UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Appeal No. 04-3946
(Case No. 00-C-0650 (E.D. Wis.))

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WARREN GOODMAN,

Petitioner-Appellant,

v.

DANIEL BERTRAND, Warden,
Green Bay Correctional Institution,

Respondent-Appellee.

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**Appeal From A Final Judgment Denying Petition For Writ Of Habeas Corpus and the Order Entered In The United States District Court For The Eastern District of Wisconsin, Honorable Patricia J. Gorence, Presiding**

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# BRIEF AND APPENDIX OF PETITIONER-APPELLANT

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## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel for the appellant, Warren Goodman, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

(1) The party represented is Warren Goodman

(2) Law firms which have represented the party in this matter:

Henak Law Office, S.C.

Attorneys and law firms which have represented the party in related, state-court matters:

Shellow, Shellow & Glynn, S.C.

Law Office of Michael J. Backes

David Rothstein, Attorney at Law

Glenn Givens, Attorney at Law

Wisconsin State Public Defender

(3)(i) N/A

(3)(ii) N/A

Dated: _____ _____

Robert R. Henak

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# BRIEF OF PETITIONER-APPELLANT

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## JURISDICTIONAL STATEMENT

Warren Goodman appeals from the final judgement entered by the district court on September 24, 2004, denying his Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The district court had jurisdiction over this federal habeas action under 28 U.S.C. §§2241 & 2254. The case was heard and decided in that Court by a Magistrate Judge, the parties having consented to such jurisdiction pursuant to 28 U.S.C. §636(c) and General Local Rule 73.1 (E.D. Wis.). The Court of Appeals has jurisdiction to hear this appeal under 28 U.S.C. §§1291 & 2253.

Goodman filed his notice of appeal on October 18, 2004. By Order dated April 28, 2005, this Court granted his motion for a certificate of appealability on the issues raised in this brief.

There are no pending motions which would toll the time within which to appeal.

There are no prior or related federal appellate proceedings in this case.

This is a collateral attack on Goodman's criminal conviction in Wisconsin state court. Goodman's current place of confinement is the Redgranite Correctional Institution, 1006 County Road EE, Redgranite, WI 54970. The warden at that institution is Jeffrey Endicott.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Goodman was denied the effective assistance of trial counsel due to counsel's:

    a. failure to subpoena Ilene Retzlaff, an eyewitness who identified someone other than Goodman from a lineup as most resembling the perpetrator;

    b. questioning of Goodman in a way which "opened the door" to evidence of his prior convictions for armed robbery;

    c. failure to request a limiting instruction regarding the permissible use of evidence that two witnesses were threatened by individuals unconnected to Goodman;

    d. failure properly to object and preserve the record regarding the denial of petitioner's right to confront the witnesses against him; and

    e. failure to object and request a mistrial based upon prosecutorial misconduct in closing argument.

2. Whether Goodman was denied the effective assistance of post-conviction/appellate counsel due to such counsel's:

a. failure to raise the foregoing issues 1, c-e above in his initial post-conviction motion and on direct appeal; and

b. failure to challenge by post-conviction motion or on direct appeal the admission of evidence of threats to witnesses without evidence connecting the threats to the petitioner.

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

The state of Wisconsin charged Goodman with armed robbery, party to a crime, and possession of a firearm by a felon. The charges arose from the robbery of a Kohl's Food Store in Milwaukee on July 28, 1992.

The basic facts regarding what happened were essentially undisputed; only the identification of Goodman as the robber was in issue.

On July 28, 1992, an individual entered the store, pointed a small silver handgun at the store manager, Daniel Kollath, and a cashier, Ilene Retzlaff, and demanded money. After Kollath complied with that demand, the perpetrator ran out of the store and jumped into a car driven by another individual. (R23:Exh.14:15-20).[1] The two later were seen a few blocks away, abandoning the first get-away car and climbing into a second car, a white Pontiac, which was driven by a third person (R23:Exh.14:123-25).[2]

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[1] Throughout this brief, several abbreviations are used pursuant to Fed. R. App. P. 28(e). Documents in the record are identified by the District Court docket sheet number as "R___"; the following ":___" reference denotes the exhibit ("Exh.") or page number of the document.

When the document is reproduced in the attached or separate appendix, the applicable appendix page number is also identified as "App. ___."

[2] The three alleged accomplices who testified on behalf of the state claimed that there (continued...)

The police stopped Mark Smith and Larry Ross in the white Pontiac later that same day (R23:Exh.14:182-90). The police also found about $200 and two handguns in the car, one a silver chrome handgun which was in Smith's pocket (R23:Exh.14:200-02; R23:Exh.15:65-66, 210-11, 216-18). Smith and Ross were placed in a lineup, but Kollath was unable to identify either of them as the perpetrator (R23:Exh.16:14-22). After providing a number of false alibis, however, Smith ultimately confessed to his participation in the robbery (although claiming to have been only a "lookout") and alleged that Ross also was involved (R23:Exh.15:61-66, 218-20). The police apparently did not attempt to lift fingerprints from the handguns (R23:Exh.14:203; R23:Exh.15:212-13).

The day after the robbery, and at a time when he subsequently admitted the facts were much clearer than they were later at trial (R23:Exh.14:43), Kollath identified an individual in a lineup as the robber, stating that, "discounting the hair . . . [he was] positive [that person] is the suspect." That person was not Goodman. After speaking with the detective, Kollath decided that he was not so sure of this identification. (R23:Exh.14:21-23, 70-77; R23:Exh.16:14-22).

On July 31, 1992, a detective showed Smith a photo of Warren Goodman, but Smith failed to identify him as a participant in the robbery (R23:Exh.15:240-42).

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[2](...continued)
was a fourth person in the white car as well (R23:Exh.14:84; R23:Exh.15:115-16, 162). The independent eyewitness to the transfer, however, testified that there could not have been anyone in the front passenger seat prior to the time the two individuals left the first car and jumped into the white one (R23:Exh.14:131, 135).

Later, however, Smith met with a prosecutor and obtained an agreement that, in exchange for his testimony, the state would dismiss one felony charge against him and make no recommendation as to sentence other than that any time run concurrent with his parole revocation. Only then did Smith claim that Goodman was involved and that Goodman was the gunman who entered the store. (R23:Exh.15:88-89, 240-42).

Armed with this information, the police obtained a photo identification, and later a lineup identification, of Goodman from Kollath (R23:Exh.14:25-31). Ms. Retzlaff, however, could not identify Goodman as the robber, choosing someone other than Goodman as the person in the lineup most resembling the person who had robbed the store (R23:Exh.3:80-81, 87-88, 93).

Smith ultimately pled guilty pursuant to the agreement to testify against Ross and Goodman (*see* R23:Exh.15:101-03). Ross pled no contest to the robbery and was sentenced to 17 years in prison (R23:Exh.18:11-12). However, he testified under oath at Goodman's parole revocation hearing in December, 1992, that Goodman was not with him the day of the robbery, and that he had not seen Goodman since they were in prison together some time previously (*see* R23:Exh.15:178-81).

The case against Goodman ultimately went to trial on January 31, 1994, before the Hon. Diane S. Sykes (R23:Exh.1-Exh.7). Smith and Kollath testified for the state and identified Goodman as the robber (R23:Exh.3:26; R23:Exh.4:119-22). Ms. Retzlaff, on the other hand, admitted that she could not identify Goodman and that she

instead picked someone other than Goodman as most resembling the robber, even though she told the police at the time of the robbery that she would be able to make an identification (R23:Exh.3:78-81). Goodman, represented at the time by Attorney Michael Backes, testified on his own behalf that he was not involved in the robbery (R23:Exh.5:8-23). Following extensive deliberations, the jury was unable to reach a verdict and the Court declared a mistrial on February 7, 1994 (R23:Exh.7:9-10).

In light of his testimony against Goodman, Judge Sykes sentenced Smith on December 4, 1994, to a term of six years in prison, concurrent with the sentence he was then serving (*see* R23:Exh.18:12-13).

When Larry Ross learned of the benefit Smith had obtained for his testimony against Goodman, he contacted the prosecutor and the investigating detective in an attempt to get a similar deal for himself. As he explained in a letter to the prosecutor, "I am not asking for forgiveness, I am asking for your help in considering me for a time cut, as in the same consideration you gave my co-defendant Mark Smith." In exchange for the state's agreement to support a motion for modification of his sentence, Ross agreed to testify against Goodman at the retrial and also agreed to identify the driver of the first getaway car. (R23:Exh.I:Exh.A).

Ross then disclosed that Percy Sallis was the driver of the first getaway car. Sallis was arrested, and likewise entered into an agreement with the state to testify against Goodman. (R23:Exh.12:3; R23:Exh.15:126-127; R23:Exh.18:13). While Ross claimed to have only met Sallis through Goodman (R23:Exh.15:181), Sallis

admitted that he and Ross had known each other for a long time, that Sallis was a close friend of Ross' brother, and that Sallis had never before met Goodman (R23:Exh.15:108-09, 123-24). Sallis also admitted that he had received a phone call from Ross' brother, informing him of Ross' arrest soon after it happened (R23:Exh.15:125).

