STATE OF WISCONSIN

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

DISTRICT I

Case No. 2015AP001325CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

GEORGE D. TAYLOR,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION
AND THE ORDER DENYING
MOTIONS FOR POSTCONVICTION RELIEF
ENTERED IN MILWAUKEE COUNTY COURT,
THE HON. DAVID L. BOROWSKI PRESIDING,
CIRCUIT COURT CASE NO. 2012-CF-1509

SEPARATE APPENDIX OF DEFENDANT-APPELLANT

Respectfully submitted:

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The trial court answered: no.

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The trial court answered: no.

III. WHETHER THE TRIAL COURT'S LIMITATIONS ON TAYLOR'S CROSS-EXAMINATION OF SAFFOLD FOR BIAS VIOLATED THE CONSITITUTIONAL RIGHT TO CONFRONTATION

The trial court answered: no.

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The trial court answered: no.

V. WHETHER TAYLOR'S TRIAL COUNSEL WAS CONSITUTIONALLY INEFFECTIVE

The postconviction court answered: no.

VI. WHETHER TAYLOR DESERVES NEW TRIAL IN THE INTEREST OF JUSTICE

Neither court below answered this question.

VII. WHETHER TAYLOR DESERVES A RESENTENCING, BECAUSE HE WAS SENTENCED BASED ON INACCURATE INFORMATION.

The postconviction court answered: no.

VIII. WHETHER THE POSTCONVICTION COURT IMPROPERLY DENIED TAYLOR'S MOTION FOR POSTCONVICTION RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING

The postconviction court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel requests oral argument, if such would aid this Court's decision-making. Publication is not warranted because the resolution of Taylor's claims of error shall rest on well-established precedent.

STATEMENT OF THE CASE

This case asserts that a new trial is due Mr. Taylor in the interest of justice, and presents the following challenges:

1. of the State's withholding of crucial impeaching/rebuttal evidence, contrary to *Brady*;
2. of the trial court's restrictions, during cross-examination, on the exposure of bias and impeachment of credibility of Taylor's sole accuser;
3. of trial counsel's assistance, as ineffective;
4. of the trial court's denial of mistrial, on the grounds that the prosecutor's improper remarks violated due process;
5. of the postconviction court's denial, without a hearing, of Taylor's postconviction motion;
6. of the postconviction's court's denial of re-sentencing.

PROCEDURAL FACTS

The Corrected Judgment of Conviction was entered on April 24, 2012. (R.39, App. 1-2.) Taylor timely filed: a Notice of Intent to Pursue Postconviction Relief (R.40); a multi-portion Motion for Postconviction Discovery (R.52, 57, 62), which was denied (R.63); a Motion for Postconviction Relief, Memorandum of Law in Support of it, and a Response to the State's Reply (R.66, 67, 72), also denied (R.73); a Motion to Reconsider and Reply to State's Response (R.76, 84), also denied (R.85).

The Motion for Postconviction Relief ("Motion") was denied without a *Machner* (or other) evidentiary hearing. (R.73).

The Notice of Appeal and the Statement on Transcript were timely filed, pursuant to statutes. (R.88, 89). Pursuant to this Court's Order of 9/14/2015, this Brief of Defendant-Appellant is timely if filed on or before November 16, 2015.

FACTS RELEVANT TO THIS APPEAL

On a bright evening in June 2010, Vincent Cort was murdered in the parking lot of Jack's Liquor in Milwaukee, by a man in a dark hoodie who walked up to Cort (and his orange car) and fired once at Cort, then ran away. (R.2).

During a neighborhood canvass a man living across from the crime scene, self-identified as Rico Santana, stated that he knew nothing about the shooting. (R.108:29-31).[1] Det. Rodolfo Gomez led the long-fruitless investigation.[2] (R.104:60; R.106:50 et seq.). Cort's parents offered a

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[1] During trial the same man, then correctly identified as Paris Saffold, was the State's crown witness. Saffold testified that during the canvass he had given a false name and had lied about knowing nothing of the crime. (R.108:31).

[2] As detailed infra, after the verdict in this case, Gomez was convicted of felony misconduct in public office for beating up a handcuffed suspect during an interrogation, and was subsequently fired.

$10,000 reward for information leading to a conviction. (R.104:50).

Verdale Armstrong was one of several self-admitted shooters named early in the investigation. Kanyetta Watson reported that she had heard Armstrong confess to shooting a "white dude" with an orange car. (R.67, Ex.D, App. 62-63). Armstrong stated that he had been paid by the dude's ex-girlfriend, "T", to rob the dude at/near a liquor store. Armstrong showed off the killing gun to Watson. Id. Armstrong was never questioned by police. Id. Several details in Watson's account were corroborated: Cort's ex-girlfriend Tawana ("T") was the beneficiary of Cort's life insurance policy and collected the payout. (R.67, Ex.E, App. 64-66).

About two years after the crime George D. Taylor ("Taylor") was charged, based *solely* on accusations of Paris Saffold. (R.2:3; R.67, Ex.F, App.69-71).

Saffold was arrested in 2012 for cocaine possession. Facing a new felony possession charge and aware of the $10,000 reward, Saffold offered to help solve the Cort homicide, if his new cocaine case would not be charged.[3] In statements contradicting those he had given as "Rico Santana," Saffold said that he had seen the Cort shooting, and named Hopgood, Riley, and Taylor as perpetrators. (R.67, Ex.F, App.69-71).

Saffold told the police that Hopgood first suggested robbing Cort and Riley volunteered to do it; that Hopgood handed a gun to Riley; and that Riley put on a dark hoodie, tightened it around his face, crossed over to Jack's lot, shot once into Cort's car, then ran back across the street and to the back of a building. Id.

Saffold claimed he witnessed 4 things connecting Taylor to the crime: (1) that Taylor was hanging out with Hopgood and Riley before Cort's arrival at Jack's, and all observed Cort's orange car arriving; (2) that upon seeing

[3] Indeed, Saffold was never charged in connection with that 2012 cocaine arrest. (R.110:5) (counsel's summary of the situation in discussion with court regarding the scope of cross).

Cort's arrival Taylor stated, in paraphrase: "That dude was present when I was shot in 2008;" (3) that Taylor took off a dark hoodie and handed it to Riley (who put it on and went to shoot Cort), (4) after the shooting, Taylor drove Riley away in a white BMW. (R.67, Ex.F:4, App.70).

Except for Saffold, no witness or other evidence linked Taylor to the crime in any way.

Throughout the trial, the prosecutor labored to show that Saffold's story was credible, despite his criminal record and multiple incentives for cooperating. (R.104:49-55 (opening); R.114:8-11, 12-17, 19, 21-22 (closing)).

Taylor's defense was that Saffold was not credible and made up the accusations, *inter alia* to avoid prosecution, collect a reward. (R.104:69-72) (in opening calling Saffold "absolutely critical to the State's case against . . .Taylor"). Consistent with this theory, Taylor's counsel labored to impeach Saffold's credibility through cross-examination. (R.109:41-59). [4]

At trial Saffold testified that during the canvass he had lied about his name and knowledge of the crime. (R.108:30-31); that for some time before the crime Taylor, Riley and Hopgood were together across from Jack's, as Saffold observed; and he repeated his 4 accusations against Taylor. (R.108:4-12, 18-21, 24-28). On cross, Saffold admitted that he did "not remember" how Riley got the dark hoodie and had only speculated it came from Taylor. (R.108:20).

Taylor was convicted of felony murder, party to a crime. (R.113:19-20 (verdicts)).

[4] The court disallowed "argumentative" and "confrontational" cross-examination questions. Id. at 49, 58, 59.

ARGUMENT

I. FAVORABLE IMPEACHMENT/REBUTTAL EVIDENCE WAS WITHHELD FROM TAYLOR CONTARY TO *BRADY*, IN VIOLATION OF DUE PROCESS.

A. Standard of review

A *Brady* violation occurs when the State fails to disclose impeachment evidence favorable to the defense and material to a determination of guilt. *State v. Harris*, 2004 WI 64, ¶12, 272 Wis.2d 80, ¶12, 680 N.W.2d 737.

"Evidence is material for *Brady* purposes only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Rockette*, 2006 WI App 103, ¶40, 718 N.W.2d 269.

This Court reviews *de novo* whether the facts of a case establish a *Brady* violation. *Id.* at ¶39.

B. The legal standard

Prosecutorial suppression of evidence favorable to an accused and material to innocence/guilt violates due process, whether done in good or bad faith. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. U. S.*, 405 U.S. 150, 154 (1972). The prosecutor has a duty to disclose such evidence even without a formal request. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). Evidence is "favorable" when, "if disclosed and used effectively, it may make the difference between conviction and acquittal." "Favorable" evidence can be exculpatory or impeaching. S*trickler*, 527 U.S. at 281-82. [5] Evidence is "material" if "there is a reasonable probability that, had the evidence been

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[5] A *Brady* violation occurs when the defense makes a specific request and there is failure to disclose the requested material. *United States v. Bagley*, 473 U.S. 667, 678-81 (1985). Here, Taylor's counsel, by his Private Investigator, requested any video footage from the police, but was told there was no video footage in the evidence files for any co-defendant. (R.67, Ex.C; App.61).

disclosed, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985).[6] Evidence related to the credibility of the State's most influential witnesses is material, thus subject to disclosure. *Harris,* 2004 WI ¶28. Once there is a showing of materiality sufficient to establish a constitutional violation, that error cannot be harmless. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *Loveday v. State*, 74 Wis.2d 503, 516, 247 N.W.2d 116 (1976).

