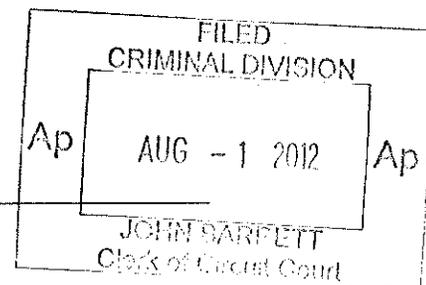


STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY
Case No. 08CF718



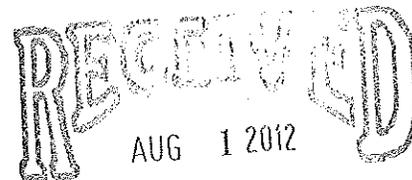
STATE OF WISCONSIN

Plaintiff,

v.

SENECA MALONE

Defendant.



Before the Honorable David L. Borowski

Office of District Attorney
Milwaukee, WI 53233

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL

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INTRODUCTION

Seneca Malone did not receive a fair trial. Over the last year, the Court has heard eight days of testimony consistent with one unifying theme: there was a prosecution, but there was not a defense. The jury did not hear critical exculpatory evidence, and conversely, heard evidence it should not have. After considering evidence submitted at postconviction proceedings, a reasonable juror would conclude that an innocent man is sitting in prison. Pursuant to that evidence, Malone advances multiple claims for relief: an ineffective assistance of trial counsel (IAC), a *Brady* claim, a newly discovered evidence (NDE) claim, and an interest of justice (IOJ) claim. Any one of these claims would overturn what was a constitutionally defective conviction.

The State's case against Seneca Malone for the shooting death of Ricardo Mora was based on the written statement of Mark Fossier, a gang member with a history of gun violence who was an alternate suspect in the homicide. In addition, heavily redacted excerpts of Malone's jailhouse phone calls with a friend were erroneously admitted as consciousness of Malone's guilt. No physical evidence connected Malone to the crime.

The jury never heard evidence critical to a fair trial. The jury did not hear evidence that Fossier's statement to police inculcating Malone was factually impossible, that Fossier was a bad actor with a recent history of gun violence in the neighborhood, and that Fossier fabricated his statement to avoid prosecution for the homicide. Neither the judge nor the jury heard the full recordings of the Malone-Joe jailhouse calls; cut out were Malone's protestations of innocence and his frustration with being falsely accused.

Many of the trial's deficiencies are attributable to the sub-standard performance of Malone's attorney at trial. Inexplicably, trial counsel failed to conduct any investigation to test the strength of the State's case. He did not hire an investigator. He did not seek to interview a

single witness. He did not request a single document from the State or any other source. He failed to adequately object to the introduction of inadmissible evidence. He failed to undermine Fossier's written statement against Malone. And perhaps most importantly, he failed to portray Fossier, the State's chief witness, as an alternate suspect.

Counsel's failure to present Fossier to the jury as an alternate suspect, alone, warrants a new trial. The State argued Fossier was moved to implicate Malone because Fossier's best friend had just been killed in an unrelated and unsolved crime, and Fossier had come to believe Mora's killer should be brought to justice. In his written statement to police, Fossier said Malone was the shooter. He later testified that Malone was not the shooter. The State argued that Fossier was coached by his mother to lie on the stand and maintained that Fossier's written statement constituted the "moment of truth." Trial counsel failed to propose an alternative, and a more coherent, explanation for Fossier's many stories: everything Fossier has ever said about the Mora homicide, from the first time detectives questioned him through his postconviction testimony, has been motivated by the singular goal to insulate himself from prosecution.

Trial counsel also failed to present ample evidence contradicting important details of Fossier's written statement. Postconviction counsel presented sources far more objective than Fossier—property owners, lease agreements, business records, utility bills, CCAP entries, news reports, and meteorological data—all of which contradict Fossier's assertions about where he was and what he was doing the day of the homicide. The jury did not hear from alibi witnesses who maintain Malone was with them when Mora was killed. Jurors should have been able to weigh the credibility of this impeachment evidence against the credibility of Fossier, a suspect in the Mora shooting who repeatedly lied on the stand, and who resorted to violence upon the slightest provocation. Based on these defects, a new trial should issue.

FACTUAL BACKGROUND

I. Initial Investigation

On December 16, 2005, around 10:15 p.m., Ricardo Mora was shot and killed on 26th and Lapham in Milwaukee. Hearing (Hr.) Ex. 37. Unknown to the jury, Fossier's name was one of the first to come up as a potential suspect. The police knew Fossier was "as big a thug as anyone" who had a criminal record and was a "gang-banger, member of the two-fives" and a "bad actor." Hearing Transcript (Hr. Tr.) 34 (Det. David Chavez, agreeing with Court's assessment of Fossier); *see also* Addendum 1 (Transcript Index). Just after Mora's death, Milwaukee Police Department (MPD) Sergeant Tony Reilly sent an email to Lieutenant David Klabunde with the subject line "12-16-05 Homicide, 2608 W. Lapham," alerting him of the "2-5 Boys," a gang that operated in the area of the homicide, "where there's been [reckless endangerment of safety] and shooting incidents." Hr. Ex. 12. Fossier was first on the list of names "associated with this gang or clique" *Id.* Malone was not on that list. *Id.* The email referenced another shooting that took place in the neighborhood six weeks before Mora was gunned down and noted Fossier had been arrested for it (other reports confirm this previous shooting was the "Lewis shooting" (*see* Argument II, *infra*)). Police made no arrests for the Mora homicide, and the investigation was dormant for over two years.

II. Fossier Denies Involvement for Over Five Hours of Interrogation, and Police Suggest to Fossier that Malone Was Involved

In early 2008 the investigation was revived. Detectives interrogated Fossier as a suspect. Hr. Tr. 17 (Det. Charles Mueller confirming Fossier was a suspect); Trial Transcript (TT), 192 (Mark Fossier, testifying, "[t]hey said I was a suspect"). On February 6, 2008, around 9:00 p.m., police took Fossier to the station. Hr. Ex. 9. Fossier first denied any knowledge of the homicide:

FOSSIER was advised his name came up in a Homicide investigation that occurred 2 days after his (FOSSIER) birthday in 2005. FOSSIER stated that he no ideal [sic] what Homicide

Detectives were talking about and related he had no knowledge on what happened. FOSSIER did view [a photo] of the victim Richardo [sic] MORA . . . and related that he did not know who this individual was and had never seen him before.

Hr. Ex. 9. As the night wore on, detectives told Fossier that other people had implicated him, and then held up a photo of Malone. *Id.* Fossier held fast:

FOSSIER was advised *other individuals had implicated him in the Homicide* of MORA at which time FOSSIER *again* denied being involved or having any knowledge of this Homicide.

Id. (emphasis added). Detectives continued to press Fossier about details of Malone's alleged involvement in the homicide:

FOSSIER related MALONE never mentioned about being involved in any Homicide and FOSSIER denied ever being with MALONE when a Homicide was committed. FOSSIER also denied ever seeing MALONE with any guns.

Id. Only after detectives repeatedly asked Fossier about Malone's possible involvement, and suggested untruthfully that Malone had implicated Fossier, did Fossier implicate Malone.

III. Fossier's Written Statement

Five hours after Fossier repeatedly denied knowledge of the homicide, new detectives took over and interrogated Fossier for another four and a half hours. Hr. Ex. 9. Fossier helped the new detectives prepare a highly detailed statement that described his activities the day of the homicide and identified Malone as the shooter. Hr. Ex. 3. Police wrote that Fossier was "now coming forward to tell us what happened because his best friend, Jimmy Bogust was just killed a couple of weeks ago and he knows this is what Jimmy would have wanted him to do." *Id.*

IV. State's Case Against Malone at Trial

No physical evidence linked Malone to the crime. Hr. Tr. 34 (Chavez). The State's case instead depended on the jury believing Fossier experienced a cathartic "moment of truth" when he inculpated Malone. TT, 89 (State's closing). According to the State, "Detective Chavez and

other detectives walked into Mark Fossier's life" at precisely the right moment, just after Fossier's best friend had been killed, which motivated Fossier to say he saw Malone shoot Mora.

At the preliminary hearing and at trial, Fossier denied seeing Malone shoot Mora. The State successfully attributed Fossier's inconsistent testimony to threats by gang associates, and the coaching efforts of his mother (exhibited at trial through the "Fossier-Mother" jailhouse calls):

Well, [Fossier] opened his mouth, ladies and gentlemen [referring to the written statement]. And no matter how many times [Fossier's] mother and he tried to pretend like he didn't, and to make this statement just go away, they couldn't. You heard the truth. You heard the truth when all [Fossier] was thinking about was what happened to Mr. Mora.