The case again proceeded to trial before Judge Sykes on October 17, 1994 (R23:Exh.13-Exh.17). This time Goodman was represented by Attorney David Rothstein. Mr. Kollath again claimed that Goodman was the gunman, as did Smith, Ross, and Sallis (R23:Exh.14:12; R23:Exh.15:7-11, 114, 158-61). Goodman again testified that he was not involved in the robbery (R23:Exh.16:25-46). However, because Attorney Rothstein had failed to subpoena Ms. Retzlaff, who was away on vacation, she did not testify and the Court excluded as hearsay any evidence of the fact that she chose someone other than Goodman from a lineup as most resembling the robber (R23:Exh.13:2-4; R23:Exh.14:160-73).

Once again, there followed extensive deliberations, with the jury out nearly a full day (R26:Attach.:23-24). This time, however, the jury ultimately found Goodman guilty of both charges on October 21, 1994 (R23:Exh.17:2-3). On December 15, 1994, Judge Sykes sentenced Goodman to the maximum of 20 years in prison for the armed robbery and a consecutive term of two years for the felon in possession count (R23:Exh.A; R23:Exh.18:31-32).

Sallis and Ross ultimately received the benefit of their bargains with the state.

On January 18, 1995, Judge Sykes sentenced Sallis to probation for his part in the robbery, conditioned on six months of work release (*see* R23:Exh.I:6; R23:Exh.I:Exh.B:8). On January 25, 1995, the state appeared before the Hon. Jeffrey A. Wagner in support of Ross' motion for sentence modification, and Judge Wagner cut his sentence from 17 years to 12 years (*id.*:Exh.B).

Goodman, once again represented by Attorney Backes, filed a post-conviction motion on October 12, 1995, under Wis. Stat. (Rule) 809.30(2), claiming that Attorney Rothstein provided ineffective assistance of counsel, by (1) failing to subpoena Ms. Retzlaff to testify at trial, resulting in exclusion of evidence that one of two eyewitnesses identified someone other than Goodman as the perpetrator and (2) failing to obtain a certified transcript of the testimony at Goodman's parole revocation hearing for use in impeaching the same witnesses at trial; and (3) he asked an unnecessarily open-ended question of Goodman, which the Court then held "opened the door" to state cross-examination concerning the specifics of Goodman's prior convictions. The motion also included a general assertion that Rothstein was unprepared for trial. (R23:Exh.B:App. 201-09). By supplement filed November 10, 1995, Attorney Backes expanded upon the latter claim by specifying three instances of alleged ineffectiveness: an irrelevant question asked of Ross, the question of Goodman already referred to above, and a number of questions asked of a police officer for which Attorney Rothstein allegedly did not know the answers or which "revealed a basic ignorance of" the detective's role in the investigation

(R23:Exh.B:App. 301-06).

On December 11, 1995, the circuit court, Hon. Diane S. Sykes, denied the motion without a hearing. Relying primarily on the number of witnesses against Goodman, which it viewed as making the state's case "overwhelming," the court concluded that Goodman was not prejudiced, regardless whether Attorney Rothstein's performance was deficient for the specific reasons alleged in the motion. The court also noted the limiting instruction it gave regarding use of Goodman's prior convictions, the scope of the cross-examination it permitted despite lack of an official transcript of the parole hearing, and what it perceived as the limited value of Ms. Retzlaff's testimony. (R23:Exh.B:App. 401-11).

By per curiam order dated March 11, 1997, the Court of Appeals affirmed (R23:Exh.E; App. 124-34), and the Wisconsin Supreme Court denied Goodman's pro se petition for review by Order dated May 13, 1997 (R23:Exh.H; App. 123).

On July 31, 1998, present counsel filed a post-conviction motion, with supporting documentation, on behalf of Goodman pursuant to Wis. Stat. §974.06, raising, *inter alia*, the following issues:

1. Evidence of threats to witnesses without evidence connecting the threats to Goodman violated due process;

2. Ineffective assistance of trial counsel based on counsel's:

    a. failure to request a limiting instruction regarding the threats evidence,

    b failure properly to object and preserve the record regarding the denial of confrontation, and

c. failure to object and request a mistrial based upon prosecutorial misconduct in closing argument; and

3. Ineffective assistance of post-conviction/appellate counsel for failure to raise the foregoing issues in his initial post-conviction motion and on direct appeal.

(R23:Exh.I). On August 5, 1998, the circuit court, Hon. Diane Sykes, summarily denied the motion (R23:Exh.J). The Court of Appeals affirmed on February 22, 2000 (R23:Exh.O; App. 107-22). Although purporting to find that Goodman's claims were procedurally barred, the court in fact considered the merits of each of his claims under the rubric of ineffective assistance of post-conviction counsel (R23:Exh.O:6-16; App. 112-22). The Wisconsin Supreme Court denied Goodman's petition for review on April 28, 2000 (R23:Exh.R; App. 106; *see* R23:Exh.P).

On May 8, 2000, Goodman filed his habeas petition pursuant to 28 U.S.C. §2254, raising the issues presented on this appeal (R1). On November 3, 2000, the district court, Hon. Rudolph T. Randa, granted Goodman leave to proceed *in forma pauperis*, but denied and dismissed his habeas petition and his motion for appointment of counsel (R4; App. 24-33).

On November 13, 2000, Goodman moved for reconsideration (R6). By Orders dated June 20, 2001, and July 31, 2001, the court granted reconsideration, ordered the respondent to file an answer, and appointed undersigned counsel to represent Goodman (R9; R17; App. 21-23). By consent of the parties, the case was transferred to Magistrate Judge Patricia J. Gorence on August 13, 2001, for decision pursuant to 28 U.S.C. §636(c) (R22).

Following briefing (R27; R35; R37), the district court, Hon Patricia J. Gorence, Magistrate Judge, entered an order and judgment on September 24, 2004, dismissing Goodman's petition (R39; R40; App. 1-20).

Goodman filed his notice of appeal on October 18, 2004 (R41). Although Magistrate Judge Gorence denied his request for a certificate of appealability (R44; App. 101-05), this Court granted him that certificate by Order dated April 28, 2005.

## SUMMARY OF ARGUMENT

Warren Goodman appeals from denial of his federal habeas petition under 28 U.S.C. §2254. That petition claimed violation of Goodman's right to the effective assistance of trial and post-conviction counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

The District Court erred in concluding that Goodman is not entitled to habeas relief. The state court decisions on these points were not merely wrong, but unreasonably so.

Trial counsel acted unreasonably in (1) failing to subpoena an eyewitness who identified someone other than Goodman as most closely resembling the robber and thus corroborated Goodman's misidentification defense, (2) questioning Goodman in a way that "opened the door" to evidence of his prior robbery convictions, and (3) failing to request a limiting instruction regarding the permissible use of evidence that two witnesses were threatened by individuals unconnected to Goodman. The state court of appeals chose not to address these matters, which accordingly are reviewed

*de novo*.

Trial counsel also acted unreasonably in (4) failing properly to object to unconstitutional restrictions on his ability to confront the "cooperating witnesses" against Goodman with evidence of the extent of the benefits they obtained in exchange for claiming Goodman was involved in their illegal conduct, and (5) failing to object to false and misleading statements in the prosecutor's closing argument. While the state court of appeals properly held that one of the prosecutor's statements was impermissible, it unreasonably applied controlling United States Supreme Court authority in concluding that the prosecutor's other false statement was permissible and that Goodman was not denied the right to confrontation.

Goodman's post-conviction/appellate counsel acted unreasonably by failing to raise on direct appeal trial counsel's failures regarding the threats evidence, absence of a limiting instruction, denial of confrontation, and prosecutorial misconduct. While the state court concluded that trial counsel was not ineffective, and that post-conviction/appellate counsel thus was not ineffective for failing to raise such a challenge, that conclusion was patently unreasonable.

On the issue of resulting prejudice, the state court's decision on Goodman's direct appeal that counsels' errors did not prejudice his defense is directly contrary to controlling Supreme Court authority, requiring Goodman to show not just a reasonable probability of a different result but for counsel's errors, but that the errors also rendered the trial results "unreliable." The state court decisions on both appeals

also were contrary to controlling Supreme Court authority because they assessed the prejudicial effect of each attorney error in isolation rather than cumulatively.

Even if the state court had not applied an improper standard for assessing resulting prejudice, that court's conclusion that Goodman was not prejudiced by his attorneys' errors is so unreasonable or arbitrary as to permit habeas relief nonetheless.