C. Due process was violated when the State withheld favorable impeachment-rebuttal evidence, contrary to *Brady*.

Taylor's due process was violated when the following evidence in the State's possession was withheld and prejudice ensued. *Harris*, 2008 WI P61.

1. Surveillance camera footage showing that -- contrary to Saffold's repeated testimony -- before the shooting Taylor was *not* hanging out with Hopgood, Riley, and Saffold.

Saffold testified that he and the co-defendants had been together across from Jack's for "probably about twenty minutes" before Cort pulled into Jack's lot. (R.109:36). He *twice* testified that "nobody from this group went over to Jack's Liquor Store until after the orange car had already pulled up" and after Cort "was getting back" to his car. Id. at 42-43.

Non-harmless *Brady* violation #1.

But surveillance camera footage not disclosed pre-trial (R.67, Ex.A) shows Taylor – before and around the time of Cort's arrival -- in Jack's parking lot, dressed in a white T-shirt, talking to people, showing off his tattoos.[7]

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[6] This test is the same as the "prejudice" test for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668. *See Bagley*, 473 U.S. at 683.

[7] The footage was attached to the Motion on a DVD, as Exhibit A. (R.67, Ex.A). On the DVD that is Exhibit A, footage from Camera 3 (starting at Event 20100612185151003.avi) shows Taylor walking up to the store/camera in red sweatpants and white T-shirt, talking to several

The footage thereby directly rebuts Saffold's repeated testimony and impeaches his credibility. Because Saffold was the State's most influential witness, the footage which impeached his credibility was "material" and subject to disclosure under *Brady*. *Harris,* 2004 WI ¶28. For this reason alone its non-disclosure constituted a *Brady* violation, which cannot be harmless. *Whitley*, 514 U.S. at 436; *Loveday*, 74 Wis.2d at 516 (once there is a showing of materiality sufficient to establish a constitutional violation, that error cannot be harmless).

Non-harmless *Brady* violation #2.

But in yet another way this footage was "material" (thus disclosable under *Brady*) and, if disclosed, would have led to Taylor's acquittal, establishing a separate not-harmless *Brady* violation. *Harris,* 2004 WI ¶28; *Kyles*, 514 U.S. at 436; *Loveday*, 74 Wis.2d at 516.

The footage shows Taylor at Jack's lot *at the same time as, and side by side with, Latoria Dodson*. As Dodson parks her yellow car against the store, right under the surveillance camera, Taylor is seen nearby talking to people in and close to a white car next to Dodson'ss.

Dodson testified at trial that, while she was pulling into Jack's lot, she already saw Cort's shooter waiting on the edge of the lot (by the store's sign); then later (after leaving the store and returning to her car) she heard a shot and saw the shooter escaping. (R.105:87-104).

Because the non-disclosed footage shows Taylor and Dodson simultaneously, side by side, at Jack's parking lot, it indicates -- consistent with Dodson's sworn testimony -- that the shooter was *already poised to do the crime while Taylor was at Jack's lot* (near Dodson), *before Cort's arrival at the lot.*

Thereby the footage (R.67, Ex.A) again, independently, rebuts Saffold's testimony that Taylor and

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people, showing off his tattoos, then walking away -- during Event 20100612185542003.avi. That same Event 20100612185542003.avi also shows Cort's orange car pulling into the lot and Cort walking to the store, proving that Taylor and Cort were at the parking lot at about the same time, contrary to Saffold's testimony.

co-defendants stayed together across the street from Jack's before Cort's arrival, together watched his arrival, and that Taylor from across the street made a comment -- at seeing Cort arrive at Jack's -- which in turn caused Riley to suggest the robbery, etc. [8]

2. Evidence of pre-trial payment by the prosecutor of Saffold's security deposit for housing ($770).

This is impeaching evidence disclosable under *Brady*, as indicating that Saffold received valuable consideration from the State before trial, tainting his testimony with *additional* bias. (R.67, Ex. H, I; App.76, 77). This evidence was first disclosed to undersigned counsel post-conviction.[9]

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[8] As stated in Footnote 5, supra, the footage on Exhibit A to Postconviction Motion (R.67, Ex.A) was not disclosed to Taylor pre-trial, although counsel sought its disclosure though his Private Investigator. The State belatedly disclosed to the defense various multiple discs on the Friday afternoon preceding the Monday first day of trial. Trial Tr. 12/17/12, Day 1 -- A.M., pp. 2-4. Those late-disclosed discs did not contain the footage included in Exhibit A. That footage was first disclosed *post-conviction* to Hopgood's then-appellate counsel, who conveyed it to undersigned counsel.

The State in postconviction court did not deny that this footage was withheld, so this issue should be deemed admitted. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 108-109, 279 N.W.2d 493, 499 (Wis. Ct. App. 1979); *State v. Delebreau*, 2014 WI App 21, Fn. 3, 352 Wis.2d 647, 843 N.W.2d 441. See also R.72:6; Taylor's Reply to the State's Response to the Postconviction Motion, p. 6. ("In its Response the State does not deny that the surveillance footage showing Taylor before the crime at the parking lot of Jack's Liquor (thus rebutting Saffold's claim that Taylor had been continuously hanging out with the co-defendants and was present with them while the victim's car drew near) was NOT disclosed to the defense prior to trial. The State merely states that it 'is unknown' whether such footage was disclosed to Taylor. Response at p. 13. Such failure to deny Taylor's non-disclosure claim should be deemed admission of this claim by the State." (citations to authorities omitted)).

[9] Saffold's self-interest as a motive for his testimony was a key theme on his cross-examination, because it would impeach his credibility (the central issue of the trial). Taylor's trial counsel argued, and repeatedly tried to show, that Saffold accused Taylor (and others) in exchange for consideration from the State, including that he would not be charged

In Exhibit H (App.76) Victim/Witness Advocate Sadie Adams reports that Saffold "wants to know if the Witness Protection Program can still *provide money for housing*. He stated that you [the prosecutor] may be able to *give him some money for his first month's rent*.") (emphasis added). Exhibit I (App.77) an email from Joseph Link to David Budde, states that Saffold had moved into a shelter outside Milwaukee "to protect . . . from the defendant's friends;" that Saffold "*is a very important witness and [the prosecutor] could not go ahead with the Murder case without this witness*;" that his "*time at the shelter has run out and he needs to rent a place*. . . . . he *needs help with the security deposit for the apartment*." (emphasis added). [10]

Exhibits H and I show that the security deposit payment was a gift of value, which secured for Saffold new housing he could not afford. Saffold complained that *lack of funds* prevented him from renting an apartment, and the State provided the funds.

Witness protection services would have provided *replacement secure* housing, *in place of* Saffold-paid *insecure* housing. Here, the State obtained for Saffold housing when and because -- according to Saffold's statements -- he could not afford it.

The record alleges that Saffold moved into a shelter outside Milwaukee "to protect . . . from the defendant's friends," without specifying any names of defednants. (R.67, Ex.I.; App.77). This allegation stands unsupported.

But the record repeatedly supports that Saffold needed funds, asked for funds, received them from the State pre-trial. Such pre-trial payment -- to cover Saffold's security deposit on an apartment, which he could not pay himself -- arguably evidenced Saffold's bias and

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with a new drug felony. The trial court stated that it would dismiss the case if it had evidence that the State had "bought" Saffold's testimony. (R. 109:10.) Taylor asserts that the security deposit the State paid for Saffold constituted such "buying" of Saffold's testimony, of which neither the defense nor the court were notified.

[10] That same Exhibit I contains the prosecutor's email authorizing the payment of over $700 in for Saffold's security deposit.

credibility, thus should have been disclosed under *Brady*. *See Harris*, 2004 WI at P29. Its withholding was a constitutional violation which could not be harmless. *Kyles*, 514 U.S. at 436; *Loveday*, 74 Wis.2d 516.

3. Evidence impeaching the credibility and exposing the bias of lead investigator Detective Gomez.

During trial the lead investigator, det. Gomez, was under investigation for allegations of professional misconduct and dishonesty.[11] The State knew *the details* of the allegations and investigations, but withheld them, although they bore on Gomez's credibility and bias, and on the investigation's reliability.

After the trial, in 2013, Gomez's pattern of violence, coercion, and fraud in office became public knowledge. (R.67, Ex.K, App. 80-81; R.67, Ex.L, App. 82-83) (news articles from December 2013: Gomez fired from MPD for "misconduct in public office," beating a suspect; MPD considers Gomez's application for disability retirement "fraudulent;" federal jury found Gomez had lied on a warrant application).

