STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2013AP814-CR

ANTONIO D. WILLIAMS,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE MILWAUKEE COUNTY CIRCUIT COURT
HONORABLE REBECCA F. DALLET, PRESIDING

APPELLANT'S BRIEF

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ISSUES PRESENTED

1. Whether the refusal to allow defense cross-examination of the State's witnesses who had received consideration in exchange for their testimony as to the details of the possible penalties they faced, including the maximum penalty, violated the basic state and federal right to confront and cross-examine.

Each time the defense sought to explore penalties with a State's witness, including an accomplice, the court below refused to allow such cross-examination.

2. Whether the State's impeachment of Mr. Williams' alibi witness with a letter seized in violation of the state and federal right to counsel was also a prejudicial violation of that right.

The court below suppressed the letter as a violation of the right to counsel but later ruled it could be used for impeach-

ment.

3. Whether a mistrial should have been granted when the State brought out "other acts" evidence incriminating Mr. Williams on cross-examination of a defense witness.

The court below denied a mistrial, opting instead for a jury instruction to disregard.

4. Whether the failure to disclose material impeachment evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), was fundamentally unfair.

The court below denied a hearing on the *Brady*, *supra*, issue and found no error.

5. Whether the cumulative effect of errors limiting Mr. Williams' ability to present a defense justifies discretionary reversal because the real controversy was not fully and fairly tried.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

STATEMENT ON PUBLICATION

Counsel requests publication because the opinion here is likely to apply established rules of law to a factual situation significantly different from those in previous opinions and therefore will clarify those rules. Furthermore, the case presents issues of first impression in Wisconsin.

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of Mr. Williams' criminal conviction by a jury of four counts of 1st Degree Intentional Homicide and of part of the denial of his postconviction motion for new trial.

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2. Proceedings Below

On July 11, 2008, complaint number 08-CF-3380 was filed in Milwaukee County Circuit Court, charging Mr. Williams and a co-defendant with 4 counts of violating §940.02(1), *Wis. Stats.* (1st Degree Reckless Homicide). (2). An arrest warrant for Mr. Williams was issued on that date. (3).

On August 8, 2008, Mr. Williams appeared on return of the warrant with counsel, who waived reading of the complaint. (95:2). Bail was set at $500,000 cash. (95:4).

On August 15, 2008, preliminary hearing was held. (96). After hearing testimony, the court ordered Mr. Williams bound over for trial. (96:50). An information making the identical charges as in the complaint was filed. (6). Mr. Williams entered not guilty pleas to each count of the information. (96:51).

On September 5, 2008, an amended information was filed, changing the charges against Mr. Williams to 4 counts of 1st Degree Intentional Homicide. (7)(97:2).

On December 4, 2008, the State filed motions *in limine* (9) and gave notice of its intent to introduce "other acts" evidence. (10).

On February 11, 2009, trial counsel filed motions *in limine* (11), including a motion to suppress evidence taken from an envelope labeled "for my lawyer" by police from Mr. Williams in jail. (11:3, ¶23).

On March 2, 2009, trial counsel filed motions for change of venue (13)(14), to disclose a confidential informant (15), to require use of a jury questionnaire (17) and gave notice of alibi. (16).

On March 12, 2009, the State filed a motion for use of "other acts" evidence. (12). On that date, the court began hearing pretrial motions. (18)(98).

On April 1, 2009, the State filed briefs in opposition to the motion to suppress the letters seized from Mr. Williams at the

jail (19) and to the motion for change of venue. (20).

(Although the record shows no direct evidence of it, at some point, the State decided to sever Mr. Williams' case from that of his co-defendant. See (99:17-18).)

On May 1, 2009, trial counsel filed news reports in support of the motion to change venue. (21).

On May 12, 2009, the court orally decided motions. (100). It granted the motion to suppress the letters seized from Mr. Williams at the jail, but deferred the issue of whether the letters could be used for impeachment. (100:26-27). It granted the State's motion to use the "other acts" evidence described in the State's motion. (100:38-39). Finally, it denied the motion for change of venue. (100:40-42).

On June 2, 2009, the State filed a motion *in limine* (22), its witness list (23) and its jury questionnaire. (24). On that date, the court heard the motion *in limine*, granting it in part and denying it in part. (101:2-3).

On June 4, 2009, the State filed a motion to compel production of the defense witness list. (25). On June 5, 2009, defense filed its witness list. (29).