## ARGUMENT

### TRIAL AND POST-CONVICTION COUNSELS' UNREASONABLE ACTS AND OMISSIONS PREJUDICED GOODMAN'S DEFENSE, DENIED HIM EFFECTIVE ASSISTANCE OF COUNSEL, AND ENTITLE HIM TO HABEAS RELIEF

Warren Goodman is being held in violation of the Constitution of the United States because his conviction in Wisconsin state court resulted from the violation of his right to the effective assistance of trial and post-conviction/appellate counsel. Specifically, Goodman was denied the effective assistance of trial counsel due to counsel's:

a. failure to subpoena Ilene Retzlaff, an eyewitness who chose someone other than Goodman from a lineup as most resembling the perpetrator;

b. questioning of Goodman in a way that "opened the door" to evidence of his prior convictions for armed robbery;

c. failing to request a limiting instruction regarding the permissible use of evidence that two witnesses were threatened by individuals unconnected

to Goodman.;

d. failure properly to object and preserve the record regarding the denial of petitioner's right to confront the witnesses against him; and

e. failure to object and request a mistrial based upon prosecutorial misconduct in closing argument.

Goodman was denied the effective assistance of post-conviction/appellate counsel due to counsel's:

a. failure to raise the foregoing issues c-e above in his initial post-conviction motion and on direct appeal; and

b. failure to challenge by post-conviction motion or on direct appeal the admission of evidence of threats to witnesses without evidence connecting the threats to the petitioner.

Even under the restrictive requirements of the Antiterrorism and Effective Death Penalty Act of 1996, relief is appropriate where, as here, the defendant's custody results from the violation of his constitutional rights and the state court decisions are both contrary to controlling federal law and palpably unreasonable. *E.g.*, *Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997).

**A. Standard of Review**

The substantive legal standards are settled. A defendant alleging ineffective assistance of trial counsel first must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668,

688 (1984). A defendant thus must rebut the presumption of attorney competence "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986), *citing Strickland*, 466 U.S. at 688-89. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id*., *citing Strickland*, 466 U.S. at 689. Moreover, 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*, 477 U.S. at 384.

It is not necessary, of course, to demonstrate total incompetence of counsel. Rather, a single serious error may justify reversal. *Kimmelman*, 477 U.S. at 383; *see United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). "[T]he right to effective assistance of counsel. . . may in a particular case be violated by even an isolated error. . . if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The deficiency prong of the *Strickland* test is met when counsel's performance was the result of oversight or inattention 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).

Second, a defendant must show that counsel's deficient performance prejudiced his or her defense. A counsel's performance prejudices the defense when

the "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The defendant is not required, however, to show "that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693; *see Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, the question on review is "whether there is 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. "Reasonable probability," under this standard, is defined as a "probability sufficient to undermine confidence in the outcome." *Id.* 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 consider the totality of the circumstances. *Strickland*, 466 U.S. at 695. The Court thus must assess the cumulative effect of *all* errors, and may not merely review the effect of each in isolation. *E.g.*, *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001); *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000). Prejudice does not depend on whether the particular fact-finder at the original trial would have decided the matter differently but for counsel's errors, but whether the errors could have affected the decision of a reasonable trier of fact. *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985); *see Strickland*, 466 U.S. at 695.

The same two-prong standard is applied, with appropriate modifications, to

assess the constitutional effectiveness of post-conviction or appellate counsel. As explained by this Court:

> [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) (citations omitted).

Both prongs under *Strickland* are reviewed *de novo*. *E.g.*, *Hall v. United States*, 371 F.3d 969, 973 (7th Cir.2004).

Demonstrating a prejudicial constitutional violation is not alone sufficient for habeas relief, however. The question of whether a constitutional violation mandates or permits habeas relief is controlled by 28 U.S.C. §2254(d). As amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104, 110 Stat. 1214 ("AEDPA"), 28 U.S.C. §2254(d) provides that a habeas application "shall not be granted" with respect to a claim the state courts adjudicated on the merits

> unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court . . ..

28 U.S.C. §2254(d)(1).

This Court has explained the applicable legal standards under the AEDPA as follows:

> A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the

> Supreme] Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that reached by the Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) [footnote omitted]. An "unreasonable application" of Supreme Court precedent occurs when "the state court identifies the correct governing legal rule ... but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at 407; see also *Jackson v. Miller*, No. 98-3736 2001 WL 884814 (7th Cir. Aug. 8, 2001). We review a state court decision de novo to determine whether it was "contrary to" Supreme Court precedent; however, we defer to reasonable state court decisions. *See Ouska v. Cahill-Masching*, 246 F.3d 1036, 1044 (7th Cir.2001).

*Dixon v. Snyder*, 266 F.3d 693, 700 (7th Cir. 2001).

This Court has construed this provision as requiring *de novo* review only of purely legal questions to determine if the state court cited the correct Supreme Court precedents, and "reasonableness" review regarding application of that precedent to the particular facts of the case:

> Under these new standards, our review of state courts' legal determinations continues to be *de novo*. So, too, does our review of mixed questions of law and fact. [Citations omitted]. Under the AEDPA, however, we must answer the more subtle question of whether the state court "unreasonably" applied clearly established federal law as the Supreme Court has determined it. *Pitsonbarger v. Gramley*, 103 F.3d 1293, 1297-98 (7th Cir. 1996).

*Hall v. Washington*, 106 F.3d 742, 748 (7th Cir. 1997). The *Hall* Court went on to hold, however, that the reasonableness standard is not a toothless one:

> The statutory "unreasonableness" standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes. On the other hand, Congress would not have used the word "unreason-

> able" if it really meant that federal courts were to defer in all cases to the state court's decision. Some decisions will be at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue.

*Id.* at 748-49.

Finally, however, this Court has made clear that the restrictive provisions of the AEDPA apply *only* to matters actually decided on the merits by the state court. Matters which the state court did not decide on the merits are reviewed *de novo*. *Dixon*, 266 F.3d at 701, 702; *see Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir.), *reh'g denied*, 108 F.3d 144 (7th Cir. 1997).

The district court's application of those standards is reviewed *de novo*. *Washington v. Smith*, 219 F.3d 620, 626 (7th Cir. 2000) (citation omitted).

Applying these standards, the state courts' findings that Goodman's trial and post-conviction counsel provided effective assistance of counsel were both contrary to established federal law and "involved an unreasonable application of clearly established Federal law" as determined by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The state court decisions on Goodman's ineffectiveness claims were not "one of several equally plausible outcomes." *Hall*, 106 F.3d at 748-49. Rather, those decisions were, at best, seriously at tension with governing Supreme Court precedents, inadequately supported by the record, and arbitrary, thus mandating issuance of the writ despite the AEDPA amendments. *Id.* at 749.

### B. Goodman Was Denied The Effective Assistance Of Trial Counsel

Warren Goodman was denied the effective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The specific instances of ineffectiveness concern Attorney Rothstein's (1) failure to subpoena an exculpatory eye-witness, (2) "opening the door" to admission of Goodman's prior armed robbery convictions, (3) failure to request a limiting instruction regarding evidence of threats to two state witnesses, (4) failures regarding denial of Goodman's confrontation rights, and (5) failure properly to object to prosecutorial misconduct in closing argument.

#### 1. The State Court Decision on Goodman's Direct Appeal Is Contrary to Clearly Established Federal Law as Determined by the Supreme Court Regarding the Necessary Showing of Prejudice

"It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams v. Taylor*, 529 U.S. 362, 391 (2000). While purporting to apply the Supreme Court's *Strickland* standard for ineffectiveness, the Wisconsin Court of Appeals on Goodman's direct appeal in fact did not. Specifically, in assessing whether Goodman was prejudiced by the first two claims of ineffectiveness above (i.e., failure to subpoena Ilene Retzlaff and opening the door to admission of prejudicial "other acts" evidence), the Wisconsin Court of Appeals placed the burden on Goodman to prove, not merely a reasonable probability of a different result, but that the alleged errors of

counsel rendered his trial "unreliable" or "fundamentally unfair." Although initially reciting *Strickland's* "reasonable probability of a different result" standard, the court quoted *State v. Smith*, 207 Wis.2d 258, 558 N.W.2d 379, 387 (1997), for the proposition that the applicable test had evolved away from that standard:

> "The *Strickland* test is not an outcome-determinative test. In decisions following *Strickland*, the Supreme Court has reaffirmed that the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceedings fundamentally unfair.'"

(R23:Exh.E:7; App. 130). The Court of Appeals on Goodman's initial appeal summarized its holding regarding prejudice solely by reference to its "reliability" standard:

> The trial court properly concluded that none of Goodman's counsel's alleged deficient conduct prejudiced him such that the result of the trial was unreliable.

(R23:Exh.E:8; App. 131).

