STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 1

CASE NO. 2014AP001566
CASE NO. 2014AP001567

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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROYCE HAWTHORNE,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT 974.06 STATS. FOR MILWAUKEE COUNTY, THE HONORABLE MEL FLANAGAN, PRESIDING

BRIEF AND APPENDIX OF THE APPELLANT

Oakhill Correctional Institution
Royce Hawthorne #455666
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BRIEF OF THE APPELLANT

ISSUES PRESENTED

1. Post-conviction counsel was ineffective for not raising the issue of ineffective assistance of trial counsel upon direct appeal.

2. Post-conviction counsel was ineffective for not raising the issue of sufficiency of the evidence upon direct appeal and also failed to raise numerous errors from letters written by the defendant, and failed to raise numerous errors that defendant brought up at his sentencing hearing.

3. Post-conviction counsel was ineffective for not raising the objections of authentication and cause made by trial counsel during the forfeiture by wrongdoing hearing upon direct appeal.

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POSITION ON ORAL ARGUMENT AND PUBLICATION

This appeal involves only settled issues of law and presentation of the arguments can adequately be made in the briefs. Therefore, neither oral argument nor publication is requested.

STATEMENT OF THE CASE

The case numbered 2011-CF-1566 began on April 9, 2011, when a criminal complaint was filed in Milwaukee County Circuit Court against Royce Hawthorne alleging one count of First Degree Recklessly Endangering Safety by Use of a Dangerous Weapon, Domestic Abuse, contrary to §941.30(1), §968.075(1)(a) and §939.63(1)(b) of the Wisconsin Statutes and one count of Felon in Possession of a Firearm, contrary to §941.29(2) of the Wisconsin Statutes.[2014AP001566]. The case numbered 2011-CF-3695 began on August 9, 2011, when a criminal complaint was filed in Milwaukee County Circuit Court against Royce Hawthorne alleging two counts of Felony Intimidation of a Witness, Domestic Abuse, Repeater, contrary to §940.43(7), §968.075(1)(a) and §939.62(1)(b) of the Wisconsin Statutes. [2014AP001567].

On September 2, 2011 the trial court granted the state's request to consolidate the two cases for trial. [R.35:7]. On November 14, 2011 the trial court granted the state's request to admit hearsay statements at the jury trial under the doctrine of forfeiture by wrongdoing. [R.37: 47]. A jury trial was held on November 15 and 16, 2011. On November 16, 2011 the jury returned verdicts of guilty on all counts across both cases.

On January 12, 2012 the Honorable Mel Flanagan sentenced the defendant, on both counts in 2011-CF-1566, to concurrently serve 6 years in the Wisconsin State Prison, with 3 years as initial confinement followed by 3 years as extended supervision. The defendant was also ordered, on both counts on 2011-CF-3695, to concurrently serve 4 years in the Wisconsin State Prison, with 2 years as initial confinement followed by 2 years as extended supervision. On January 17, 2012 the defendant filed Notices of Intent to Pursue Post-Conviction Relief for both cases.

The State Public Defender Office appointed the defendant Attorney Patrick Flanagan. Post-Conviction counsel Patrick Flanagan bypassed circuit court and went on a direct appeal to the Court of Appeals District 1 and raised only one argument which was, "Did the record adequately support the trial court's unavailability finding allowing for hearsay statements to be introduced at trial to the doctrine of forfeiture by wrongdoing?' On May 7, 2013, the Court of Appeals Decision Dated and Filed affirmed the judgment if the circuit court for Milwaukee County: MEL FLANAGAN, JUDGE.

On June 6, 2013 the defendant through counsel filed a petition for review to the Supreme Court of Wisconsin. On October 21, 2013, the Wisconsin Supreme Court

denied the petition for review. On January 21, 2014, the defendant filed a *pro se* motion for post-conviction relief pursuant to section 974.06. The court set a briefing schedule, to which the parties have responded. On June 13, 2014, the Honorable Mel Flanagan filed a decision and order denying motion for post-conviction relief without a hearing. Now, the defendant pro se is appealing the judge's decision.

STATEMENT OF FACTS

At the jury trial, the state called City of Milwaukee Police Detective Joseph McLin. Detective McLin testified that on April 5, 2011 he investigated a shooting complaint at 3109 N. Sherman Boulevard in the City of Milwaukee. [R.38:22]. Detective McLin testified that he went to St. Joseph's hospital in Milwaukee to interview the shooting victim, Corneil Hawthorne. Detective McLin testified that Corneil Hawthorne told him that he was shot in an alley from a shotgun after being confronted by an unknown number of individuals. [R.38:23]. Detective McLin testified that the hole in the victim's jeans appeared consistent with an injury from a shotgun. [R.38:28]. Detective McLin testified that he went to 3109 N. Sherman Boulevard to speak with Grace Hawthorne. [R.38:29]. Detective McLin testified that Grace Hawthorne told him words to the effect that: "I'm not telling you everything because they're my boys." [R.38:29]. Detective McLin went on to explain that Grace Hawthorne told him that the defendant and Corneil Hawthorne are her sons and that earlier she overheard the two arguing in the basement of her home and then overheard the sound of a shotgun blast. [R.38:29].

Detective McLin testified that Grace Hawthorne told him that she went down to the basement where she observed the defendant exiting the bedroom in possession of a short barreled shotgun [R.38:30]. Detective McLin testified that Grace Hawthorne told him that she asked the defendant whether he planned to shoot his family and the defendant responded by saying no and also stated that he loved her. Detective McLin testified that Grace Hawthorne told him that the defendant went back up the stairs while continuing to argue with Corneil Hawthorne [R.38:31]. Detective McLin testified that Grace Hawthorne told him that she tried to get her sons to stop arguing but gave up. Detective McLin testified that Grace Hawthorne told him that after leaving to go back upstairs she heard another loud shot. [R.38:34]. Detective McLin testified that Grace Hawthorne told him that she went back to where her sons were and observed that the defendant still had possession of the shotgun and that Corneil had now been shot [R.38:35]. Detective McLin testified that Grace Hawthorne told him that the defendant explained to her that he had taken his brother to the hospital for a graze wound and he was sorry for arguing with his brother and shooting him [R.38:36]. Detective McLin testified that he then went back to St. Joseph's hospital to talk further with Corneil Hawthorne. Detective McLin told the jury that he confronted Corneil Hawthorne with what his mother had reported to him. Detective McLin testified that Corneil Hawthorne then replied that, "if you know all that then why do you have to talk to me" [R.38:37].

