CIRCUIT COURT

STATE OF WISCONSIN CRIMINAL DIVISION MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 08 CF 718

SENECA MALONE,

Defendant.

STATE'S RESPONSE TO DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR NEW TRIAL

ARGUMENT

I. *The Defendant's Offered "Newly Discovered Evidence" Is Incredible and Thus Would Not Reasonably Result in a Different Result*

a. Standard of Review

Due Process "may require granting a new trial under sec. 974.06, Stats., on the basis of evidence discovered after the time for bringing postverdict motions has passed." State v. Bembenek, 140 Wis.2d 248, 252 (Ct. App. 1987). To sustain this claim, the defendant must "establish by clear and convincing evidence that '(1) the evidence was discovered after conviction, (2) the defendant was not negligent in seeking evidence, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative." State v. Edmunds, 308 Wis.2d 374, 385-86 (Ct. App. 2008) *quoting* State v. Armstrong, 283 Wis.2d 639 (2005) *quoting* State v. McCallum, 208 Wis.2d 463, 473 (1997).

If the defendant is able to prove all four of these criteria, then the court should determine whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. McCallum. 208 Wis.2d at 473. A "reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury looking at both the [old evidence] and the [new

evidence] would have a reasonable doubt as to the defendant's guilt.'" State v. Love, 284 Wis.2d 111, 134 (2005) *quoting* McCallum. 208 Wis.2d at 474.

The defense argues that this court, when determining the fifth requirement, plays a threshold role, but "ultimately leaves credibility determinations to a future jury." *Defense Brief at pg 34.* This is true to an extent. If this Court were to find the new evidence less credible than the old evidence, it is still finding some credibility and "thus it does not necessarily follow that a finding of 'less credible' must lead to a conclusion of 'no reasonable probability of a different outcome.'" McCallum. 208 Wis.2d at 475.

However, that is because "[l]ess credible is far from incredible." Id. A finding by this Court that the new evidence "is incredible necessarily leads to the conclusion that the [new evidence] would not lead to a reasonable doubt in the minds of the jury." Id; *See Also* McCallum, at 487-488 (*C.J. Abrahamson Concurring*) (when discussing the credibility evaluation of new evidence, in that case a recantation of a state's witness, against the old evidence, the Chief Justice noted that a finding that the new evidence **"is incredible as a matter of law** is sufficient to support its conclusion that **no reasonable probability exists of a different result at a new trial.**") *citing* State v. Terrance J.W., 202 Wis.2d 497, 502 (Ct. App. 1996) (emphasis added). Therefore, if this Court were to find that Mr. Malave's testimony were *incredible*, it would also find that his testimony would not lead to a reasonable doubt.

In the instant case, the defendant fails to prove the fifth requirement, that this evidence would probably lead to a reasonable doubt. Thus, the State does not address the defendant's burden in the other criteria and reserves the right to address them later if needed.

b. The Testimony of Mr. Malave is Incredible and Thus Would Not Cause a Reasonable Doubt as to the Defendant's Guilt

Mr. Malave testified that on December 16, 2005, he picked up Mark Fossier, at

which point, Mr. Fossier admitted that he killed a Mexican male over a cigarette. *10/6/11(p.m.) Hearing at 41-43.* At this time, Mr. Malave had been friends with the defendant for approximately 12 to 13 years (Id, at 49), and friends with Mr. Fossier for approximately 9 to 10 years. Id. All three, along with others, were members of the 2-5s. Id, at 46-49. Mr. Malave appears to still be friend of the defendant, as shown by his appearance at the defendant's sentencing, in the company of other 2-5s. Id, at 49-50. However, he testified that he is no longer a friend of Mr. Fossier because Mr. Fossier testified against the defendant, a fellow 2-5. Id, at 49 and 51.

Shortly after this alleged conversation, Mr. Malave is charged, convicted, and sentenced to prison. Id, at 54-55. He testified that he did not attempt to exchange this information to his advantage because he "didn't want to snitch." Id, at 55. Mr. Malave testified that a "snitch" is "someone who testifies, you know, and testifies against somebody." Id, at 51. He further stated that testifying against someone could result in physical injury or being ostracized by the other 2-5s, much like he stopped being friends with Mr. Fossier. Id, at 51.