Although overlooked by the District Court below (R39:9-10; App. 10-11), the *Smith* Court had relied squarely upon *Lockhart v. Fretwell*, 506 U.S. 364 (1993), as authority for its modification away from *Strickland's* "reasonable probability" standard to the "unreliable" or "fundamentally unfair" standard. *Smith*, 558 N.W.2d at 387. However, the Supreme Court in *Strickland*, and more recently in *Williams*, defined the proper question when assessing resulting prejudice as whether there would have been a "reasonable probability of a different result" but for counsel's errors. *Williams*, 529 U.S. at 391; *Strickland*, 466 U.S. at 694. Indeed, the Court in

*Williams* expressly rejected as "contrary to" *Strickland* exactly the interpretation of *Lockhart* described in *Smith* and applied by the Wisconsin Court of Appeals on Goodman's direct appeal. 529 U.S. at 391-95.

The Wisconsin Court of Appeals' decision thus was directly contrary to controlling Supreme Court precedent. Contrary to that decision, the defendant need only show a reasonable probability of a different result. He is not required under *Strickland* to show that counsel's deficient performance *also* undermined the fairness or reliability of the proceedings. *See Williams*, *supra*.

In light of *Williams*, this Court has explained the "contrary to" provision of §2254(d)(1) as follows:

> In order for the state court's decision to be considered "contrary to . . . clearly established Federal law as established by the United States Supreme Court," that state court's decision must be "substantially different from relevant [Supreme Court] precedent." Id. at 1519. Thus, under the "contrary to" clause of sec. 2254(d)(1), we could grant a writ of habeas corpus in what would seem to be a narrow range of cases where the state court applied a rule that contradicts the governing law as expounded in Supreme Court cases or where the state court confronts facts materially indistinguishable from a Supreme Court case and nevertheless arrives at a different result. Such decisions would be "contrary to" clearly established federal law within the meaning of sec. 2254(d)(1).

*Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000).

Because the Wisconsin Court of Appeals' decision on the direct appeal in this case applied a standard for prejudice which contradicts the Supreme Court's holdings in *Strickland* and *Williams*, that decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court . . .." Because application of the proper

standard establishes violation of Goodman's right to the effective assistance of counsel, *see infra*, habeas relief is appropriate. *See, e.g.*, *Williams*, 529 U.S. at 391-95 (state court decision requiring more than "reasonable probability of a different result" to establish prejudice was "contrary to" *Strickland*); *Washington v. Smith*, 219 F.3d at 632-33 (Wisconsin court's application of improper prejudice standard was contrary to *Strickland*; application of proper standard mandated habeas relief).

### 2. The State Court Decisions on Both of Goodman's Appeals Are Contrary to Clearly Established Federal Law as Determined by the Supreme Court Requiring an Assessment of the Cumulative Prejudicial Effect of Counsel's Errors

The ultimate state court decisions on both Goodman's direct appeal and his Wis. Stat. §974.06 appeal also were contrary to clearly established federal law as determined by the Supreme Court in *Strickland* because both decisions assess the prejudice resulting from each alleged error in isolation. *Strickland* and *Williams*, however, mandate that a court assess the *cumulative* effect of counsel's alleged errors. *See Washington v. Smith*, 219 F.3d at 634-35:

> Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence under *Strickland* rather than the individual errors. *See Williams*, 120 S.Ct. at 1515. Considering the "totality of the evidence before the . . . jury," *Strickland*, 466 U.S. at 695 . . ., [trial counsel's] unprofessional errors were prejudicial to Washington.

The District Court was wrong in holding that the Wisconsin Court of Appeals assessed the cumulative effect of counsels' errors (R39:10-11; App. 11-12). Neither state court decision purports to assess the cumulative effect of counsel's errors, nor

even cites to that requirement (*see* R23:Exhs.E & O; App. 107-22, 124-33). Rather, they merely address each alleged instance of deficient conduct individually and determines that each, individually, did not prejudice Goodman's defense. (*See* R23:Exh.E:8-9, 10; App. 131-33; R23:Exh.O:10 ("Goodman fails to demonstrate a reasonable probability that but for trial counsel's failure to request a limiting instruction the results of the proceedings would have been different"), 15-16 (because the prosecutor's misconduct affected the testimony of only one witness, there was no resulting prejudice); App. 116, 121-22). Also, while assessing cumulative prejudice on Goodman's second appeal would have required considering the deficient performance identified in his direct appeal as well (*see* R23:Exh.K:22-26), the Wisconsin Court of Appeals failed to do so.

Because the state court failed to apply the appropriate standard for assessing prejudice as required by the Supreme Court's holdings in *Strickland* and *Williams*, its decisions are "contrary to . . . clearly established Federal law, as determined by the Supreme Court . . ." on this ground as well.

### 3. The State Court's Decisions Are Unreasonable Applications of Controlling Supreme Court Precedent

As already noted, the *Strickland* standards qualify as "clearly established Federal law, as determined by the Supreme Court of the United States." *Williams,* 529 U.S. at 391. For the reasons which follow, the state court's determination that trial counsel's actions provided effective assistance of counsel was an unreasonable

application of those standards.

### a. Trial counsel's performance was deficient

#### i. Failure to subpoena exculpatory eye-witness Ilene Retzlaff

Ms. Retzlaff was an eyewitness to the robbery who was sure she could identify the robber. Yet, when presented with Goodman in a lineup, she chose someone else as most closely resembling the person who actually robbed the store. (R23:Exh.3:78-81, 87-88, 93).

Ms. Retzlaff testified at the first trial (R23:Exh.3:70-94), which resulted in a hung jury (R23:Exh.7:9-10). Attorney Rothstein, however, failed to subpoena her to testify at the second trial. Because she was on vacation, she was unavailable to testify at the second trial and the trial court excluded her prior exculpatory testimony as hearsay. Attorney Rothstein's persistent efforts to introduce Retzlaff's prior testimony were denied by the trial court. (R23:Exh.13:2-4; R23:Exh.14:160-73).

This issue was raised in Goodman's direct appeal (R23:Exh.B:7-8; R23:Exh.F:8-10). The state's response relied solely on the claimed lack of resulting prejudice; it failed to claim that Rothstein's failure to subpoena Retzlaff was somehow reasonable (R23:Exh.C:7-8, 9-10). The Wisconsin Court of Appeals did not decide whether Attorney Rothstein's failure to subpoena Retzlaff to testify was deficient performance, instead holding in conclusory terms that Goodman's defense was not prejudiced given the number of witnesses for the state (R23:Exh.E:10; App. 133).

Because the state court did not conclude that Attorney Rothstein's actions were reasonable, this Court's review is *de novo*, uncontrolled by the new, higher standards of the AEDPA. *Dixon*, 266 F.3d at 701, 702.

No rational argument can be made that the failure to subpoena this important defense witness was some part of a reasonable defense strategy. Given the significance of an independent eye-witness who would corroborate Goodman's denial of participation in the robbery, the need for such a defense witness is obvious. Attorney Rothstein certainly recognized the importance of her testimony, trying time and again to attain admission of her testimony from the first trial (R23:Exh.13:2-4; R23:Exh.14:160-73). He intended to call her to testify, but simply failed to subpoena her in time.

Where, as here, defense counsel fails to subpoena a critical defense witness in a timely manner, such failure is deficient performance. *Washington v. Smith*, 219 F.3d at 629-30 (failure to subpoena exculpatory witness until beginning of trial constitutes deficient performance).

**ii. "Opening the door" to evidence of Goodman's prior armed robbery convictions**

Goodman testified on his own behalf and denied involvement in the offense charged against him (R23:Exh.16:25-46). During direct examination, Attorney Rothstein asked him the following question:

Q. I ask you again did you do any armed robberies?

A. No.

(R23:Exh.16:44). The trial court construed Goodman's response as a denial of any armed robberies, not just that at issue in this case. It therefore construed Goodman's answer as untruthful and allowed the state to introduce evidence that he had two prior armed robbery convictions. (R23:Exh.16:47-52; *see* R23:Exh.16:64-66). But for Attorney Rothstein's unnecessarily vague and broad question, evidence of the substance of the prior convictions would not have been admissible. *E.g.*, *State v. Kuntz*, 160 Wis.2d 722, 467 N.W.2d 531, 542-43 (1991) (when witness truthfully answers whether he has been convicted of a crime and the number of times, further inquiry regarding substance of offenses is barred); *see* Wis. Stat. §906.09.

Once again, Goodman raised this matter on his direct appeal (R23:Exh.B:9; R23:Exh.F:9-10). Once again, the state focused solely on the alleged lack of resulting prejudice and did not claim that the vague and overly broad nature of Attorney Rothstein's question was somehow part of a rational trial strategy (R23:Exh.C:9-10). And, once again, neither the state trial court nor the Court of Appeals concluded that Rothstein's actions were in any way justified or reasonable (R23:Exh.B:App.403-05; R23:Exh.E:8-9; App. 131-32).

Since the Wisconsin Court of Appeals did not make a finding regarding deficient performance, review of this issue is *de novo*. *Dixon*, 266 F.3d at 701, 702.

