closing argument the prosecutor acknowledged Mr. McDuffie's lack of particularity (579a) and the differences

between his testimony and the testimony of Mr. Sheffield's friends (578a, 593a), but averred that discrepancies in otherwise truthful testimony can be explained by the passage of time and the distorting effect of fear on one's memory (578a).

Mr. Hudson's testimony that he never saw Mr. Pippen shoot anyone would have directly contradicted Mr. McDuffie's trial testimony and would have given actual evidence to the jury that Mr. McDuffie was not merely misremembering a traumatic event that happened six years prior, but rather lying to this jury regarding his actions in connection with this case. See *People v Armstrong*, 490 Mich 281, 292 (2011) (where impeachment evidence would have provided proof that a witness lied to the jury regarding his or her actions with regard to that very case, there is a greater possibility that the additional attack "would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt.").

2. Mr. Pippen's claim of prejudice is supported by the notable weaknesses in the prosecution's case.

As the trial court acknowledged at the evidentiary hearing, "the prosecution's case essentially rested on the testimony of Shawn [sic] McDuffie" and Mr. McDuffie was "a key witness for the prosecution in terms of placing Mr. Pippen at the scene of the homicide." 703a-704a. Outside of Mr. McDuffie's inconsistent and incentivized testimony, the only evidence that Mr. Pippen committed this crime was that (1) he fit an extremely vague physical description of the shooter and (2) approximately three months after the shooting he was in possession of the gun that was believed to be the murder weapon.

On the other hand, none of the three individuals who were in the car with the victim identified Mr. Pippen as the shooter.

- Ms. Gregory was seated in the front passenger seat. 435a. When asked if

she could describe the man or if the man was tall, she replied, "no." 436a.

- Mr. McGrier was seated behind Ms. Gregory in the rear passenger seat. 436a. At trial, the only information he could provide about the shooter was his height; he estimated that the man was about six foot. 452a.

- When Mr. McGrier spoke to police directly after the incident, he described the shooter as having a dark complexion. 464a. At trial, he stated that he was not able to tell. 463a. Mr. Pippen has a light complexion.

- Ms. Larry, who is 4 feet 11 inches tall, described the shooter as a tall and "little" black man. 412a. She agreed that both Mr. Pippen *and* his trial attorney fit this general description. 413a, 418a.

- Ms. Larry never saw the shooter's face and she was unable to provide any other details about his appearance. 419a-420a, 430a.

The prosecution contended that among Mr. Pippen, Mr. Hudson, and Mr. McDuffie, Mr. Pippen most closely fit the generic physical description of the shooter provided by Camry Larry. 580a. In a case where Mr. Pippen has consistently maintained that he was not present and not involved, this evidence is vague and unpersuasive, and not nearly as compelling as what Mr. Hudson would have testified to – that Mr. Pippen was not there.

Nor was Mr. Pippen's possession of the weapon three months after the shooting so compelling that it would lead a jury to find guilt beyond a reasonable doubt even with Mr. Hudson's testimony. First, the passage of time is significant. This is not a case where a defendant was caught with the murder weapon hours or days after an offense, it was about 90 days later. Second, there was no independent evidence that Mr. Pippen possessed this gun prior to or around the time of the shooting.

Plainly this was not a gun that Mr. Pippen came to possess legally. Street guns, like this one, change hands. According to the prosecution's own evidence, the gun originally belonged to someone named Darnell "Terry" Hicks who is now dead. 522a. Then, Norman

Clark, who was present when Mr. Pippen was arrested with the gun on October 18, 2008, bought the gun from Mr. Hicks. 550a. Mr. Pippen had no way of knowing everyone who possessed the gun before him, or how it was used. Indeed, the fact that Mr. Pippen pled guilty to felony firearm for his possession of this firearm strengthens the argument that he was not aware that the gun he possessed was a murder weapon. The only evidence linking Mr. Pippen to this gun at the time of the shooting was Mr. McDuffie.

3, Mr. Hudson is a key player in this story and the trial court failed to consider the impact of his absence at trial.

