STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

No. 2018AP183-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GENERAL GRANT WILSON,

Defendant-Appellant.

Appeal from the Circuit Court of Milwaukee County,
The Honorable Victor Manian, The Honorable Jeffrey A. Conen,
and The Honorable M. Joseph Donald Presiding,
Circuit Court Case No. 1993 CF 931541

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT GENERAL GRANT WILSON

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ISSUE PRESENTED FOR REVIEW

Did Peter Kovac fail to provide effective assistance of counsel to defendant General Grant Wilson?

Answer by the circuit court: "no."

STATEMENT CONCERNING ORAL ARGUMENT AND PUBLICATION

The significance of this case supports both oral argument and publication.

STATEMENT OF THE CASE

1. Nature of the Case

Peter Kovac compromised Wilson's defense from beginning to end with inadequate investigation, poor preparation, and glaring errors in court. This mattered because the state's case, centered on the testimony of one felon witness, Willie Friend, was filled with improbabilities. Kovac himself has admitted to not adequately investigating the defendant's third-party-perpetrator defense, brushing aside evidence to discredit Friend, and missing potentially exculpatory evidence. Taking preparation of the third-party defense lightly because he "assumed" that it would go forward, R.193(IH):71, Kovac failed to present competently such a defense under *State v. Denny*, 120 Wis. 2d 614, 621-625, 357

N.W.2d 12, 16-18 (Ct. App. 1984). Small wonder, then, that the circuit court in the ineffectiveness proceeding termed Kovac's performance "deficient in various respects." App. 5.

But the circuit court erred in somehow finding no *prejudice* to Wilson from Kovac's deficiencies. *Id.* Witnesses from 1993, who were still willing to testify some 24 years after the trial (at the ineffectiveness hearing), showed how Wilson would have satisfied the *Denny* elements if Kovac had performed effectively. Additional materials showed how Kovac might have effectively discredited the felon, Friend, to impeach his critical state testimony. Kovac conceded, too, that he damaged Wilson's case by going out of his way to permit the state to admit at trial "pretty damning" hearsay, R.193(IH):53, that the court had already ruled to exclude.

Kovac's deficiencies cost Wilson dearly. The jury heard only the state's story without appreciating the evidence supporting Wilson's viable third-party defense. In a case where credibility was a central issue, the jury heard the testimony of the state's crucial witness, Friend, without proper impeachment. To sum it up: Wilson lost a "meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 690 (1986).

The ineffectiveness court here instead chose to concentrate on the strength of the state's case. That was error, as explained by the Supreme Court in *Holmes v. South Carolina,* 547 U.S. 319 (2006), where it concluded that lower courts in assessing a third-party defense should not look at the strength of the state's case but rather "evaluat[e] the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.* at 329-31. *See also State v. Pitsch*, 124 Wis. 2d 628, 645, 369 N.W.2d 711, 720 (1985).

Kovac did not provide the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and the Wisconsin Constitution, art I, § 7. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 587, 665 N.W.2d 305, 313-14.

2. Brief Procedural History: The Trial, the Appeals, and the Ineffective-Assistance-of-Counsel Hearing

a. The Trial

Peter Kovac was privately retained to represent Wilson at a trial in 1993. R.193(IH):38-39. Kovac was willing to try the case only 69 days after Wilson's arrest even though the charges included first-degree homicide. *Id.*; App. 1 & n.1. Kovac has

admitted that this was a "very quick" period of time to investigate and bring such a case to trial. R.193(IH)193:40.[1]

The trial occurred on June 29-30 and July 1-2, 6-8, 1993. App. 1 n.1. The State relied on a circumstantial case. No fingerprints, DNA, or other physical evidence connected Wilson to the crime. R.180(Tr.)162; R.182(Tr.):53,62.

Carol Kidd Edwards testified. R.180(Tr):95-98. She heard loud gunshots during the early morning of April 21, 1993, and saw a man from the neighborhood, Willie Friend, run away from a car. *Id.* She heard more shots fired. R.180(Tr.):102. The police found Evania Maric shot dead in the car. R.180(Tr.):110.

Edwards could not identify the gunman. R.180(Tr.):107-108. For that, the state relied on the testimony of Willie Friend, a felon, who accused Wilson. R.180(Tr.):46-48. Kovac cross-examined Friend on some aspects of his many stories of what happened that night but not much else. R.180(Tr.):50-91.

As explained by the ineffectiveness court, "It was [the] theory of defense that Willie Friend either shot [Maric] or that it

[1] References are made to the record as R.__; the transcripts from the proceedings and trial of Wilson in 1993 as R.__(Tr.):__; the transcripts from the ineffectiveness hearing in 2017 as R._(IH):__; exhibits from the ineffectiveness hearing as R.__(IH)Ex. __; and appendix as App __.

was a conspiracy between Willie Friend and his brother Jabo [Larnell] Friend to set her up to be killed." App. 1-2.

To permit the third-party defense, the trial court needed to be convinced. Kovac did not make a showing to do so because he "didn't think it was going to be a problem." R.193(IH):70. Quite wrong: the court decided not to permit questioning on a third-party defense. R.180(Tr.):248; R.185(Tr.):15-17,38-41. The defense accordingly was unable to examine the state's witnesses about anyone else—including Friend—who had motive, opportunity, and direct connection to the crime. R.180(Tr.):76-77, 231-234. The court also prohibited Wilson from presenting witnesses to the jury regarding a third party. R.185(Tr.):11-15,38-41. In the end, from Mary Larson and Barbara Streeter, there was only testimony to the jury about Wilson—and nothing about Friend other than Maric's knowing him and nothing at all about his brother, Jabo, as third-party perpetrator. *Id.* The court rejected Wilson's proffered jury instructions regarding the third-party defense. R.15; R.186(Tr.):5-25.

The jury at first was at an impasse. R.186(Tr.):154-156. The court told the jury that "[y]ou have all the information you need to reach a verdict." R.186(Tr.):156. The jury then returned

a verdict against Wilson. App. 18-19. The court denied Wilson's post-trial motion for judgment. R.189(Tr.):8. On October 4, 1993, the court entered a judgment of conviction and sentenced Wilson to life imprisonment with potential eligibility for parole in 30 years. App. 17; R.190(Tr.):46-54.

The trial court denied Wilson's motion for post-conviction relief on June 17, 1996. R.38. Kovac failed to file a notice of appeal for Wilson, for which he was publicly reprimanded. *See* Public Reprimand of Peter J. Kovac, 2008-OLR-05; R194(IH):76.

b. The Appeals

On September 14, 2010, this Court, on Wilson's petition for *habeas corpus*, decided that Kovac had provided ineffective assistance of counsel on appeal, permitting Wilson to pursue direct post-conviction and appellate relief. R.41. The circuit court subsequently denied Wilson's post-conviction motion. R.60. Wilson appealed. R.62.

On appeal, this Court summarily reversed Wilson's conviction and the denial of post-conviction relief. R.71 at 11. This Court determined that Wilson was deprived of a "complete defense" because he did not have the opportunity to present a third-party-perpetrator defense. *See id.* at 10. Because the state

did not prove that "there is no reasonable possibility that the error contributed to the conviction," "Wilson [was] entitled to a new trial." *Id.* at 8, 10.

The Wisconsin Supreme Court reversed. With respect to Wilson's third-party-perpetrator defense, the Court stated that "[b]ecause Wilson failed to make an adequate offer of proof as to [Willie or Larnell] Friend's opportunity to [commit the murder of Maric], it was not error for the circuit court to refuse to admit Wilson's proffered evidence." R.75, ¶86.

Wilson's appeal returned to this Court for review of other arguments, including that Wilson, at trial, received ineffective assistance of counsel. App. 9-16.

This Court determined that Kovac possibly was "deficient" in his representation and that, if so, this prejudiced Wilson:

> Based on the Wisconsin Supreme Court's decision, Kovac's trial counsel['s] failure to adequately investigate and make an adequate offer of proof prior to or at trial *resulted in* the proper exclusion of third party evidence pointing to Willie Friend or Larnell Friend. Wilson has thus alleged sufficient facts that, if true, show that he was prejudiced.