On June 8, 2009, the State filed a motion to allow impeachment with one of the letters seized from Mr. Williams at the jail (31) and a motion to adjourn the trial, which was scheduled to begin that day. (32). On that date, despite Mr. Williams speedy trial demand, the court granted the State's motion to adjourn the trial. Trial was set for June 29, 2009. (103:12-14).

On June 12, 2009, the State's letter asking to adjourn the trial until August 17, 2009 was filed. (33).

On June 19, 2009, the court heard the State's request for further adjournment. (104). Trial counsel moved to dismiss. (104:3). The court again granted the State's requested adjournment over defense objection. (104:6-8).

On July 22, 2009, trial counsel filed her brief opposing the

State's motion to allow impeachment with one of the letters seized from Mr. Williams at the jail. (37).

On July 24, 2009, the court denied the State's motion for impeachment and granted the defense request the seized letters not be used "at all." (105:3-4).

On July 28, 2009, the State asked the court by letter to re-consider its ruling on impeachment with the letters seized from the jail, basing its request on the then recent decision in *Kansas v. Ventris*, 556 U.S. 586 (2009). (42).

On July 29, 2009, the court heard arguments as to the effect of *Ventris*, *supra*, on the impeachment issue (106) and ruled the letters seized in violation of the Sixth Amendment could be used for impeachment. (106:44).

On August 7, 2009, trial counsel filed a motion for a stay of the trial so defense could bring the Sixth Amendment impeachment issue before this Court. (43). On that date, the new trial judge heard the defense request for stay and denied it. (44)(107:13).

(Trial counsel brought the Sixth Amendment impeachment issue to this Court by petition for leave to file an interlocutory appeal. (178). The State responded to the petition. (75). This Court denied the petition on August 17, 2009. (55). See *State v. Williams*, Appeal No. 2009AP2075-CRLV)

On August 14, 2009, trial counsel requested by letter limited *voir dire* of the State's witnesses as to their plea deals. (51). On August 17, 2009, counsel followed that letter up with a motion identifying 15 witnesses who had plea agreements with the State. (52). Counsel also filed an enlarged witness list that date. (53).

Trial began on August 17, 2009 with hearing and decision on final pretrial motions. (108). The court denied the requested limited *voir dire*. (108: 20, 47). The court allowed testimony of witnesses previously undisclosed by the State (108:26) and by the defense. (108:63-64).

That afternoon, the court confirmed Mr. Williams was

entering not guilty pleas to each count of the amended information (109:5-6) and then began *voir dire* of the jury. (109:20).

On August 18, 2009, *voir dire* continued. (110). Following peremptory strikes, trial counsel objected pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) to prosecution strikes of 3 African-American jurors. (110:61). The court denied the *Batson* challenge for failure to show a *prima facie* case. (110:75-77).

The court heard further motions that afternoon. (111). Over defense objection, the court allowed the State to defer presenting its case until the following day because it could not find a witness. (111:2-5). The court resolved the issue of which photographs the State would be allowed to use. (111:28-41).

On August 19, 2009, the State, unable to find the missing witness, moved the court to allow his preliminary hearing testimony to be used in lieu of his live testimony. (112:4). Trial counsel's objection to that procedure was sustained. (112:5-6, 17). The jury was sworn. (112:37). After preliminary instructions and opening statements, the State began presenting its case. (112:78).

On August 20 and 21, 2009, the State continued presenting its case. (113)(114)(115)116). The trial resumed the following week and the State continued presenting its case on August 24, 25 and 26, 2009. (117)(118)(119)(120)(121)(122). Throughout the State's case, the court refused to allow cross-examination as to the details of the penalties cooperating witnesses faced. See, *e.g.*, (118:4-7 [re: accomplice Fuentez]).

On August 26, 2009, the State rested. (122:38). The defense began presenting its case. (122:43).

On August 27, 2009, trial counsel moved for a mistrial when the State brought up "other acts" evidence in cross-examination of a defense witness. (123:123, 125). The court denied the motion, opting instead to strike the references and give the jury instructions to disregard. (123:136-139).

On August 28, 2009, Mr. Williams told the court he did not wish to testify and the court questioned him about his decision, finding it was a knowing and voluntary choice on his part. (124:9-12). Defense rested. (124:54). After a rebuttal witness testified, the State rested. (124:69). The jury returned its verdicts of guilty on all counts. (124:165-168). The court entered judgment on the verdicts. (124:169).

On October 29, 2009, the court sentenced Mr. Williams to life imprisonment without eligibility for release on each of the 4 counts. (125:24). The judge ordered the sentences to be consecutive. (78)(125:26).

