STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	
Plaintiff-Appellee,	Supreme Court No. **155276**
-vs-	Court of Appeals No. **328532**
DIALLO CORLEY,	
Defendant-Appellant.	Lower Court No. **14-007466-01-FC**

APPELLANT'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

Procedural History

Defendant-Appellant, Diallo Corley ("Corley"), was convicted of Assault With Intent to Murder, MCL 750.83; Assault With a Dangerous Weapon, MCL 750.82(1); Intentionally Discharging a Firearm From a Motor Vehicle, MCL 750.234a(1); and Felony Firearm, MCL 750.227b(1) after a jury trial in Wayne County Circuit Court.

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 concurrent, and a consecutive 2-year term, respectively.

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, and 25 and February 11 and 23, 2016. Defendant Corley presented Tarryl Johnson, Desiree Edwards, Stanley Davis, Jr., and Attorney Randall Upshaw. Defendant's Exhibits A through K, and Exhibit N (Appendix, p. 186a-202a) were admitted and are attached to this Supplemental Brief. The prosecution called no witnesses. Two exhibits on behalf of the prosecution were admitted.[1]

[1]People's Exhibit 1 is a color copy of Defendant's Exhibit F (Appendix, p. 193a).

On December 27, 2016, the majority of the Court of Appeals in an unpublished *per curiam* opinion, affirmed the convictions, but remanded regarding Corley's sentence. Jansen, P.J. (concurring in part and dissenting in part) would reverse the defendant's convictions and sentences and remand for a new trial based on the newly discovered evidence.

On February 8, 2017, Corley filed his Application for Leave to Appeal with this Court.

On June 29, 2018, this Court issued an order for supplemental briefs addressing "whether the trial court abused its discretion by declining to grant a new trial on grounds of newly discovered evidence, and in particular, whether the trial court erred in concluding that the newly discovered evidence would not make a different result probable on retrial." (Appendix, p. 212a)

The Prosecution's Case at Trial

The only eyewitness presented at trial was the Complainant, Calvin Wray ("Wray") (Appendix, p. 40a-73a, 171a). 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 (Appendix, p. 171a-172a, 185a). There was no evidence that the red Mountaineer Corley 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, hair and ethnic" was "unknown" (Appendix, 169a-170a, 189a).

Although the shooting occurred on April 21, 2014, Wray did not identify Corley as the shooter until July 21, 2014, *three months later* (Appendix, p. 61a, 63a, 172a).

At trial, Wray admitted *lying under oath* at the preliminary examination, claiming he lied because defense counsel "antagonized" him (Appendix, p. 74a, 172a).

Wray told his physical therapist that he was *shot during a robbery*, which was completely inconsistent with his trial testimony (Appendix, p. 47a, 71a, 172a).

Wray gave inconsistent versions about whether there was a passenger in the red Mountaineer. At one time Wray testified that there was only the driver in the vehicle (Appendix p. 38a, 77a). Subsequently, he changed his testimony to seeing the legs of an unknown passenger in the car (Appendix, p. 76a-77a, 172a).

According to Wray's question-and-answer statement to Detective Thomas, Wray was shot with a "dark automatic" handgun (Appendix, p. 39a, 69a, 79a).

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 (Appendix, p. 66a, 76a-77a, 183a-184a).

Of importance, 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 (Appendix, p. 47a, 57a, 172a).

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 or more years before the shooting, Wray was homecoming king at Highland Park High School (Appendix, p. 71a, 80a-81a, 174a-182a).

Wray has previously been convicted of an offense involving theft (Appendix, p. 78a, 81a).[3]

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[2]That change in testimony, from an automatic to a revolver, would render Wray's testimony consistent with the fact that no shell casings were found at the scene, in an apparent attempt by Wray to make his version consistent with the physical evidence of which he subsequently learned.

[3]Wray misrepresented to the judge and jury that his conviction was a misdemeanor (Appendix, p. 81a). 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 750.157 n(2).

Anthony Day, Wray's friend, testified at trial that when he went to Wray, who was lying on the ground after being shot, Wray told him he was shot by "Diallo" (Appendix, p. Appendix, p. 83a). However, prior to trial, Day had *never told anyone* that Wray said it was "Diallo" who shot him (*id*., p. 84a-89a). 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" (Appendix, p. 84a) (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" (Appendix, p. 82a). When asked at trial why he had never told anyone *before* trial what Wray had allegedly said, Day answered "A. I don't know" (Appendix, p. 90a).