App. 12 (emphasis in original). The Court reversed the denial of Wilson's post-conviction motion and remanded for a hearing on Wilson's claim of ineffective assistance of counsel. App. 14.

c. The Ineffectiveness Hearing

Wilson's ineffectiveness-of-trial-counsel hearing occurred on May 12, June 16, and July 24, 2017 (the "ineffectiveness hearing"). R.192;193;194. Kovac testified. R.193(IH):38. Others testified, including Mary Lee Larson and Barbara Lange Streeter (friends of the victim); Willie Wilson, the brother of the defendant; and a defense investigator (hired in this stage). R.192(IH)16,30,37; R.193(IH):6. These witnesses were available to the defense for the 1993 trial but for the investigator (and *an* investigator unquestionably was available then). R.192(IH): 21,34; R.194(IH):32.

The ineffectiveness court issued its order on January 8, 2018. It determined as a conclusion of law that "Attorney Kovac's performance was deficient in various respects." App. 5. It also determined as a conclusion of law that "his performance was not prejudicial," *id.*, and, consequently, it denied Wilson's motion for a new trial. Wilson appeals from the circuit court's order. R.168.

3. Statement of Facts: The Crime, the State's Case, and Wilson's Defense

a. The Crime

Evania (Eva) Maric was shot and killed in the early morning of April 21, 1993. R.182(Tr.):26,38. Maric and Friend were parked outside an illegal nightclub, located at 9th and Concordia Streets in Milwaukee and operated by Willie Friend's brother, Larnell (Jabo) Friend. R.180(Tr.):31-34; R.194(IH):36; R.136(IH)Ex. 28. Willie Friend testified that he and Maric had been sitting in the car for hours when she was shot. R.180(Tr.):33-34, 56-57.

The illegal club was a place of prostitution. R.193(IH):98; R.194(IH):21-23. Kovac did not investigate the club outside of which the murder occurred. *Id.* Kovac knew Willie spent time with his brothers there, but the attorney did not investigate Jabo, as pimp or club operator, or any other of Friend's brothers, such as Marshall, who was at the club when Maric was shot. R.193(IH):95-96,122. Kovac questioned why a police officer known to the Friends interviewed them, but did not ask if the Friends were confidential informants for the police. R.193(IH):101-103. Nor did Kovac ask officers why no search was

made of the club for the guns (never recovered) that shot Maric, as Kovac now acknowledges he should have done. R.193(IH) at 99-100.

Maric was a prostitute. R.192(IH):16-17; R.193(IH):7-8, 66. The evidence presented at the ineffectiveness hearing was that her pimp was Jabo Friend, at times, and Willie Friend, at other times. R.192(IH):33, R.193(IH):24-25. Friends of Maric testified that he was Maric's pimp and violent towards her. R.192(IH):19, R.193(IH):24-29.

Kovac knew that Maric was a prostitute but did not present evidence of this at trial. R.193(IH):66. Police reports (admitted into evidence at the ineffectiveness hearing) showed that Maric's family knew Eva was a prostitute and wanted out. R.193(IH):66; R.194(IH)27-28, 32; R.135(IH)Ex.27. They feared Willie Friend, who had beaten Eva with a clothes hanger. *Id.* Kovac did not question these family members or seek to admit such testimony at trial. R.194(IH)13-14.

Kovac did not elicit from Maric's family or her friends, Mary Lee Larson and Barbara (Lange) Streeter, their testimony that Willie Friend stood against Maric's leaving prostitution. R.192(IH):18-19; R.193(IH):27-2; R.194(IH):14-22. At the

ineffectiveness hearing, these women gave compelling accounts of three times Friend showed them violence:

First, four or five weeks before Maric was killed, Friend came to Larson's house with Maric. R.192(IH):18-19, 25-26. Larson testified that she would not have her kids anywhere near Friend because she feared him and he had a gun. R.192(IH):1. Streeter said Friend was "cold." R.193(IH):27-28. Streeter testified, "I just didn't trust him. I felt unsafe around him." R.193(IH):28. Larson gave her assessment of Friend: "his eyes are as cold as ice. He didn't care." R.192(IH):17.[2]

At this time, while the adults were in her kitchen, Larson recognized that Friend had a gun "sticking out of his pants." R.192(IH):17-18, 26-27. She saw Friend threaten Maric. Friend vowed: "she [Eva] gonna do as I say or I'll pop her, and I won't think twice about it." R.192(IH):19.

Streeter also testified about Friend's threats to Maric in Larson's kitchen: "[They] were all talking about [Eva's] prostitution. And she was saying how she didn't want to be in it. She was kind of done with it. She wanted to stop. He said, 'well,

[2] These statements and all that followed were admitted into evidence by the circuit court at the ineffectiveness hearing. After the fact, in its conclusions of law, the court suggested that these statements were hearsay. App. 2-3. They are not, as explained below at pp. 33 and 40.

you ain't stopping. I'm gonna keep all my bitches in check.'" R.193(IH):16:25,29.

Second, Larson testified to an encounter, a couple of weeks before Maric's death, involving herself, Friend, and Maric at the Edge-O-Town motel. R.192(IH):22-24. Larson sought out Maric, who had installed a phone using Larson's name without permission. R.192(IH):22-23. During their argument, Larson yelled at Friend. R.192(IH):20-21. Maric was immediately in Larson's face: "Eva pushed me out and told me I can't talk to him like that; they'll pop [you] you know." *Id.*

Third, three weeks before Maric's death, Larson saw signs of abuse on Maric. R.192(IH):18-20, 25. Larson saw visible welts on Maric's back when her shirt slid up as she picked up Larson's child. *Id.* Larson asked Maric, "who beat [you?] . . . She said Willie." R.192(IH):26. Streeter, too, testified about this incident: "[I]t seemed as if she [Eva] was afraid to leave because she wasn't sure what was going to happen if she did. I mean I remember Mary telling me about Willie beating [Eva] with a hanger once." IH6/16 at 25.[3]

[3] Mary Larson and Barbara Streeter had no contact at the ineffectiveness hearing, testifying on different days. R.193(IH):5.

The ***jury*** did not hear from Larson about matters involving Friend. As Kovac explained, "We weren't able to get [the threat] in." R.193(IH):88; R.185(Tr.):11-22. Nor did the jury hear from Streeter about Friend. R.193(IH):90; R.185(Tr.):38-43.

b. Trial Counsel's Deficiencies and the State's Case

Two witnesses provided the bulk of the state's narration of the events of April 20-21, 1993. Carol Kidd Edwards testified that she was getting ready for work when she heard five loud gunshots, which caused her to drop to the floor of her upstairs room. R.180(Tr.):96-98. Edwards stood when the shots stopped, and she looked out the window. *Id.*

Edwards saw Friend (whom she recognized from the neighborhood) run away from the "vicinity of the car." R.180(Tr.):97-98,100. She saw another man alight from the passenger side of a car parked near the one from which Friend had fled. R.180(Tr.):102-105,116-117. Edwards saw the gunman approach and shoot, at close range, into the car. *Id.* Those gunshots were not as loud as the original shots Edwards heard. R.180(Tr.):119. The gunman then reentered the passenger side of the car from which he had come, and the car drove away. R.180(Tr.):102,106.

Kovac questioned Edwards about her identification of the gunman. At the ineffectiveness hearing, Kovac explained that Edwards gave a description of the "[s]hooter of Eva as ha[ving] a slight build . . . Whereas Mr. Wilson who's very stocky, well built." R.193(IH):43; *see* R.180(Tr.):122-123 (Edwards' trial description of gunman: "slight built," about "six feet," wearing a "leather tapered jacket").

Kovac did not question a nearby witness with information: Clyde Edwards, the husband of Edwards. Carol Kidd Edwards described the car that left the shooting scene as a "gold-toned Continental." R.180(Tr.):101.[4] Clyde Edwards, who was also home the morning of April 21, told the police he had seen a gold-toned Lincoln around the after-hours club in days prior to the shooting. R.193(IH):68-69; R.94(IH)Ex.6; R.95(IH)Ex.7. This is important because Friend testified that Wilson had not been at the club before April 21, R.180(Tr.):51-52, and Wilson, who owned a gold Lincoln, testified at trial that he had never been at the club. R.184(Tr.):6-7. Kovac offered evidence at trial of the

[4] Edwards at one time thought that she could identify the license plate of the car and described it as a regular plate, but she could not identify the license plate at trial. R.180(Tr.):128-130. Wilson had a specialty plate. R.193(IH):44.

numerous gold-toned Lincolns registered to neighbors. R.182(Tr.)175-181.