On May 25, 2012, present counsel filed a postconviction motion for new trial which included a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). (143). After further briefing, the court denied the *Brady* claim without a hearing. (156).

3. Statement of Facts of the Offenses

Two eyewitnesses testified they saw Mr. Williams taking part in the shooting here. Xavier Turner, who was hurt in the shooting (114:108), swore he saw Mr. Williams with a rifle at the scene. (114:107). Mr. Turner testified pursuant to a plea agreement with the State. (114:109-111). Rosario Fuentez testified he was an accomplice in the shooting and Mr. Williams participated. He testified Mr. Williams was firing an automatic weapon. (118:26-110). Mr. Fuentez also testified pursuant to a plea agreement with the State. (118:68-70).

Argument

I. THE RESTRICTION ON CROSS-EXAMINATION OF STATE'S WITNESSES VIOLATED MR. WILLIAMS BASIC STATE AND FEDERAL RIGHT TO CONFRONTATION.

A. Additional Facts

1. Xavier Turner

During cross-examination of Mr. Turner, one of

the two witnesses who identified Mr. Williams as one of the shooters (114:107), the State objected to any questions as to the nature of the charges for which the State had given him consideration (114:109-111) or to the potential maximum penalty Mr. Turner faced. (114:113-114). The court below ruled defense could not explore the details of the penalties Mr. Turner faced nor the possible maximum or mandatory minimum. (115:24-25, 36-37).

2. Charlie Body

During cross-examination of Mr. Body, who testified Mr. Williams told him he participated in the shooting (116: 146-149), the State objected to any questions on the nature of the charges Mr. Turner was facing. (116:157). In a sidebar, the court below ruled there could be no discussion of the penalty Mr. Body was facing but the nature of the charges could be explored. (116:201). Mr. Body was testifying pursuant to an agreement with the State. (116:153-155).

3. Armando Hurtado

Before Mr. Hurtado testified for the State, the court below ruled he could not be cross-examined about the details of the time he was facing when he signed his plea agreement. (117:60-61). Mr. Hurtado testified Mr. Williams told him the details of his participation in the shooting. (117:77-85).

4. Rosario Fuentez

Before Mr. Fuentez, who admitted participating in the shooting and identified Mr. Williams as his accomplice (118:47-55), testified for the State, the State moved defense be prohibited from cross-examining as to the maximum penalty Mr. Fuentez faced before he made his plea deal. (118:4). The court below granted the State's motion. (118:6-7, 16-17).

5. Montrelle Johnson

Before Mr. Johnson, who told the jury Mr. Williams attempted, both in person and through third parties, to influence him to give favorable but false testimony in this

case (120:12-46), testified for the State, defense requested cross-examination as to the penalties he was facing in his state charges. (119:7-9). The State objected. *Ibid*. The court below prohibited cross-examination as to penalties. (119:9-10, 12). Mr. Johnson had an arrangement with the State. (119:41-42).

B. Standard of Review

Confrontation Clause issues are reviewed *de novo*. *State v. Barreau*, 2002 WI App 198, ¶48, 257 Wis.2d 203, 231, 651 N.W.2d 12.

C. Discussion

1. Introductory

"[I]t is an unquestioned truism . . ." "that on cross-examination the *range* of evidence that may be elicited for any purpose of discrediting is to be *very liberal*." 3A Wigmore, Evidence, §944(1) & n.1(Chadbourn rev.1970), emphasis in original.

In Wisconsin, this truism means a criminal "defendant has a right to bring out the motives of the state witnesses on cross-examination." *State v. Gresens*, 40 Wis.2d 179, 186, 161 N.W.2d 245, 248 (1968). "This permits an avenue of questioning *broader* than whether the State has made specific promises." *State v. Lenarchick*, 74 Wis.2d 425, 446, 247 N.W.2d 80, 92 (1976), emphasis added.

That is to say, the receipt of consideration from the State by its witnesses in exchange for their testimony creates a "prototypical form of bias." *Barreau*, *supra*, ¶55. The *Lenarchick* court explained this form of bias:

> Even though that expectation [of a reward] were absurd, defense counsel had the right and duty to explore the witness' motives. When a witness has been criminally charged by the state, he is subject to the coercive power of the state and can also be the object of its leniency. The witness is aware of that fact, and it may well influence his testimony.