According to Wray, the *only* thing he said to Day was, "Just 'Don't let me die in the street'" (Appendix, p. 58a-59a). *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 (Appendix, p. 91a). 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. 93a). 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. 94a). Not seeing anyone he knew at the Mission, he walked about three blocks to the house on Buena Vista off of Hamilton (*id.*, p. 95a-97a). Johnson identified Exhibit C (Appendix, p. 190a), 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. 98a-99a). Exhibit D (Appendix, p. 191a), which Johnson had not previously seen, was a Google map street view of 294 West Buena Vista, the white duplex, where Johnson met Big Moe at (*id.*, p. 99a-100a). 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. 101a). Johnson explained that this was a homosexual "greet and meet," but was not what he had expected (*id.*, p. 102a, 130a). Johnson gave a detailed physical description of Big Moe (*id.*, p. 102a). Johnson had met Big Moe on a gay app called Jet (*id.*, p. 102a-103a, 124a). Johnson left the West Buena Vista house and walked west to Avalon toward Woodward. Exhibit H (Appendix, p. 195a) depicted the path Johnson walked from 294 West Buena Vista to the area of 114 Avalon, where the shooting occurred (*id.*, p. 104a-105a). Exhibit F (Appendix, p. 193a) was the Google

map that Investigator Cole used to have Johnson identify the scene of the shooting (*id.*, p. 103a). Exhibit G (Appendix, p. 194a) was a Google map of 114 Avalon, where Mr. Wray lived (*id.*, p. 104a).

While walking on the south side of Avalon, Johnson saw a young man coming between an abandoned house and another house, on the north side of Avalon, very close to Second Street (*id.*, p. 105a-106a). Johnson indicated on Exhibit I (Appendix, p. 196a) where the man came from between the houses (*id.*, p. 107a). That man was moving quickly toward another man, who was standing in front of 114 Avalon (*id.*, p. 108a, 125a). The two men looked at each other, and, according to Johnson, the man in front of 114 Avalon looked scared (*id.*, p. 108a-109a). The shooter said something that Johnson interpreted as taunting, and challenging to the other man (*id.*, p. 126a-127a). When the man in front of 114 Avalon began to turn and run, the man who had come from between the houses fired many shots (no less than three) (*id.*, p. 109a). Johnson had an unobstructed view of the two men (*id.*, p. 125a). Johnson ducked behind a car (a white Pontiac Grand Am) and saw the man who had been shot on the ground (*id.*, p. 110a). Johnson was directly across the street from where the shot man was lying. Looking through the windows of the car he was behind, Johnson saw the shooter run back between the houses where he had come from (*id.*, p. 111a). The shooter had a dark handgun (*id.*, p. 142a). Johnson saw the shooter's face and described the shooter as a black male, dark skinned, about 5'8", and slim and with a

short hair style referred to as a 360 Wave (*id.*, p. 112a-113a). He was wearing jeans and a dark shirt (*id.*, p. 127a). The man did not have dreadlocks (*id.*, p. 113a). 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. 132a-133a). Johnson did not see a red Mountaineer or any other vehicle driving by when the shooting occurred (*id.*, p. 128a, 145a). After the shooting, Johnson ran off toward Woodward to the bus stop (*id.*, p. 114a115a). On the way, Johnson called a person and told him briefly about the shooting (*id.*, p. 115a). Johnson did not know Calvin Wray, Diallo Corley, or Corley's family and had first learned Corley's name when he saw his subpoena. He had never seen Corley before the hearing (*id.*, p. 116a-117a). Johnson said that he had clearly seen the shooter's face but had never seen Corley before his testimony in court.

Johnson was first contacted in October of 2015 regarding the incident through his aunt (*id.*, p. 117a). Johnson's Aunt Andrea had been contacted through Facebook by an investigator, who in turn contacted Johnson. Once his aunt explained what the investigator was asking about, he called Investigator Desiree Edwards (*id.*, p. 118a-119a). After meeting with Ms. Edwards, Johnson's statement was reduced to a signed affidavit, Exhibit A (Appendix, p. 187a) (*id.*, p. 119a-120a). The Facebook contact for Johnson was Yung.Ryl (*id.*, p. 120a-121a). Johnson also met with Investigator Cole from the Wayne County Prosecutor's Office, cooperated with him during a 1½

to 2-hour interview, and signed a written statement for Cole, Exhibit J (Appendix, p. 197a) (*id.*, p. 121a-123a).

