AP04

STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT I

State of WISCONSIN,
Plaintiff-Respondent,

v. Case No. 2010AP000425

Tramell E. STARKS,
Defendant-Appellant.

APPEAL FROM CIRCUIT COURT OF MILWAUKEE COUNTY
FROM THE DENIAL OF POSTCONVICTION MOTION

APPELLANT'S BREIF AND APPENDIX

Tramell E. STARKS,
Appellant-Defendant,
pro se.

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STATEMENT OF ISSUES

I. STARKS' post-conviction motion alleges sufficient material facts that entitle him to an evidentiary hearing.

This issue was not presented to the trial court.

II. Post-conviction counsel was ineffective for not asserting meritable claims of ineffective assistance of trial counsel on STARKS' direct appeal.

The trial court disagreed.

III. The outcome of STARKS' trial is grossly undermined by five ineffective assistance of trial counsel errors.

The trial court disagreed.

IV. Under the totality of the circumstances, the cumulative effect of trial counsel's errors amounted to prejudice.

The trial court held that none of trial counsel's errors were prejudicial.

STATEMENT ON ORAL ARGUMENT & PUBLICATION

Oral argument or publication are not necessary for this court to address the issues on this appeal. The issues in this appeal are novel and only require a reasonable application of already established law.

STATEMENT OF CASE

On March 31, 2005 just before 2:30 PM STARKS allegedly confronted the victim Lee WEDDLE, inside of WEDDLE's apartment on the north side of Milwaukee, and the confrontation presumably led to a fist fight. Supposedly several individuals, including Wayne ROGERS, claimed to have witnessed this fight. At some point after the alleged fight, WEDDLE was shot three times in the area of his buttocks and thighs. During and after the shooting everyone inside the apartment scattered. The resident to the upper flat of the duplex where WEDDLE lived called authorities and reported hearing a struggle and several gunshots. Police arrived on the scene and found WEDDLE's body lying in a pool of blood on the kitchen floor. The coroner concluded that WEDDLE died as a result of exsanguinations (R. 2:1-2; App. 144).

A short time later, authorities received a tip that STARKS was responsible for WEDDLE's death and that ROGERS was present when it happened. At some point STARKS received word that authorities were looking for him in connection to WEDDLE's death so he walked into the police station and made himself available for questioning. STARKS was taken into custody and affirmatively denied any involvement in WEDDLE's murder, so he was released from custody.

At some point in August 2005, some five months after WEDDLE's death, ROGERS was arrested for a drug offense. It was during that arrest when he was first questioned about WEDDLE's murder. Like STARKS, ROGERS denied knowing anything about what happened to WEDDLE. He told authorities he was sleep when the shooting happened and that he never saw the shooter (R. 2:4; App. 146)[1].

ROGERS was continuously interviewed by authorities about WEDDLE's death and each time he told a different story and claimed each version to be true and correct. Several interviews and statements later ROGERS finally claimed that WEDDLE was his "best friend." He then went on to tell authorities another version of what happened to WEDDLE. This time he claimed he witnessed a fight between STARKS and WEDDLE and that after the fight STARKS walked over to his known associate, Mario MILLS, retrieved a handgun and then shot WEDDLE. It was at this point ROGERS also claimed he ran out of the house and never helped or called assistance for his supposedly "best friend" WEDDLE (R. 2:4; App. 146).

Eight months after WEDDLE's death ROGERS was re-interviewed by authorities again. It was at this point he "recalled" that shortly after the shooting he called MILLS, STARKS' associate, and asked if WEDDLE was okay, when STARKS allegedly got on the phone and said, "Fuck [WEDDLE]" then hung up.

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[1] Antwon NELLUM was the first person interviewed by police that allegedly implicated STARKS in WEDDLE's death. In the background of this court's decision for STARKS' direct appeal, it was strongly implied that STARKS was somehow responsible for NELLUM's death or that NELLUM was murdered because he implicated STARKS. See R. 108, ¶¶4-5. Cf. R. 77:29, where there's mention of a statement from ROGERS that NELLUM shot at MILLS the night before he was killed and there was nothing linking STARKS to NELLUM's murder.

Ultimately STARKS was arrested and charged with first degree intentional homicide as party to a crime and possession of a firearm by a felon (R. 9). He pled not guilty and went to trial (Rs. 82 thru 92).

Before trial STARKS' trial counsel filed inter alia two motions in limine seeking to exclude any and all other-acts evidence from being submitted to the jury (R. 24 and 27; App. 117-121).

At trial Carvius WILLIAMS testified that he saw STARKS shoot WEDDLE, yet he also stated that he never saw a gun in STARKS' hands. He also testified that at some unknown point in time or circumstances STARKS told him, "If you shoot anybody below the waist, it's not attempted homicide" (R. 89:76; App. 116).

Another witness for the state was Trenton GRAY, STARKS' cousin, who was not present when WEDDLE was shot, but testified that he had several discussions with STARKS about WEDDLE's murder. One of those conversations allegedly took place on the day of a relatives death (R. 89:56-58), and another allegedly happened when GRAY supposedly called STARKS from "JUNEBUG's" cell phone (R. 88:77). STARKS emphatically denies ever talking to GRAY about WEDDLE's murder on the phone or the day of a relative's death (App. 114-115).

Through GRAY's testimony it was discovered that the court's sequestration order was violated (R. 90:54; App. 123-125). As it turned out GRAY and ROGERS talked with each other about the case against STARKS when they were transported to trial in the same van. At least nine other prisoners, including a Dion ANDERSON, were transported in the van with GRAY and ROGERS, and were potential witnesses (R. 90:55-56; App. 139). However, only one witness was

questioned about the nature and extent of what was communicated between GRAY and ROGERS in that van and that was GRAY (R. 90:48-54).

STARKS' theory of defense was complete innocence and to establish that, he had to undermine the credibility of the state's three key witnesses--ROGERS, GRAY, and WILLIAMS, by proving them all to be opportunist, liars, and false witnesses. A key witness to STARKS' defense was his co-defendant Mario MILLS, whose name appears on the amended defense witness list, but was never called to testify (R. 39; App. 138).

A lesser included instruction was given to the jury along with the original charge (R. 43). However, STARKS' trial counsel did not take the prior advice if the prosecution and request cautionary instructions for any of the other-acts evidence presented to the jury (R. 89:20; App. 122). The jury found STARKS guilty of the lesser included offense and the possession charge (Rs. 43 and 44). He was sentenced to 45 years (31 initial confinement; 14 extended supervision) on the homicide charge, and a consecutive term of 10 years (5 years initial; 5 extended) on the possession charge (R. 53). His judgment if conviction was corrected to eliminate all references to party to a crime (Rs. 54 and 57; App. 148-149).

STARKS conviction was affirmed on direct appeal (Rs. 108 and 110). On January 18, 2010 he filed a motion for post-conviction relief (R. 125). The trial court denied that motion (R. 126; App. 101-106). This appeal is the result of that denial.

I. STARKS' Post-conviction Motion Alleges Sufficient Material Facts Which, If True, Entitle Him To An Evidentiary Hearing

Summary—

It is well established that ineffective counsel claims must be raised in the circuit court and be subjected to a Machner Hearing before they can be discussed on appeal. See State v. Waites, 158 Wis.2d 376, 392, 462 N.W.2d 206 (Wis.1990)(Ineffective counsel claims deemed waived when they are not raised in a motion to the trial court); and State v. Machner, 92 Wis.2d 797, 285 N.W.2d 905 (Ct.App.1979).

In his motion to the trial court STARKS requested an evidentiary hearing on his ineffective trial counsel claims and his request was denied without explanation. On this appeal he seeks appellate review of the trial court's decision not to grant him a hearing and asserts that his motion does contain sufficient material facts that entitle him to a hearing on all of his ineffective trial counsel claims.