The prosecutor asked Detective McLin to share with the jury the answers that Grace Hawthorne gave at the preliminary hearing held on April 18, 2011 in case 11-CF-1566. Detective McLin told the jury that Grace Hawthorne testified that on April 5, 2011, at her residence located at 3109 North Sherman Boulevard in the City of Milwaukee, she observed the defendant in possession of a sawed-off shotgun [R.38:38-39]. Detective McLin told the jury that the defendant "made shots where my other son was at" and that Corneil Hawthorne was hit [R.38:39-40]. The state called Anna Linden to the stand and she told the jury that she works as an investigator in the witness protection unit of the District Attorney's office. Anna Linden testified that she listened to recordings of jail calls made by the defendant to determine whether he had engaged in any intimidation of witnesses in this case [R.38:60]. She testified that she listened to a recorded call allegedly made by the defendant in April 7, 2011 from the booking area of the Milwaukee County Jail and also listened to two more recorded calls made by the defendant on April 11, 2011 from Pod 6-C of the Milwaukee County Jail [R.38:63-64]. Anna Linden told the jury that on the April 7,2011 recording the caller identifies himself as "Royce" and is heard to say: "make sure that mom and Dono don't come to court" [R.38:65]. Anna Linden testified that she played the recordings for Grace Hawthorne and that Grace Hawthorne identified the voice as being the defendant's. She identified the second male voice heard on the first call as her other son, Corey Hawthorne [R.38:66]. Anna Linden testified that Grace Hawthorne told her that the female voices on the two later calls were the defendant's girlfriend, Pebbles Griffin, and her next door neighbor Amber Jurgensen [R.38:66].

Anna Linden testified that Grace Hawthorne told her that Amber Jurgensen subsequently called her on the telephone to ask her was she coming to court and she replied, "no" [R.38:66-67]. The prosecutor played these recordings for the jury and provided them with a transcript to follow along [R.38:67-68]. Anna Linden testified that Grace Hawthorne told her that Corneil Hawthorne's nickname is "Dono" [R.38:69]. City of Milwaukee Police Detective Michael Washington testified that on April 5, 2011 he spoke with the defendant about the shooting at 3109 North Sherman Boulevard [R.38:70]. Detective Washington testified that the defendant told him that his mother is Grace Hawthorne and his brother is Corneil Hawthorne [R.38:71-72]. Detective Washington told the jury he listened to the jail phone call recordings and that the voice on the calls was the defendant's voice [R.38:73]. Detective Washington conceded on cross examination that he listened to the recordings several months after speaking with the defendant and that his total interaction with the defendant consisted of two separate meetings covering 22 minutes [R.38:74-75]. On the day before trial, the court took testimony on the state's motion to use hearsay statements at trial. The prosecutor informed the court that neither Grace Hawthorne nor Corneil Hawthorne had appeared that day for trial [R.37:6]. The prosecutor informed the court that both witnesses had been personally served with subpoenas requiring their appearance [R.37:46].

Anna Linden testified that she listened to jail telephone calls made from the Milwaukee County Criminal Justice Facility [R.37:12]. Anna Linden testified that

the first call was made on April 7, 2011 from the booking area of the jail [R.37:12]. She testified that this was the same day that the defendant was booked at the jail and that the call was made from a phone inside the same inmate housing assignment for the defendant [R.37:12-13]. Anna Linden testified that the second call she listened to was made on April 11, 2011 and was made from pod 6C of the jail [R.37:13]. Anna Linden stated that the recordings featured a male caller from the jail telling a female on the other end to "go speak to the witness and the victim and tell 'em not to show up for court." [R.37:14]. Anna Linden testified that she played the recordings for Grace Hawthorne who identified the male voice as being the defendant's but Grace Hawthorne did not testify in court as to her identification of the voice [R.37:16]. Anna Linden testified that Grace Hawthorne told her that she received a phone call from a female named "Amber" who told that the defendant was on the other line and was: "asking her was she gonna show up to court" [R.37:16-17].

City of Milwaukee Police Detective Michael Washington testified that he spoke with the defendant as part of his investigation into the shooting incident from April 5, 2011 involving the victim Corneil Hawthorne [R.37:20-21]. Detective Washington told the court that he was "familiar" with the defendant's voice [R.37:22]. Detective Washington testified that he listened to the recorded jail calls and that the male voice was the defendant's [R.37:22-23].

The trial court granted the state's motion to enter the hearsay statements of Grace Hawthorne and Corneil Hawthorne into evidence at trial under the doctrine of forfeiture by wrongdoing [R.37:42-47].

ARGUMENT

A. Post-conviction counsel was ineffective for not raising the issue of ineffective assistance of trial counsel upon direct appeal.

1. Trial court erred when it denied the issue about trial counsel causing a breakdown in the adversarial system in his opening and closing summation which relieved the state of proving its case beyond a reasonable doubt.

The trial court stated in its judgment that counsel's statements in opening and closing summation did not prejudice the defendant and the evidence overwhelmingly established that the defendant committed the offenses with which he was charged beyond a reasonable doubt. U.S. Const. Amend. VI provides that "in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. The Supreme Court has instructed that the U.S. Const. Amend. VI recognizes the right to assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." ***Strickland v. Washington,*** 466 U.S. 668, 685, 80 L. Ed. 2d 674, 104 S. Ct. 2052(1984). The adversarial process protected by the

Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." ***Anders v. California,*** 386 U.S. 738, 743, 87 S. Ct. 1396, 18 L. Ed. 2d 493(1967). The Defendant's counsel had a duty to make the adversarial testing process work in this particular case. He failed to perform this function. This was a credibility case. There was no physical evidence. There was no blood or other items of evidentiary value observed at the scene of the crime. *See Discovery 4/7/11 pg 6 of 6.* There were no eye-witnesses. This case consisted mostly of testimony from police officers testifying to what the witnesses "supposedly told them," which was inadmissible double hearsay.