After being released from prison, Mr. Malave, in the company of other 2-5s, attended the defendant's sentencing. Id, at 49-50. However, Mr. Malave does not relate this information to either the defendant's attorney (Id, at 51, 52) nor to the other 2-5s that he attended the sentencing hearing with, who were angry with Fossier. Id, 51-52. At first, Mr. Malave stated he did not tell the defendant's attorney nor their mutual 2-5s because he "didn't want to be a snitch." Id, at 51. However, when confronted, he admitted that he did not fear retaliation for talking about Mr. Fossier. Id, at 51-52. In the end, he could not think of any reason why he did not tell either the defendant's

sentencing attorney or the other 2-5s at the hearing. Id, at 52.

Later, Mr. Malave became a confidential informant for the Milwaukee Police Department. Id, 56-61. However, even though he was told by the detective conducting the debriefing not to withhold information, Mr. Malave did not inform the Police Department of the supposed confession given by Mr. Fossier. Id, 57-58. Mr. Malave testified that he was specifically asked about his knowledge of shootings and homicides. Id. According to Mr. Malave, he decided to lie to the detective. Id. He was unable to provide any reason for withholding this information (Id, at 58), although we can rule out his previous aversion to being a "snitch," since he was answering questions in order to become a confidential informant.

As the defendant pointed out, this Court did not find Mr. Malave or his testimony to be credible. This is understandable, as Mr. Malave testified that he would lie when it suited him. Id, at 60. As it is clear that the Court found Mr. Malave's testimony to be incredible, it is also clear that, therefore, there is no reasonable probability of a different outcome would result. Thus, the defendant fails in this claim.

II. *Trial Counsel Did Not Provide Ineffective Assistance of Counsel*

a. Standard of Review

In order to prevail on a claim of ineffective assistance of trial counsel, a defendant must show that counsel was deficient and that the deficiency prejudiced his defense. State v. Mayo, 301 Wis.2d 642 (2007). Because a defendant must prove both prongs, the court need not consider one prong if the defendant has failed to establish the other. Stickland v. Washington, 466 U.S. 668, 697 (1984).

In the first prong, the defendant must point to specific acts or omissions of trial the lawyer that are "outside the wide range of professionally competent assistance." Stickland,

466 U.S. at 697. At this stage, there is a strong "presumption that counsel acted reasonably within professional norms." State v. Johnson, 153 Wis.2d 121, 127 (1990). When evaluating this prong, this Court should "not second-guess a trial attorney's 'considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel." State v. Elm, 201 Wis.2d 452, 464 (Ct. App. 1996) *quoting* State v. Felton, 110 Wis.2d 485, 502 (1983). Rather, a "**strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.**" Elm, 201 Wis.2d at 464-465 *citing* Felton, 110 Wis.2d at 501-02 (emphasis added).

When considering the second prong, the defendant must demonstrate that the lawyer's errors were so serious as to deprive the defendant of a fair trial. Johnson, 153 Wis.2d at 127. Additionally, the defendant must show "that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." Stickland, 466 U.S. at 694. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Id.

b. Trial Counsel Was Not Ineffective For Not Calling Kerry Malicki As An Alibi Witness Because It Was A Strategic Decision Agreed To By The Defendant

Trial counsel had approximately a ten to fifteen minute conversation with Ms. Malicki, during which she indicated that the defendant had been at her house playing video games. *12/21/11 Hearing at pg 54.* After that conversation, counsel had concerns about using her as a witness. Id, at 61-63. Specifically, counsel had concerns as he found her to be belligerent (Id, at 71) and not very credible. Id, at 71-72. Because of his concerns, counsel believed that calling Ms. Malicki as an alibi witness would be a tactical mistake. Id, at 66.

Due to his concerns, counsel had a conversation with the defendant about his decision against using Ms. Malicki as an alibi witness. Id. When told of the potential alibi, the defendant told counsel that the Malicki family was attempting to help him out. Id, at 63.