Standard Of Review--

If STARKS' motion does not set forth sufficient material facts, the trial court's decision not to hold a hearing is reviewed under the deferential erroneous exercise of discretion standard. However, if his motion does set forth sufficient material facts which, if true, would entitle him to relief, the trial court was required to hold a hearing and such a motion presents questions of law that is reviewed de novo. See State v. Bently, 201 Wis.2d 303, 308-11, 548 N.W.2d 50, 53-54 (Wis.1996)(Explaining the standard of review for decisions not to hold an evidentiary hearing).

Argument--

The dirty window through which evidentiary hearings were previously examined was wiped clean by the WI Supreme Court in State v. Allen, 2004 WI 106, 274 Wis.2d 568, 682 N.W.2d 433 (Wis.2004). The Allen court made it clear that the standard for evidentiary hearings rest on the long standing principle that a motion must allege sufficient material facts and not rely on conclusory allegations. Id. 2004 WI 106, ¶23. The Allen court precisely identified markers that would satisfy the sufficient material facts standard--the name of the witness (who); the facts that can be proven (what, where, when); and the reason the witness is important (why, how). Id.¶24.

As part of his first issue STARKS sets forth the following sufficient material facts related to each of his ineffective trial counsel claims:

A. Trial Counsel's Failure To: Object To Prejudicial Other-Acts Evidence Elicited Through Prosecutorial Misconduct; Cross-Examine Witness; And Request A Mistrial Or Cautionary Instructions.

During trial Carvius WILLIAMS was allowed to testify that STARKS told him, "If you shoot somebody below the waist, it's not attempted homicide" (R. 89:76; App. 116). Due to the fact that WEDDLE was shot below the waist, the prosecutor maliciously elicited this uncorroborated comment to establish to the jury that STARKS had the propensity to commit the crime charged (R. 92:38; App. 113). For starters the prosecutor did not properly seek to have this evidence admitted under §904.04(2) with the knowledge that it was non-specific, vague, and uncorroborated, and its prejudicial value

heavily out weighed its probative value. Trial counsel was only present in name and not as a participant to the adversarial process when this evidence was elicited by the prosecution.

Trial counsel filed two motions in limine several months before trial to prohibit the submission of any and all other-acts evidence sought to be associated with STARKS (R. 24 and 27; App. 117-121). A hearing was held on the two motions by a judge other than the trial judge, and counsel was of the strong belief that the two motions were granted (R. 89:7). However, following counsel's objection to the separate other-acts evidence wrongfully attributed to STARKS by a witness who testified before WILLIAMS, the trial court revisited the issue as it related to that one particular witness and allowed that specific other-acts evidence to be submitted to the jury without addressing the other-acts evidence associated to WILLIAMS (R. 89:10-20).

When WILLIAMS' other-acts testimony against STARKS was elicited by the prosecutor on direct examination, counsel sat silent and did not utter one objection, or attack the evidence on cross examination, or seek a mistrial (R. 89:76). Counsel's failure to object; request a mistrial; or cross-examine the truthfulness of the other-acts evidence offered through WILLIAMS' testimony is equivalent to an engine falling out of a car on the highway, with counsel at the wheel and STARKS' in the passenger seat. Serious injury is inevitable in that situation.

In the trial court's decision that is the subject if this appeal it was concluded that WILLIAMS' other-acts testimony was "vague and non-specific" and did not refer[] to any other 'act' or

crime" (R. 126:3; App. 103). It was also concluded that WILLIAMS' statement was a "recitation of an opinion" made by STARKS. Id.

The trial court's conclusion that this evidence is not other-acts evidence is inaccurate. "The evidence against the accused shall be confined to the very offense charged and neither general bad character nor commission of specific disconnected acts, whether criminal or meretricious, can be proved against [the defendant]." Whitty v. State, 34 Wis.2d 278, 292-93, 149 N.W.2d 557, 563 (Wis.1967). State v. Jeske, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Wis.App.1995), has made it clear that "verbal statements" are admissible as other-acts evidence even when not acted upon. Further more, the judge that decided STARKS' post-conviction motion is not the same judge that presided over his trial.

By filing two motions in limine trial counsel demonstrated **before trial** that he was not willing to let the jury be tainted by prejudicial evidence. The question that looms in the reasonable mind is, "Why did counsel abandon that strategy **at trial** during WILLIAMS' testimony?" The only person who can provide the answer to that question is trial counsel.

To make matters worse trial counsel did not take the advice of the prosecutor and request that cautionary instructions be given for previous other-acts evidence (R. 89:20), which would have extended to the other-acts evidence now being challenged. As courts have stated, "a cautionary instruction, even if not tailored to the case, can go far to cure any adverse effect attendant with the admission of the [other acts] evidence." State v. Fishnick, 127 Wis.2d 247, 262, 378 N.W.2d 272 (Wis.1985). Because the jury was not given

"admonition or curative or limiting instruction[s]" there is a strong likelihood that STARKS was prejudiced by counsel's conduct. See State v. Spraggin, 77 Wis.2d 89, 101, 252 N.W.2d 94, 99 (Wis.1997)(Failure to give limiting instructions regarding evidence of other-acts evidence warranted reversal); and Arrowood v. Clusen, 732 F.2d 1364 (7th Cir.1984)(Trial counsel's failure to request limiting instructions constituted ineffective assistance of counsel).

Trial counsel is the witness who will testify at the hearing on this issue (who). Counsel's failure to: object to the other-acts evidence elicited by the prosecutor through WILLIAMS' testimony; cross examine WILLIAMS on the authenticity of that evidence; and request a mistrial or cautionary instructions, was not sound trial strategy are the facts that will be proven through counsel's testimony (what, where, when). The reason trial counsel's testimony at a hearing is important is because it will establish that his performance, with regard to the other-acts evidence maliciously elicited by the prosecutor through WILLIAMS' testimony, unfairly prejudiced STARKS and undermined the outcome of his trial.

Sufficient material facts have been established to warrant a hearing on the issue of trial counsel's performance regarding the other-acts evidence associated to STARKS through WILLIAMS' testimony.

B. Trial Counsel's Failure To Investigate The Phone Records Of Willie R. GILL, Also Known As "JUNEBUG."

The circumstantial case against STARKS hinged on the credibility of three state witnesses. One of those witnesses was

Trenton GRAY, STARKS' cousin. GRAY claimed among other things that he called STARKS on JUNEBUG's phone when STARKS supposedly made some incriminating statements (R. 88:77-82).

A key part of STARKS' defense relied on proving GRAY's accusations to be false, and exposing him for the "opportunist" that he was. To accomplish that objective STARKS urged trial counsel to find JUNEBUG and get a copy of his phone records. JUNEBUG's phone records would clearly prove that GRAY never talked to STARKS when he claimed, thus establishing GRAY to be a false witness looking for an opportunity to shorten a pending prison sentence.

As requested by the defense, the state handed over the one piece of evidence they had on JUNEBUG, which turned out to be a copy of GRAY's phone directory (App. 107-109). Listed in that directory was one JUNEBUG followed by two phone numbers (414)442-6586 and (414)745-5349 (App. 108). With this evidence in his possession, trial counsel made no effort to investigate these two phone numbers to see if they belonged to the JUNEBUG that GRAY referred to in his testimony. Two phone numbers. Not two hundred. Just two. Counsel clearly fumbled the ball with this crucial piece of impeachment evidence that would either expose GRAY as a liar or prove him to be credible. STARKS was "all in" on the former, and counsel folded before even looking at the hole cards.

For some reason counsel was under the impression that it was the state's duty to track JUNEBUG down and get his phone records to prove that STARKS never talked to GRAY. That logic escapes the grasp of reasonableness. This court wisely pointed that out in its decision on STARKS direct appeal when post-conviction counsel argued

that there was a "discovery issue" regarding the identity of JUNEBUG. It was in that decision this court pointed out that once GRAY's phone directory was turned over by the state, it was on trial counsel to do the additional footwork (R. 108:¶¶26-28). It was later discovered at trial that JUNEBUG was actually Willie R. GILL (R. 88:78).