Friend was the key State witness about the events of April 20-21. But he gave a number of accounts about the evening of April 20. He testified that Maric picked him up outside the county courthouse around 4 p.m. on April 20, 1993. R.180(Tr.):19. According to Friend, he and Maric went to her mother's house in South Milwaukee, where they had some drinks. R.180(Tr.):19-22. Friend testified that he took Eva's car home. *Id.* He returned to get her at 11 p.m. *Id.* Friend and Maric then went to a tavern, where they had more drinks. *Id.*

Friend stated he and Eva "stopped at this chicken place because we was talking about getting something to eat, and we went there and went back to my mother's house. We was parked in front of the house at that time eating some chicken. And I was feeding my mother['s] cat chicken bones." R.180(Tr.):25.

Maric's stomach was found in the autopsy protocol to be "collapsed and contracted" at the time of her death, just three or so hours after she supposedly ate chicken. R.141(IH)Ex. 33:10. Kovac did not question the medical examiner about any findings in the autopsy. R.194(IH):60.

Friend later claimed, during the time he and Maric ate chicken, he thought he saw the car belonging to Wilson, Maric's long-standing friend, "c[o]me around the bend." R.180(Tr.):26,60. Kovac admitted at the ineffectiveness hearing that the absence of food in Maric's stomach would "be helpful defense evidence" as it would contradict Friend's testimony. R.194(IH):69.

In his direct testimony, Friend related that Maric drove away from his mother's house sometime before 2 a.m. R.180(Tr.):30. Friend walked to his brother's after-hours club. R.180(Tr.):30-31. One hour later, Maric was at the club. R.180(Tr.):32. According to Friend, he and Maric sat in her car for hours. R.180(Tr.):32-33. Police reports admitted at the ineffectiveness hearing show that Friend and Eva actually were in the club for hours. R.180(Tr.):90-91; R.138(IH)Ex.30.

Around 4:30 a.m. Maric was back in her car outside the club. R.180(Tr.):33. Maric was in the driver's seat, Friend in the passenger's. R.180(Tr.)33-34. Friend supposedly saw a car approaching. R.180(Tr.):34. At this point, as Kovac characterized it, Friend gave "stories that were inconsistent." R.194(IH):67.

In one account, Friend testified that he got out of the car despite his concerns, and walked around to confront the man (whom Friend identified as Wilson). R.180(Tr.):63-68. In another account, Friend testified that he got of the seat and stayed near the open car door before he ran. R.180(Tr.):37-38. Friend testified that he saw a man exit the other car, with a "blue steel large revolver." R.180(Tr.):38.

In all the accounts, Maric stayed in the car. She did not leave the front seat. She did not drive away or take any other evasive measures. R.194(IH):68.

Friend ran away from the car. R.180(Tr.):40-41. This Court has noted, "There were bullet strikes in the concrete on either side of the sidewalk where Friend ran away." R.71:7. Somehow, Friend was not shot. R.180(Tr.):41. Maric, however, was shot at close range and killed. She had gunshots from a large-caliber gun and also was shot by a smaller-caliber gun. R.182(Tr.): 51,60-61; R.141(IH)Ex. 33.

The police received a call at 5:16 a.m. about the shooting. R.180(Tr.):136. Friend told the police that the gunman was Wilson. R.180(Tr.):46-47. As the Wisconsin Supreme Court stated, "The police investigation quickly focused on Wilson based

on Friend's statement." R.75, ¶13. Nonetheless, Kovac did no investigation of Friend. R.192(IH):46, R.193(IH):100-101; R.89(IH)Ex.1. Kovac admitted that Jabo and Willie Friend "both had some relationship with Eva's prostitution activity." R.193(IH):101. Kovac acknowledged at the ineffectiveness hearing that Willie Friend was "the most important witness for the State." R.193(IH):41. However, Kovac did not pull Willie Friend's criminal history records from the Department of Justice, listing some 16 aliases, or seek his arrest records, all of which were available. R.192(IH):40-43,46; R.193(Tr.):101-102; R.89(IH) Ex.1.

The police arrested Wilson at his workplace. R.180(Tr.):175. Wilson worked at Krause's Mill, where he had been for sixteen years and was a union steward. R.184(Tr.):33. Wilson also had served in the Army reserves for eighteen years. R.184(Tr.):102,107. Wilson was a drill sergeant and a qualified expert marksman, *id.*, which explained his possession of guns.

Friend's identification resulted in Wilson's being held in custody. (Wilson has remained in custody ever since April 21, 1993.) During the time of Wilson's arrest and custody, police told Wilson that he was being questioned about a shooting.

R.184(Tr.):49. Wilson cooperated with the police and gave them permission to search his house and car, from which they took a number of personal guns. R.184(Tr.):42-45.

While in custody en route to his house, Wilson heard on the police radio "information about a shooting on 9th street." R.184(Tr.):44. Once at the station, Wilson wanted clarification about why he was being held and he asked whether someone was dead. R.184(Tr.):49-50. Kovac did not question why the officers thought this query implicated Wilson. R.180(Tr.):216. After all, if he had been the shooter, Wilson need not have asked, given that Maric was shot at close range and the shooter therefore already would have known Maric to be dead.

On the shooting, the state presented a ballistics expert, Monty Lutz, who testified that "the .44 caliber bullets involved in the shooting were fired from a St[urm] R[uger] revolver." R.182(Tr.):48-58; R.140(IH)Ex.32. Lutz testified that no gun was found. R.182(Tr.):53.

Kovac did not cross-examine Lutz about the ballistics identification. R.184(Tr.):78-82. Although Kovac acknowledged at the ineffectiveness hearing the importance of this distinction to the defense, Kovac did not question Lutz regarding the .44

caliber Sturm Ruger murder weapon versus a .44 caliber Smith & Wesson, which Wilson testified that he had once owned before bartering it during a trip to Alabama. R.182(Tr.):78-82; R.184(Tr.):58-60.

c. Trial Counsel's Deficiencies and Wilson's Defense

The trial turned to the defense case, whose essence was that a third party—such as Willie Friend or his brother—committed or were implicated in the crime. R.193(IH):118-119. Kovac acknowledges that this was the defense; yet he did not notify the court by motion or otherwise. R.193(IH):69.

The state objected when Kovac finally sought to advance the defense. R.179(Tr.):41-43. Kovac was not prepared to respond and submitted nothing. R.193(IH):72-74,79-80. Kovac explained, "I don't know that I even used a police report. I just said this is our theory." R.183(IH):80.

The circuit court revisited the third-party-perpetrator defense two days after opening statements, when Kovac sought to cross-examine Friend on the third-party defense. Kovac attempted to explain by citing *State v. Denny*, but the court was unpersuaded. R.193(IH):73-75, 80; R.180(Tr.):12,247-248. Given the slim showing, the court did not allow the defense to ask cross-

examination questions on the third-party-perpetrator defense because it was "speculation." R.193(IH):81; R.180(Tr.):12.

Kovac did not seek a court ruling: "I would not have wanted to . . . press him for a ruling when he was obviously hostile to the idea." R.193(IH):81. Kovac simply asked no questions about the third-party defense. R.193(IH):85, Tr.6/30/1993:18, 50-82. Kovac also failed to make an offer of proof at the time of Friend's cross-examination about what he would have asked if the trial court had allowed this avenue of examination. R.193(IH):84-85.

Kovac failed with the defense's third-party case. It was not until *after the defense had closed*, following the July 4 weekend, that Kovac sought to introduce third-party-defense testimony. R.193(IH):53-54. Kovac sought to have Mary Larson testify as a "surprise witness." R.192(IH):21. The circuit court permitted Larson to give the jury some testimony about Wilson, but ***prohibited her from testifying about Friend***. R.193(IH):53-54,88-89; R.185(Tr.):11-17. Kovac countered with a minimal offer of proof: an instance where Friend told Maric that "he had to keep Eva in check" and one where he slapped Maric. R.185(Tr.):16-17. Kovac made no offer of proof about Friend's gun, his threat to Maric while in possession of the gun, or his subsequent threats.