"Opening the door" to otherwise inadmissible evidence of a defendant's two prior armed robbery convictions, and in the process making it appear his client lied

under oath in an effort to hide them, cannot remotely be deemed part of a rational defense strategy. Attorney Rothstein did not intend to "open the door" to such highly prejudicial evidence. He sought to exclude it. (*See* R23:Exh.16:47-52, 65-66). Rather, it was a "blunder" (R23:Exh.B:App.409), a mistake that any reasonable trial attorney would seek to avoid by careful questioning.

### iii. Failure to request limiting instruction regarding threats evidence

Two state witnesses, Mark Smith and Larry Ross were permitted to testify, over extensive objection, regarding threats they allegedly received from persons other than Goodman (R23:Exh.15:32-45). Smith testified that, in October, 1993, he was approached and threatened by other prison inmates and made to sign an affidavit not to come to court and testify against Goodman. Smith previously had gotten into a fight due to his testifying in this case. (R23:Exh.15:50-61, 91-92). Ross testified that he was threatened in a holding cell after he was brought from prison to testify against Goodman (R23:Exh.15:147-50). Neither witness testified that Goodman threatened him in any way or that he was present during the alleged threats.

It is well-established that evidence of threats, unconnected to the defendant himself, generally is irrelevant and highly prejudicial, such that its admission results in a denial of fundamental fairness and due process. *See Clark v. Duckworth*, 906 F.2d 1174 (7th Cir. 1990); *Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988). Only when such evidence is necessary to explain a specific credibility issue, such as

nervousness or delay in reporting, can the extremely limited probative value of such evidence overcome its extreme prejudicial effect. *E.g.*, *United States v. Thomas*, 86 F.3d 647, 654 (7th Cir. 1996) (threat evidence unconnected to the defendant is inadmissible regarding witness' general credibility), *cert. denied sub nom.*, 519 U.S. 967 (1996).

Wisconsin law is in accord. *Bowie v. State*, 85 Wis.2d 549, 271 N.W.2d 110, 111-12 (1978) (evidence of threats inadmissible where witness "was unable to point to any connection between the defendant and the threat, apart from the fact that fulfillment of the threat was said to turn upon her testifying against him").

After offers of proof, objections, and arguments, however, the trial court nonetheless found a specific link between the threats and Goodman's *case*, despite the absence of evidence that Goodman *himself* was involved in or had prior knowledge of the threats (R23:Exh.15:32-46, 129-45). The trial court admitted the evidence on the limited grounds that, in the court's view, they reflected on the witnesses' credibility by showing what they had to lose by testifying (R23:Exh.15:36-37, 145).[3]

Despite the limited justification for admission of such inherently prejudicial evidence, Attorney Rothstein did not request an instruction limiting the jury's use of the evidence to that allegedly permissible purpose. As a result, the jury was left to use the threats for *any* purpose, including as evidence suggesting Goodman's "conscious-

[3] Post-conviction counsel's failure to appeal the circuit court's decision to admit the threats evidence independently denied Goodman the effective assistance of post-conviction counsel. *See* Section C, 1, *infra*.

ness of guilt" and otherwise to question his credibility, even though the threats were not attributable to him except by improper innuendo.

This issue was argued in Goodman's §974.06 motion and on appeal from denial of that motion (R23:Exh.I:22; R23:Exh.K:13-14; R23:Exh.P:13-14). The state conceded deficient performance in this regard by not arguing the point in state court (R23:Exh.M:17-19), *see, e.g.*, *Charolais Breeding Ranches v. FPC Securities Corp.*, 90 Wis.2d 97, 279 N.W.2d 493, 499 (Ct. App. 1979) (that which is not controverted is deemed conceded), and the Wisconsin Court of Appeals relied solely on a perceived lack of resulting prejudice (R23:Exh.O:10; App. 116). Accordingly, the deficient performance prong on this issue also is reviewed *de novo*, unconstrained by the AEDPA. *Dixon*, 266 F.3d at 701, 702.

Attorney Rothstein would have had nothing to lose by requesting a limiting instruction and much to gain. Such a limiting instruction would have been proper under Wis. Stat. §901.06, and, contrary to the conclusory assertion of the trial court in denying post-conviction relief on this ground (R23:Exh.J:5), essential to ensuring that such highly prejudicial evidence not be used beyond the extremely limited purpose for which it was deemed admissible. The limitation on the permissible use of such evidence would not be intuitively clear to a lay jury. Rather, the natural tendency of jurors would be to use the evidence to show propensity, as evidence that Goodman likely committed this crime because he had committed a similar crime in the past.

Goodman can conceive of no possible legitimate or reasonable strategic purpose in not seeking to limit the damage from his trial counsel's blunder with a proper limiting instruction. The failure to request such an instruction accordingly was deficient performance.

### iv. Failure properly to object and preserve the record regarding the denial of Goodman's right to confront the witnesses against him

Although previously stating that evidence of what Mark Smith "has to gain or to lose by testifying in this trial" is highly relevant to the jury's evaluation of his credibility (R23:Exh.15:36-37), the trial court excluded evidence of the amount of time he faced and the state's recommendation in his case (R23:Exh.15:90). This exclusion deprived the jury of prototypical evidence of bias and interest, thus violating Goodman's right to confrontation. *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

According to the United States Supreme Court:

> a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness."

*Van Arsdall*, 475 U.S. at 680, *quoting Davis v. Alaska*, 415 U.S. 308, 318 (1974). *See also State v. Lenarchick*, 74 Wis.2d 425, 247 N.W.2d 80, 91-92 (1976) (recognizing right of defendant to cross-examine an accomplice about prosecutorial concessions

in exchange for testimony implicating the defendant).

"[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Van Arsdall*, 475 U.S. at 678-79. In order to test the truth of a witness's testimony, defense counsel thus is entitled not only to elicit answers to questions *whether* a witness is biased, prejudiced, possessed ulterior motives or "otherwise lacked that degree of impartiality expected of a witness at trial," but rather, must be allowed to "make a record from which to argue *why*" any or all of these factors may exist. *Davis*, 415 U.S. at 318 (emphasis in original). The jurors are "entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on [a witness'] testimony which provided 'a crucial link in the proof. . . of petitioner's act.'" *Id.* at 317 (citation omitted). *See also Lenarchick*, 247 N.W.2d at 92.

Disclosure of the full benefit received by Smith in exchange for inculpating Goodman was critical to the jury's evaluation of his credibility. Attorney Rothstein, however, failed to make a record of either an objection or proffer on this ground (there was an unreported sidebar (R23:Exh.15:90)). Smith had faced a possible sentence of up to 22 years consecutive to the eight years remaining on his parole term, but received only six years concurrent based upon the state's recommendation and his testimony against Goodman (R23:Exh.I:4; *id.*:Exh.I:Exh.B:8).

Rothstein likewise failed to make a record or to seek to introduce similar

evidence concerning Ross and Sallis. Ross had received a 17-year sentence, which he could avoid only be testifying against Goodman (R23:Exh.I:Exh.B:7-8), while Sallis faced a possible 20-year term for the armed robbery. *See* Wis. Stat. §§939.50(3)(b) & 943.32(1)(b)(2) (1991-92). Since Smith was the first alleged accomplice to testify, Rothstein reasonably would conclude that the court's exclusion applied to the time faced by Ross and Sallis as well, but counsel should have made a record of that fact.

The legitimacy of inquiry into whether a witness such as Ross or Sallis has been influenced by a hope or expectation of leniency is well-recognized. *See*, *e.g.*, *Gordon v. United States*, 344 U.S. 414, 422 (1953); *Lenarchick*, 247 N.W.2d at 92. The only way truly to demonstrate the significance of the witness' hopes and expectations was to bring out the full extent of their exposure to punishment if he did not receive the hoped-for leniency. Only by fully demonstrating the witnesses' hopes, expectations, and vulnerability could the defense establish the extent to which they were biased, possessed ulterior motives, or "otherwise lacked that degree of impartiality expected of a witness at trial" and "make a record from which to argue *why*" any or all of these factors existed. *Davis*, 415 U.S. at 318 (emphasis in original). Moreover, it is the hopes and expectations of the witness at the time he testifies which determine whether that testimony in fact is influenced thereby. *Id*. at 317 n.5 (quoting 3A *Wigmore* §940, p. 776 (Chadbourne Rev. 1970)).

It is not sufficient merely to show the jury that a witness has *some* incentive to

lie. The state court's contrary conclusion overlooks the fact that all motives are not equal (R23:Exh.O:12-13; App. 118-19). Someone who is promised or expects something of value in return for his or her testimony has a motive to lie. A jury reasonably could conclude, however, that a witness' willingness to lie under oath is directly proportional to what he or she has to gain from the testimony. One who has more to gain by lying (or more to lose by not lying) is more likely to lie. For example, an offer of a million dollars, or avoiding 17 or 20 years in prison, would provide a very strong motive to lie, while bus fare or a chance to avoid a short time in prison likely would not.