This reinforced his concerns about Ms. Malicki's credibility. Id, at 63-64. After this conversation with the defendant, the defendant agrees with counsel's plan to avoid the alleged alibi defense and not proceed with further investigation into the Malicki claims. Id, at 66-67.

It appears clear that counsel's concerns as to Ms. Malicki's credibility were well founded. As the defendant noted, the Court appeared to find the alibi witnesses to be incredible. *Defense Brief at pg 25.* Ms. Malicki arguably exhibited little credibility as she avoided questions, was combative, and changed her version of events from what she swore to in an affidavit. *4-26-11 Hearing at pg 19-76.* The only corroboration for Ms. Malicki's testimony was that of her son Nicholas Malicki. However, this Court found his testimony so incredible that it referred to it as "the most implausible testimony I've heard in a while..." *Defense Brief at pg 25, fn 5.* Furthermore, Nicholas changed his testimony after a lunch break and outside the courtroom questions. *10-7-11 (p.m.) Hearing at 1-12.* This prompted this Court to label his testimony as "lying and committing perjury...". Id, at 12.

Therefore, trial counsel's decision to not present an alibi defense that would depend entirely upon the incredible testimony of members of the Malicki family was not ineffective assistance of counsel. Rather, it was a rational tactical decision based upon the facts and lack of credibility of the witness. Lastly, it was decision explained and agreed to by the defendant. Thus, the defendant fails in this claim as well.

c. Trial Counsel Was Not Ineffective For Failing to Object to Portions of the Fossier-Mother Calls As the Calls Were Properly Admitted As Prior Inconsistent Statements

Wisconsin Statute Section 908.01(4)(a) defines a prior inconsistent statement as non-hearsay. Wis. Stat. Sec. 908.01(4)(a). Thus, an objection on hearsay grounds would be properly overruled if the phone calls are prior inconsistent statements of Mr. Fossier. It is clear that they were, as the following line of questioning occurred before the playing of any

phone calls:

Q: Have you talked to anybody about your statement?

A: No, never did.

Q: Has anyone encouraged you to say you don't remember?

A: No, never did. Nobody.

Q: Nobody?

A: No one.

Q: Has anyone practiced your testimony with you?

A: No, never did.

Q: Has anyone encouraged you to say that the firearm you saw on the garbage can was the Puerto Rican gentleman's?

A: No.

Q: Has anyone encouraged you to say that, in fact, when you saw the gun at Donovan's that that was actually a different day than the day of the shooting?

A: I wasn't quite sure what day it was.

Q: Has anyone encourage you to say that?

A: No. *Trial Transcript 8-19-08 at 107.*

Later on during the trial, Mr. Fossier was again asked if anyone instructed him on how to answer certain questions or practiced his testimony. Id, at 145-146. Furthermore before some taped sections, Mr. Fossier was asked if he ever said a certain statement or was told to testify a certain way. Id, at 150 (playing the "dumb card"), at 160 (not taking cherry Nyquill), at 162 (whether police taped the conversation), at 163-164 (about a "Nick" that called Fossier's mom along with the defendant), at 164 and 167 (about whether or not anyone told Fossier to say it was the Puerto Ricans with the gun), at 173 (about testifying that no one talked to him about changing his story) at 178 (stating that he never rehearsed his testimony

with anyone).

The played portions of Fossier's conversations with his mother were inconsistent with what he had testified to. Thus, under Wisconsin statutes, they were properly admitted and are not hearsay. Wis. Stat. Sec. 908.01(4)(a). Therefore any objection would have been properly overruled. The defendant further alleges that trial counsel should have requested a limiting instruction telling the jury that the calls should not be considered as substantive evidence. *Defense Brief at 27.* However, it is long standing Wisconsin law that prior inconsistent statements are properly admitted as substantive evidence. Vogel v. State, 87 Wis.2d 541, 550 (1979). Thus, any request would have been denied and failure to do so cannot be considered ineffective assistance of counsel. The defendant also fails in this claim.

d. Trial Counsel Did Argue That Fossier's Statement To Police Was Motivated by His Desire To Escape Prosecution