When a case hinges on witness credibility, such as this one, any piece of credible impeachment evidence is valuable to fulfilling the function of the adversarial process--to discover the truth. The truth in this case in regards to GRAY's testimony, was never unveiled because counsel failed to investigate the two phone numbers under the name JUNEBUG listed in GRAY's phone directory. This crucial information was contained in discovery material provided by the prosecution, so counsel had a duty to at least explore the evidence. See Williams v. Washington, 59 F.3d 673 (7th Cir.1995)(An attorney has a duty to familiarize himself with the discovery materials provided by the state); and State v. Hubert, 181 Wis.2d 333, 510 N.W.2d 799 (Ct.App.1993).

There is no doubt at all on STARKS' behalf that JUNEBUG's (GILLS') phone records during the period in question would've revealed that GRAY never called or talked to him on JUNEBUG's phone. However, now that he's housed inside a maximum correctional facility his resources, finances, and abilities to obtain evidence that can't be obtained through open records, are extremely difficult to put it mildly. Despite the odds against him, STARKS continues to put forth his best effort to retrieve a copy of the materials in question, and

is currently in the process of trying to get GILL to release the information freely. See Letter from PI, App. 110.

Trial counsel and GILL will be the witnesses to testify at a hearing on this issue (who). GILL will testify as to the authenticity of the phone records, and counsel's testimony will prove: (1) the two phone numbers listed under JUNEBUG in GRAY's phone directory were important to proving GRAY, STARKS' cousin, to be a false witness, scoundrel, and a liar; and (2) this evidence was a key part to STARKS' defense (what, where, when). The reason why GILL's and trial counsel's testimony are so important is because it will establish that counsel's inactions with regard to this discovery material, was not sound trial strategy and greatly undermined the reliability of STARKS' trial.

Sufficient material facts have been established to warrant an evidentiary hearing on the issue concerning counsel's failure to investigate GILLS' phone records.

C. Trial Counsel's Failure To Interview And Call Mary MCCULLUM And Stanley DANIELS As Defense Witnesses.

Mary MCCULLUM and Stanley DANIELS have provided STARKS with sworn affidavits indicating that while at the home of a deceased relative--on the same day GRAY claimed STARKS told him about shooting WEDDLE--at no point did either of them see STARKS and GRAY talking with each other (Appxs. 111 and 112).

The statements of MCCULLUM and DANIELS contradict the testimony of GRAY who claimed that he talked to STARKS on that same day (R. 88:56). The statements that these two witnesses provided STARKS should not be considered as cumulative because this is the

first evidence that directly challenges GRAY's account of what happened on the day in question. The statements of these witnesses provided STARKS with ammo toward undermining any presumption of truthfulness the jury may have inferred on the basis that GRAY is STARKS cousin, and would have aided the jury in their search for the truth. These statements would further STARKS' claim that GRAY is a false witness, a scoundrel, and a liar seeking to jump on an opportunity to save himself (R. 88:48-49, 60). Had the testimony of these two witnesses been presented at trial, it would have undermined GRAY's seemingly strong credibility--based on his relation to STARKS--in the eyes of the jury.

The trial court concluded that there is no "reasonable probability that the jury would have ... believed that [MCCULLUM and DANIELS] had their eyes on [STARKS'] every single movement" (R. 126:5, note 4). However, because GRAY is STARKS' cousin--making them both equally related to MCCULLUM and DANIELS--the statements of MCCULLUM and DANIELS more than likely would have been considered by the jury as more closer to the truth because neither has nothing to gain from their testimony.

Due to the fact that the circumstantial case against STARKS hinged on the credibility of the state's witnesses, the statements of these two credible witnesses must be considered as highly valuable impeachment evidence against GRAY, one of the state's key witnesses. Counsel's failure to interview and call MCCULLUM and DANIELS as witnesses for the defense amounted to ineffective assistance of counsel. See Williams, supra, Sub-Issue B under this claim.

In addition to trial counsel, MCCULLUM and DANIELS would be the witnesses testifying at an evidentiary hearing (who). Counsel's testimony would prove that he was aware of witnesses that were willing to testify that GRAY and STARKS were never seen talking to each other at the home of a deceased relative (what). MCCULLUM and DANIELS testimony would prove that they kept a close eye on everyone at the house that day and at no point in time did they observe GRAY and STARKS talking to each other (what, where, when). These witnesses would also testify that they gave STARKS' trial counsel notice of the testimony they had to offer. The testimony of these two individuals is important for several reasons. First, counsel's failure to call MCCULLUM and DANIELS as witnesses for STARKS' defense can not be reasoned as sound trial strategy because their testimony taps into the core of the fact finding process (why). Second, the testimony of these two witnesses goes to the heartbeat of STARKS' theory of defense that GRAY is a false witness (why, how). Third, trial counsel's failure to call these witnesses hindered STARKS' defense and undermines the outcome of his trial (why, how).

Sufficient material facts have been established to warrant an evidentiary hearing on counsel's failure to interview and call MCCULLUM and DANIELS as defense witnesses.

D. Trial Counsel's Failure To Investigate And Interview Dion ANDERSON As A Witness.

There was a sequestration order issued by the trial court to keep all witnesses for STARKS' trial separated (R. 37). This order was violated when ROGERS and GRAY were transported to the courthouse

in the same van where they communicated with each other about the case against STARKS (R. 88:89-92). A key witness to this forbidden communication is Dion ANDERSON, one of several others who were present in the van (App. 139). ANDERSON witnessed, overheard, and participated in this banned communication (App. 127-128; and 132-137).

When it was discovered that the trial court's sequestration order had been violated, trial counsel filed a motion for mistrial (R. 90:50). However, and to no surprise, counsel did not seize the opportunity to seek out and interview the other witnesses who traveled in the van with GRAY and ROGERS, who were easily available at the courthouse. As a result the specifics of what was actually communicated between GRAY and ROGERS in that transport van went unexplored. The trial court easily disposed of counsel's unsubstantiated motion for a mistrial (R. 90:64).

Despite the daunting limitation of being incarcerated at a maximum correctional facility, STARKS has made and continues to make, valid efforts to obtain the necessary evidence to establish his innocence. With his very limited resources STARKS did hire a private investigator (PI) to find and interview ANDERSON regarding the forbidden communication that took place between GRAY and Rogers in that transport van. STARKS' PI found ANDERSON at a WI correctional facility but the PI's efforts to interview and obtain a statement from ANDERSON were thwarted by prison staff (App. 129). The only evidence STARKS has managed to gather are letters from ANDERSON indicating that while he was inside the van he witnessed GRAY and ROGERS conspire to get STARKS convicted (App. 127; 132-

136). Specifically, ANDERSON states, "I no (sic) how [GRAY and ROGERS] put everything together to get my cousin ... STARKS for a [expletive] murder he didn't do." App. 127. This statement is substantial and material to STARKS claim of innocence and critical to assisting this court with determining if the forbidden communication between GRAY and ROGERS was prejudicial in the form of tainted or fabricated testimony.

In the effort to discover the specifics of what ANDERSON knows, STARKS has exhausted all reasonable avenues available to him from behind prison walls. The institution where ANDERSON is housed has even prevented his PI from communicating or obtaining a sworn statement (App. 132). What is needed now is for ANDERSON to be subpoenaed to testify at an evidentiary hearing as to the specifics of what he witnesses between GRAY and ROGERS in that transport van.

Counsel's failure to adequately investigate and interview ANDERSON concerning the violated sequestration order was objectively unreasonable and undermines the outcome of STARKS' trial. See Crisp v. Duckworth, 743 F.2d 580 (7th Cir.1984)(Defense counsel should not only interview his own witnesses, but also those that the government intends to call); and Sullivan v. Fairman, 819 F.2d 1382 (7th Cir.1982)(Counsel's failure to locate and call witnesses amounted to ineffectiveness).