DESIREE EDWARDS, an investigator with Sunshine Investigations, received a request for investigation in August or September of 2015 (Appendix, p. 146a) after the Facebook name for Mr. Johnson came from Corley's mother, Ms. Tibu, who, while attending a funeral, was approached by a family friend and asked 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 Johnson's Facebook name to her (*id.*, p. 155a).[4] To find 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 the names friends or family members of the person (*id.*, p. 148a). The Facebook page was set on private and provided very little information about the user. By looking at postings on the Facebook page (such as where the person was, friends, etc.) and piecing together bits of the information gathered, a prospective employer, the Produce Station was contacted to no avail (*id.*, p. 149a-150a). One posting was from an Andrea Tribune, a cousin of Johnson's (*id.*, p. 150a). Edwards contacted Tribune, who put Edwards in contact with her mother. When Edwards explained about the investigation, Tribune's mother (Johnson's aunt)

[4]Edward's report regarding Johnson and her rough notes were provided to the assistant prosecutor (Appendix, p. 155a1-155a2, 166a2).

in turn contacted Mr. Johnson (*id.*, p. 150a-151a). 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 (Appendix, p. 187a) (*id.*, p. 151a-153a). Edwards had described the attempts and possibility of locating Johnson as "an extreme long shot" (*id.*, p. 154a-155a).

STANLEY DAVIS, JR. lived at 115 Avalon, Highland Park in April of 2014 (Appendix, p. 156a). In the evening hours, he was putting spark plugs in his van in the backyard of his house (*id.*, p. 156a-157a). He heard about five shots, but considered it "pretty normal" for Highland Park (*id.*, p. 158a). His initial response was to duck down in the van. When he stepped out of the van, he saw people sitting on Calvin Wray's porch (*id.*, p. 158a). Davis had done work for Calvin's mother in the past and recognized Calvin (*id.*, p. 158a, 164a2-165a). After seeing people out on the porch, Davis "stood there for a minute" before running over to where Mr. Wray was to aid him (*id.*, p. 159a). Mr. Wray "was dying" and in no condition to speak (*id.*, p. 160a, 162a). Davis said Mr. Wray "wasn't trying to say nothing" (*id.*, p. 162a). He was in no condition to tell anyone who shot him (*id.*, p. 161a). No other civilians came to aid Mr. Wray (*id.*, p. 160a, 164a). He did not see a red Mountaineer and had never heard of the BTA or Winona Boys (*id.*, p. 161a). Prior to the trial, Davis was

not contacted by the trial attorney, Randall Upshaw (*id.*, p. 163a).[5] Davis had never seen Defendant Corley before the hearing (*id.*, p. 164a1).

The trial attorney, RANDALL UPSHAW, testified at the hearing 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" (Appendix, p. 167a). Upshaw said that Defendant Corley did not fit the description of the shooter as testified to by Mr. Johnson because Corley had dreadlocks and was not slim or dark-skinned (*id.*, p. 167a-168a).

Upshaw recalled that there was no physical or scientific evidence linking Corley to the shooting, and that Wray had lied at the preliminary examination, told a physical therapist that the shooting was part of a robbery, and given inconsistent testimony about whether a passenger was in the vehicle and whether the weapon used was a revolver or an automatic (*id.*, p. 171a-173a). Furthermore, there was no evidence linking Corley to a red Mountaineer or to any type of weapon (*id.*, p. 185a).

The trial court denied the motion for new trial based on the newly discovered evidence as follows:

> If Mr. Tarryl Johnson had given testimony at the time of trial as has been suggested by defendant's counsel, certainly his testimony could be

[5]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. 164a1). Later, Davis said "five minutes" (*id.*, p. 166a1).

impeached, pursuant to MRE 609, where Mr. Johnson's conviction involved an element of theft for which he was imprisoned for 18 years and had most recently been released from prison in 2011.

> Elements of a conviction under this rule is not admissible if the period of time is more than 10 years has elapsed since the date of his conviction or as a release of a witness from the confinement imposed, **whichever is the later date**. (Emphasis added).

