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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# REPLY BRIEF OF PETITIONER-APPELLANT

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## 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

### A. The Performance of Goodman's Trial and Post-Conviction Counsel Was Deficient

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

As he did below, the Respondent fails to dispute, and thus concedes, virtually all of Goodman's allegations of deficient performance on the part of his trial counsel. *See United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) (government's failure properly to argue harmlessness constitutes waiver). Respondent thus concedes that

Goodman's 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, (3) failing to request a limiting instruction regarding the permissible use of evidence that two witnesses were threatened by individuals unconnected to Goodman, (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 to the effect that one of the state's cooperating witnesses could not have been prosecuted but for his own admissions, *see* Goodman's Brief at 25-38, and that Goodman accordingly has satisfied the "deficient performance" prong of *Strickland v. Washington*, 466 U.S. 668 (1984), regarding those claims.

The only exception concerns trial counsel's failure to object to the prosecutor's false and misleading assertions in closing argument to the effect 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. On that issue, the state merely references the state Court of Appeals opinion, Respondent's Brief at 23-24, and then asserts in wholly conclusory terms that this holding was "plainly rendered in full compliance

with" *Strickland*, was "not contrary to its principles," and "involved a reasonable application of *Strickland's* governing principles." Respondent's Brief at 25-26.

For the reasons already stated in Goodman's Brief at 35-38, the state court of appeals decision that the prosecutor properly could be allowed to mislead the jury is not only wrong, but patently unreasonable. While it may be true that the prosecutor accurately summarized Detective Orlowski's testimony that he informed Ross that nothing could be done to reduce his sentence (R23:Exh.O:13-14; App. 119-20), she either knew or should have known that Orlowski's advice to Ross was untrue. *See, e.g.*, *Rosado v. State*, 70 Wis.2d 280, 234 N.W.2d 69, 73 (1974) (defendant permitted to request sentence modification based on "new factors"). *See also State v. Doe*, 2005 WI App. 68, 280 Wis.2d 731, 697 N.W.2d 101 (post-sentence assistance to law enforcement constitutes "new factor").[1]

The state has an obligation to correct false or misleading testimony, not attempt, as here, to benefit from it. *E.g.*, *Giglio v. United States*, 405 U.S. 150 (1972); *Miller v. Pate*, 386 U.S. 1 (1967); *Alcorta v. Texas*, 355 U.S. 28 (1957). This obligation is not new, and a reasonable attorney in the position of Goodman's trial counsel would have known of both that obligation and of his own obligation to object to the prosecutor's violation of it. His failure to do so here was patently unreasonable, as was the state court's view that it was not.

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[1] Although *Doe* was decided long after the prosecutor's misleading statements in this case, the fact remains that there was no authority supporting the prosecutor's assertion, and the state subsequently did in fact appear in support of a motion to reduce Ross' sentence on exactly the grounds the prosecutor here advised the jury could not be done. (R23:Exh.I:Exh.B).

### 2. Post-conviction counsel's performance was deficient

#### a. Admission of evidence of threats not connected to the defendant

Again simply parroting the state court of appeals' decision, the Respondent here asserts that Goodman's post-conviction counsel did not act unreasonably by inadvertently omitting any challenge to the admission of prejudicial evidence of threats not connected to Goodman. Respondent's Brief at 46-50. According to the state court, and thus the respondent here, *see id.*, admission of the threats evidence did not violate state evidence rules, so that counsel's failure to raise the claim on appeal was neither deficient nor prejudicial (R23:Exh.O:9-10; App. 115-16).

Although overlooked by the state court and ignored by the Respondent here, Goodman's claim is not based on his state appellate counsel's failure to raise a state evidentiary challenge to the threats evidence. While such a claim necessarily would have succeeded had the state appellate court followed controlling state precedent, *see Bowie v. State*, 85 Wis.2d 549, 271 N.W.2d 110, 111-12 (1978) (evidence of threats, unconnected to the defendant, are inadmissible), Goodman's claim here is based on counsel's failure to raise a constitutional due process challenge on appeal. Goodman's Brief at 46-48. *See e.g.*, *Clark v. Duckworth*, 906 F.2d 1174 (7th Cir. 1990); *Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988).