Kovac sought to admit the testimony of Barbara (Lange) Streeter, but she, too, was prohibited from testifying about Friend's threats. R.193(IH):89-90; R.185(Tr.):38-42. Streeter told the jury she had observed the relationship between Maric and Friend and the one between Maric and Wilson, nothing more. R.193(Tr.):38-39. Kovac made no offer of proof for Streeter because "it was obvious that we were trying to get . . .the same information" from her. R.193(IH):90-91. Kovac did not present any further witnesses to support the third-party defense.

During closing arguments, the state relied on the testimony of Friend. R.187(Tr.):31-44. What the jury never heard was the defense rebutting this testimony with evidence of the Friend brothers' pimping Maric; Friend's possession of a gun and his threats towards Maric; and the Friends' illegal activities at the after-hours club on the evening when Maric was shot. *Id.*

Another problem, during the trial: Kovac acted in a way that delivered "pretty damning" hearsay evidence to the jury. R.193(IH):53. Kovac in effect assisted the state in presenting to the jury alleged statements by Maric before her death (1) that she recognized Wilson's automobile; (2) that she was being followed by Wilson; and (3) that Wilson drove her off the road and

threatened to kill her if she did not stop seeing that "nigger" (meaning Friend). R.193(IH):48-53; R.178(Tr.): 234-252.

Kovac initially objected to all three statements as "classic hearsay." R.178(Tr.):238. While the court admitted the first two statements, it excluded the third statement. R.178(Tr.):242. Some minutes later, Kovac revisited the third statement and, even though he had prevailed, informed the court that he was withdrawing his objection. R.193(IH):51; R.178(Tr.):250. The trial court was confused. *Id.* The state was confused. *Id.* When asked for clarification, Kovac told the state that it could introduce the statement without the need to overcome hearsay objections. R.178(Tr.)251-252. The State did. It told the jury of the statement:

- in its opening statement
- in its examination of Friend
- in its closing.

R.179(Tr.):9-10; R.180(Tr.):32; R.187(Tr.):35. Kovac even:

- inexplicably emphasized the statement to the jury in his examination of Friend.

R.180(Tr.):54-56. The hearsay statement was "dynamite testimony" against Wilson, as Kovac has conceded. R.193(IH):51.

Kovac acknowledges that, in his withdrawal of the objection, he permitted the state to admit the very statement he sought to exclude from evidence. R.193(IH):52-53. He has stated, "I didn't get around that problem by waiving my objection. Rather, I just ensured that the ruling was going to be changed [to admit the hearsay]." R.193(IH):58. Kovac has admitted that his withdrawal of the hearsay objection was "wrong." R.193(IH):52.

ARGUMENT

TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HIS DEFICIENCIES DEPRIVED WILSON OF A COMPLETE DEFENSE AND THAT WAS PREJUDICIAL.

Kovac's deficiencies "so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. *See Pitsch*, 124 Wis. 2d at 645-46, 369 N.W.2d at 720.

The State's case was one of improbabilities that relied not on physical evidence but on the credibility of a felon and pimp, Willie Friend. For a properly functioning adversary process, consistently with the defense as he stated it, Kovac:

- should have investigated and introduced to the jury Wilson's viable third-party-perpetrator defense

- should have used evidence impeaching the credibility of Friend
- should not have withdrawn a successful objection and thereby allowed Friend to give "pretty damning" hearsay testimony. R.193(IH):53.

The ineffectiveness court properly concluded that Kovac's representation was "deficient in various respects." App 5. The court's error was to conclude that deficiencies were "not prejudicial." *Id.* It did so because it focused on the state's case and on whether the evidence supported the conviction. This was error under *Holmes*, 547 U.S. at 329-31, and *Pitsch*, 124 Wis. 2d at 645-46, 369 N.W.2d at 720.

This Court should conclude that these deficiencies prejudiced Wilson. "[L]egal conclusions of whether the performance was deficient and prejudicial" are "questions of law independently reviewed by this Court." *State v. Delgado*, 194 Wis. 2d 737, 750, 535 N.W.2d 450, 455 (Ct. App. 1995). The magnitude of Kovac's deficiencies was extraordinary. And, as in *Holmes*, the ineffectiveness court "d[id] not focus on the probative value . . . of admitting the defense evidence of third-party guilt"

and "[i]nstead" improperly focused on "the strength of the prosecution's case." 547 U.S. at 329.

The test for ineffective assistance of counsel is met—deficiency and prejudice—and, therefore, this Court should determine that Wilson is entitled to a new trial. *See Strickland*, 466 U.S. at 687.

A. Kovac Provided Deficient Representation by Failing to Investigate and Present Wilson's Third-Party Defense.

Kovac's deficiencies undermined the core of Wilson's defense: specifically, that a third party committed the crimes. App. 1-2.

1. Kovac did not investigate circumstances of the crime that showed opportunity for the third party.

The ineffectiveness court found that "Attorney Kovac did not . . . investigate sufficient facts to support the admission of *Denny* evidence." App. 2. Kovac failed in his "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations . . . unnecessary." *Strickland*, 466 U.S. at 691; *accord State v. Domke*, 2011 WI 95, ¶41, 337 Wis. 2d 268, 291, 805 N.W.2d 364, 375.

To begin: Kovac did not investigate facts central to the state's case. Maric was killed while sitting with Willie Friend

outside an illegal after-hours club operated by his brother Larnell (Jabo) Friend and where the Friend brothers gathered. R.182(Tr.):26,31-34,38. Yet Kovac did not investigate any of the Friends. R.193(Tr.):100-104.

Kovac did not investigate the illegal activities at the club. R.193(IH):94-96, 98-100. Kovac knew from the police reports of illegal activities there and the use of a metal detector on that evening. R.193(IH):95-96, IHEx. 13. Yet Kovac did not ask officers why they did not search the club for the murder weapon. R.193(IH):97-100. "I guess I should have done" that, he now says. R.193(IH):99.[5]

Kovac's failure to probe into the illegality surrounding the crime scene compromised his ability to "investigate adequately the circumstances of the case . . . which could lead to facts that are relevant to either guilt or innocence." *State v. Felton*, 110 Wis. 2d 485, 501, 329 N.W.2d 161, 168 (1983):

- This was part of the "panorama of evidence needed to completely describe the crime," and place the shooting in context, which is significant given that the *state* was

[5] Given that the third-party-perpetrator defense *was* the defendant's theory, this is not second-guessing the trial counsel's selection of trial tactics. *Cf. Weatherall v. State*, 73 Wis. 2d 22, 25-27, 242 N.W.2d 220, 222-23 (1976).

relying on circumstantial evidence. *See State v. Duke*, 2007 WI App. 175 ¶28, 303 Wis. 2d 208, 227-28, 736 N.W.2d 515, 524.

- The absence of this evidence was crucial, as reflected in the Wisconsin Supreme Court's criticism on direct appeal: "Wilson has proffered no *evidence* demonstrating that Friend had the *opportunity* to arrange a hit on Maric during the relatively short time they were in Maric's car—no evidence that Friend had the contacts, influence, and finances to quickly hire or engage a shooter or shooters to gun down a woman on a public street." R.75, ¶85 (emphasis in original).

As shown at the ineffectiveness hearing, Kovac could have and should have shown that Willie Friend had brothers—brothers with lengthy criminal records, such as operating the "house of prostitution" that was the illegal after-hours club, which involved metal detectors (and thus presumably guns). R.193(IH):96-97; R.194(IH):22-23. The Friends' gathering spot was the illegal club through which the Friends easily could have deployed "the contacts, influence, and finances to quickly hire or engage a shooter or shooters to gun down a woman on a public

street." R.75, ¶85. And it was outside that club that Maric, who shared in some of these illegal activities, was killed.

Kovac should have made investigating Friend, his brothers, and their activities a priority. Friend was *the* person who identified Wilson for the police, and his "credibility [as] the complaining witness was central to the jury's verdict." *Thiel*, 2003 WI 111, ¶4, 264 Wis. 2d at 581, 665 N.W.2d at 310-311. Indeed, in *Thiel*, trial counsel's "failure to use a great deal of available evidence to impeach the State's chief witness because of inadequate trial preparation" was ineffective assistance of counsel. *Id.*

2. Kovac did not investigate Maric's circumstances, which showed the opportunity for a third party.

Kovac also dismissed evidence about Maric that implicated Willie Friend in her death, going to the opportunity element of *Denny*. At the ineffectiveness hearing, Kovac explained the theory of the defense:

> . . . it was effectively a conspiracy between Willie Friend and his brother to set her [Maric] up, because she was trying to get out of the prostitution business with Jabo. And so, you know, she was problematic to Jabo and that Willie Friend, the brother, set her up in the street there for then someone to come by, not necessarily Jabo, but somebody who was part of this agreement to kill her.