ANDERSON's testimony will establish that trial counsel failed to reasonably investigate the violated sequestration order (who); that GRAY was not the only witness who had testimony to offer regarding his own forbidden communication with ROGERS; that ANDERSON, and other witnesses, were readily available at the

courthouse; that GRAY and ROGERS had the intent to fabricate testimony against STARKS (what, where, when); and that GRAY's and ROGERS' testimony was tainted and prejudicial, entitling STARKS to a new trial (why and how).

Sufficient material facts have been established to warrant an evidentiary hearing on the issue surrounding counsel's failure to investigate and interview ANDERSON concerning the tainted trial testimony of GRAY and ROGERS.

E. Trial Counsel's Failure To Call Co-Defendant Mario MILLS As A Defense Witness.

Mario MILLS, STARKS' co-defendant, was present when the shooting took place inside WEDDLE's residence. As pointed out in his affidavit, if MILLS was called as a witness for the defense he would have identified ROGERS as the real shooter (App. 131). Another important fact that MILLS attests to in his affidavit, is that ROGERS--who was present when the shooting occurred--always carried a gun and had one at the time WEDDLE was shot. Id. It is worth noting that ROGERS was also wanted for a separate shooting when he was arrested and questioned for WEDDLE's murder (App. 150). These key facts partially corroborate ROGERS own testimony at trial (Cf. R. 86:95). Add to this the fact that ROGERS stated that he didn't see who shot WEDDLE until **after** he was arrested for his federal case (R. 86:71), and MILLS testimony equals crucial nun-cumulative exculpatory evidence that supports STARKS' claim of innocence.

Trial counsel interviewed and took a written statement from MILLS before trial attesting to these key facts; listed MILLS as a witness for the defense (App. 138); yet counsel never called MILLS

to testify for STARKS' defense. Trial counsel's failure "to call alleged accomplice to testify" amounted to a valid claim for ineffective assistance of counsel. White v. Godinez, 301 F.3d 796 (7th Cir.2002).

The trial court mistakenly concluded that the facts MILLS' attest to--which exonerate STARKS--were made after he entered a plea to a lesser charge and was sentenced. Cf. R. 126:5 (App. 105) and App. 140-141. The fact that MILLS is a close friend of STARKS has no more of a bearing on testifying to the truth, than the state witnesses who were rewarded for their testimony.

MILLS' affidavit establishes that trial counsel was aware of the exculpatory evidence he had to offer (who, where, when); and that counsel's failure to call MILLS as a witness for the defense was not sound trial strategy because it undermined the reliability of STARKS' trial (what, why, how).

Sufficient material facts have been established to warrant an evidentiary hearing on the issue of trial counsel failing to call MILLS as a witness for the defense.

Conclusion--

Within each of the above five claims, STARKS has made a substantial showing of material facts that require further exploration into his ineffective assistance of trial counsel claims at an evidentiary hearing. This court should reasonably agree with that assessment.

II. Post-conviction Counsel Was Ineffective For Not Asserting Meritable Claims On STARKS' Direct Appeal.

Summary--

STARKS asserts that post-conviction/appellate counsel's failure to raise meritable ineffective trial counsel claims is a sufficient reason and undermined the outcome of his direct appeal. Prejudice resulting from counsel's performance is established on three grounds: (1) STARKS' best opportunity to present his ineffective trial counsel claims were foreclosed; (2) the factual basis of STARKS' ineffective trial counsel claims were precluded from being developed at an evidentiary hearing; and (3) counsel's refusal to raise the claims are grounded on not wanting to tarnish the reputation of a colleague, and not on the facts of the case.

Standard Of Review--

Ineffective assistance of post-conviction/appellate counsel can constitute as a sufficient reason to overcome the Escalona requirement that must be satisfied in a second or successive petition following direct appeal. See State ex rel. Rothering v. McCaughtry, 205 Wis.2d 675, 556 N.W.2d 136 (Ct.App.1996). Ineffective post-conviction counsel claims are governed by the same standards as ineffective trial counsel claims. See State v. Sanchez, 201 Wis.2d 219, 232-36, 548 N.W.2d 69 (Wis.1996), citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Argument--

The appropriate forum for asserting ineffective assistance of post-conviction counsel for failure to raise ineffective trial counsel claims, is in a collateral motion under §974.06. See Page v.

Frank, 334 F.3d 901 (7th Cir.2003)(Post-conviction counsel deemed ineffective for failing to assert meritable ineffective trial counsel claim). Interestingly, the same counsel scolded in Page is the same one who's the subject of this appeal--Robert A. KAGEN.

STARKS urged KAGEN to challenge trial counsel's ineffectiveness regarding the issues now raised on this appeal. KAGEN refused to do so, not because the record did not support the claims, but on the grounds that he did not want to tarnish the reputation of a colleague. Such conduct is highly scrutinized. A lawyer must challenge the conduct of a colleague when it is necessary to protect the rights of their client. See ABA Standards For Criminal Justice: Challenges To The Effectiveness Of Counsel, 3rd Ed., §4-8.3(a). This is essential to our system of justice, and KAGEN disregarded it on STARKS' direct appeal.

Additionally, the ineffective trial counsel claims not raised by KAGEN on direct appeal precluded STARKS from developing a factual basis for his claims at an evidentiary hearing in the trial court. See Machner, 92 Wis.2d at 804 (Evidentiary hearing is a prerequisite to a claim of ineffective counsel to preserve the testimony of trial counsel).

Furthermore, KAGEN, post-conviction counsel, failed to "federalize" STARKS' appeal brief, by failing to cite U.S. Supreme Court authority to support the claims raised. See Appeal Brief In Chief, Table Of Authorities. Challenges to a state conviction are limited to claims decided contrary to U.S. Supreme Court authority. See 28 U.S.C. §2254. Failure to do so waives federal review.

Conlcusion--

Had KAGEN raised the underlying claims of ineffective assistance of trial counsel on STARKS' direct appeal, there is a reasonable probability that the outcome of the proceedings would have been different.

III. A Reasonable Probability Exist That The Outcome Of STARKS' Trial Would Have Been Different, Absent Five Ineffective Trial Counsel Errors.

Summary--

Like any well fought battle, the respect given to any worthy opponent is not determined by who claimed victory, but by who performed at an esteemed level. The question debated in this case is whether or not, under the totality of the circumstances, STARKS trial counsel's performance fell below an objective standard of reasonableness; and whether or not there exist a reasonable probability of a different result minus counsel's errors.

The case against STARKS is completely circumstantial, and his theory of defense at trial--complete innocence--was symbolically played out on "the battlefield of credibility" (uncredible versus credible) with his lawyer as the general in command. STARKS asserts that trial counsel committed significant errors on "the battlefield" that undermined counsel's performance and the outcome of his trial. In all STARKS alleges five claims of error where trial counsel failed to significantly advance his theory of defense rooted in his claim of innocence.

Without the distorting affect of hindsight and with a reasonable evaluation of the errors from trial counsel's frame of reference, it will be established that counsel's actions were

unreasonable and not sound trial strategy. As a result, there is a reasonable probability that absent counsel's errors the result of STARKS' trial would have been different.

Standard Of Review--

The right to counsel is entitled to criminal defendants under the 6th and 14th Amendment of the United States Constitution and Article 1§7 of the Wisconsin Constitution. Attached to the right to counsel is the right to effective assistance of counsel. See Strickland, supra, 466 U.S. at 686. The two familiar standards of governing claims of ineffective assistance of counsel are: "Deficient Performance" and "Prejudice." See Strickland, 466 U.S. at 687.

The Strickland standards require STARKS to show that "his lawyer's performance was deficient and that he was prejudiced as a result. ... [I]t is not the role of the reviewing court to engage in post hoc rationalization for the attorney's actions by constructing strategic defenses that counsel does not offer." Goodman v. Bertrand, 467 F.3d 1022, 1028-29 (7th Cir.2006); and Strickland, 466 U.S. at 688.

