STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Richard A. Bandstra, Presiding Judge

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee, APPEAL NO.: 252498

v.

MAURICE H. CARTER, LOWER COURT NO. 76-122-FY-W

Defendant-Appellant.
_____//

APPLICATION FOR LEAVE TO APPEAL

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APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Maurice Carter was convicted of one count of assault with intent to commit murder following a jury trial on May 5, 1976. He was sentenced to life in prison by the Honorable Julian E. Hughes on June 28, 1976. On November 22, 2002, he filed a Motion for Relief from the Judgment under MCR 6.500. On November 12, 2003, the Honorable John T. Hammond entered an Opinion and Order denying that Motion (App. A). Mr. Carter timely sought leave to appeal to the Michigan Court of Appeals. In an order dated April 16, 2004, the Court of Appeals denied leave to appeal, with one judge dissenting.

Mr. Carter now seeks leave to appeal in this court. He seeks an order reversing the circuit court's order denying his request for relief from judgment under MCR 6.500 *et seq.*. He asks that this court vacate his conviction and order a new trial.

Jurisdiction is conferred on this Court by MCR 7.301(A)(2); MCR 7.302; MCL 600.212; MCL 600.215; MCL 600.219; MCL 600.232; MCL 600.314; and MCL 770.3(6). This application for leave to appeal is timely filed within 56 days of entry of the Court of Appeals order denying leave to appeal.

STATEMENT OF QUESTIONS PRESENTED

I. Was Mr. Carter's constitutional right to effective assistance of counsel violated when his trial attorney failed to conduct any investigation or interview any witnesses, and failed to develop or introduce extensive available exculpatory and impeachment evidence that was necessary for fair consideration of the question of guilt or innocence, and failed to move to suppress impermissibly suggestive eyewitness identifications because they were unreliable?

The Circuit Court answered: No.

II. Did the prosecutor violate Mr. Carter's due process rights by failing to disclose exculpatory evidence when it failed to inform the defense that, contrary to his testimony at trial, one of the Government's witnesses—Grayling Love—had received benefits in return for his cooperation with the Government, and by failing to disclose that one of witness Ruth Schadler's original police reports indicated that she might have described

the gunman as having a "dark" complexion, but was changed to reflect that the gunman had a "medium" complexion (thereby matching Mr. Carter)?

The Circuit Court answered: No.

III. Did the Government violate its duty, under Michigan law in effect at the time of trial in 1976, to produce all *res gestae* witnesses, when it failed to produce Lucy Hodder, who witnessed a man fleeing the scene of the shooting, and who would have testified that that man was not Maurice Carter?

The Circuit Court answered: No.

IV. Is Mr. Carter entitled to a new trial based upon newly discovered evidence where he presented multiple pieces of new evidence, including new witnesses at the scene of the shooting who would exclude Mr. Carter, new evidence supporting the testimony of the trial witnesses who excluded Mr. Carter, and new evidence undermining the identifications purportedly made by the Government's witnesses (including new statements by those witnesses themselves)?

The Circuit Court answered: No.

V. Did the Circuit Court err by denying Mr. Carter's postconviction motion without an evidentiary hearing, where the motion was premised upon specific factual allegations, where those allegations were supported by affidavits and other documentary offers of proof, where numerous facts were in dispute, and where his factual allegations, if proved or accepted, would have entitled him to relief?

The Circuit Court answered: No.

STATEMENT OF FACTS

Procedural History

Defendant-Appellant Maurice Henry Carter was convicted following a jury trial on May 5, 1976, of one count of assault with intent to commit murder. On June 28, 1976, the Honorable Julian E. Hughes sentenced him to life in prison.

Mr. Carter's conviction and sentence were affirmed on direct appeal in 1979. Thereafter, acting at various times both in pro per and with counsel, Mr. Carter unsuccessfully sought postconviction relief in both state and federal court.

Mr. Carter filed his first motion for postconviction relief under MCR 6.500 in 1992. In that motion Mr. Carter claimed that black jurors had been impermissibly removed from the jury pool on the basis of their race. The Circuit Court, the Honorable John T. Hammond presiding, denied that motion. That decision was affirmed by both the Michigan courts, and ultimately the federal courts in habeas corpus proceedings, in 1995.

Mr. Carter filed his second motion for postconviction relief under MCR 6.500—the motion at issue in this appeal—on November 22, 2002. That motion sought for relief from the judgment based on claims of newly discovered evidence; the prosecutor's failure to disclose exculpatory evidence; the prosecutor's failure to produce a *res gestae* witness; and ineffective assistance of counsel.

The Government requested and received two extensions of time to file its response to the motion, and filed its brief and supporting exhibits over six months later, on June 6, 2003. Mr. Carter filed his reply brief, along with additional affidavits and exhibits, on July 1, 2003.

In the months that followed, Mr. Carter became gravely ill with end stage liver disease. Because the Circuit Court had not scheduled a hearing or otherwise decided his motion, and because Mr. Carter's counsel feared that his declining health made prompt disposition of the

motion essential, he filed a motion on September 5, 2003, asking the court to expedite its consideration of his 6.500 motion. He supported that motion with affidavits and medical evaluations revealing that his illness was terminal, that he needed a liver transplant to have a chance at survival, and that he was ineligible to be considered for a transplant as long as he remained incarcerated (Motion to Expedite, 9/5/03).

On October 29, 2003, Judge John T. Hammond heard arguments on the Motion to Expedite. Rejecting a defense request to hear oral arguments on the merits of the 6.500 motion at that time, Judge Hammond suggested he saw no real urgency, commenting, "Any of us could die tomorrow" (10/2903 Hearing at 17). The court also denied a request for an evidentiary hearing, and scheduled oral arguments on the Motion For Relief From Judgment for November 12, 2003. [2]

On November 12, 2003, the court heard oral arguments on the merits. At the conclusion of the argument, Judge Hammond adjourned for just over 30 minutes, and then returned to read a fourteen-page, typed decision into the record in which he denied each of Mr. Carter's claims for a new trial. The court did not find that any of the claims were procedurally barred, but reached each claim on the merits.

The Court of Appeals denied leave to appeal, with one judge dissenting.

The Crime and Trial

On December 20, 1973, at around 1:30 p.m., off-duty police officer Thomas Schadler and his wife, Ruth, entered the Benton Harbor Wig and Record Shop to do some Christmas shopping. The only other people present in the store were the store clerk, Gwen Gill (now Baird), and an

[2] At that hearing Judge Hammond also granted a motion to permit undersigned counsel from Wisconsin to appear in this matter *pro hac vice*, along with undersigned Michigan counsel.

unidentified black man (Opinion and Order Denying 6.500 Motion, "Opinion," Appendix A). Within minutes and without warning, the black man pulled out a small .22 caliber handgun and shot Officer Schadler in the head and neck five to six times from behind. The gunman then walked out of the store and headed east on Main Street. Officer Schadler got up, followed the man out of the store, and fired his .38 caliber service revolver at the fleeing man (*id*.).

For more than two years, police arrested no one for the shooting. Police reports reveal that, during that time, police received unsworn tips suggesting Maurice Carter, among others, may have been involved, but they had no evidence linking him to the crime, and none of the witnesses could identify Mr. Carter as the assailant (*id*.). None of these unsworn tips were presented as evidence at trial. Eventually, on November 26, 1975, Wilbur Gillespie was arrested on unrelated charges of delivery of heroin. As a repeat offender, Mr. Gillespie faced a potential life sentence (Defendant's Appendix in Support of 6.500 Motion, "Def. App.," Ex. 2). According to Mr. Gillespie, police offered him a deal: identify Mr. Carter as the man who shot Officer Schadler, and they would drop the heroin charges (*id*.). Mr. Gillespie initially refused. Ultimately, on December 5, 1975, Mr. Gillespie signed a statement implicating Maurice Carter in the shooting (*id*.). Using that statement, police obtained a warrant for Mr. Carter's arrest. Mr. Carter, who was living and working in Indiana, waived extradition.

Upon Mr. Carter's return to Benton Harbor on January 5, 1976, *The Herald Palladium* newspaper published his picture on the front page, announcing the arrest of the man suspected of shooting Officer Schadler (Def. App. Ex. 3). The following week, on January 13, 1976, police conducted a lineup that included Mr. Carter (Def. App. Ex. 4). Three witnesses were invited to the lineup—Thomas Schadler, Ruth Schadler, and Nancy Butzbach (*id*.). For the first time—more than two years after the shooting—the witnesses picked Mr. Carter as the gunman (*id*.). Mr. Carter was then charged with two counts of assault with intent to commit murder.

The Government's case against Mr. Carter rested on the eyewitness testimony of five people. Thomas Schadler, Ruth Schadler, and Nancy Butzbach, who was in a second-floor office across the street from the Wig and Record Shop at the time of the shooting, said that Mr. Carter was the gunman (Tr. 180-81, 266-67, 429-30). Victor Miller, who had been walking on Main Street to the east of the shop, testified that he believed Mr. Carter looked like the man who ran by him, fleeing the shop (Tr. 465). And Grayling Love testified that the gunman knocked him down when he was fleeing from the shop, and that Mr. Carter looked so much like the gunman he "could pass for a twin" (Tr. 392).

There was no other evidence of guilt. There was no physical evidence—no fingerprints, no gunshot residue, no bloodstains, no fibers, no hairs—linking Mr. Carter to the scene. There was no confession. And Mr. Carter had no motive.

At trial, Wilbur Gillespie recanted his accusations against Mr. Carter, and admitted that he had concocted the story solely to avoid a potential life sentence. He testified that he knew that Mr. Carter was not involved in the shooting because he awoke Mr. Carter in his hotel room at approximately the time of the shooting (Jury Trial Transcript, "Tr." 575). The Government subsequently convicted Mr. Gillespie of one count of perjury for falsely accusing Mr. Carter at Mr. Carter's preliminary hearing, and sentenced him to 15-30 years in prison (Def. App. Ex. 5).

In addition to Mr. Gillespie, two other witnesses were certain that Mr. Carter was not the gunman. Gwen Baird, the store clerk who had waited on the gunman, alone, for approximately 12 minutes before the shooting began, testified that Mr. Carter was not the gunman (Tr. 366, 369). And Connie Allen (now Norris), another woman who had been in the shop with the gunman, but left before the shooting began, testified that Mr. Carter was not the gunman (Tr. 501-02, 525). Mr. Carter also testified and denied involvement in the shooting (Tr. 653).

None of the remaining witnesses—five of whom claimed to have seen the gunman, and who

gave wildly divergent descriptions of him and his clothing[3]—identified Mr. Carter.

After the jury returned its guilty verdict, the judge commented on the closeness of the case, telling the jury that this was "an extremely tough case, frankly. … I am certainly pleased … that I don't have the responsibility of deciding the case" (Tr. 858).

The Postconviction Evidence

On November 21, 2002, Mr. Carter filed a Motion for Relief from the Judgment under MCR 6.500. In that motion, he alleged that, while the case presented to the jury against Mr. Carter was thin, the jury never heard the bulk of the evidence of innocence.[4] He alleged that some of that evidence was only recently discovered; that the prosecutor improperly withheld some of the exculpatory evidence from the defense; that the Government failed to produce a required *res gestae* witness; and that trial counsel was constitutionally ineffective. Mr. Carter alleged that the following evidence, never heard by the jury, warranted relief from the judgment.