TT, 96 (State's closing).

The State also presented short excerpts of phone calls between Malone and Joe¹ Malicki (the "Malone-Joe" jailhouse calls) to suggest that Malone had directed Joe to threaten witnesses against him, arguing that the jury should consider the calls as "consciousness of guilt." TT, 99 (State's closing).

V. Evidence Not Presented at Trial

A. Evidence that Fossier was the Shooter and Was Motivated to Escape Prosecution When He Inculpated Malone

There is more evidence suggesting Fossier is the killer than any other suspect, including Malone. At trial, the jury learned that Fossier admitted to being at the scene, and to having a confrontation with the victim. The jury did not hear, however, that Fossier was easily provoked to gun violence, as confirmed by eyewitnesses who saw Fossier shoot at an unarmed individual just six weeks before Mora was gunned down on the same block. Hr. Ex. 13-16. The jury never heard that Fossier was seen with a handgun before the Mora homicide, and caught with a handgun after the Mora homicide. Hr. Ex. 13-16; 18. The jury never considered the fact that

¹ Joe Malicki will be referred to as Joe in this brief, to differentiate him from Malone and from other Malickis.

Fossier implicated Malone in the written statement only after police told Fossier that others had implicated Fossier and repeatedly asked about Malone's involvement. Hr. Ex. 9. And the jury did not hear evidence undermining portions of the written statement essential to the State's case.

So drastically has the weight of the evidence shifted that this Court appointed Fossier a lawyer; as a result Fossier plead the Fifth to every category of questioning—about his statement, about his interaction with police, and about the prior shooting. Hr. Tr. 60-87 (Fossier).

B. Evidence that Fossier's Written Statement was False

The postconviction court heard objective, verifiable facts, never heard by the jury, that undermine the veracity of Fossier's written statement, the State's key piece of evidence:

Assertion #1: After Fossier asserted on page one of his written statement that he was not associated with a gang (Hr. Ex. 3), Detective Chavez vouched for the statement's credibility to the jury. TT, 15 (CHAVEZ: Usually there's going to be a few different stories prior to, but until, you know, the correct story comes out or the truth comes out, that's when we begin to write on this statement); Hr. Tr. 65-66 (MEYN: And in your testimony at trial you told the jury or you testified that you didn't put anything in that statement, Fossier's statement, until it was the correct story, correct? CHAVEZ: Correct).

This key portion of Fossier's statement was false. Fossier clearly was in a gang. Hr. Tr. 68 (COURT: That's why the defense is confused. I'm confused too. You say the statement has veracity because of the details that lends to its veracity. CHAVEZ: Correct. COURT: Yet on Page 1 of the statement [Fossier] tells you a bald-faced lie.)

Assertion #2: Fossier asserted that, the day of the homicide, he and Malone were at Donovan Bellamy's house on 26th Street. Hr. Ex. 3. This was shown to be impossible. The postconviction court heard testimony from landlords, utility company representatives, and

Bellamy's mother that Bellamy's family had moved away from 26th Street four months before the homicide. Hr. Tr. 7 (Mary Carpenter), 10 (Rafael Cetina), 14 (Tracey Morales).

Assertion #3: Fossier asserted that he saw Malone near a gun at the garage behind Bellamy's home, the same gun he saw in Malone's hand at the crime scene. Hr. Ex. 3. This fact was elicited by the State from Fossier, and from its detective, and emphasized in closing. TT, 138 (Fossier); TT, 19-20 (Chavez); TT, 94-95 (State's closing). This was shown to be impossible. Bellamy's old residence on 26th Street had a rear garage. Where Bellamy actually lived at the time of the homicide, however, did not. Hr. Ex. 46-47 (photos of garage at Bellamy's house on 26th); Hr. Ex. 50-51 (photos of area behind Bellamy's house on 22nd showing no garage).

Assertion #4: Fossier asserted that Bellamy gave Fossier a haircut on the front porch of Bellamy's 26th Street home. Hr. Ex. 3. This was shown to be impossible. Bellamy did not live on 26th Street at the time of the homicide and did not know the occupants of the 26th Street house. Hr. Tr., 16 (Morales); Hr. Tr. 34 (Donovan Bellamy). Moreover, climatological data demonstrate that the wind-chill temperature was 26 degrees below freezing on that mid-December day, ridiculous weather for an outdoor haircut. Hr. Ex. 38-39. Bellamy testified that he did not cut hair outdoors during the winter, and he never cut Fossier's hair. Hr. Tr. 31-32, 41 (Bellamy). In a rare deviation from taking the Fifth at the postconviction hearing, when asked what the temperature was that day, Fossier answered, "100 degrees." Hr. Tr. 73 (Fossier).

Assertion #5: Fossier asserted he identified Malone as Mora's killer because he was upset that his best friend Jimmy Bogust had just been murdered in an unrelated and unsolved case. Hr. Ex. 3. At trial, Fossier began to embellish this story. He testified neither he nor Bogust's family had any idea who killed Bogust at the time Fossier was questioned by detectives. TT, 116-117

(Fossier). Fossier was lying—two weeks before Fossier’s statement to police, newspaper accounts revealed that Bogust’s sister had identified the killer, and court documents showed that Bogust’s alleged killer was *charged with and in custody* for the killing. Hr. Ex. 7 (Milwaukee Journal Sentinel article); Hr. Ex. 8 (CCAP report indicating initial appearance of Antonio Heredia). Such evidence would have prevented the State from leading the jury to believe Fossier’s assertion that nobody knew who had killed Bogust. *Cf.* TT, 22-23 (Chavez) (STATE: And at the time nobody knew who had killed Jimmy, is that correct? CHAVEZ: At that time, no. We had not finished the investigation.) *to* Hr. Tr. 79-80 (Chavez) (MEYN: Did you inquire with anyone to determine who might have killed Jimmy Bogust? CHAVEZ: I don’t get what you’re saying).

C. Evidence that the Malone-Joe Phone Calls Were Not Consciousness of Guilt

In crafting its excerpts of the Malone-Joe calls, the State removed portions in which Malone proclaimed his innocence with tearful helplessness, wondered how his family members were doing, and asked whether they were saddened by his predicament. Tr. Ex. 17F-G; *cf.* Hr. Ex. 21 (transcript of call excerpt)(audio² track 1), Hr. Ex. 23 (transcript)(audio tracks 2-4), Hr. Ex. 25 (transcript)(audio track 5). Postconviction hearings also demonstrated there was an alternate explanation for Joe’s belligerence (not only did Joe rant and rave on the phone, but he also walked into the District Attorney’s Witness Waiting Room screaming about snitches). Unknown to the jury, Joe had been diagnosed with a host of mental problems, including impulse control disorder and borderline personality disorder. Hr. Ex. 27 (June 9, 2007 disability report re: Joe Malicki).

² All audio tracks referenced in the postconviction hearing are found on Hr. Ex. 44. All tracks of calls admitted by the State at trial are found in Tr. Ex. 17.

D. Evidence of Malone’s Alibi

This Court heard testimony from Kerry and Nick Malicki, who testified Malone was at the Malicki home the entire night of the homicide. Hr. Tr. 23-32 (Kerry Malicki); Hr. Tr. 39-42 (Nick Malicki). The jury did not have the opportunity to compare the credibility of these alibi witnesses, who had no gang-affiliation, no history of violence, and were not murder suspects, to the credibility of Fossier, who was a gang member, who had a history of violence, and was a suspect in this murder.

E. Fossier’s Lone Account Implicating Malone Stands in Stark Contrast to the Corroborated Case against Fossier

The landscape of the State’s case has changed. Fossier is unwilling to testify now that objective facts impeach his written statement and implicate him in the shooting.

MEYN: Why is it that you were willing to testify at trial without invoking the Fifth Amendment but you're not willing to do that now?

FOSSIER: I plead the Fifth.

MEYN: What’s changed?

FOSSIER: I plead the Fifth.

MEYN: Is that a valid invocation of the Fifth?

COURT: Mr. Opland-Dobbs, do you want to make a record on that?

OPLAND: There is an implication that there was misstatements by Mr. Fossier in the past. They're asking him to explain that. That goes directly to a possible incriminating area of questioning and he refuses to answer those questions as well.

COURT: I would agree with that. There's an implication that he may have lied then or be lying now or lied multiple times previously. Opening himself up to additional potential charges *and obviously potentially more significant charges going forward*. That's a valid implication.

Hr. Tr. 85-86 (Fossier) (emphasis added).