Mr. Johnson's conviction for Armed Robbery could be used to impeach his credibility at the time of trial and to put his testimony on par with that of Calvin Wray and Anthony Davis is a stretch.

The defendant's contention that this newly discovered evidence of Tarryl Johnson would make a different result probable is therefore, in this Court's opinion, untenable. In order for newly discovered evidence to meet the criteria as "newly discovered evidence," a defendant must show: 1) that the evidence is newly discovered (this element may be concluded as proven by the defendant); 2) that the newly discovered evidence is not cumulative (this element would be assumed; and 3) that the party could not, using reasonable diligence, have discovered and produced that evidence at trial (agreed, for the evidence from the *Ginther* hearing reflected that considerable and unusual efforts were engaged in order to identify Mr. Tarryl Johnson's existence and identity and/or his anticipated testimony, therefore, this evidence has been met).

The last element, that being that the new evidence makes a different result probable on retrial, is, in the opinion of the Court, not feasible, and that had Mr. Johnson given testimony during the course of the original trial, a result, other than that which was ultimately arrived at by the jury in this case, would not be probable (Appendix, p. 15a-16a).

The trial court clearly abused its discretion in denying the Motion for New Trial when it deemed the newly discovered, exculpatory evidence by the independent eyewitness, which establishes that Defendant Corley did not commit the crime, was deemed

insufficient to make a different result probable on retrial. The newly discovered evidence, together with the weaknesses of the prosecutor's evidence at trial, should have made the trial court's decision to retry the case a fait accompli.

ARGUMENT

I. WHEN REVIEWING THE STRENGTH OF NEWLY DISCOVERED EVIDENCE, TOGETHER WITH THE WEAKNESSES OF THE PROSECUTOR'S EVIDENCE AT TRIAL, THE TRIAL COURT CLEARLY ERRED. THE EXCULPATORY EVIDENCE OF THE INDEPENDENT EYEWITNESS WHICH ESTABLISHED THAT DEFENDANT CORLEY DID NOT COMMIT THE CRIME WAS SUFFICIENT TO MAKE A DIFFERENT RESULT PROBABLE ON RETRIAL. THEREFORE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL.

STANDARD OF REVIEW: The question presented by this Court's order for Supplemental briefs is a mixed question of law and fact. Findings of fact are reviewed for clear error. *People v. Cress*, 468 Mich 678, 691 (2003); *People v. Armstrong*, 490 Mich 281, 289 (2011); MCR 2.613(c). "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v. Johnson*, 466 Mich 491, 497-498 (2002). A trial court's decision to deny a motion for new trial is reviewed for an abuse of discretion. *People v. Grissom*, 492 Mich 296, 302 (2012). An abuse of discretion occurs "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v. Babcock*, 469 Mich 247, 269 (2003).

SUMMARY OF ARGUMENT

The testimony of Tarryl Johnson at the post-conviction hearing was compelling and went to the heart of Corley's defense that he did not commit the crime of which

he was convicted. Johnson's testimony was material exculpatory evidence. Johnson was an independent, disinterested, and neutral eyewitness to this shooting and testified that Corley was not the shooter. He knew neither the victim, Calvin Wray, nor Defendant Corley. He gave detailed and convincing exculpatory testimony of how the shooting occurred and gave a detailed description of the actual shooter.

The prosecutor's case at trial had serious problems as it rested entirely on the uncorroborated testimony of Wray. Wray gave significant inconsistent versions of the shooting (even claiming at one time that it occurred during a robbery rather than a drive-by shooting), admitted lying under oath, and had a prior theft conviction. Wray failed to identify Corley as the perpetrator until three months after the incident. The prosecution had no physical or scientific evidence linking Corley to the crime, to the vehicle driven by the perpetrator, or to any weapon. Moreover, Corley had no previous history, conflict, or contact with Wray.

The trial court clearly erred in concluding that Johnson's exculpatory eyewitness testimony would not make a different result probable on retrial. The trial court erroneously addressed the newly discovered evidence in *isolation*, rather than taking into account the *entire record*, including the weaknesses in the prosecution's case at trial. The trial court failed to take into account both the significance and substance of Johnson's testimony that Corley was not the shooter. Instead, the trial judge based his decision *solely* on Johnson's prior felony conviction, as impeachment,

and as outcome determinative of the motion. In truth, that factor is not dispositive of whether a different result was probable if Johnson testified at a retrial. Having failed to consider the entire record, and the content of Johnson's exculpatory eyewitness testimony, and denying the Motion for New Trial based on Johnson's prior record alone, the trial court abused its discretion. This Court should reverse and remand for a new trial.