The defendant claims that trial counsel did not attempt to demonstrate to the jury that Fossier's initial statement to Detectives was motivated by a desire to escape prosecution. *Defense Brief at 12-13.* However, in fact, counsel did. First, during cross-examination of Fossier, trial counsel established that Fossier had been told that he was a suspect:

> Q: -- even though you weren't under arrest, did you think that they were gonna let you go?
>
> A: No sir. They were calling me terrorist and all types of this, that, and the other thing. "You know what we do to terrorists" and You know what you did to Sadaam," type stuff like that. I was like "no." I even told the officers. I was like "Hey, man, whatever. What are you guys trying to do," blah, blah, woo, woo. They were like "Well, we're going to lock you up here. We're going to keep you here for as long as we want," blah, blah, blah and stuff like that.
>
> Q: So did they tell you that you might be a suspect?
>
> A: **They said I was a suspect.**
>
> Q: So you were – you were afraid, concerned about your situation?
>
> A: Correct, sir. *Trial Transcript 8-19-08 at 192 (emphasis added).*

Fossier also testified that detectives would not let him leave until he signed the statement implicating the defendant. Id, at 105-06.

At closing argument, trial counsel specifically argued what the defendant now says he did not:

> Now let's look at the statement that he made. Well, you heard the officer, Officer Chavez, say he was agitated. He was upset. **This wasn't Jimmy Bogust though**. I'm sure it was on his mind. **He thought he was in trouble, he thought – he was in a jail**. He had been sitting there, in interrogation that night, from 8:30 in the morning until about 2:30 when those officers arrived. *Trial Transcript 8-20-08 at 102 (emphasis added).*

Trial counsel was establishing the "counter-narrative" the defendant argues he did not. Counsel is arguing that Fossier's own worry about being in trouble, about being in jail, was the motivating factor for his statement to police, and not the death of Jimmy Bogust as the State argued. He continued in this vein:

> Again, while I'm sure that he is upset about his friend, Jimmy Bogust, **I think he was more upset about him – about being, what he thought was, being involved in a homicide**. He told him what it was about. So there is more than a possibility that he gave them what they wanted to hear. **Very conveniently packaged so he isn't the shooter, he isn't the one that is responsible for this happening. Seneca Malone was he said**. I don't know if you read the statement or not. An I don't know what his motivations are exactly. **But I do know one thing, at least at that time he was worried about himself. He was worried about getting himself mixed up in a homicide, worried about being accused of a homicide. And he certainly didn't want that**. Who would. *Trial Transcript 8-20-08 at 103 (emphasis added).*

After arguing that the statement implicating Malone was based upon his fear of a homicide prosecution, trial counsel then attempted to explain Fossier's new statement on the stand:

> So what does he do? He's realized, you know: I have implicated my friend Seneca. How do I get out of that? Say it's not true. Well, the logical way you do that is to alter your story somewhat. Not come up a completely new version of what happened, but enough of change that it gets your friend off **and still preserves his [Fossier's] position as not being a part of a homicide**. *Trial Transcript 8-20-08 at 103-04 (emphasis added).*

Counsel then continues with his argument that Fossier's statement to police was motivated by a desire to escape prosecution:

> So I don't know what happened there that night. I don't know exactly what Mark Fossier's motivations are. I don't know who he might be covering for. I don't know. **But I do know that he had a great interest in separating himself from this homicide**. He wanted to give a version of events that made it so – made it so that he would – wasn't a participant**, so he wouldn't be sitting in that chair over there facing a homicide charge**. You know. *Trial Transcript 8-20-08 at 104-05 (emphasis added).*

Counsel then concluded by revisiting this same argument, that Fossier was attempting to avoid prosecution for homicide:

> So, ladies and gentlemen, I would argue that Mr. Fossier should give you great pause basically to believe anything that came out of his mouth. **He's got his own agenda. You heard the officer. He said he was scared, he was nervous, he was agitated. And about him being in trouble**. And so by my count, he's probably given about at least three different versions, and who knows. So I think that you should discount his testimony. *Trial Transcript 8-20-08 at 107-08 (emphasis added).*

Therefore, it appears fairly clear that trial counsel did in fact argue that Fossier's statement to police implicating the defendant was driven by his own desire to escape a homicide prosecution. Counsel cannot be said to be ineffective for failing to make an argument that he in fact did make.