Claims of ineffective assistance of counsel present a mixed question of law and fact. The circuit court's factual findings will be upheld unless they are clearly erroneous. The issue of whether or not counsel's performance reaches the threshold of ineffectiveness is a question of law that this court reviews de novo. See State v. Theil, 2003 WI 111, ¶23, 264 Wis.2d 571, 588, 66 N.W.2d 305, 314 (Wis.2003).

Argument--

STARKS' trial counsel committed the following five errors that undermined the fundamental fairness of his trial:

counsel claims:

A. Trial Counsel's Failure To: Object To Prejudicial Other-Acts Evidence Elicited Through Prosecutorial Misconduct; Cross-Examine Witness; And Request A Mistrial Or Cautionary Instructions.

"[T]he evidence against an accused should be confined to the very offense charged and neither general bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against [the defendant]." Whitty, supra, 34 Wis.2d 292-293. See also Paulson v. State, 118 Wis. 89, 98-99, 94 N.W. 771, 774 (Wis.1903); and Boyd v. U.S., 142 U.S. 450, 458, 12 S.Ct. 292, 295 (1892).

At STARKS' trial Carvius WILLIAMS was allowed to testify that STARKS told him, "If you shoot someone below the waist, it's not attempted homicide" (R. 89:76; App. 116). This statement was "non-specific" and WILLIAMS could not recall when, where, and under what circumstances STARKS allegedly made that statement; nor could the prosecutor specify when WILLIAMS in fact told this to anyone on behalf of the state (R. 74:49). In essence this statement attributed to STARKS popped out of thin air. STARKS unequivocally denies that he ever made such a statement (App. 114, ¶2).

The prosecutor, ADA BECKER, maliciously elicited this statement from WILLIAMS and circumvented the admissibility test required for "other-acts evidence" under Wis. Stats. §904.04(2). See State v. Sullivan, 216 Wis.2d 768, 576 N.W.2d 30 (Wis.1998). As a

result, the trial court never weighed the appropriate factors to determine if this other-acts evidence should be admitted or excluded. It will later become evident why ADA BECKER used the "back door" to present this evidence to the jury.

Prior to trial, STARKS' counsel filed two motions in limine to exclude "other-acts evidence" from tainting the jury (Rs. 24 and 27; App. 117-121). At a pretrial hearing addressing the "discovery concerns" for the evidence in question, the trial judge gave numerous indications to trial counsel that there were a "variety of other potential prejudicial issues" concerning the other-acts statement attributed to STARKS through WILLIAMS (R. 75:8, 15). The fact that counsel failed to have this highly prejudicial, illicit, other-acts evidence suppressed at trial is clear evidence that counsel twiddled his thumbs and squandered a critical opportunity to prevent STARKS from being convicted based on unrelated prejudicial evidence. For STARKS, a person with no prior shooting cases or a history of violence, this error by counsel was cataclysmic.

"It is universally established under the 'character rule' that evidence of prior conduct may not be admitted into evidence for the purpose of proving general bad character, criminal propensity or general disposition on the issue of guilt or innocence because such evidence, while having probative value, it is **not legally or logically relevant to the crime charged.**" (emphasis added) Whitty, 34 Wis.2d at 291-92.

The character rule excluding prior conduct evidence as it relates to guilt rest on four pillars: (1) the over strong tendency to believe the defendant guilty on the charge merely because he is a

person likely to do such acts; (2) the tendency to condemn not because the defendant is believed guilty of the present charge but because they escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues might result from bringing in evidence of other conduct. See Whitty, 34 Wis.2d at 292. All four of these exclusion pillars were toppled by the other-acts evidence in this case and would have never been allowed in as evidence if it was properly requested by the evil-driven prosecutor. This is why ADA BECKER did not seek to have this evidence properly submitted to the jury.

The admission of the maliciously elicited other-acts evidence by ADA BECKER shattered the foundation of the exclusion rule and sabotaged the fairness of STARKS' trial.

To establish that ADA BECKER's actions were malevolent, a preview of the record before trial reveals that he knew there wasn't and never would be any records indicating the specifics of when STARKS made the alleged statement (R. 74:3-4). ADA BECKER deviously used this vague, uncorroborated, and unsubstantiated other-acts evidence as a basis to establish that STARKS had the propensity to commit the charged offense.

To establish that ADA BECKER relied on this evidence to show that STARKS had the propensity to commit the crime charged, we need not look any further than the closing arguments where ADA BECKER states, "[STARKS] knows how dangerous it is to shoot somebody perhaps below the waist" (R. 92:38; App. 113). ADA BECKER not only injected his personal opinion about STARKS knowing the dangers of

shooting someone below the waist, he also insinuated that STARKS had engaged in that type of conduct before and had the propensity to commit the crime charged. STARKS was unfairly prejudiced by ADA BECKER's characterization that "he [STARKS] knows what it means to shoot someone below the waist" because it created the perception that STARKS has shot people below the waist before. See Sullivan, at ¶69 (where prosecutor used other-acts evidence to show that the defendant "knows exactly what is going on" because he's been involved in similar conduct in the past).

A lawyer shall not "assert a personal knowledge of facts in issue, or state a personal opinion as to the justness of a cause, or guilt or innocence of an accused." Wisconsin Supreme Court Rules, 2004, 20:3.4(e). See also State v. Mayo, 2007 WI 78, ¶35, 301 Wis.2d 642, 662-63, 734 N.W.2d 115, 125 (Wis.2007); and U.S. v. Badger, 983 F.2d 1443, 1456 (7th Cir.1993)(prosecutor should not inject personal opinions or speak as if they "knows" what the jury believes).

On top of that, when ADA BECKER wrongfully elicited the prejudicial other-acts evidence in question, prosecutorial misconduct is established by the fact that the evidence was used as the proverbial "final kick at the cat." See Whitty, 34 Wis.2d at 297.

Without any doubt ADA BECKER's reinforcement of the other-acts statement elicited through WILLIAMS' testimony bolstered WILLIAMS' credibility and violated STARKS' 5th Amendment right to remain silent. By narrating the alleged other-acts statement, ADA BECKER impermissibly and indirectly referenced to STARKS failure to testify. The only way STARKS could disprove or refute the

uncorroborated other-acts evidence in question was to take the stand and relinquish his right to remain silent. See U.S. v. Cotnam, 88 F.3d 487 (7th Cir.1996)(Indirect commentary on a defendant's failure to take the stand constitutes as a violation of the defendant's 5th Amendment right not to testify). Counsel's failure to object to the maliciously elicited other-acts evidence in this case, allowed the jury to conclude--by STARKS' failure to testify--that the other-acts statement offered through WILLIAMS' testimony is not only credible but true.

The probative value of this evidence, if any, is out weighed by its prejudicial effect creating a strong likelihood that the jury used it as evidence that STARKS had the propensity to commit the crime charged. See Sullivan, 216 Wis.2d at ¶62 Fn. 19.

To make matters even worse, trial counsel did not object and request a mistrial when the evidence was elicited by ADA BECKER; did not seek out the specifics of the statement on cross examination of WILLIAMS; and did not request cautionary instructions for the jury.

Failure to object or request a mistrial. Counsel's failure to object and request a mistrial on the prejudicial other-acts evidence elicited through WILLIAMS' testimony, denied STARKS the opportunity to preserve the issue for appeal, and undermined the fundamental fairness of his trial. See State v. Marshall, 113 Wis.2d 643, 335 N.W.2d 612 (Wis.1983)(Failure to object to an error at trial generally precludes the defendant from raising it on appeal); and Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574 (1986).

Failure to cross examine witness regarding other-acts evidence. Counsel's failure to seek out the specifics of the

prejudicial other-acts evidence during cross examination of WILLIAMS allowed the jury to further imply that the statement was truthful. See Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038 (1973) (Due process rights of a criminal defendant are in essence the right to a fair opportunity to defend against the state's accusations); and Dixon v. Snyder, 266 F.3d 693 (7th Cir.2001)(defense counsel's failure to cross-examine witness deemed to be deficient performance that amounted to ineffectiveness). Trial counsel's failure to cross examine WILLIAMS regarding the fabricated other-acts statement waived STARKS right to a fair opportunity to defend against the state's accusation that he killed WEDDLE.