Because the state court did not resolve this claim, habeas review is *de novo*. *E.g.*, *Dixon v. Snyder*, 266 F.3d 693, 701, 702 (7th Cir. 2001). Because the Respon-

dent chose not to address Goodman's due process claim, and indeed emphasized throughout its argument that the state court limited its holding to matters of state evidentiary law, Respondent's Brief at 47-49, he should be deemed to have conceded or waived the point. *E.g.*, *Giovannetti*, *supra*.

Even if Respondent had addressed the due process basis for Goodman's claim, however, this Court's analysis in *Dudley* and *Clark* demonstrates that Goodman's post-conviction counsel acted unreasonably in not raising that challenge to the threats evidence. *See* Goodman's Brief at 46-48.

#### b. Failure to raise ineffectiveness claims regarding the failure to request a limiting instruction concerning the threats evidence, the denial of confrontation and prosecutorial misconduct in closing

The Respondent's argument that Goodman's post-conviction counsel did not act unreasonably in failing to allege ineffectiveness of trial counsel regarding the limiting instruction, confrontation, and prosecutorial misconduct issues is based entirely on the conclusory assertion that such claims would have been meritless. Respondent's Brief at 50-52. Because the premise is mistaken, the Respondent's conclusion is as well.

### B. Goodman's Defense Was Prejudiced By the Deficient Performance of His Trial and Post-Conviction Counsel

For the reasons stated in Goodman's opening Brief at 38-45, 52-53, the cumulative effect of counsels' errors indisputably prejudiced Goodman's right to a

fair determination of his guilt or innocence. But for those errors, there is far more than a reasonable probability of a different result.

Respondent never actually responds to this showing. Rather, in assessing the question of prejudice, Respondent makes the same fundamental error made by the state courts. While purporting to look at the "totality of the evidence," Respondent, like the state courts, addresses only whether the effect of each error, in isolation, prejudiced the defense. See Respondent's Brief at 31-32 (arguing no reasonable probability of a different result but for trial counsel's failure to subpoena exculpatory witness Retzlaff), 33 (same, opening door to prejudicial "other acts" evidence), 36-38 (same, failure to request limiting instruction re threats), 38-40 (same, confrontation violation).

As explained in Goodman's Brief at 23-24, resulting prejudice must be assessed cumulatively. *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000); *see Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). Yet, while either conceding or assuming deficient performance on a number of Goodman's claims, neither the state court nor the Respondent makes any effort to address the cumulative effect of trial and appellate counsels' errors on Goodman's defense.[2] Assessing each isolated error

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[2] Indeed, at one point, Respondent claims that the admission and unguided jury consideration of the inflammatory "threats" evidence did not prejudice Goodman's defense in part because, "[a]side from Goodman's own self-serving testimony that he had been at his girlfriend's house at the time the robbery occurred, the jury received no evidence to show that Goodman was not at the robbery." Respondent's Brief at 36. Aside from overlooking Goodman's right to determination by an unbiased jury, and not the appellate courts, regarding the relative credibility of witnesses, the Respondent conveniently ignores the fact that it was another of trial counsel's errors which resulted in that lack of corroborating defense evidence. Had counsel not failed to subpoena (continued...)

in light of the "totality of the evidence" against Goodman simply is not, as the Respondent asserts, the same thing as assessing the cumulative effect of all the errors. For the reasons stated in Goodman's Brief at 23-24, the state courts' failure to assess the cumulative prejudicial effects of counsels' errors results in decisions contrary to clearly established Supreme Court precedent. *See, e.g.*, *Washington*, 219 F.3d at 632-33.