74 Wis.2d at 447-448 quoted and followed in *State v. Stuart*, 2005 WI 47, ¶33, 279 Wis.2d 659, 674. 695 N.W.2d 259. And see a similar explanation in *State v. Lindh*, 161 Wis.2d 324, 356-357, 468 N.W.2d 168, 179-180 (1991), quoted and followed in *State v. Delgado*, 194 Wis.2d 737, 752-753, 535 N.W.2d 450, 456 (Ct.App.1995):

> In cases where there exists a prototypical form of bias, the possibility of bias, motive and interest of the witness is particularly distinct and immediate. The witness has an ongoing, dual relationship with the prosecutory actors. On the one hand, the witness as such is being of some service to the prosecution by giving his testimony; on the other hand, his status with respect to the same prosecution is "vulnerable." Criminal process of some sort against the witness, even if only at its initial stages, is a reality. Usually, it is being carried out by the prosecuting attorneys who are depending on his services as a witness; at the very least, it is being carried out in the same jurisdiction as the one in which the witness is offering his testimony. Under such circumstances, there usually is a reasonable inference that the witness is or considers himself to be in a position of being effectively more or less "vulnerable" to factors that could influence his testimony. The witness's acts, relationship or situation with respect to the state might be likely to produce at least a strong suspicion of bias, motive and intent in the eyes of a jury. A jury might reasonably have found the evidence "furnished the witness a motive for favoring the prosecution in his testimony."

2. The restriction on cross-examination was unconstitutional.

"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness . . ." *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431 (1986) followed in *State v. Rhodes*, 2011 WI 73, ¶31, 336 Wis.2d 64, 799 N.W.2d 850, 857.

Here, as detailed above in I.A., the court below restricted Mr. Williams' cross-examination of 5 prosecution witnesses as to the details of the penalties they faced, including the maximum penalty, before they entered into agreements with the State for their testimony. Two of these witnesses, Xavier

Turner and Rosario Fuentez, were the only State's witnesses who identified Mr. Williams as a participant in the shooting.

It was fundamentally unfair to limit this cross-examination on the issue of bias. "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess *all* evidence which might bear on the accuracy and truth of a witness' testimony." *U.S. v. Abel*, 469 U.S. 45, 52, 105 S.Ct.456 (1984), emphasis added. It seems clear as a matter of simple logic: the greater the benefit the witness expects from the State for his testimony, the greater will be the witness' motive to testify favorably to the State. By restricting cross-examination as to the details of the penalties, including the maximum penalty, the witnesses faced, the court below prevented the jury from assessing the magnitude of their motives.

Counsel's research discloses no authoritative Wisconsin case so restricting cross-examination on bias as to specific penalties. *Cf. State v. Balistreri*, 106 Wis.2d 741, 754, 317 N.W.2d 493, 499 (1982)(where defense cross-examination elicited reduction in possible sentence from 105 to 40 years, this was proper).

The high courts of other states have, however, spoken on the issue. See *State v. Gracely*, 399 S.C. 363, 374-375, 731 S.E.2d 880 (2012)(reversal required where defense prohibited from cross-examining on mandatory minimums); *State v. Vogelson*, 275 Ga. 637, 571 S.E.2d 752 (2002)("a witness' understanding of the sentence he/she was facing is relevant to the degree of bias as it shows how high the witness thought the stakes were." at 639-640 [affirming reversal of conviction]).

Wisconsin's highest court has found in these situations the accused's right to a fair trial is to be safeguarded by, *inter alia*, " (2) the opportunity for *full* cross-examination of those witnesses concerning the agreements and the effect of those agreements on the testimony of those witnesses . . ." *State v. Nerison*, 135 Wis.2d 37, 46, 401 N.W.2d 1, 5 (1987), emphasis added. Such full cross-examination was prohibited here and the judgment should be reversed on this ground alone.

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II. THE STATE'S IMPEACHMENT OF MR. WILLIAMS' ALIBI WITNESS WITH A LETTER SEIZED IN VIOLATION OF HIS RIGHT TO COUNSEL WAS A FURTHER VIOLATION OF HIS STATE AND FEDERAL RIGHT TO COUNSEL.

A. Additional Facts

The complaint against Mr. Williams was filed on July 11, 2008. (2). Mr. Williams was taken into custody on August 7, 2008. (3). Pursuant to a search warrant (178:App. C), Mr. Williams jail cell was searched on December 17, 2008. (98:26). Officers seized an envelope labeled "for my attorney" from Mr. Williams' person. (98:27). The officers examined the contents of this envelope, seizing five letters from it. (98:28-29), including an unsigned letter to "Big Homie." (98:31).