If disclosed to Taylor pre-trial, Taylor could use the complaints against Gomez to impeach any investigation result involving Gomez, including Saffold's original accusations (made by Saffold in a one-on-one interview with Gomez) and the alleged killing bullet (found by Gomez two years after the crime, a year after a previous search discovered nothing).[12] Because the Gomez misconduct evidence would have helped impeach the State's most important witness and would have shown the bias of the investigator, it was "material" and its non-disclosure constitutes a non-harmless constitutional violation. *Bagley*, 473 U.S. at 682; *Harris*, 2004 WI ¶28.

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[11] Gomez did not testify, probably because he would have been impeachable because of those allegations and investigations.

[12] Evidence of underlying complaints and investigations was admissible evidence of the lead investigator's "other acts" showing motive, bias, intent, and prejudice. *State v. Missouri*, 2006 WI App 74, P15, 714 N.W.2d 595, 600 (Ct. App. 2006).

Each of the above three batches of non-disclosed evidence was favorable and "material" to Taylor's defense. If presented, especially *cumulatively*, this evidence would have completely impeached the credibility and exposed the bias of the State's sole witness against Taylor; would have rebutted Saffold's specific accusations (annihilating the *sole* evidentiary link between Taylor and the crime); and would have destroyed trust in the reliability of the investigation (including Saffold's disclosures to Gomez).

Taylor's acquittal hinged on impeaching Saffold, the State's crucial witness. After evidence closed the jury was at "an impasse" over Taylor. (R.113:8) (jury question stating they are "at an impasse" regarding Taylor). Under these facts, *any* evidence allowing *additional* and *different* impeachment would have probably made a difference between conviction and acquittal. The non-disclosed evidence would certainly make a difference between conviction and acquittal, by resolving any "impasse" in Taylor's favor. It thus meets the "materiality" definition, its non-disclosure constitutes a non-harmless constitutional violation. *Bagley*, 473 U.S. at 682; *Harris*, 2004 WI ¶28. [13]

[13] Should this Court rule that neither of above is a non-harmless *Brady* violation, Taylor asserts that counsel's failure to discover and present any and/or all of these above batches of evidence was ineffective assistance of counsel, warranting a new trial.

II. PROSECUTORIAL COMMENTS INFECTED THE TRIAL WITH UNFAIRNESS, MAKING TAYLOR'S CONVICTION DENIAL OF DUE PROCESS AND WARRANTING MISTRIAL

A. Standard of review.

Although the decision whether to grant a mistrial is usually discretionary, this Court considers *de novo* whether particular remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Neuser*, 191 Wis.2d 131, 136, 528 N.W.2d 49 (Ct.App.1995) (internal quotations omitted).

B. The legal standard

"The government may not suggest that information not in evidence supports its claim." *U.S. v. Badger*, 983 F.2d 1443, 1455 (7th Cir. 1993).

The line between permissible and impermissible argument is drawn where the prosecutor goes beyond reasoning from the evidence and suggests that the jury should arrive at a verdict by considering factors other than the evidence. *State v. Draize,* 88 Wis.2d 445, 454, 276 N.W.2d 784, 789 (1979). The constitutional test is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Wolff*, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Wis.Ct.App.1992) (quoted source omitted). Whether the prosecutor's conduct affected the fairness of the trial is determined by viewing the statements in context. *Id.* at 168.

C. Prosecutorial comments infected the trial with unfairness, making Taylor's conviction denial of due process and warranting mistrial.

In impeaching Saffold with his previous testimony, Taylor's counsel read back portions of it, then stated: "And there's more there that I'm sure the State can follow up with." (R.110:50). The prosecutor retorted: "Because it's the truth." Id. Other counsel objected, Taylor's counsel stated

he had “a motion to make” (on “vouching”), id., then moved for mistrial, id. at 66-67 (R.110:66-67). The prosecutor asserted that he had referenced only “the truth” of what was in the transcript. (R.110:67). Mistrial was denied. (R.110:70, 82). As remedy, the court would give the "general instruction relative to comments by lawyers, comments by counsel not being evidence." (R.110:82).

At the end of trial, defense (including Taylor’s counsel) again moved for mistrial, based on repeated prosecutorial references to "38 witnesses on the [State’s] witness list" and "14 CDs worth of evidence," which all were not in evidence. (R.112:26-34). Although defense’s objections had been sustained (R.110:66), the prosecutor persisted. (112:27-28). Mistrial was again denied. (113:13-14).

Three times (vouching, invoking “38 witnesses” twice) the prosecutor improperly indicated that credible, profuse evidence supported guilt, but was not presented at trial to save everyone time this holiday season. The prosecutor planted in the jurors’ minds images of 38 *additional* witnesses with credible incriminating evidence; his own belief that Saffold’s statements were “the truth;” and gratitude to the State for sparing the jury the hearing of such evidence before Christmas. By so encouraging the jury to base their verdict on multiple factors not in evidence, the prosecutor argued impermissibly. *Draize*, 88 Wis.2d at 454. The resulting verdict, instead of resting solely on relevant and properly admissible evidence, reflected extraneous factors not relevant to proving Taylor’s charge.

Although Saffold’s credibility was significantly impeached by the defense, the jury still convicted Taylor, apparently believing the State, probably due to vouching and the “38 witnesses” whose testimony (the prosecutor insinuated) the jury was mercifully spared from hearing at

this busy pre-holiday time.[14] Without this triple bolstering, doubt about Saffold's credibility -- created by all defense counsels -- would not have supported Taylor's "guilty" verdict.

Mistrial should was warranted because the trial was infected with unfairness when the prosecutor, in closing, vouched for Saffold's credibility and *multiple* t*imes* invited the jury to consider matters not in evidence (over defense's sustained objection). Taylor's conviction thus violates due process. *Neuser*, 191 Wis.2d at 136.

This was a close case, where the State had little evidence against Taylor, which only tangentially linked him to the crime and came from a non-credible source. In this situation the prosecutor's *repeated* encouragement to the jury to believe that source (because it "was the truth") and rest the verdict on the insinuated testimony from "38 witnesses" (matters *not* in evidence) yielded a verdict based not on relevant, admissible evidence (contrary to due process) and effectively relieving the State of its burden of proof.

III. THE TRIAL COURT'S LIMITATIONS ON TAYLOR'S CROSS-EXAMINATION OF SAFFOLD FOR BIAS VIOLATED THE CONSITITUTIONAL RIGHT TO CONFRONTATION.

A. Standard of review

This Court independently reviews whether the limitation of cross-examination violates the defendant's right of confrontation. *State v. Barreau*, 2002 WI App 198, ¶48, 257 Wis.2d 203, 651 N.W.2d 12.

This Court shall reverse a trial court's determination to limit cross-examination attempting to show bias if the trial court's determination represents an erroneous exercise

[14] The trial took place just days before Christmas: December 18-21, 2012.

of discretion that is prejudicial. *State v. Lindh*, 161 Wis.2d 324, 348-49, 468 N.W.2d 168 (1991).

B. The legal standard: defendant's right to cross-examine for bias

The confrontation right "includes the right to cross-examine adverse witnesses to expose potential bias." *Barreau*, 2002 WI App ¶47.[15] Trial counsel has the right and duty to cross-examine a witness on subjective motives of lenient treatment, where criminal charges are pending against witness. *State v. Lenarchick*, 74 Wis. 2d 425, 447-48, 247 N.W.2d 80 (1976). [16]

A criminal defendant states a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness," and "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986**)** (citations omitted). [17]

The constitutional right to confrontation "is not violated when the court precludes a defendant from presenting evidence which is irrelevant or immaterial." *State v. McCall*, 202 Wis. 2d 29, 43, 549 N.W.2d 418

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[15] A criminal defendant's right to confront witnesses is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution. *Barreau*, 2002 WI App ¶47.

[16] The right to cross-examination to reveal witness's charges, situation and relationship to the state does not depend on whether there was in fact a deal between witness and state. *State v. Delgado*, 194 Wis. 2d 737, 535 N.W.2d 450 (Ct. App. 1995).

[17] Because certain facts impacting credibility determinations were kept from the jury by limited cross-examination, the Supreme Court in *Van Arsdall* held: "Respondent has met that burden here: A reasonable jury might have received a *significantly different impression of [a witness'] credibility* had respondent's counsel been permitted to pursue his proposed line of cross-examination." Id. at 680.

(1996). Evidence elicited on proposed cross-examination is relevant if it would "be useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony." *Rogers v. State*, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980).

In *State v. Yang*, 2006 WI App 48, ¶¶ 17-18, 290 Wis. 2d 235, 712 N.W.2d 400, this Court held that the court's limitation on the defendant's cross-examination of a witness was reversible constitutional error when it impeded the exposure of the witnesses' bias and the case was "close," for resting on witness credibility.

C. Taylor's right to confrontation was violated by the court's limitations on Saffold's cross-examination for bias.

The case against Taylor rested entirely on the credibility of Taylor's sole accuser, Saffold. The State and the defense both emphasized, in openings and closings, that verdicts would hinge on Saffold's credibility, as shown supra. Successfully impeaching Saffold's credibility was Taylor's key goal. (R.109:57) (counsel was "very, very concerned about meaningfully confronting this very dubious witness…")

Saffold first accused Taylor months after the crime. At that time he had prior adult convictions which he hoped to expunge, but also faced a felony cocaine possession charge after an arrest in Wauwatosa. (See e.g. R.109:53-54, 59 (other counsel's cross-exam about expungement hopes).