R.193(IH):118-119. ***Yet Kovac did not pursue or present available testimony that Maric was a prostitute who wanted out of the business.***

Kovac was aware of the circumstances. He understood that Jabo and Willie Friend "both had some relationship with Eva's prostitution activity, Jabo more than Willie. . . . Jabo was more the head of the business and Willie was, I assume, just cooperated with him." R.193(IH):101,122. And evidence was available.

Maric's long-time friends, Larson and Streeter, testified at the ineffectiveness hearing that Maric was a prostitute. R.192(IH):16-19,26; R.193(IH):24, 27. Maric talked with them, in Friend's presence, about getting out of prostitution, and they experienced Friend's violent response. R.192(IH):17-19; R.193(IH):29. At the ineffectiveness hearing, Streeter testified about one conversation, "[T]hey were all talking about her prostitution. And [Maric] was saying how she didn't want to be in it. She was kind of done with it. She wanted to stop. He said, 'well, you ain't stopping. I'm gonna keep all my bitches in check.'" R.193(IH):29.

Larson testified similarly of Friend's view, and this was said when he had a gun: "she [Eva] gonna do what I say or I'll pop her, and I won't think twice about it." R.192(IH):19. Although they believed that the prostitution contributed to Maric's death, R.193(IH):31, Kovac did not investigate sufficiently to elicit the foregoing critical testimony.

Larson and Streeter feared Friend, R.192(IH):17; R.193(IH): 24-25, and feared for Maric. Maric's family shared their concern. The victim's mother, as recorded in a police report, stated: "Eva told 'Jabo' she wanted to get out of the prostitution business. Upon doing so, 'Jabo' threatened to kill Eva if she attempted to leave him and that type of business." (R.135(IH)Ex.27, properly admitted at the ineffectiveness hearing as it is an ancient document under Wis. Stat. § 908.03(16).)

This evidence did not figure into the defense either in cross-examining Friend or otherwise, even though it is probative and substantially supports Wilson's third-party defense. Kovac, as a former prosecutor, knew that in a trial of Friend the state could have used the evidence from Larson, Streeter, and Maric's family consistently with *Simpson v. State*, 83 Wis. 2d 494, 511-512, 266 N.W.2d 270, 277 (1978), as threats to the victim to establish,

among other things, *intent*. He thus could have used them here in the third-party defense. *Denny*, 120 Wis. 2d at 623, 357 N.W.2d at 17 (stating that defense has lesser burden than prosecution but not doubting that it can introduce same sort of evidence). Kovac failed in his "duty [as] a lawyer to . . . explore all avenues that could lead to facts that are relevant to either guilty or innocence." *Felton*, 110 Wis. 2d at 501, 329 N.W.2d at 168.

Kovac's failure to tell the story of Maric as a prostitute mattered deeply. The state portrayed Maric's murder as arising from a love triangle, but Kovac could have shown otherwise. For instance, Kovac did not call Willie Wilson as a witness. Wilson could have testified (as at the ineffectiveness hearing) of his awareness that Maric was a prostitute and that his brother (General Grant) knew of Maric's prostitution and tolerated it. R.192(IH):30-34. Answering-machine messages from Maric left on the phone of General Grant, which were admitted at the trial, were consistent with this: They demonstrated that Maric had no fear of Wilson, contrary to Friend's testimony. R.184(Tr.):67-71.

Maric's friends and family would have told the jury that, by contrast, Maric feared Friend. Maric wanted to break from

prostitution for the Friends, and this provided the reason for Friend's action: he had to "keep all [his] bitches in check." R.193(IH):29.

This statement was against Friend's interest and thus not hearsay under Wis. Stat. § 908.045(4). Further, it is an excited utterance with a threat of deadly force and thus admissible under Wis. Stat. § 908.03(2). As in *Simpson*, 83 Wis. 2d at 511, 266 N.W.2d at 277, Friend's threat to Maric was "competent admissible evidence in [a] homicide," showing "intent," and, on the same principle, it was evidence available in a third-party defense to impeach Friend's story about his relationship with Maric.

Knowledge of Friend's character, violent tendencies, and motives would have helped the jury understand what happened April 20-21, and undermined Friend's credibility.

B. Kovac's Representation Was Deficient in Not Investigating or Using Impeachment Evidence to Attack Friend's Credibility.

The State's case was circumstantial, relying on Friend's testimony in large part. Kovac knew about Friend's conflicting accounts of the shooting, and he should have exploited the existing significant opportunities to attack Friend's credibility.

1. Kovac missed opportunities to impeach Friend's testimony.

Friend was *the* state witness who identified Wilson. Friend testified at trial that he saw a "blue steel large revolver" in the hand of the gunman. R.180(Tr.):38. At trial, witnesses (Terry Bethly and a teenager who worked at a sporting goods store shooting range) reported that Wilson used a .44 caliber gun at a shooting range 18 days before the death of Maric. R.182(Tr.):5-7, 22-25. Neither could identify the manufacturer of the gun. *Id.* However, Bethly described the .44 gun in a police report admitted at the ineffectiveness hearing: "all black." R.149(IH)Ex.39.

Kovac admitted at the ineffectiveness hearing that he did not question Friend on this critical difference, *blue gun v. black gun*, R.194(IH):70-75, which would have undercut Friend's identification.

2. Kovac did not use lab or autopsy evidence.

Given the circumstantial nature of the state's case and its dependence on Friend's testimony, physical evidence was critical to the defense. Kovac went ahead with the murder trial, barely more than two months after the death, without receiving all of the results. Kovac acknowledged at the ineffectiveness hearing

that he had not received all the gun swab results until days into the trial. R.194(IH):105-107; R.103(IH)Ex.14. No vaginal swab results (which might have raised questions about Friend's narrative) ever were received. R.194(IH):54. This counsel had not done his job.

Kovac had the autopsy available. R.141(IH)Ex. 33. Yet, as the circuit court found, "Attorney Kovac did not use lab or medical evidence during his cross-examination of Willie Friend." App. 3. This failure to use available evidence to impeach a key witness was ineffectiveness. *See Thiel*, 2003 WI 111, ¶50, 264 Wis 2d at 600, 665 N.W.2d at 320.

Kovac should have questioned the medical examiner about the autopsy report and the improbabilities in Friend's testimony. The autopsy showed that, contrary to Friend's suggestions, Maric was *not* pregnant. R.141(IH)Ex.33. If Kovac had demonstrated this, it would have dispelled highly charged emotions at trial, which persisted through closing arguments into the court's conclusions at the ineffectiveness hearing (*see* App. 8).

One of the autopsy's most significant results for the defense was that Maric's stomach was "collapsed and contracted." R.141(IH)Ex.33:10. This evidence was available (as shown at the

ineffectiveness hearing) and valuable to impeach Friend who testified, as an essential part in identifying Wilson, that earlier "[w]e [Eva Maric and Friend] was sitting there eating some chicken and General came around the bend." R.180(Tr.):26.

The evidence of nothing in Maric's stomach conflicts with her supposedly eating chicken a few hours earlier. Maric even exhibited various slowing factors for digestion such as those discussed by the assistant Milwaukee County medical examiner. R.194(IH):99-104. The conclusion of the County's assistant medical examiner: it was as probable as not that food eaten by Maric would have still been in her stomach at the time of the autopsy. R.194(IH):112-115. This 50/50 chance would have helped sow reasonable doubt of Friend's narrative.

The conclusion drawn from this lack of evidence of eating chicken mattered. Friend placed Wilson's car at the shooting because of his earlier look at the car while eating chicken:

> Q: Was it the same car that you had seen on 5th and Center and on, in front of your mother's house earlier in the evening?
> A: Yes.

R.180(Tr.):36. With no chicken, there is no earlier glimpse of the car by Friend, on the basis of which he could pin Wilson's car to

the shooting scene. No chicken means no series of improbable events as told by Friend. This goes strongly to the reasonable doubt that the defense needed to show.