Failure to request cautionary instructions. Counsel's failure to request cautionary instructions allowed the jury to give considerable weight to evidence that otherwise would have been inadmissible. This blatant and utter disregard toward the substantial harm of the other-acts evidence in question is a clear case of ineffectiveness because cautionary instruction would have, at the very least, served as a "last line of defense" to ensure the jury properly considered the evidence. See Spraggin, supra, (Fatal error occurred when there were no admonition or curative or limiting instructions cautioning the jury that the other-acts evidence was not to be used as proof of guilt). Had counsel took heed to the recommendation of the prosecutor at the pretrial hearing, as to previous other-acts evidence "which would have weighed over" and requested cautionary instructions (R. 89:20; App. 122), a reasonable probability exist that the unfairly prejudicial effect of the evidence in question would not have infected the jury, and the

outcome of the proceedings would have resulted in a not guilty verdict.

The "vague" and "undefined" other-acts evidence attributed to STARKS through WILLIAMS' testimony is unfairly prejudicial on several grounds. First, this evidence was used by the prosecutor to establish with the jury that STARKS has bad character ("He knows how dangerous it is to shoot somebody perhaps below the waist" R. 92:38). Second, this evidence was so "vague" as to when, where, why, and under what circumstances it was made that it did not give STARKS the opportunity to challenge its authenticity, not to mention that no records exist of when WILLIAMS initially attributed the statement to STARKS. Third, the only way STARKS could come close to challenging the evidence was to sacrifice his 5th Amendment right to remain silent and take the stand. Fourth, outside of the fact that the victim, Lee WEDDLE, was shot below the waist, the evidence is not related to the crime charged, or corroborated by other evidence. Fifth, this evidence was so ambiguous that it more than likely was used by the jury as evidence that STARKS had the propensity to commit the charged offense. Last, ADA BECKER's treacherous elicitation of this uncorroborated evidence amounted to prosecutorial misconduct.

The circuit court concluded that the other-acts evidence in question was "vague and non-specific" and does not "constitute evidence of 'other bad acts' or of other specific crimes" (R. 126:3). That court also concluded that WILLIAMS' statement was only a "recitation of an opinion" made by STARKS, and the prosecutor's reference to it in closing arguments was "fair game." Id.

The circuit court's reasoning is inaccurate. Although the statement attributed to STARKS through WILLIAMS' testimony is "vague and non-specific," Jeske, has made it clear that "verbal statements" are admissible as **other-acts evidence** even when not acted upon. Furthermore, it was the position of the judge who presided over STARKS' trial that "there are fundamental issues" that needed to be addressed along with the "potential prejudicial issues under §904.03" (R. 75:15; App. 142). With that being said, it is clear that in the mind of the trial judge and the law, that this was other-acts evidence, and not just an opinion. Whether the evidence in question was more probative than prejudicial is the decision that this court must decide. See Wis. Stats. §(Rule)904.04(2).

Had trial counsel challenged the unrelated, vague, prejudicial other-acts evidence maliciously elicited by ADA BECKER, there exist a real probability that evidence would have been suppressed because its prejudicial effect outweighed its probative value.

Counsel's failure to reasonably respond to this issue can not be considered as sound trial strategy. The admission of this highly prejudicial evidence incites the real probability that STARKS' conviction is cradled in the hands of that unfairly prejudicial evidence. Evidence that is unrelated to the crime for which he stands wrongly convicted. Should this court decide to reach the merits of this claim without an evidentiary hearing, it must be reasoned that trial counsel was constitutionally ineffective in regards to how he handled the other-acts evidence attributed to STARKS through WILLIAMS' testimony.

B. Trial Counsel's Failure To Investigate The Phone Records Of Willie R. GILL, Also Known As "JUNEBUG."

Leading the charge for the state's case against STARKS on the "battlefield of credibility," was STARKS cousin Trenton GRAY. GRAY claimed, among other things, that he called STARKS on JUNEBUG's cell phone, when STARKS supposedly made some incriminating statements about shooting WEDDLE (R. 88:77-82).

Due to the fact that the outcome of STARKS' trial rested on the credibility of the state's witnesses, every single piece of impeachment evidence was crucial and would influence the final outcome.

Based on the police reports, STARKS knew that GRAY's testimony would be based on lies which is why he urged trial counsel to obtain a copy of JUNEBUG's cell phone records. This evidence would prove GRAY to be an uncredible witness. Trial counsel took heed to STARKS advice and made boisterous discovery demands for everything concerning JUNEBUG. In response, the prosecutor produced one piece of evidence; a hard three page copy of GRAY's phone directory (App. 107-109). In the listing of names on that directory there is one JUNEBUG and two phone numbers behind that name (App. 108). This evidence was supplied months before trial.

For some unknown reason trial counsel had the misconception that it was the prosecutor's duty to find out who JUNEBUG was, and track down his phone records to establish a nexus between STARKS and JUNEBUG's phone as claimed by GRAY.

This court wisely pointed out in its decision on STARKS' direct appeal, that once the phone directory was handed over as

discovery material, it was trial counsel's duty to do the footwork (R. 108:¶¶26-28). It was later discovered at trial that JUNEBUG is WILLIE R. GILL (R. 88:78).

Despite the fact that there were only two numbers behind the name JUNEBUG listed on GRAY's phone directory, STARKS' trial counsel did not even call the two numbers to see where they would lead. There existed a reasonable probability that one of those numbers belonged to the JUNEBUG that GRAY would and did mention in his testimony.

Due to trial counsel's blunder with investigating the two phone numbers, STARKS defense was paralyzed. JUNEBUGS's cell phone records, for the date and time in question, was a valuable piece of impeachment evidence against GRAY. Counsel never utilized that evidence to expose GRAY as a liar, and opportunist, who was uncredible from the start. GILL's phone records will unquestionably disprove GRAY's testimony.

Imagine trial counsel sitting and twiddling his thumbs in the heat of battle, instead of respectably safeguarding his client's rights, including but not limited to STARKS' right not to be convicted based on fabricated evidence. Is that the type of opponent worthy of respect and accommodation for good performance? That type of conduct shreds all standards of reasonableness, like paper in a shredder.

Trial counsel's performance on handling this valuable impeachment evidence for his client fell below the basic standards of reasonableness. Counsel's actions with regard to this evidence overshadowed the outcome of STARKS' trial, as well.

In the decision that is the subject of this appeal, the circuit court concluded that since STARKS failed to produce GILL's phone records--which is unavailable under open records--to establish the truthfulness and accuracy of his claims, his arguments are conclusory. The circuit court also was not persuaded that an attack on GRAY's credibility would have altered the outcome of STARKS' trial (R. 126:4).

When a case hinges on witness credibility, such as this one, trial counsel has a duty to investigate and present impeachment evidence when counsel is or should have been aware of its existence. See Williams, supra, Issue I.B. above.

With all respect to this court's ability to see the high level of importance for the phone records in question, and the undeveloped crux of this issue, there is a pause to consider. Trial counsel had in his possession--months before trial--the name and two numbers pointing to the only JUNEBUG listed on GRAY's phone directory. The results of even a simple phone call to those two numbers--not two hundred--would have produced a pivotal witness and credible evidence that would have proved GRAY's testimony to be uncredible, altering the outcome of STARKS' trial.

"The question before a reviewing court is never whether evidence would have been sufficient to justify conviction, absent error, but rather whether the error undermines the outcome of the proceeding to an unacceptable degree." U.S. v. Young, 470 U.S. at 20, Chapman v. California, 386 U.S. 18, 24 (1967); Kottenkos v. United States, 328 U.S. 750, 765 (1946).