There is not a single individual to corroborate Fossier’s written statement implicating Malone. In contrast, multiple witnesses and documents undermine the veracity of this statement, which opens, on the first page, with what the Court found to be a “bald-faced lie.” Hr. Tr. 68 (Chavez). Various sources of evidence, including Fossier’s own statements and testimony,

implicate Fossier in the murder. A witness has come forward to testify that Fossier admitted to committing the homicide. Another witness testified that she saw Fossier, in unprovoked rage, try to shoot down an unarmed man, just weeks before the Mora homicide, on the same block. The last words Mora uttered were “Fuck you, get a job,” and those words were directed to Fossier, a gang member who had access to handguns and ammunition, and was known to resort to gun violence. The jury did not hear this evidence, and it should have.

ARGUMENT

I. Malone Received Ineffective Assistance of Counsel

To receive a new trial based on ineffective assistance of counsel (IAC), a defendant must establish that counsel’s representation was deficient and prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W. 2d 845 (1990). Deficient representation is that which falls “below objective standards of reasonableness.” *State v. Thiel*, 2003 WI 111, ¶33, 264 Wis. 2d 571, 665 N.W. 2d 305.

Prejudice occurs when the deficient representation is “sufficient to undermine confidence in the outcome.” *Id.* at ¶20 (citing *Strickland*, 466 U.S. at 694). A court must consider the totality of the evidence when determining whether errors by trial counsel prejudiced the defendant. *Strickland*, 466 U.S. 695-96 (also noting that a verdict only weakly supported by the record is more likely to have been affected by errors). When the State’s case rests largely on the credibility of a single witness, and trial counsel fails to present important evidence to impeach that witness, such failure is more likely to result in prejudice. *Thiel*, 2003 WI 111, ¶71.

A. Trial Counsel Failed to Present Evidence that Fossier was the Shooter

Trial counsel should have secured a hearing under *State v. Denny*, 120 Wis. 2d 614, 357 N.W. 2d 12 (Ct. App. 1984) to present evidence that Fossier shot Mora. *Denny* provides that a defendant may only introduce evidence of an alternate perpetrator who, by a “legitimate

tendency” had (1) the motive to commit the crime, (2) the opportunity to commit the crime, and (3) some direct connection to the crime. *Id.* “Direct connection” means the existence of evidence that directly connects the alternate perpetrator to the crime and is not too remote in time, place, or circumstance. *Id.* at 624. Trial counsel conceded that this portrayal of Fossier would have been consistent with his trial strategy, but because he neglected to file a *Denny* motion, he could not introduce evidence to support this theory:

MEYN: And, in fact, did you attempt to raise to the jury the possibility that Fossier was responsible for this and not Mr. Malone?

NANZ: Well, closing argument I threw a line in. I was almost expecting it to be objected to but it stood.

MEYN: Right. And that would be objected to because, generally, you can't raise that evidence unless it satisfied *Denny*; is that correct?

NANZ: That's correct, yes.

MEYN: So since you did mention it in your closing, raising the theory, in your mind, would not be inconsistent with your theory [of the case], correct?

NANZ: No.

Hr. Tr. 52-53 (Nanz, 10/06/11 a.m.).

Fossier's written statement satisfies the *Denny* elements. Fossier admitted to motive—hostilities ensued between Fossier and Mora, ending with Mora saying, “Fuck you! Get a job.”

Hr. Ex. 3. As to opportunity and direct connection, Fossier placed himself within arm's length of the victim and described the position of the victim as he was shot. *Id.* “I,” said Fossier, “had a better chance of killing that man than Seneca did of killing that man.” TT, 183 (Fossier).

The failure to raise a *Denny* claim prejudiced Malone because neither the police nor Fossier ever had to explain why Fossier was not the one tried for Mora's murder.

COURT: In this case when you don't have a witness other than Fossier who's a potential shooter, you don't have DNA, you don't have a gun, why does this case rise and fall on Mr. Fossier who's just as allegedly as big a thug as anyone you're going to talk to? Criminal record, gang-banger... That's all true about Fossier, right?

CHAVEZ: True.

Hr. Tr. 34 (Chavez).

Had Fossier been questioned about facts implicating him in the murder, he would have, as he did at the postconviction hearing, claimed the Fifth Amendment. This in turn would have rendered his written statement inadmissible by way of hearsay or Confrontation Clause prohibitions—in effect, leaving the State without a case. When confronted with the prospect of being an alternate suspect, Fossier, at the postconviction hearing, plead the Fifth to every line of questioning attempted by postconviction counsel. Hr. Tr. 60-92 (Fossier). Being unable to introduce evidence that Fossier committed the crime precluded trial counsel from conducting an adequate cross. *See* Addendum 2 (Offer of Proof Regarding Impeachment of Mark Fossier).

COURT: The other thing that ultimately is going to have to be explained to me is why there was not much more made in this case by the defense, by the defense attorney in the way of a *Denny* motion... As I recall... Mr. Nanz never filed a *Denny* motion, correct, Mr. Huebner?

STATE: That's correct.

COURT: Both sides are going to have to explain to me but particularly the State how that was not again completely ineffective because I would think that the first thing Mr. Nanz should have done in this case is file a *Denny* motion, have that vetted in front of Judge Franke because clearly, or at least arguably to my mind all of the criteria in *Denny* applied which would have allowed Mr. Nanz to stand up and point the finger continuously during the trial at Mark Fossier as the perpetrator who was taking the stand and lying.

Hr. Tr., 51 (Chavez). Given that there was a clear alternate perpetrator—who also happened to be the State's chief witness against the defendant—trial counsel's failure to request a *Denny* hearing and introduce evidence supporting the alternate-perpetrator theory prejudiced Malone.

B. Trial Counsel Failed to Demonstrate that Fossier was Primarily Motivated to Escape Prosecution When He Inculcated Malone

It was critical for the State to demonstrate to the jury that Fossier had “a moment of truth” when police took down his statement—that way, the State could argue why the jury should credit Fossier's written statement over his trial testimony. TT, 93-96 (Closing). It was equally

critical for trial counsel to present a counter-narrative to explain why Fossier inculpated Malone. Trial counsel failed to do so; as a result, the jury had only the State's explanation for Fossier's behavior.

A counter-narrative, however, was available and should have been presented: at each and every juncture, Fossier attempted to extricate himself from responsibility—by first denying any knowledge of the homicide (Hr. Ex. 9), then by implicating Malone (Hr. Ex. 3), and then by backing off his statement when he realized his own words had put him too close to the fire. Tr. Ex. 17A; TT, 92, 100-105 (Fossier). When Fossier inculpated Malone, he was simply trying to save his own skin.

In this regard, trial counsel failed to capitalize on the jailhouse calls between Fossier and his mother. Trial counsel had no idea what to do with these calls—to him they all sounded “damaging.” Hr. Tr. 32 (Nanz, 10/06/11 p.m.). The State admitted these calls to demonstrate why Fossier had backed away from portions of his written statement: “no matter how many times his mother and he tried to pretend like he didn't [open his mouth], and to make this statement just go away, they couldn't. You heard the truth [in the statement].” TT, 96 (Closing). This tactic worked—even the sentencing court found the State's explanation convincing in this regard: “[B]ecause [Fossier] tried to deny [the statement] at trial, his initial allegation became that much more credible.” Sentencing Tr. 37-38. Yet, the counter-narrative—that Fossier, at every juncture, made an effort to avoid prosecution—provides a much more coherent explanation for the Fossier-Mother calls. By the time of trial, Fossier was concerned that he had not done enough to distance himself from the crime. Here, he relays to his mother a conversation he had with a jailhouse acquaintance who faced party-to-a-crime liability under similar circumstances:

He said he was with his boy, man, and his boy killed somebody, dog, he knew about it and shit. . . And he was like, yeah man, they . . . they found out I was there man, they tried to charge me with a party to a crime. I was like, yeah, you think they gonna charge that to me and shit?

Tr. Ex. 17A.

In the end, trial counsel didn't provide an explanation for Fossier's motives, but rather ceded any interpretation to the jury: "So I don't know what happened there that night. *I don't know exactly what Mark Fossier's motivations are.* I don't know who he might be covering for. I don't know." TT, 104-105 (Closing) (emphasis added). The Court has already commented on this incoherence:

...It was all obtuse, Mr. Nanz. Your closing argument barely references Fossier who you were trying to hang this case on. It seems to me that you should be jumping up and down, pointing the finger at Fossier for being a lying SOB, for being the shooter himself, for covering his rear end. And you barely mentioned it in the closing.

Hr. Tr. 43-44 (Nanz, 12/22/11). The State offered a good story on weak facts. The defense failed to develop any facts, and offered no alternative, coherent story to explain why Fossier's statement should not be believed. Malone was prejudiced by that incoherence.

