STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2010AP1856
(Milwaukee County Case No. 00-CF-6204)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. DAVIS,

Defendant-Appellant.

Appeal From The Final Order Entered In The Circuit Court For Milwaukee County, The Honorable M. Joseph Donald Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the post-conviction court erroneously exercised its discretion by summarily adopting the state's written arguments and refusing to make specific findings regarding outstanding factual disputes.

After it asserted specific reasons for denying Davis' claims, essentially based on a harmless error theory, the post-conviction court summarily adopted wholesale the arguments in the state's briefs as part of its findings and declined defense counsel's request that it make specific findings regarding disputed factual issues.

2. Whether Davis was denied the effective assistance of trial counsel due to counsel's failure to seek suppression of statements attributed to Davis but taken in violation of ***Edwards v. Arizona***, 451 U.S. 477 (1981).

The post-conviction court held that the officers violated ***Edwards*** by continuing to question Davis following his request for counsel, but concluded that the error was harmless.

3. Whether Davis was denied the effective assistance of post-conviction counsel due to counsel's

a. failure to raise the ***Edwards*** ineffectiveness claim in Davis' initial post-conviction motions under Wis. Stat. (Rule) 809.30; and

b. failure to reasonably allege and argue the claims he did raise in Davis' initial post-conviction motions under Wis. Stat. (Rule) 809.30, specifically, that newly discovered evidence that, both before and after Davis' trial, the state's primary transactional witness, Armond

Henderson, admitted that Davis in fact was not involved in the robbery/homicide for which he was convicted.

The post-conviction court held that Davis was denied his rights under ***Edwards*** but concluded that the violation and the newly discovered evidence had no effect on the verdict.

4. Does newly discovered evidence that prison inmate Richard Ringstad advised another inmate of his scheme to obtain transfer to a less secure prison by falsely testifying for the state that Davis had admitted his involvement in the crime mandate a new trial on due process grounds.

The post-conviction court held that, given Davis' alleged statement to police, evidence that Ringstad lied against Davis in an attempt to benefit himself had no effect on the verdict.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Publication likely is justified under Wis. Stat. (Rule) 809.23. Although Davis' entitlement to relief is clear under established authority, the circuit courts apparently need a published reminder, both regarding the meaning of "reasonable probability of a different result," and the inappropriateness of cutting corners by merely adopting a party's arguments without explanation.

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

On June 20, 2000, three men, variously identified as either Armond Henderson, Roger Powell (aka Manny, Maine, or Maniac), and Shomar Lord, or Henderson, Powell, and Kenneth Davis, robbed what they thought was a drug house. (R63:30-33, 38-53, 86-89).[1] The three men first confronted Henry Matthews and others on the porch and two subsequently entered the house while the third remained on guard on the porch (R62:91, 94-98, 122-26).

When one of the occupants resisted, the two robbers inside the house began shooting (R62:98, 127, 146-48). As they ran out, the third began shooting as well (R62:99, 127-28). As a result, two occupants of the house were wounded and Matthews was killed (R62:14, 25-31,

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[1] Henderson, Lord, and Idris Purdy previously had burglarized the same house. (R63:33-36, 75-76).

34-35, 127-28).

Attorney Thomas Erickson represented Davis at trial (R60:1).

The central issue at trial concerned whether Davis was one of the robbers. The state's case in that regard rested on three bases. First, Henderson testified pursuant to a plea agreement that Davis was the third robber along with Henderson and Powell (R63:30-53, 65-69).[2] Second, a police witness claimed that, after questioning over a three-day period, Davis admitted his involvement in the robbery and death of Matthews (R62:194-96, 212-13; R73:40-41; R75:Exhibit 12). Third, the state, disclosed mid-trial that Richard Ringstad, a prior cellmate of Davis', claimed that Davis had confessed his involvement in the robbery to him as well (R60:3-4; R64:18-23).

Following Davis' conviction at trial, the Court, Honorable Joseph Donald, presiding, sentenced him to 80 years with 60 years initial confinement and 20 years extended supervision (R36).

Joseph Sommers represented Davis on post-conviction motions and appeal. On March 18, 2003, the circuit court denied his post-conviction motion alleging new evidence that (1) Ringstad was schizophrenic and suffered from delusions and hallucinations and (2) Henderson had admitted to others that Davis was not in fact involved in the robbery (R54; *see* R42; R51). The Court deemed this new evidence insufficient to question the verdict given Davis' supposed confession to police (R54:3-5; App. 33-35).

On Sommers' appeal, this Court agreed, holding that Sommer's allegations were "vague" and that the new evidence regarding Henderson and Ringstad would not create a reasonable probability of

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[2] In exchange for his testimony against Davis, the charges against Henderson for this crime were reduced to one count of first degree reckless homicide, and charges for two other robberies he had committed with Lord, including a prior robbery of Matthews, were read in. (R63:66-71, 87-88; *see id.*:33-36).

a different result given Davis' alleged confession. (R73:Attach.1; App. 21-31).

On June 1, 2009, Davis, by counsel, filed his post-conviction motion pursuant to Wis. Stat. §974.06 (R73). That motion alleged, *inter alia*, (1) ineffective assistance of counsel based on trial counsel's failure to object to admission of evidence that Davis allegedly confirmed, after asserting his right to counsel, a police account of the incident; (2) ineffective assistance based on post-conviction counsel's failure to (a) raise the errors identified in Davis' §974.06 motion and (b) adequately raise the errors identified in Davis' original post-conviction motion (i.e., that Henderson had admitted to others that his allegations against Davis were untrue); and (3) newly discovered evidence that Ringstad had informed another inmate of his intention to obtain transfer to a less secure prison by falsely claiming Davis had confessed to him (R73).

The state conceded Davis' entitlement to a hearing (R72), and never disputed Davis' showing of "sufficient reason" under Wis. Stat. §974.06(4). After three days of evidentiary hearings (R85-R87), substantial briefing (R77-R80), and oral argument (R88:4-27), the circuit court orally denied Davis' motion on May 6, 2010. The court agreed that the continued questioning violated Davis' right to counsel, but concluded that this error, and Davis' other claims, were harmless given that he allegedly confessed his involvement to police (R88:27-34, 42; App. 5-12, 20). The court denied Davis' post-conviction ineffectiveness claim on the grounds that it had rejected the underlying claims and that Sommers had strategically decided which issues to pursue (R88:32-33, 35-36; App. 10-11, 13-14).

Having decided Davis' motion on specific, stated grounds, the court then summarily added, over defense objection, that it "adopts those arguments [in the state's briefs] as part of its findings with respect to this determination." (R88:34, 37-42; App. 12, 15-20).

The court entered its written Order on May 6, 2010 (R82; App. 1). Davis filed his notice of appeal on July 28, 2010 (R83), and the appeal record was filed in this Court on September 29, 2010.

ARGUMENT[3]

I.

THE POST-CONVICTION COURT ERRONEOUSLY EXERCISED ITS DISCRETION BY WHOLESALE ADOPTING THE DISPUTED REASONING OF THE STATE'S BRIEFS BELOW WITHOUT A REASONED EXPLANATION OF WHAT REASONING IT WAS ADOPTING OR WHY

The circuit court erroneously exercised its discretion by adopting the state's briefs wholesale, and without explanation, as supplemental reasons for denying Davis' motion. The court's actions here denied Davis an independent and neutral evaluation and resolution of the relevant factual disputes and, in the process, deprived this Court of an adequate record for appellate review.