TOM SCHADLER

Officer Schadler testified that he was certain Mr. Carter was his assailant (Tr. 261). In his 6.500 Motion, Mr. Carter alleged, however, that the jury never heard that Officer Schadler had made numerous statements shortly after the shooting indicating he could not identify the shooter. For example, on the day of the shooting, Officer Schadler told police that "he did not know who the susp[ect] is and that he did not get a description of him," and at least twice told other officers that he "paid no special attention to him" (Def. App. Ex. 6, 7), and that he "didn't pay him mind" (Def. App. Ex. 8). Officer Schadler also told police that out of the corner of his eye he noticed the assailant turn away from the counter and walk behind him, but he "didn't think anything of the man until he was shot" (*id.*). He told police that "all [he] could recall of the gunman was that he wore a

[3] The descriptions given by each witness at trial are summarized in Def. App. Ex. 1b.

[4] For a side-by-side comparison between what the jury heard and the evidence not presented at trial, see Def. App. Ex. 1a (Evidence Chart).

¾ [length] army jacket" (Def. App. Ex. 7). The jury heard none of this, because Officer Schadler was never questioned about his initial statements.

Police reports reveal that Officer Schadler later attempted to provide a description of the assailant. Mr. Carter alleged, however, that the jury did not hear that, at the hospital shortly after the shooting, Officer Schadler twice described the assailant as a Negro male, approximately 30 years old, 160-170 pounds, and 5'10" or 5'11" tall (Def. App. Ex. 8, 9). Mr. Carter weighed 200 pounds and stood just over 6' tall (Tr. 670).[5]

Mr. Carter also alleged that the jury did not hear that Officer Schadler told police that after he was shot—that is, during the only time when he observed the gunman—he began "seeing stars" and became dizzy (Def. App. Ex. 7). Officer Schadler also told police that, after being shot in the head and neck, he fell onto the gunman's legs (*id*.). Police stopped Mr. Carter, along with almost everyone else in the vicinity, shortly after the shooting. No claim has ever been made that he had any blood on him or his clothing.

Mr. Carter also alleged that the jury did not hear that, during the two years between the shooting and the lineup identification, Officer Schadler saw Mr. Carter's photograph, but was unable to identify him. Two weeks after the shooting, on January 4, 1974, Officer Schadler was shown Mr. Carter's picture (Def. App. Ex. 10). Although Officer Schadler said that the photo resembled the shooter, he could not make a positive identification, remarking that he "only saw his assailant from a side view and the photo of Maurice Carter resembled that person" (*id*.). The jury heard nothing about this at trial.

In response to Mr. Carter's 6.500 motion, the Government claimed that Officer Schadler had indeed identified Mr. Carter when he viewed the photographs on January 4, 1974 (Govt Brief at 81).

[5] Officer Schadler also said he thought the gunman looked like "Josh." No description of "Josh" was ever provided, and no one named "Josh" has ever been identified.

Mr. Carter replied by noting that, at the preliminary hearing, Officer Schadler confirmed that he had not been able to identify Mr. Carter, admitting that he had been shown many photographs, but had not been able to identify any of them as the assailant (Prelim. Tr. 22). Mr. Carter also produced police reports confirming that, for nearly two years after Officer Schadler saw those photographs, police remained frustrated because no one had been able to make a positive identification of Mr. Carter (Def. Supp. App. G).

Mr. Carter also alleged that the jury did not hear that shortly before picking Mr. Carter in the lineup in 1976, Officer Schadler saw Mr. Carter's photograph on the front page of *The Herald Palladium* with a story identifying him as the prime suspect. At the preliminary hearing, Officer Schadler admitted that he saw the photograph in the paper (Prelim. Tr. 23-24), but this evidence was not presented to the jury.

RUTH SCHADLER

In his 6.500 motion, Mr. Carter claimed that Mrs. Schadler also made numerous statements to the police on the day of the shooting, about which the jury never heard, indicating that she did not get a good look at the perpetrator (*see, e.g.*, Def. App. Ex. 7). She told police that after she and Officer Schadler entered the store, she only saw the assailant from the "corner of her eye" (Def. App. Ex. 11). As for recalling what the suspect looked like, Mrs. Schadler told police that "she didn't pay any attention while he was within the store" (Def. App. Ex. 7). On the day of the shooting, she described the shooter as a Negro male in his 30's, approximately 5'8" tall, with a heavy build, short hair and a mustache, wearing a gray coat with a black fur collar and brown pants (Def. App. Ex. 6). Mrs. Schadler described the sudden shooting in the store, but, according to the police report, "because of the shock and confusion, this is all she remembered at the time" (*id.*). Mr. Carter noted that the jury heard none of this.

He also alleged that the jury did not hear that on the day of the shooting, Mrs. Schadler told

police that the shooter "had the gun in his left hand and it appeared the subject was going to shoot again" (Def. App. Ex. 11). Mr. Carter is right-handed.

On December 22, 1973, two days after the shooting, Mrs. Schadler attended a lineup in Kalamazoo (Def. App. Ex. 12). At this lineup, Mrs. Schadler was not able to identify anyone as the gunman (*id*.). She identified one person in the lineup, Luther Whitfield, as resembling the shooter (*id*.). Mr. Carter alleged that the jury did not hear, however, that Mrs. Schadler identified Mr. Whitfield as having the same complexion, build and hairstyle as the shooter, and that Mr. Whitfield is very dark-skinned, while Mr. Carter is light-skinned (Def. App. Ex. 13; Ex.12).

At trial Mrs. Schadler testified that the gunman's complexion was the same as Mr. Carter's (Tr. 297). Police reports disclosed to the defense before trial indicated that Mrs. Schadler had told police that the assailant had a "medium" complexion (Def. App. Ex. 11). Mr. Carter's 6.500 motion alleged that, recently, he had obtained new copies of those same reports from the Benton Harbor Police Department. He asserted that those new copies revealed that Mrs. Schadler's original police report had the word "dark" typed in the same space as the word "medium," indicating that at some point the report was changed, and suggesting that Mrs. Schadler originally told police the assailant had a dark complexion, not a medium complexion, as she testified at trial (Def. App. Ex. 14; Tr. 297). He noted that the jury never knew of this discrepancy.

Mrs. Schadler testified that she had seen many photos, and had found only one person who resembled the shooter, a man who had the same eyes as the gunman, but she excluded him because he had different facial features than the assailant (Tr. 291). Mr. Carter alleged in his 6.500 motion, however, that the jury never heard that among the photos she saw was at least one photo of Maurice Carter (Def. App. Ex. 10). He alleged, therefore, that the jury did not hear that she was not able to positively identify Mr. Carter from his photo, nor that she had in fact rejected his photograph because his facial features did not match the assailant (*id*.).

NANCY BUTZBACH

On the day of the shooting Ms. Butzbach was working on the second floor of the Gray Building, across the corner from the Wig and Record Shop (Tr. 424). At trial, Ms. Butzbach testified that she heard shots, moved to a window with a view of the shop, and saw a man running from the shop (Tr. 424-25). At trial, Ms. Butzbach testified that she was certain that Mr. Carter was the man she saw.

Mr. Carter's postconviction motion claimed, however, that the jury did not hear that on the day after the shooting Ms. Butzbach had told police officers that she saw only "the shadow of a black man" running away from the shop (Def. App. Ex. 15).

Ms. Butzbach testified that she told police the gunman was just under 6 feet tall, had a medium build, was neatly dressed in a black and gray coat, and may have had a hat (Tr. 441). Mr. Carter's postconviction motion alleged, however, that the jury was not told that the police report of the statement she gave the day after the shooting provided no physical description of the man other than that he was wearing a gray and black coat (Def. App. Ex. 15).[6]

For over two years after the shooting, Ms. Butzbach never made any identification. During this time she took a job in the Berrien County Prosecutor's office (Tr. 423). Mr. Carter alleged that the jury did not hear that nearly two years after the shooting, on December 19, 1975, a detective showed Ms. Butzbach three photographs (Def. App. Ex. 16). Mr. Carter's photo was among those photographs. Mr. Carter pointed out that the jury never heard that Ms. Butzbach passed over Mr. Carter's photograph, failed to identify him, and instead identified an unknown third person as being someone she had seen with the fleeing gunman earlier in the week (*id*.).

Mr. Carter also alleged that the jury did not hear that, at a live lineup just a few months before trial, Ms. Butzbach said that she recognized Mr. Carter, but not as the gunman. On January

[6] Other witnesses, including Tom Schadler and Gwen Baird, said that the gunman wore a green army fatigue jacket, not a gray or black coat (Tr. 225, 364).

13, 1976, Ms. Butzbach attended this lineup with Officer and Mrs. Schadler (Def. App. Ex. 4). This lineup occurred shortly after Maurice Carter's picture appeared on the front page of *The Herald Palladium* (Def. App. Ex. 3). In contrast to her trial testimony, in which she stated that she was certain Mr. Carter was the gunman, she stated at this lineup only that Mr. Carter was "at the scene before the shooting and believe I saw him in the area after the shooting" (*id.*). The jury heard nothing about this statement.

At trial Ms. Butzbach testified that she viewed the fleeing gunman from a second story window across the street, which she said was less than 100 feet away (Tr. 424, 426). Measurements taken after trial, however, establish that the front of the Wig and Record Shop is actually 140 feet from the near corner of her office building (Def. App. Ex. 17). Ms. Butzbach was set back from the corner in a second floor window, and the gunman was fleeing down Main Street away from her. Thus, the actual distance was well in excess of 140 feet. Attached to his 6.500 motion Mr. Carter submitted new evidence from a perception expert to the effect that human beings cannot distinguish facial features from that distance (Def. App. Ex. 18). The jury heard no evidence of this.

Ms. Butzbach testified that she went to her office window only after she heard gunshots. She testified she got up from her desk and went to the window, looked out, and saw a man running down the street. She claimed she then saw Officer Schadler run out of the store, fall, and try to get up and shoot (Tr. 424-25). After trial, however, Ms. Butzbach admitted in a sworn affidavit that she could not have been alerted to run to the window by the .22 caliber gunfire inside the Wig and Record Shop, but rather that she heard only Officer Schadler's .38 caliber gunfire on the street as he chased his attacker. In her affidavit, she swore that she knew the difference between the sound of a .22 and a .38, and said that what she heard was a .38, not a .22 (Def. App. Ex. 21, ¶4). Testing by an expert audiologist in October 2001 confirmed that Ms. Butzbach could not have heard the shots

from the small .22 inside the shop (Def. App. Ex. 20).[7] Officer Schadler testified that he began firing the .38 at the assailant when the fleeing man was 30-40 feet east of him on Main Street (Tr. 184). That meant Ms. Butzbach could not have gotten to the window before the gunman had already run down the block away from her building. Accordingly, she swore in her affidavit that she only saw a rear and partial side view of a fleeing man at the far end of the street (Def. App. Ex. 21). In his postconviction motion Mr. Carter alleged that the jury never heard this evidence showing that, contrary to her trial testimony, Ms. Butzbach could not have seen the assailant's face, and that he was too far away for her to make an identification by the time she looked out the window.

In response, after Mr. Carter filed his 6.500 motion the Government interviewed Ms. Butzbach and got her to sign a new affidavit in which she reaffirmed her trial testimony and claimed that she felt she had been tricked into signing her previous affidavit (Govt. App. Ex. MM). Her new affidavit, however, did not identify anything in her previous affidavit that was inaccurate or explain in any way why she felt she was tricked or how she was tricked, including how she was "tricked" into adding in her own hand-writing to the affidavit an explanation of how she knew she heard only the .38. The Circuit Court did not hold an evidentiary hearing to resolve these or any other factual disputes or ambiguities.

