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STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

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STATE OF WISCONSIN,

Plaintiff,

Case No. 98-CF-539

vs.

JAMES D. MILLER,

Defendant.

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**DEFENDANT’S ARGUMENTS AND AUTHORITIES IN SUPPORT OF  
MOTION FOR POST-CONVICTION RELIEF  
PURSUANT TO WIS. STAT. § 974.06**

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**INTRODUCTION**

Representing criminal defendants can be a uniquely humbling experience for some lawyers. Some work and re-work their witness examinations and summations until dawn’s early light. Those same lawyers often find themselves driving down a highway re-writing the cross, one more time, hoping to get it right, even though the trial is long over.

Dan Fay is one of those lawyers.

It takes an enormous amount of humility and integrity to invite one’s peers to “look back” and try to figure out what went wrong. Nothing that we have said or written was intended to diminish or challenge the integrity and humility of

Miller's trial counsel. Dan Fay brought the Miller case to us and said something terrible must have happened here. I don't know what went wrong. I thought we had won. Can you see if we have missed something?

## **1. Summary of Arguments**

One starts the review of a case for a potential ineffective assistance of counsel claim the way one always starts any other case: reading the file, writing a check list of pre-trial motions and reviewing the applicable case law-- one more time, even though, one might have tried scores of similar cases. Though seasoned lawyers rarely expect the law to change dramatically from year to year, part of our job is to become attuned to appellate decisions that signal a shift in direction that foreshadows a coming sea change.

The law that underlies the admissibility of hearsay statements in child sexual assault cases underwent a fundamental sea change when the United States Supreme Court decided the case of *Idaho v. Wright*, 497 U.S. 805 (1990). The Supreme Court held it was error to admit child hearsay without a trial court being afforded a sufficient opportunity to evaluate the independent trustworthiness of the child's statement. The sea change which started with the reversal in *Idaho v. Wright* was only the beginning of a trend which has continued to this day with the United States Supreme Court's decision in June of 2004 in *Crawford v. Washington*, 124 S.Ct. 1354 (2004).

Five years after *Idaho v. Wright* and five years before Dr. Miller was tried in Waukesha County, Wisconsin, the United States Supreme Court reversed the conviction of Mathew Tome. *Tome v. United States*, 513 U.S. 150 (1995). Mathew Tome was charged with molesting his four-year-old daughter on an Indian reservation in New Mexico. Two and one-half years after the crime allegedly occurred and after a protracted custody dispute, the trial court admitted the testimony of 6 witnesses who repeated what Tome's daughter said to them about the molestation. "The theory underlying the government's position is that an out of court consistent statement, whenever it was made, tends to bolster the testimony of a witness and so tends also to rebut an express or implied charge that the testimony has been the product of an improper influence." *Tome*, 513 U.S. at 159. The Court in *Tome* disagreed with the government's theory and held that for the statements to be admissible they must have been made before either the recent fabrication or **improper influence** had occurred.

After *Tome* was decided, states scrambled to adopt procedures such as the videotaping of children's testimony so that child sexual assault cases would not go un-prosecuted. Simultaneously, there were attempts to try to fashion a "tender years" exception or to expand other exceptions to make room for otherwise inadmissible child hearsay. But despite the efforts of those genuinely seeking to obtain convictions in these cases, criminal defense lawyers, skilled in the area of criminal law, were raising the issue of reliability of child hearsay day in and day out, because of the rulings in *Tome* and *Wright*. Expert after expert began writing

and testifying that: 1) Young children's eye-witness testimony is more likely to be inaccurate compared to their adult counterparts; 2) That even if children perceive events accurately, their memories of the events, are more likely to be subject to distortion and fantasy, when compared with their older counterparts; 3) That younger children are more vulnerable to suggestion than older children; 4) That the younger the child, the more they are susceptible to influence by authority figures -- parents, police and other adults; 5) That children may alter their statements to gain or maintain attention from adults; 6) That often communication between the declarant and the child becomes immediately misinterpreted and repeated over and over again. *See Gardner, True and False Accusations.*

In 1992, when Assistant District Attorney Stephen Centinario, authored the now infamous "Centinario letter", it is clear he took into account the edict in *Idaho v. Wright*. Upon objection by defense counsel to the admission of child hearsay, the court must make an independent determination as to the reliability of the child-hearsay prior to its admission. The Centinario letter was the district attorney's explanation to Detective Dodd of the Oconomowoc Police Department why ALL of Shawn Wambach's purported statements would fall short if a judge were to make a judicial determination of their reliability. There is no other way to interpret this letter. The purported hearsay statements of Shawn Wambach were no more reliable the day of trial than they were eight years before, when Centinario drafted the letter to the police department, explaining to them, why he would not charge the case.