Saffold testified that after his cocaine arrest he offered "some information on the murder, hoping for a little consideration on [the cocaine] case, that it wouldn't make it to the D.A.'s desk." (R.109:27-28); and that he hoped to get the $10K reward (R.109:30-31).[18]

He minimized his incentives for helping: avoiding new felony possession charge was "little consideration;" he

[18] Saffold testified that the cocaine case indeed was never charged in "consideration" for his help. Id. at 29-30.

"shrugged off" the $10K in reward money, (R.109:31; he did not "really" need money (R.109:40); $10K was "not really" a lot of money (R.110:41).

To show the incentives' powerful lure (thus Saffold's bias) counsels sought cross-examination about Saffold's *feelings* about the impending felony charge. (R.109: 6-10, 14) (discussing cross-examination on expectations of leniency, testifying in exchange for leniency, citing *Lenarchik).* The court disallowed any mention of the "felony" status of that charge. (R.110:4).

To show that incentives caused Saffold's accusations, counsel sought cross-examination about his subjective *fears and hopes* at/after the cocaine arrest (e.g. fear of prison, aborted expungement). Id. at 8 ("… it's what's in Paris Saffold's mind that motivates him to say what he says. That's what's important, and that's what's relevant, and that's what I think I get to confront this very, very dubious person's testimony that I get to meaningfully and aggressively cross-examine.").[19]

Convinced that Saffold would not go to prison, the judge forbade inquiry into Saffold's subjective fears/hopes as "speculations:" "Let's not deal with hypotheticals . . . . The chances of [a judge] boot[ing] him into prison on two grams of powder cocaine are slim to none." Id. at 5-6.

The judge allowed counsel to ask "what favor if any were you currying with the DA's office," but disallowed "accusatory" wording, e.g.: "You were expecting, you were afraid you were going to prison after this." Id. at 18. Counsel objected: "That's the essence of cross-examination, asking forcefully as opposed to asking open-ended direct examination questions." Id. at 8.

The judge only allowed counsel to ask: "'So, you got stopped with cocaine in your car? 'Yeah.''What did you expect when you came forward?'" Id. at 22. Questions

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[19] See also id. at 5-6, 7 (counsel arguing: "The issue is what he thinks, not what the State issues, not into what the investigation reveals. The issue is what does Paris think. He knows he's on paper. He knows he's looking at expungement. Now he has 2.8 grams of cocaine;" stating this was constitutionally guaranteed "meaningful confrontation").

containing "speculation" about Saffold's fears -- e.g. "didn't you think you were going to prison?" -- were "explicitly forbidden by this order," for "put[ting] facts that are not in evidence in front of the jury." Id. at 22-23.

Counsel did not ask the one question allowed: "I'm not going to ask that. That's an open-ended question, and I won't be part of that assisting the State with that type of questions. I can't." Id. [20]

Taylor had the due process right fully to "reveal [Saffold's] prototypical form of bias," *Barreau,* 2002 WI App ¶55, [21] by showing Saffold's burning incentives to accuse: the "inherently and independently relevant" fact of a cocaine felony *"charge which hung over [his] head like the sword of Damocle*s...." *Anderson,* 881 F.2d 1128, 1139 (D.C.Cir.1989) (emphasis added) (cited at *Barreau,* 2002 WI App ¶55).

The court *doubly* prevented Taylor from revealing that bias: (1) by disallowing mention that Saffold faced "felony" charges; and (2) disallowing non-open-ended questions about the subjective fears/hopes at the core of Saffold's bias.

By disallowing mentions of impending "felony" charges and allowing only open-ended questions about Saffold's expectations for cooperating, the court limited "otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of [Saffold]," thus keeping from the jury "facts from which jurors . . . could

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[20] Counsel stayed away from disallowed questions also because he wished to avoid the court's censure in front of the jury. 13, 21.

[21] *Barreau*, 2002 WI App ¶55: "With respect to [witness'] pending charges and his 'subjective expectation of favorable treatment in exchange for his testimony,' we agree with Barreau that because the right of confrontation includes the right to reveal potential bias, defendants must be permitted to cross-examine witnesses regarding motives for testifying for the State. *It is generally recognized that evidence of pending charges against a witness, even absent promises of leniency, may reveal 'a prototypical form of bias*.'" (citations omitted) (emphasis added).

appropriately draw inferences relating to the reliability of [Saffold]." *Van Arsdall,* 475 U.S. at 680 (citations omitted).

Taylor's confrontation rights were thus arbitrarily violated, prejudicing Taylor, by disallowing relevant evidence "useful to the trier of fact in appraising the credibility of the witness and evaluating the probative value of the direct testimony," *Rogers v. State*, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980). This violated confrontation guarantees and counsel's right to "cross-examine a witness on subjective motives of lenient treatment, where criminal charges are pending against witness," *State v. Lenarchick*, 74 Wis. 2d 425, 447-48, 247 N.W.2d 80 (1976). [22]

Full exposure of Saffold's subjective fears and expectations would have been "appropriate cross-examination designed to . . . expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Van Arsdall*, 475 U.S. at 680 (citations omitted). The court's dual limitations hobbled such appropriate cross-examination; and by hiding from view Saffold's subjective fears and hopes prevented the jury from "*appropriately* draw[ing] inferences" about Saffold's reliability.

This was hugely prejudicial when the case against Taylor rested *wholly* on Saffold's credibility and Taylor's defense hinged *wholly* on destroying that credibility.

Like *Yang*, this too was a "close" case, hinging on witness credibility. Like the limitation in *Yang*, the limitations here -- on exposing Saffold's *subjective fears* about the *felony* he faced and *subjective hopes* (of *avoiding the felony*, obtaining expungement of prior record, scoring $10k in reward money) -- violated confrontation and prejudiced Taylor, requiring reversal and a new trial. *Yang*, 2006 WI App ¶¶17-18.

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[22] The right to cross-examination to reveal witness's charges, situation and relationship to state does not depend on whether there was in fact a deal between witness and state. *State v. Delgado*, 194 Wis. 2d 737, 753, 535 N.W.2d 450 (Ct. App. 1995).

Like Lenarchick, so also Taylor was "denied meaningful cross-examination to explain the *witness's subjective motive* for testifying because at the time the witness was *subject to the coercive power of the State* and was *also subject to the State's leniency*." *Lenarchick*, 74 Wis. 2d at 447-48.

The court "deprived [Taylor] of a meaningful opportunity to elicit *available, relevant information* that was likely to *effectively* impeach the credibility of the witnesses." *U.S. v. Cameron,* 814 F.2d 403, 406 (7th Cir.1987). In this close, credibility-based case, the disallowed evidence made the difference between conviction and acquittal. See *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Taylor deserves a new trial at which he can present *all* evidence exposing the bias and impeaching the credibility of his sole accuser.

IV. TAYLOR'S JOINT TRIAL WITH CO-DEFENDANTS VIOLATED DUE PROCESS

A. Standard of review

Whether the defendant's constitutional right to a fair trial was violated -- e.g. by improperly joint trial -- is a question of law that this Court reviews *de novo*. *State v. Ballos,* 230 Wis.2d 495, 500, 602 N.W.2d 117 (Ct.App.1999).

B. The legal standard

In making its discretionary decision about separate vs. joint trial, courts must balance any potential prejudice to defendants against public interest in avoiding unnecessary or duplicative trials. *State v. Nelson,* 146 W*is.*2d 44*2*, 432 N.W.2d 115 (App. 1988),

A separate trial is proper where danger exists that an entire line of evidence relevant to liability of only one defendant may be treated as evidence against all defendants, because they are tried jointly. *Haldane v. State*, 85 Wis.2d 182, 189, 270 N.W.2d 75 (1978). Defendants should be

tried separately where a line of evidence is admissible only as to one defendant and unduly prejudicial to another. *State v. Jennaro*, 76 Wis.2d 499, 505, 251 N.W.2d 800 (1977). Joint trial prejudices a defendant where evidence is presented as to any co-defendants, which could not be introduced at the defendant's separate trial. Id.

In "line of evidence" cases which are tried jointly, the trial court is bound to give, *sua sponte* if necessary, cautionary instruction stating that evidence against one defendant cannot be considered against codefendant simply because they are being tried together. *State v. Patricia A.M.*, 168 Wis.2d 724, 736, 484 N.W.2d 380 (Ct.App.1992) (reversed on other grounds by *State v. Patricia A.M.*, 176 Wis.2d 542, 500 N.W.2d 289 (1993)).

C. Taylor should have been tried separately

After the State announced it would seek joint trial, Taylor's counsel requested speedy trial. CCAP entries for on 5/21/2012, 6/18/2012. A s*peedy* trial would mean a *separate* trial for Taylor.[23]

Counsel resisted joinder by relying on a speedy trial demand: "I have a more practical problem with the joinder in that we have a speedy trial demand filed. We have a date for trial scheduled for September 4th." (R.97:16).