In his postconviction motion Mr. Carter also alleged that the jury never learned other facts that should have been important to their assessment of Ms. Butzbach's purported identification of Mr. Carter. He alleged that Ms. Butzbach had informed investigators after trial that she recalled the incident clearly, and remembered seeing Officer Schadler being carried out of the Wig and Record

[7] The audiology tests involved blocking off the entire block of Main Street in Benton Harbor and test-firing a .22 into a barrel of sand inside the shop while trained listeners stationed in Ms. Butzbach's former office recorded the sounds audible from that distance. Dr. Fred Wightman issued a report based upon that testing and upon recent scientific research, in which he concluded to a reasonable degree of scientific certainty that Ms. Butzbach would not have heard a .22 fired inside the shop from her position in her office building (Def. App. Ex. 20).

Shop on a stretcher and being taken away in an ambulance (Def. App. Ex. 22, 23). This never happened. Officer Schadler walked out of the store under his own power and was taken to the hospital in a squad car, not an ambulance (Tr. 211, 330).

Mr. Carter also noted that Ms. Butzbach testified she did not recognize Officer Schadler when she saw him on the street in front of the shop on the day of the shooting (Tr. 425). Mr. Carter's postconviction motion, however, alleged that, after trial, Ms. Butzbach admitted that she knew Officer Schadler at the time, and had known him for several years (Def. App. Ex. 23). Mr. Carter alleged that it would have been important for the jury to know that Ms. Butzbach claimed that she did not recognize Officer Schadler, whom she knew, but did recognize Mr. Carter, whom she did not know (*id.*).

VICTOR MILLER

Victor Miller testified that just after the shooting he saw a black man run past him heading east on Main Street. When asked if he could identify Mr. Carter as that man, he testified that he thought he "could make a better identification" if Mr. Carter stood and walked (Tr. 464-65). After watching Mr. Carter walk in the courtroom, Mr. Miller testified that the demonstration "assisted" him, and that there was a "reasonable possibility" that Mr. Carter was the gunman (Tr. 465). He also testified that Mr. Carter was the only person in the courtroom who "resembled what I remember," and that he could not recall seeing anyone else since the shooting who resembled the gunman (Tr. 469).

Mr. Carter alleged, in his postconviction motion, that the jury should have heard, but did not hear, that, on the day of the shooting, Mr. Miller told police that "he didn't recall anyone running by him prior to the shots being heard nor after the shots" (Def. App. Ex. 24). Indeed, Mr. Miller told police that, after the shooting, an unidentified bystander told him that a black man "rather on the large size had been running east" (*id.*).

In his postconviction motion Mr. Carter offered a new affidavit from Mr. Miller in which he expressed concern that his trial testimony may have sounded like he was making an identification, when he in fact could not (Def. App. Ex. 25b). He said that the gunman walked past him before he realized there was any particular reason to take notice of the man, and that "Mr. Carter could have been the man, but just as easily might not have been the man" (*id*.). Mr. Miller also reported that, before he was called upon to identify Mr. Carter at trial, he had been informed that Officer Schadler had already identified Mr. Carter, that police believed Mr. Carter was the perpetrator, and that he likely had seen Mr. Carter's picture in the newspaper (Def. App. Ex. 25a, 25b). The jury heard none of this.

GRAYLING LOVE

Grayling Love testified at trial that he was present outside the Wig and Record Shop when Officer Schadler was shot (Tr. 377). He said he saw a man flee from the shop, and saw Officer Schadler chase and shoot at the man (*id*.). Mr. Love testified that Mr. Carter looked "somewhat similar" to the assailant, and then said he looked "so much like him he could pass for a twin" (Tr. 392).

With his postconviction motion Mr. Carter submitted an affidavit executed by Mr. Love after trial in which Mr. Love swore that, in fact, he could not identify Mr. Carter (Def. App. Ex. 27). In his affidavit, Mr. Love swore that he was guided by police and prosecutors to tailor his testimony to make it sound as if he could identify Mr. Carter (*id.*). He swore that, in fact, when he saw Mr. Carter at trial he observed that Mr. Carter was much lighter in complexion and had different hair than the man he saw fleeing from the Wig and Record Shop (*id*.).

In his postconviction motion Mr. Carter also alleged that the Government had withheld exculpatory evidence related to Mr. Love's purported identification of Mr. Carter. At trial, Mr. Love testified that he was offered no deals for his assistance to the Government. Mr. Carter alleged

and provided documentation to support the allegation that, contrary to that testimony, Mr. Love, was granted benefits in return for his cooperation with the government, including a furlough from prison to testify and a letter from police to the prosecutor asking him to dismiss pending credit card fraud charges against Mr. Love as a "reward" for his assistance (Def. App. Ex. 29).[8]

In its response to Mr. Carter's postconviction motion, the Government claimed that the prosecutor and an investigator had subsequently spoken with Mr. Love, and that he had recanted the statements he had provided to Mr. Carter (Govt. Brief at 42). Mr. Carter replied, noting that Mr. Love "recanted" only after the Government confronted him with his trial testimony and demanded that he choose a version, at which point he agreed to stick with his trial testimony and expressed fear about what was going to happen to him and how much trouble was he in (Def. Supp. App. L). The Government did not dispute that Mr. Love received a letter from the police asking the prosecutor to dismiss credit card fraud charges against him or that Mr. Love was granted a furlough, but disputed that the furlough had anything to do with his status as a witness at Mr. Carter's trial. The Circuit Court did not hold an evidentiary hearing to resolve these disputes about Mr. Love's statements or about the benefits he may have received in return for his cooperation.

GWEN (JONES, GILL) BAIRD

On the day of the shooting, Gwen Baird was the clerk on duty in the Wig and Record Shop (Tr. 366). She waited on the assailant for approximately 12 minutes, giving him her undivided attention during most of that time, under relatively non-stressful conditions, before he shot Officer Schadler (*id*.) On the day of the shooting she described the assailant as a tall, very dark-skinned, heavy-set black man, wearing a green army fatigue jacket (Tr. 364). At trial, the prosecutor asked Ms. Baird if she saw the assailant in the courtroom and she said "no" (Tr. 365). She was never

[8] The prosecutor did subsequently dismiss those charges, although ostensibly for other reasons (Def. App. Ex. 30).

specifically asked, by the prosecutor or defense counsel, whether or not Maurice Carter was the gunman, or if she was certain. If she had been asked this question she would have positively stated that Mr. Carter was not the man who shot Officer Schadler (Def. App. Ex. 13).

In his 6.500 motion Mr. Carter alleged that the jury did not hear important evidence that would have significantly enhanced the persuasiveness of her testimony. The jury did not hear that, in contrast to the Schadlers' statements that they could not identify the gunman, on the day of the shooting Ms. Baird told police that she "could definitely identify this assailant and agreed to cooperate with Police" (Def. App. Ex. 33). The jury also did not know that shortly after the shooting Mr. Carter was among the people brought to the store for Ms. Baird to view (Def. App. Ex. 13). Ms. Baird told the police officers that Mr. Carter was not the assailant. *Id.* The jury thus never learned that *within a few hours of the shooting* Ms. Baird positively excluded Mr. Carter.

The Government responded to this allegation by submitting an affidavit from a police officer swearing that he was the officer who took Mr. Carter to the shooting scene for an identification on the day of the shooting (Govt. App. Ex. SS). In that affidavit, the officer claimed to recall—although he made no report of the incident—that when he got to the shop no one was present, and he released Mr. Carter because other officers told him that Mr. Carter had already been cleared (*id.*). The Circuit Court did not hold an evidentiary hearing to resolve this factual dispute.

Mr. Carter's 6.500 motion also alleged that the jury should have known, but was never informed, that two days after the shooting Ms. Baird viewed two lineups in Kalamazoo with Mrs. Schadler. Neither woman identified anyone in the lineup, but both agreed that Luther Whitfield had the same complexion and build as the gunman (Def. App. Ex. 12). Mr. Whitfield has a much darker complexion than Mr. Carter (Def. App. Ex. 13).

Mr. Carter also alleged that the jury did not hear that Ms. Baird excluded Mr. Carter a second time approximately two weeks after the shooting when she was shown a series of mug

photos that included a photo of Mr. Carter (Def. App. Ex. 34). According to a police report, Ms. Baird viewed the photos for ten minutes and said the photo of a man named Meridy came closest to the suspect. According to the report, "when the witness came to the photo of Maurice H. Carter, she didn't appear to notice it a second time" (*id*.).

WILBUR GILLESPIE

At the preliminary hearing on January 15, 1976, Wilbur Gillespie testified that he saw Mr. Carter flee from the Wig and Record Shop after the shooting (Tr. 576, 580). Mr. Gillespie recanted that testimony at trial and admitted that he "lied on Maurice. He wasn't there. I woke him up in his room between 12 and 1" (Tr. 575). Mr. Gillespie admitted that he falsely accused Mr. Carter in return for a promise by police to drop serious heroin charges then pending against him (Tr. 573.)

In his postconviction motion Mr. Carter pointed out that the jury was unaware that the Government ultimately accepted Mr. Gillespie's recantation, as it later convicted him of perjury for his original, false allegations against Mr. Carter (Def. App. Ex. 5). Mr. Gillespie was sentenced to 15-30 years in prison, and served more than six years for the perjury (*id*.).

LUCY HODDER

Mr. Carter's 6.500 motion also offered evidence that a witness known to the police, but who was previously unknown to the defense and who was not called to testify at trial, could have testified that she saw the fleeing gunman, and that Mr. Carter was not that man (Def. App. Ex. 37a). Lucy Hodder swore in an affidavit that at the time of the shooting she was shopping one block east of and across the street from the Wig and Record Shop. As she crossed the street to her car on the northwest corner of Main and Sixth Streets (the same side of the street as the Wig and Record Shop), she heard a noise like firecrackers. After she got into her car, a dark-skinned black man wearing a dark-colored pea coat and dark stocking cap ran in front of her car, approximately 10 feet away from where she was seated. She stated that she saw a commotion in front of the Wig and

Record Shop and later learned that Officer Schadler had been shot at that time (*id*.).

Ms. Hodder states that the man she saw running had such a dark complexion that his face blended into the navy or black stocking cap that he was wearing. She has since seen color photographs of Maurice Carter, and has stated that Mr. Carter could not have been the man she saw running in front of her car on the day of the shooting (Def. App. Ex. 37a).[9]

ARGUMENT

I. MR. CARTER IS ENTITLED TO A NEW TRIAL BECAUSE HIS DEFENSE ATTORNEY PROVIDED CONSTITUTIONALLY INADEQUATE ASSISTANCE.

> **Standard of Review**: "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v. LeBlanc*, 465 Mich 575, 579; 640 NW2d 246, 249 (2002). The trial court's findings of fact are reviewed for clear error. *Id*. Questions of constitutional law are reviewed *de novo*. *Id*.

At first blush, the record in this case appears to indicate that Attorney James Jesse did what he could for the defense. His cross-examinations exposed inconsistencies in the various witnesses' descriptions of the perpetrator and, in the end, as tried, the government's case was not strong. But that facial review of this case is misleading. Counsel's errors in this case were pervasive and disastrous. They were errors of omission, which are not readily apparent without looking beyond the trial record. Counsel's errors involved failure to expose the vast majority of the exculpatory and impeaching evidence that was available and that, if presented, would have likely produced a not guilty verdict.

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[9] Mr. Carter also presented evidence from another new witness, Johnnie Williams, who stated that he believed he saw the fleeing gunman, on December 20, 1973, and that Mr. Carter was not that man (Def. App. Ex. 38). Mr. Williams saw the man fleeing away from the Wig and Record Shop down the alley behind Main Street (*id*.). During their investigation, police assumed that the gunman most likely cut through one of the buildings on Main Street, and continued running through the alley that runs parallel to Main Street (*id*.; Tr. 547-49). Mr. Williams's report of seeing this man in the alley, however, is inconsistent with the reports of Lucy Hodder and several witnesses at trial, who believed the man ran to the end of the block on Main Street, not down the alley behind Main Street. Mr. Carter offered Mr. Williams's new testimony to support his contention that, whichever route the gunman took, new witnesses would offer testimony that Mr. Carter was not that man.