Dr. Miller was convicted of assaulting Shawn Wambach because Shawn's mother believed it occurred. There were no motions-in-limine filed to exclude vouching and no motion-in-limine to exclude any of the hearsay. If trial counsel chose not to consider *Tome* and *Wright* in their initial analysis of the hearsay statements contained in the discovery, an ordinarily prudent lawyer, skilled in criminal law, would have said STOP upon receipt of the Centinario letter. The ordinarily prudent lawyer would have realized the inadmissibility of the hearsay and moved to exclude the hearsay as unreliable. If some or all of the hearsay had been excluded, Miller would not have been convicted of sexually assaulting Shawn Wambach.

Had any of the hearsay remained in the case, after motions-in-limine had been decided, trial counsel was armed and ready with experts to explain to the jury why any of the remaining hearsay should be given little or no weight. The failure to call an expert witness in a case where the defendant is a psychologist conducting a custody evaluation of a four-year-old boy and where the initial combined police and social services interview was tainted, constitutes deficient performance and clearly prejudiced this particular defendant. On this issue alone, the conviction cannot stand.

The defense to the Bergum count was not complicated. It was not technical, nor difficult to understand: Miller didn't do it. Justin Bergum was lying. Justin Bergum was not impeached. He should have been. He could have been. Evidence existed at the time of trial that Justin Bergum lied about being a victim of sexual

abuse. The state argued in its summation that just because Bergum was a drug user and a criminal doesn't mean he would lie about sexual abuse. Bergum did lie about being a victim of sexual abuse. The jury never heard the one piece of evidence that completely destroyed the credibility of the main witness for the state. Trial counsel's explanation is simple-- *they missed it*.

Bergum testified that Dr. Miller isolated Bergum to prevent Bergum from disclosing to others that Miller was molesting him. Bergum lied. Miller did not isolate him. Miller did the opposite. Miller referred Bergum to many other treatment providers during the five years Bergum was in therapy with Miller. The other professionals with whom Bergum developed close relationships were available to impeach Bergum and not called by trial counsel.

## **II. Argument**

By all accounts, this was not a "slam-dunk" for the state. There was an unbelievable amount of discovery available to the defense at the time of trial. The discovery supported trial counsel's defense that Dr. Miller didn't do it. Unlike many criminal cases that go to trial, shortage of financial resources was not an issue. Trial counsel testified that they "had it in the bag." They believed that there was evidence in the record to support that Justin Bergum lied about being sexually assaulted, that Pam Groh's credibility was "destroyed", and that Vicki Wambach

was on a mission to crucify Dr. Miller. (Trans. Of Motion Hearing, Day 2, p. 111-112).

They were wrong.

There was no impeachment of Justin Bergum. His credibility remained intact after cross-examination. Scores of witnesses were available and subpoenaed who, if called to testify, would have contradicted Bergum's trial testimony. There were no motions-in-limine brought, or hearsay objections raised, during the testimony of Vicki Wambach, Pam Groh, Ernie Lindeman, Michael Dodd, Denise Gast, or Patricia Kutschenreuter.

**A. Failure to Object to Inadmissible Hearsay In Count 2 (Shawn Wambach).**

The defense never filed pre-trial motions to exclude the hearsay statements of Shawn Wambach. Shawn did not testify that Dr. Miller had touched him. (Trans. Day 6, p. 121). Instead, he testified that Dr. Miller only asked to look at him. In order to sustain the charge in the criminal complaint, the state had to prove that Dr. Miller touched Shawn. Shawn never testified that Dr. Miller touched him. Therefore, the state called Shawn's mother to testify that Shawn had told her Dr. Miller touched him. There was no objection to her testimony. The state called Pam Groh to testify that Vicki Wambach told her that Shawn said Dr. Miller touched

him. Pam Groh also testified that Shawn told her Dr. Miller touched him. The state called Detective Ernie Lindeman to testify that Shawn told him that Dr. Miller had touched him. The hearsay referenced above was not difficult to identify. It was not buried in medical records or the product of a whimpering but not excited child.

Pozner testified at the motion hearing that it was “. . . critical that pretrial motions be filed seeking rulings on the admissibility of various pieces of evidence.” (Trans. 5-13-04, PC Motion Hearing Day 1, p. 16). Because the defense “failed to challenge the hearsay aspects of Shawn’s statements to various people, . . . the evidence rolled in unopposed and this is inconsistent with where the defense was in the case.” (*Id.* at p. 17).