When the co-defendants were not ready for September trial, counsel argued:

> It's my request we are ready and are prepared to proceed. I think the Court will recall here with the facts of this complaint are that my client . . . basically sat on the step the entire time, is not involved in the handling of any gun. There's no allegation he's involved in the shooting. He's basically there. We are prepared to proceed on *a very compact, tightly focused case that I don't think needs all the evidence that the District Attorney is referring to before*. So I would ask that [we proceed without co-defendants] .

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[23] The prosecutor admitted during the speedy/separate trial arguments: "…Defendant Taylor's demand for speedy trial would act as a de facto severance…" (R.99:2).

(R.98:12) (emphasis added). [24]

Counsel's remarks show that he strategically prepared for a "compact," "focused" (separate) trial, un-muddled by evidence relevant only to Riley or Hopgood. Counsel sought separate trial, because he understood that Taylor's alleged minimal involvement could not be proven by evidence against co-defendants (involving violence, weapons), which would unduly confuse the jury as to *Taylor's* guilt/innocence and "spill over" to besmear Taylor. Counsel continued arguing for speedy/separate trial:

> … we do have a date, September 4th. We are prepared to proceed. And I think *Mr. Taylor's case is significantly different than those other two* -- allegations against the other two. . . there's never any allegation in this Complaint that he ever touched a gun or did anything with a gun other than what could be --- what would be implied as a hostile, aggressive statement but that his fannie never left the stoop upon which he was sitting and didn't participate actively in the violence that is alleged in this Complaint. . . . I looked at the case law extensively.... I found nothing saying that because there are other co-defendants that the speedy trial right does not exist …

(R.99:4) (emphasis added).

The State insisted on joinder, as the "[l]egal impediment here would be Defendant Taylor's speedy trial demand" (R.99:5), but that impediment disappeared when the court released Taylor on bail pre-trial (R.99:4-5). [25]

The court ordered joint trial based on "judicial economy" and lack of "legal impediments," and because

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[24] The State argued for joinder and that Taylor's speedy trial request cannot be met. (R.97:18).

[25] Taylor's counsel did not expressly argue, as "legal impediment" or otherwise, that joinder would violate *due process* by causing "prejudicial spillover" and an unreliable verdict, from a jury confused about which evidence could be used in deciding *Taylor's* innocence/guilt (as opposed the his co-defendants'). Taylor reserves the right to argue that counsel was ineffective *also* in not arguing that "prejudicial spillover" was a due process ground for separate trial, and/or a "legal impediment" to joinder which would violate Taylor's due process.

"[a]ll three individuals were allegedly involved in the same incident, the same circumstances that led to the death in this case." (R.98:11).

Extensive evidence was admitted, from various witnesses, of Riley's participation in the killing: Riley's pre-trial identification as the shooter, Riley suggesting the robbery, volunteering to rob Cort, accepting the weapon from Hopgood, hiding his identity, hastening toward Cort, firing, running awa, returning the weapon to Hopgood, etc.

Extensive evidence was also admitted of Hopgood's involvement: that he provided the weapon, coached the shooter to use the sole bullet "carefully," hid the weapon after the shooting, intimidated Saffold into silence.

The only evidence of *Taylor's* involvement -- from Saffold alone -- indicated that Taylor, Hopgood, and Riley hung out together for some time before the shooting across the street from Jack's; that they together observed, and commented on, Cort's arrival; that Taylor recalled Cort's presence when Taylor had been shot in the past; that Taylor drove Riley away after the shooting in a white BMW. [26]

Saffold's testimony takes up 117 pages of trial transcripts.[27] Of those 117 pages, Taylor's alleged marginal involvement is addressed on only 26 pages.

So 91 pages of Saffold's testimony -- over 75% of it -- concerned only Riley and Hopgood, thus was *not relevant* to Taylor or admissible at his separate trial, as addressing specific acts of Riley and Hopgood *only*, independent of Taylor.

Yet those 91 pages of Saffold's incriminating testimony about Riley and Hopgood besmeared and incriminated Taylor improperly, in a typical instance of "prejudicial spill-over," uncured by a limiting instruction.

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[26] As discussed elsewhere in this Brief, Saffold first accused Taylor of providing the hoodie which Riley used to hide his identity during the shooting, but later Saffold testified, on cross, that he did not recall seeing Taylor provide the hoodie.

[27] This and other transcript page counts are based on undersigned counsel's count.

See Zafiro v. U.S., 506 U.S. 534, 539-41 (1993) ("When the risk of prejudice is high . . . limiting instructions, often will suffice to cure any risk of prejudice.").

Of the remaining witness' testimony, which takes 241 transcript pages, only 35 pages reflect Taylor's counsel's cross-examination.

None of those 241 pages, not one contains testimony addressing *Taylor's* alleged acts. So none of the testimony of the remaining witnesses (not Saffold) -- 241 pages, given over 3 days of trial -- made any of *Taylor's* alleged *acts* more or less probable, thus none was relevant to Taylor's charge. See Sec. 904.01, Stats; *State v. Sarinske*, 91 Wis.2d 14, 44, 280 N.W.2d 725 (1979) ("relevant" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") As such, none of it would be admissible at Taylor's separate trial. Wis. Stats Section 904.02 ("[e]vidence which is not relevant is not admissible).

No instruction was given cautioning the jury to use only Taylor-relevant evidence in deciding Taylor's innocence/guilt, although the court was bound to give such instruction, sua sponte if necessary. *Patricia A.M.*, 168 Wis.2d at 736. Thus the jury was in effect instructed that it could rely on *all* the admitted evidence in deciding Taylor's guilt/innocence; and the jury presumably followed this instruction. *Zafiro*, 506 U.S. at 539–41 (juries are presumed to follow instructions).

D. Taylor did not receive a fair trial when tried jointly with co-defendants

Here "entire line[s] of evidence relevant to the liability of only [Riley and/or Hopgood]" were treated "as evidence against [Taylor] by the trier of fact simply because they [were] tried jointly." *Haldane*, 85 Wis.2d at 189 (internal citation omitted). Because not instructed correctly, the jury became "confused as to which evidence [was] applicable to which defendant." *Butala v. State*, 71 Wis.2d 569, 579, 239 N.W.2d 32 (1976). "Prejudicial

spillover" resulted. *See State v. Suits*, 73 Wis.2d 352, 243 N.W.2d 206 (1976); *Patricia A.M.*, 168 Wis.2d at 736.

Because there was so little evidence against Taylor (only 35 pages of Saffold's testimony), all of it of low credibility, Taylor's conviction must have rested largely on various evidence against Riley and Hopgood, which -- while properly incriminating them alone -- improperly spilled over to Taylor and supported Saffold's credibility. See *Zafiro*, 506 U.S. at 541.

On these case facts, Taylor did not receive a fair trial and due process was violated by joint trial with Hopgood and Riley, where "spillover" improperly affected Taylor's verdict. [28] Taylor's guilty verdict is unreliable and his conviction must be reversed. See *Zafiro*, 506 U.S. 534 (reversal proper when there is a serious risk that a joint trial compromised defendant's specific trial right or prevented the jury from making a reliable judgment about guilt/innocence).

E. The court abused discretion in allowing Taylor to be trial jointly, substantially prejudicing him

Separate trials should be granted where a line of evidence is produced which is admissible only as to one defendant and is unduly prejudicial to the other. *State v. DiMaggio*, 49 Wis.2d 565, 577, 182 N.W.2d 466 (1971). What constitutes "abuse of discretion" depends upon facts of each case. *Patricia A.M.*, 168 Wis.2d at 739.

In this case separate lines of evidence were relevant only to Taylor's co-defendants and not relevant as to Taylor, but unduly prejudicial to him, for they presented details of cold-blooded violence with weapons against a peaceable young man (violence unrelated to Taylor's alleged actions).

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[28] As argued elsewhere in this Brief, it was arguably ineffective for counsel not to argue that due-process-violating "prejudicial spillover" was the "legal impediment" mandating separate trial.

Under these facts Taylor allowing joint trial was abuse of discretion. *DiMaggio*, 49 Wis.2d at 576. For example, the trial court denied separate trial without ever weighing the potential prejudice of joint trial vs. public interest in joint trial, though required to do so by law. *Nelson*, 146 Wis.2d at 445 (court must balance potential prejudice to defendant against public's interest in avoiding unnecessary trials).

Substantial prejudice resulted from joint trial because 2 separate lines of highly incriminating, even inflaming, evidence relevant to liability only of Riley and Hopgood, were presented and treated by the jury as evidence against Taylor, because the trial was joint. *State v. King* (App. 1984) 354 N.W.2d 742, 120 Wis.2d 285 (defendant must show "substantial prejudice").

Substantial prejudice also resulted when profuse incriminating evidence not relevant to Taylor "spilled over" to him, confused the jury, and was prejudicially relied-on in making Taylor's verdict (without limiting/cautionary instruction). *See Zafiro*, 506 U.S. at 539–41; *Patricia A.M.*, 168 Wis.2d at 726 (need to give cautionary instruction).