A. Factual Background

Having explained at length its specific rationale for denying Davis' post-conviction motion based on a theory of harmlessness, the circuit court nonetheless continued to summarily adopt wholesale the arguments in the state's briefs "as part of its findings with respect to

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[3] The state below did not dispute that Davis showed "sufficient reason" under Wis. Stat. §974.06(4) and thus waived any challenge on the point. ***State v. Avery,*** 213 Wis.2d 228, 247, 570 N.W.2d 573 (Ct. App. 1997), overruled on other grounds, ***State v. Armstrong***, 2005 WI 119, ¶ 162, 283 Wis.2d 639, 700 N.W.2d 98. In any event, sufficient reason is shown where, as here, the failure to raise the claim, or failure to adequately raise the claim, on the prior motion is due to ineffectiveness of post-conviction counsel, ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 681-682, 556 N.W.2d 136 (Ct. App.1996), or the claim is based on evidence discovered after the prior motion, ***State v. Edmunds***, 2008 WI App 33, ¶10, 308 Wis.2d 374, 746 N.W.2d 590.

this determination." (R88:34, 37-42; App. 12, 15-20). Davis objected that, given the number of significant factual disputes, none of which contributed to the court's stated reasons for denying his motion, it was inappropriate for the court to merely adopt the state's arguments without explanation (R88:36-41; App. 14-19).

Davis requested specific findings on the factual disputes that the court intended to rely upon in light of the fact that several arguments in the state's briefs simply made no sense. The court denied that request and cut off Davis' argument on particular factual disputes with the conclusory assertion that it was, "in essence, . . . adopting the State's reasoning." (R88:39; App. 17). The court directed counsel to present the argument to this Court. (R88:37-42; App. 15-20).

B. The Post-Conviction Court Erroneously Exercised its Discretion

The circuit court erroneously exercised its discretion by adopting the state's briefs wholesale, and without explanation, as supplemental reasons for its denial of Davis' motion.

As the Seventh Circuit has explained:

> A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive, and why it rejected contrary views.

DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990) (citations omitted). Such wholesale adoption of a party's brief "obscures the reasoning process of the judge, . . . deprives this court of the findings

that facilitate intelligent review, . . . and causes the losing litigants to conclude that they did not receive a fair shake from the court." ***Walton v. United Consumers Club, Inc.***, 786 F.2d 303, 313 (7th Cir. 1986). It presents the judge as "a mouthpiece for the winning party . . . rather than a disinterested evaluator of the several advocates' urgings." ***Id.***.

See also ***Bright v. Westmoreland County***, 380 F.3d 729, 732 (3rd Cir. 2004):

> Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.

Wisconsin authority is in accord. Although a court may adopt a party's arguments, it must "articulate the factors upon which it based its decision." ***Trieschmann v. Trieschmann***, 178 Wis.2d 538, 542, 504 N.W.2d 433 (Ct. App. 1993). It must explain in nonconclusory terms *why* it found the party's position to be convincing. ***Id.*** at 542-44 (court misuses discretion by merely adopting party's position "without stating any reasons for doing so other than its belief that doing so was the 'only just solution'"); *compare* ***In the Interest of Joy P.***, 200 Wis.2d 227, 241, 546 N.W.2d 494 (Ct. App. 1996) (no misuse of discretion where court discussed reasoning in adopting state's position).

Here, the post-conviction court's rationale for denying Davis' motion as expressed in open court relied on a perceived lack of resulting prejudice rather than on resolution of any factual disputes (R88:27-34; App. 5-12). That court gave no more reason for its wholesale adoption of the state's briefs than that deemed insufficient in ***Trieschmann***, asserting only that they were "persuasive." (R88:34;

App. 12). This assertion is especially puzzling since the same court already had rejected as baseless at least one of the state's arguments by concluding that the officers violated Davis' right to counsel by continuing to question him (R88:29-30; App. 7-8; *see* R78:4-5).

The court also refused to make specific findings on disputed factual issues or to give reasons for any factual findings beyond the conclusory assertion that it was adopting the state's reasoning. (R88:37-42; App. 15-20). Even when Davis attempted to raise specific factual disputes, and identified one particular dispute where the state's position made no sense, the court simply reiterated the same conclusory assertion that it was adopting the state's reasoning and directed Davis to take it up with this Court. (R88:39-42; App. 17-20). The circuit court's actions thus reflect, not merely the erroneous exercise of discretion by failing to explain its wholesale adoption of the state's arguments, but an abdication of its judicial role. *See* ***Bright***, 380 F.3d at 731-32 (reversing and remanding in absence of evidence that fact-finding by adoption of party's arguments was product of judge's independent judgment). Indeed, the court initially sought to delegate to the state's attorney the task of identifying what facts the court allegedly found (R88:37-38; App. 15-16), which, when combined with its refusal to address the specific factual disputes raised by Davis' counsel, left the clear impression that the court did not even know what facts it was actually finding by adopting the state's briefs.

Finally, the circuit court neither identified what specific arguments or facts in the state's brief it "in essence" found compelling nor why, rendering appellate review impossible. We know, after all, that the court did not adopt all of the state's reasoning since it found that the officers violated Davis' right to counsel by continuing to question him (R88:29-30; App. 7-8), rejecting a substantial part of the state's argument on that point (*see* R78:4-5). What else in the state's arguments the court may or may not have rejected *sub silento,* and the reasons for that court's decisions, we simply do not and cannot know

without remand. Without that knowledge, this Court is left to speculate, making appellate review of any such decisions by this Court impossible. Remand for appropriate findings accordingly is required here. *See* ***Wurtz v. Fleischman***, 97 Wis.2d 100, 108, 293 N.W.2d 155 (1980) ("When an appellate court is confronted with inadequate findings and the evidence respecting material facts is in dispute, the only appropriate course for the court is to remand the cause to the trial court for the necessary findings"), *quoted in* ***Trieschmann***, 178 Wis.2d at 544.

II.

TRIAL COUNSEL'S FAILURE TO SEEK SUPPRESSION UNDER *EDWARDS v. ARIZONA* DENIED DAVIS THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Davis was denied the effective assistance of counsel at trial. U.S. Const. amends. VI & XIV; Wis. Const. art. I, §7. Specifically, trial counsel unreasonably failed to seek suppression based on a clear violation of ***Edwards v. Arizona***, 451 U.S. 477 (1981) (when defendant requests counsel, all interrogation must cease). There was no legitimate tactical basis for this failure, it was unreasonable under prevailing professional norms, and Davis' defense was prejudiced by it.

A. Standard for Ineffectiveness

A defendant alleging ineffective assistance of counsel first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176, 181 (1986), *quoting* ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). In analyzing this issue, the Court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." ***Strickland***, 466 U.S. at 690; *see* ***Kimmelman v. Morrison***, 477 U.S. 365, 384 (1986).

It is not necessary to demonstrate total incompetence of counsel, and the defendant makes no such claim here. Rather, a single serious error may justify reversal. ***Kimmelman v. Morrison***, 477 U.S. 365, 383 (1986); *see* ***United States v. Cronic***, 466 U.S. 648, 657 n.20 (1984). The deficiency prong of the ***Strickland*** test is met when counsel's errors were the result of oversight rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Dixon v. Snyder***, 266 F.3d 693, 703 (7th Cir. 2001); ***State v. Moffett***, 147 Wis.2d 343, 353, 433 N.W.2d 572, 576 (1989). Moreover, "'just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer.'" ***Davis v. Lambert***, 388 F.3d 1052, 1064 (7th Cir. 2004), *quoting* ***Harris v. Reed***, 894 F.2d 871, 878 (7th Cir. 1990). *See also* ***Kimmelman***, 477 U.S. at 386-87 (same).