On November 15, 2011, jury trial, a.m. session, trial counsel gave the jury an opening summation. Immediately trial counsel stated to the jury: *"I can tell you that this trial is going to be mostly about the first degree recklessly endangering safety charge."* [Tr.p.19:8-10]. He also stated: *"What they're going to show or try to show is that some statements of others and based on some jail phone call recordings, that Mr. Hawthorne is guilty of first degree recklessly endangering safety."* [Tr.p.19:13-17]. This comment was prejudice to the defense because what he is really telling the jury is that the defendant is guilty of felony witness intimidation.

Also on November 16, 2011, jury trial, a.m. session, trial counsel gave the jury a closing summation. Counsel stated:

"Exhibit Number 9 is the interior shot from the common hallway that shows where the shotgun hole, according to the State, is in relation to the floor. Remember, there's a window up above and there's the hole. Maybe I mean, you'll see the photograph. You've seen the photograph. Maybe-I'm estimating two and a half, three feet, something like that above the floor through the doorway. I submit to you that's consistent with an accidental discharge." [31: 8-24].

This comment from trial counsel's closing argument "operated like a direct verdict," and failed to safeguard the defendant from being found guilty by the jury. The ***Strickland*** test, requiring a showing of prejudice caused by counsel's ineffectiveness, is applicable (1) in cases where the record reflects that an attorney's errors or omissions occurred during an attempt to present a defense, or (2) that he or she engaged in an unsuccessful tactical maneuver that was intended to assist the defendant in obtaining a favorable ruling. In the instant case, trial counsel's abandonment of his duty of loyalty to his client by assisting the prosecutor also created a conflict of interest. A defense attorney who abandons his duty of loyalty to his client and effectively joins the State in an effort to attain a conviction suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, 'represents' the defendant only through a tenuous and unacceptable legal fiction." ***Faretta v. California,*** 422 U.S. 806, 821, 95 S. Ct. 2525, 2534, 45 L. Ed. 2d 562(1975). The right to effective assistance extends to closing arguments. Instead of serving as the defendant's advocate during closing argument, trial counsel abandoned the defendant at a critical stage of the proceedings and affirmatively aided the prosecutor in his efforts to persuade the jury that the shooting was an accidental discharge, arguing for maybe a lesser-

included offense, thereby arguing guilt with no consent from the defendant, instead of arguing for the defendant's innocence.

2. The defendant is not barred from raising the issue about trial counsel not objecting to admitting the testimonial statements under the forfeiture by wrongdoing because trial counsel did not object specifically under Confrontation Clause grounds.

The Court stated in its judgment that item 2 of the defendant's 974.06 brief is a rerun of what was formerly argued on appeal and may not be reraised at this time, but it can be reraised. Post-conviction counsel argued that since the defendant objected to the prosecutor's motion on the record by stating to the court: "we're asking for the court not to grant the State's motion" [R.37:39], that this objection preserved the defendant's right to seek review of the trial court's decision to grant the motion, a ruling which included the trial court's findings as to unavailability. But the Court of Appeals rejected the defendant's argument stating that the defendant forfeited the right to appellate review on the unavailability finding because the defendant did not specifically object on that ground. Now in the instant case, the Court contends that the defendant did object to the forfeiture by wrongdoing on Confrontation Clause grounds, but the Court of Appeals District 1 affirmed the fact that trial counsel explicitly cited two bases for its objection to the motion, stating: "*One is authentication, and the second is cause.*" [11/14/11 Tr.p.33:19-25], but did not object to the Confrontation Clause under ***Crawford v. Washington*** about testimonial statements admitted without prior cross-examination.

The Confrontation Clause U.S. Const. Amend VI, reflects a preference for face to face confrontation at trial, and a primary interest secured by the provision is the right of cross-examination of the witness in which accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. These means of testing accuracy are so important that the absence of proper confrontation at trial calls into question the ultimate integrity of the fact-finding process. ***Ohio v. Roberts,*** 448 U.S. 56. The forfeiture by wrongdoing doctrine is a recognized exception to the Sixth Amendment's Confrontation Clause. ***Giles v. California,*** 554 U.S. 353, 128 S. Ct. 2678 (2008). The doctrine permits the prosecution to introduce hearsay statements of a witness who is made unavailable as a result of wrongful conduct by the accused. ***State v. Jensen,*** 299 Wis.2d 267, 727, N.W. 2d 518 (2007). In ***Crawford v. Washington*** (2004), the United States Supreme Court announced a new standard for determining when Confrontation Clause of the Sixth Amendment prohibits the use of hearsay evidence, an out-of-court statement offered for its truth against a criminal defendant. ***Crawford*** held that this clause protects an accused against hearsay uttered by one who spoke as a "witness bearing testimony" if the declarant neither takes the stand nor was otherwise available for cross-examination by the accused.

In case 11CF1566, nowhere on record has the victim Corneil Hawthorne been cross-examined at the preliminary hearing nor trial, which makes his out-of-court statements hearsay and not reliable, and he also gave two inconsistent statements to officers. ***See Discovery 4/7/11 pg 2 of 6 and pg 5 of 6.*** In case 11CF3695, no where on record has the victim nor the witness Grace Hawthorne testified to her out-of-court statement on authentication about the voice on the jail phone calls being that of the defendant. She has never been cross-examined at the preliminary hearing nor trial, which makes her out-of-court statement hearsay and not reliable, and makes these statements "testimonial" and automatically be excluded under the Confrontation Clause. The rule of forfeiture by wrongdoing (1) extinguishes claims under the confrontation clause of the Federal Constitution's Sixth Amendment on essentially equitable grounds; but (2) *does not purport to be an alternative means of determining reliability* [emphasis added]. ***Crawford v. Washington,*** 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In determining admissibility, the focus is on the "testimonial" or "nontestimonial" nature of out-of-court statements: Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is one the Constitution actually prescribes: Confrontation. Regardless of their reliability, therefore, out-of-court testimonial statements are barred under the Confrontation Clause unless (1) a declarant is unavailable and (2) a defendant had a prior opportunity to cross-examine the witness. ***State v. Searcy,*** 288 Wis. 2d 804. In order to apply the forfeiture by wrongdoing doctrine, certain things must be shown. First, the witness should be genuinely unavailable to testify and the unavailability for cross-examination should be caused by the defendant's intentional criminal act. Second, a trial court cannot make a forfeiture finding based solely on the unavailable witness' testimony; there must be independent corroborative evidence that supports the forfeiture finding. ***People v. Giles,*** 40 Cal 4th at p854.