Taylor was convicted contrary to due process and based on abuse of judicial discretion, based in part on evidence of *Hopgood's* and *Riley's* behavior, relevant to proving their charges only. Taylor's due process was improperly sacrificed on the altar of administrative efficiency.

V. TAYLOR'S TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

A. Standard of review

An ineffective assistance of counsel claim presents a mixed question of law and fact. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Findings of fact, "including the circumstances of the case and the counsel's conduct and strategy," are upheld unless they are clearly erroneous. *State v. Jenkins*, 2014 WI 59, P38, 355 Wis. 2d 180, 848 N.W.2d 786. A determination of whether counsel's performance was deficient or prejudicial is a question of law, subject to *de novo* review. *Sanchez*, 201 Wis. 2d, at 236.

B. The legal standard

To establish ineffective assistance of counsel, Taylor must show that trial counsel's performance was deficient and that such deficiency prejudiced Taylor. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient representation is that which falls "below objective standards of reasonableness." *State v. Thiel*, 2003 WI 111, ¶33, 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).

C. Trial counsel was ineffective in multiple ways

1. Trial counsel was ineffective when he failed to present exculpatory rebuttal/impeaching testimony from Kelli Walton.

Kelli Walton asserts that on the day of the crime and during its commission she was in possession of Taylor's white BMW, returning it to Taylor hours after the crime. (R.67, Ex.J, App.78-79; R.76, attached Affidavit of Kelli Walton; App.15-16). [29] She asserts that she had told so to Taylor's counsel and was prepared to so testify, but counsel never called her to the stand. Id. During voir dire Taylor's counsel indicated that Kelli Walton might be called as a rebuttal witness. (R.103:66). Counsel never called Walton.

Walton's testimony would have rebutted Saffold's claim that Taylor drove Riley away from the scene in a white BMW. No other evidence existed rebutting this claim, and the State had only Saffold's testimony to support

[29] The crime was committed at ca. 7 P.M. (See Criminal Complaint, R.2). The video footage of the crime from Jack's surveillance cameras, shown during the trial and on Exhibit A attached to the Postconviction Motion (R.67, Ex.A), indicates the crime occurred at ca. 6:55 (military time showing on the video: 18:55).

it. At the end of the trial, this accusation against Taylor stood unrebutted. [30]

Not presenting this evidence was deficient, as contrary to Taylor's main defense theory (that Saffold was not credible) and strategy (impeaching his credibility).

Failure to present Walton's testimony prejudiced Taylor. In his closing and in opposing mistrial the prosecutor argued that Taylor in a "major" way participated in the crime by driving Riley away in the white BMW. (R.114:7). Walton's testimony would have likely caused acquittal: (1) by rebutting this accusation of Taylor's "major" involvement (driving Riley away in the BMW), and (2) by further impeaching Saffold. [31]

Prejudice is evident in light of the fact that the jury were "at an impasse" on Taylor's guilt/ innocence. (R.113:8) (jury writing court that is was at impasse over Taylor). Walton's testimony would help resolve the impasse in Taylor's favor.

2. Trial counsel failed to present multiple other impeaching/rebuttal evidence.

Counsel was also ineffective for failure to present the following impeaching/rebuttal evidence:

- rebuttal evidence showing that Saffold had known Taylor in 2008 and had heard about Taylor's 2008 shooting prior to the crime.

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[30] As shown supra, Saffold's "hoodie" allegation was successfully rebutted, because Saffold admitted late on the stand that he "did not remember" seeing Taylor take off a dark hoodie and hand it over to Riley, and the prosecutor then withdrew the hoodie allegation. See also (R.114:32-34) (Hopgood's counsel in closing arguing it made no sense that Taylor would be wearing a hark hoodie on a warm summer night, then prosecutor objecting:" I'm going to object at this time because *Paris Saffold never said George Taylor was wearing a hoodie, that he provided a hoodie. That is simply not in the* record.")

[31] Taylor's defense counsel stipulated during trial that on the date of the crime Taylor was stopped by the police driving a white BMW at ca. 11:30 PM. (See R.114:17). That fact is still consistent with Walton's assertion that she was in possession of Taylor's white BMW during the crime, which Taylor picked up around 10:30 P.M.

The prosecutor argued in opening that Saffold's story had to be true, because Saffold could *only* have learned about Taylor's 2008 shooting from Taylor's comments during the crime: "according to Paris Saffold he [Taylor] says [on seeing Cort] that bitch ass . . . was there . . . when I got shot in 2008, that bitch ass was there? Now . . . but it's an important point. . . . it was fully investigated by the police in 2008, and they had names of the witnesses who were present in the house when George Taylor got shot in 2008. And one of the people who was there was [Cort's identical twin] brother. . . Who would know that [Cort's twin was present during Taylor's 2008 shooting] unless they're there, that George Taylor said 'bitch ass was there when I got shot.'" (R.104:56).

In closing he argued: "And there is no way, *no way that Paris Saffold can know that this is the motive*. Who would know this? . . . *How would Paris know that?* . . . And *there is nothing in the evidence at all which would dispute the fact that Paris Saffold has no idea that George Taylor was ever shot in 2008* . . . and that a guy who looked just like [Cort] . . . was there . . . and, *according to George's insinuation, responsible…*" (R.114:13-14) (emphasis added).

But Saffold's statements to the police and trial testimony indicated that he had known Taylor in 2008 and knew about Taylor's 2008 shooting before the crime. (See e.g. R.108:7) (Saffold testifying on direct that he had known Taylor for ca. 2 years before June 2010, thus in 2008); R.67, Ex. F, App.69 (Milw. Police Dept. Incident Report 101630148, Suppl. 64, p.3, where Gomez reports: "Paris stated George [Taylor] was known to hang out in the area of N. 61st street and W. Thurston Street," when the 2008 shooting occurred near Thurston); App.70 ("Paris stated he believed Taylor may have been shot at about four years ago, in the area of N. 60th and W. Thurston Ave."). [32]

[32] In the same Incident Report det. Gomez reports that Saffold "stated George [Taylor] was previously arrested for CCW and drugs, while driving a blue in color Oldsmobile Cutlass." Id. at p.3. This additionally

Reasonable counsel would use Saffold's statements and testimony on crossing Saffold, to show his prior knowledge of Taylor's 2008 shooting, emphasizing them in closing argument. [33] Failure to do so was deficient and prejudiced Taylor by allowing the jury to believe -- contrary to the facts in the discovery and testimony -- that Saffold was credible *because* he must have learned these details from Taylor during the crime.

- impeaching evidence of Saffold's grudge against Taylor, proving *additional* bias and reason to incriminate Taylor.

The question of Saffold's motivations and bias was crucial to his credibility and was subject of testimony and argument of all parties. [34] Taylor informed counsel that he had clashed with Saffold prior to the crime. He (with Riley) "intervened" after Saffold had abused a cousin, Tinnile Reynolds. This gave Saffold a motive to incriminate Taylor.

Taylor's counsel did not show this motive to the jury, e.g. by cross-examining Saffold regarding his prior conflicts with Taylor.

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supports that Saffold was quite familiar with details of Taylor's life, even of greater degree of intimacy than was needed to know of Taylor's shooting. Taylor's wound from the 2008 shooting was very visible to all in the neighborhood: he had his arm in a cast/sling for at least 2 months after the shooting.

[33] Defense counsel could also have discovered and presented *additional rebuttal evidence* -- for example testimony from Kelli Walton and/or others -- to show that *many in the neighborhood (where Taylor was very visible) had been aware of Taylor's 2008 shooting and of Cort's presence during the shooting*. Such evidence would have prevented the prosecutor from improperly bolstering Saffold's credibility by falsely claiming that Saffold could have only learned about the 2008 shooting during the crime -- thus surely his story was true. Taylor would argue that counsel was ineffective also for failure to discover and present such additional rebuttal evidence.

[34] For example the prosecutor in his opening emphatically asked the jury to consider *why* Saffold made his accusation, why he "came forward." (R.104:50) ("…one of the things I want you to do in weighing this information [about Saffold's belated accusations] is the reasons that he came forward."). Similarly in closing. (R.114:8-10).

Riley's counsel did cross-examine Saffold on this bad prior history, to show *Saffold's grudge as additional bias* in accusing Riley. (R.109:76) (asking Saffold if he "got into it with Tinnile Reynolds," starting to ask about "Riley comi[ng] to her" aid, interrupted by an objection); (R.110:36 et seq). [35] Taylor's counsel was ineffective for not doing the same.

- evidence showing that Taylor had no grudge against Cort or his twin brother, and no reason for a grudge, to rebut the prosecutor's argument that Taylor instigated the crime as revenge.

The prosecutor argued in opening and closing that Taylor was majorly responsible for instigating the crime as revenge against a Cort twin, whom Taylor (allegedly) blamed for the 2008 shooting; and because Saffold claimed that, on seeing Cort pull into Jack's parking lot, Taylor -- vengefully and angrily, in the prosecutor's opinion -- set up the crime by (mis)identifying the victim as the "bitch ass" present during that shooting. In rebuttal closing the prosecutor argued: "George Taylor . . . *He is what I call the "but for*." But for George Taylor, this does not happen. *He is the man with a grudge*. He is *the man who puts it in motion*. . ." (R.114:70-71) (emphasis added) (See also R.114:13-14) (closing).