C. Trial Counsel Failed to Investigate and Discover Facts that Would Impeach Fossier's Written Statement

Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Thiel*, 2003 WI at ¶40 (citing *Strickland*, 466 U.S. at 691). The Court has acknowledged that failure to conduct any independent investigation in a homicide case strongly suggests deficient performance:

[A] very well-respected veteran attorney ... said to me sort of in a scoff, well, Judge, that would be like not hiring an investigator on a homicide as if that was so outlandish, so atrocious that he or she would have never, never, never done that.

Hr. Tr. 50 (Chavez).

In *Thiel*, the facts are simple: the victim, and chief witness for the State, testified that she drove, on multiple occasions, to the house of the defendant—a psychiatrist charged with having

sexual relations with a patient. *Thiel*, 2003 WI at ¶5. Postconviction counsel discovered that the witness did not, in fact, have a driver's license. *Id.* at ¶28. Finding prejudice to defendant, the court of appeals ruled defense counsel must "conduct any significant independent investigation into the underlying facts of the case or the credibility of the prosecution's witnesses," especially the State's chief witness. *Id.* at ¶¶25, 50. Here, the violation of that duty is total. Trial counsel failed to conduct any investigation, whatsoever:

MEYN: In fact, you didn't hire an independent investigator, did you?

NANZ: No.

MEYN: In fact you didn't propound any discovery in any state agencies for, say an open records request; is that correct?

NANZ: That's correct.

Hr. Tr. 20-21 (Nanz, 12/22/2011); *see also* Hr. Tr. 18, 36, 51 (Nanz, 10/06/2011 a.m.) and Ex. 1 (indicating Trial Counsel incurred \$0 in "Investigator" and "Discovery" expense lines).

In his statement, Fossier stated that before the shooting, he: walked with Malone to Bellamy's house on 26th Street, smoked marijuana behind Bellamy's house, received a haircut on Bellamy's front porch, and then walked back behind Bellamy's house and saw Malone standing near a black revolver close to the garage. Hr. Ex. 3. This, according to Fossier, was the same gun he saw in Malone's hand when Mora was shot. *Id.* Had trial counsel conducted an adequate investigation, all of these statements would have been subject to impeachment.

1. Fossier lied about seeing Malone with a gun at Bellamy's house on the day of the homicide.

Postconviction investigation revealed Bellamy had moved away from his 26th Street home more than four months prior to the crime. This was corroborated: a) Jesus Santos, landlord of the 26th Street house, testified Bellamy's family moved out in July 2005, and that a new tenant had occupied the house by December 2005; b) Rafael Cetina, property manager of

Bellamy's new home on 22nd Street, testified Bellamy's family occupied that house from August 2005 onward; c) WE Energies representative Mary Carpenter testified that the final utility bill for Donovan Bellamy at 26th Street was sent to his new home at 22nd Street in August 2005; and d) Tracey Morales, Bellamy's mother, testified that she and Bellamy moved away from 26th Street in Fall 2005. Hr. Tr. 94-95 (Santos); 10 (Cetina); 7-8 (Carpenter); 14 (Morales). Morales testified that their new home on 22nd Street, the house where Bellamy lived at the time of the homicide, did not have a garage. Hr. Tr. 15-16; Hr. Ex. 50-51 (photos of the rear of 1324A 22nd Street). Bellamy and Morales testified that they did not know the tenant who occupied the 26th Street address, and Bellamy further testified he would not have spent time there after he moved. Hr. Tr. 16 (Morales); 33-34 (Bellamy).

Fossier lied about his whereabouts. He lied about seeing Malone with a gun shortly before the homicide. Fossier could not have mistaken the 22nd Street home for the 26th Street home because the 22nd Street home did not have a garage. Under *Thiel*, counsel's failure to identify and present important impeachment evidence of the State's chief witness constitutes prejudice. *Thiel*, 2003 WI 111, ¶¶28, 46, 71.

2. Fossier would not have gotten a haircut or spent extended periods of time outdoors in sub-freezing temperatures.

Postconviction investigation of freely available climatological records revealed that the wind-chill temperature in Milwaukee that afternoon (the wind was about 15mph) was 6 degrees Fahrenheit. Hr. Ex. 38-39. Trial counsel could have used this evidence to impeach Fossier's statement that he spent periods of time behind Bellamy's garage and on Bellamy's front porch getting a haircut in frigid weather. At the post-conviction hearing, Bellamy confirmed that he never cut hair outdoors during winter, never cut Fossier's hair at any time, and would not have been spending time with Fossier by the garage on 26th Street in winter 2005. Hr. Tr. 32-33, 40-

41 (Bellamy). Trial counsel never called Bellamy at trial, or even interviewed him. Hr. Tr. 51 (Nanz, 10/06/2011 a.m.).

3. Fossier was never motivated by the spirit of Jimmy Bogust.

Fossier's embellishment at trial—that at the time of making the written statement, Fossier had no idea who had killed Bogust—was also subject to impeachment. TT, 116 (Fossier). Well before Fossier was questioned, Bogust's killer, Antonio Heredia, had been positively identified by Bogust's sister. Hr. Ex. 7. The Journal Sentinel had made Heredia's identity public, law enforcement had taken him into custody, and the State had charged him with murder. Hr. Ex. 7-

8. Trial counsel had made no inquiry into this issue:

MEYN: Did you conduct any investigation into the homicide investigation of the Bogust murder?

NANZ: No, I didn't.

MEYN: And, in fact, in closing, the State again capitalized on this fact; do you recall that?

NANZ: Actually, I don't, but [I'm] not disputing that it happened.

Hr. Tr. 36 (Nanz, 10/06/11 a.m.).

4. Fossier had shot at an unarmed individual just prior to the Mora homicide.

Included in discovery was an internal police email stating that 2-5 gang members had been involved in a shooting six weeks prior to the Mora homicide, in the same neighborhood. The email listed Mark Fossier among the 2-5s. Hr. Ex. 12. Trial counsel showed little interest in learning of any potential significance of the report:

MEYN: In your estimation, would this [email], seeing this document, would this engender further inquiry on your part into the February 28 [shooting] incident?

NANZ: I'm not—not sure that it would.

Hr. Tr. 61 (10/06/11 a.m.).

Postconviction investigation revealed that Fossier was the only suspect in the shooting, and that witnesses saw Fossier fire eight to nine rounds at an unarmed and unthreatening

individual. Hr. Ex. 13-16; Hr. Tr. 13 (Oman). During interrogation for the Mora homicide, Fossier was afraid he would be prosecuted; his involvement in this previous shooting likely amplified that fear. Under *Thiel*, trial counsel's failure to investigate and discover evidence impeaching the State's chief witness clearly prejudiced Malone.

D. Trial Counsel Failed to Adequately Argue Against the Admissibility of the Malone-Joe Calls or to Supplement the State's Excerpts

The trial court struggled with the issue of whether the excerpts of the Malone-Joe calls demonstrated consciousness of guilt. Hr. Tr. 8 (08/11/08). Unlike the trial court, trial counsel had no such struggle—he had already concluded that these calls “were going to come in.” Hr. Tr. 5 (Nanz, 10/06/11). Not surprisingly, trial counsel provided no legal argument, and made no effort to provide essential context to the calls. Hr. Tr. 7-35 (trial counsel conceding he failed to supplement each and every excerpt presented to the postconviction court). Trial counsel even failed to supplement the calls when invited to do so by the court before trial:

MEYN: Would it be a fair interpretation that the Court would have been open to supplementation of excerpts in order to understand the nature of these conversations?

NANZ: That's what it sounds like, yes.

Id. at 7. The State's motion to introduce the call excerpts was granted, and the excerpts were played for the jury at trial. The speech was offensive, suggestive of gang life, and prejudicial to Malone. As the sentencing court noted:

If you have the gang tattoos, if you associate with gang people, if you talk on the phone like a gang person, you're a gang person... You [Malone] chose at some point in your early adult life to act and *talk in a very ugly way that's revealed on the telephone conversations*, and there's nothing there that suggests anything positive or redeeming in your character.

Sentencing Tr. 45 (emphasis added). At trial, counsel again failed to request supplementation of recordings so the jury could hear essential context that had been redacted by the State.

Consciousness-of-guilt evidence, especially such evidence suggesting that the defendant has threatened a prosecution witness, surpasses even confession evidence in terms of impact on the jury. It conveys not only that the defendant is guilty, but that he is willing to hurt innocents to escape justice. The effect is amplified when the State explicitly terms the evidence “consciousness of guilt” for the jury, as it did here. TT, 99 (State’s closing). Attempts by the State to introduce this evidence should set off alarm bells for any competent defense attorney. Here, trial counsel failed to pursue any of the available options to protect Malone from the prejudicial effect of the calls.