3. Reasonable Doubt Jury Instruction

The Court stated in its judgment that this is a pattern jury instruction and this assertion by the defendant is without merit. U.S. Const. Amend VI's right to trial by jury requires "a jury verdict of guilty beyond a reasonable doubt." ***Sullivan v. Louisiana,*** 113 S. Ct. 2078, 124 L. Ed. 2d 182 (U.S. 1993). Where a trial court has seriously misdescribed the Government's burden of proof, however, there is no jury verdict within the meaning of U.S. Const. Amend VI. The court need not consider the strength of the evidence, therefore, in order that an erroneous instruction on reasonable doubt affects substantial rights. A constitutionally defective "reasonable doubt" instruction constitutes a structural defect in the constitution of the trial mechanism. A criminal trial marred by a structural defect cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment resulting from such a trial maybe regarded as fundamentally fair. ***United States v. Colon-Pagan,*** 1 F. 3d 80.

On November 15, 2011 jury trial, a.m. session, the Court was giving preliminary instructions to the jury when she stated: "*Reasonable doubt means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to*

act in the most important affairs of life." [Tr.p.15:11-14]. People are often required to act in the major affairs of their lives even when they are not entirely confident of the correctness of the result. In ***Bumpus v. Gunter,*** 635 F. 2d 907, 913 (1st Cir. 1980): "Either one of two possible choices [could be] fraught with risk and therefore neither choice could be made with anything approaching moral certainty." Indeed, "decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking." Such risk taking would be clearly inappropriate in the context of deciding whether a person is guilty beyond a reasonable doubt. ***Moore v. Ponte,*** U.S. Dist. LEXIS 2190.

The Court also stated: *"While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth."* [Tr.p.15:20-23]. Trial counsel did not object to the Court's defective jury instruction. The instruction "search for the truth" would constitute error because, by itself, that instruction is inadequate to ensure the jury's understanding that (1) the law presumes the truth of a defendant's innocence, and (2) the truth of a defendant's guilt may not be found on less than proof beyond a reasonable doubt. The question fails to make clear that, even if the jury strongly suspects that the Government's version of events is true, it cannot vote to convict unless it finds that the Government has actually proved each element of the charged crime beyond a reasonable doubt. The question also fails to inform the jury that if the evidence is insufficient to permit it independently to "search for the truth," its duty, in light of the presumption of innocence, is to acquit. Mindful that instructions telling juries to "search for the truth" require considerable explication to ensure a jury's understanding of the rule of constitutional sufficiency, a number of courts have discouraged their use. ***United States v. Wilson,*** 333 U.S. App. D.C. 103, 160. ***United States v. Pine,*** 609 F. 2d 106, 108. The instruction "search for the truth" was clearly erroneous. This "error" seriously affected the defendant's right to a jury trial under Fed R. Crim. P 52(b), despite the lack of objection at trial. The trial court erred for dismissing this issue in its judgment. A constitutionally deficient reasonable doubt instruction cannot be harmless error. This error from the Court requires reversal of a conviction.

4. Amended Complaint/Information

The Court stated in its judgment that the objection to the amendment would have been overruled. The Court also stated that given the evidence adduced with regard to both counts in 11CF3695, counsel's position relating to the amendment was reasonable under the circumstances. But counsel's position did affect the substantial rights of the defendant.

On August 9, 2011, the defendant was charged with two counts of felony intimidation of a witness/repeater. On the original complaint of count one alleged that the defendant knowingly and maliciously instructed his brother Corey Hawthorne, to attempt to dissuade and prevent Grace Hawthorne, a witness, from attending and giving testimony at a proceeding authorized by law. Count two alleged that the

defendant knowingly and maliciously attempted to dissuade Grace Hawthorne, a witness, from attending and giving testimony at a proceeding authorized by law.

On November 15, 2011, jury trial, voir dire, the State asks the Court orally to amend the charges on the original complaint, for case 11CF3695. It's two counts of felony intimidation. The State wanted to amend count one for only Grace Hawthorne, without the assistance of Corey Hawthorne and the second count to amend that to reflect Corneil Hawthorne instead of Grace Hawthorne [Tr.p.5-6]. The Court asks trial counsel: "do you have any objection to the amendment?" [Tr.p.6:6-7]. Trial counsel replied, "No" [Tr.p.6:8-11]. The day of jury trial was too late for the State to ask for an amendment of the original complaint because the Court found probable cause that a crime has been committed. It should have been a second preliminary hearing to find probable cause. **Wis. Stats 971.29(1) (2).** By amending the criminal complaint so late in the case, and by changing the parties involved, and also the witnesses, the defendant's rights to notice, speedy trial, and the opportunity to defend was violated. There is a misuse of discretion if the defendant is prejudiced by the amendment. The defendant did not receive constitutional notice of the new charge such that he could prepare and defend against it. ***Whitaker v. State,*** 83 Wis. 2d 368. In the instant case, the amended information does not have the same parties involved as was the original complaint. On the original complaint, the parties involved in count one of case 11CF3695, the defendant did knowingly and maliciously instruct his brother Corey Hawthorne, to attempt to dissuade and prevent the witness, Grace Hawthorne from attending court. The amended complaint says the defendant by himself attempted to dissuade the witness from attending court. The witnesses are not the same on the amended complaint as was the original.

On the original complaint both counts were about dissuading and preventing "Grace Hawthorne" from attending court. On the amended information, count 1 is for Grace and count 2 is for Corneil Hawthorne. The evidence was not the same because originally both counts were against the witness, Grace because she gave the investigator an out-of-court statement about the voice on the phone calls were that of the defendant. No one ever heard from the victim, Corneil Hawthorne. The charges must be related in terms of parties involved, witnesses involved, geographical proximity, time, physical evidence, motive and intent. A charge may be undeniably related to the transactions or facts considered at the preliminary hearing and yet, if there is no adequate notice of that charge, the prosecution cannot be legally sustained. ***State v. Neudorff,*** 170 Wis. 2d 608.