A. 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 retrial. *People v. Cress*, 468 Mich 678, 692 (2003).

In the trial court and on appeal, the prosecution conceded, and the trial court so found, that the first three criteria for newly discovered evidence had been met.[6] The trial court's ruling that the newly discovered evidence would not make a different result probable on retrial is the only issue for review before this Court.

[6](Appendix, p. 16a, 29a).

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 339, 341, Markman, J. concurring ("I write separately to summarize both the newly discovered evidence and the existing evidence that *must be considered* by the trial court . . ." (emphasis added); "[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 lacks 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 affect a different result on a retrial of the case. 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. Cummings*, 42 Mich App 108 (1972)

(reversed and remanded for new trial because "jury's assessment of the prosecutor's witness could be seriously damaged" by newly discovered evidence."); *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, p. 21a) ("The trial court clearly erred in finding that the defendant's attorney was credible.")[7]; *People v. Nelson*, unpublished per curiam, 2014 WL783464, Docket No. 301253, 02/25/2014 (Appendix, p. 203a-210a) (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).

Other jurisdictions have agreed that while newly discovered evidence entitles a defendant to a new trial, the trial court should consider the newly discovered evidence in conjunction with the evidence originally presented at trial. *Wisconsin v. Avery*, 345 Wis.2d 407, 424-425; 826 NW2d 60 (2013); *Preston v. Florida*, 970 S.2d 789, 798 (Fla. 2007); *Utah v. Pinder*, 114 P.3d 551, 565 (Utah, 2005).

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[7]This Court's order in *Hunter* addressed the same trial judge, Judge Callahan, who ruled on Corley's Motion for New Trial.

C. APPLICATION OF NEWLY DISCOVERED EVIDENCE.

Johnson's testimony is a prime example of 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 to the victim. It is eyewitness testimony that contradicts the heart of the prosecutor's case and advances the defense that Corley did not commit the crime.

The test for a new trial is one of probability, not certainty. The trial court engaged in role playing as an oracle regarding what a jury *might* believe regarding the credibility of Johnson (solely based on his conviction) while failing to consider how the jury might reconsider Wray's suspect testimony, in light of the new evidence.

1. THE POWERFUL INDEPENDENT EXCULPATORY TESTIMONY OF TARRYL JOHNSON.

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.

The test is not that a certainty exists that Johnson's testimony would bring an acquittal, but rather that an acquittal is a distinct probability. While it is the defen-

dant's obligation to establish this *Cress* factor, that standard of probability is the lowest standard in the law. Essentially, this is a case where a jury should be presented with the two versions and then be 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 (Appendix, p. 147a-148a). The investigator, Desiree Edwards, testified that the only information she received from Ms. Tibu was a suspected Facebook contact using the name Yung.Ryl. She was not provided with a name, date of birth, address, phone number, description of the person or names of friends or family. Since the Facebook profile did not provide a proper name, the agency conducted an extensive search, including unsuccessfully contacting an employer in Ann Arbor and doing a database search through social media accounts, which ultimately led to possible relatives. Eventually, contact was made via social media with an aunt who lived in Warren, Michigan. Once having obtained a telephone number, contact was made with the aunt, who was informed of the investigation (*id*. at 150a-151a). 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, p. 187a-188a). Johnson was subpoenaed and appeared and testified on January 15, 2016. Ms. Edwards described the

investigation as an "extreme long shot" (*id*. at 154a-155a). Locating Mr. Johnson was the result of hard work and determined investigators. Additionally, Johnson gave a *consistent* written witness statement, which was recorded, to Investigator Cole from the Wayne County Prosecutor's Office (Appendix, p. 197a-200a, 201a).

Tarryl Johnson's testimony is detailed and compelling. Johnson is familiar with the area, having lived nearby in the Detroit Rescue Mission in the past (*id*. at 91a-93a). Johnson openly admitted to personal matters that he may have considered embarrassing.