Second, a defendant generally must show that counsel's deficient performance prejudiced his defense. "The defendant is not required [under ***Strickland***] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***Moffett***, 147 Wis.2d at 354, *quoting* ***Strickland***, 466 U.S. at 693. Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." ***Id.*** at 357.

"Reasonable probability," under this standard, is defined as "'probability sufficient to undermine confidence in the outcome.'" *Id.*, *quoting* ***Strickland***, 466 U.S. at 694. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000).

In assessing resulting prejudice, the Court must assess the the totality of the circumstances, and thus the cumulative effect of *all* errors. *E.g.*, ***Strickland***, 466 U.S. at 695; ***Alvarez v. Boyd***, 225 F.3d 820, 824 (7th Cir. 2000); ***State v. Thiel***, 2003 WI 111, ¶¶ 59-60, 264 Wis.2d 571, 665 N.W.2d 305 (addressing cumulative effect of deficient

performance of counsel).

Once the facts are established, each prong of the analysis is reviewed *de novo*. ***State v. Cummings***, 199 Wis.2d 721, 747-48, 546 N.W.2d 406 (1996).

B. Factual background

According to the police, they conducted three "interviews" with Davis. In the first, conducted by Det. Koceja on December 15, 2000, Davis acknowledged receiving his ***Miranda*** rights but asked to be allowed to sleep (R62:63-65, 67-70, 73; R73:36-37). In the second, Detectives Morales and Domagalski claimed that, after receiving and waiving his ***Miranda*** rights, Davis claimed that they (the police) had it all wrong but that he wanted to think about things and go over his options before telling them everything that happened (R62:171-79, 182-88; R73:38-39). Davis refused to sign that alleged statement (R62:85). In the third statement, on December 17, 2000, Morales and Domagalski claimed that Davis felt guilty about what happened to the victim, admitted that he was involved and at the "dope house" during the robbery when the victim was killed, and asked to speak with the officers hypothetically and off the record (R62:188-96, 211-13; R73:40-41; R75:Exhibit 12). When they declined, he requested a lawyer (R62:210; R73:41; R75:Exhibit 12). Davis again refused to sign this statement (R62:193; R73:41; R75:Exhibit12).

During the hearing on the motion to suppress Davis' statements, Domagalski testified that, after Davis gave his statement on December 17 and Morales wrote it down, the detectives read the statement to him and he agreed that what was written down was true. (R60:46-47). According to the written statement, however, Davis agreed to give them more details about the offense but that "Davis stated he would like to speak with his attorney before doing so." (R73:40-41; R75:Exhibit 12). By the detective's own testimony, therefore, Davis invoked his right to counsel *before* he supposedly read and attested to the accuracy of the

written statement. The court below so held (R88:29; App. 7).

Likewise at the post-conviction hearing, Domagalski admitted that Davis asserted his right to counsel and that he understood that Davis was asserting his right to counsel and that he therefore had to stop "interrogating" or "interviewing" him. (R86:75-76, 84). Domagalski understood Davis' request for counsel as asserting that

> he wanted the opportunity to discuss his situation with an attorney and then decide whether he wanted to provide further information that he had or not.

(*Id.*:77-78). Domagalski also admitted that they nonetheless asked additional questions attempting to obtain Davis' confirmation of the accuracy of Morales' summary (*id.*:81, 84-85, 87-91).

Attorney Erickson did not argue this point in his suppression argument and the trial court accordingly did not address it. Erickson confirmed at the post-conviction hearing that his failure to do so was not intentional; he would have raised the issue had he perceived it (R85:9, 13-15).

C. Trial Counsel's Performance Was Deficient.

Attorney Erickson acted unreasonably in failing to seek suppression on ***Edwards*** grounds.

1. The continued questioning violated *Edwards*

As the court below properly concluded, the continued questioning of Davis to confirm the accuracy of the officers' summary violated the requirements of ***Edwards*** that all interrogation must cease when the defendant requests counsel (R88:28-30; App. 6-8). By the detective's own testimony, Davis invoked his right to counsel *before* he supposedly read and attested to the accuracy of the written statement.

Although Domagalski attempted to fashion some distinction between conversations, interviews, and interrogations (R86:76, 78-79, 84-86), asking a suspect to confirm what someone else has written

down is not the equivalent of asking them if they want a soda. (*Compare id*.:78-79). Such confirmation adds another link in the chain of evidence against the defendant by attesting to the truth of the officer's summary, which is, of course, exactly why the detectives sought it. It is one thing to claim that a defendant made a particular statement but refused to sign or otherwise attest to the accuracy of a police summary; it is quite another when the defendant himself confirms the accuracy of the summary. The former statement remains subject to a claim that the officers misquoted or misunderstood what the defendant actually said, while the latter does not.

Both the United States Supreme Court and the Wisconsin Supreme Court have rejected Domagalski's semantical argument. "[A]n accused, ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." ***Edwards***, 451 U.S. at 484-85. "Interrogation," under these circumstances, refers to "questioning initiated by law enforcement officers." ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966); *see* ***Rhode Island v. Innis***, 446 U.S. 291, 298 (1980). The Supreme Court has made clear, however, that interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." ***Innis***, 446 U.S. at 301. The Court defined "incriminating response" to "refer to any response-whether inculpatory or exculpatory-that the *prosecution* may seek to introduce at trial." *Id.* at 301 fn.5 (emphasis in original). *See also* ***State v. Jennings***, 2002 WI 44, ¶ 26, 252 Wis.2d 228, 647 N.W.2d 142 ("[T]he police must immediately cease questioning a suspect who clearly invokes the ***Miranda*** right to counsel at any point during custodial interrogation").

Here, the undisputed evidence established that, despite Davis'

assertion of his right to counsel, the detectives insisted on further questioning him, seeking to elicit an incriminating confirmation of the accuracy of their summary of his supposed statements. However they viewed their actions, the detectives intended that confirmation to be used in court against him. It in fact was used by the prosecution, with significant impact, to confirm the asserted accuracy of the alleged summary against defense arguments that it misinterpreted or misquoted what Davis actually told the detectives:

> Q When Mr. Davis was offered a chance to change his statement which is now Exhibit 54, did he attempt to change the word guilty as it's recorded on Exhibit 54?
>
> A No. After the statement was read over to him, he agreed that everything that was written down was accurate regarding the conversation that we had.

(R62:213-14; *see id.*:193, 211-13).

2. Counsel's failure to object was unreasonable

Attorney Erickson admitted that his failure to raise this point in his suppression argument was unintentional and that he would have raised the issue had he perceived it (R85:9, 13-15). Deficient performance is shown where, as here, counsel's errors are the results of oversight rather than a reasoned defense strategy. *E.g.*, ***Wiggins***, 539 U.S. at 534; ***Dixon***, 266 F.3d at 703; ***Moffett***, 147 Wis.2d at 353.

D. Trial Counsel's Deficient Performance Prejudiced Davis' Defense at Trial

There can be no reasonable dispute that trial counsel's errors prejudiced Davis' defense and that, but for those errors, there exists a reasonable probability of a different result. Because it is the cumulative effect of those errors and the other issues raised here that controls, *e.g.*, ***Alvarez,*** 225 F.3d at 824, Davis addresses cumulative prejudice in Section V, *infra*.