Additional physical evidence available to Kovac, but not used, was the report and testimony from the state's ballistics expert, Monty Lutz, who established that Maric was killed by shots from a .44 caliber gun manufactured by Sturm Ruger. R.182(Tr.):48-58; R.140(IH)Ex.32. Kovac should have questioned Lutz about the difference between a .44 caliber Sturm Ruger and the .44 caliber Smith & Wesson that Wilson had once owned and bartered away. R.193(IH):44-47. But Kovac did not question Lutz. R.193(IH):55-56. Kovac did not draw for the jury the distinction between the murder weapon and the gun Wilson had owned, even though Kovac now admits that this distinction was significant. R.193(IH):55-56. This Court has previously noted the importance of this difference. R.71 at 10, n.5.

3. Kovac failed to present critical testimony or, alternatively, provide adequate offers of proof.

Wilson's theory was the *Denny* defense: i.e., that a third party had the motive, opportunity, and direct connection to the

crime. Nonetheless, Kovac did not prepare and present the defense by motion or evidence, including offers of proof.

First, "Attorney Kovac did not file a motion before trial . . . to support the admission of *Denny* evidence." App. 2. Kovac simply made a brief oral statement and later mentioned *Denny.* R.193(IH):72-81; R.179(Tr.):41-49. He did not support this rhetoric with adequate substance, such as references to witness testimony, documents, or other proof. R.193(IH):72-81. This was prejudicial deficiency.

Kovac's "verbal offer of proof" led to "Judge Manian den[ying] Attorney Kovac's request to allow such evidence" because it "was based on speculation and hearsay." App. 2. An effective attorney here would have provided more than a verbal offer of proof.

Kovac had available Maric's family, Maric's friends, and other witnesses such as Willie Wilson. Kovac admitted at the ineffectiveness hearing that testimony from the Maric family—about Eva's prostitution, Jabo acting as Eva's pimp, and the after-hours congregating of Jabo, Willie Friend, and Eva, as well as Eva's desire to get out of prostitution—"would be important because that was our theory of the case." R.194(IH):11-13.

This was the defense, but Kovac did not advance it remotely effectively. The ineffectiveness court noted that, while "Mary Larson testified at trial, [she] was not permitted to testify about Willie Friend," App. 2, who was the victim's pimp. Kovac did not make an adequate offer of proof for Larson under Wis. Stat. § 901.03, so "the substance of the evidence [would be] made known to the judge by offer or [be] apparent from the context within which the questions were asked."

Larson had so much more of relevance to say. For example, among other things at the ineffectiveness hearing, "Mary Larson testified that three weeks before Eva's death, she saw welts on Eva's back, which Eva told her [came] from physical abuse perpetrated by Willie Friend." App. 2.

The ineffectiveness court admitted into evidence all of Larson's and Streeter's testimony. Not until after the fact, in its order, did the court seek to retract this admission: "[t]he physical abuse attributed to Willie Friend regarding the welts on Eva Maric's back was hearsay." App. 2.[6]

[6] At the hearing itself, the ineffectiveness court excluded only one piece of evidence, a medical expert's affidavit. R.150-153(IH)Ex.40. Thus, this Court is not being asked to review a ruling made during the evidentiary hearing.

Not so. The evidence was admissible under a hearsay exception, which this Court reviews as a *de novo* matter. *See State v. Stevens*, 171 Wis. 2d 106, 112, 490 N.W.2d 753, 756 (1992). Maric identified to Larson that Friend put "a lot of welts" on Maric's back. R.192(IH):25-26. This excited utterance was admissible under Wis. Stat. §908.03(2), since this reliving by Maric of Friend's infliction of the welts was a startling event. It also is "evidence of a pertinent trait of character of the victim of a crime to be offered" under Wis. Stat. § 904.04(1)(b) to prove conduct by Friend. Specifically, Larson and Streeter gave their opinions of Friend, his "cold[ness]," R.192(IH):17; R.193(IH):24-25, and his capacity for violence, which were "testimony as to reputation or in the form of an opinion" about Friend, admissible under Wis. Stat. § 904.05. This Court, then, can and should conclude *de novo* that the ineffectiveness court's after-the-fact determination of hearsay with no pertinent exception was erroneous.

Additionally, Kovac failed to provide an adequate offer of proof for Streeter. R.193(IH):89-91. Both Larson and Streeter had valuable, admissible testimony to offer in support of the *Denny* defense. As the ineffectiveness court stated:

> Mary Larson and Barbara Lange Streeter testified at the evidentiary hearing that four or five weeks before Eva's death when Willie Friend came to Mary Larson's house with Eva, they were all in the kitchen and Willie Friend had a gun sticking out of his pants. He announced that Eva was going to do what he said or he'd pop her and wouldn't think twice about it.

App. 2, n.3.[7] This is "competent admissible evidence" under *Simpson*, because "previous threats by the accused to kill the deceased tend to show the state of the accused's mind, his intent to kill, and his malice against the deceased at the time of the homicide . . . . Former threats made by the accused against the deceased are also admissible as evidence upon the question whether the accused in fact committed the homicide." 83 Wis. 2d at 511-12, 266 N.W.2d at 277 (internal quotation marks omitted). Given that the state could have admitted this testimony in any trial of Friend, basic logic (indeed, due process) suggests that Wilson could have introduced it here as part of the *Denny* defense. An effective counsel *would* have done so.

These threats came within months of Maric's death. So there is not even a concern of temporal remoteness. In all events, the threats were properly for the jury to consider, as "[any]

[7] Streeter's testimony detailed Friend's threat: "[T]hey were all talking about her prostitution. And she was saying how she didn't want to be in it. She was kind of done with it. She wanted to stop. He said, 'well, you ain't stopping. I am gonna keep all my bitches in check.'" R.193(IH):28-29.

remoteness . . . goes merely to the weight not to the competency of the threats as evidence." *Id.*

Larson and Streeter did not testify to the jury about Friend's threats and violence. R.185(IH):11-14,38-42. Larson told the trial judge that Friend threatened Maric and slapped her. R.185(IH):15-17. But nowhere did Larson testify, as she did at the ineffectiveness hearing, that Friend stated only weeks before Maric's death that he would "pop" Maric. Friend's direct threat of Maric with a gun was critical evidence.

Streeter's evidence, as set forth at the ineffectiveness hearing, was spot on: Maric "seemed like she . . . wanted to get out of the life" but had "fear" of her "pimp," who she identified as Willie Friend. Upon first hearing of Maric's death, "the first thought I had was it had something to do with prostitution." R.193(IH):8, 24-25, 31.

The original trial court would not admit Larson's or Streeter's testimony about Friend, calling it "speculation." R.180(Tr.):12. That ruling falls on Kovac, who did not lay a foundation for their testimony or make offers of proof. He needed to do more under Wis. Stat. § 901.03(1) than assume that

Streeter's testimony would have been "obvious." *See* R.193(IH):90.

C. Kovac's Failure to Object to Hearsay Evidence Was Deficient Performance.

Kovac permitted devastating hearsay testimony to go to the jury. Before opening statements, the state sought to admit three statements that Maric allegedly made to Friend. R.178(Tr.):234-252. Kovac initially objected the statements as "classic hearsay." R.178(Tr.):238. The circuit court disagreed, concluding that two of the three statements, while hearsay, fell within the exception of excited utterance. R.178(Tr.):239-241. However, as to the third statement—that Maric allegedly told Friend hours before her death that Wilson drove her off the road and threatened to kill her if she did not stop seeing the "nigger," R.178(Tr.):237, 242-243—the trial court concluded that it was hearsay without an exception. Tr.6/29/1993 at 234-242. When the state continued to argue for admission, the court stood fast but permitted the possibility of the state's renewing its motion in rebuttal. *Id.*

Although he had prevailed, ***Kovac*** inexplicably asked the trial court to reconsider its hearsay ruling. R.178(Tr.):250. Kovac informed the court that, upon reflection, he was

withdrawing his hearsay objection, permitting the statement's admission against Wilson. Kovac now agrees the statement was "pretty damning." R.194(IH):53.

That is understatement. The state used the statement against Wilson. Friend testified about it on direct examination, and Kovac compounded the damage on cross-examination, where the hearsay "got a lot more attention." R.193(IH):53. The state invoked it in closing. R.187(Tr.):35. Permitting it to be admitted was, in short, prejudicial.