On February 11, 2009, trial counsel filed motions *in limine*, including a motion to suppress the letters seized from the "for my attorney" envelope. (11:3, ¶23).

On May 12, 2009, the court below granted the motion to suppress the letters but deferred the issue of their use for impeachment. (100:26-27).

On June 8, 2009, the State filed a motion requesting use of the "Big Homie" letter for impeachment, attaching a copy of the original handwritten letter. (31).

On July 22, 2009, trial counsel filed her brief opposing use of the "Big Homie" letter for impeachment. (37).

On July 24, 2009, the court below ruled the letters seized from the "for my attorney" envelope would not be used "at all" at trial. (105:3-4).

On July 28, 2009, the State, by letter, asked for reconsideration of its motion for impeachment, basing its request on the then recently decided case of *Kansas v. Ventris*, 556 U.S. 586 (2009). (42).

On July 29, 2009, the court below reversed itself on the impeachment issue, ruling that, though the letters had been seized in violation of the Sixth Amendment, they could be used for impeachment. (106:44).

At trial, the State used the "Big Homie" letter to impeach Mr. Williams' alibi witness. (123:174, 180-181).

B. Standard of Review

Right to counsel issues are reviewed *de novo*. *State v. Badker*, 2001 WI App 27, ¶8, 240 Wis.2d 460, 469, 623 N.W.2d 142.

C. Discussion

In *Kansas v. Ventris*, 556 U.S. 586, 129 S.Ct. 1841 (2009), the highest Court found the accused's incriminating statements made to an informer placed by police in his jail cell, which were concededly the fruit of a Sixth Amendment violation, nevertheless could be used for impeachment. The *Ventris* Court saw "no distinction" for impeachment purposes between a Sixth Amendment violation and all the other constitutional violations for which an impeachment exception has been made. 556 U.S. at 594, 129 S.Ct. at 1847.

But the impeachment exception to the other constitutional exclusionary rules extends only to impeachment of the accused. *James v. Illinois*, 493 U.S. 307, 312-320, 110 S.Ct. 648 (1990)(impeachment exception cannot be extended to include all defense witnesses because the reason for the rule, *i.e.*, preventing the accused's perjury, does not apply to other witnesses). Since there is "no distinction" between these other rules and the Sixth Amendment exclusionary rule, *Ventris*, *supra*, *id*., it was a violation of that rule to allow impeachment of Mr. Williams' alibi witness with the letter seized in violation of his right to counsel.

Counsel contends prejudice must be presumed from this official interference in the attorney-client relationship. See, *e.g.*, *Shillinger v. Haworth*, 70 F.3d 1132, 1140-1142 (10th Cir.1996)(where deputy sheriff reported details of accused's trial preparation sessions with his lawyer to prosecutor, this was *per se* Sixth Amendment violation and habeas relied affirmed); *State v. Lenarz*, 301 Conn. 417, 22 A.3d 536 (2011)(where accused's computer recording privileged communications with counsel was seized and prosecutor read the documents revealing trial strategy, reversed and remanded with directions to dismiss). *Cf. People v. Knippenberg*, 66 Ill.2d 276, 362 N.E.2d 681 (1977)(where prosecutor obtained

counsel's written summary of accused's confidential statements to him, error contributed to the conviction and so justified reversal).

Here, the State claimed the original handwritten, unsigned letter (31:3-5) was an attempt to suborn perjury. The State's interpretation neglects the facts the letter was in an envelope marked "for my attorney," not in an envelope stamped and addressed to any person, and that the letter was unsigned. Thus, it is equally as likely Mr. Williams planned to consult with counsel about the letter before sending it to anyone or that he had already consulted with counsel about its proper or improper contribution to trial strategy. Either way, the seizure of the letter interfered with the attorney-client relationship, revealing potential trial strategy to the State.

Furthermore, once the letter was unconstitutionally in the hands of the prosecutor and so could potentially be used to impeach Mr. Williams, this put him to a Hobson's choice between taking the witness stand in the exercise of his basic Due Process right to defend himself, knowing he would likely have to reveal confidential attorney-client communications about the letter, and exercising his Fifth Amendment privilege not to testify in order to protect those confidential communications. It is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. U.S.*, 390 U.S. 377, 394, 88 S.Ct. 967 (1968)(maj. opn. per Harlan, J.). See *Howard v. Walker*, 406 F.3d 114, 128-131 (2d Cir.2005)(where accused was forced to choose between 6th Amendment right to confrontation and 6th Amendment right under *Bruton*, denial of habeas relief reversed).