Finally, the trial court failed to take into account the central role Mr. Hudson played (in absentia) in the prosecution's case. Though he was never interviewed by the police or prosecution, or called as a witness trial, Mr. Hudson was a major part of the story the prosecution presented to the jury. That story claimed there were three people in the world who knew who was responsible for the murder of Brandon Sheffield: Sean McDuffie, Roderick Pippen, and Michael Hudson. The jury was repeatedly told that both Mr. McDuffie and Mr. Hudson witnessed Mr. Pippen commit this crime (276a, 278a, 279a, 286a), and Mr. Hudson's name was mentioned 15 times in the prosecution's opening statement alone (275a-287a).

During Mr. McDuffie's testimony, the prosecutor inquired about his relationship with Mr. Hudson and asked him to identify a photograph of Mr. Hudson. 530a; People's Exhibit 17. The prosecution then elicited testimony from Mr. McDuffie that Mr. Hudson was present when the shooting took place and that "he was just as shocked as [Mr. McDuffie] was" when it occurred. 531a. This narrative was reiterated in closing argument, and the prosecutor reminded the jury that Mr. McDuffie had identified photographs of both Mr. Pippen and Mr. Hudson. 580a.

A natural question that a juror would have in hearing the prosecution's opening statement and Mr. McDuffie's testimony was whether Mr. Hudson was going to testify. See *Stewart v Wolfenbarger*, 468 F3d 338, 360 (CA 6, 2007); *Washington v Smith*, 219 F3d 620, 634 (CA 7, 2000). When Mr. Hudson did not testify, the jury likely assumed the prosecution did not need him, and the defense did not want him. Trial counsel's failure to investigate and call Mr. Hudson as a witness allowed the jury to draw a negative inference against Mr. Pippen based on Mr. Hudson's absence. *Stewart*, 468 F3d at 360 (counsel prejudices his client's defense when counsel fails to call a witness who is central to establishing the defense's theory-of-the-case, and the jury is thereby allowed to draw a negative inference from that witness's absence). This is especially so given the role that credibility and witness testimony played in this case. See *Harrison v Quarterman*, 496 F3d 419, 427-28 (CA 5, 2007).

Mr. Hudson is a key player in this story, who the prosecution used at trial but now want to keep from the jury now that they know his testimony would be exculpatory. This is fundamentally unfair. It is also a dynamic the trial court failed to consider when it concluded Hudson's testimony was of no consequence.

C. Conclusion

Mr. Hudson's testimony is sufficiently credible to warrant a new trial, where cross-examination can take its proper course. Even though the jury could have discredited Mr. Hudson based on factors such as bias or prior criminal history, there certainly remained a reasonable probability that the jury would not have. *Ramonez*, 490 F3d at 490-91. Just because a witness may have certain bases for impeachment upon retrial does not mean that the court may simply decline to grant a new trial. *Id*. at 490; *Johnson*, 502 Mich at

570; *Corley*, 503 Mich at 1004.

Mr. Pippen is entitled to a new trial because the trial court failed to properly assess the effect of Mr. Hudson's testimony in conjunction with the evidence that was presented at trial as it was required to do. When considered against all the evidence presented at trial, the importance of Mr. Hudson's testimony cannot be underestimated. Not only is it exculpatory evidence that Mr. Pippen did not commit this crime, it would have directly contradicted Mr. McDuffie's testimony at trial and would have corroborated the defense that Mr. McDuffie was lying in exchange for a benefit in his own case. Indeed, the failure to adequately investigate and call Mr. Hudson as a witness was the kind of error that altered the entire evidentiary picture. *Strickland*, 466 US at 695-696.

Mr. Pippen's conviction rested on "shaky ground" and the new evidence is sufficient to create a reasonable probability of a different outcome. *Johnson*, 502 Mich at 571-579; *Strickland*, 466 US 696 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); see also *United States v Agurs*, 427 US 97, 114 (1976). Considering the totality of the evidence in this circumstantial case, there is a reasonable probability that had trial counsel conducted an adequate investigation and called Mr. Hudson as a witness, Mr. Pippen would not have been convicted as charged.

Mr. Pippen deserves the opportunity to present Michael Hudson's testimony to a jury and properly defend himself against these charges. The trial court abused its discretion, and this Court should remand for a new trial.

Summary and Relief

WHEREFORE, for the foregoing reasons, Roderick Louis Pippen asks that this Honorable Court grant his previously submitted application for leave to appeal and reverse his convictions.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY:_____

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