Kovac conceded at the ineffectiveness hearing that he was "wrong." R.193(IH):52. He could not "rationalize" his decision to withdraw the hearsay objection. R.193(IH):57. Kovac explained why his action was illogical: "I can't explain it other than I was concerned about the statement that the judge made that he might revisit it. . . . That [i.e., my action] didn't make any sense because I was agreeing that it was going to come in anyway." R.193(IH):52.

The ineffectiveness court properly decided "Attorney Kovac's performance was deficient in withdrawing the objection." App. at 5. There was no reasonableness in Kovac's action under

these circumstances. *See Felton*, 110 Wis. 2d at 502, 329 N.W.2d at 169 ("reasonableness" required).

D. Kovac's Deficiencies, Singly and Cumulatively, Prejudiced Wilson, and the Court Erred in Determining Otherwise.

The ineffectiveness court erred in concluding that Wilson was not prejudiced by Kovac's deficiencies. For prejudice, "[t]he question for the court [is] whether the deficient performance [of trial counsel] undermines confidence in the outcome." *State v. Maday*, 2017 WI 28 ¶54, 374 Wis. 2d 164, 195, 892 N.W. 2d 611, 625. The answer here is "yes."

Kovac's many omissions and actions hamstrung the defense and infected the verdict. The defense's theory was not adequately presented. In particular, the "trial's reliability was undermined because the jury was not able to assess [witness] evidence" that "went to the core of [defendant's] defense." *State v. White*, 2004 WI App. 78, ¶¶12-21, 271 Wis. 2d 742, 751-756, 680 N.W.2d 362, 365-368.

1. Kovac's failure to investigate and present the third-party defense prejudiced Wilson.

Kovac's failure to adequately investigate and present the third-party defense was why the trial court was unwilling to hear the defense and why it failed. That is consistent with the

Wisconsin Supreme Court's reasoning: "Because Wilson [through Kovac] failed to make an adequate offer of proof as to [Willie or Larnell] Friend's opportunity, it was not error for the circuit court to refuse to admit Wilson's proffered evidence." R.75, ¶86.

And it already *is* this Court's conclusion. On remand, this Court stated that, if Wilson's allegations of Kovac's deficiencies were true, prejudice existed:

> Based on the Wisconsin Supreme Court's decision, Kovac's trial counsel['s] failure to adequately investigate and make an adequate offer of proof prior to or at trial *resulted in* the proper exclusion of third party perpetrator evidence pointing to Willie Friend or Larnell Friend. Wilson has thus alleged sufficient facts that, if true, show that he was prejudiced.

App. 13. At the ineffectiveness hearing, Wilson showed the alleged facts were, indeed, "true":

- No investigation was done by Kovac of the Friend brothers, including Willie Friend, who
  - were at the scene of the crime;
  - had substantial conviction records;
  - were known to, and had a relationship with, the police;
  - were named by friends of Maric as being the pimp for Maric's prostitution;

- ran an illegal after-hours club involving themselves and others in illegal activities.

R.192(IH):40-46; R.193(IH):94-104, 122; R.89(IH)Ex.1; R.90(IH)Ex.2; R.91(IH)Ex.3.

If Kovac had done his job, Wilson could have "identified any individuals as being the shooter or shooters possibly employed by Friend," as wanted by the supreme court, R.75, ¶85, and shown that the Friends had the "means or access or ability," *id.*, to plan and execute the shooting of Maric.

- The jury did not hear the circumstances surrounding the relationship of Maric and the Friend brothers, including:
  - the Friends pimping out Maric
  - the desire of Maric to leave prostitution
  - the fear that Maric and her friends had of Willie Friend.

  R.192(IH):19, 33, R.193(IH):24-29, 101.
- The jury did not hear from Larson and Streeter how Maric and they feared Friend or of Friend's refusing

to let Maric leave prostitution despite her desire to do so. R.192(IH):17-19; R.193(IH):29.

- The jury did not hear that Willie Friend had a gun and threatened Maric a number of weeks before her death. Willie Friend made the threat in the company of Maric, Larson, and Streeter. R.192(IH):17-19.

This Court was correct about prejudice. If Kovac had brought all this to the jury, it would have had evidence that "Friend had the contacts, influence, and finances to quickly hire or engage a shooter or shooters to gun down a woman on a public street." R.75, ¶85.

By contrast, the ineffectiveness court seemed to apply a sufficiency test, App. 5-8, thereby imposing a heavier burden on Wilson than contemplated by *Denny*: "[A] defendant should not be required to establish the guilt of third persons with the degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted." 120 Wis. 2d at 623, 357 N.W.2d at 17. *See also* David S. Schwartz & Chelsey B. Metcalfe, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 Wis. L. Rev. 337, 397-98.

Kovac's failure to present this evidence or provide a complete offer of proof establishing the *Denny* factors was critical to the failed defense. Kovac called the *Denny* defense "the heart of the theory of the defense." R.185(Tr.):19. Yet this counsel did not lay the foundation for the defense or submit evidence in the form of documents or witness offers of proof to persuade the court that this defense was more than "speculation." R.185(Tr.):22. This was not a strategy call for Kovac. It was ineffectiveness.

2. Wilson's inability to impeach the key witness, Friend, was prejudicial.

Kovac's deficiencies as trial counsel were all the more damaging because they deprived Wilson of a powerful challenge to the credibility of the state's key witness: Friend.

The state's case depended on Willie Friend. As this Court has previously stated, "Willie Friend was the only person linking Wilson directly to the crime." App. 10. The ineffectiveness court "f[ound] the most striking witness was Carol Kidd-Edwards." App. 6. But Edwards could not identify the gunman. Indeed, her description did not match Wilson. It was *Friend* who identified the gunman as Wilson.

Willie Friend's credibility mattered. But because of Kovac's deficiencies:

- The jury could not gauge the credibility of the testimony of Friend and his motives towards Maric.
- The jury did not hear the defense discredit Friend's trial version of the timeline of events surrounding Maric's death, using the neutral findings of the medical examiner in the autopsy that Maric's stomach was "collapsed and contracted." R.141(IH)Ex.33.
- The jury did not see the photograph supposedly used by Friend to identify the gunman, which would test Friend's account. R.193(IH):59-60.
- The jury did not hear the defense question Friend about his testimony that the gun that he saw in the *left hand* of the gunman was a *blue* gun while the gun discussed by Terry Bethly as the .44 caliber gun used by Wilson at the shooting range was a *black* gun and Wilson shoots *right-handed*. R.180(Tr.):38, 51, 67; R.183(Tr.)38-45; R.149(IH):39.

Kovac was obligated to use all means available to undermine the testimony of Friend, whose "credibility [as] the complaining

witness was paramount to the case." *Thiel*, 2003 WI 111, ¶¶4, 46, 264 Wis. 2d at 581, 598, 665 N.W. 2d at 310, 319. As in *Thiel*, Kovac's failure to "use . . . available evidence to impeach the State's chief witness because of inadequate trial preparation" was deficient and prejudicial. *Id.*

The ineffectiveness court concluded that, as to the lab and medical evidence for impeaching Friend, "there was no showing that evidence . . . would have been reasonably probable to alter the outcome of the trial." App. 3. But the state's case against Wilson was built on circumstantial evidence. Wilson only needed to show a reasonable *doubt*, and that doubt would have been enhanced by the autopsy evidence or the assistant medical examiner's conclusion that (if Friend's story were true) there would have been equally likely to be food in Maric's stomach.

Kovac forfeited many and substantial ways for attacking Friend's credibility. As in *Thiel*, they were of "sufficient quantity and persuasiveness to put into question the reliability of proceedings held in the trial." 2003 WI 111, ¶¶77-80, 264 Wis. 2d at 613-16, 665 N.W.2d at 326-27 (internal quotation marks omitted).