III. DAVIS WAS DENIED THE EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL

Davis also was denied the effective assistance of post-conviction counsel. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996) (ineffectiveness of post-conviction counsel properly raised under Wis. Stat. §974.06). Specifically, Davis' post-conviction counsel, Joseph L. Sommers, unreasonably failed (1) to identify and raise the trial ineffectiveness claim identified in this motion and (2) to adequately raise the claims he did identify.

Although post-conviction or appellate counsel is not constitutionally ineffective solely because the attorney fails to raise every potentially meritorious issue, *see* ***Smith v. Robbins***, 528 U.S. 259, 287-88 (2000), counsel's decisions in choosing among issues cannot be isolated from review. *E.g.*, *id.*; ***Gray v. Greer***, 800 F.2d 644, 646 (7th Cir. 1986). The same ***Strickland*** standard for ineffectiveness applies, with appropriate modifications, to assess the constitutional effectiveness of post-conviction or appellate counsel. ***Smith***, *supra*; *see* ***State v. Ziebart***, 2003 WI App 258, ¶15, 268 Wis.2d 468, 673 N.W.2d 369.

The Seventh Circuit has summarized the standards as follows:

> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient . . . and when that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial," we will deem the lack of effective assistance prejudicial.

Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) (state appellate attorney's failure to raise preserved hearsay issue constituted ineffective assistance of appellate counsel, mandating federal habeas relief).

Again, both deficient performance and resulting prejudice are reviewed *de novo*. ***Cummings***, 199 Wis.2d at 747-48.

A. Failure to Raise Trial Ineffectiveness Regarding Davis' Alleged Statement

Sommers testified at the post-conviction hearing that the admission of Davis' alleged statements was very important to his client, but that he did not raise the challenges to those statements identified by trial counsel (which did not include the ***Edwards*** violation) because he viewed them as not viable, and thus weaker than the issues he chose to raise regarding Henderson and Ringstad, and because he believed they therefore would interfere with his chances of success on appeal. (R85:22-24). Although he also offered his opinion that, in hindsight, the ***Edwards*** issue raised in this motion is not as strong as the issues he raised, Sommers admitted that he did not consider it at the time of the direct appeal (*id.*:25-26 ("The issue that you raise was not an issue I don't believe that popped out at me")).

Sommers' failure to identify such an obvious violation of ***Edwards*** is, of course, deficient performance, resulting as it does from oversight rather than any reasoned defense strategy. ***Wiggins***, *supra*. Yet, even if Sommers had considered the issue and decided not to raise it because he viewed it as somehow weaker than the issues he raised, such a decision would fail the test of reasonableness.

While noting in his motion that the state's case rested, not only on the testimony of Henderson and Ringstad but also on Davis' supposed confession to Officer Domagalski (R42:4), Sommers made no effort to demonstrate error regarding admission of that alleged statement nor any reason why a reasonable jury could have discredited it. As a result, both the circuit court and this Court focused on the alleged confession as rendering the absence of evidence obliterating the testimony of Henderson and Ringstad "harmless" (R73:Attach.1:7-8; R54:3-5; App. 27-28, 33-35).

Attacking two of the three foundations of the state's case while ignoring a strong challenge to the third and thereby allowing the courts

to deem the issues raised to be harmless simply is not a rational appeal strategy.

B. Failure to Adequately Assert Issues Sommers Chose to Raise

Attorney Sommers' Rule 809.30 motion and direct appeal on Davis's behalf raised significant challenges to the veracity of the allegations of Davis' involvement in the homicide by Armond Henderson and Richard Ringstad (*e.g.*, R42). The circuit court and this Court nonetheless concluded that those allegations were insufficiently specific to justify a hearing or relief. Both courts also concluded that relief would be inappropriate in any event because, given Davis' supposed admission to Domagalski and Morales, nullifying the allegations of Henderson and Ringstad necessarily would not alter the jury verdicts. (R73:Attach.1:7-8; R54:3-5; App. 27-28, 33-35).

As demonstrated by the post-conviction testimony of Cornelius Reed and Derrick Griffin (R86:7-69), they provided Sommers and his investigator more than enough information to avoid any possible "vagueness" argument and to mandate a hearing in this matter, had Sommers only included that information in his motion. *See* Section IV,A, *infra*. Although Sommers believed that he had provided adequate allegations to require a hearing, and remained of that belief at the time of the post-conviction motion hearing (R85:20-21), the circuit court and this Court obviously disagreed. Sommers' failure thus was unreasonable and was based on oversight rather than any reasonable defense strategy (*id.*:21). His failure to include adequate allegations to require a hearing on his motion accordingly was deficient performance. *E.g.*, ***Wiggins***, *supra*.

As already noted, Sommers also acted unreasonably by overlooking the ***Edwards*** challenge to Davis' supposed admission to the accuracy of the detectives' summary raised here. Such a challenge would have nullified the circuit court's rationale that, "even if Henderson's claim that Davis was involved would have been discred-

ited by the testimony of Reed (and Griffin), Detective Domagalski's testimony that he had obtained an *admission* from Davis of his involvement in the offense would not have been affected by either Reed's or Griffin's testimony" (R54:3 (emphasis in original)).

However, given the established principle that allegations not refuted are deemed admitted, *see* ***State v. Clark***, 179 Wis.2d 484, 492, 507 N.W.2d 172, 175 (Ct. App. 1993), Sommers also acted unreasonably by failing to address the harmlessness rationale raised by the state in response to his motion (R46:8), and ultimately adopted by the circuit court. Because Sommers failed to address it, this Court (and the court below) overlooked the fact that Reed's and Griffin's evidence, if credited by the jury, would not have merely nullified Henderson's claim of Davis' involvement, while leaving Domagalski's allegations unaffected (*See* R54:3 ("The court notes that trial counsel's cross examination of Henderson was extremely effective in operating to discredit him and in making him appear to be a complete liar")).

Rather, Henderson's admission to Cornelius Reed that Davis in fact was *not* involved in the crime, corroborated by a similar admission to Derrick Griffin, was affirmative evidence of Davis' innocence. ***Vogel v. State,*** 96 Wis.2d 372, 383-84, 291 N.W.2d 838 (1980) (prior inconsistent statement is admissible for its truth, not merely as impeachment). Accordingly, a reasonable argument by Sommers would have noted for the circuit court that the new evidence from Reed and Griffin was evidence of Davis' actual innocence that the jury in a new trial would have been just as entitled to credit as Domagalski's uncorroborated allegation that Davis had admitted his involvement. *E.g.*, ***Rohl v. State***, 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974) (jury entitled to believe evidence unless it is inherently incredible, i.e, "in conflict with ... nature or with fully established or conceded facts"). After all, a police officer is no more *entitled* to be believed than is any other witness. *See, e.g.*, ***United States v. Carson***, 560 F.3d 566 (6th Cir. 2009) (police officers convicted, *inter alia*, of perjury); ***United States***

v. Ronda, 455 F.3d 1273 (11th Cir. 2006) (police officers convicted of obstruction of justice and perjury).