1. Trial counsel failed to raise legal arguments against admissibility.

Trial counsel made no reference whatsoever to the cases that frame the “consciousness-of-guilt” doctrine as it applies to threats against witnesses. Hr. Tr. 16-18 (08/11/08). The case law on this topic is straightforward—the defendant’s communications are inadmissible as consciousness of guilt unless a defendant himself engages in a criminal act. Evidence of “*criminal acts of an accused* which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge.” *State v. Bettinger*, 100 Wis. 2d 691, 698, 303 N.W.2d 585 (1981) (emphasis added; cited in State’s Brief, 08/04/08).

The cases permitting admission of such evidence—cited by the State in its pre-trial brief—involve egregious criminal acts committed by the defendant, and they are not applicable here. *State v. Bauer*, 2000 WI App 206, 238 Wis. 2d 687, 617 N.W.2d 902 (defendant attempted to hire an assassin to murder the victim and a witness); *State v. Neuser*, 191 Wis. 2d 131, 528 N.W.2d 49 (Ct. App. 1995) (defendant threatened victim directly). According to these cases, defendant must intentionally act to suppress evidence or threaten a witness. In contrast, when a

criminal act cannot clearly be attributed to the accused, it cannot be admitted to demonstrate consciousness of guilt. *See Bowie v. State*, 85 Wis. 2d 549, 553-54, 271 N.W.2d 110 (1978).

Malone committed no criminal acts in those phone calls. He did not threaten anyone. He did not direct anyone to threaten or harm anyone. In fact, he affirmatively diffused, ignored, dismissed, or redirected each of Joe's hostile rants. The calls were clearly inadmissible as consciousness of guilt under the cases cited by the State.

At trial, the State introduced the fact that Joe entered the District Attorney's witness waiting room to "put in context the phone calls that were admitted in evidence." TT, 54 (8/20/08). But Malone never directed Joe to do any such thing. Moreover, Joe's bizarre act was more likely attributable to Joe's mental instability, which trial counsel failed to explain. Unknown to the trial court, Joe has been diagnosed with several psychiatric disorders. Hr. Ex. 27. Joe's history of mental illness is marked by unpredictable outbursts and impaired communication. In March of 2007, Joe was admitted to a mental health care treatment center because he was, by his own admission, "on a rampage" and "felt like [he] was going to hurt somebody and hearing voices." *Id.* Joe himself reported an inability to follow instructions, stating, "You tell me to do one thing, I do another. Something's wrong with me." *Id.*

A defendant may request an in-camera inspection of a witness's mental health records if the records sought contain information necessary to determine the defendant's guilt or innocence. *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W. 2d 719 (Ct. App. 1993). An effective counsel would have assembled sufficient facts from Joe's family to demonstrate an in-camera review was necessary. Failure to do so prejudiced Malone because no alternate explanation for Joe's belligerence was presented to the judge and jury. The only interpretation was the one supplied by the State. TT, 99 (Closing).

Finally, trial counsel should have opposed admission of the calls on hearsay and Confrontation Clause grounds, and requested a limiting instruction. In the calls, Joe and another friend named Chris³ told Malone that friends had made statements to police implicating him, even quoting other witnesses at times, which constituted double hearsay. Tr. Ex. 17F-G. Joe and Chris' statements were also testimonial under the Confrontation Clause, because the statements were made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *State v. Jensen*, 2007 WI 26, ¶17, 299 Wis. 2d 267, 727 N.W.2d 518. Both Joe and Chris understood the jailhouse calls were monitored, and could have reasonably believed their statements could be used later at trial. Tr. Ex. 17F-G. At the least, trial counsel should have asked the court to explain the limited purpose of the calls to the jury. In the absence of such a limiting instruction, the jury was free to consider Chris and Joe's statements—which included descriptions of the many witnesses against Malone—as substantive evidence of Malone's guilt.

2. Trial counsel failed to provide essential context to the judge and jury.

On their face, the State's excerpts are inadmissible. At the very least, however, trial counsel failed to supplement these calls. Hr. Tr. 8-17 (Nanz, 10/07/11); Hr. Ex. 21, 23, 25. When an adverse party introduces an out-of-court statement, the opposing party may request the entry of any omitted part of the statement that ought to be considered with it. *State v. Marks*, 2010 WI App 172, ¶¶20-22, 330 Wis. 2d 693, 794 N.W.2d 547; Wis. Stat. § 901.07 (rule of completeness). Trial counsel's failure to add essential context occurred twice: first at the pretrial admissibility hearing, and again at trial. Supplementation would not have been difficult—trial counsel was provided with, and listened to, the phone calls. Hr. Tr. 17 (Nanz, 10/06/11). The

³ "Chris" spoke to Malone before handing the phone to Joe. His last name is not in the record. Tr. Ex. 17G.

trial court and the jury drew conclusions based on portions redacted to favor the State's case. At the postconviction hearing, the Court found this approach questionable at best:

I don't see, frankly, how Judge Franke could have ruled on this issue if he didn't hear, see or read the complete transcript... I would never let anyone argue in front of me on a redacted transcript of anything, and we're talking about just a few paragraphs. How was this not given to Judge Franke? How could he make an intelligent ruling?

Hr. Tr. 17-18 (Nanz, 10/06/11). Absent supplementation, the jury was left with the unmitigated impression that Malone was a thug. *See* Sentencing Tr. 45.

Trial counsel failed to alert the judge and jury to these essential, redacted portions:

a. Opportunity to supplement: Malone wept and claimed innocence.

After Joe made his first, most explicit, and unprompted threat, the State's transcript ends. Unknown to the Court and redacted from the transcript, Malone ignored Joe and began to weep.

Hr. Ex. 21 (**bolded** portions redacted by State).

JOE: And all along nigga he might be snitching on you. If I find that out, nigga, he getting murked.

DEFENDANT: **[crying]** Dawg, I'm hurting like a motherfucker, dog.

JOE: I hear you. Sen, nigga don't worry.

DEFENDANT: **[crying]** Fuck dawg.

JOE: Hey, Sen. Sen.

DEFENDANT: **[crying]** What's up, man?

JOE: Nigga, man, just pray to God, nigga. Alright? It'll be alright, man.

DEFENDANT: **[crying]** No, but if my whole fucking family, my niggas, put me in this shit dog, that's fucked up dog.

JOE: Hey...

DEFENDANT: **[crying]** ... don't tell me that shit dog.

JOE: I know but, Sen, listen...

Tr. Ex. 17F; Hr. Ex. 21.

Through tears, Malone expressed disbelief that friends would implicate him in a crime he did not commit:

DEFENDANT: **How the fuck can my name be put in this shit? I ain't even do shit, man. Them niggas... [unintelligible]... don't know shit, they ain't do shit, why the fuck would they put my name in this shit?**

Tr. Ex. 17F; Hr. Ex. 21.

b. Opportunity to supplement: Malone redirected the conversation.

After Joe had gone off, again, about threatening snitches, Malone said, "Yeah cuz." Hr. Ex. 23. The State argued this response sufficed to impute a guilty conscience on Malone, yet neglected to include the remainder of Malone's response: "Hey, you got my information? Try to get a hold of Whiteboy [Malone's friend]. Hey, you said what, [that] Tourean [Malone's brother] was crying too?" *Id.* Why did the State redact the remainder of Malone's response? Because Malone had quickly changed the topic to family and friends. Nowhere does Malone direct Joe to threaten or harm anyone. Hr. Ex. 21, 23, 25.

c. Opportunity to supplement: Malone used "holla" in a friendly way.

Trying to find something in nothing, the State argued that Malone encouraged Joe to threaten a witness by having told Joe to "holla" at a friend. TT, 99 (Closing). In portions redacted by the State, Malone also told a friend named Chris that he would "holla" at Joe, and Malone invited Joe to "holla" back at him. Tr. Ex. 17G. This confirms that Malone used "holla" in a friendly way.

d. Opportunity to supplement: Malone repeatedly asserted his innocence.

Trial counsel failed to correct the State's systematic redactions of Malone and Joe's declarations of Malone's innocence. Hr. Ex. 21, 23, 25, 44; Tr. Ex. 17G-F. Malone declared his innocence multiple times, and Joe agreed. *Id.* These redacted statements directly contradict the State's argument that the conversations show consciousness of guilt.⁴ TT, 10-11 (Chavez).

⁴ The trial court's failure to review a full transcript of the calls before reaching a decision on admissibility was not harmless error; supplementation of the excerpts indisputably favor Malone's position that nothing in the tapes suggest consciousness of guilt. Moreover, there is no indication in the record that the Court actually considered the

At one point, the State even cut out exculpatory language *mid-sentence* (**bolded** portions redacted by State):

JOE: **They charged you . . .they're trying to charge you with homicide?**

DEFENDANT: **First-degree intentional homicide. My bail is five million dollars.**

JOE: **Oh what?**

DEFENDANT: **On my life, nigga. I'm sick as a [unintelligible]. I been crying like a motherfucker, dawg. I'm sick dawg.**

JOE: **You're, you're, you're not guilty right?**

DEFENDANT: **Hell no, man! But they're talking about, since I ain't speaking and shit, they gonna charge me with the shit, they talking about . . . um . . . Rashee and Mark and them talking. Saying I had something to do with it.**

JOE: Ah hell no.