To establish that he was denied his constitutional right to effective counsel, Mr. Carter must establish both that his attorney's performance "fell below an objective standard of reasonableness," and that the deficient performance "so prejudiced the defendant as to deprive him of a fair trial." *People v. Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994) (adopting the standard set forth in *Strickland v. Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)). In this case, counsel's performance was seriously deficient and prejudicial.

A. Defense counsel was ineffective in failing to investigate and utilize available exculpatory evidence.

1. Defense counsel failed to conduct an investigation or interview key witnesses before trial.

Attorney Jesse, who since 1975 has been suspended at least twice from the practice of law for neglecting client matters in criminal cases, (Def. App. Ex. 44), conducted essentially no investigation in this serious felony case. He interviewed no witnesses before trial, and instead relied completely on police reports provided by the prosecution. Because he failed to investigate, he failed to discover and present significant exculpatory evidence that otherwise would have been available.

Significantly, Mr. Jesse did not interview Lucy Hodder,[10] Connie Norris, Wilbur Gillespie, Grayling Love, or Victor Miller (Def. App. Ex. 37; Ex. 35; Ex. 2; Ex. 27; Ex. 25b; Tr. 516-517). Each of these witnesses, when interviewed by Mr. Carter's current counsel, provided substantial exculpatory evidence not previously known to the defense. Ms. Hodder, for example, was able to provide a description of the gunman that does not match Mr. Carter, and after viewing a photo of Mr. Carter, stated definitively that he was not the man she saw running from the scene of the shooting. Mr. Miller and Mr. Love have revealed that they could not identify Mr. Carter, that they

[10] As argued below, Mr. Carter maintains that Lucy Hodder is a new witness, because the defense was unaware of her previously. If, however, the court should conclude that counsel could have found and interviewed her before trial, then counsel's failure to do so constituted ineffective assistance of counsel. The claim that counsel erred by failing to interview and present Lucy Hodder's testimony is thus presented here as an alternative argument, should the court reject the newly discovered evidence or *res gestae* rule violation claimed below.

have serious doubts that he was the perpetrator, and that they were encouraged by police to identify Mr. Carter. Ms. Norris and Mr. Gillespie corroborate these statements about police pressure, and further undermine the credibility of the police investigation (Def. App. Ex. 35, Ex. 2).

In addition, Ms. Baird called Mr. Jesse before trial and asked if she could meet with him to discuss what she had witnessed, but Mr. Jesse declined. Thus, Mr. Jesse never even interviewed Ms. Baird, the witness who had the best opportunity to view the assailant and who is certain that Mr. Carter was not the gunman (Def. App. Ex. 13). Mr. Jesse thereby failed to learn that she had excluded Mr. Carter as the gunman when police brought him to the shop within hours of the shooting, that she had called Lt. Edwards when Mr. Carter was arrested two years after the shooting to tell him that Mr. Carter (whose picture she saw in the newspaper) was not the right man, and that police refused to speak with her or allow her to participate in the lineup that included Mr. Carter.

2. Defense counsel failed to present extensive available exculpatory information to the jury.

The failure to investigate was made worse by Mr. Jesse's failure to use the evidence that he did have. First, Mr. Jesse failed to utilize effectively the important testimony that Ms. Baird could offer. Because she had spent the most time with the assailant under relatively non-stressful circumstances, Ms. Baird had by far the best opportunity to observe the assailant. Her testimony should have been the centerpiece of the trial. The Government presented her testimony, as a *res gestae* witness, merely by asking her if she could "positively identify anybody in this courtroom as having been in the store on this date" (Tr. 365). When she responded that she didn't "see the officer and his wife in here," the prosecutor asked, "Anybody else, specifically the gunman?" (*id*.). She answered with a single word: "No" (*id*.). Her testimony, as presented by the government, merely suggested that she could not positively *include* Mr. Carter, when in fact, if asked, she would have testified that she could positively *exclude* Mr. Carter.

Mr. Jesse then failed to question her in a way that would have given her testimony the prominence it deserved, and would have shown that, not only did she not recognize anyone, she was indeed *certain* that Mr. Carter was not the gunman. He also failed to give her a chance to explain why she was so certain, including that the gunman was a very dark black man, and Mr. Carter is light-skinned. Finally, Mr. Jesse failed to elicit from her other facts that would have bolstered her testimony, including:

1. Ms. Baird excluded Mr. Carter within hours of the shooting, after police brought Mr. Carter to her in person.

2. She excluded Mr. Carter again within weeks of the shooting when police showed her Mr. Carter's photograph.

3. Unlike the Schadlers, who told police on the day of the shooting that they did not pay any attention to the gunman and did not get a description, she told police that day that she was confident that she would be able to identify the gunman.

4. At a lineup a few days after the shooting she identified a darker-skinned person as having the same complexion as the gunman.

5. She was not invited to attend the lineup after Mr. Carter's arrest.

Mr. Jesse also failed to utilize the information available to him in the police reports to show that the witnesses who purportedly identified Mr. Carter in fact could not reliably identify him, and that other evidence pointed toward innocence. For example, Mr. Jesse did not elicit any of the following exculpatory evidence:[11]

1. On the day of the shooting, Officer Schadler repeatedly told police that he did not know the assailant or get his description, and was wounded and dizzy before he looked at the gunman.

2. At the hospital, Officer Schadler described the assailant as a Negro male, approximately 30 years old, 160-170 pounds, and 5'10" or 5'11" tall. Mr. Carter was much larger—over 6' tall and 200 pounds.

3. Officer Schadler told police that after being shot five to six times in the head and neck, he

[11] If defense counsel failed to elicit this information because it was not available at the time of trial, the evidence qualifies as newly discovered evidence and can be considered by this Court. If the evidence was unavailable to defense counsel because of misconduct by the police or prosecution, the evidence can be considered by this Court as exculpatory evidence improperly withheld under *Brady v. Maryland*, *infra*, as argued below.

had fallen onto the gunman's legs. However, when police stopped Maurice Carter within hours of the shooting, there was no blood on him or his clothing.

4. Mrs. Schadler also made repeated statements to the police on the day of the shooting that she did not get a good look at the perpetrator, and described a man smaller than Mr. Carter.

5. On the day of the shooting, Mrs. Schadler told police that the shooter held the gun with his left hand, but Mr. Carter is right-handed.

6. Two days after the shooting Mrs. Schadler joined Gwen Baird at the lineup in Kalamazoo, where she identified a man much darker than Mr. Carter as having a similar complexion as the gunman.

7. Within two weeks of the shooting, Officer and Mrs. Schadler (like Ms. Baird) looked at Mr. Carter's mug photo and failed to identify him.

8. No positive identifications were made by any witnesses until after Mr. Carter's picture ran on the front page in January 1976, over two years after the shooting. Officer Schadler even admitted at the preliminary hearing that he saw Mr. Carter's picture on the front page of the paper before he picked Mr. Carter out at the lineup.

9. Although Nancy Butzbach testified at trial that she was certain Mr. Carter was the shooter, she told police the day after the shooting that all she saw was the "shadow of a black man" running away from the shop. Indeed, at trial she testified she saw the gunman from a distance of less than 100 feet. Measurements—never made or disclosed by trial counsel—reveal that in fact her building was more than 140 feet from the Wig and Record Shop, and then gunman was fleeing away from her, at an even greater distance, when she allegedly saw him.

10. On December 19, 1975, police showed Ms. Butzbach a photograph of three men: Maurice Carter, Wilbur Gillespie, and an unidentified black male. Ms. Butzbach told police that she had seen the unidentified man with the shooter earlier in the week of the shooting. She did not, however, identify Mr. Carter as the gunman.

11. Although Ms. Butzbach claimed at trial to be certain of her identification, at the lineup she said only that she "Saw #4 [Maurice Carter] at scene before shooting and I believe I saw him in area after the shooting" (Def. App. Ex. 3).

12. At trial, Victor Miller said he saw the gunman run past him on Main Street and said Mr. Carter looked like he could be the gunman. But on the day of the shooting, Mr. Miller told police that "he didn't recall anyone running by him prior to the shot being heard nor after the shots" (Def. App. Ex. 24).

13. By the time Mr. Miller tentatively identified Mr. Carter as the gunman at trial, he had been told that Officer Schadler had identified Mr. Carter as the gunman.

14. Lucy Hodder saw the fleeing gunman, and could have testified that Mr. Carter was not that

man.[12]

Most of this evidence was available to Mr. Jesse in police reports provided to him before trial, or could have been obtained by him if he had only interviewed the witnesses before trial or cross-examined them during trial. Failure to obtain and present this significant exculpatory evidence fell well below prevailing norms for reasonably adequate representation. *See People v. Johnson*, 451 Mich 115, 120-22; 545 NW2d 637 (1996) (counsel ineffective for failing to call witnesses with exculpatory evidence).

3. These errors prejudiced the defense.

The sheer magnitude of the exculpatory evidence that Mr. Jesse overlooked establishes that his errors prejudiced the defense. There is more than a reasonable probability that, had the jury heard all of the evidence that Mr. Jesse overlooked, the result of the trial would have been different.

In many ways, this case is much like *Kyles v. Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995), in which the U.S. Supreme Court held that the failure to present exculpatory evidence undermined confidence in the outcome, and created a reasonable probability of a different outcome at a retrial.[13] In *Kyles*, like this case, multiple eyewitnesses to a shooting gave dramatically different descriptions of the assailant. 514 US at 423. The case against Kyles rested primarily upon the testimony of four eyewitnesses. *Id*. at 429, 441. Unlike this case, however, in *Kyles* the government also had physical evidence—the victim's stolen purse was found in the defendant's trash, the murder weapon was found hidden in his kitchen, groceries of the type stolen from the victim were found in his kitchen, and the defendant's fingerprints were found on a grocery receipt in the victim's car. *Id*. at 427-28.

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[12] Again, this argument is presented in the alternative, as explained in footnote 8, *supra*.

[13] *Kyles* involved a claim that the government withheld exculpatory evidence, not a claim of ineffective assistance of counsel. But the Court made clear that the materiality of the suppressed exculpatory evidence turned on whether the evidence created a reasonable probability of a different outcome, and that the standard is identical to the standard for evaluating prejudice in a claim of ineffective assistance of counsel. 514 US at 434, 436. The analysis of the evidence in *Kyles* is therefore fully applicable here.

The Supreme Court nonetheless held that evidence not presented to the jury undermined confidence in the outcome and required a new trial. That evidence included the revelation that two of the four eyewitnesses who identified Kyles had made police statements inconsistent with their trial testimony.[14] One witness testified he had seen the actual shooting, and identified Kyles as the shooter. But his statements to police, which were never disclosed and hence not heard by the jury, indicated that his initial description did not match Kyles. *Id*. at 441. Failure to disclose this evidence contributed significantly to the Court's finding that a new trial was required. As the Court put it:

> The jury would have found it helpful to probe [the witness's identification] in the light of [his] contemporaneous statement, in which he told the police that the assailant was "a black man, about 19 or 20 years old, about 5'4" or 5'5", 140 to 150 pounds, medium build" and that "his hair looked like it was platted." App 197. If cross-examined on this description, Williams would have had trouble explaining how he could have described Kyles, 6-feet tall and thin, as a man more than half a foot shorter with a medium build.

Id. at 441.