The defendant states that an amended complaint can be executed before sentencing. However, the defendant's due process right is violated when the defendant is denied his right to appear before the judge finding initial probable cause while swearing to the four corners of the warrant and criminal complaint in order to prosecute the defendant. This constitutional right is lost when an amended charge or criminal complaint is executed before sentencing the defendant instead of allowing him to challenge the amended information at the initial court finding probable cause that a crime has been committed. But permitting the criminal information to be used before

sentencing violates the defendant's constitutional right to object to the information and to have it dismissed as a matter of law/right. However, due process requires notice of the amendment allegation to be attached to the original complaint to be heard at the preliminary hearing. ***State v. Smaxwell,*** 612 N.W. 2d 756.

5. Improper Joinder

The Court relates in its judgment that an objection to joinder would have been overruled. It goes on to state that since trial counsel conceded that it was clear that the cases are intertwined, that a motion for severance would not have prevailed.

On September 2, 2011, Status Conference/Arraignment, the State asks the Court to join case 11CF3695 with case 11CF1566 [Tr.p.6:11-14]. Trial counsel objects formally on the record with no argument but adds: *"If my review of the discovery, if I find something that causes me to think they should be separated, I'll bring a motion well before the trial date."* [Tr.p.6:22-25]. But trial continues with no further objection from trial counsel or a motion for severance. The jail.phone calls allegedly occurred on April 7 and 11, 2011, but the defendant was not charged with intimidation until August 9, 2011. Wis. Stat 971.12(1): governs whether separate charges can be properly joined for trial. The statute is to be construed broadly in favor of initial joinder. ***Locke,*** 177 Wis. 2d at 596. Fed. R. Crim. P 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. ***United States v. Coleman,*** 22 F. 3d 126.

In the case of 11CF1566 and 11CF3695, the acts of the defendant are separate and distinct. The acts are not, however, a single act or transaction. They are not so inextricably intertwined that proof of one is impossible without proof of the other. To allow the jury to consider case 11CF3695 in determining the defendant's guilt or innocence of case 11CF1566 tends to allow the jury to infer guilt from case 11CF3695. Likewise, the details of case 11CF1566 are not relevant to the commission of case 11CF3695. A motion to sever offenses may be granted under Del Super Ct. Crim. P14, when the defendant would be prejudiced by joinder of the offenses, even though the offenses were properly joined in the same indictment. Prejudice may be shown where (1) the jury may cumulate the evidence of the various crimes charged and find guilt if considered separately, it would not so find (2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes and (3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges. ***State v. Charbonneau,*** 2003 Del. Super Lexis 332.

In regarding to cases 11CF1566 and 11CF3695 was an instance where a weak evidentiary case (11CF1566) and what the State thought was a strong case

(11CF3695) were joined in the hope that an overlapping consideration of the evidence would lead to convictions on both.

6. Selective Prosecution

. On August 9, 2011, the defendant was charged with two counts of intimidation of a witness with a felony domestic abuse, repeater [Tr.p.3:1-8]. On case 11CF3695, the criminal complaint alleges that the defendant knowingly and maliciously instructed his brother Corey Hawthorne, Pebbles Griffin, and Amber Jurgensen, to attempt to dissuade and prevent Grace Hawthorne, a witness, from attending and giving testimony at a proceeding authorized by law, in connection with that felony, contrary to sec. 940.43(7), 939.50(3) (g), 968.075(1) (b) Wis. Stats on the dates of April 7 and 11, 2011. The State discriminated against the defendant by charging only him for intimidation but not Corey, Pebbles, and Amber. The original criminal complaint for case 11CF3695 alleges that the defendant knowingly and maliciously dissuaded the witness and the victim, Corneil Hawthorne not to come to court and instructed Corey Hawthorne, on April 7, 2011, and Pebbles Griffin and Amber Jurgensen, on April 11, 2011, *to do the same, amount to intimidation of a witness.*

The State also commented about the other people who were associated with this case when he said on November 14, 2011, forfeiture by wrongdoing hearing: *"There is a Corey who was associated with this case. And throughout the phone calls this Court heard today, a—Royce requested from a young lady by the name of Amber and a person named Pebbles to holler at my mama and tell her not to come to court, tell my brother not to come to court."* [Tr.p.30:2-9]. Trial counsel was ineffective for not bringing the matter to alert the court about selective prosecution. It is appropriate to judge selective prosecution claims according to ordinary equal protection standards. These standards require the petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose. Although prosecutorial discretion is broad, it is not limited, and courts must protect individuals from prosecutorial decisions that are based on unconstitutional motives or executed in bad faith. Prosecutors may not engage in selective prosecution, which denies equal protection of the law. ***U.S. v. Schoolcraft,*** 879 F. 2d 64, 67 (3rd Cir. 1989), ***U.S. v. Jones,*** 399 F. 3d 640, 644, ***U.S. v. Bauer,*** 84 F. 3d 1549, 1560.

In ***Wayte v. United States,*** the Supreme Court held that in order to demonstrate selective prosecution, a defendant must show that he or she received disparate treatment and that the prosecution was improperly motivated. A defendant may prove disparate treatment by pointing to others similarly situated individuals who were not prosecuted. In ***United States v. Armstrong,*** the Supreme Court held that a defendant is entitled to discovery to help prove a selective prosecution claim if the defendant makes a "credible showing of different treatment of similarly situated persons." The Court erred in its judgment denying the motion without a hearing. To obtain an evidentiary hearing, a defendant generally must establish a prima facie case of selective prosecution. ***McClesky v. Kemp,*** U.S. 279, 292-97 (1987).

7. State's Opening and Closing Comments

The trial court erred when it found nothing improper about the State's opening statement or closing argument. However, it is actually quite obvious that the State's opening and closing summations were improper and plain error.