When Attorney Matthew Huppertz, was questioned regarding why the defense failed to file motions-in-limine he said: “we had done the legal gymnastics as far as Shawn Wambach’s and all the related hearsay and double hearsay and so on. We had done that. So as far as we were concerned – As far as I was concerned, that was a dead issue.” (Trans. of Motion Hearing Day 2, p. 144). We respectfully assert that Mr. Huppertz was wrong in his analysis. After *Wright* and *Tome*, the exclusion of child hearsay had become a reality for ordinarily prudent lawyers skilled in the area of criminal law.

After discovering the “Centinario letter”, neither Huppertz nor Fay re-visited their analysis of the hearsay issues. They did not consider using

the Centinario letter as a roadmap to challenge the reliability of the hearsay statements. For them, the Centinario letter represented the hope that the long sought after medical records regarding Shawn's penis problems were within their grasp. At that point in their preparation, Huppertz and Fay had tunnel vision. Failure to have identified inadmissible hearsay as a result of tunnel vision, falls below the objective standard of reasonableness for two attorneys representing a psychologist charged with sexually assaulting a four-year-old child.

Huppertz justified his decision not to challenge the Pam Groh hearsay. He testified that he and Fay discussed the issue and decided the hearsay was coming in so they would not challenge the testimony.

Essentially, Mr. Fay and I discussed the issue, we talked about the various exceptions, and we painted ourselves into a corner. What I mean by that is we were convinced it was coming in either under one or two or three different hearsay exceptions, the residual, the whole climate of you lax these rules up a little bit when it comes to child victims and so on. We were convinced at the time that it was coming in, and if it's coming in and we know it's coming in we didn't file the motion." (Trans. of Motion Hearing, Day 2, p. 134-135).

Mr. Huppertz's reference to a "lax climate" is illustrative of his failure to understand the significance of the decisions of the United States Supreme Court in *Tome* and *Wright*. After the decision in *Idaho v Wright*, "you didn't need to be a weatherman to know which way the wind was blowing."

Mr. Fay had a different reason for not challenging the hearsay. He claimed it helped them because it showed Shawn's hesitation or reluctance to repeat what he had previously told his mother.

Larry Pozner testified as to why this decision was unreasonable.

. . . the motion-in-limine and the objection at trial are on the surface and are – and are vitally necessary, and assuming that any part of the tape disappears even then if the Court were to allow the mother's hearsay in, even if the first statement the mother alleges Shawn made about, "He's a doctor and he examined me," that stands in isolation now without any supporting witnesses to it, without any other people. . . . The amount of evidence available to the prosecution is dramatically reduced or is substantially more attackable in front of a jury. (Trans. of motion hearing, Day 2, p. 160-162).

It makes no difference whether the court relies on the analysis of Mr. Huppertz that the hearsay was coming in or on Mr. Fay's analysis that the hearsay was helpful. The decision to allow the admission of repetitious, inculpatory, inadmissible hearsay constituted deficient performance. Destroyed or not, Pam Groh and Ernie Lindeman's testimony stood for the proposition that because Shawn repeated it, it must be true.

Deficient performance requires a showing that the identified acts or omissions of counsel fell below the objective standard of reasonableness under prevailing professional norms viewed at the time of counsel's conduct. *State v. Hubert*, 181 Wis. 2d 333, 339, 510 N.W.2d 799 (Ct. App. 1993). The identified acts or omissions must be "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The failure of defense counsel to

challenge the hearsay, without question, constitutes deficient performance. There was no reason consistent with the theory of defense to allow the allegations to have been repeated.

Larry Pozner testified that the state had a weak case. Shawn Wambach denied any assault on the witness stand. The state called Vicki Wambach, Pam Groh and Ernie Lindeman to strengthen an otherwise weak case. Without some or all of their hearsay testimony, confidence in the verdict would have been undermined.

The state will argue that the failure to object to hearsay was a reasonable strategy to pursue. The state is wrong. It is inconsistent with the theory of the defense that Dr. Miller didn't do it, to allow two more witnesses to say Dr. Miller did do it.

## **B. Inadmissible Vouching**

Vicki Wambach vouched for the credibility of her son Shawn. This was against the rules. Other than the narrow exceptions outlined in *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), vouching is against the rules. It is against the rules for a very good reason. The jury was not supposed to convict Dr. Miller because Vicki Wambach believed her son was assaulted. Unfortunately, that is exactly what happened in this case.

Attorney Huppertz stated that he “blew it” when he did not object to the vouching testimony of Vicki Wambach. (Trans. of motion hearing Day 2, p. 127-

128). What he failed to admit was that he himself, elicited testimony that Vicki Wambach believed her son. There is no reasonable explanation consistent with the theory of defense to allow Vicki Wambach to testify that she believed Dr. Miller touched her son. It is far too dangerous a risk to take, even if trial counsel was attempting to show the witness's bias. Since Shawn did not acknowledge that touching occurred, the jury could only convict if they believed Vicki's testimony that it occurred.