A second witness similarly claimed at trial that he saw the shooting, and that Kyles was the assailant. Immediately after the shooting, however, this witness had told police that he had *not* seen the actual murder, that he only heard the shot and then saw the victim lying on the ground, and that he had not seen the assailant until the assailant was driving away. *Id*. at 443. At trial, however, he testified not only that he saw the shooting, but was able to describe the shooting "with such detailed clarity as to identify the murder weapon as a small black .32-caliber pistol, which, of course was the type of weapon used." *Id.* He also changed his description of the victim's car, and omitted details he had initially provided in his description of the suspect that did not match the descriptions given

[14] The suppressed evidence also included various inconsistent statements from another individual (who did not testify at trial, but was instrumental in the police investigation), that would have provided a basis for challenging the probative value of "crucial physical evidence," casting suspicion on that individual as the true perpetrator, and challenging the thoroughness and good faith of the police investigation. *Kyles*, 514 US at 445. That does not distinguish *Kyles* from this case, however, because here too there is significant other evidence that the jury did not hear, both because of counsel's errors and because the government suppressed it, as outlined elsewhere in this brief.

by others. *Id*. The Supreme Court viewed these discrepancies as significant:

> A jury would reasonably have been troubled by the adjustments to [this witness's] original story by the time of the second trial. … These developments would have fueled a withering cross-examination, destroying confidence in [his] story and raising a substantial implication that the prosecutor had coached him to give it.

Id. The Court reasoned that, "[s]ince the evolution over time of a given eyewitness's description can be fatal to its reliability, … the [witnesses'] identifications would have been severely undermined by use of their suppressed statements." *Id*. at 444.

By the same reasoning, the failure to reveal to the jury the discrepancies in the various eyewitnesses' accounts undermines confidence in the outcome of Mr. Carter's trial. The testimony of every one of the five eyewitnesses in this case (as opposed to only two of the four eyewitnesses in *Kyles*) evolved significantly to support the government's case, but the jury never knew it. Like the witnesses in *Kyles*, the three witnesses who testified with confidence that Mr. Carter was the gunman each made grossly inconsistent statements to police at the time of the shooting. Both Officer and Mrs. Schadler said they paid no attention to the gunman before the shooting began and couldn't provide much of a description; both described a man significantly smaller than Mr. Carter; both had failed to identify Mr. Carter's photograph, and indeed had excluded him in photographic arrays; neither ultimately identified him until after they had been exposed to his photograph numerous times; Mrs. Schadler identified a much darker-skinned man as having the same complexion as the shooter, and said the gunman used his left hand. Nancy Butzbach initially told police she only saw a "shadow of a black man" (Ex. 15), failed to identify Mr. Carter in photos, did not identify him at the lineup as the shooter or with any confidence, and made numerous other inconsistent and inaccurate statements.

Even the testimony of the more tentative eyewitnesses—Victor Miller and Grayling Love—was inconsistent with prior statements, or otherwise subject to impeachment. Victor Miller, for

example, told police on the day of the shooting he did not see the fleeing gunman, but had been told by others that a black man had run by.

As in *Kyles*, this impeachment evidence should have led to "a withering cross-examination [of each witness], destroying confidence in [their] stor[ies] and raising a substantial implication that the prosecutor had coached [them] to give it." *Id.* But counsel failed to use the evidence. As in *Kyles*, this evidence, particularly when combined with all the other evidence never disclosed to the jury, demonstrates that there is a reasonable probability of a different outcome.

Add to that the fact that, in this case, counsel overlooked affirmative evidence of innocence—such as Lucy Hodder's testimony and the missing parts of Gwen Baird's testimony—and the prejudice from counsel's errors becomes apparent.

Despite the power of this claim of ineffective assistance of counsel, the Circuit Court dismissed the claim in a single paragraph. After reciting the two-prong *Strickland v. Washington* test, the Court's entire analysis consisted of the following: "One can second guess and suggest that an attorney should have asked more but every experienced attorney remembers vividly asking one too many questions, resulting in disaster. The defendant has failed to show that Mr. Jesse's performance fails the *Strickland* test" (Opinion at 13; App. A).

The Court simply ignored the mountain of exculpatory evidence that defense counsel could have elicited, but failed to elicit. The Court ignored that counsel could not make strategic decisions about what questions to ask the witnesses, because he never interviewed any of the witnesses before trial. *See People v. Kelly*, 186 Mich App 524, 526; 465 NW2d 569, 570 (1990) ("A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses."); *People v. Lewis*, 64 Mich App 175, 183; 235 NW2d 100,104 (1975) ("The importance of defense counsel's pretrial investigation and preparation cannot be overemphasized."). The Court apparently posited that counsel deliberately chose to refrain from eliciting any of this additional

exculpatory evidence for fear of asking one question too many. But without holding an evidentiary hearing, there simply is no basis in the record for that assumption. *See People v. Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973) (when defendant claims ineffective assistance of counsel, "the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion"); *Harris v. Reed*, 894 F2d 871, 878 (7th Cir. 1990) (reviewing court "should not … construct strategic defenses which counsel did not offer.").

Moreover, any such purported strategic decision simply would not be reasonable, as no competent attorney would refrain from cross-examining the Government's witnesses, or from questioning his own witnesses, about some of the most exculpatory evidence available, out of fear of the unknown. If that were sufficient lawyering, no lawyer would ever be expected to do more than just scratch the surface in developing and presenting exculpatory evidence. And the Circuit Court's decision seriously undervalues the prejudicial effect of counsel's errors. Especially given that this was such a close case even on the evidence that was presented at trial, counsel's failures to present all of the significant evidence outlined here were unavoidably prejudicial.

B. Defense counsel provided ineffective assistance by failing to move to suppress the tainted eyewitness identifications.

The eyewitness identifications in this case made by Officer Schadler, Mrs. Schadler, and Ms. Butzbach were the product of a grossly suggestive procedure. As outlined above, these witnesses were repeatedly shown Mr. Carter's photograph before they ultimately picked him at the lineup. They purported to identify him for the first time more than two years after the offense, after memories had faded and were then shaped by the intervening images they saw of Mr. Carter. Furthermore, the "identifications" were made at a lineup held only shortly after Mr. Carter's picture was published on the front page of the newspaper, when all knew that the suspect had been apprehended and was in that lineup. The Circuit Court failed to address this claim of ineffective

assistance of counsel at all; the Court's decision simply ignores it in its entirety.

But both case law and psychological literature at the time established that identifications under the conditions involved here were highly suspect and subject to misidentification. Indeed, in *People v. Anderson*, 389 Mich 144, 172; 205 NW 2d 461 (1973), decided three years before Mr. Carter's trial, the Michigan Supreme Court recognized a number of factors, all present here, that undermine the accuracy of eyewitness identifications. Those factors include: (1) the unexpected nature of the incident; (2) the witnesses' emotional response, such as stress or fear, to the incident; (3) the "filling in" of memory; (4) the possibility of "group pressure" to identify the same person; (5) and the passage of more than two years before identification. *Id*. These factors all apply to the identifications by the Schadlers and Nancy Butzbach, but *not* to Gwen Baird's exclusion.

The U.S. Supreme Court has made clear that, under the due process clause, reliability is the key. *Manson v. Brathwaite*, 432 US 98, 114 (1977). The factors to be considered include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the level of certainty demonstrated "at the confrontation"; and (5) the time between the crime and the confrontation. *Id.*

Four of these factors weigh heavily against the reliability of these identifications. (1) The witnesses all described very limited opportunities to view (the Schadlers observed the gunman only after bullets were flying and the man was fleeing; Butzbach only saw him fleetingly, and at the time of the crime from a great distance). *See United States v. Singleton*, 702 F2d 1159, 1178-79 (D.C. Cir. 1983) ("Psychological studies have shown that individuals under high stress tend to focus on relatively few features of their environment. Where a weapon is brandished it tends to capture a good deal of attention, thereby reducing the ability to recognize and to recall details about an assailant."); *Thigpen v. Cory*, 804 F2d 893, 897 (6th Cir. 1986) ("This court has previously noted the important effects stress or excitement may have on the reliability of an identification."); *People v.*

Kachar, 400 Mich 78, 94-98; 252 NW2d 807, 814-15 (1977). (2) The Schadlers repeatedly said they paid no attention at all before the shooting began, and Nancy Butzbach has only described an unremarkable chance observation of a man earlier in the day, and has admitted that after the shooting she didn't look at all until the gunman was down the block. (3) The descriptions provided were general at best, and did not match Mr. Carter in significant respects. And (5) the identifications did not occur until over two years after the incident.

Only one factor, the witnesses' asserted confidence, supports the reliability of these identifications in any way. Yet scientific study since *Brathwaite* was decided has established that this factor really bears very little, if any, relationship to reliability, and is itself influenced by the suggestiveness of an identification procedure. *See Singleton*, *supra*, 702 F2d at 1179. These identifications should have been suppressed, and most likely would have, had Mr. Jesse filed a motion.

Had the court found the pretrial identifications to be tainted, the in-court identifications also would have been suppressed, as there was no basis for concluding that the in-court identifications had an independent source. *See People v. Prast*, 114 Mich App 469, 486; 319 NW 2d 627 (1982); *see also People v. Currelly*, 99 Mich App 561, 565-66; 297 NW 2d 294 (1980) (citing *Kachar*, *supra*). Indeed, the in-court identifications were made just a few months after the out-of-court identifications, but almost two and a half years after the crime.

Defense counsel ultimately recognized that the identifications should have been suppressed, as he brought up this issue on direct appeal (Appellant's Brief on Direct Appeal at 18-24). Because Mr. Jesse failed to preserve the issue, however, the Court of Appeals deemed the issue waived on direct appeal (Order, May 29, 1979, No. 78-2118 (Mich Ct App)). Mr. Jesse's error deprived Mr. Carter of any right to appellate review of this critical issue.

This error was highly prejudicial. If the identifications had been suppressed, the

Government would have been left with no case. Questionable eyewitness identification was the whole case. Failure to make any attempt to keep out the identifications in such a case was deficient performance that seriously compromised the defense.

II. A NEW TRIAL IS ALSO WARRANTED BECAUSE THE STATE FAILED TO TURN OVER MATERIAL EXCULPATORY EVIDENCE TO DEFENSE COUNSEL, IN VIOLATION OF DUE PROCESS.

Standard of Review: A claim that the prosecutor violated due process by failing to disclose exculpatory evidence presents a constitutional question subject to *de novo* review. *People v. Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *People v. Lester*, 232 Mich App 262, 276-77; 591 NW2d 267 (1998).

A. The Government was obligated to disclose to the defense all material exculpatory evidence in its possession.

Some of the evidence of Mr. Carter's innocence was never heard by the jury because the prosecution kept that exculpatory evidence from the defense, in violation of Mr. Carter's due process rights. The United States Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

In Michigan, to establish a *Brady* violation a defendant must prove: "(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable due diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v. Lester*, 232 Mich App 262, 276, 281-82; 591 NW 2d 267 (1998).

The prosecution's failure to disclose evidence favorable to the defense violates the constitution and requires reversal if the withheld information was "material" to the defense. *United States v. Bagley*, 473 US 667, 676-77; 105 S Ct 3375; 87 L Ed 2d 481 (1985)*; Giglio v. United*

States, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972); *United States v. Trujillo*, 136 F3d 1388, 1393 (10th Cir. 1998). Undisclosed evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Bagley, supra* at 682*; People v. Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). This does not require the defendant to prove that a different outcome is more likely than not. *Kyle supra*, 514 US at 434. Instead, a "reasonable probability" of a different outcome is "a probability sufficient to undermine confidence in the outcome." *Bagley, supra* at 682. The duty to disclose exculpatory evidence extends to impeachment evidence. *Id*. at 676-78. The test should be liberally construed, especially when "'substantial room for doubt' exists as to the effect disclosure might have." *People v. Eddington*, 53 Mich App 200, 206; 218 NW2d 831 (1974) (quoting *United States v. Bryant*, 439 F2d 642 (1971)). In cases such as this one, where the evidence is not strong or where "the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States v. Agurs*, 427 US 97, 112-13; 96 S Ct 2392, 2401-02; 49 L Ed 2d 342 (1976).