A. Opening Summation

On November 15, 2011, jury trial, a.m. session, the State gave an opening statement to the jury. The State's whole summation was extremely improper. The State explained the whole case from the beginning to the end all in his opinion. His summation was for the jury to decide and to weigh the credibility of the evidence and witnesses. He made statements like, *"Royce went down in the basement, grabbed a sawed-off shotgun, fired the shotgun in the air. He also possessed the firearm, a person prohibited from possessing the weapon."* [Tr.p.16:4-7]. In cases of prosecutorial misconduct during argument, the appellate courts determine first whether the prosecutor's comment considered by itself is improper and then examines the entire record to see if the improper comment deprived the defendant of a fair trial. ***United States v. Severson,*** F. 3d 1005, 1014 (7th Cir. 1993). The State's opening summation was prosecutorial misconduct and this misconduct was so serious that it poisoned the entire atmosphere of the trial.

B. Closing Summation

On November 16, 2011, jury trial, a.m. session, the State gave the jury a closing statement and a rebuttal. The State's entire closing summation was improper and sounded entirely alike the opening statement and operated like a direct verdict. The prosecutor's comments had a substantial influence on the result of the trial [Tr.p.18-25]. The prosecutor also vouched for all his witnesses with comments like, *"Anna Linden, Investigator, you heard from Mrs. Linden. She had no vested interests in this case."* [Tr.p.24:2-4]. "Whether a prosecutor's conduct during closing argument affected the fairness of the trial is determined by viewing the statements in the context of the total trial." ***State v. Smith,*** 2003 WI App 234. Vouching occurs when the prosecutor interjects his personal opinion about the credibility of a witness or the strength of the evidence as a whole. In such a situation, vouching introduces credibility evidence that would have been inadmissible during trial. However, a prosecutor may draw reasonable inferences from the evidence adduced at trial. ***United States v. Andreas,*** 216 F. 3d 645. Another improper remark from the prosecutor was: *"based upon the totality of these circumstances and the stipulation that he's a felon, he's possessing a gun"* [Tr.p.25:8-9]. An attorney may properly state, "I believe that the evidence has shown the defendant's guilt," but he may not state that, "based on the circumstances and the stipulation," or that he believes that the defendant is guilty. ***United States v. Morris,*** 568 F. 2d 396.

Also another improper comment from the State was: *"she said, yes, that's my son Corey, that's my son Royce, she said, and the women on the phone, one of them came and talked to me "or" talked to me via the phone and told me not to come to court. Now you have Grace's own words."* [Tr.p.24:20-24]. On the criminal complaint, Grace never said nor testified these very words that the State spoke. It was the prosecutor's opinion and it so infected the trial with unfairness as to make the resulting conviction a denial of due process. An attorney may not say anything to the jury implying that evidence supporting the attorney's position exists but has not been introduced in the trial. It follows that an attorney may not express his personal opinion concerning the merits of the case. ***United States v. Diharce-Estrada,*** 526 F. 2d 637. During a closing argument, the State may "comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors." ***State v. Adams,*** 221 Wis. 2d 1. "The line of demarcation is drawn where the prosecutor goes beyond reasoning from the evidence to a conclusion of guilt and instead suggests that the jury arrive at a verdict by considering factors other than the evidence."

To evaluate a prosecutorial misconduct claim, the court examines the conduct in two steps. First, the court reviews the remark in isolation to determine if it was proper. If the statement was improper, the court moves on to step two and considers several factors to decide if the prosecutor's statement violated the defendant's right to a fair trial. The court considers the nature and seriousness of the statement; whether the statement was invited by the conduct of defense counsel; whether the court sufficiently instructed the jury to disregard such statements; whether the defense could counter the improper statement through rebuttal; whether the weight of the evidence was against the defendant. ***United States v. Severson,*** 3 F. 2d 1005.

C. Rebuttal

On November 15, 2011, jury trial, a.m. session, on rebuttal, the State made a statement that was invited by the conduct of defense counsel, when he said: *"If you're going to take what defense counsel said, because he said a lot of things, if he's holding a gun outside, he's pointing it low, he's holding a gun. He shot it through a door."* [Tr.p.35:1-5]. This comment was improper. In addition, the uncontroverted, highly prejudicial, and largely inadmissible evidence appeared to be cloaked with the Court's approval.

8. Counsel's Cross-Examination of Detective McLin

The trial court claims that the defendant's argument is conclusory and that the defendant has not set forth any specific questions that would have had an impact on outcome of the trial. On November 15, 2011, jury trial, a.m. session, on cross-examination of Detective McLin [Tr.p.53-54], here are some specific questions that trial counsel could have asked Detective McLim that would have had an impact on the outcome of the trial:

1. Didn't Mitchell and the victim get in a fist fight earlier that night?

2. If the defendant shot the victim, why did the witness Jeremy (whose statement did not get admitted within the forfeiture by wrongdoing motion because it was exculpatory for the defendant) state that after the alleged shooting, he called Mitchell blaming him for the incident?
3. Did or did not Mitchell have a motive to shoot the victim?
4. Did or did not the victim state to you that while he was walking toward his house in the alley that he was confronted by an unknown male, is it possible that that could have been Mitchell or someone sent by him?
5. Where did the scratches on the victim's neck come from?
6. If the defendant shot the victim that night in his residence, why would he be sleeping in his bedroom when the officers forced entry into the home like nothing happened?
7. If the defendant shot the victim in his residence, why wasn't the shotgun recovered?

Each one of these questions would have had an impact on the outcome of this trial, first of all because neither the victim nor the witness showed up to court to testify. Also if we went off of Jeremy's statement which was not admitted, he stated that, "he does not know where the gun is and had not seen the defendant with it." On November 15, 2011, jury trial, a.m. session, trial counsel was cross-examining Detective Joseph McLin about a person named Mitchell who was also at the home of the victim around the time of the shooting. [Tr.p.54:3-22]. *In the Incident Report 110950011 Draft Page 3 of 6,* Detective McLin interviewed the victim at the hospital, where he observed him to have several scratches and bruising around his neck. When questioned about the source of the scratches, the victim indicated that he had been engaged in a physical "play fight" with his cousin Mitchell earlier in the day. Grace Hawthorne indicated to Detective McLin that earlier that same day the victim had gotten into an argument with his cousin Mitchell. Grace stated that Mitchell's mother called and told her that the victim and Mitchell had "got into it." Mitchell's mother was very upset because Mitchell also had scratches on his neck. Grace stated also that at the time she got the call from Mitchell's mother, she believed that Mitchell was also upstairs at this time. Grace stated also that at some point prior to shortly thereafter, Mitchell came to her residence.