Tr. Ex. 17F; Hr. Ex. 25. What the State did in this respect was wrong, and trial counsel's supplementation could have exposed this fact for the court and jury.

Redacted, these calls were highly prejudicial. There was no basis for their admission—Malone never threatens a single witness. Trial counsel's failure to adequately object to the excerpts based on governing case law prejudiced Malone. Alternatively, trial counsel's failure to provide essential context also warrants a new trial.

E. Trial Counsel Failed to Investigate and Present Malone's Alibi

Trial counsel failed to investigate and present alibi critical witnesses, despite the fact they were readily available and their credibility exceeded that of Fossier. Kerry Malicki informed trial counsel before trial that Malone was in the Malicki home the night of the homicide. Hr. Tr. 19 (Nanz, 12/21/11). After a ten to fifteen minute meeting with Ms. Malicki, trial counsel concluded the alibi was presented to him too late and decided not to put her on the stand. *Id.* at 12. No follow up investigation was conducted to corroborate or discredit her testimony. *Id.* at

case law presented in the State's brief. The case law precludes admitting even those portions of calls that were surgically redacted to favor the State's theory. In admitting these excerpts, the Court abused its discretion. Doing so was prejudicial to Malone, and constitutes grounds for a new trial.

49. The Court made explicit its opinion that the alibi witnesses had credibility issues, though Nick was the focus of the Court's concerns.⁵ By the same token, the Court also noted that Fossier suffered credibility problems, which the State concedes.⁶

Ms. Malicki testified in the postconviction hearing that Malone had been playing video games in her home, with her son, the entire evening of the homicide. Hr. Tr. 38-40 (Kerry Malicki, 04/25/2012). She testified she saw Malone shortly before the weather report during a 10:00 p.m. television news program, and then again shortly after the news ended. *Id.* Given that the homicide occurred at roughly 10:15 p.m., this alibi would have exculpated Malone. The alibi is made more credible by the fact that Ms. Malicki believed the homicide occurred some time after 10:35 p.m., after she had gone to bed. *Id.* at 41. Ms. Malicki also testified her husband had told her that Fossier had been in the Malicki home late that night, after the homicide. *Id.* at 47. This fact contradicts Fossier's written statement that he could not enter the Malicki home that night because no one was home. Hr. Ex. 3.

Although Ms. Malicki struggled somewhat to answer questions during her testimony, her credibility far exceeded that of Fossier and should have been presented at trial. Ms. Malicki, unlike Fossier, was not a suspect in the Mora homicide. Unlike Fossier, she had no prior criminal history and no history of gun violence in the neighborhood. On the contrary, she

⁵ Hr. Tr. 87 (Nick M.) (COURT [commenting on Nick's testimony]: I don't know if you can do anything to bolster what is the most implausible testimony I've heard in a while...); (Hr. Tr. 45 (Kerry M. 4/26/11) (COURT [commenting on Kerry's testimony]: Ma'am, yesterday I thought you testified you did not sign it. Now two seconds later you just said you did sign it, but the one in front of us is not signed, so he's asking questions that are somewhat repetitive, but he's trying to get to the bottom of the issue...)).

⁶ TT, 183 (Fossier) (STATE: Mr. Fossier, we now know that you told your mom different things than what you told the detectives. You told your mom different things than what you told this jury. You actually told this jury several different conflicting stories.); Hr. Tr. 34 (Chavez) (COURT: So in this case when you don't have a witness other than Fossier who's a potential shooter, you don't have DNA, you don't have a gun, why does this case all rise and fall on Mr. Fossier who's just as allegedly as big a thug as anyone you're going to talk to? Criminal record, gang-banger, member of the two-fives, general louse of a person, bad actor, right? That's all true about Fossier, right?); Hr. Tr. 73-74 (Fossier) (COURT [responding to Fossier's postconviction testimony that it was "100 degrees" on the day of the homicide, which was in the middle of Winter]: I'm going to offer an editorial comment. Obviously that's untrue. Obviously that's a lie. That's what he chose to answer.)

presented as a sensitive woman who cared for children in her neighborhood. Hr. Tr. 81 (Kerry Malicki, 04/25/2012). While Ms. Malicki did have friendly relationship with Malone, and thus a potential motive to protect him, she had a similar relationship with Fossier. *Id.* at 45-46. Trial counsel admitted he thought Ms. Malicki would be more credible on the stand than Fossier.

MEYN: So a jury would be more like to believe Ms. Malicki's story than Mr. Fossier's in your assessment?

NANZ: Potentially, yes.

Hr. Tr. 48 (Nanz, 12/21/2011).

Ms. Malicki would have been even more credible at trial. Almost all of the State's cross-examination at the postconviction hearing focused on a poorly drafted affidavit Ms. Malicki had signed long after trial. Hr. Tr. 59-88 (Kerry Malicki, 04/25/2012). This affidavit did not exist at the time of trial and would have been unavailable as a source of impeachment. Further, Ms. Malicki's memory at the time of trial would have been fresher.

Given that the State's case hinged on the highly questionable credibility of Mark Fossier, trial counsel had a duty to counter Fossier with Ms. Malicki's testimony. By trial counsel's own account, Ms. Malicki was more credible than Fossier and would have been so at trial. The failure to call her is deficient performance and sufficient to undermine confidence in the conviction.

F. Trial Counsel Failed to Object to Prejudicial Portions of the Fossier-Mother Calls

Parts of the Fossier-Mother calls arguably qualify as prior inconsistent statements or illustrations of bias. Some portions, however, were problematic enough that trial counsel should have objected. For example, some portions merely repeated Fossier's allegation that Malone

was at the crime scene.⁷ TT, 96 (Closing); Tr. Ex. 17A, 17B, 17D. In this respect, trial counsel failed to argue that these particular portions should have been excluded as hearsay, cumulative, and unfairly prejudicial. TT, 87 (08/19/08). (Trial counsel disagreeing: “I think [all of the phone calls are] admissible for impeachment.”) Trial counsel also failed to request a limiting instruction so the jury would consider them only as to Fossier’s credibility, not as substantive evidence that Malone was at the crime scene. *See Wittig v. Hoffart*, 2005 WI App 198, ¶3 n.2, 287 Wis. 2d 353, 704 N.W.2d 415; 7 Wis. Prac., Wis. Evidence § 106.1 (3d ed.) (a jury may consider an out-of-court statement for any purpose, unless the opponent makes a timely hearsay objection, or a limiting instruction is provided to the jury when the statement is received). Trial counsel’s failures in this regard prejudiced Malone.

G. Ineffective Assistance of Counsel Claims Constitute Cumulative Prejudice

The State’s case was based on (1) Fossier’s statement to police, (2) the Malone-Joe phone calls, and (3) the Fossier-Mother calls. Defense counsel failed to undermine these key components of the State’s case or show essential and exculpatory context. Malone was prejudiced by each instance of deficient performance. He was also prejudiced by the cumulative effect of these errors. “When a court finds numerous deficiencies in a counsel’s performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice.” *Thiel*, 2003 WI 111, ¶59 (citing *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000)).

In this case, trial counsel failed to develop and present readily available evidence that: (1) Fossier shot the victim, (2) Fossier falsely implicated Malone to save himself, (3) Fossier’s

⁷ Example of Fossier placing Seneca at the scene of the crime, as is consistent with Fossier’s written statement:

MOTHER: And... but who was with you [at scene of crime]?

FOSSIER: Sen.

Tr. Ex. 17A; 02/28/2008; 15:56; 440.48-521.48 (emphasis added).

statement, the State's primary evidence, was factually impossible and inconsistent with the recollections of other witnesses, and (4) the Malone-Joe calls were not indicative of Malone's guilt.

Trial counsel's failure to suppress inadmissible evidence permitted the State to present: (1) versions of the Malone-Joe calls that were heavily redacted, unfairly prejudicial, and irrelevant when understood in context (Hr. Ex. 21, 23, 25); and (2) calls between Fossier and his mother that included unmitigated and damaging hearsay, including repeated statements that Malone was at the crime scene. Tr. Ex. 17A. Given trial counsel's inexcusable and repeated failures, there is no confidence in the conviction. Under *Strickland* and *Thiel*, Malone is entitled to a new trial.