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 93a). 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 where he was staying 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, which he described as a white duplex (*id*. at 95a-101a). Presented with several Google maps of the location, maps that Johnson had not seen before his testimony, he identified the white duplex at 294 W. Buena Vista, Highland Park (Appendix, p. 190a, 191a, 192a). After entering the duplex and noticing only a mattress 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

101a-102a). Johnson then walked up Avalon Street toward Woodward to the bus stop to return back to where he was staying (*id*. at 104a-105a). The path he took was set out in Appendix, p. 195a. Previous testimony at trial established the shooting occurred at 114 Avalon, Wray's home (Appendix, p. 194a) (*id*. at 104a).

While walking on the south side of Avalon, Johnson saw Wray walk down 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 105a-106a). This man said something to Wray, to the effect "what's up now?" when Wray and the man were face-to-face (*id*. at 126a-127a). 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 110a). The shooter ran back between the houses where he had initially came from while Wray lay wounded (*id*. at 111a). When the shooting stopped, Johnson ran off and then walked to the bus stop where he caught the bus (*id*. at 114a-115a). Johnson described the shooter as about 5'8", slim, dark-skinned, and wearing dark clothes and a short hairstyle, called a "360 Wave" (*id*. at 113a).[8] Johnson testified he was right across the street when the shooting occurred and could *clearly* see the shooter and that there was a "good chance" he would be able to

[8]Wray described the shooter as having long dreadlocks.

identify the shooter (*id*. at 132a-133a). 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 questioning from the trial judge about his personal background, including being a homosexual, and his past criminal history, as well as offering detailed information surrounding the shooting (*id*. at 128a-145a).

On January 4, 2016, Johnson gave a detailed interview to Investigator Duane Cole of the Wayne County Prosecutor's Office that lasted approximately an hour and a half and resulted in a written signed statement (Appendix, p. 197a-200a) (*id*. at 121a-123a). That statement is consistent with both his affidavit (Appendix, p. 187a-188a) 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 contradicting* Wray's testimony - - that:

- There were people present on Wray's porch (Appendix, p. 159a).
- 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 (Appendix, p. 159a).

[9]Davis had worked for Wray's mother to work on her house and knew of Wray. He did not know Defendant Corley (Appendix, p. 158a, 164a2-165a).

- That there was no red Mercury Mountaineer in the area at the time of the shooting (Appendix, p. 161a).

A jury is likely to accept Johnson's testimony as his testimony is believable, consistent, and 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 both gave inconsistent versions and admitted lying. Wray's testimony was highly suspect and the State's case was weak because:

- The prosecution's case rested on the *uncorroborated single eyewitness* testimony of Calvin Wray (Appendix, p. 171a).

- 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 (Appendix, p. 171a-172a, 185a).

- 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* (Appendix, p. 61a, 63a, 172a).

- *Wray admitted lying at the preliminary examination*, giving the excuse that he lied because the defense attorney was "antagonizing him" (Appendix, p. 74a, 172a).

- Wray told his physical therapist that he was shot *during a robbery*, claiming that he thought if he lied he would be seen as a victim "and get the best treatment possible" (Appendix, p. 67a-68a, 172a).

- 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 (Appendix, p. 47a, 57a, 71a, 172a). Wray's testimony that Corley was "Diablo" conflicted with Anthony Day's testimony that Wray said it was "Diallo."

- Wray gave *inconsistent versions* about a passenger in the car, first saying there was only one person, the driver, and then contradicting that version, saying he saw the legs of the passenger in the car (Appendix, p. 76a, 77a, 172a).

- Wray denied telling the police the shooter fired an automatic gun, although the police statement to Detective Thomas indicates he did say that (Appendix, p. 69a, 79a, 173a).

- 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 (Appendix, p. 66a, 75a-76a, 183a-184a).

- Wray admitted that he never had a "beef" or conflict with the Winona Boys, with whom Wray claimed Corley was associated. Instead, Wray and Anthony Day said there was some jealousy and tension between the BTA and Winona Boys because Wray was homecoming 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 an exacerbation of this contrivance of a motive, the prosecution painted the BTA as a "group" and the Winonas as a "gang" (Appendix, p. 71a, 80a-81a, 174a-182a).

Wray testified at trial that the only thing he had said to his friend, Anthony Day, was "Just don't let me die on the street." Wray did not tell Day that "Diallo" or "Diablo" shot him. Day agreed with Wray, until the trial. Day admitted that before the trial he had never told *anyone* that Wray allegedly said he was shot by "Diallo."