Also, in the *Incident Report 110950011 Page 5 of 6,* Detective McLin interviewed the brother of the victim, Jeremy Hawthorne. He also stated that after the phone conversation with Grace and Mitchell's mother, the victim came home and what time his mother confronted the victim about the alleged dispute between the victim and Mitchell. Jeremy stated that he believed Mitchell was at his residence at the time the phone call from Mitchell's mother came in or arrived shortly afterwards. Jeremy also stated that Mitchell was upstairs and he also heard him talking loud in the upper about the victim, but was unable to recall what specifically was said. Jeremy also stated that after the shooting, he then went inside and called Mitchell and left him a message blaming him for the incident. In the *Incident Report 110950011 Page 2 of 6,* the victim states when walking towards his home he was confronted in the alley by an unknown person and he was shot with a shotgun and then ran to St. Josephs Hospital.

Trial counsel was ineffective for not asking more about Mitchell who was at the home the same night the victim got shot. Including Mitchell had a motive and recently had a fight with the victim the same night. This creates "reasonable doubt" because the defendant did not possess or owned a shotgun, and a shotgun was never recovered in this case. If trial counsel were more effective, the result of the verdict would have been different.

B. Post-conviction counsel was ineffective for not raising the issue of sufficiency of the evidence.

As shown in this defendant's brief, this case was so lacking that it did not supposed to be submitted by the jury. Without the forfeiture by wrongdoing motion being granted by the Court, it would have never been a trial. To be sufficient, the evidence supporting a conviction must be substantial. ***United States v. Dunmire,*** 403 F. 3d 722. In ***Jackson v. Virginia,*** 443 U.S. 307 it states:

"A mere modicum of evidence may satisfy a "no evidence" standard. Any evidence that is relevant that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt."

1. "Errors" noted in Defendant's letters and at sentencing.

To satisfy ***Strickland's*** deficiency prong, a defendant needs to show that post-conviction counsel's failure to raise an issue fell below an objective standard of reasonableness. ***Balliette,*** 2001 WI at 67. "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome." Upon direct appeal, post-conviction counsel was ineffective for not raising the issues that the defendant wrote in his letters to post-conviction counsel. ***See Appendix A1-A3.*** All of the issues that the defendant researched had merit and would have changed the outcome of the trial. However, the court states in its judgment that it is conclusory and fails to demonstrate any prejudice as required by ***Strickland.***

Also, on January 12, 2012, sentencing hearing, the defendant stated numerous errors that the Court made and also that trial counsel made. ***See Appendix A4-A7.*** All of these issues had merit, and post-conviction counsel was ineffective for not bringing the issues argue upon direct appeal.

2. Post-conviction counsel was ineffective for not raising the objections of authentication and cause made by trial counsel during the Forfeiture by Wrongdoing hearing upon direct appeal.

The trial court stated in its judgment that any claim that post-conviction counsel failed to raise other issues with respect to the forfeiture by wrongdoing argument, specifically authentication and cause, would have not met with success based on the

nature of the evidence adduced, but there was no evidence. Neither the victim nor the witness showed up for trial to testify against the witness. This is a credibility case. The jury did not have a chance to judge look at the witness nor the victim and judge by their demeanor upon the stand and the manner in which they gave their testimony whether they are worthy of belief.

A. Authentication

1. True and accurate recordings

On November 14, 2011 at the forfeiture by wrongdoing hearing, The State played the Court 3 separate phone call recordings over the objection of trial counsel [Tr.p.14:22-23] that were made at the Milwaukee County Jail on April 7 and 11, 2011. [Tr.p.16:6-7]. The April 7, 2011 phone call was 1 minute and 25 seconds. The April 11, 2011 (1) call was 15 minutes and 24 seconds which had exculpatory remarks in the call. The April 11, 2011 (2) call was 15 minutes and 26 seconds which also had exculpatory remarks in this call. During the ending of the jail phone calls and after testimony of Investigator Anna Linden and Detective Michael Washington, the Court believed the State had met its burden by a preponderance of evidence that the defendant intended to prevent the witnesses from showing up for trial and granted the motion to invoke the doctrine of forfeiture by wrongdoing. After the motion was granted, the Court asked the State if he could clean up the digital recording to "make it nicer." [Tr.p.49:19-22]. Trial counsel was ineffective for not objecting to the trial court's statement about the changing, altering, and tampering with the tape recording. The law respecting chain of custody requires proof that is sufficient "to render it improbable that the original item has been exchanged, contaminated, or tampered with." ***B.A.C. v T.L.G.,*** 135 Wis. 2d 280. Before evidence may be introduced, the party requesting its admission must provide proof "sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. 909.01. With regard to recorded conversations, "it is a well-settled principle of law that the party attempting to admit a tape recording into evidence must prove, by clear and convincing evidence, that the tape is a true, accurate, and authentic recording of the conversation, at a given time, between the parties involved." ***United States v. Faurote,*** 749 F. 2d 40, 43 (7th Cir).

On November 15, 2011, jury trial, a.m. session, the State played the recordings for the jury. [Tr.p.68:15]. The phone calls the State played at the November 14, 2011 forfeiture by wrongdoing hearing were the State's original phone calls at lengths of 4/7/11 1:25, 4/11/11 (1) 15:24 and 4/11/11 (2) 15:26. The recordings that the State played for the jury on November 15 were redacted with different parts of the calls transcribed in lengths of 4/7/11 0:35, 4/11/11 (1) 3:29 and 4/11/11 (2) 1:55. The redacted jail phone calls did not recount the alleged entire event and they have been altered. Once recordings are admitted, the defendant can seek to impeach them by showing, for example, that the voice on the tape is not his; that the tapes do not recount the entire event; that they have been altered; or that they are trustworthy or contradictory. ***United States v. Thompson,*** 130 F. 3d 676. The redacted phone calls were "inadmissible duplicates." Fed. R. Evid. 1003 provides:

That a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. The best evidence of a tape recorded conversation is the tape itself; there must be a proper foundation for the introduction of the evidence. Those requirements include a showing: (1) That the recording is authentic and correct; (2) That changes or deletions have not been made in the recording. ***United States v. McMillan,*** 508 F. 2d 101.