This constant argument that Fossier is attempting to avoid a homicide prosecution includes the argument that Fossier was in fact the shooter. While, trial counsel did not file a Denny motion, his closing was filled with the argument that Fossier lied to police to avoid a prosecution for homicide. Trial counsel's argument even attempted to explain Fossier's attempts to recant his statement on the stand as the cunning attempt to withdraw his accusation against the defendant and at the same time protect himself from a homicide charge. The jury heard the argument that Fossier was a suspect in the homicide and was trying to avoid a homicide prosecution by falsely accusing the defendant, and they rejected it. Therefore, counsel's failure to file a Denny motion is not ineffective, as the jury heard the

argument without objection from the State. Again the defendant fails in these claims.

e. Trial Counsel Did Argue That the Defendant-Malicki Phone Calls Were Not Consciousness of Guilt And Would Prejudice the Defendant

Trial Counsel did in fact argue that the recorded jail calls between the defendant and Joseph Malicki, the individual later convicted of misdemeanor intimidation of a witness for his conduct at the defendant's first preliminary hearing, should not be admitted. He argued that:

> ...these phone calls, I don't think they are consciousness of anything. Now, he's talking about witnesses and so forth, **and Malicki in particular is shooting his mouth off through those conversations**.
>
> However, the defendant doesn't do that. He says he's going to "holla" at somebody which is unclear as to who it is, and "holla" in that kind of – does not mean he needs to talk to somebody. **He is not asking will he do anything, he's making threats. He's not trying to stop people from testifying**.
>
> It's Malicki that's making all these statements about threats; about, you know, people getting together and being interrogated. **Again, it's not – it's not the defendant here**.
>
> I would argue that it's consciousness of nothing. Certainly not consciousness of guilt other than trying to figure out who's talking about him, and perhaps he did rather inelegantly using tremendous amounts of profanity along with his colleague. **I don't how relevant it is**.
>
> They don't make any admissions, they don't – my – my client doesn't threaten anyone, **and I think it just leads to confusion**.
>
> It's – I think if you not used to this kind of language could be highly prejudicial. I'd ask you not to allow it in. I don't think it really add to the State's case, and since they're not really going to be viewed as bringin in other than the fact that perhaps we can argue about that – the fact that Malicki was arrested – I just don't think it says anything that goes to my client.
>
> That's all, Your Honor. **I'd object on relevance grounds. I object on prejudice grounds as well and the fact that it doesn't really state any consciousness of guilt**. *Motion Transcript 8-11-08 at 16-18 (emphasis added).*

Trial counsel argued that calls were irrelevant, highly prejudicial, would lead to confusion,

and were not consciousness of guilt. While the Court has some concerns, it decided to allow limited portions. Id, at 20-21. Counsel argued to keep the phone calls from the jury, but the Court disagreed. Counsel is not deficient, nor has the defendant shown that exclusion of these calls would have resulted in a different result. Thus this claim also fails.

f. The Alleged Facts That the Defendant Believes Would Impeach Fossier's Initial Statement to Police Were Either Presented to the Jury in Some Form, Not Proven by the Defendant During This Hearing, Or Would Not Result in a Different Result at Trial

The defendant lists a series of items that he believes should have been discovered by trial counsel. *Defense Brief at 14-18.* The list starts with the accusation that Fossier initial statement was a lie about being a Donovan Bellamy's house with the defendant the day of the homicide. The basis for this is the series of witnesses called by the defendant to show that the Bellamy family had moved out by July, 2005. *Hearing Transcript 12-23-11 at 7-104.* However, at the time of the investigation, Detectives did interview Mr. Bellamy, who stated that he lived at that residence until early 2006, which would mean either January or February, 2006. Id, at 66 and 68.