II. Independent of Malone's IAC Claim, a New Trial is Warranted Because the State Failed to Fulfill its *Brady* Obligations

Independent of trial counsel's failure to adequately represent Malone, the State failed to perform its duty to disclose all exculpatory and material evidence to the defense before trial. *Brady v. Maryland*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419, 421 (1995). The State has conceded that it failed to disclose reports revealing that: (1) Fossier was arrested for firing a gun multiple times at an unarmed individual named Milton Lewis (the Lewis shooting), just weeks before and in the same vicinity of the Mora shooting (Hr. Ex. 13-16); (2) Fossier had access to a sizeable cache of ammunition at the time Mora was killed (Hr. Ex. 17); (3) a year after the Mora homicide, Fossier was again found in possession of a handgun in that same vicinity (Hr. Ex. 18); and (4) Donovan Bellamy did not live on 26th Street at the time of the homicide, thereby disproving an important assertion in Fossier's written statement (Hr. Ex. 61; see Argument I.C.1, *supra*). The State has stipulated that it did not disclose this evidence. Hr.

Tr. 25 (Nanz, 12/22/2011). Based on the State's concession, Malone has carried his burden to show that the State withheld evidence at issue.

To the extent the State maintains it had no duty to disclose these documents because it was not aware of their existence—the State elicited testimony from its lead investigator that these documents were not “in the system,” Hr. Tr. 83 (Chavez)—the State's position contradicts a long line of precedent holding otherwise. *See, e.g., Kyles*, 514 U.S. at 437-38 (prosecutor must learn of favorable evidence known to the others acting on the government's behalf in the case).

Similarly, to the extent the State argues that trial counsel should have requested the documents (and thereby concedes the merits of one of defendant's IAC claims), the case law is clear: any failure by trial counsel to request the disclosure of material evidence does not relieve the prosecutor of his constitutionally mandated duty to disclose it. *Bagley*, 473 U.S. 667, 682 (1985). In *Bagley* the Court established that the State's burden to disclose material exculpatory evidence is the same whether defense counsel requested or failed to request evidence favorable to the defendant. *Id.* Thus, the fundamental inquiry is whether the evidence is exculpatory and material; if it is, the prosecutor had a duty to turn it over to the defense.

A. Under the Supreme Court's Recent Pronouncement, the Withheld Impeachment Evidence is *Per Se* Material

Under the Supreme Court's January 2012 decision in *Smith v. Cain*, where a case rises or falls on one witness, and the undisclosed evidence impeaches that witness, the evidence is *per se* material. 132 S. Ct. 627, 630 (2012). In these circumstances, *Smith* prohibits a reviewing court from engaging in the traditional test of weighing the State's case against the import of the withheld evidence. *Id.* at 630. According to *Smith*, to speculate about how a jury would weigh key credibility evidence would impermissibly invade the province of the jury. *Id.* Rather, where

such evidence has been withheld, the remedy is to order a new trial to permit a jury to make this credibility assessment.

Smith is directly on point—there, the only witness to directly implicate Smith in the shooting was Larry Boatner who testified that he was at a friend’s house when a man, along with two other gunmen, entered the home, demanded money and drugs, and began shooting. *Id.* at 629-30. At trial, Boatner identified Smith as the first gunman to come through the door. *Id.* After trial, the defense learned of detective’s notes that stated Boatner “could not ... supply a description of the perpetrators other than [sic] they were black males.” *Id.* The State also failed to disclose Boatner’s statement that he “could not ID anyone because [he] couldn’t see faces” and “would not know them if [he] saw them.” *Id.* at 630.

The *Smith* Court found the undisclosed statements “plainly material.” *Id.* The dissent in *Smith* attempted to explain away the significance of the withheld evidence while highlighting other sources of evidence presented by the State at trial; the majority explicitly rejected this approach. *Smith* at 632-33 (Thomas, J., dissenting). The majority in *Smith* acknowledged that the undisclosed evidence might be subject to competing interpretations—but this fact “merely leaves us to speculate” about which part of the contradictory evidence the jury would have believed. *Smith* at 630. The Majority found that the State “offers a reason that the jury *could* have disbelieved” the undisclosed evidence, but this argument gave the Court “no confidence that it *would* have done so.” *Id.* (emphasis in the original).

The facts here are governed by the holding in *Smith*. Without Fossier, the State had no case against Malone. In the State’s closing, Fossier is mentioned on every single page of the transcript. TT, 90-101 (Fossier’s name appeared on nine of eleven pages and the other two pages were so clearly devoted to Fossier that the State was free to use the pronoun “he”). In both

cases the testimony of one person determined the guilt of defendant—in *Smith*, that witness was Boatner; here, Fossier. And here the withheld evidence not only impeaches the key witness (as was the case in *Smith*), but also suggests that Fossier could have been provoked to kill Mora. *Smith* controls. The excluded reports are material and a new trial should issue.

B. Withheld Evidence is also Material Because it Supports a Flawed Investigation Defense

Independent from its impeachment value, the withheld evidence (Hr. Ex. 13-18; 61) is material to demonstrating that investigators failed to follow basic leads, to the point that investigators failed to even review Fossier’s criminal history. Hr. Tr. 78-79 (Chavez). This Court had repeatedly inquired as to why the police focused their attention on Malone without questioning the accuracy of Fossier’s statement. Hr. Tr. 32-38 (COURT [questioning Det. Chavez]: “So you had nothing other than Mark Fossier, a lying, gang-banging thug who’s a member of the two-fives who’s got a criminal record. That’s all you have, right?” and “the question is why you thought this entire case rises and falls on the gang-banging thug piece-of-garbage Mark Fossier”).

In *Kyles*, the Court found evidence material when it could have been used by the defense to “throw the reliability of the investigation into doubt.” 514 U.S. 447. There, the withheld evidence included statements from Beanie, an alternate suspect “essential” to their investigation and who, by the State’s own admission, “made the case” against the defendant. *Id.* at 445. Undisclosed statements to the police were “replete with inconsistencies,” suggesting Beanie was anxious to see *Kyles* arrested for the murder. *Id.* Beanie’s statements led the police to evidence used to convict *Kyles*, but also revealed that Beanie had the motive and opportunity to plant evidence. *Id.* at 446. The Court found the withheld evidence would have allowed defense

counsel to attack the reliability of the investigation for its “remarkably uncritical attitude” towards Beanie, and for “failing even to consider Beanie’s possible guilt...” *Id.* at 446.

The same dynamic occurred here, where police apparently ignored facts suggesting that Fossier, and not Malone, was Mora’s killer. Surprisingly, investigators were unaware that Fossier was the sole suspect in the Lewis shooting. Hr. Tr. 79 (Chavez). Not only did the lead investigator credit Fossier’s written statement despite knowing the first page contained a bald-faced lie (Hr. Tr. 66 [Chavez conceding Fossier’s statement declared no gang affiliation and knowing that to be untrue]), but investigators did not follow up on police reports undermining the veracity of the written statement. Hr. Tr. 71 (Chavez stating that he did not consider reports about the Lewis shooting that suggested Bellamy did not live where Fossier said he did). As demonstrated at the postconviction hearing, the withheld evidence provided a foundation from which to cross-examine detectives on the adequacy of the investigation. Hr. Tr. 78-79 (Chavez admitting that he did not even look into Fossier’s criminal history after accepting Fossier’s statement); Hr. Tr. 76 (Chavez admitting that he did not consider Fossier’s assertion that he received a haircut on Bellamy’s front porch in the dead of winter).

In sum, the withheld evidence is material because its net effect raises a “reasonable probability that disclosure would have produced a different result at trial.” *Kyles*, 514 U.S. 420. It does so because the evidence fundamentally recasts and weakens the State’s evidence, provides Malone new and significant defenses, and alters defense strategy by (1) providing strong impeachment evidence against Fossier, (2) undermining the State’s narrative that Fossier had a “moment of truth,” (3) furnishing the defense with powerful evidence to support an alternate perpetrator defense, and (4) suggesting a flawed investigation. Thus, based on the *Brady* violation alone, Malone should be granted a new trial.

III. Newly Discovered Evidence Warrants a New Trial

Malone also requests a new trial based on newly discovered evidence (NDE) impeaching Fossier's statement to the police and supporting the defense's theory that Fossier was the shooter. The newly discovered evidence consists of: (a) *Brady* documents, and (b) Jose Malave's testimony that Fossier confessed to shooting Mora.

Due process requires granting a new trial where (1) evidence is discovered after trial; (2) the moving party was not negligent in failing to discover it; (3) the evidence is material; (4) the evidence is not cumulative; and (5) it is reasonably probable that a different result would be reached at a new trial. *State v. Love*, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62. The first four elements are to be proven by clear and convincing evidence. *State v. Armstrong*, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98. As to the last element, the court must determine whether "there is a reasonable probability that a jury, looking at both [the old and the new evidence], would have a reasonable doubt as to the defendant's guilt." *State v. McCallum*, 208 Wis. 2d 463, 475, 561 N.W.2d 707 (1997). Here, the *Brady* evidence, along with Jose Malave's testimony that Fossier admitted to killing Mora, constitutes NDE. Considered independently or in the aggregate, the *Brady* and Malave evidence warrant a new trial.