B. Voice Identification

In the criminal complaint for case 11CF3695, Investigator Anna Linden stated that on Thursday, June 16, 2011, she spoke to the witness, Grace Hawthorne, regarding the voice of the speaker on 3 jail phone calls. No charges were filed on the defendant until August 9, 2011. On November 14, 2011, forfeiture by wrongdoing hearing, the witness nor the victim showed up for trial despite being personally served with subpoenas. Without Grace Hawthorne's statement that she identified the voice on the calls to be the defendant's voice, the defendant would have never been charged with intimidation because the State had no cause, and cause is required, which means that Grace Hawthorne's testimony of the voice identification was crucial for the conviction of case 11CF3695. This conviction was "insufficient to sustain a guilty verdict," because Grace never testified on record that the voice on the phone calls were that of the defendant.

Now brings the attention to Detective Michael Washington, who is no expert voice analyst. On November 14, 2011, forfeiture by wrongdoing hearing, on direct examination, Washington testified that he listened to the phone calls, and identified the voice on the calls to be that of the defendant's. [Tr.p.22-23].On cross-examination, Washington testified that he only talked to the defendant only about five to ten minutes [Tr.p.25:11], because the defendant invoked his right to remain silent. [Tr.p.26:2-4]. He also testified that the last time he listened to the jail phone calls were "prior to the last hearing," which was late August sometime. [Tr.p.26:11-18]. He testified that between April of 2011 and August 2011, he did somewhere between fifty and sixty interviews since he last spoke with the defendant. [Tr.p.26:21-22]. He also testified that he did not hear the voice at any time and connected it with the defendant's voice, and it wasn't a situation where he listened to the recording and then came up with a name. [Tr.p.26-27]. He testified that prior to him listening to those recordings, he was already told that the phone calls were regarding the voice of the defendant. [Tr.p.26-27].The standard of familiarity necessary to an authenticating witness to identify the voices of participants in conversations on tape is clear: Fed. R. Evid. 901 (b) (5) permits *voice identification to be made by opinion based upon hearing the "voice at any time under circumstances connecting it with the alleged speaker."* Clearly, this requirement for voice identification was not met. Authentication in this case gives rise to "a very substantial likelihood of irreparable misidentification." The identification was unduly suggestive.

Detective Washington also testified that he was not an expert voice analyst. [Tr.p.27:16-23]. Expert testimony should be adduced when interpreting the evidence involves special knowledge, skill or experience that is not within an ordinary person's realm of experience or knowledge. In complex and technical situations, the lack of

expert testimony constitutes an insufficiency of proof, because in its absence the trier of fact would be speculating. Requiring expert testimony is an "extraordinary step" to be taken only when a jury is confronted with "unusually complex and esoteric issues." ***State v. Kandutsch,*** 2010 WI APP 159. That a cooperating witness has testified to certain facts does not automatically prevent an expert from testifying on the same subject. ***United States v. Saulter,*** 60 F. 3d 270.

C. Cause

Under the doctrine of forfeiture by wrongdoing announced in ***Jensen,*** the statement of an absent witness is admissible against a defendant who the trial court determines by a preponderance of the evidence caused the witness's absence. Applying the long-established legal definition of causation, the court must find that the defendant's conduct was a "substantial" factor in producing the absence of the witness. ***State v. Rodriguez,*** 306 Wis. 2d 129. In the defendant's case, causation was not shown. The witness nor the victim in case 11CF3695 ever made a complaint about the defendant intimidating, coercing, dissuading, or threatening them. Investigator Anna Linden testified on November 14, 2011 that her analyst brought to her attention some jail phone calls. [Tr.p.11:6-8]. Trial counsel objected to this testimony when he stated: *"the purpose of this overall hearing is to determine if there is some causation between my client's actions and the absence of the witnesses, here."* [Tr.p.11:9-17]. Investigator Linden testified that she met with the witness and played her "snippets" of the jail phone calls so the witness can identify the voice on the calls. [Tr.p.16:13-23]. Under Wis. Jury Instructions Crim. No. 901, *"cause" means that a defendant's conduct was a substantial factor in producing a "harm or consequence."* Trial counsel stated that, *"the phone calls were made before the preliminary hearing date. We know that Grace Hawthorne did appear at the preliminary hearing date."* [Tr.p.37:8-14]. Trial counsel also that, *"what evidence, in addition, is there to show that it caused her not to appear on today's date. She's also made other appearances, on this case."* [Tr.p.37:15-20]. He also believed based on her statements and her past appearances, that she would appear. [Tr.p.37-38]. Trial counsel also stated that, *"Corneil Hawthorne originally gave a statement to the police that he didn't want to prosecute the shooting and no one has ever talked to him."* [Tr.p.38:3-6].Trial counsel also stated that, *"they had no evidence whatsoever that any of the communication that went on, allegedly, between my client, Royce. There's absolutely nothing to show that this was ever communicated to em."* [Tr.p.38:7-15].

CONCLUSION

For the foregoing reasons, Royce Hawthorne respectfully requests this court to find that the trial court erred for denying the defendant's motion without an evidentiary hearing under 974.06 Stats. Royce Hawthorne requests that this court enter an order vacating the judgment of conviction in this case and send the matter back for a new trial.

Respectfully Submitted,

Dated this 9 day of September 2014

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8) (b) and (c) for a brief and appendix printed in a proportional font. The length of this brief is [redacted] 10,492 words.

Dated this 9 day of September 2014

Respectfully Submitted,

Royce Hawthorne

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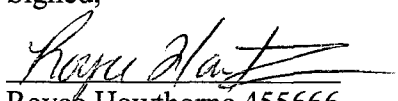
CERTIFICATION OF MAILING

I certify that this brief or appendix and deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on (date of mailing). I further certify that the brief and appendix was correctly addressed and postage was pre-paid.

Signed,



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CERTIFICATION OF APPENDIX

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

I further certify 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 person, specifically including juveniles, with a notation that portions of the record have been produced to preserve confidentiality and with appropriate references to the record.

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