A reasonable attorney in Sommers' position also would have noted the substantial reasons why a reasonable jury could reject Domagalski's story. As Erickson demonstrated at trial, the supposed statement was not made until Davis had been held in a spartan holding cell for 67 hours following his arrest, with no TV, reading material, writing materials, or access to a telephone. (R62:197-211) Although the police suspected Davis in the robbery, the gun found near where Davis was arrested was not involved in the robbery and an eyewitness had failed to pick Davis from a lineup. (*Id.*:200-03). Indeed, another eyewitness had chosen Shomar Lord as sounding just like one of the robbers (*id.*:207), and the officers' ploy of falsely telling Davis he was chosen from a lineup did not work (*id.*:208).

A reasonable jury therefore easily could conclude that the officers were getting desperate for some solid evidence against Davis when, after 67 hours, he supposedly admitted he was there. Even then, however, we know that Davis signed the ***Miranda*** waiver when Det. Koceja spoke with him (R62:63; R73:36-37), but allegedly refused to sign anything acknowledging what Detectives Morales and Domagalski attributed to him (R62:203-04). We also know that the statement Domagalski sought to attribute to Davis was in fact written by Morales, and Domagalski admitted that only the limited portions in quotations were Davis' own words, so that Morales' assertions that Davis was feeling guilty about what happened and that he was present and involved were Morales' words rather than Davis' (*id.*:211-12). A reasonable jury also would note that the statement attributed to Davis was totally conclusory, providing no specific information that a creative police officer desperate for a break in a case could not easily provide regardless what the suspect may have said. A reasonable jury thus easily could have significant reason to doubt Domagalski's account of Davis' supposed statement.

A reasonable reply to the state's argument that Domagalski's testimony barred reversal based on Reed's and Griffin's information also would have reminded the circuit court that the relevant question is not whether Davis necessarily, or even more likely than not, would have been acquitted but for counsel's errors. ***Strickland***, 466 U.S. at 693; *see* ***Kyles v. Whitley***, 514 U.S. 419, 434 (1995). Rather, there need only be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. He also would have reminded the circuit court that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support," ***Strickland***, 466 U.S. at 696, and that, since the prosecutor obviously did not believe that Davis' supposed "admission" was sufficient to guaranty conviction on its own, given her perceived need to give substantial concessions for Henderson's testimony, a jury easily could have reached the same conclusion. *Cf.* ***Kyles*** , 514 U.S. at (1995) ("If a police officer thought so, a juror would have, too") (footnote omitted).

Without such guidance, however, the circuit court was left mistakenly to assume that the possibility that the jury would credit Domagalski's testimony was sufficient to deny Davis relief. A reasonable attorney would have responded to the state's assertion to explain exactly why that is neither factually nor legally correct.[4]

Because the issues unreasonably omitted or inadequately raised by Attorney Sommers "may have resulted in a reversal of the conviction, or an order for a new trial," ***Mason v. Hanks***, 97 F.3d 887, 893 (7th Cir. 1996) (citation and internal markings omitted), Davis was denied the effective assistance of post-conviction counsel.

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[4] Of course, the circuit court repeated the same error in denying Davis' §974.06 motion (R88:27-34; App. 5-12). This Court, however, has the opportunity and the obligation to correct that mistake.

IV. NEWLY-DISCOVERED EVIDENCE MANDATES REVERSAL

After Davis' conviction, he learned that, prior to Henderson's arrest, Henderson had admitted his involvement in that offense, joined only by Roger Powell and Shomar Lord, to Derrick Griffin. Davis also learned that, sometime after his conviction and sentence, Henderson had admitted to Cornelius Reed that he had set Davis up for something he did not do. Sometime later, he also learned that, prior to testifying against him, Ringstad had admitted to another inmate, Dan Winkler, that he intended to fabricate his testimony against Davis based on documents he removed from Davis' footlocker.

Whether individually or in combination, this newly discovered evidence demonstrates more than a reasonable probability of a different result and thus mandates reversal of Davis' conviction.

A. Factual Background

1. Henderson's admissions to Griffin

Derrick Griffin testified at the post-conviction hearing that Davis, who he also knew as "Blue," had been a friend since 1995. Griffin had known Armond Henderson as an acquaintance, though not as a friend, since at least 2000. (R86:34-35, 40, 45). Sometime before Griffin's son was born in October 2000, Henderson came to stay at his apartment, hiding out for a few days before he could leave town (*id.*:37, 40). Henderson explained that he was in trouble because he, Manny and Shomar had robbed someone that Henderson, Shomar, and a third guy had robbed previously for marijuana, and the recent robbery "went bad" and someone was shot (*id.*:37-39, 42-44, 47). Henderson did not say or suggest that "Blue" also was involved in the robbery (*id.*:39).

Griffin could not recall when or if he told this information to Davis, although he probably did tell him at some point that Henderson said Davis was not there (*id.*:47-48). Griffin did provide this informa-

tion to a defense investigator who called him at work sometime after Davis' trial (*id.*:41, 46, 50, 52).

2. Henderson's admissions to Reed

Cornelius Reed testified at the post-conviction hearing that, while incarcerated at Waupun Correctional Institution in 2002, he was playing basketball one day with Henderson, who was on his same unit. Henderson asked Reed for some paperwork as Henderson was trying to file an appeal. Henderson told Reed that he had been convicted of a homicide for a shooting when he and two others, Manny (aka Roger) Powell and Robert or "Little G," attempted to rob a guy. (R86:9-13, 23-25). Henderson told Reed that Kenneth Davis (aka "Blue"), who likewise was at Waupun at the time, also was convicted even though he was not involved in the crime (*id.*:13-14, 27-28). Henderson admitted that he falsely told the police and the D.A. that Davis was involved because Henderson was unwilling to tell them who actually was involved, and because he would have received more time in prison had he told the truth. (*Id.*:14-15).

Davis was not around at the time of Reed's conversation with Henderson, and Reed did not know Davis at the time (*id.*:17, 27). He later met Davis in a prison program and told him about the conversation with Henderson (*id.*:17-18). Reed believed it was the right thing to do since he similarly had been wrongly convicted once in the past before he was ultimately exonerated after the conviction was reversed on appeal (*id.*:18-19). Reed later spoke with Sommers' investigator in November, 2002, and gave him this information (id.:17-18, 24-25, 30-31).

3. Ringstad's admissions to Winkler

Dan Winkler attended an MATC program on custodial services at Columbia Correctional Institution ("C.C.I.") with Ringstad from April through June, 2001. (R85:39; *see* R75:Exhibits 8 & 9; *see also* R85:50-52, 65 (Winkler correctly identified photo of Ringstad)). The

two had conversations during their joint involvement in that program, with Ringstad once asking Winkler if he would use information on someone to get transferred to a lower security facility (R85:40). When Winkler responded that he would not, Ringstad replied that it would "just be another n-i-g-g-a up the river." (*id.*:41).

Ringstad later told Winkler that he had entered his cellmate's footlocker and went through his legal files. He intended to use that information to create a lie about his cellmate, "Blue," to get a transfer to a medium or minimum facility. (*Id.*:41-42). Shortly thereafter, Ringstad was removed from general population and Winkler did not see him again (*id.*:46, 48-49). Winkler did not know Blue at the time he spoke with Ringstad (*id.*:43, 45, 49-50).