Pozner underscored this point when he said the vouching testimony compounded the prejudice caused by the inadmissible hearsay:

You have hearsay, and then we have multiple hearsay, the mother said Shawn said, and then we have as the third party is the vouching on top of that, which is, "I believe the child." So the – the problem is being compounded and therefore the cross-examinations that need to be done are getting longer and more complex because it hasn't been attacked before trial, . . ." (Trans. of Motion Hearing, Day 2, p. 163).

The state will argue that all of the hearsay statements are admissible under *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988). *Sorenson*, like *Idaho v. Wright* requires a finding by the court of circumstantial guarantees of trustworthiness prior to the admission of child hearsay.<sup>1</sup> It is clear that the

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<sup>1</sup> In *State v. Sorenson*, 143 Wis. 2d 226, 421 N.W.2d 77 (1988), the court set forth the five factors which should be weighed by the trial court to determine whether hearsay statements should be admitted under the residual hearsay exception. They are:

First, the attributes of the child making the statement should be examined, including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as close familial relationship with

testimony of Pam Groh and Ernie Lindeman should have been excluded under the analysis of *Tome v. United States, supra*. It is equally clear that it should have been excluded under the reliability analysis outlined in *Sorenson*. Had an expert testified consistent with the testimony of Dr. Ackerman at the motion hearing, the reliability of the statement to Shawn's mother and others would have been excluded. This is especially true had the court agreed with the analysis outlined in the Centinario letter.

Larry Pozner testified at length about the Centinario letter. According to Pozner, "the best evidence for the defense that there are problems [with the Shawn Wambach prosecution] starts with a prosecutor." (Trans. of Motion Hearing, Day 1, p. 30). No ordinarily prudent practitioner skilled in the area of criminal law would have believed that the best use of the Centinario letter was to call Stephen Centinario to testify before the jury.

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the defendant, expressed by the child which might affect the child's method of articulation or motivation to tell the truth.

Second, the court should examine the person to whom the statement was made, focusing on the person's relationship to the child, whether that relationship might have an impact upon the statements' trustworthiness, and any motivation of the recipient of the statement to fabricate or distort its contents.

Third, the court should review the circumstances under which the statement was made, including relation to the time of the alleged assault, the availability of a person in whom the child might confide, and other contextual factors which might enhance or detract from the statement's trustworthiness.

Fourth, the content of the statement itself should be examined, particularly noting any sign of deceit or falsity and whether the statement reveals knowledge of matters not ordinarily attributable to a child of similar age.

Finally, other corroborating evidence, such as physical evidence of assault, statements made to others, and opportunity or motive of the defendant, should be examined for consistency with the assertions made in the statement. *Sorenson*, 143 Wis. 2d at 245-246.

Attorney Fay testified at the motion hearing that they should have reevaluated the case, after the Centinario letter was received.

You know, this case had been going for about a year, and as you well know when you get a case you kind of start off saying, well, these are my ingredients and therefore I'm gonna make a chocolate cake so to speak, and then what happened here is is in retrospect when we got this letter we should have turned around and said wait a minute here, we have different ingredients here, let's make a chocolate pie instead." (Trans. of Motion Hearing, Day 4, p. 160).

In short, he testified that the red light should have gone on and they should have STOPPED. "... [C]ounsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial." *Strickland*, 466 U.S. 668, 681 (1984). This was not done. They did not STOP. Counsel received the Centinario letter approximately three months before the case went to trial. The failure to recognize that the Centinario letter created, for the state, a huge uphill battle on the issue of reliability was an error of great magnitude.

When Fay was quoted paragraph 5 of the Centinario letter and asked: "Does the phrase 'perception of reality' harken to the phrase reliability as we use it within the context of the evidence code?" Fay answered: "That's absolutely correct, and if we would have, you know, this letter would have been forthcoming earlier in the process before we had kind of started . . . it probably would have changed the way we would have thought about things in terms of all of the decisions that got made up to then." (Trans. Of Motion Hearing, Day 4, p. 159).

There was plenty of time to challenge the reliability of these statements. There was no shortage of money to utilize the experts they had hired or to hire additional experts. There was no scheduling order in effect precluding the filing of motions-in-limine.

### **C. Failure to Impeach Justin Bergum**

Justin Bergum lied about being sexually assaulted.

The jury never heard that evidence.