In reality, Taylor had no grudge against any Cort twin, and no reason for one. The Cort twin present during the 2008 shooting *helped convict Taylor's 2008 shooter*, so Taylor owed him *gratitude*, not grudge.

Evidence of this was in the Affidavit in Support of a Search Warrant, sworn-to and signed by det. Formolo. (R.67, Ex.M; App. 84-87 (excerpt of Affidavit)). In Paragraph 9 Formolo states that Donald Cort, the victim's twin brother, witnessed Taylor's 2008 shooting and gave a statement to the police, "which assisted with arresting the

[35] See also id. at pp.24-27 (R.110:24-27) (counsels' discussion and court allowing Riley's impeachment of Saffold by cross-examining Saffold about his grudge against Riley, due to prior conflict, as a reason for incriminating Riley).

perpetrator." In Paragraph 10 he states: "Cort stated that approximately 3-6 months after the incident the victim [of the shooting, i.e. Taylor] stopped him [Cort] at a strip mall . . . and asked if he had anything to do with him being shot. [Cort] stated he informed [Taylor] that he was not involved and that he in fact cooperated with the Police."

Reasonable counsel would present these pre-trial statements from Donald Cort as rebuttal evidence, to disprove that Taylor had a grudge against Cort. This would be done by cross-examining Donald Cort, who testified on direct that he had witnessed Taylor's 2008 shooting and later saw Taylor one more time before the crime. (R.110: 62-64). Cross-examination would elicit testimony showing there was no cause for a grudge, no grudge, and that the additional contact between Taylor and Cort was not antagonistic. That would rebut the prosecutor's vendetta-as-motive argument and show that Taylor had reasons to be *grateful* to a Cort twin. [36]

Without this evidence, the jury believed that Taylor had a vendetta against a Cort twin -- a clear manifestation of prejudice. (R.115:38) (judge in sentencing remarks reporting that jury, polled by him, stated they believed that Taylor had a vendetta against a Cort twin based on the 2008 shooting).

- rebuttal evidence of viable alternate suspects identified early in the investigation.

The discovery contained police reports of three alleged admissions to the crime. One of these -- Armstrong's admission -- was corroborated by several key factual details. See supra. Counsel should have presented evidence of these additional viable suspects, to rebut the prosecutor's

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[36] Saffold repeatedly and unambiguously testified that the suggestion of robbery came from Hopgood. (See e.g. R.109:44; R.108:11-13) (Saffold testifying that after Taylor identified the driver, Steven Hopgood "implied" and suggested the crime). In light of this Saffold testimony, the prosecutor's argument that Taylor suggested or instigated the crime was not based on the evidence, or on reasonable inferences from the evidence, and as such was yet another instance of improper prosecutorial argument.

false claim (in the opening and closing) that Saffold identified the first (and only) suspects, which claim improperly bolstered Saffold's credibility.

Undeniably, in this case acquittal/conviction hinged on Saffold's credibility. The evidence presented left the jury undecided – "at an impasse" -- about Taylor's guilt or innocence, thus about Saffold's credibility. In this situation, foregoing *any* action which may have *additionally or differently* impeached Saffold's credibility, or help rebut Safffold's accusations or the prosecutor's arguments, was outcome determinative.

Cumulatively, counsel's omissions prejudicially *over*-determined the outcome. *State v. Thiel*, 2003 WI 111, 665 N.W.2d 305, 322 (prejudice is assessed based on the cumulative effect of deficiencies). Counsel's omissions created the "impasse" which the jury experienced -- quite avoidable by presenting additional, differently impeachment/rebuttal evidence.

Cumulatively, counsel's deficient inactions also have rendered Taylor's prosecution *unreliable*, warranting a new trial with effective defense counsel. *State v. Pitsch*, 124 Wis.2d 628, 642, 369 N.W.2d 711 (1985) (when the *Strickland* standard is applied to defense counsel's failure(s) to investigate and present favorable evidence in case centering on credibility of a key witness, the test for prejudice is not the deficiencies' impact on the outcome of the trial, but "the reliability of the proceedings.") (citation to quoted material omitted).

3. Other instances of ineffectiveness.

Additionally, counsel was ineffective for not presenting expert opinion testimony regarding the alleged killing bullet. The bullet looked intact to the eye. Post-conviction, criminologist Greg Martin has opined that the bullet shows no changes consistent with having traveled through a human body. (R.67, Ex.N; App. 88-90).

Considering that the bullet was found 2 years after the crime by Gomez (of impeachable integrity) when a previous search found nothing, and that it looked intact, reasonable counsel would have had an expert examine the bullet,

presenting their report/testimony as rebuttal evidence. Such evidence would have boosted reasonable doubt already experienced by the jury, which was left "at an impasse" without it.

Other instances of counsel's ineffectiveness, which Taylor would support and argue at the *Machner* hearing, include: (a) failure successfully to argue, and/or preserve for appeal, a motion for mistrial, based on prosecutorial vouching and improper statements;[37] (b) erroneously admitting in the defense PSI and in sentencing argument that Taylor drove Riley away after the crime; (c) failing to secure a lesser included jury instruction on "aiding and abetting a felon" or failing to preserve for appellate review the trial court's denial of such lesser included jury instruction. [38]

VI. TAYLOR DESERVES NEW TRIAL IN THE INTEREST OF JUSTICE

A. The legal standard.

This Court has discretion to order new trial in the interest of justice. *State v. Henley*, 2010 WI 97, P65, 787 N.W.2d 350. Such new trial is warranted "if it appears from the record that the real controversy has not been fully tried, *or* that it is *probable* that justice has for *any reason* miscarried." Wis. Stat. § 752.35 (emphases added). The real controversy is not fully tried when the jury is erroneously prevented from hearing testimony bearing on an important issue of the case. *State v. Hicks*, 202 Wis.2d

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[37] If counsel did not ineffectively prosecute the motion for mistrial, nor ineffectively failed to preserve its denial for appellate review, then Taylor will argue that the court committed reversible error in denying the motion for mistrial.

[38] Should this Court rule that trial counsel was not ineffective in either of these two ways related to lesser included jury instructions, then Taylor would argue that the trial court erroneously denied Taylor's request for the lesser included instruction of "aiding and abetting a felon," Wis. Stats. Section 946.47(1). (See R.112:3-8).

150, 160, 549 N.W.2d 435 (1996). Discretionary reversal is also warranted when "an analysis of the events together . . . minimize[s] [the reviewing court's] confidence in the verdict." *State v. Burns*, 2011 WI 22, P54, 332 Wis.2d 730, 798 N.W.2d 166.

B. Trial in the interest of justice is due Taylor.

Here *both* the real controversy of *Taylor's* guilt/innocence was not fully tried *and* justice miscarried for *several reasons.*

Justice miscarried when several due-process-violating errors (the State's, the court's, *and* defense counsel's), discussed supra, (1) kept from the jury crucial evidence that would have destroyed the credibility, and directly rebutted the testimony, of Taylor's sole accuser, *and* (2) confused the jury with evidence "prejudicially spilled over" from co-defendants (but not relevant to Taylor's charge), improperly causing Taylor's "guilty" verdict.

The real controversy was not fully tried when the jury was erroneously prevented from hearing crucial testimony bearing on the central issue of the case: Saffold's credibility and the truth of his accusations. *Hicks,* 202 Wis.2d at 160. The evidence erroneously kept from the jury included footage showing Taylor very differently occupied before the shooting than testified-to by Saffold; and Ms. Walton's testimony that *she* (not Taylor) was using the white BWM (the alleged get-away car) at the crucial time. These compounded errors robbed Taylor of exculpatory evidence and muddled his prosecution with non-relevant evidence, so the question of *Taylor's* guilt/innocence was not fully tried. Id. Tried was the issue of Taylor's *joint* guilt, by association with Hopgood and Riley.

Justice miscarried when improper limitations on Saffold's cross-examination hid from the jury additional evidence of Saffold's bias. See supra.

Justice miscarried when, through prosecutorial misconduct, the jury did not hear about viable alternate suspects, see supra, thus latched on to the co-defendants as

sole suspects; and when prosecutorial misconduct both bolstered Saffold's credibility (vouching) and shielded it from destruction (withholding of the impeaching-rebutting footage), see supra.

Justice miscarried when the State withheld video footage which -- plainly, as only pictures can -- disproved Saffold's accusations of Taylor's conduct before the crime. See supra.

These multiple miscarriages of justice prevented the real controversy of *Taylor's* guilt/innocence from being fully tried. And the *compounded* due process violations undermine confidence in Taylor's "guilty" verdict. *Burns*, 2011 WI at P54.

For these *multiple* reasons -- which together annihilated fairness -- Taylor deserves a new trial in the interest of justice.