All of this matters in this "close call" involving *Denny*, as then District Attorney McCann adjudged it in 1993. R.187(Tr.):4. The jury reached an impasse after deliberating the first day. R.186(Tr.):154-156. The court instructed it to continue deliberations because the jury had "all the information you need to reach a verdict." R.186(Tr.):156. The jury then asked to review the testimony of Friend and Terry Bethly and the exhibit from the shooting range. R.186(Tr.):156-157. Friend, then, was important to deliberations (he could scarcely *not* have been), as were the events at the shooting range—and both were areas where Wilson's defense suffered because of Kovac's deficiencies. Those deficiencies undermined the reliability of the adversary process. *See White*, 2004 WI App. 78, ¶12, 271 Wis. 2d at 751, 680 N.W.2d at 365 (reversing in "close" case where counsel did not introduce evidence challenging the only two witnesses to transaction).

3. Kovac's ensuring that tainted hearsay went to the jury was prejudicial.

When Kovac withdrew the hearsay objection on which he had already prevailed (concerning Wilson's supposed threat against Maric), Wilson forfeited the right to have the statement

barred or admission limited. Kovac admitted at the ineffectiveness hearing that the statement was "pretty damning." R.193(IH):53. Friend testified to the damning statement in his direct and cross-examinations. The jury heard the damning statement in the state's closing. R.179(Tr.):9-10; R.180(Tr.):32, 54-56; R.187(Tr.):35. There was no objection, qualification, or limitation of the damning hearsay statement—all because Kovac abandoned a point that he had won.

Kovac's "wrong" decision cannot be considered strategic or reasonable representation, *see State v. Oswald*, 2000 WI App. 2, ¶49, 232 Wis. 2d 62, 88, 606 N.W.2d 207, 220, given his lack of explanation, its critical nature, and the damage that it caused to the defense.

The ineffectiveness court erred in determining that Kovac's withdrawal of his objection to damaging hearsay was not prejudicial. According to the court, while Kovac acted deficiently, the excited-utterance exception would have been reason for admission. App. 5. However, because of Kovac's action, the state was not required to argue hearsay or whether any exception to hearsay applied. Moreover, the trial court almost certainly would—and in all events should—have denied admission of the

hearsay because, in this close case, the damaging effect of the testimony would outweigh its admissibility. It cannot be seriously maintained that Kovac's failure to secure the exclusion of the statement (allegedly from Maric) that Wilson was stalking her was anything other than prejudicial to Wilson.

4. Kovac's deficiencies meant the jury heard the state without the defense case, and this was prejudicial.

The ineffectiveness court erred in its approach for evaluating the prejudicial effect of Kovac's deficiencies. Contrary to the Supreme Court's admonitions in *Holmes*, 547 U.S. at 329-31, the ineffectiveness court focused on the state's case rather than independently gauging the probative evidence in Wilson's defense. This also was inconsistent with the Wisconsin Supreme Court's guidance in *State v. Love*, 2005 WI 116, ¶41, 284 Wis. 2d 111, 132, 700 N.W.2d 62, 73, which instructs that, in determining prejudice, a court cannot be satisfied with reciting the strength of the state's case.

Here is Wilson's defense if independently considered:

(1) the Friend brothers, including Willie, were operating an after-hours as a place from which illegal activities were taking place;

(2) the Friends were involved in prostitution at that illegal after-hours club;

(3) Willie Friend, a felon, had a gun;

(4) the Friend brothers, through their illegal activities, had the contacts and the means to arrange and facilitate the murder of Maric;

(5) Maric wanted to leave her prostitution for the Friends;

(6) Friend, while in the possession of a weapon, threatened to kill Maric if she left prostitution;

(7) weeks later, Maric was killed outside the after-hours, after spending hours at the club with the Friends;

(8) Friend was sitting beside Maric outside the club when the bullets were fired;

(9) Friend left Maric in the car;

(10) Friend ran and, incredibly, was not hit by bullets despite the number fired;

(11) no physical evidence such as fingerprints, DNA, or a murder weapon tied Wilson to the crime;

(12) Friend's identification tied Wilson to the crime.

This evidence, taken with the other probative evidence discussed in this brief, adds up to a third-party defense under

Denny, with motive, direct connection, and opportunity sufficient for a third party, the Friends, to have been implicated in or have committed the crime. [8]

According to the supreme court, Wilson lacked the "show[ing] that a third party had the 'opportunity' to commit a crime by employing a gunman or gunmen to kill the victim." R.75, ¶10. Had the above-discussed information been collected and presented, Kovac would have established that the Friend brothers had the place of operation in the after-hours club and wherewithal to acquire guns and the "contacts, influence and finances," R.75, ¶85, needed to conspire to kill Maric because she wanted to stop prostituting for the Friend brothers. Friend wanted, as with "all [his] bitches," to "keep [Maric] in check," R.193(IH):16:25,29, and under the defense theory of the case he was involved in killing her when he could not do so.

The ineffectiveness court did not independently assess the defense facts presented above; rather, it simply agreed with the state's case that these facts were "speculation." *See* App. 6. The

[8] The ineffectiveness court was troubled by the third-party defense because, as it says, Willie Friend did not shoot Maric. App. 8. However, Wilson's defense did not rest on Willie Friend as the shooter. It would be sufficient, as this Court has recognized, for Wilson to "present evidence implicating Willie Friend and/or his brother Larnell Friend, in Maric's murder." App. 11.

court wanted to "[p]ut[] aside Willie Friend, as the State's star witness," App. 6. That cannot be done, given Friend's centrality to the state's case, any more than the court can "put aside" Kovac's failure to elicit evidence impeaching Friend's credibility.

The ineffectiveness court sought to deflect Kovac's troublesome handling of Friend by turning to concerns about Wilson's credibility. For instance, the court discussed Wilson's having been less than forthright about owning a .44 caliber gun. App. 7. But this gun-ownership evidence does not overcome Kovac's deficient performance. Wilson's .44 caliber gun was not the murder weapon. The state's testifying witness, Terry Bethly, stated that Wilson's had a .44 caliber gun some weeks before Maric's death, and she described in the police report the gun as "all black." R.149(IH)Ex.39. Friend testified that the gunman who killed Maric had a .44 "blue steel large revolver." R.180(Tr.):38. Friend further stated that the gunman was left-handed and wore wire-rim glasses. R.180(Tr.):51, 67. Defense evidence was introduced that Wilson was a right-handed shooter and did not wear gold wire-rim glasses. R.183(Tr.):38-45. Additionally, above, pages 19-20 discuss the circumstances and responses to the court's other credibility points.

The ineffectiveness court focused on the state's case, which is what the jury also heard because of Kovac's deficiencies, and this was error. *See Love*, 2005 WI 116, ¶41, 284 Wis. 2d at 132, 700 N.W.2d at 73. Wilson was deprived of the opportunity for a "logical conclusion [to] be reached regarding the strength of contrary evidence offered by [Wilson] to rebut or cast doubt." *Holmes,* 547 U.S. at 331. Wilson was, in short, deprived of a "meaningful opportunity to present a complete defense." *Id.* (quoting *Crane*, 476 U.S. at 690).

* * * *

"[W]hen the court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency, if, taken together, the deficiencies establish cumulative prejudice." *Thiel*, 2003 WI 111, ¶¶59-60, 264 Wis. 2d at 603-06, 665 N.W.2d at 321-22. Kovac's deficiencies, singly and cumulatively, deprived Wilson of his constitutional right to a complete defense under the Sixth Amendment (as interpreted in *Crane*, 476 U.S. at 690, and other cases) and the Wisconsin Constitution, and this was prejudicial. There was no fair trial here where there was "deficient performance by [trial counsel that] prejudiced the defense." *Strickland*, 466 U.S. at 687.

CONCLUSION

The order denying General Grant Wilson's motion for a new trial should be reversed. His judgment of conviction and sentence should be vacated and the matter remanded for a new trial.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief and Appendix of Defendant-Appellant General Grant Wilson conforms to the rules contained in s. 809.19(8) for a brief produced with a proportional serif font. The length of this brief is 10,996 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this Brief and Appendix of Defendant-Appellant General Grant Wilson, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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.

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MAILING CERTIFICATION

I, Anne Berleman Kearney, do hereby certify that the Brief and Appendix of Defendant-Appellant General Grant Wilson was hand-delivered to a third-party carrier (Federal Express) on May 29, 2018 for delivery to

Ms. Sheila Reiff
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I further certify that on May 29, 2018 three copies of the Petition for Review were mailed via the United States Postal Service, postage prepaid, addressed to the following counsel:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this Brief and Appendix of Defendant-Appellant General Grant Wilson is an appendix that complies with s.809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral and 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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