Therefore, the State's intrusion into the attorney-client privilege here was prejudicial and the judgment should be reversed on this ground. See *Bishop v. Rose*, 710 F.2d 1150 (6thCir.1983)(where sheriff seized from accused's jail cell his handwritten statement of his whereabouts during time of crime, prepared at counsel's request, habeas relief affirmed).

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III. A MISTRIAL SHOULD HAVE BEEN GRANTED WHEN THE STATE USED "OTHER ACTS" EVIDENCE TO CROSS-EXAMINE A DEFENSE WITNESS.

A. Additional Facts

In cross-examination of a defense witness, the State asked if the witness had seen Mr. Williams shoot an automatic weapon into a bar on a specific date. (123:123). Trial counsel moved for a mistrial. *Id*. The trial court denied the mistrial motion (123:131-132), opting instead for a jury instruction to disregard the evidence. (123:136-139, 142).

B. Standard of Review

"[A]n appellate court must, at a minimum, satisfy itself that the circuit court exercised sound discretion" when deciding a mistrial motion. *State v. Seefeldt*, 2003 WI 47, ¶13, 261 Wis.2d 383, 393, 661 N.W.2d 822, following *Arizona v. Washington*, 434 U.S. 497, 514 (1978).

C. Discussion

This Court has repeatedly warned, "The practice of flouting motion in limine orders has become nearly epidemic," finding it to be "flagrant misconduct." *State v. Sigarroa*, 2004 WI App 16, ¶31, 269 Wis.2d 234, 259, 674 N.W.2d 894. This Court has described the "common thread" in this misconduct:

> a common thread seems to be that it happens in a jury case of some length. The suspect line of questioning is gone into when the trial is well underway. [In the case of attorney violation of in limine orders,] [i]t is almost as if the attorney takes the risk that the trial court will be more inclined to finish the trial than declare a mistrial due to prejudice. Thus, the jury hears the damaging evidence and the lawyer gets what he or she wants with little more than a rebuke from the trial court.

Sigarroa at ¶29, quoting with approval *Gainer v. Koewler*, 200 Wis.2d 113, 121-122, 546 N.W.2d 474 (Ct.App.1996).

Here, the pretrial order prohibited offering evidence of "other acts or crimes" absent notice to the opposing party by

motion *in limine*. (8:2, ¶5(h)). That the State's advocate knew of this ruling seems clear since its first motion *in limine* asked that defense be prohibited from introducing "other acts" evidence until its admissibility has been determined in advance by the court. (9:2, ¶7- ¶8). Indeed, the State itself made such a motion (12) which was granted. (100:38-39).

Nevertheless, the State violated this order, following the pattern recognized by this Court as flagrant misconduct almost to the letter in cross-examining a defense witness. Late in this 2 week trial, the State inquired about a year old incident in which Mr. Williams allegedly fired an automatic weapon into a bar. (123:123). That this was an objectionable question was obvious since Mr. Williams was on trial for murders allegedly committed using an automatic weapon. (2:4 [complaint]). That is to say, the prosecutor "took the risk that the trial court would be more inclined to finish the trial than declare a mistrial due to prejudice." *Sigarroa* at ¶29.

And, indeed, though the court below found the error "very prejudicial" (123:132 [line 10]), it opted for a curative instruction instead of a mistrial. Thus, the State won its bet, *i.e.*, the jury heard the damaging evidence and the State's advocate got what he wanted with little more than a rebuke. *Sigarroa* at ¶29.

Counsel submits this Court should not be so generous. The court below should not be given any deference when it found the error "very prejudicial" yet only gave a curative instruction. (123:142). The idea such an instruction could "unring the bell" was found meritless decades ago by a famous jurist. "The naïve assumption that prejudicial effects can be overcome by instructions to the jury [citation omitted] all practicing lawyers know to be unmitigated fiction." *Krulewitch v. U.S.*, 336 U.S. 440, 453, 69 S.Ct. 716 (1949)(conc. opn. per Jackson, J.). Assuming the jurors here, who brought in their guilty verdict the day after this error occurred, forgot about this prejudice in the short intervening time seems not only naïve, but laughable.

Counsel submits it was prejudicial error justifying reversal to refuse a mistrial here. If this Court really wants this kind of misconduct to stop, then it will have to do more than warn

the Bar. It will have to reverse and this is an appropriate case in which to do so.