Winkler associated mainly with white inmates and did not seek Davis out (*id.*:58-59). Some time later, however, he met Blue/Davis at C.C.I. and told him that he believed Ringstad was in protective custody and was setting him up, although he did not give Davis any specifics (*id.*:48-50, 54-55, 59-60). Winkler did not know if this conversation was before or after Davis' trial (*id.*:49, 53-54). The only other time he spoke with Davis was when they both were in Green Bay Correctional Institution in 2005 and Davis approached him in the prison yard for more information and Winkler told him what he knew about Ringstad's statements to him about lying about Davis to get to a different prison. (*Id.*:47, 53). The next time Winkler spoke with anyone regarding Ringstad was when undersigned counsel's investigator contacted him (*id.*:61).

Ringstad in fact benefitted from his testimony just as he told Winkler he desired. Within two weeks after testifying against Davis, he was transferred from the maximum security prison where he had been housed for the first six years of his sentence to a medium security

prison. (R86:99-100, 106, 108, 111).[5]

B. Applicable Legal Standards

This Court explained the requirements for a newly-discovered evidence claim as follows:

> To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." [***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis.2d 639, 700 N.W.2d 98] (citation omitted). Once those four criteria have been established, the court looks to "whether a reasonable probability exists that a different result would be reached in a trial." *Id.* (citation omitted). The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof. *Id.*, ¶¶160-62 (abrogating ***State v. Avery***, 213 Wis.2d 228, 234-37, 570 N.W.2d 573 (Ct. App. 1997)).

State v. Edmunds, 2008 WI App 33, ¶13, 308 Wis.2d 374, 746 N.W.2d 590.

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[5] Ringstad claimed at the post-conviction motion hearing that the Program Review Committee ("PRC") had previously authorized his transfer to medium security at Fox Lake Correctional Institution, so that his testimony had nothing to do with the transfer. (R86:107). However, the PRC meets every 6 or 12 months, and had met with Ringstad just three months before his testimony and transfer (*Id.*) Normal practice thus would have meant at least another three months before Ringstad would again be seen by PRC for possible transfer.

Ringstad also admitted that his transfer to medium was contingent on his completion of the custodial training program he was taking in April through June, 2001 (*id.*:107-08; R64:33 (PRC deferred transfer to medium because Ringstad was in custodial program)). Although he claimed at the post-conviction hearing that he had finished the program before his trial testimony (R86:109), he admitted at Davis' trial (when he had no reason to lie about this particular point) that he had *not* completed it (R64:36; see R86:109-11). The stipulated records from Columbia Correctional Institution, moreover, specifically state that "Ringstad did not complete the program." (R75:Exhibit 8 at 1).

The standard of review is confused. Newly discovered evidence claims present due process issues, *e.g.*, ***State v. Love***, 2005 WI 116, ¶43, n.18, 284 Wis.2d 111, 700 N.W.2d 62, which generally are reviewed *de novo*. ***State v. Coogan***, 154 Wis.2d 387, 395, 453 N.W.2d 186 (Ct. App. 1990). However, the courts have stated without explanation that newly discovered evidence claims are reviewed for erroneous exercise of discretion. *E.g.*, ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis.2d 28, 750 N.W.2d 42. Even then, factual findings are reviewed for clear error, Wis. Stat. §805.17(2), and the reasonable probability analysis is an issue of law reviewed *de novo*. ***Plude***, ¶33. Of course, whether evidence is material and not merely cumulative also would appear to be legal determinations and thus reviewed *de novo* even in the context of review of discretion. ***Plude***, ¶31 (erroneous exercise of discretion where court applies wrong legal standard).

C. Application of the Newly Discovered Evidence Test

For the reasons which follow, Davis satisfied each of the first four requirements for newly discovered evidence. Because reasonable probability of a different result must be assessed cumulatively, that is addressed in Section V, *infra*.

1. Henderson's Pre-Testimony Admissions to Griffin Constitute Newly Discovered Evidence

There is no rational dispute that evidence that one of the state's primary witnesses gave an account of the offense that excluded the defendant is material. After all, such an admission is affirmative evidence of Davis' innocence. Moreover, the evidence is not cumulative since the issue of Davis' involvement was the central disputed issue at trial.

The state nonetheless claimed below that Davis already knew at the time of trial that Henderson had admitted to Griffin that only Henderson, Powell and Shomar were involved in the robbery/homicide for which Davis was charged (R78:9). However, Attorney Erickson

testified that he had no knowledge of Henderson's admission to Griffin at the time of trial (R85:11-12). There is no rational reason why Davis would not have told his attorney that the primary witness against him had admitted Davis' non-involvement had he known of it.

Griffin's explanation for not having told Davis, moreover, makes perfect sense. Griffin explained that (1) he spoke with Davis one time in the jail shortly after Davis' arrest in mid-December 2000 (R86:45, 54); (2) that he did not know at the time of that meeting that Davis was charged with the same offense that Henderson had spoken to Griffin about (*id.*:55, 60, 67-68); (3) that he did not make the connection between the two cases until after Henderson was arrested, which took place *after* the conversation with Davis (*id.*:55-56, 59-60, 67-68; *see* R63:57-58 (Henderson arrested March 8, 2001)); (4) that the reason he did not make the connection was because Henderson never suggested Davis was involved (R86:41, 46, 55); (5) that he did not speak with Davis again prior to his trial (*id.*:49); (6) that he corresponded with Davis after Davis was convicted (*id.*:48-49); and (7) that he ultimately spoke with a male defense investigator who called him at his job after Davis' trial (*id.*:41, 50, 52; *see* R75:Exhibit 1).

Although the state succeeded (intentionally or unintentionally) in sometimes confusing Griffin concerning the timing of matters that happened nine years ago (*see* R86:46-48, 69), Griffin's account makes perfect sense and the state's does not. After all, if, as Griffin explained, Henderson did not suggest that Davis was involved in the actions by Henderson, Powell, and Shomar Lord robbing and shooting someone Henderson previously had robbed of marijuana, there was no apparent reason for him to connect Davis to that crime without additional information. Robberies and shootings happen all too often in the inner city. Also, although in retrospect we can see that the details provided by Henderson to Griffin clearly connect his statements to Griffin to the

same robbery/shooting for which Davis ultimately was convicted,[6] it appears that Henderson regularly involved himself in such misconduct. Not only did he burglarize Matthews' home at some point prior to the robbery at issue here, but he also received a pass for a subsequent robbery in exchange for claiming that Davis was involved in Matthews' death. (*See* R63:68; R75:Exhibit 10 at 8-9). Who knows how many other robberies he committed that, like this one, did not involve Davis?

Griffin, moreover, knew that Davis was charged with murder (R86:65), while Henderson only told Griffin that someone was shot, not that anyone was killed (*id.*:39, 43). It was therefore absurd for the state to suggest that Griffin necessarily would have known at the time he met with Davis in jail prior to trial that Henderson had been discussing with Griffin the participants in the very crime for which Davis had been charged.

Reasonably enough, given the lack of anything to connect the two incidents at the time and the nine years that had passed prior to his testimony, Griffin could not recall whether he raised Henderson's statements during his one meeting with Davis in jail shortly after Davis' arrest (R86:41, 46, 58-59), although he admitted on cross-examination that he said something about this sometime without going into detail or mentioning the other individuals involved (*id.*:47-48, 67-68).