The jury was denied important evidence necessary to the evaluation of the credibility of three of the state's star witnesses. A proper objection and record on this ground would have provided the trial court an opportunity to correct its error in excluding the evidence or, if it did not, would have preserved the error for reversal on appeal.

The Wisconsin Court of Appeals' suggestion that Attorney Rothstein's failure to make such a record was somehow proper thus is wholly unreasonable (R23:Exh.O:11-13; App. 117-19). Attorney Rothstein in fact sought to introduce that evidence, and there is no rational basis on which a failure to object to its exclusion could be deemed a legitimate part of a rational defense strategy. At best, the state court's conclusion on deficient performance is a misguided application on the separate issue of resulting prejudice. *See* Section B,1,c, *infra*.

### v. Failure to object and request a mistrial based upon prosecutorial misconduct in closing argument

During its closing argument, the state was permitted to argue that, although Larry Ross wanted a time cut for his testimony, nothing could be done for him because he already had been sentenced for the robbery. The obvious purpose of the state's argument was to assert that Ross thus had no motive falsely to accuse Goodman. (R23:Exh.16:98-99).

As Goodman argued in the state courts (R23:Exh.I:25-26; R23:Exh.K:17-19; R23:Exh.P:17-19), the prosecutor's argument was false. *See, e.g.*, *Rosado v. State*, 70 Wis.2d 280, 234 N.W.2d 69, 73 (1975) (defendant permitted to request sentence modification based on "new factors," *i.e.*, "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all the parties"). Indeed, the state subsequently did in fact appear in support of just such a motion on behalf of Ross, resulting in reduction of his sentence from 17 to 12 years (R23:Exh.I:Exh.B).

The state likewise was permitted to argue that Percy Sallis should be deemed reliable because he could not have been charged or convicted based on Ross' testimony except for the fact Sallis voluntarily confessed his own involvement (R23:Exh.16:99-100). This argument also was untrue, as the Wisconsin Court of Appeals held (R23:Exh.O:15; App. 121). It is well-settled that even uncorroborated

testimony of an alleged accomplice is sufficient to convict if the jury finds the testimony credible. *See, e.g.*, *Kutchera v. State*, 69 Wis.2d 534, 230 N.W.2d 750, 758 (1975).

False arguments of this type deny the defendant due process. *See, e.g.*, *Miller v. Pate*, 386 U.S. 1 (1967). The Supreme Court has long held that the state's knowing use of false evidence deprives the defendant of due process and a fair trial when the evidence is material to guilt or punishment. *See*, *e.g.*, *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) ("[D]eliberate deception of court and jury by the presentation of testimony known to be perjured ... is ... inconsistent with the rudimentary demands of justice," violates due process rights, and denies fair trial); *Pyle v. Kansas*, 317 U.S. 213 (1942). The same analysis applies when the prosecutor fails to correct false testimony. *Alcorta v. Texas*, 355 U.S. 28 (1957); *see Napue v. Illinois*, 360 U.S. 264 (1959) (extending *Mooney* to prosecutor's knowing failure to correct false testimony related solely to witness' credibility).

The Court likewise has extended *Mooney* to cases in which the prosecutor fails to correct testimony related to a witness' credibility that the prosecutor should have known, but did not in fact know, was false. *Giglio v. United States*, 405 U.S. 150 (1972). Contrary to the state courts' suggestions (R23:Exh.J:3-4; R23:Exh.O:13-14, App. 119-20), therefore, it matters not that the prosecutor based her argument on the detective's statements to Ross. She affirmatively used those inaccurate statements to suggest to the jury something which in fact was not true.

Attorney Rothstein, however, failed to object or request a mistrial on this ground. *See State v. Holt*, 128 Wis.2d 110, 382 N.W.2d 679, 692 (Ct. App. 1985) (failure to object to improper prosecutorial argument and move for mistrial on those grounds waives issue on appeal). Nor did he request a jury instruction that the law is contrary to that alleged by the state. There was no possible reasonable basis for this failure.

The state court of appeals properly concluded that Attorney Rothstein's failure to object to the false argument regarding Sallis was deficient performance (R23:Exh.O:14-15; App. 120-21). However, once again confusing the deficient performance and prejudice prongs of the analysis, that court concluded that Attorney Rothstein's failure to object to the false argument regarding Mr. Ross was not deficient. (R23:Exh.O:13-14; App. 119-20).

That court suggests that the prosecutor's argument that Ross had nothing to gain from changing his testimony and claiming Goodman was involved in the robbery,[4] while directly contrary to both state law and Ross' reasonable expectations, was somehow nothing more than a recitation of what an officer had told Ross and therefore proper (R23:Exh.O:13-14; App. 119-20). The court wholly overlooked, however, that the prosecutor either knew or should have known that the statements attributed to the officer were false. In fact, the state could help Ross with his sentence (as it in fact did after Ross changed his testimony). A prosecutor cannot so easily

[4] Ross had testified at Goodman's parole revocation hearing that Goodman was not involved in the robbery (R23:Exh.15:178-80).

circumvent the requirements of due process by failing to correct the misleading testimony of a witness and indeed relying on that misleading testimony as the prosecutor did here. *E.g.*, *Giglio*, *supra*. By overlooking this fact, the state court's conclusion that trial counsel's performance was not deficient in failing to object to the false and misleading argument regarding Mr. Ross was both contrary to controlling Supreme Court authority (*i.e.*, *Giglio*), and an unreasonable application of both *Giglio* and *Strickland*.

**b. Goodman's defense was prejudiced by trial counsel's errors**

The identified errors were not harmless. To the contrary, there is more than a reasonable probability of a different result on retrial without these errors. Of course, the Court must consider the cumulative effect of all errors in assessing prejudice. *See* Section B,2, *supra*; *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995). Because the state courts failed to apply the prejudice analysis mandated by the Supreme Court, and instead reviewed the effect of each error in isolation, review of this matter is *de novo*. *Washington v. Smith*, 219 F.3d at 632-33.

The sole issue at trial concerned the identity of Goodman as a participant in the robbery carried out by Ross, Smith and Sallis. Given the absence of any physical evidence or confession tying Goodman to the robbery, that issue boiled down to a credibility contest between Goodman on the one hand and Kollath, Smith, Ross, and Sallis, on the other. Resolution of such a contest is for a fully informed jury. The jury

cannot search for the truth, however, if the trial court erroneously prevents the jury from considering relevant admissible evidence on a critical issue in the case. *State v. Cuyler*, 110 Wis.2d 133, 327 N.W.2d 662, 667 (1983). The errors identified here dramatically distorted the relative balance between the state's case and that of the defense.

The errors unfairly undermined Goodman's credibility. Evidence of supposed threats against Smith and Ross likely led the jury to believe that Goodman ultimately was behind those threats, despite the absence of evidence supporting that conclusion. *See, e.g.*, *Clark*, 906 F.2d at 1177. As this Court explained in *Dudley*,

> In considering the petitioner's alibi defense, his credibility, because he testified in his own behalf, takes on added significance. Pointer's threat testimony could only reflect adversely on the petitioner even though the threats were not traced to him or his codefendants, except by innuendo.

854 F.2d at 971. The Third Circuit similarly has found that threats "constitute a striking example of evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *United States v. Guerrero*, 803 F.2d 783, 785 (3rd Cir.1986) (internal quotations and citations omitted).

The danger of such prejudice is especially high given trial counsel's failure to demand an instruction limiting use of the evidence to the narrow purpose for which the court deemed it admissible. Indeed, this Court has noted that even an instruction on the issue likely would be insufficient to overcome the resulting unfair prejudice of

such evidence. *See Dudley*, 854 F.2d at 970 ("'[S]uch evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant'" (citation omitted)).

Of course, the adverse effect of the particular errors raised here on Goodman's credibility cannot be viewed in isolation. The effect of these claims must be combined with that resulting from the failure to subpoena Ms. Retzlaff and trial counsel's opening the door to evidence of Goodman's prior robbery convictions. The absence of Ms. Retzlaff denied Goodman important exculpatory evidence that one of the two eyewitnesses to the robbery, a person with no motive to lie and who felt certain soon after the robbery that she could identify the perpetrator, chose someone other than Goodman as the person in the lineup most resembling the robber. Such evidence would have bolstered and corroborated Goodman's testimony that he was not the robber. Had trial counsel not improperly "opened the door," moreover, the jury's evaluation of his credibility would not have been tainted by prejudicial evidence of his prior convictions for a similar crime.