Mr. Bellamy further testified that he then changed his opinion as to when they moved from the residence in approximately 2010. Id at 68-69. Before that year, he would have told anyone they had moved in January or February, 2006. Id. After that year, he would have testified that he had moved in December, 2005. Id, at 69. Both of these dates would have been consistent with the statement of Fossier. Thus, it is clear that had trial counsel interviewed Mr. Bellamy, he would not have provided the information that he testified to at the motion. In fact, Bellamy did not believe that he had moved before December until two to three days before his testimony at the hearing, when he was informed what his landlord's records contained. Id, 66-68.

Besides that, there were other tactical reasons to not call Mr. Bellamy. He was a

fellow member of the 2-5s (Id, at 50-55, 62-65) and had stored weapons for the 2-5s which the defendant, Mr. Fossier and others had access to. Id, at 55, 58, 70-76. As with other witnesses called by the defendant during the hearing, the Court did not find him credible. Id, at 73. When considering Bellamy testified that after he used to hang out with Mr. Fossier, the defendant and others by the garage (although he testified mostly in the back yard) and that after he moved, he still went back to the area and hung out with these same people. Id, at 61-62. Therefore, interviewing or calling Mr. Bellamy would not have resulted in a different result at trial.

The defendant next argues that it is not likely that Fossier would have spent time outdoors in extremely cold conditions. However, the jury did hear through Detective Walton as to the very cold conditions. First, Detective Walton described that night as "extremely cold...It was one of the coldest nights I ever had on the job..." *Trial Transcript 8-19-08 at 40.* Additionally, there were several references to snow and ice. Id, at 40, 43, 44, 49, 50. Thus, the jury was told of the extreme cold and could judge Fossier's statement accordingly. Similarly, the defense attempts to use a Journal Sentinel article to show that Fossier's motivation had nothing to do with Mr. Bogust's death. However, as already shown above, trial counsel extensively argued that Fossier's real motivation was to escape a homicide prosecution. Additionally, the phone calls from Fossier to his mother show that Mr. Bogust's death was extensively talked about during the interview. Therefore, these items were either brought to the jury's attention or argued to the jury and additional information would result in a different result at trial. Thus, this claim fails as well.

III. *No Brady Violation Occurred As The Evidence Is Not Material*

a. Standard of Review

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that the "suppression of evidence favorable to an accused upon request violates due process

where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." State v. Harris, 272 Wis.2d 80, 94 (2004) *quoting* Brady, 373 U.S. at 87. The prosecutor has a duty to disclose this evidence even if there has been no formal request. Harris, 272 Wis.2d at 94-95 *citing* Strickler v. Greene, 527 U.S. 263, 280 (1999).

In the instant case, the prosecution turned over everything in the State's file. Moreover, the reports at issue were not even known to the Milwaukee Homicide Unit or in the Milwaukee Police Homicide file pertaining to the death for which the defendant was convicted. *Testimony of Detective Chavez at.* The Wisconsin Supreme Court noted that under the "Due Process Clause, prosecutors are required to disclose evidence that is material to either guilt or punishment. **A defendant's request for Brady material, however, does not require a prosecutor to wade through all government files in search of potentially exculpatory evidence**." Harris, 272 Wis.2d at 99 *quoting* U.S. v. Lov-It Creamery, Inc., 704 F.Supp. 1532, 1552 (E.D. Wis. 1989) (further citations omitted in Harris) (emphasis added). Even though the Milwaukee County District Attorney's Office and the Milwaukee Police Department practice an open file policy, such a policy is not required by the Constitution. Harris, 272 Wis.2d at 99-100 *citing* U.S. v. Bagley, 473 U.S. 667, 675 (1985), U.S. v. Coppa, 267 F.3d 132, 143-44 (2nd Cir. 2001); and State ex rel. Lynch v. Circuit Court of Dane County, 82 Wis.2d 454, 463-64 (1978).