IV. FAILURE TO DISCLOSE MATERIAL IMPEACHMENT EVIDENCE UNDER *BRADY V. MARYLAND*, 373 U.S. 83 (1963), VIOLATED BASIC DUE PROCESS.

A. Additional Facts

Present counsel included a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), in Mr. Williams' postconviction motion. (143:1-4). Counsel supported the claim with a police report tending to show 2 of the State's witnesses lied on the stand about the co-actor's whereabouts on the night of the killings. (143:Ex. A). To a response brief, counsel attached trial counsel's affidavit swearing this police report had never been produced in discovery. (154:6). The State had previously provided affidavits from officers, none of whom swore they had given the specific report and its attachments to defense. (145:25-27).

Without taking evidence on the issue, the court below decided in a single paragraph there was no "reasonable probability the absence of Washington's [the co-actor] name on the printout would have made a singular difference in the outcome of the trial." (156:2, 2d ¶)

B. Standard of Review

Failure to disclose material impeachment evidence under *Brady*, *supra*, is reviewed *de novo*. *State v. DelReal*, 225 Wis.2d 565, 571, 593 N.W.2d 461, 464 (Ct.App.1996)("This court independently applies the *Bagley* constitutional standard to the undisputed facts of the case.").

C. Discussion

1. Introductory

In the landmark case of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), the highest Court held for the first time "suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

373 U.S. at 87. It has long been settled exculpatory evidence coming within the *Brady*, *supra*, rule includes impeachment evidence. *Giglio v. U.S.*, 405 U.S. 150, 154, 92 S.Ct. 763 (1972). Since *Brady*, the high Court has ruled it makes no difference whether the accused requested the exculpatory information or not. *U.S. v. Bagley*, 473 U.S. 667, 678-684, 105 S.Ct. 3375 (1985)(opn. per Blackmun, J.). See *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555 (1995)("*Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression . . .").

Furthermore, it makes no difference whether the exculpatory evidence is in the hands of the prosecutor or not. *Kyles*, *supra*, 519 U.S. at 437 ("the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."). See, *e.g.*, *Crivens v. Roth*, 172 F.3d 991, 996-999 (7th Cir.1999)(where state police failed to produce criminal history of witness, due process violated & habeas relief granted).

"[T]he three components or essential elements of a *Brady* prosecutorial misconduct claim," *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256 (2004), are "[1] [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the state, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S.Ct. 1936 (1999); 540 U.S. at 691.

The court below assumed, without deciding, the impeaching evidence here was not disclosed to defense. (156:2, 2d ¶). Thus, the issue here turns on whether the impeachment evidence was "material." See *Benn v. Lambert*, 283 F.3d 1040, 1053, n. 9 (9th Cir.2002)(terms "material" and "prejudicial" are used interchangeably by Supreme Court in *Brady* cases; for *Brady* purposes the two terms have come to have the same meaning).

2. The withheld impeachment evidence was "material."

Evidence is material under *Brady* "if there is a

reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley, supra*, 473 U.S. at 682; *Kyles, supra*, 514 U.S. at 433. The *Kyles* Court discussed the meaning of the materiality test in some detail:

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. * * * The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.
>
> [M]ateriality . . . is not a sufficiency of the evidence test. * * * One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

514 U.S. at 434-435. Recently, the high Court has indicated the materiality inquiry is "whether there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment [of the case]." *Bell v. Cone*, 556 U.S. 449, 452, 129 S.Ct. 1769, 1773 (2009).

The prosecution's theory was these murders were committed by Mr. Williams, James R. Washington, and Rosario Fuentes. The State presented the testimony of 2 witnesses, Tim Nabors and Erica Warrens, placing Mr. Washington at Questions nightclub on the night of the killings. (114:59 [Warrens ID's photo of Mr. Washington]), (114:72-73 [Nabors ID's photo & says he spoke with Washington]). This testimony was to support the State's theory Mr. Washington was at the nightclub keeping tabs on the victims for his alleged accomplices so they could pick the right time for an ambush. (112:59 [opening statement]); (124:146-147 [closing argument]).

But the police report withheld from the defense was an official analysis of the computer used at Questions to record

the identification cards of all the patrons entering the nightclub on the night of the killings. Neither Mr. Nabors' nor Mr. Washington's name appears on this list and separate client profiles from this computer show the last visits of these individuals to have been in May, 2008. (143: Ex.A). That is to say, the withheld police report was evidence that witnesses Warrens and Nabors lied about seeing Mr. Washington at Questions that night and that Mr. Nabors lied about being at Questions at all.