However, even if Griffin had told Davis something of what Henderson had told him, there still is nothing to suggest that Davis would have made the connection at the time between the offense Henderson spoke of and that with which Davis was charged. Davis knew Henderson and therefore would have heard of Henderson's likely involvement in other criminal activity. The fact that Davis knew that he was not involved in the offense for which he was charged does not mean that he would have made the connection at the time between that

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[6] Henderson admitted at trial that he had, in fact, previously burglarized Matthews's home and stolen a large amount of marijuana (R63:33-36).

charge and whatever minimal references Griffin would have made to the conversation with Henderson on something that, for all they knew, was wholly unrelated. After all, Henderson was involved in a number of criminal activities that Davis was not involved in. Indeed, neither the state nor the circuit court was willing to make that connection at the time of Davis' original post-conviction motions based on Investigator Garrott's account of Griffin's statements to him.

> Moreover, the statement does not exculpate the defendant. Mr. Garrott's description of the conversation (or perhaps, Griffin's) is so vague as to be meaningless. Griffin gives no details given of the conversation; *indeed, from the information provided, there is little reason to believe that, if the conversation occurred, Henderson was describing the Matthews murder, as opposed to the earlier robbery/burglary at the Matthews residence.*

(R46:7 (emphasis added). *See also* R54:2-3 (agreeing with state's analysis and finding Garrott's account of Griffin's statement "entirely vague, and for that reason immaterial"); App. 32-33). Surely, Davis cannot be expected to make a connection neither the Court nor the state was willing to make.

For the same reasons, to the extent that the circuit court's unexplained adoption of the state's briefs below is read to include the state's argument that Davis knew prior to trial that Henderson's admissions to Griffin concerned the same robbery in his case, its findings clearly erroneous. "The 'clearly erroneous' standard of review for findings of fact made by a circuit court is essentially the same as the 'great weight and clear preponderance' test." ***State v. Hambly***, 2008 WI 10, ¶16 fn.7, 307 Wis.2d 98, 745 N.W.2d 48 (citations omitted). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ***Anderson v. City of Bessemer City***, 470 U.S. 564, 573 (1985) (citation omitted).

2. Henderson's Admissions to Reed Constitute Newly Discovered Evidence

There can be no rational suggestion that Davis knew or should have known prior to his trial in 2001 that Henderson would confess a year later that, despite Henderson's testimony to the contrary, Davis was not, in fact, guilty of the crime for which he was convicted. While Davis knew at trial that Henderson was lying, Henderson's admission of that fact did not exist until after the trial. Nor can it rationally be suggested that affirmative evidence that Davis in fact was innocent is somehow immaterial or cumulative.

Henderson's rationalization at trial for an earlier admission of Davis' innocence, i.e., that Davis had threatened him if he did not recant to Davis' investigator (R63:18-22), could not apply to Henderson's admission to Reed, who did not even know Davis at the time, which Henderson made while Davis was nowhere to be seen. Also, evidence is not "cumulative" unless it "supports a fact established by existing evidence." ***Washington v. Smith***, 219 F.3d 620, 634 (7th Cir. 2000), citing Black's Law Dictionary 577 (7th ed. 1999). Davis' alleged involvement in this robbery/homicide was squarely in dispute.

The state below nonetheless cited several older cases in support of the claim that "[e]vidence that serves only to impeach the credibility of a witness who testified at trial is insufficient to warrant a new trial, because it does not create a reasonable probability of a different result." (R78:7). However, the United States Supreme Court has long rejected this legal fallacy, *e.g.*, ***United States v. Bagley***, 473 U.S. 667 (1985) (impeaching, as well as exculpatory evidence, may create reasonable probability of different result); ***Giglio v. United States***, 405 U.S. 150 (1972) (prosecutor's withholding of material impeachment evidence violates due process), as has the Wisconsin Supreme Court, ***State v. Plude***, 2008 WI 58, ¶¶38-41, 310 Wis.2d 28, 750 N.W.2d 42 (newly discovered evidence that state expert misrepresented his credentials "may have been determinative of Plude's guilt or innocence," citing

Giglio, *supra*); *see* ***id.*** ¶47 ("Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial"), citing ***Birdsall v. Fraenzel***, 154 Wis. 48, 52, 142 N.W. 274 (1913).

The state's "mere impeachment" theory also fails because Henderson's admission that Davis was not involved in the robbery and homicide of Matthews was not merely impeachment, but affirmative evidence of Davis' innocence. *E.g.*, ***Vogel***, 96 Wis.2d at 383-84 (prior inconsistent statement is admissible for its truth, not merely as impeachment).

The state's suggestion below that Henderson's admission to Reed was not adequately corroborated (R78:10) also is baseless. Under ***State v. McCallum***, 208 Wis.2d 463, 473-74, 561 N.W.2d 707 (1997), a witness' admission to having lied (i.e., recantation) must be corroborated by other newly discovered evidence. ***McCallum*** makes clear, however, that the defendant need not show that the witness confessed perjury to two separate witnesses. Rather, the defendant meets the corroboration requirement simply by showing a feasible motive for the initial false accusation and circumstantial guarantees of the trustworthiness of the recantation. ***Id.*** at 477-78.

Here, Henderson's admission to Reed is corroborated by his prior admission to Griffin. Also, the evidence reflects both a feasible motive for the initial false accusation and circumstantial guarantees of the trustworthiness of the recantation. ***McCallum***, 208 Wis.2d at 477-78. As Henderson explained in his admission to Reed, he had a motive for the initial, false accusation in that he would obtain a lower sentence by lying and would face a longer one if he told the truth that Davis was not involved. Moreover, circumstantial guarantees of trustworthiness exist for the recantation to Reed because, unlike his testimony at trial, Henderson had nothing to gain by telling Reed the truth about Davis' lack of involvement. Indeed, given the general ridicule faced by jailhouse snitches, even when telling the truth about the misconduct of other inmates, Henderson would not have admitted

to having falsely accused another inmate if he had not done so. *Cf.* Wis. Stat. 908.045(4) (circumstantial guarantees of trustworthiness where person makes statement which, at time it is made, so makes the declarant an object of ridicule or disgrace "that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true").

The state, tellingly, did not call Henderson to testify at the post-conviction hearing, as it did with Ringstad, to deny or explain away Reed's testimony (or Griffin's). The state could have called him from prison to testify if Reed's or Griffin's testimony was untrue.

3. Ringstad's Pre-Testimonial Admission to Winkler Constitutes Newly Discovered Evidence

Winkler's testimony likewise meets each of the requirements for a new trial based on newly-discovered evidence. Although Winkler did not know whether he first told Davis about Ringstad's actions before or after Davis' trial (R85:49, 53-54), Erickson testified that he was unaware of that information at the time of trial (*id.*:11-12), and it would have been irrational for Davis to have withheld it had he known it at the time.[7] The defense thus also was not negligent in seeking that evidence because, although they knew that Ringstad lied at trial, they had no way of knowing that Ringstad had admitted that fact to anyone. *Cf.* ***State v. Sturgeon***, 231 Wis.2d 487, 500-01, 605 N.W.2d 589 (Ct. App. 1999) (although defendant knew at time of plea that he had given exculpatory statements to the police, he did not know that the police had memorial-

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[7] The state's speculated below that Davis and his counsel might have known of Ringstad's intentions to falsely accuse Davis based on information pilfered from Davis' files because trial counsel cross-examined Ringstad on such common sense matters as his access to Davis' files, what he had to gain from his false allegations, and the fact that Ringstad did not want to be in prison. (R78:12). Given Attorney Erickson's testimony that he was not aware of Ringstad's admissions at trial (R85:11-12), the state's speculation is contrary to the evidence, and any finding consistent with the state's speculation would be clearly erroneous. ***Anderson***, *supra*.

ized them). The evidence also is material to the case since Ringstad's false testimony formed one of the three prongs critical to the state's evidence that Davis was involved in the robbery/homicide. It likewise was not cumulative because the truth of Ringstad's claims was actively disputed at trial. *See* ***Washington***, 219 F.3d at 634 (evidence not cumulative unless supports previously established fact).