The theory of the defense was simple: Justin lied about being sexually assaulted by Dr. Miller. The defense had to show the jury that Justin Bergum lied about sexual assault. The prosecutor argued that just because Bergum was doing drugs, did not mean he was not credible. “. . . [T]hese are the kind of factors that you have to think about when you go back and determine who you believe in this case because its not just as easy as saying he was in treatment, he was doing drug and therefore we don’t believe him.” (Trans. Of Jury Trial, Day 9, p. 73). The prosecutor was right.

The defense failed to challenge Bergum’s credibility. Instead, they chose to badger him on cross-examination. There may be times when badgering a witness is helpful to the theory of defense. But in this particular situation, they needed to catch Bergum in a lie – a big lie.

Prior to trial, the defense possessed ammunition to catch Bergum in a big lie. The same hearing where the defense failed to recognize the explosion created

by the Centinario letter, they also failed to recognize the significance of the time bomb that went off when they received the Lacey records. The Lacey records contained statements by Bergum that he was sexually assaulted prior to treatment with Dr. Miller. At trial, Bergum denied telling Lacey he had been assaulted before. The defense did not impeach Bergum with the biggest time bomb in its arsenal. Had they done so, they could have argued Bergum lies about being sexually assaulted. They could have caught Bergum in a lie - - a huge lie.

Huppertz acknowledged that the “No. 1 thing” he needed to show the jury was that “Justin Bergum could lie about sexual assault.” (Trans. of Motion Hearing, Day 2, p. 66). However, his cross-examination of Bergum did not make it clear that Bergum had lied. Huppertz acknowledged that Lacey’s records were clear about the revelation Bergum made to her. Trial counsel could have established that incalculably important fact. Whether it was because of questions asked inartfully on cross-examination or the failure to understand the fundamental power of impeachment by prior inconsistent statement, the jury never heard that Bergum lied about being sexually assaulted.

Pozner showed the court how Bergum should have been impeached.

A: If the impeachment of Justin is when did he get his first traffic ticket, it’s a minor league impeachment having no great effect in the case. When it’s a case of sexual assault and he has told a therapist that he’s trying to bond with right around the time of the reporting of this crime and around the time he’s getting ready to file a civil case, when he tells that therapist, “I was sexually abused by another person before Dr. Miller,” and that person – and then he says to a jury, “I’m telling you not to believe that therapist,” now you have Justin saying don’t believe somebody as opposed to the defense

saying don't believe Justin. The impeachment is not accomplished. . . . It is opened but not closed and so it did not occur from an evidentiary point of view.

Q: And so before it the jury did not have the testimony that this is what he told Kathleen Lacey?

A: They do not have the testimony from Kathleen Lacey nor Kathleen Lacey's credibility that stands behind it. They—They lack any of the things they need to understand the significance of the question that was asked and the denial that was given. **So the denial stood as the fact.**" (Trans. of Motion Hearing, Day 2, p. 181-182(emphasis added)).

The decision of which legal expert to hire was an easy one. There were only two choices. My father, James Shellow who, says "The Rules of Evidence are the 'lingue franque' of a courtroom. They are our friends. If you understand them and know how to use them, you will be protected from the uncertainty of a waffling witness. All you have to do is learn how to set up the impeachment. Calling counsel's father as an expert witness would have constituted a conflict of interest. The only other choice was Larry Pozner. For Pozner, the rules of evidence do not represent a cumbersome impediment to a showy cross-examination. They represent the tools a skilled lawyer must possess to ensure his client receives a fair trial.

Attorney Fay was supplied with a copy of the post-conviction motion. He was questioned about the Lacey records. Fay conceded, "We just plain missed this one totally. Somehow, it slipped through the cracks." (Trans. of Motion Hearing Day 4, p. 148). He acknowledged the importance of the testimony. He did not attempt to justify their failure to call Lacey.

The state may argue that Bergum was made to look stupid and evasive on cross-examination. He may have looked stupid and evasive on cross-examination, but he was not impeached. Failure to impeach Bergum meant there were no facts in the record to support the argument that Bergum lied.

It was clear from the motion filed by the defense and heard by the court regarding the admissibility of the Lacey testimony that the defense completely missed the significance of the Lacey testimony. Trial counsel was focused on two particular aspects of those records: Bergum told Kathleen Lacey that Dr. Miller would not allow him to go to group therapy and Dr. Miller ruined his life. Both of these statements pale in comparison to the fact that Bergum told Kathleen Lacey that he was sexually assaulted by someone before Dr. Miller. The assault had never been disclosed in any other interview or document. Bergum denied the assault at trial and continued to deny in his post-trial deposition. It is uncontroverted that had Kathleen Lacey testified, she would have testified consistent with her post-trial deposition. Had Lacey testified, Bergum would have been impeached on the single most important issue in this case: Bergum lies about being a victim of sexual assault.