As the U.S. Supreme Court has noted, "the Constitution does not require the prosecutor to share all useful information with the defendant." U.S. v. Ruiz, 536 U.S. 622, 629 (2002). Rather, "the mere possibility that an item of undisclosed information might have helped the defense...does not establish 'materiality' in the constitutional sense. U.S. v. Agurs, 427 U.S. 97, 109-110 (1976). In U.S. v. Bagley, 473 U.S. 667, 682 (1985), which Wisconsin recognized in State v. DelReal, 225 Wis.2d 565, 570-71 (Ct. App. 1999), the

Court developed the standard for determining "materiality" of evidence:

> **The evidence is only material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.** A ' reasonable probability' is a probability sufficient to undermine confidence in the outcome. Harris, 272 Wis.2d at 97 *quoting* Bagley, 473 U.S. at 682 (emphasis added).

This test is the same test used in determining ineffective assistant of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Therefore, "strictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler. 527 U.S. at 281.

b. The Evidence at Issue Is Not Material

The alleged evidence at issue can be divided into two areas: (1) other bad acts of Fossier involving firearms and (2) evidence that Bellamy did not live at the address he informed detectives he did live at. In the first area, the defendant alleges that the other acts of Fossier are material as they are impeachment and evidence of a flawed investigation. However, both arguments include one main underlying point: that Fossier uses weapons illegally. Thus, the defendant wants to use there other acts to show that Fossier is the type of person that has firearms illegally and uses them when angered over little provocation.

Regardless of whether that is true, Wis. Stat. Sec. 904.04(1) states that "[e]vidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person **acted in conformity therewith on a particular occasion.**" Wis. Stat. Sec. 904.04(1) Section 904.04(2) does allow other acts if offered for motive, opportunity, intent, plan, preparation, knowledge, identity, or absence of mistake. However, none of the other acts bear any link to the act they are attempting to link it to, other than the argument that Fossier carries guns, shoots them, and therefore is the type of person who

would shoot the victim. Unfortunately, that is the exact reason prohibited by Statute. As none of this evidence would have been allowed at trial, the evidence is not material.

In regards to the Bellamy information, that has already been addressed above. It could only have been introduced through Bellamy, whose issues were addressed previously. As already noted, Bellamy does not result in a different result at trial and thus this information also is not material. The defendant thus fails in this claim.

IV. THE DEFENDANT FAILS TO MEET THE BURDEN REQUIRED TO WARRANT A NEW TRIAL IN THE INTERST OF JUSTICE.

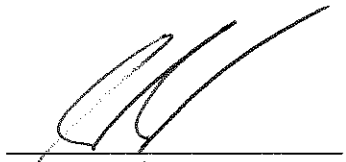
The Court has the "ability to set aside a conviction through the use of discretionary-reversal powers. State v. Burns, No. 2009AP118-CR, par. 24 (April 26, 2011). This power arises from both statute and common law. Vollmer v. Luety, 156 Wis.2d 1, 13 (1990), *See Also* Wis. Stat. Sec. 751.06. In terms of the "real controversy not fully tried" category, there exists two situations in which a court may grant a new trial. State v. Schumacher, 144 Wis.2d 388, 400 (1988). Either (1) "the jury was not given an opportunity to hear important testimony that bore on an important issue, or (2) the jury had before it testimony or evidence which had improperly admitted, and this material obscured a crucial issue and prevented the real controversy from being fully tried." Burns, No. 2009AP118-CR, at par. 24 *quoting* Schumacher, 144 Wis.2d at 400. In either situation, the court need not conclude that there would be a probability of a substantially different result on retrial. Schumacher, 144 Wis.2d at 401 *referring to* State v. Wyss, 124 Wis.2d 681 (1985). Instead, the court should only grant a new trial in order "to maintain the integrity of our system of criminal justice and so that we can say with confidence that justice has prevailed." State v. Jeffrey A.W., 323 Wis.2d 541, 551 (Ct. App. 2010) *citing* State v. Hicks, 202 Wis.2d 150, 171-72 (1996).

As discussed above in the various sections, the defendant has not shown information or evidence that either improperly obscured an issue or was not heard by the jury and was important on an important issue. The defendant fails in this last claim.

CONCLUSION

For the reasons stated above, which the State reserves the right to supplement with oral argument at the decision date, this court should deny the defendant's postconviction motion and request for a new trial.

Respectfully submitted this 2nd day of October, 2012.



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