Ringstad's admissions to Winkler that he intended to falsely accuse someone were made *prior* to his false testimony at Davis' trial. As such, although not discovered by Davis until after his trial, they were prior inconsistent statements, not a recantation subject to the corroboration requirements of ***McCallum***, *supra*. In any event, Ringstad's stated desire to obtain a transfer to a medium security prison provided the feasible motive for the initial false accusation, and circumstantial guarantees of the trustworthiness of Ringstad's admissions to Winkler are demonstrated by their nature as both a statement against interest, *cf.* Wis. Stat. §908.045(4), and a statement of then existing state of mind or intent, Wis. Stat. §908.03(3). *See* ***McCallum***, 208 Wis.2d at 477-78.

V. THE COMBINED EFFECT OF THE IDENTIFIED ERRORS PREJUDICED DAVIS' DEFENSE

Contrary to the circuit court's assessment (R88:27-34; App. 5-12), the combined effects of the errors and new evidence create far more than a reasonable probability of a different result here. Indeed, they create a very real probability that an innocent man stands convicted and sentenced to 80 years in prison.

Resting, as it apparently does, on its adoption of the state's reasoning below (R88:34-42; App. 12-20), the circuit court's prejudice analysis necessarily rests as well on the state's erroneous statement of that standard. The question is not whether the defendant can prove *both* that counsel's errors "render the resulting conviction unreliable" *and* creates a reasonable probability of a different result (R78:4). Rather, the Supreme Court has made clear that the defendant need only

show a reasonable probability of a different result; no supplemental, abstract inquiry into the "fairness" or reliability of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000). Davis, moreover, need not prove that acquittal is more likely than not or that the evidence is legally insufficient but for the identified errors or new evidence. ***Kyles***, 514 U.S. at 434-35.

The central issue at Davis' trial was whether he was in fact one of the robbers. The state's evidence in that regard consisted of Henderson's testimony pursuant to a plea deal, Ringstad's allegations of a jailhouse confession, and Domagalski's claim that Davis confessed his involvement to the police. The identified errors and new evidence undermine each of these three pillars of the state's case.

Winkler's testimony either demonstrates that Ringstad lied about Davis, or at least supports a reason to doubt Ringstad's testimony. That evidence also undermines Ringstad's false testimony (R64:23-24), bolstered by the prosecutor's closing argument (R65:49), that he had nothing to gain from his testimony. Although this Court already has opined that Ringstad's testimony was wholly incredible, such that additional evidence on the point would be cumulative (R73:Attach.1:8), a juror reasonably could (and undoubtedly would) view evidence that, contrary to his trial testimony, Ringstad in fact fabricated his allegations against Davis and gained his knowledge of the case from Davis' legal papers as conclusively establishing Ringstad's incredibility.

Similarly, a jury reasonably could conclude, given evidence that Henderson, at a time when he was under no pressure from Davis, admitted that he had falsely accused Davis of participation in the robbery in order to preserve Henderson's own plea deal, that Henderson's trial testimony as to Davis' involvement also was false.

Reed and Griffin undermine Henderson's credibility in a way

not available to the original jury.[8] As already explained, moreover, it goes farther than that. Henderson's admissions to Griffin and Reed that Davis in fact was *not* involved in the robbery/homicide do not merely undermine the credibility of his trial testimony; they are affirmative evidence of Davis' innocence. ***Vogel***, 96 Wis.2d at 383-84. This evidence of actual innocence did not exist at the original trial and directly undermines Domagalski's dubious claim that Davis somehow admitted his guilt.

There is nothing inherently incredible about the new witnesses' testimony. Unlike Henderson and Ringstad, upon whose testimony the state based its conviction, the testimony of Winkler, Reed and Griffin was internally consistent and they had nothing to gain by telling what they knew. Although the defense witnesses had prior criminal convictions, so did the state's. Their evidence is equally as entitled to credit by a jury as the testimony of a police officer. *E.g.*, ***Rohl v. State***, 65 Wis.2d at 695 (jury entitled to believe evidence unless it is inherently incredible, i.e, "in conflict with ... nature or with fully established or conceded facts"). *See also* ***Ronda***, *supra* (police officers convicted of obstruction of justice and perjury).

The relevant question, moreover, is not whether this Court believes the defense witnesses, but whether a reasonable jury could believe them to the extent necessary to create a reasonable doubt. ***McCallum***, 208 Wis.2d at 474.

As discussed in Section III,B, *supra*, moreover, the suggestion that Domagalski's assertion that Davis admitted his involvement renders all Davis' claims irrelevant is baseless. The detectives' ***Edwards*** violation removes much of the perceived weight of Davis'

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[8] Unlike Henderson's trial claim that he admitted Davis' non-involvement to Erickson's investigator only because Davis badgered him and offered him money (R63:96-98), Davis was not present when Henderson made similar admissions to Reed and Griffin, and there is no evidence he was offered anything for those admissions.

supposed admission. It is one thing to say, without corroboration, that a defendant, on the third day of questioning, finally provided, but refused to sign, the vague admission of involvement needed for his prosecution. It is much more powerful to assert that the defendant personally read through the officers' summary of the alleged statement and confirmed that it was accurate as written. The first is open to attack and reasonable doubt based on the officers' possible misinterpretation or misrepresentation of the defendant's actual words. Indeed, Erickson effectively attacked the detectives' summary of Davis' supposed statement on exactly these grounds (R62:193, 211-13), only to have that cross-examination eviscerated by testimony that Davis had reviewed the summary and agreed it was accurate (*id.*:213-14), evidence that should have been excluded under ***Edwards***.

While the jury *could* believe Domagalski's claim that Davis admitted his involvement, there is ample reason not to do so. Once again, the question is not, as the circuit court appeared to believe, whether there remained sufficient evidence for conviction, but whether there is a reasonable probability of a different result. ***Kyles***, 514 U.S. at 434-35.

The lower court's prejudice holding also overlooks the fact that "[c]onfessions, even those that have been found to be voluntary, are not conclusive of guilt." ***Crane v. Kentucky***, 476 U.S. 683, 689 (1986). Indeed, psychological research has shown that the "commonly held belief that innocent people will not confess to a crime is countered by evidence establishing that police-induced false confessions are a substantial cause of erroneous convictions." Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1280 (2005).

Even individually, therefore, these matters would give rise to a reasonable probability of a different result. After all, the prosecutor clearly believed all three pillars her case to be necessary for conviction and a jury reasonably could believe so as well. ***Kyles***, 514 U.S. at 448

("If a police officer thought so, a juror would have, too"). Combined, however, the cumulative prejudice is overwhelming, giving substantial reason to doubt each of the conviction's foundations and creating, not merely the reasonable probability of a different result required for reversal, but the likelihood of acquittal.

CONCLUSION

For these reasons, Kenneth M. Davis respectfully asks that the Court reverse the order denying his postconviction motion, vacate the judgment of conviction, and remand with directions to enter an order granting him a new trial.

Dated at Milwaukee, Wisconsin, November 8, 2010.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,654 words.

_____
Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 8th day of November, 2010, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Kenneth M. Davis to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____
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