B. The prosecution withheld material exculpatory evidence.

At least two significant categories of material exculpatory evidence were withheld from the defense in this case, in violation of *Brady*. First, the government withheld the fact that Grayling Love was offered benefits in return for his testimony. Second, the government withheld the fact that an initial version of a police statement taken from Ruth Schadler the day of the shooting was altered to change her description of the gunman.

Grayling Love. Grayling Love was a key witness in the case against Mr. Carter. He testified at trial that he was at the scene of the assault on December 20, 1973, and identified Mr. Carter as looking like the assailant. He also testified that he was offered no deal for his testimony.

On cross-examination, defense counsel queried him on that point, and he denied any deal:

> Q: Did you make any deal with the Prosecutor's office in regard to your testimony here today?
> A: No sir, And, I would not like to make any either.

(Tr. 387.) After trial, Mr. Carter's attorneys learned, however, that Mr. Love was cooperating with the Government pursuant to a deal and that he received considerable benefits for his testimony.

While police were investigating this case, Mr. Love was arrested on charges of fraudulent use of a credit card. He first began cooperating with police in Mr. Carter's case while those charges were pending. In a letter dated March 24, 1975, a month before Mr. Carter's trial, Lt. Edwards, the chief investigating officer in the Schadler shooting, wrote to the Berrien County Prosecutor, as follows: "we are herewith requesting that further prosecution of Grayling Love in the fraudulent credit card use be nolle or at least remain dormant until this Carter case has been decided. In other words, the only thing that we are requesting is that Grayling Love be not prosecuted…" (Def. App. Ex. 29 (underscore in original)). Lt. Edwards wrote, "the problems we are having obtaining people for courtroom testimony warrants the above reward for Grayling Love" (*id.*). Regardless of whether Mr. Love recognized that this constituted a deal about which the defense was entitled to know, the prosecution should have. Yet the prosecutor did nothing to correct the inaccuracy or disclose the truth about the deal.

The credit card charges against Mr. Love were indeed subsequently dismissed, although ostensibly not pursuant to any deal with Mr. Love, but because prosecutors decided they had other charges (a subsequent arson) that were sufficient. Even if it is true that the charges were not dismissed pursuant to an explicit deal between the prosecutor's office and Mr. Love, the fact remains that Mr. Love began cooperating with police pursuant to an arrangement under which Lt. Edwards recommended that the credit card charges be dismissed. And the government conferred the benefits of that bargain—the letter from Lt. Edwards asking that the charges be dismissed in

return for his cooperation in identifying Mr. Carter. That was a substantial benefit to Mr. Love, and the defense was entitled to know about it, so that the issue could be explored on cross-examination. *See Giglio*, *supra* at 150 (failure to disclose the promise of a deal to a witness in return for his testimony violates due process); *cf. Davis v. Alaska*, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974) (defendant is entitled to cross-examine state's witnesses to expose bias arising from witness's own criminal problems and resulting incentive to curry favor with the state); *Delaware v. Van Arsdall*, 475 US 673, 678-79; 106 S Ct 1431; 89 L Ed 2d 674 (1986) (same).

The prosecution also failed to disclose that Mr. Love was granted the benefit of a furlough to testify at Mr. Carter's trial. At trial, Mr. Love admitted that he was under the jurisdiction of the Department of Corrections (DOC), but denied that he was incarcerated (Tr. 387).

In the postconviction proceedings, however, the Government conceded that Mr. Love was indeed at the time serving a prison term, and that he had testified at Mr. Carter's trial while on a furlough. Love was sentenced on July 7, 1975, on his conviction for attempted arson. He was sentenced to two to five years and his sentence was terminated on May 20, 1978. According to the DOC, its "database indicates that this inmate was incarcerated" during this time, and was "discharged on 5/20/78," almost two years after the trial in which he testified that he was not incarcerated (Def. App. Ex. 31).

This furlough constituted a second tangible benefit for Mr. Love's testimony against Mr. Carter. This grant of temporary freedom was both unusual and significant, and the government's failure to disclose it to the defense again undermined counsel's ability to cross-examine Mr. Love.

Not only did the Government fail to disclose evidence of the benefits it had conferred on Mr. Love, the Government sought advantage from the violation. In closing argument, the prosecutor urged the jury to believe Mr. Love because he was impartial and had no self-interest in his testimony. Taking advantage of defense counsel's ignorance of Mr. Love's benefits, the

prosecutor told the jury: "Remember, no promises had been made to Mr. Love. He testified to that" (Tr. 712). The prosecutor repeatedly emphasized Mr. Love's credibility in his closing argument to the jury, and thereby misled the jury into believing that Mr. Love received no benefits for his testimony and was thus completely impartial (Tr. 728-29).

While the Government conceded in the postconviction proceedings that Mr. Love was indeed serving a prison sentence at the time of the trial and had been released on a furlough, the Government disputed that the furlough had anything to do with its need for Mr. Love's testimony. The Government claimed that Mr. Love arranged the furlough to look for employment in anticipation of his parole, and that it was just a coincidence he was free to testify against Mr. Carter. But such a convenient coincidence is implausible; the Government surely was in on the arrangements—as evidenced by the fact that the Government knew in advance not to issue a writ to arrange for Love to be brought from prison to testify, and instead issued a subpoena for him to get himself to court. Moreover, under the Michigan policy directive governing furloughs in 1976 (Govt. App. KK at 70), Mr. Love would not have been eligible for a furlough to seek employment. Employment furloughs were granted only to offenders who did not exhibit "behavior indicating them to be an unwarranted risk to the public" (*id*. at 71, sec. IV(4)). Love, however, was serving time for an attempted arson of a dwelling house, an extremely dangerous crime that surely rendered him a risk to the public. Indeed, at Love's sentencing hearing on July 7, 1975, the judge noted the extreme danger he presented to the community (Def. Supp. App. K at 3). And when Love was ultimately paroled, his parole plan didn't include any employment; his parole notice lists his occupation as "student" (Govt. App. HH at 67).[15]

[15] Additionally, the timeline surrounding Love's furloughs makes the Government's explanation dubious at best. Love stated he had already taken "two or three" furloughs by the time he was furloughed to testify at Mr.

Despite the irrefutable evidence that the police wrote a letter requesting that charges be dismissed against Mr. Love as a "reward" for his assistance, and despite these significant factual disputes about the reason for Mr. Love's furlough, the Circuit Court did not hold an evidentiary hearing. Instead, the Court merely declared, in conclusory fashion, that "there is not a shred of evidence, or proposed evidence, to show that the witness, Mr. Love, had any knowledge or information about any promise, arrangement, request, or deal in consideration of his testimony" (Opinion at 10; App. A). The Court inexplicably ignored the letter from Lt. Edwards and the undisputed fact that Mr. Love was furloughed from prison at the time he was needed to testify against Mr. Carter. This was critical evidence that the defense was entitled to know of, and use, to impeach Mr. Love by showing that he had reasons to curry favor with the Government.

Ruth Schadler. The government also withheld evidence that Ruth Schadler's initial police report apparently was altered to change her description of the assailant's complexion from "dark" to "medium." While it is unclear who altered the report or when it was altered, it is clear that someone altered it, and that the defense knew nothing of this at the time of trial.

The existence of the previously undisclosed report at the very least provides substantial reason to doubt the reliability of Mrs. Schadler's trial testimony. The gunman's complexion was a significant issue at trial. Gwen Baird has consistently insisted that Mr. Carter could not have been the gunman in part because the gunman had a much darker complexion. Indeed, as noted above, both Ms. Baird and Mrs. Schadler identified a dark-skinned man at a lineup shortly after the shooting as having a complexion like the gunman's. This additional information, suggesting that Mrs. Schadler had initially described the gunman as "dark," and that someone altered that report,

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Carter's trial (Govt. App. Ex. VV). Under the Michigan DOC Policy Directive, furloughs could only be "granted at not less than 4 week intervals" (Govt. App. Ex. KK-72). Therefore, the latest date that Love's series of furloughs could have begun was on January 28, 1976. This was *nine months* before Love was paroled. It is difficult to understand why Love would be awarded furlough to seek employment a full nine months before he was released.

provides strong evidence that Mrs. Schadler's identification of Mr. Carter was wrong. Withholding that report from the defense violated *Brady*.

The Circuit Court denied that the discovery of this altered report provided any *Brady* material. The Court reasoned that, while the new copy of the report might support a conclusion that Mrs. Schadler initially said the assailant's complexion was dark, "[t]he facts would equally support a contemporaneous correction" (Opinion at 7; App. A). But that very observation makes the point that this is *Brady* material. If it was equally likely that this was evidence of an inconsistent statement by Mrs. Schadler and an alteration of her original statement, then the jury should have had this evidence so that it could have evaluated the likelihood of such a scenario. Withholding the report from the defense meant that possibility could never be investigated or presented by the defense or evaluated by the jury.

The Circuit Court also dismissed the significance of that report, concluding that, "[r]egardless, this police report is hearsay and would be admissible only to impeach Mrs. Schadler's trial testimony …" (Opinion at 7; App. A). That the report itself is hearsay, however, is not significant, given that it would have been admissible either through Mrs. Schadler or the officers who took the report as a prior inconsistent statement. And that it would have been admissible to impeach Mrs. Schadler is legally irrelevant. The U.S. Supreme Court has made clear that withholding of impeachment evidence can violate *Brady*. *See Kyles v. Whitley,* 514 US at 434. The Circuit Court's decision betrays a fundamental misunderstanding of *Brady*.

Had all of this evidence been disclosed to the defense, there exists a very reasonable probability that the result of the proceedings would have been different. In evaluating the effect of this evidence, the evidence must be considered collectively, not item by item. *Fink, supra* at 455. As in *Kyles v. Whitley*, even if a single piece of this evidence would not undermine confidence in the outcome, in combination the suppressed impeachment evidence creates a reasonable probability

of a different outcome. *Kyles, supra* at 454.

III. MR. CARTER WAS DENIED A FAIR TRIAL BECAUSE THE GOVERNMENT FAILED TO PRODUCE OR MAKE AVAILABLE AN IMPORTANT *RES GESTAE* WITNESS.

Standard of Review: The trial court's factual findings, including whether a witness is a *res gestae* witness, are reviewed for clear error. *People v. Baskin*, 145 MichApp 526, 531; 378 NW2d 535 (1985). A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion. *People v. Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002). "An abuse of discretion is found when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *Id*. at 326.

Lucy Hodder was an important *res gestae* witness: just like the eight witnesses who testified at trial that they saw the gunman fleeing from the store, Lucy Hodder saw the fleeing gunman as he ran east down Main Street. Just like all these other witnesses, the government knew she was a *res gestae* witness; Ms. Hodder was named in a police tip report shortly after the shooting (Def. App. Ex. 37b). But Ms. Hodder would have affirmatively excluded Mr. Carter as the perpetrator (Def. App. Ex. 37a). And, unlike these other witnesses, the Government did not produce Ms. Hodder at trial or make her available to the defense, as was then required under the *res gestae* rule. Under the rule as it then existed in M.C.L. § 767.40; M.S.A. § 28.980, the Government had an "affirmative duty … to endorse and produce at trial all res gestae witnesses."[16] *People v. Baskin*, 145 MichApp 526, 531; 378 NW2d 535 (1985). The Government violated this duty in this case with regard to Lucy Hodder.