It is only through the physical production of GILL's cell phone records, for the date and time in question, that four things can be established: (1) this valuable impeachment evidence existed; (2) that trial counsel squandered the opportunity to perhaps produce the most important piece of evidence at trial; (3) the evidence is crucial to exposing one of the state's key witnesses; and (4) counsel's failure to discover this evidence was unreasonable under the circumstances. This is why this case needs to be remanded back to the circuit court for an evidentiary hearing and GILL's phone records subpoenaed, along with GRAY's phone records for the alleged date and time, as evidence.

GRAY's trial testimony was more than likely the most damaging to STARKS because GRAY is STARKS' cousin. Trial counsel's failure to use valuable impeachment evidence to undermine GRAY's credibility at trial was objectively unreasonable and unworthy of a seal of valor.

"Counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary. In any ineffective case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

With extremely limited opportunities available to him as a resident at one of WI heavily fortified maximum prisons, STARKS is diligently using every resource available to him to obtain a copy of GILL's cell phone records on his own. However, with practically both hands and feet tied behind his back, STARKS desperately needs the

assistance of the courts to produce this evidence, because phone records are not accessible by the public. A court order is needed.

Peering from the view of trial counsel and applying a heavy measure of deference to counsel's judgment, without engaging in post hóc rationalization, we are primarily confronted with one question: "Why didn't trial counsel, at the least, investigate those two phone numbers behind the name JUNEBUG in GRAY's phone directory?" Even through trial counsel's rose colored lenses, it is undeniable that even though trial counsel made a ruckus about the prosecution concealing JUNEBUG's identity, he failed to investigate the two credible leads he had in his possession--those two phone numbers.

If this court decides to reach the merits of this claim WITHOUT an evidentiary hearing, it must be reasonably concluded that trial counsel's performance was objectively unreasonable and constitutionally ineffective.

C. Trial Counsel's Failure To Interview And Call Mary MCCULLUM And Stanley DANIELS As Defense Witnesses.

Another valuable weapon not used by trial counsel on the battlefield of credibility, was the voluntary credible testimony of Mary MCCULLUM and Stanley DANIELS (App. 111 and 112).

GRAY, the same witness discussed in the previous issue, also claimed at trial that STARKS "talked" to him about shooting WEDDLE, when he and STARKS were at the home of GRAY's dead grandmother (STARKS' Aunt) whose body was still inside the house (R. 88:56). This was another lie told by GRAY, STARKS' own cousin, that could have been countered by the testimony of two elders equally related to them both and had no incentive to lie; MCCULLUM and DANIELS.

The circuit court concluded that trial counsel's failure to call these two witnesses "did not operate to prejudice the case against [STARKS]" (R. 126:5).

STARKS' PI has provided him with sworn affidavits from MCCULLUM and DANIELS that specifically oppose GRAY's claim that he and STARKS communicated with each other at the house of a deceased relative. Both witnesses state that they did not see GRAY and STARKS talking to each other at any point in time on the day in question (App. 111 and 112).

There is no question that the testimony of these two witnesses would have been beneficial to STARKS defense. This is why he urged trial counsel to call these two witnesses to testify before trial even began. To no surprise trial counsel squandered another opportunity to safeguard STARKS' right to a fair trial and strengthen his theory of defense. The testimony of MCCULLUM and DANIELS more than likely would have been considered credible by the jury and reinforced the position that GRAY is uncredible. In addition to the fact that GRAY is a compulsive liar and opportunist willing to destroy the life of his cousin to save himself from heavy prosecution in another case, the testimony of MCCULLUM and DANIELS had more to offer for the spirit of the truth that loomed over STARKS' trial.

"An attorney who fails to interview a readily available witness whose non-cumulative testimony may potentially aid the defense should not be allowed to automatically defend his omission simply by raising a shield of trial strategy and tactics." Sullivan v. Fairman, 819 F.2d 1832 (7th Cir.1987).

Had trial counsel interviewed and called MCCULLUM and DANIELS as witnesses for the defense, there is a reasonable probability that their testimony would have been accepted as truthful and further undermined GRAY's credibility.

The specific testimony of MCCULLUM and DANIELS has yet to be fully developed, and shows the need for an evidentiary hearing on this issue as well. However, the key point to their testimony does significantly poke holes in the armor of GRAY's trial testimony, and provokes the possibility that the outcome of STARKS' trial would have been different.

Should this court elect to reach the merits of this claim WITHOUT having an evidentiary hearing, it should be reasonably concluded that counsel's failure to call these two witnesses to testify rendered counsel constitutionally ineffective.

D. Trial Counsel's Failure To Investigate And Interview Dion ANDERSON As A Witness.

There was a sequestration order to keep all witnesses separated during trial (R. 37). This order was violated when GRAY and ROGERS were transported to the courthouse in the same van (R. 90:54), during which time they exchanged communication between each other about the case against STARKS (R. 88:89-92). The specifics of this communication was never thoroughly examined by the trial court.

In the middle of this exchange between GRAY and ROGERS was Dion ANDERSON (App. 139), who confirms in a letter that GRAY and ROGERS conspired to get STARKS wrongfully convicted.

It was discovered during trial that there were at least nine other prisoners in the van with GRAY and ROGERS (R. 90:55-56), yet

none of these "direct witnesses" were interviewed about what they saw or heard transpire between GRAY and ROGERS while in that van. STARKS does have a copy of the listed prisoners who were in that van, however their names have been blacked-out, making any further investigation into this issue impossible without the intervention of the courts via an evidentiary hearing.

Trial counsel did not attempt to interview not even one of the nine potential witnesses to shed some light on the specifics of the violated sequestration order. Instead counsel made an unsubstantiated motion for a mistrial, which allowed the court to render an ex parte decision based solely on the testimony of the scoundrel accused of the wrongdoing--GRAY. GRAY initially denied having talked about STARKS case in the van (R. 84:90), then shortly thereafter came clean and admitted that he discussed STARKS' case with ROGERS (R. 84:91).

"Counsel has a duty to conduct an independent investigation into the underlying facts of the case and to the credibility of the prosecution's witnesses." Theil, 264 Wis.2d at 571. See also Duckworth, supra, (A defense attorney should interview not only his own witnesses but also those that the government intends to call).

Without motivation from STARKS, ANDERSON has written several letters indicating that while inside the van he witnesses GRAY and ROGERS conspire to get STARKS convicted. To be more specific ANDERSON states, "I no (sic) how [GRAY and ROGERS] put everything together to get my cousin [STARKS] for a [expletive] murder he didn't do." App. 127.

In the decision that is the subject of this appeal, the circuit court acknowledged STARKS' attempt to obtain valuable information from ANDERSON (R. 126:4; App. 104). However, that court also concluded that this claim was conclusory and determined that STARKS failed to established an evidentiary showing that counsel's performance was deficient (R. 126:4). What more can STARKS do from the confines of his prison cell, beyond the documentation he has already provided to the court? As mentioned in the argument for an evidentiary hearing on this issue (II.D. above), prison officials where ANDERSON is incarcerated have thwarted every attempt by STARKS and his PI to communicate with ANDERSON (App. 132). This court should acknowledge the difficulty incarcerated litigants have with producing sufficiently precise evidence of uncalled witnesses. See Wright v. Gramley, 125 F.3d 1038 (7th Cir.1997); and U.S. ex rel. Cross v. DeRobertis, 811 F.2d 1008 (7th Cir.1987).

Like the claims that precede this one, the crux of this issue is undeveloped, and needs to be properly examined at an evidentiary hearing.

Once again trial counsel squandered yet another opportunity to ensure that his client received a fair trial when he failed to at least interview ANDERSON--who was readily available at the courthouse--regarding GRAY and ROGERS' violation of the court's sequestration order. The depth of prejudice caused by the violated sequestration order went unexplored and increased the risk that STARKS trial was tainted by fabricated evidence.