The state attempted to diminish the errors of trial counsel by getting them to state that their errors were based on “strategy”. Decisions based on a particular strategy are not sufficient to uphold these convictions. This court must determine whether their particular strategic choices were reasonable and whether they were consistent or inconsistent with pursued lines of defense. *See Strickland, supra.*

Using Kathleen Lacey to impeach Bergum was consistent with trial counsel's pursued lines of defense. Failure to call Kathleen Lacey, who would have unequivocally provided the evidentiary fact that Bergum lied about sexual abuse, undermined the confidence in the outcome of the case.

**D. Inadmissible Hearsay: Denise Gast**

The hearsay testimony of Denise Gast was admitted without objection. The hearsay statements of Justin's mother were admitted to bolster the state's case. There was no foundation to admit prior consistent statements of Justin through Denise Gast.

The United States Supreme Court in *Tome v. United States*, 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995), construed the identically worded Fed. R. Evid. 801(d)(1)(B) as only allowing the admission of a prior consistent statement if the statement was made prior to the time of the alleged fabrication, improper influence, or improper motive. The Court stressed that:

Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited... . The question is whether A.T.'s out-of-court statements rebutted the alleged link between her desire to be with her mother and her testimony, not whether they suggested that A.T.'s in-court testimony was true. The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told.

This limitation is instructive, not only to establish the preconditions of admissibility but also to reinforce the significance of the requirement that the consistent statements

must have been made before the alleged influence or motive to fabricate, arose.

*Tome*, 513 U.S. at 157-158.

The Wisconsin Court of Appeals has followed the logic expressed in *Tome* and held that the prior consistent statements must predate the alleged recent fabrication or improper influence or motive in order to be admissible under Wis. Stat. §908.01(4)(a)(2). For example, in *State v. Peters*, 166 Wis. 2d 168, 479 N.W.2d 198, 201 (Ct. App. 1991), the Court emphasized:

We doubt that Peters' mere request to the jury to believe his story is necessarily a charge that J.P. was lying. However, even if it can be so construed, an allegation that a person is lying, standing alone, is not sufficient to render admissible the prior consistent statements. The allegation must be that the fabrication is recent or based upon an improper influence or motive. This requirement exists because the prior consistent statements must predate the alleged recent fabrication or improper influence or motive before they have probative value.

The prior consistent statements of Justin Bergum testified to by Denise Gast were inadmissible as a matter of law. Attorney Huppertz was responsible for attacking the state's case. He testified that he did not make a hearsay objection during the direct examination of Denise Gast. (Trans. of Motion hearing Day 2, p. 90). There was no reason given for Huppertz' failure to object to the admission of the prior consistent statements of Justin Bergum as testified to by Denise Gast.

## **E. Failure to Call Outcry Witnesses**

Bergum had the ability to report the sexual abuse prior to 1997. To sustain a conviction, the state had to prove this beyond a reasonable doubt. It is uncontroverted that the defense had in its possession prior to trial, evidence in the form of expert opinion testimony. These witnesses supported the defense position that Bergum had the opportunity to report the abuse prior to 1997 and chose not to because it did not occur.

Some of the most compelling testimony presented by the state was that Dr. Miller isolated Bergum from other treatment professionals so that he would keep Dr. Miller's molestation a secret. This was completely untrue and a fabrication created by Bergum. The defense failed to impeach Bergum on this critical issue thereby relieving the state of its burden of proof. Trial counsel introduced reams of documents which, if read closely by the jury, might have raised a doubt as to Bergum's credibility. However, the actual witnesses who could have impeached Bergum on this issue did not testify. Therefore, there were no facts in the record to show Bergum's complete fabrication.

When asked about this decision, Fay said:

You know, looking back we were all wrong, but it had come in very wrong – or very well, and it was like is there a reason that we need to add anything more, you know. We had you know – We kept that jury there a long time. . . . Some were going on vacation. We made promises to them about when things would be concluded, and it was kind of a matter of trial strategy not to call those witnesses because quite frankly – Looking back it was a stupid decision, but quite frankly I think we all thought we had it in the bag, that this was a winner.” (Trans. Of Motion Hearing, Day 4, p. 128).

When trial counsel realizes he has made bad decisions which were not consistent with the theory of the defense, these epiphanies should be given great deference by this court.

Counsel struggled long and hard as to how to present the issue that Attorney Huppertz's formulation of questions prevented him from catching the witness in a lie. We recognized the fundamental danger in going down such a road and appearing to insult senior lawyers in our community. As Pozner says more artfully than many,

I am not critiquing a lawyer's style or choice of words because we all have something to be desired in the heat of battle, but the rules of evidence and the manner of persuasion are – must be known to a lawyer. When we talk about a feeling in a courtroom, we're talking about something fairly low level in terms of persuasion. When we talk about an inference that might be drawn, we're still talking about a moderate level of persuasion. Cases are built on facts and the facts come from primarily witness testimony. The form of the question that was used predominantly was a form that did not put up the fact in a way that it could be impeached or was impeached and did not use the facts available. An ordinary prudent lawyer would handle these facts with a different methodology of questioning. (Trans. Of Motion Hearing Day 2, p. 187-188).