Withholding this report frustrated the search for truth in this case and restricted Mr. Williams' right to confront. Defense was prevented from impeaching the State's witnesses (many of whom, like Nabors, were of questionable credibility to begin with (114:84 [6 priors on Nabors' record]) on this crucial point of the prosecution's theory of the case. Furthermore, defense was prevented from investigating the contents of the report itself to see what witnesses it might be able to discover to refute the State's case.

Counsel notes Mr. Nabors' testimony was not limited to the presence of Mr. Washington but included matters the State alleged were the motive for the killings. See (114:80-84 [reporting barbershop conversation about bar fights State alleges were motive for killings]). That is to say, anything which discredited Mr. Nabors' testimony on one point may have discredited his entire testimony in the eyes of one or more jurors. (While the *falsus in uno* instruction is disfavored today, jurors are of course still free to follow that policy on their own. See, *e.g.*, *Penister v. State*, 74 Wis.2d 94, 103, 246 N.W.2d 115 (1976)(jury could reject witness' entire testimony)).

Therefore, counsel submits this impeaching report was "material" since there was "a reasonable probability [it] would have altered at least one juror's assessment" of the State's case. *Cone*, *supra*, 556 U.S. at 452. If one or more jurors disbelieved Mr. Washington was present at Questions that night, a central part of the State's theory of the case would be undermined, *i.e.*, that he was an accomplice doing surveillance on the victims. (112:59 [State's opening statement]); (124:146-147 [State's closing argument]).

V. THE CUMULATIVE EFFECT OF THE ERRORS AFFECTING CREDIBILITY MEANT THE REAL CONTROVERSY WAS NOT FULLY AND FAIRLY TRIED, JUSTIFYING DISCRETIONARY REVERSAL.

It is well settled this Court's power of discretionary reversal under §752.35, *Wis. Stats.*, is identical to the power of the state supreme court to reverse under §751.06, *Wis. Stats. Vollmer v. Luety*, 156 Wis.2d 1, 19, 456 N.W.2d 797 (1990). This Court may exercise this power "regardless of whether the proper motion or objection appears in the record . . ." §752.35, *Wis. Stats.* It is equally well settled this Court has inherent power to grant a new trial in the interest of justice. *State v. Johannes*, 229 Wis.2d 215, 229, 598 N.W.2d 299 (Ct.App.1999).

Here, all of the errors interfered with the jury's ability to properly determine credibility. See *Garcia v. State*, 73 Wis.2d 651, 655, 245 N.W.2d 654 (1976)("The administration of justice is and should be a search for truth."). The errors either restricted the defense ability to impeach State's witnesses, see arguments I. & IV., *supra*, or allowed improper impeachment of defense witnesses. See arguments II. & III., *supra*. Because there was no physical evidence linking Mr. Williams to the shooting, "[t]he major issue was the credibility of witnesses." *Garcia*, *supra*, *id.* Where credibility is a major issue, the reviewing courts have repeatedly found discretionary reversal appropriate. *State v. Cuyler*, 110 Wis.2d 133, 142-143, 327 N.W.2d 662 (1983) (credibility is "crux of the case"); *Garcia*, *supra*, *id.*, *Logan v. State*, 43 Wis.2d 128, 137, 168 N.W.2d 171 (1969)(credibility "crux of the case").

And it is equally appropriate here. The errors restricting impeachment of the State's witnesses "permeated the whole trial," *Cuyler*, *supra*, 110 Wis.2d at 142, limiting the jury's ability to make proper credibility determinations and thereby frustrating the search for truth. Therefore, if any of the separate errors discussed here do not justify reversal, counsel submits the cumulative effect of them does justify a new trial in the interest of justice because the real controversy, credibility, was not fully and fairly tried. *Cf. State v. Davis*, 2011 WI App 147, ¶35, 337 Wis.2d 688, 808 N.W.2d 130

(cumulative effect of errors affecting credibility justified discretionary reversal).

Conclusion

Counsel respectfully submits the foregoing demonstrates the Court should reverse and remand for a new trial.

Dated: September 3, 2013

Respectfully submitted,

_____

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WILLIAMS

STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2013AP814 CR

ANTONIO D. WILLIAMS,

Defendant-Appellant.

CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 6, 491 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated: September 3, 2013 So Certified,

Signature: _____

Timothy A. Provis

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C O U R T OF A P P E A L S

DISTRICT I

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Defendant-Appellant.

CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on September 4, 2013. I further certify that the brief was correctly addressed and postage was prepaid.

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