The letters from ANDERSON (Appxs. 127, 132-136) clearly establish that trial counsel failed to interview at the very least

one key witness to the questionable communication between GRAY and ROGERS in the van; and that GRAY and ROGERS possessed the intent to fabricate evidence against STARKS.

Counsel's failure to investigate ANDERSON as a witness for the court's violated sequestration order, even after a plea from STARKS, can not be considered as reasonable sound trial strategy. Counsel's lack of action in this regard contributed to fabricated and tainted testimony being submitted to the jury. Should the court chose to reach the merits of this claim as well WITHOUT an evidentiary hearing, it must be reasonably determined that counsel's failure to investigate and interview ANDERSON undercuts the reasonable presumption that STARKS had a fair trial, rendering that STARKS was prejudiced by trial counsel's ineffectiveness.

E. Trial Counsel's Failure To Call Co-Defendant Mario MILLS As A Defense Witness.

Mario MILLS was present when WEDDLE was shot inside his home (App. 140-141). Trial counsel interviewed MILLS, took a statement, and placed him on the "Amended Defense Witness List" (App. 138). MILLS indicates in his affidavit that if he was called as a witness for the defense in STARKS' trial he would have testified that STARKS was not the shooter and that ROGERS--one of the state's key witnesses--was the real shooter. Id. MILLS was also willing to corroborate ROGERS own testimony that he always carried a gun (R. 86:95).

"To maintain the integrity of our system of justice, the jury must be afforded the opportunity to hear relevant and material evidence or at least not present with evidence on a critical issue

that is later determined to be inconsistent with the facts. Only then can we say with confidence that just has prevailed." State v. Hicks, 202 Wis.2d 150, 171-72, 549 N.W.2d 435 (Wis.1996).

The trial court concluded that this claim was highly speculative because of two key facts in MILLS' affidavit--that he never saw STARKS shoot WEDDLE, and the only weapon in the residence belonged to ROGERS--was made after MILLS entered a plea to a lesser charge and was sentenced (R. 126:5). However, the trial court is partially mistaken. MILLS was willing to testify to those key facts after he pled guilty, but before he was sentenced (App. 140-141).

Counsel's failure to utilize the benefits of MILLS' testimony at trial to advance STARKS' position on the battlefield of credibility, was another squandered opportunity to prove STARKS' innocence. MILLS' testimony would have undermined the three key witnesses for the state--GRAY, WILLIAMS, and ROGERS. Considering that these three state witnesses conspired to put STARKS' neck on the chopping block to save their own, MILLS testimony would have shattered their credibility. See Malone v. Walls, 538 F.3d 74 (7th Cir.2008)(Trial counsel's failure to call a witness who would have severely undermined the state's witnesses was manifest incompetence, not sound trial strategy).

Parallel to other claims raised on this appeal, the heart of this issue needs to be outlined and examined at an evidentiary hearing. However, should this court decided to reach the merits of this claim WITHOUT an evidentiary hearing, it must be reasonably concluded that MILLS' testimony would have changed the outcome of

STARKS' trial, concluding that STARKS was prejudiced by trial counsel's ineffectiveness.

Conclusion--

Trial counsel's ineffectiveness on each of the above claims grossly undermines the outcome of STARKS' trial. This court must reasonably conclude that trial counsel was ineffective and reverse STARKS conviction.

IV. Under The Totality Of The Circumstances, The Cumulative Effect Of Trial Counsel's Errors Amounted To Prejudice.

Summary--

The state's case against STARKS is mostly circumstantial, an relies heavily on the credibility of WILLIAMS, GRAY and ROGERS. The cumulative effect of trial counsel's errors are all, in some way, connected to the mishandling of valuable impeachment evidence against these individuals. Under the totality of the circumstances counsel's errors undermine any reasonable presumption that the outcome of STARKS' trial was fair and reliable. Trial counsel did not just botch up one error, he repeatedly demonstrated a lack of diligence required for a vigorous defense. All counsel had to do in the case against STARKS was establish reasonable doubt. Thus, had counsel not made the errors that are the subject of this appeal, he more than likely would have changed the outcome of STARKS' trial.

Standard Of Review--

"[W]hen a court finds numerous deficiencies in counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative

prejudice." Theil, at ¶59, referring to Washington v. Smith, 219 F.3d 620, 634-35 (7th Cir.2000).

To address the Strickland prejudice prong, this court must find that the effect of multiple deficiencies of trial counsel's performance undermines the presumption of confidence in the outcome of STARKS' trial. For a claim to be "included in the calculus for prejudice," it must fall below an objective standard of reasonableness. Whether or not the aggregated errors by counsel will be enough to satisfy the Strickland prejudice prong depends on the totality of the circumstances at trial and not the representation given. Theil, at ¶¶61-62.

The foundation to the Sixth Amendment right to effective assistance of counsel is to ensure that the fundamental fairness of the adversarial process was not compromised. If that fundamental principle is comprised by the cumulative effect of counsel's errors, a request for a new trial must be granted.

Argument--

Any combination of the claims argued on this appeal against STARKS' trial counsel contributes to the cumulative effect of prejudice.

A. Trial Counsel's Failure To Object To Prejudicial Other-Acts Evidence.

The prejudicial effect of this claim is rooted in the fact that STARKS' conviction is the result of the jury being allowed to rely on prejudicial evidence. Trial counsel's failure to properly address this evidence falls below the objective standard of reasonableness.

Had counsel objected to this prejudicial evidence it would have been excluded. A request for a mistrial, by trial counsel, regarding this maliciously illicited evidence may have been granted.

B. Trial Counsel's Failure To Investigate The Phone Records Of Willie R. GILL.

The prejudicial effect of this claim is rooted in trial counsel's failure to discover credible impeachment evidence he had in his possession. Trial counsel's failure to explore and compare GILL's phone records with GRAY's phone records, falls below the objective standard of reasonableness, also.

Had counsel investigated GILL's phone records, compelling impeachment evidence would have been produced that would have proved GRAY to be a liar and false witness.

C. Trial Counsel's Failure To Interview And Call MCCULLUM And DANIELS As Witnesses.

The prejudice effect of this claim is rooted in the fact that counsel failed to call two key witnesses for STARKS' defense that would have undermined GRAY's seemingly credible testimony based on him being STARKS' cousin. Trial counsel's failure to call these two witnesses to aid in STARKS' defense, falls below the objective standard of reasonableness too.

Had counsel interviewed and called these two witnesses the jury would have been exposed to evidence that undermined GRAY's credibility as a reliable witness.

D. Trial Counsel's Failure To Investigate/ Interview Dion ANDERSON.

The prejudicial effect of this claim is rooted in the fact that there is a high degree of probability that STARKS' conviction

rest on the tainted testimony of GRAY and ROGERS. Trial counsel's failure to talk to other witnesses as to the court's violated sequestration order, when they were readily available at the courthouse, falls below the objective standard of reasonableness, also.

Had trial counsel investigated/interviewed ANDERSON, both GRAY and ROGERS' testimony would have been excluded, leaving the state to rely solely on the testimony of WILLIAMS who claimed he saw STARKS shoot the victim, but never saw him with a gun.

E. Trial Counsel's Failure To Call Mario MILLS As A Defense Witness.

The prejudicial effect of this claim is rooted in the fact trial counsel failed to call STARKS' alleged accomplice to provide evidence related to STARKS' actual innocence. Trial counsel's failure to call MILLS as a witness to prove STARKS' actual innocence, falls below the objective standard of reasonableness, as well.

Had trial counsel called MILLS to testify before the jury, STARKS would have been found "not guilty," based on MILLS' convincing identification of ROGERS as the real shooter.

Conclusion--

While it can be reasonably determined that these claims standing alone don't amount to prejudice, the cumulative effect of trial counsel's errors does undermine the outcome of STARKS' trial. This court should reach the same conclusion.

FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is forty-seven (47) pages.

Dated this 16th day of August, 2010.

Submitted & Certified By:

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