In such cases, the "defendant is presumed prejudiced" unless the prosecutor "can establish that the missing testimony would have been of no assistance to the defendant…." *People v. Pearson*, 404 Mich 698, 724; 723 NW2d 856 (1979). Given the closeness of this case, and the

[16] The rule has since been modified, but even under the current version, the prosecutor has a continuing duty to provide notice of known witnesses and to give reasonable assistance in the locating of witnesses if a defendant requests such assistance. *People v. Kevorkian*, 248 MichApp 373, 441; 639 NW2d 291 (2001).

importance of Ms. Hodder's testimony affirmatively asserting that Mr. Carter was not the gunman, the government cannot meet that burden here.

Without holding a hearing to hear Ms. Hodder's testimony, the Circuit Court rejected the claim that she was a *res gestae* witness. The Court declared that "[d]efense counsel surmises that [the man Ms. Hodder saw] was the gunman involved in this case. There is nothing to support this assumption" (Opinion at 6; App. A). On this record, that conclusion is astounding and is clearly erroneous. The Government never disputed that Ms. Hodder saw the fleeing gunman, but rather argued only that her testimony was merely cumulative to that of *other witnesses who also saw the fleeing gunman* (Govt. Brief at 67). And there is every bit as much reason to believe that the man Ms. Hodder saw was the gunman as to believe that the other witnesses saw the gunman. Ms. Hodder reported that she was at the end of the block, in the path of the gunman, at the time of the shooting, and that she heard what sounded like firecrackers and then saw a black man fleeing the scene (Def. App. Ex. 37a). She then saw a commotion in front of the Wig and Record Shop (*id.*). This is precisely the type of evidence that (even better evidence than) many of the other *res gestae* witnesses who testified at trial drew upon to conclude that they had seen the gunman. For example, just to mention a few, Nancy Butzbach heard what sounded like shots and looked out the window to see a man running down the block (Tr. 424); Victor Miller was down at the end of the block and saw, or was told of, a black man who ran past him (Tr. 460-62); Rosie Barnes saw a commotion at the shop and saw man running down the street (Tr. 529). No one has ever questioned that these witnesses saw the fleeing gunman; there is no reason to question what Lucy Hodder saw either.

The Circuit Court then concluded that, even if Ms. Hodder did see the gunman, her testimony was merely cumulative to that of other witnesses who said the gunman was not Mr. Carter (Opinion at 7; App. A). But just because Ms. Hodder would have agreed with Gwen Baird and Connie Allen that Mr. Carter could not have been the gunman, and would have

disagreed with the Government's identification witnesses, that did not make her testimony merely cumulative. In a case that relied solely on eyewitness testimony—where there was no physical evidence, no confession, no significant evidence of any other type—each eyewitness account was critical. Every trial witness who identified or excluded Mr. Carter was important, even though some agreed with one another. Ms. Hodder was no more cumulative and unnecessary than any of the 13 eyewitnesses who testified at trial, or the five witnesses on whom the Government relied to support each other's testimony that Mr. Carter was probably the gunman.[17]

Evidence is not merely cumulative, and hence insignificant, merely because it covers a topic also addressed by other witnesses. *See United States v. Fulcher,* 250 F2d 244, 250 (4th Cir. 2001) ("Evidence is cumulative if repetitive, *and* if the small increment of probability it adds may not warrant the time spent in introducing it." (quoting 1 Weinstein's Evidence ¶401[07] (1985)); *see also United States v. Williams*, 81 F3d 1434, 1443 (7th Cir. 1996). In this very close case built upon conflicting eyewitness accounts, Lucy Hodder's unequivocal assertion that Mr. Carter was not the fleeing gunman was, by any fair view of the case, more significant than merely cumulative evidence.[18] The Government's *res gestae* violation requires a new trial.

[17] Moreover, Lucy Hodder was the only witness who said she saw the gunman run east on Main, then north on Sixth Street and then "cross over to the east side of the street and last seen heading towards Territorial" (Def. App. Ex. 37b).

[18] The Government argued repeatedly in the Circuit Court that Ms. Hodder's proffered testimony was also valueless because she said she never saw the gunman's face. That is not what she has said, however. The tip sheet dated the day of the shooting indicates that she said she could not identify the gunman (Def. App. Ex. 37b)—but that is the same type of statement that Tom and Ruth Schadler repeatedly gave on the day of the shooting, and that has not disqualified their identification testimony. In her recent affidavit, Lucy Hodder indicates that she knows Mr. Carter was not the gunman because she could see the man's complexion, and it was very dark, while Maurice Carter's is light (Def. App. Ex. 37a).

IV. A NEW TRIAL IS ALSO WARRANTED BASED ON NEWLY DISCOVERED EVIDENCE.

Standard of Review: A trial court's decision whether to grant a new trial based on newly discovered evidence is reviewed for an abuse of discretion. *People v. Miller (after remand)*, 211 Mich App 30, 47; 535 NW2d 518 (1995).

A. Abundant new evidence pointing toward innocence is now available.

Much of the evidence of innocence was not available previously. This new evidence, taken individually and cumulatively, meets the standard under Michigan law for a new trial based on newly discovered evidence. The evidence (1) is newly discovered; (2) is not merely cumulative; (3) is such as to render a different result probable on retrial; and (4) could not have been produced at trial through the exercise of reasonable diligence.[19] *People v. Lester*, *supra*, 232 Mich App at 271; *People v. LoPresto*, 9 Mich App 318; 156 NW 2d 586 (1968). The evidence includes:

1. Lucy Hodder and Johnnie Williams both have now come forward as eyewitnesses offering testimony that Mr. Carter was not the gunman.

2. A newly discovered police report reveals that Ruth Schadler apparently initially told police that the gunman was dark-skinned, not medium- or light-skinned like Mr. Carter. The report shows that the word "dark" on that report was overwritten with the word "medium." The newly discovered report contrasts with police reports disclosed to the defense before trial and Mrs. Schadler's trial testimony indicating only that she had described the gunman as having a medium complexion.

3. Victor Miller and Grayling Love now state that, contrary to their trial testimony or the impression created by their trial testimony, they could not identify Maurice Carter. Indeed, Mr. Love now states that when he saw Mr. Carter in the courtroom he was surprised because Mr. Carter was much lighter in complexion than the gunman.

4. Evidence now shows that, contrary to testimony offered by the government at trial, he was offered benefits in return for his testimony, including a furlough from prison and a letter from police requesting dismissal of pending felony charges.

5. Nancy Butzbach has conceded, and audiology tests confirm, that she did not hear the .22 caliber gunshots inside the Wig and Record Shop as she claimed at trial, but heard only the .38 fired on the street as the gunman fled. Therefore, she could not have been alerted to run to the window of her office in time to see the gunman fleeing from the shop, and she has

[19] To the extent that the court might conclude that any of this evidence could or should have been discovered before trial, Mr. Carter maintains, as set forth above, that his trial attorney provided constitutionally ineffective assistance by failing to do so.

admitted that at best she only saw the gunman when he was at the far end of the block, and did not see his face from the front, but only from the back and side.

6. New measurements establish that Ms. Butzbach was not less than 100 feet from the assailant, as she claimed at trial, but well in excess of 140 feet from the assailant. New expert testimony establishes that human beings are not capable of identifying facial details from that distance.

7. Ms. Butzbach has made other new statements that also demonstrate she could not have seen what she claimed, including an admission that, contrary to her trial testimony, she knew Officer Schadler at the time, yet could not recognize him from her distance, while she claims to have been able to identify the *unknown* gunman with certainty from that distance.

8. Ms. Butzbach claims to remember events from the shooting—such as Officer Schadler being carried to an ambulance on a stretcher—that never happened.

B. This evidence is new and not merely cumulative.

This new evidence meets the first requirement for a new trial based on newly discovered evidence—it is new. Evidence is considered newly discovered if the defendant was unaware, at the time of trial, that such evidence existed. *LoPresto*, *supra*, at 325. Neither Mr. Carter nor his attorney was aware of any of the evidence listed above at the time of trial.

This evidence also satisfies the second prong of the newly discovered evidence test, because it is not merely cumulative of other evidence in the case. All of the evidence outlined above is different from that presented at trial. As noted above, the Circuit Court concluded that the new testimony of Lucy Hodder was cumulative. Similarly, the Court concluded that the new testimony from Johnnie Williams, to the effect that he saw the gunman fleeing the scene, and that man was not Mr. Carter, was also cumulative. But, as argued above, new eyewitness testimony excluding Mr. Carter, like all the other eyewitness testimony addressing the dispute at the heart of this case—whether Mr. Carter was the man who shot Thomas Schadler—is not merely cumulative.

Together, the new evidence points directly toward Mr. Carter's innocence, demonstrating either directly that Mr. Carter was not the gunman, or demonstrating in ways never presented at trial that the witnesses who purported to identify Mr. Carter could not or did not identify him. Taken

together, this newly discovered evidence casts serious doubt on the inculpatory evidence used to support the government's case at trial. This evidence goes directly "to the heart of [the defendant's] defense, which is that he did not commit the crime." *People v. McCallister*, 16 Mich App 217, 218; 167 NW 2d 600 (1969).

C. This newly discovered evidence would likely produce a different result upon retrial.

If newly discovered evidence "might create a reasonable doubt as to the defendant's guilt," then a different outcome is highly likely upon retrial. *People v. Burton*, 74 Mich App 215, 222; 253 N.W. 2d 710 (1977). In this case, the new evidence more than meets this burden.

This new evidence creates an evidentiary picture considerably different than that presented to the jury. The *only* evidence against Mr. Carter at trial was the questionable identifications of five eyewitnesses. Countering that evidence were three eyewitnesses who were certain Mr. Carter was not the gunman, and five other eyewitnesses who did not identify him as the assailant. The new evidence presented here undermines the testimony of three of the five eyewitnesses against Mr. Carter (Victor Miller, Grayling Love, and Nancy Butzbach), casts significant doubt on the reliability of the remaining two (Tom and Ruth Schadler), adds two additional eyewitnesses who are certain Mr. Carter was not the assailant, and corroborates the evidence of innocence, thereby making a different result very likely upon retrial.

Two of the eyewitnesses, Grayling Love and Victor Miller, now make clear that they simply could not identify Mr. Carter, and that they have sincere doubts about his guilt. Their new statements also make clear that their purported identifications at trial were the product of police or prosecutorial or suggestiveness—not true, untainted identification.

The Circuit Court dismissed the significance of the new statements provided by Victor Miller and Grayling Love, contending that their trial testimony wasn't very important because they

did not make "much of an identification" (Opinion at 8; App. A). That assessment unfairly undervalues the significance of their testimony and cannot be reconciled with the record. Grayling Love plainly told the jury he thought Mr. Carter was the gunman; he went so far as to say that Mr. Carter looked so much like the gunman that he "could pass for a twin" (Tr. 393). The prosecutor certainly viewed it as a valuable identification; he relied on Mr. Love's testimony, citing it no fewer than seven times during his closing argument (Tr. 700, 710-12, 724, 728, 729, 772). The prosecutor said Mr. Love was one of the witnesses "closest" to the assailant, had one of the "best position[s] to observe," and had a reason to recall the assailant (Tr. 724, 728, 729).