As to the *Brady* evidence, to the extent the Court finds that trial counsel was not negligent in failing to discover these documents, the *Brady* evidence qualifies as NDE. As to the Malave evidence—Malave testified that he first disclosed this information two years after the trial; thus, it was found after trial and trial counsel was not negligent in failing to force Malave to speak. Hr. Tr. 14 (Malave). If the fifth prong is satisfied—the NDE creates a reasonable probability of a different outcome at a new trial—by that virtue the evidence is material and not cumulative, and the third and fourth prongs are satisfied as well.

The fifth factor is satisfied. It is reasonably probable that a jury considering the

impeachment evidence captured in the *Brady* documents would not have convicted Malone. *State v. Plude*, 2008 WI 58, ¶47, 310 Wis. 2d 28, 55, 750 N.W.2d 42, 56 (stating that “Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial”).

Similarly, it is reasonably probable that a jury could have credited Malave’s testimony over Fossier’s—which would mandate a different result. This Court explicitly voiced its concerns about the credibility of Malave. Hr. Tr. 33-34 (Malave). But the key inquiry is not whether a court believes a witness, but whether a reasonable *juror* could have credited the testimony given the unique circumstances of the case. *McCallum*, 208 Wis. 2d at 474. Accordingly, to evaluate such credibility challenges, a court plays a threshold role in ascertaining a minimal level of credibility, but ultimately leaves credibility determinations to a future jury. *Id.* at 474-75.

Malave’s testimony, especially in light of the State’s case, meets that minimal threshold: a reasonable juror could credit Malave over Fossier. The two witnesses were similar in many ways. Malave was associated with the 2-5’s, but so was Fossier. Hr. Ex. 12. Malave and Fossier both sat on critical information implicating a fellow gang associate, and both, at first, denied they had such information when confronted by police.

Unlike Fossier, however, Malave’s credibility is bolstered by his strong disincentive to testify. Malave was a confidential informant who had much to gain by cooperating with the State. Hr. Tr. 56 (Malave, 10/7/11). It is likely that the State will deem him a liar because of his testimony, which in turn destroys his value as a confidential informant. Where Fossier implicated Malone to save his own skin, Malave implicated Fossier to Malave’s own detriment. The State argued that Malave is incredible because he does not have a satisfactory explanation as to why he waited until 2010 to come forward with information regarding Fossier’s confession.

Hr. Tr. 58 (Malave, 10/7/2011). The same can be said of Fossier. If Malave's testimony is incredible because of its timing, the credibility of Fossier's written statement dies by the same sword.

A court need not even find that the jury would have accepted the NDE "as true, nor believe it, in order to have a reasonable doubt." *McCallum*, 208 Wis.2d at 476; *see also State v. Kivioja*, 225 Wis. 2d 271, 296, 592 N.W.2d 220 (1999) (holding that circuit courts determine not whether the witness should be believed, but only whether the NDE has "any indicia of credibility persuasive to a reasonable juror if presented at a new trial")(quoting *McCallum*, 208 Wis. 2d at 487 (Abrahamson, C.J., concurring)); *see also State v. Carnemolla*, 229 Wis. 2d 648, 659-62, 600 N.W.2d 236 (Ct. App. 1999). The substance of Malave's testimony, should a juror credit it over Fossier's testimony, mandates a different result at trial. Accordingly, based on either the *Brady* evidence, or the testimony of Malave, NDE warrants a new trial.

IV. The Court Should Grant a New Trial in the Interest of Justice

Malone requests that the Court grant a new trial in the interest of justice (IOJ). A court may grant an IOJ claim when the real controversy was not fully tried because the jury did not hear important testimony. *Lorenz v. Wolff*, 45 Wis. 2d 407, 414, 173 N.W.2d 129 (1970); *State v. Cuyler*, 110 Wis. 2d 133, 142, 327 N.W.2d 662 (1983); *see also State v. Henley*, 2010 WI 97, ¶63, 328 Wis. 2d 544, 787 N.W.2d 350, (a circuit court may grant a new trial in the interest of justice under § 972.02 and § 809.30). Here the jury did not hear critical evidence impeaching Fossier and implicating him as the killer:

- 1) The jury never heard Fossier claim the Fifth Amendment Privilege against self-incrimination when asked about the homicide. Hr. Tr. 60-88 (Fossier).
- 2) The jury never heard portions of the Malone-Joe jailhouse phone calls in which Malone professed his innocence. Hr. Tr. 27-28 (Nanz, 10/06/11). The jury never heard portions of the jailhouse phone calls that demonstrate Malone's total disinterest in Joe's ranting about snitches and informants. Hr. Ex. 21-25.

- 3) The jury never heard that Fossier, before making a written statement, lied to police, denying any knowledge of the incident over a period of five hours. Hr. Ex. 9.
- 4) The jury never heard that Fossier pointed the finger at Malone only after police suggested Malone was involved. Hr. Ex. 9.
- 5) The jury never heard that that, on the first page of his statement, Fossier denied any association with a gang, a bald-faced lie. Hr. Ex. 3.
- 6) The jury never heard evidence suggesting that the State conducted a flawed investigation. Hr. Tr. 76-79 (Chavez).
- 7) The jury never heard that Fossier unloaded his pistol at an unarmed individual weeks prior to and on the same block as the Mora homicide. Hr. Ex. 13-16. That pistol was never recovered by police, suggesting Fossier had a handgun at the time Mora was killed. *Id.*
- 8) The jury never heard that MPD recovered a cache of ammunition attributed to Fossier, just weeks before the Mora homicide. Hr. Ex. 17.
- 9) The jury never heard that, after the Mora homicide, on the same block, Fossier was arrested for carrying a concealed handgun after a foot chase. Hr. Ex. 18.
- 10) The jury never heard that Fossier told a fellow gang associate that he killed Mora, describing details only the shooter would know. Hr. Tr. 42 (Malave, 10/06/11).
- 11) The jury never heard that Donovan Bellamy did not even live at the house where Fossier told police he saw Malone with the murder weapon on the day Mora was shot. Hr. Tr. 16 (Morales); Hr. Tr. 33-34 (Bellamy); Hr. Ex. 53-55, 61.
- 12) The jury never heard that at the time of the homicide, Donovan Bellamy lived at a house with no garage, discrediting Fossier's written statement that he saw Malone near the murder weapon by Bellamy's garage. Hr. Tr. 16 (Morales).
- 13) The jury never heard that Fossier's written statement that he received a haircut on Bellamy's porch is undermined by the fact that, with windchill, the temperature was 26 degrees below freezing. Hr. Ex. 38, 39.
- 14) The jury never heard evidence strongly suggesting, contrary to Fossier's statement and testimony, that Fossier knew exactly who killed Jimmy Bogust. Hr. Ex. 7.
- 15) The jury never heard from alibi witnesses who stated that Malone was with them the evening of the homicide, and that after the shooting, Fossier came in to the Malicki residence, which contradicts Fossier's written statement. Hr. Tr. 23-32 (Kerry Malicki, 04/26/12); Hr. Tr., 39-42 (Nick Malicki).

At trial, the jury never heard the full story. Moreover, a court may also grant an IOJ

claim where the jury considered improperly admitted evidence that clouded a crucial issue

(*Lorenz*, 45 Wis. at 414), which occurred here:

- 1) The jury was permitted to infer Malone's consciousness of guilt based on redacted transcripts of the Malone-Joe phone calls that did not include essential context. Hr. Ex. 21-25.
- 2) The jury was allowed to consider Joe's entry into the witness waiting room as further evidence supporting Malone's guilt. TT 13 (Chavez).
- 3) The jury was improperly permitted to consider calls between Fossier and his mother—which

demonstrated Fossier's continued effort to escape responsibility—as substantive evidence of Malone's guilt. Tr. Ex. 17.

In granting an IOJ claim, a court may order a new trial without finding the probability of a different result on retrial. *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745, 770 (1985), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 504-05, 451 N.W.2d 752 (1990). The improper use of highly prejudicial jailhouse calls, in combination with key witness testimony not considered by the jury, warrants a new trial in the interest of justice.

CONCLUSION

For the reasons stated, the defects at trial are many and severe. Malone respectfully requests that the Court vacate his conviction and order a new trial.

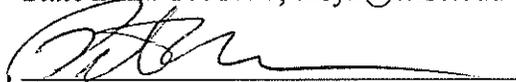
Dated this 1st day of August, 2012.

Respectfully submitted,



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