Day never testified to the alleged statement at the prosecutor's subpoena hearing or at the preliminary examination. Day had absolutely no explanation of why he had not told anyone else before the trial.

Motive is the lynch pin for the prosecution of any crime. Every prosecution is grounded in motive, the reason, or the impetus for the crime, whether, as P.D. James wrote,"love, lust, lucre [or] loathing" or whether for greed, money, revenge, or passion. Without motive, the prosecution becomes hollow and unconvincing. 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 high school (Appendix, p. 71a, 80a-81a, 181a-182a).[10]

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" (Appendix, p. 167a).

Johnson's testimony now puts the whole case in a different light. 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

[10]Wray testified he was associated with a rap group "BTA" and Corley was associated with the Winona Boys, a gang on the other side of Woodward. There was never a conflict between the two groups, just some arguments.

occurred and who the shooter was. 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. THE TRIAL COURT CLEARLY ERRED IN ITS FINDINGS AND APPLICATION OF LAW.

The trial court's findings and conclusions regarding the newly discovered evidence focused exclusively on the potential impeachment of Tarryl Johnson's conviction for armed robbery on October 11, 1993.[11] Citing to MRE 609, the trial judge stated, "Mr. Johnson's conviction for Armed Robbery could be used to impeach his credibility at the time of trial . . ." concluding that the "defendant's contention that this newly discovered evidence of Tarryl Johnson would make a different result probable is therefore, in this Court's opinion, untenable" (Appendix, p. 16a). Judge Callahan repeated this conclusion, stating, "the last element, that being that the new evidence makes a different result probable on retrial is, in the opinion of the Court, not feasible . . ." (*id.)*. Thus, the totality of the trial court's analysis of the newly discovered evidence was based solely on the potential impeachment of Johnson at trial because of his 1993 armed robbery conviction and led to the conclusory statements that a different result was "untenable" and "not feasible." Judge Callahan failed to

[11]Johnson was convicted as an aider and abettor of second degree murder and armed robbery and sentenced to concurrent terms of 20-30 years on January 13, 1994. He was released on parole on March 17, 2011.

address and take into account: the *substance* of Johnson's exculpatory eyewitness testimony; that Johnson was a neutral witness, who did not know the parties; the newly discovered evidence in conjunction with the evidence, both inculpatory and exculpatory at trial; and the extent to which Johnson's eyewitness testimony directly contradicted the prosecution's case at trial by showing that Corley was not the perpetrator and was innocent of the charges of which he was convicted.

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. The primary factor relied upon by Judge Callahan was that Johnson could be impeached by his armed robbery conviction (Appendix, p. 15a). 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.

1. JOHNSON'S PRIOR CONVICTION.

While Johnson could be subject to impeachment,[12] the Court of Appeals dissent correctly analyzed this argument.

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[12]MRE 609(2)(B) requires the trial court to determine whether the conviction has significant value on the issue of credibility. Since Judge Callahan has since retired, that would be a matter for a different judge.

> [T]he jury is not bound to discredit Johnson for the sole reason that he has a prior armed robbery conviction (Appendix, p. 35a).

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.* (Emphasis added).

In this case, the instruction would apply to Wray and Johnson, as Wray had been convicted of a theft offense (Appendix, p. 78a, 81a).[13] The instruction correctly informs the jury they "may" consider this evidence and determine for themselves "how important they think it is." 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*, unpub-

[13]Wray misrepresented to the judge and jury that his conviction was a misdemeanor (Appendix, p. 81a). 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).

lished 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, p. 203a-208a). 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 about the type of weapon used, and that Corley had no reason or motive to shoot Wray. Nor did Judge Callahan consider that Day's testimony was contradicted by his two previous sworn testimonies (at the preliminary examination and at the prosecutor's exam) and by Wray's own testimony that he did not tell Day who had shot him and did not know Corley as "Diallo," the name Day claimed, for the first time at trial, 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 an attempt to foreclose presentation of the exonerating evidence to a jury now that it has been discovered.

The trial court's ruling that the newly discovered evidence would not make a different result probable is clear error and the denial of the motion for new trial was therefore an abuse of discretion.[14]

[14]This Court's order required the parties to address the trial court's opinion only. Corley addressed both the trial court and the Court of Appeal's majority opinion in his application for leave to appeal, but consistent with this Court's order, addressees only the trial court's decision here.

RELIEF REQUESTED

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

Respectfully submitted,

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