The Court also noted that the Government had submitted a second affidavit from Mr. Love, purportedly recanting the affidavit he had signed indicating that his trial testimony had been misleading when it suggested he was able to identify Mr. Carter (Opinion at 7; App. A). Without an evidentiary hearing, however, the Court had no basis upon which to determine which of Love's apparently contradictory sworn statements was his true statement. In any event, the perjury evinced by Mr. Love's contradictory sworn statements serves to undermine Mr. Love's credibility—both in these postconviction proceedings and at trial. Those statements contribute to undermining his trial testimony, and hence the Government's case.

Victor Miller's testimony was more cautious, but nonetheless very helpful to the Government's case. Mr. Miller initially was unsure if he could make an identification, but testified that he thought he "could make a better identification" if Mr. Carter stood and walked (Tr. 464-65). After watching Mr. Carter walk in the courtroom, Mr. Miller testified that the demonstration "assisted" him, and that there was a "reasonable possibility" that Mr. Carter was the gunman (Tr. 465). He also testified that Mr. Carter was the only person in the courtroom who "resembled what I remember," and that he could not recall seeing anyone else since the shooting who resembled the gunman (Tr. 469). Mr. Miller's testimony left the distinct impression that he believed Mr. Carter

was the man who ran by him. In a close case such as this, which turned entirely on disputed eyewitness accounts, such testimony cannot be dismissed as insignificant.

The likelihood that the jury would acquit Mr. Carter at a retrial is also increased by the revelation that the Government concealed that it had extended substantial consideration to Mr. Love in exchange for his identification of Mr. Carter: a letter from the police requesting dismissal of Mr. Love's own criminal charges as a "reward," and a furlough to allow him to testify.

The new evidence also shows that a third eyewitness—Nancy Butzbach—simply could not have identified Mr. Carter. Repeatedly after trial she made statements inconsistent with the known facts of the case (*e.g.,* she has claimed that she saw Officer Schadler carried off on a stretcher to an ambulance, which never happened). More importantly, she has admitted, and that concession is confirmed by new audiology tests, that she could not have heard the .22 caliber gunshots inside the Wig and Record Shop, as she claimed at trial. She has admitted that she did not walk to the window until after Officer Schadler fired his .38 at the fleeing gunman. Therefore, she could not have seen Officer Schadler walk out of the store, fall down, and attempt to shoot, as she claimed at trial. By the time Ms. Butzbach heard those shots and walked to the window, the gunman had already fled, or was so far away as to make identification impossible.

Moreover, Ms. Butzbach has admitted that, from her vantage point across the street and upstairs, she could not recognize Officer Schadler, whom she now admits she knew at the time. At trial, however, she claimed inconsistently and implausibly that she could recognize Mr. Carter, whom she did not know, from that same vantage point. She also testified at trial that she was less than 100 feet from the gunman, but measurements taken since establish she was well over 140 feet from the gunman—beyond the range in which humans can perceive identifying facial features. This new evidence, therefore, is consistent not with her confident and specific identification at trial, but with the statement she gave police just after the shooting (which the jury never heard), in which she

said she saw only "a shadow of a black man" running down the street (Def. App. Ex. 15).

The Circuit Court dismissed the significance of these discrepancies, noting that Ms. Butzbach claimed to have seen the gunman from a closer distance earlier in the day, prior to the shooting (Opinion at 9; App. A). That may be so, but it is nonetheless indisputable that this new evidence casts Ms. Butzbach's trial testimony in a new and less credible light. Standing alone, this new evidence about Butzbach's testimony might not be enough to warrant a new trial, but it does not stand alone.

Cumulatively, the new evidence guts the government's case. In what was already a razor-thin case, the evidence undermines three of the five eyewitness identifications against Mr. Carter. That leaves, as the *only* evidence against Mr. Carter, the purported identifications made by Officer and Mrs. Schadler. But, as described above, those identifications themselves are highly suspect.[20]

New evidence also affirmatively supports Mr. Carter's claim of innocence. Lucy Hodder's testimony adds new eyewitness support to the claim that Mr. Carter was not the fleeing gunman, and that the gunman was a much darker-skinned man. That testimony, by providing a description of the gunman that matches Gwen Baird's, increases the likelihood that the jury would credit her exclusion of Mr. Carter. Likewise, to the extent that some witnesses at trial believed the gunman might have cut through the block and fled down the alley behind Main Street, Johnnie Williams's new testimony establishes that a man seen fleeing down the alley at that time also was not Mr.

[20] As outlined above, although the jury did not hear it, the Schadlers both repeatedly told police on the day of the shooting that they paid no attention to the gunman before the shooting began; they only observed the gunman during the chaotic and frenzied seconds after Officer Schadler had been bloodied and dizzied from gunshots to the head and Mrs. Schadler had been thrown to the floor. Both gave physical descriptions that did not match Mr. Carter. Both saw photographs of Mr. Carter within the weeks after the shooting and *excluded* him because his facial features were not right. Mrs. Schadler also said the gunman was left-handed, but Mr. Carter is right-handed. One of Mrs. Schadler's original police statements indicated the gunman was "dark"-skinned, but that report was apparently altered to read "medium" complexion, and within a week after the shooting Mrs. Schadler identified a very dark-skinned man as having the same complexion as the assailant (Def. Pet. Ex. 14, 11). Finally, both Schadlers made their identifications of Mr. Carter over two years after the shooting, after original memories had faded, and after their perceptions and memory had been tainted by repeated exposure to Mr. Carter's photograph, including his mug photo within weeks after the shooting and his photograph in the newspaper printed just before the final lineup. A more suggestive and unreliable identification procedure is hard to imagine. The jury heard none of this.

Carter. All of this evidence is further corroborated by the fact that Mr. Carter has passed polygraph examinations, all confirming that he did not commit this crime (Def. App. Ex. 46).[21]

The trial judge's assessment (not the same judge who denied the 6.500 motion) that Mr. Carter's trial presented "an extremely tough case" suggests that any evidence that casts doubt on Mr. Carter's guilt would result in a different outcome (Tr. 858). Especially in this context, this new evidence establishes a sufficient likelihood of a different outcome to warrant a new trial.

D. None of the newly discovered evidence could have been uncovered using reasonable diligence.

Concededly, significant portions of the evidence never heard by the jury that point toward innocence could have been discovered before trial—indeed, much of it was plainly laid out in police reports that apparently were available to trial counsel, James Jesse. That evidence, however, is not relied upon as newly discovered evidence. Rather, that evidence underlies Mr. Carter's claim of ineffective assistance of counsel, set forth above. By contrast, none of the evidence that Mr. Carter relies upon in this claim of newly discovered evidence could have been discovered through the exercise of diligence before trial. Neither Mr. Carter nor his attorney had any reason to be aware of this evidence. *See People v. Ake*, 362 Mich 134, 136-37; 106 NW2d 800 (1961) (evidence could not have been obtained through diligence where defense had no way to know about the new witness). This evidence therefore meets the requirements for a new trial based on newly discovered evidence. Because the evidence so powerfully undermines the government's case, and so convincingly points toward innocence, the Circuit Court erred by denying a new trial.

[21] Although polygraph evidence is not admissible at trial, a court may in its discretion consider polygraph evidence in deciding whether to grant a new trial based upon newly discovered evidence. *People v. Barbara*, 400 Mich 352, 412; 255 NW 2d 171 (1977).

V. THE CIRCUIT COURT ERRED WHEN IT DENIED THE POSTCONVICTION MOTION WITHOUT HOLDING AN EVIDENTIARY HEARING.

Standard of Review: Neither the statutes nor case law clearly establishes the appropriate standard of review of a circuit court's decision not to grant an evidentiary hearing. The language of the statute might be read as committing that decision to the discretion of the circuit court, but also might make the decision a question of law. As the cases set forth below reveal, other jurisdictions disagree as to whether the matter is reviewed as a question of law or for an abuse of discretion, but they generally provide that a defendant is entitled to an evidentiary hearing if he alleges facts which would entitle him to relief, and if those facts are not conclusively refuted by the record.

Under MCR 6.508(B), the trial court may rule on the merits of a postconviction motion without ordering an evidentiary hearing. The statutes provides:

> After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.

No published decisions in Michigan have addressed the standards that guide the decision to grant or deny an evidentiary hearing. In an unpublished opinion in *People v. Tarpley*, 1999 WL 33453805, Mich App (March 5, 1999) (unpublished) (attached as App. B), the Court did not decide the standard of review, but held:

> Given that defendant failed to attach with his motion any affidavits from witnesses to support his claim that trial counsel was ineffective, we believe that the court was completely within his authority to decide that an evidentiary hearing was unnecessary.

Id. In the present case, by contrast, Mr. Carter's motion was amply supported by affidavits and other documents.

State and Federal courts have generally held that a defendant is entitled to an evidentiary hearing on a motion for postconviction relief when the defendant alleges facts which (1) if proven, could entitle him to relief and (2) are not conclusively refuted by the record. *See, e.g*., *State v. Bentley*, 548 NW2d 50, 53 (Wis. 1996) ("If the motion on its face alleges facts which

would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing"; whether the motion alleges sufficient facts is a question of law reviewed *de novo*); *Ferguson v. State*, 645 NW2d 437, 446 (Minn. 2002) (Decision on holding an evidentiary hearing is reviewed for abuse of discretion, but an "evidentiary hearing is required for a postconviction motion 'whenever material facts are in dispute that … must be resolved in order to determine the issues raised on the merits.'"); *Robinson v. State*, 493 NE2d 765, 767 (Ind. 1986) (when petition for postconviction relief raises issue of material fact, evidentiary hearing must be held even if it is unlikely that petitioner will produce sufficient evidence to establish his claim; a hearing is unnecessary when petition conclusively demonstrates that petitioner is entitled to no relief); *Foster v. State*, 810 So2d 910, 914 (Fla. 2002) ("To uphold the trial court's summary denial of claims raised [in a postconviction motion], the claims must be either facially invalid or conclusively refuted by the record. Further, where no evidentiary hearing is held below, we must accept the defendant's factual allegations to the extent they are not refuted by the record."); *People v. Rissley*, 795 NE2d 174, 179 (Ill. 2003) (in determining whether allegations set forth in a petition for postconviction relief entitle petitioner to evidentiary hearing, "all well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing"; denial of a petition without an evidentiary hearing is subject to plenary review); *see also Arredondo v. United States*, 178 F3d 778, 782 (6th Cir. 1999).

In the instant case, regardless of whether reviewed for an abuse of discretion or a matter of law, the Circuit Court's failure to conduct an evidentiary hearing constituted error because Mr. Carter alleged facts which (1) if proven, would entitle him to relief, and (2) were not conclusively refuted by the record. As set forth above, Mr. Carter made extensive, specific factual allegations and meticulously supported each with affidavits and other documents. The

Government disputed many of those allegations with its own factual allegations and affidavits. Without holding an evidentiary hearing, the Court had no basis upon which to resolve those factual disputes. If taken as true, Mr. Carter's allegations—for example, to mention but one, Mr. Carter's claim that Grayling Love received benefits in return for his cooperation, and that the Government failed to disclose those benefits to the defense—entitled Mr. Carter to relief.

SUMMARY AND RELIEF SOUGHT

The errors in this case were serious and pervasive. The jury never heard the real case, the case that powerfully establishes innocence. Individually, these errors require relief. But even if any one error alone were not enough, the cumulative effect of the errors requires relief. As this Court has held, even where "certain errors which occurred, standing alone, may not have required reversal, we hold that the cumulative effect of certain instructional errors, prosecutorial misconduct and the ineffective assistance of counsel deprived defendant of a fair trial." *People v. Storch*, 176 Mich App 414, 417; 440 NW2d 14 (1989). This conviction cannot stand. For these reasons, Mr. Carter asks that this Court grant his Application for Leave to Appeal.

Dated this ___ day of June, 2004.

Respectfully submitted,

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