On a separate matter regarding the assessment of prejudice, the Respondent misconstrues Goodman's claim that the standard of prejudice applied by the state Court of Appeals in *Goodman I* was contrary to clearly established Supreme Court law. The state court of appeals' error was not, as suggested by the Respondent, that it required him to establish that it was more likely than not that his counsels' errors actually altered the outcome of the case. Respondent's Brief at 11-13.

Rather, as explained in Goodman's Brief at 20-23, the state court's error was in its modification or misinterpretation of the *Strickland* standards to require that Goodman prove, not merely a reasonable probability of a different result, but that the alleged errors of counsel *also* rendered his trial "unreliable" or "fundamentally unfair." (Exh.E:7; *see* Exh.E:8 ("The trial court properly concluded that none of Goodman's counsel's alleged deficient conduct prejudiced him such that the result of

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[2](...continued)
Ilene Retzlaff, the jury would not have been deprived of important exculpatory evidence that one of the two eyewitnesses to the robbery, a person who would have no motive to lie and 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 and thus corroborated Goodman's alibi defense.

the trial was unreliable")). While the Respondent attempts to minimize the state court's error by labeling its adoption of the "unreliable" or "fundamentally unfair" standard as "merely further statements in explication of the *Strickland* prejudice standard, Respondent's Brief at 24, the Supreme Court in *Williams* expressly rejected exactly this type of "explication" as "contrary to" *Strickland*. *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*). Indeed, the Wisconsin court of appeals regularly applied the same, inappropriate standard throughout the time frame prior to *Williams*. *See, e.g., Washington v. Smith*, 219 F.3d at 632-33 (Wisconsin appellate court's application of same standard to be "contrary to" clearly established Supreme Court precedent). *See also Martin v. Grosshans*, ___ F.3d ___, 2005 WL 2233511 (7th Cir. 2005) (Wisconsin court applied similarly invalid standard requiring defendant to show more than reasonable probability of different result).[3]

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[3] At the time of Goodman's direct appeal, this Court had a similar view of *Lockhart v. Fretwell*, 506 U.S. 364 (1993), as modifying *Strickland's* prejudice prong, requiring a showing of resulting unfairness or unreliability in addition to a reasonable probability of a different result. *E.g.*, *Eddmonds v. Peters*, 93 F.3d 1307, 1313 (7th Cir. 1996); *Holman v. Page*, 95 F.3d 481, 488-92 (7th Cir.1996) (no ineffectiveness for failing to pursue suppression motion; lack of suppression does not render trial unfair or risk conviction of the innocent), overruled by *Owens v. United States*, 387 F.3d 607 (7th Cir. 2004); *Durrive v. United States,* 4 F.3d 548 (7th Cir.1993), disapproved in *Glover v. United States*, 531 U.S. 198 (2001).

Indeed, as noted in the Respondent's Brief at 19, 23-24, this Court still occasionally references its pre-*Williams* view of *Fretwell* as requiring a higher, fairness- or reliability-based standard for prejudice in ineffectiveness cases. *E.g.*, *Burt v. Uchtman*, ___ F.3d ___, 2005 WL 2128294 (7th Cir. 2005); *United States v. Hernandez-Rivas*, 348 F.3d 595, 601 (7th Cir. 2003); *Lowery v. Anderson*, 225 F.3d 833, 843 (7th Cir. 2000).

## CONCLUSION

For these reasons, as well as for those in his opening brief, Warren Goodman respectfully asks that the Court reverse the judgment below and grant the requested writ of habeas corpus.

Dated at Milwaukee, Wisconsin, September 29, 2005.

Respectfully submitted,

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## 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 reply 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 2,077 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

_____

Robert R. Henak

## CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2005, I caused 15 hard copies of the Reply Brief 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 and one copy of the brief on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Respondent, AAG William L. Gansner, Wisconsin Department of Justice, P.O. Box 7857, Madison, WI 53707-7857.

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