VII. TAYLOR DESERVES A RESENTENCING, BECAUSE HE WAS SENTENCED BASED ON INACCURATE INFORMATION.

A. Standard of review.

Whether a defendant has been denied this due process right is a question of constitutional fact. *State v. Groth*, 2002 WI App 299, ¶ 21, 258 Wis.2d 889, 655 N.W.2d 163. This Court accepts the circuit court's findings of fact unless they are clearly erroneous. Wis. Stat. § 805.17(2). However, whether the facts amount to a constitutional violation is a question of law this Court reviews independently. *State v. Littrup*, 164 Wis.2d 120, 126, 473 N.W.2d 164 (Ct.App.1991).

B. The legal standard

"Whether the circuit court 'actually relied' on the incorrect information at sentencing, according to the case law, turns on *whether the circuit court gave 'explicit attention' or 'specific consideration' to the inaccurate information*, so that the inaccurate information 'formed part of the basis for the sentence.'" *State v. Travis*, 2013 WI 38,

P28, 347 Wis.2d 142, 832 N.W.2d 491 (emphasis added) (citations omitted).

"If a circuit court expressly paid heed to the inaccurate information, it is easier for a reviewing court to ascertain the circuit court's reliance on that information in passing sentence. For a reviewing court to conclude there was actual reliance by the circuit court, a circuit court need not have stated, 'Because of the existence of this [inaccurate information], you are sentenced to X years of imprisonment.' For a reviewing court to conclude there was actual reliance in the present case, the circuit court need not have specifically said, 'Because of the existence of the mandatory minimum, you are sentenced to prison time equal to or greater than the mandatory minimum.'" Id. at P30 (emphasis added)

In light of this law, *any* reflection in the record that the sentencing court addressed inaccurate information during sentencing indicates a due-process violating reliance on inaccurate information.

C. Taylor deserves resentencing due to the court's actual reliance on inaccurate information.

Saffold on cross-examination admitted that he "did not remember" seeing Taylor give a sweatshirt to the shooter. (R.108:20). The prosecutor subsequently withdrew the hoodie allegation"… *Paris Saffold never said George Taylor was wearing a hoodie,* that he provided a hoodie. That is simply *not in the record*."). (R.114:32-34) (rebutting Hopgood's closing argument that it made no sense for Taylor to be wearing a dark hoodie that summer night). (emphasis added).

Thus, by the prosecutor's own admission at trial, the record does not support that Taylor was the source of the sweatshirt for Riley. Yet the sentencing court so explicitly stated (R.115:39) in fashioning Taylor's sentence, making the inaccurate hoodie information part of the basis of the sentence. *Travis*, 2013 WI P28.

At the sentencing the prosecutor asserted – in depicting Taylor's bad character and future criminal risk --

that a "whip" in "street language" meant a firearm, and that Taylor and Riley, in their post-arrest correspondence, were planning subsequent armed killing, by writing to each other about a "whip." (R.115:16-17).

The State in postconviction court did not deny that "whip" in street language means "a car" (as argued by Taylor (R.66:2, App.40), so this point should be considered conceded by the State. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 108-109, 279 N.W.2d 493, 499 (Wis. Ct. App. 1979); *State v. Delebreau*, 2014 WI App 21, Fn. 3, 352 Wis.2d 647, 843 N.W.2d 441 (criminal case ruling that a party conceded a claim by not replying to it, citing *Charolais*).

The State in postconviction court admitted that the sentencing court relied on the inaccurate "whip" definition and the *un-supported* (by evidence) and *withdrawn by the prosecutor* hoodie allegation, by explicitly mentioning these things in pronouncing sentence. (R.71:21) ("the trial court paid minimal . . . attention to what 'whip' meant;" "The trial court referenced the Defendant as the source of the sweatshirt to Riley").

Under the law cited supra, express consideration of any of these two inaccuracies on the record proves that it was basis for Taylor's sentence, warranting a re-sentencing on due process grounds.

In light of the law and this record, the sentencing court clearly relied on two pieces of inaccurate information in sentencing Taylor. The postconviction court's denial of resentencing -- on the grounds argued by the State but "concurred with" by the postconviction court (R.73:11; App. 27) -- is thus error, contrary to due process, and must be overruled.

VIII. THE CIRCUIT COURT IMPROPERLY DENIED TAYLOR'S MOTION FOR POSTCONVICTION RELIEF WITHOUT HOLDING AN EVIDENTIARY HEARING

A. Standard of review.

"If the motion on its face alleges facts that would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). The circuit court must hold a *Machner* hearing if the defendant's motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433.

Whether the defendant's motion meets this standard is a question of law which this Court reviews *de novo*. *Id.*

B. The legal standard

If a postconviction motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without a hearing. *Bentley*, 201 Wis. 2d at 310-311. A circuit court acts within its discretion in denying a *Machner* hearing on a motion alleging ineffective assistance of counsel only when*:* (1) the defendant has failed to allege sufficient facts in the motion to raise a question of fact; (2) the defendant has presented only conclusory allegations; or (3) the record conclusively demonstrates that the defendant is not entitled to relief. *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

C. The postconviction court's denial of the Motion without a hearing was error.

The Motion alleged several examples of counsel's deficient assistance and their prejudicial impact, including: (1) failure to present Walton's testimony, which would rebut Saffold's claim that Taylor drove Riley from the scene in the BMW; (2) failure to present evidence showing that Taylor had no grudge against Cort or reason for such grudge, and (3) failure to present evidence of Saffold's

grudge against Taylor, as Saffold's motive for incriminating Taylor. See supra.

Such failures were "unreasonable" in the context of the "totality" of evidence against Taylor, i.e. only Saffold's accusations against Taylor and Saffold's already-strained credibility.

Failure to present this evidence prejudiced Taylor by: (1) preventing rebuttal of prosecutorial claims that Taylor *instigated* the crime out of revenge, (2) preventing *complete impeachment* of Saffold's credibility with evidence of Saffold's motive for incriminating Taylor, (3) leaving unrebutted Saffold's two specific accusations against Taylor (about the grudge/revenge as motive and about driving the shooter away), by failing to present Walton's testimony and other evidence. The State's use of these claims in opening and closing -- Taylor's revenge motive, that Saffold was credible, and that Taylor drove Riley away in the BMW, argued in detail supra -- reveals their importance for the success of the prosecution. These claims would have been disproven had counsel presented these three kinds of evidence and argued from it.

Taylor supported his ineffectiveness claims with an Affidavit from Ms. Walton, when the court requested one -- although it was not required by law. (R.76, Affidavit of Kelli Walton attached to Motion to reconsider; App. 15-16).

The above summary shows that the Motion (with attached exhibits) and Motion to Reconsider alleged sufficient facts which, if true, would entitle Taylor to relief, so the postconviction court was obligated to hold a hearing allowing Taylor to elicit evidence supporting his claims. *Bentley*, 201 Wis. at 310; *Allen*, 2004 WI ¶9. There was no room for the trial court's discretionary denial of the hearing: the hearing was mandated by Taylor's specific and detailed allegations. Id.

A *Machner* hearing was also mandated in light of *Nelson*, 54 Wis. 2d at 497-98. None of the three *Nelson* circumstances justifying denial of the ineffectiveness claim without a hearing was present here, although the

postconviction court apparently concluded (erroneously) that one of them existed.

First, the Motion alleged sufficient facts to raise multiple questions of fact: for instance that Ms. Walton discussed her prospective rebuttal testimony with counsel and made herself available to testify, but was not called. This raised factual questions regarding matters outside the record, which the requested hearing would help support.

Second, the Motion did not present only "conclusory allegations." Id. It made factual allegations and proffered supporting evidence, to be elicited during the hearing from three sources: Taylor himself, attorney Flynn, and Ms. Walton.

Third, the record did not "conclusively demonstrate" that Taylor was "not entitled to the relief" sought in the Motion. Id. Taylor's prosecution was for the State a very close case, relying solely on few accusations from a dubious and eminently impeachable source (Saffold). Any evidence rebutting Saffold's accusation and/or (further) chipping away at this credibility could have caused the jury to acquit Taylor.

The postconviction court *erroneously* concluded that, based on the record before it, Taylor was not entitled to a hearing or to relief. This erroneous conclusion lacks support in the record, the law, the facts, or common sense.

Should relief be denied on other claims or error, Taylor asks this Court to conclude, upon independent review, that the Postconviction Motion met the requisite standards for a *Machner* hearing, *Allen*, 2004 WI 106, ¶9; and to remand to postconviction court for such a hearing.

CONCLUSION

For all the aforementioned reasons, Taylor respectfully asks this Court to vacate Taylor's conviction and remand for a new trial; or, alternatively, Taylor asks this Court to rule that he was entitled to an evidentiary hearing on the matters raised in his Motion for Postconviction Relief.

Taylor respectfully asks this Court to remand his case to the circuit court for proceedings consistent with this Court's holdings.

Dated this 10th day of November, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH
AND AS TO MAILING

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,584 words.

I certify that the required number of copies of this brief have been mailed to the Court of Appeals and to the parties to this appeal by U.S. Post or third-party commercial carrier on/before November 16, 2015, for delivery to the Clerk of Court of Appeals within 3 days. Wis. Stats. Section 809.80(3)(b).

Dated this 10th day of November, 2015.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of November, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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