Trial counsel was right, Bergum lied about being sexually assaulted by Dr. Miller. They were also right in trying to show the jury that Bergum has always tried to shift blame to others for his own personal failings. Because Bergum was not able to recall the instances that Huppertz referenced in his cross-examination, trial counsel was unable to impeach Bergum. The form of the question used did

not demand an endorsement or denial of the fact contained in the question. This constitutes deficient performance and significantly prejudiced Dr. Miller.

The list of “outcry” witnesses was exhaustively discussed at the motion hearing. Failure to call these witnesses substantially prejudiced Dr. Miller. Huppertz failed to impeach Bergum when he testified that Dr. Miller isolated him from other responsible adults and mental health professionals as part of his scheme to continue the sexual molestation. Attorney Huppertz asked Bergum if he recalled numerous contacts with other treating professionals during the five-year period he was seeing Dr. Miller. The answer Bergum gave on more than 180 occasions was: “I do not recall”.

Records were admitted to the jury which, if examined closely, during deliberation might have caused the jury to question Bergum’s credibility on this issue. The jury was never made aware of the significance of the records. While the jury heard that Bergum had contact with other mental health professionals, they did not hear that Bergum had relationships with these professionals to whom he confided many shameful and embarrassing things including thoughts of suicide. It is the nature of the relationships and the professionals mentioned in these records, not the content of the records that would have provided the facts for the defense to argue that Dr. Miller encouraged Bergum to share his most intimate secrets with other responsible adults.

Pozner showed the court how easy it would have been to use those unassailable witnesses to support their position that Miller did nothing to prevent Bergum from reporting in the relevant time period. Pozner testified:

There is a dramatic difference in what the evidence is when a person gets on the stand and says, “I am unrelated to Dr. Miller in this, I am not his fan and I’m not here to support him. I’m here to tell you I was in a therapeutic relationship with Justin, here is **how close it was**, I asked him the following and he told me the following so that when he said to you ladies and gentlemen that he has no recollection of that or it didn’t happen I am here to tell you it did.” (Trans. Of Motion Hearing Day 2, p. 172(emphasis added)).

Huppertz testified that presenting defense testimony on outcry was inconsistent with the defense that Dr. Miller did not do it.

First of all, on the issue of statute of limitations, when I try a case, and we talked about this before with Mr. Fay, I ride one horse into trial. That horse in this particular case was, it didn’t happen, Justin is a liar. To then also say, oh, by the way, the State hasn’t proved that – when it happened and therefore we’re gonna ask you to find on a technicality the statute of limitations I thought was changing horses, and that is I wanted to show no weakness on the main issue it didn’t happen, he’s a liar, and here’s why given all the history. So I didn’t want to weaken what I thought we had done already in the case by my words, Miss Shellow, changing horses in mid stream because I thought Justin came across just terribly.” (Trans. of motion hearing Day 2, p. 73-74).

His analysis was incorrect and was not reasonable. Pozner testified that the two defenses were consistent.

They are [consistent], and it allows the jury to say if they so choose, “Gee, I’m not sure, I don’t know where I am on this, but I think if I’m thinking it might have happened the instructions of law which I am required to go by put a burden on the prosecution to prove to me that something has occurred to keep Justin from making outcry and

the evidence from those psychiatric, psychology and school records show that there was ample opportunity [to report].” (Trans. Of Motion Hearing, Day 2, p. 171).

It was unequivocally consistent with the defense that Dr. Miller did not do it, for trial counsel to adduce facts to show that Bergum failed to disclose abuse to responsible adults because the abuse did not occur. There were no facts before the jury to show that Dr. Miller shielded Bergum from close relationships with other mental health professionals. The jury did not know this information. They had no facts to support the defense argument that Bergum could have reported within the statute of limitations.

Trial counsel litigated complex legal issues regarding the applicability of the extender statute of limitations. Fay testified that the issue of the statute of limitations was a question of fact, not law, which the jury had to decide via a special verdict. The defense had the evidence in their possession to rebut Bergum’s testimony. They did not use it. Instead, they relied on documents which were contained in Dr. Miller’s files. Because the jury knew that the documents, which referred to Bergum’s visits to other mental health professionals, were contained in Dr. Miller’s files, they became inherently suspect. Failure to call the treatment professionals themselves to testify about the nature of the relationships and their interaction with Bergum constituted deficient performance. This was compounded in this case as there were no mental health professionals called to testify besides the defendant.