While the errors thus had the effect of unfairly undermining the defense case, they had the complementary prejudicial effect of improperly bolstering the state's case. By excluding evidence showing the true extent of the benefit sought by Ross and Sallis, and the benefit actually received by Smith, as a result of their testimony against him, Goodman was denied an opportunity to show the jury not just that the

witnesses had some reason to be biased in favor of the state, but the extent of what they had to gain or lose from their testimony. Only by understanding what the witnesses actually had at stake could the jury fairly evaluate the witnesses' credibility, as the trial court itself acknowledged on a different matter. (R23:Exh.15:36-37).

The prosecutor's false statements in closing argument likewise had the effect of bolstering the credibility of crucial state witnesses. By those arguments, the state sought to overcome the inherent reliability problems with the testimony of an alleged accomplice testifying in exchange for government concessions. The false statement concerning the sufficiency of evidence against Sallis had he not confessed was expressly intended to bolster his credibility, and the claim that nothing could be done for Ross bolstered his credibility by suggesting falsely that he had nothing to gain from accusing Goodman.

Finally, "[t]he fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial." *Kyles v. Whitley*, 514 U.S. 419, 455 (1995) (Stevens, J., concurring). The only relevant distinctions between the first trial, which resulted in a hung jury, and the second, which resulted in conviction, consisted of trial counsel's errors as identified here and the fact that the state was able to present the inherently suspect testimony of two additional participants in the offense.

While an error may be deemed harmless "if the other untainted incriminating evidence is overwhelming," *United States v. Mananellis*, 864 F.2d 528, 539 (7th Cir.

1988), that cannot be said of the evidence here. The trial court obviously had made up its mind that the evidence was "overwhelming" even after the first trial (R23:Exh.18:26). The two juries, however, did not share that view. The first jury could not agree on a verdict. Despite the additional state's witnesses and the unfairly skewed balance of the state and defense cases resulting from the identified errors at the second trial, that jury likewise did not agree that the state's case was "overwhelming" as its deliberations still took nearly a full day, even though identification was the only issue in dispute.[5]

A crucial weakness in the state's case was the fact that virtually the majority of its evidence against Goodman came from inherently unreliable "cooperating witnesses." *See, e.g.*, *On Lee v. United States*, 343 U.S. 747, 757 (1952) (use of such informers "may raise serious questions of credibility"); *Dudley*, 854 F.2d at 972 ("admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dubious witnesses").

Such witnesses have an obvious motive to falsify. "Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects

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[5] In thanking the jury, the Court itself noted the extensive deliberations in the case:

> THE COURT: Members of the jury, thank you for your participation on this case. I know that it lasted the entire week, inclusive of your lengthy deliberations, and you did spend a good amount of time deliberating on this case and we do appreciate all of your efforts and sacrifices you made to serve as jurors on this case, so I do thank you very much for your service.

(R23:Exh.17:5).

The circuit court docket sheet indicates that the jury began deliberations on October 20, 1994 at 12:40 p.m. and returned its verdict at 11:25 a.m. on October 21, 1994 (R26:Attach.:23-24).

and defendants, creating the risk of sending innocent persons to prison." *United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993).

These dangers are borne out both in the cases and by scholarly research. The Ninth Circuit, for instance, has noted that, "although the truthful testimony of accomplice witnesses will continue to be of great value to the law, rewarded criminals also represent a great threat to the mission of the criminal justice system." *Commonwealth of the N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1124 (9th Cir. 2001).

> [B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike. Frequently, and because they are aware of the low value of their credibility, criminals will even go so far as to create corroboration for their lies by recruiting others into the plot . . ..

*Id.* at 1124 (footnote omitted). *Bowie*, for instance, involved a conspiracy among government witnesses falsely to accuse another of responsibility for a homicide.

*See also Bernal-Obeso*, 989 F.2d at 333:

> The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril. . . . By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.

In their landmark study of errors leading to the conviction of innocent people,

Professors Radelet and Bedau discovered that the "most frequent [is] perjury by prosecution witnesses." M. Radelet, H. Bedau, C. Putnam, *In Spite of Innocence* 18 (1992). A study by the Actual Innocence Project similarly revealed that, of the cases where a defendant's innocence could be established by DNA evidence, 21 percent of the erroneous convictions were based to some extent on the testimony of informers. Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence* (2002), cited in *Bowie*, 243 F.3d at 1124 n.6.

The general concerns rendering informant testimony inherently unreliable apply fully to the state's cooperating witnesses in this case. To a man, these individuals faced substantial prison time, with no hope of relief unless they were able to provide a convincing show before the jury. Smith and Ross were caught with the gun and proceeds from the crime (R23:Exh.14:200-02; R23:Exh.15:65-66, 210-11, 216-18). Smith failed to identify Goodman as a participant in the robbery until he had obtained an agreement from the state for a "pass" (i.e., concurrent time) on the robbery (R23:Exh.15:88-89, 240-42). Ross had testified under oath at Goodman's parole revocation hearing that Goodman was *not* involved in the robbery, and only changed his tune when he learned how Smith had benefitted from his own deal with the state (R23:Exh.:178-81; R23:Exh.I:Exh.A).

Given the absence of any admissions or physical evidence tying him to the offense, the only other evidence beyond the inherently questionable accomplice testimony fingering Goodman was the testimony of Mr. Kollath. Yet, there was every

reason to doubt Kollath's identification of Goodman as well. Kollath had identified someone other than Goodman as the robber within a day of the robbery, at a time when he conceded the facts were clearer than they were at trial (R23:Exh.14:43). Only after discussing the matter with the detective did Kollath indicate uncertainty regarding that identification (R23:Exh.14:21-23, 70-77; R23:Exh.16:14-22), and only after the police had focused on Goodman as a result of Smith's allegations did Kollath ultimately identify Goodman.

Despite the number of witnesses, the state's case thus was far from overwhelming even without taking account of the identified errors. Because the errors had the effect of distorting the jury's perception of the relative merits of the state's case and that of the defense, unfairly skewing the matter in favor of the state in a close case, there can be no doubt that the errors were prejudicial. Regardless whether the state court applied the proper standard, therefore, trial counsel's errors in this matter cannot reasonably be deemed non-prejudicial.

### C. Goodman Was Denied The Effective Assistance Of Post-Conviction Counsel

Attorney Michael Backes' failure to include either the ineffective claims in Sections B,3,a,iii-v, *supra*, or a substantive claim regarding the improper admission of the threats evidence in Goodman's initial post-conviction motion likewise denied him the effective assistance of post-conviction counsel. U.S. Const., amends. VI & XIV.

As previously discussed, Section A, *supra*, the test for ineffectiveness is two-pronged. First, counsel's performance must have been deficient, and second, the deficiency must have prejudiced the defense. *See, e.g.*, *Strickland,* 466 U.S. at 687. The same standard is applied, with appropriate modifications, to assess the constitutional effectiveness of post-conviction or appellate counsel. Applying this standard, post-conviction counsel's performance is deficient when he or she omits "'a significant and obvious issue'" without legitimate strategic purpose. *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996). "[W]hen that omitted issue 'may have resulted in a reversal of the conviction, or an order for a new trial,' [the Court] will deem the lack of effective assistance prejudicial." *Id.*

**1. Post-conviction/Appellate counsel's performance was deficient**

**a. Admission of evidence of threats not connected to the defendant and failure to request limiting instruction**

As discussed in Section B,3,a,iii, *supra*, Mark Smith and Larry Ross were permitted to testify, over extensive objection, regarding threats they allegedly received from persons other than Goodman, even though no evidence was presented that Goodman himself was involved in or had prior knowledge of the threats. (R23:Exh.15:32-46, 129-45). Attorney Backes, however, did not challenge admission of the threats evidence on the direct appeal (*see* R23:Exh.B).

It is well-established that evidence of threats, unconnected to the defendant himself, are irrelevant and highly prejudicial, such that their admission results in a

denial of fundamental fairness and due process. *See Clark v. Duckworth*, 906 F.2d 1174 (7th Cir. 1990); *Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988), *cert. denied,* 490 U.S. 1011 (1989). *See also* Section B,3,a,iii, *supra*.

As the Court explained in *Dudley*,

> Since threats tend to show guilty knowledge or an admission of guilt on the part of the defendant, a proper foundation must be laid showing the threats were made either by the defendant or with his or her knowledge or authorization . . .. Barring such a showing, the highly prejudicial nature of such testimony requires its exclusion.

854 F.2d at 970.[6]

In rejecting Goodman's ineffectiveness claim, the Wisconsin Court of Appeals focused solely on whether the threats evidence was admissible as a matter of state law (R23:Exh.O:9-10; App. 115-16). In reaching this conclusion, the court overlooked the fact that Wisconsin law is in accord with federal authority.

In *Bowie v. State*, 85 Wis.2d 549, 271 N.W.2d 110, 111-12 (1978), as here, a witness "was unable to point to any connection between the defendant and the threat, apart from the fact that fulfillment of the threat was said to turn upon her testifying against him." *Id.* The Court held that evidence of such threats, unconnected to the defendant, was inadmissible. *Id.*, 271 N.W.2d at 112. Unless the threats were made "in the presence of the defendant or shown to have been authorized by him," the

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[6] Although it subsequently overlooked this point, the trial court itself initially recognized that evidence of threats would be relevant and admissible only "provided that the link up is made between this defendant and the activities that [the witness] is testifying that he was subjected to . . .." (R23:Exh.15:37; *see id.*:38 (evidence inadmissible "unless there's a link between whatever threats he was subjected to in the County Jail while awaiting his testimony here in this trial and Mr. Goodman")).

evidence is inadmissible. *Id.*

No connection was made in this case beyond that found insufficient in *Bowie v. State*. The evidence accordingly was inadmissible as a matter of law under that decision and denied Goodman due process as stated in *Dudley* and *Clark*.

While this Court is bound even by such clearly erroneous state court decisions on matters of state evidence law, the fact remains that the Wisconsin Court of Appeals did not address, and thus did not decide, Goodman's claim that admission of such evidence violated his due process rights (*see* R23:Exh.O:9-10; App. 115-16). Accordingly, review of the issue of whether Attorney Backes acted unreasonably in not raising the due process issue is *de novo*. *Dixon*, 266 F.3d at 701, 702.

For the reasons stated in *Dudley* and *Clark* admission of the evidence of threats unconnected to Goodman violated his rights to due process. The issue was significant for the reasons stated in those cases and obvious in the record, trial counsel having preserved the issue with proper objection. Attorney Backes admits he did not even think about the threats issues (either their admission or the failure to request a proper limiting instruction, *see* Section B, 3,a,iii, *supra*) one way or the other (*See* R23:Exh.I:100 (Henak Affidavit)). His failure to raise either issue thus was deficient performance. *E.g.*, *Mason*, 97 F.3d at 893 (non-strategic failure to raise "significant and obvious issue" is deficient performance); *Wiggins*, 539 U.S. at 534 (failure to take proper actions due to oversight or ignorance was deficient performance); *Dixon*, 266 F.3d at 703 (same).

### b. Failure to raise ineffectiveness claims regarding the denial of confrontation and prosecutorial misconduct in closing

Attorney Backes did consider raising the confrontation, prosecutorial misconduct, and related ineffectiveness claims, but did not in fact raise them. (*See* R23:Exh.I:100 (Henak Affidavit)). These issues, however, were quite obvious and, as already discussed, quite significant to the outcome of the trial and appeal as well. *See* Section B,3,a,iv & v, B,3,b. Even an attorney's intentional decisions, moreover, must meet the standard of reasonableness based upon the information at hand. *E.g.*, *Kellogg v. Scurr*, 741 F.2d 1099, 1102 (8th Cir. 1984) (Even tactics "must stand the scrutiny of common sense"); *see State v. Felton*, 110 Wis.2d 485, 329 N.W.2d 161, 169 (1983) (A reviewing court "will in fact second-guess a lawyer if the initial guess is one that demonstrates an irrational trial tactic or if it is the exercise of professional authority based upon caprice rather than judgment").

The state court of appeals denied Goodman's post-conviction ineffectiveness claim on the grounds that trial counsel was not ineffective. As explained *supra* the state court's decision in that regard was both contrary to and an unreasonable application of controlling Supreme Court authority. The state's court's resolution of the post-conviction/appellate ineffectiveness claim fails for the same reason.

At the time he failed to include the confrontation, prosecutorial misconduct, and related ineffectiveness issues in his post-conviction motion and appeal on Goodman's behalf, Attorney Backes knew that the initial trial had resulted in a hung

jury (with most jurors favoring acquittal) and mistrial, while the second trial had resulted in conviction. He knew that no physical evidence or admissions tied his client to the robbery, and that the identification testimony of Smith and Kollath was at best weak. He therefore knew that the primary factors which, combined, may explain the differing results of the two trials were as follows: Ross and Sallis testified at the second trial, but not at the first; Ms. Retzlaff, who testified at the first trial regarding her identification of someone other than Goodman as the robber, did not testify at the second trial and evidence of her identification was excluded at that trial; Goodman testified at both trials, but only at the second was evidence of his prior robbery convictions admitted; and evidence of threats against Ross and Smith was admitted only at the second trial. While the state chose not to present certain tangential evidence it had used at the first trial, the rest of its case at the second trial was essentially that presented at the first.

A reasonable post-conviction attorney in Attorney Backes' position thus would have known that success in overturning the conviction would require challenging each class of new evidence to the extent possible, and that valid challenges to all four would have complemented each other. Indeed, a reasonable attorney in that position would have realized that some challenge would have to be made to the testimony of Ross and Sallis in order to insure against a finding of harmlessness. As Attorney Backes acknowledged in his appellate reply brief (R23:Exh.D:2), "[i]n the absence of any physical evidence tying the defendant to the crime, the relative credibility of

the defendant and the respective State witnesses implicating the defendant, became the crux of the case."

Far from hurting the appeal, therefore, legitimate challenges to the denial of confrontation of Smith, Ross, and Sallis regarding the potential (and in the case of Smith, actual) benefits to be derived from their testimony against Goodman, the prosecutor's false arguments bolstering the reliability of Ross and Sallis, and the ineffectiveness of trial counsel in failing properly to address and preserve these issues, could only have helped Goodman's cause on the post-conviction motions and on appeal.

While the ineffectiveness claims raised by Attorney Backes regarding trial counsel's "opening the door" to evidence of Goodman's prior robbery convictions and his failure to subpoena Ms. Retzlaff were quite strong, they only would have been strengthened by inclusion of the prosecutorial misconduct and confrontation issues. *See* Section B,3,b, *supra*. *See also Mason*, 97 F.3d at 899-900 (finding ineffectiveness where "the omitted hearsay argument was at least as strong as one of the arguments that was raised, and much, much stronger than the other," and where omitted argument would have complemented the stronger of the two arguments actually made).

Because Attorney Backes omitted significant and obvious issues which may have resulted in reversal of Goodman's conviction, while pursuing much weaker issues (such as a general claim of insufficient preparation (R23:Exh.B:App.204;

*id.*:App.301-06) and abuse of discretion regarding violation of a sequestration order (R23:Exh.B:11-13)), his performance was deficient. *E.g.*, *Mason*, *supra*.

### 2. Post-conviction counsel's deficient performance prejudiced Goodman's case

The issues which Attorney Backes failed to raise in his post-conviction challenges to Goodman's conviction were substantial and meritorious. Absent an irrational refusal of the state appellate courts to follow established law, such claims would have been successful for the reasons already discussed. Goodman accordingly was denied his right to the effective assistance of post-conviction counsel. *See, e.g.*, *Mason*, 97 F.3d at 893 (state appellate attorney's failure to raise preserved hearsay issue constituted ineffective assistance of appellate counsel, mandating federal habeas relief); *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994) (failure to raise preserved discovery issue on appeal deemed ineffective); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) ("His lawyer failed to raise either claim, instead raising weaker claims . . .. No tactical reason--no reason other than oversight or incompetence--has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had"); *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue," raising instead a "weak issue").

For the reasons already stated, the Wisconsin Court of Appeals' failure to consider the cumulative prejudicial effects of Attorney Backes' errors renders its

decision on this point contrary to controlling federal law. *See* Section B,2, *supra*. Even if it were not contrary to such law, however, the irrationality of its conclusions as discussed in Section B,3,b, *supra*, demonstrate the decision to be contrary to, or an unreasonable application of, the controlling federal law set forth in *Strickland*, *Williams*, *Van Arsdall*, and *Giglio*, among others.

## CONCLUSION

For these reasons, Warren Goodman respectfully asks that the Court reverse the judgment below and grant the requested writ of habeas corpus.

Dated at Milwaukee, Wisconsin, July 21, 2005.

Respectfully submitted,

WARREN GOODMAN,
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_____

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Goodman Consol. Brief.wpd

## RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a principal brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 13,203 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

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Robert R. Henak

## TABLE OF CONTENTS TO APPELLANTS' APPENDIX

**Items bound with brief:**



**Items bound in separate appendix:**

## CIRCUIT RULE 30(c) STATEMENT

The items required by Circuit Rule 30(a) have been bound with appellant's brief. Those items required by Circuit Rule 30(b) are contained in the separate appendix.

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Robert R. Henak

## CIRCUIT RULE 31 STATEMENT

The materials contained in Mr. Goodman's required short appendix and the separate appendix are not available in non-scanned PDF format.

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Robert R. Henak

## CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2005, I caused 15 hard copies of the Brief and Appendix of Petitioner-Appellant Warren Goodman and 10 hard copies of the Separate Appendix of Petitioner-Appellant Warren Goodman to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of the brief, one hard copy of the separate appendix, one copy of the brief on digital media, and one copy of the available portions of the separate appendix on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Respondent, AAG William L. Gansner, P.O. Box 7857, Madison, WI 53707-7857.

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