## **F. Failure to Call Expert Witnesses**

Experts were needed. Experts were hired. Experts were not called. Dr. Miller was a psychologist. The state argued that the thread that tied the allegations together was that Dr. Miller chose his most vulnerable patients and molested them.

Expert testimony was essential in this case because: 1) Wambach was seen by Miller when he was four after his mother said his father abused him. An expert was needed to explain to the jury why Wambach's statements to his mother were consistent with a misperception. 2) That in the evaluation of Wambach, where his mother disclosed prior physical abuse, Dr. Miller as a mandatory reporter in the State of Wisconsin, was required to look at the child's body to verify the abuse. 3) That because Miller looked for signs of parental abuse without another staff member present, he set himself up for the false accusation for which he stood trial. 4) That the statements obtained by police and the department of social services were tainted and the product of leading and suggestive questioning.

Expert testimony was also essential to show that 1) Bergum was troubled and sick and manipulative BEFORE Miller treated him. 2) That teenagers like Bergum who had suffered childhood abandonment and abuse learn to manipulate others into believing they are victims and not responsible for their own anti-social behaviors. 3) That by referring Bergum to other professionals he was encouraging Bergum to disclose his problems, not preventing him or isolating him. 4) That an analysis of Miller's records showed no signs of deception or irregularity regarding the number of appointments as was alleged by both teen victims and their parents.

5) That Miller didn't understand the adverse impact of boundary violations which included hugging very troubled and manipulative teenage patients; 6) That the statement, "what happens in here, stays in here" is one of the many traditional phrases psychologists use to explain to adolescent and pre-adolescent patients the clinical and legal significance of the doctor patient privilege.

The defense called no psychologist to rebut the testimony of Pam Groh that she followed the appropriate protocol in interviewing Shawn Wambach. She did not. Dr. Ackerman testified that Pam Groh and others did not follow the necessary protocol to ensure that the interviews of Shawn Wambach were pure and not tainted.

Dr. Ackerman testified regarding the interview protocol used by Pam Groh and Ernie Lindeman. He made many points throughout his testimony which included the fact that Shawn should have been interviewed alone, that anatomically correct dolls should not have been used, that 4-year-old children tend to over generalize and that calling Vicki Wambach into the interview had an impact on Shawn which most likely caused him to make the statement to Ernie Lindeman. Dr. Ackerman testified that in his opinion, the most likely scenario is that the assault did not occur and that is why Shawn was reluctant to report it to Pam Groh or Ernie Lindeman until he believed that his mother was coming into the interview. (Trans. of Motion hearing Day 3, pp. 29).

Dr. Ackerman testified regarding the rate of false accusations of child sexual abuse. Though the accusation against Dr. Miller cannot be analyzed as if it were a parent who was the abuser, many of the characteristics of false allegations that occur in custody cases were present. While false accusations in non-custody cases may occur less than 10% of the time, the fact they occur more than one-third of the time in custody cases should have been told to the jury. David Christian, Shawn's father, testified that a heated custody battle was occurring at the time Shawn saw Dr. Miller. Some of the things that Vicki said Shawn told her his father had done to him, occurred. Some of them did not. What makes the false allegation against Dr. Miller similar to a false allegation in a custody dispute is that the child, wishing to get reinforcement from a parent, often says things that are misconstrued or simply untrue. Dr Ackerman testified:

[I]n sexual abuse allegations five to eight percent of sexual abuse allegations are false. When we add what we refer to as honest errors, which would be misrepresenting what occurred, then that estimate goes up to 23 percent. When the allegation is made in the context of a divorce case, that percentage goes up to 35 percent, which basically means that slightly more than a third of all sexual abuse allegations made in divorce cases are false allegations." (Trans. of Motion Hearing, Day 3, p. 36-37).

The only witness to testify to any psychological concepts was Dr. Miller. He testified about his credentials and clinical experience. He testified about the psychological make-up of his accusers, who were also his former patients. He

testified about his clinical practices and clinical judgments as it related to his accusers. Miller had never been qualified as an expert witness in the field of forensic psychology or other related areas. Miller had never authored treatises on false accusations in child sex abuse cases. Miller had never evaluated a defendant to see if that person had the characteristics of a child molester.

Miller was a fact witness when he took the stand and denied the allegations. Miller was an expert witness when he was asked in painstaking detail to explain the clinical significance of the entries in his own medical records for all of his accusers. Standing alone, Miller's *expert testimony* as it pertained to explaining his own medical records was completely discounted when the jury was instructed that in weighing the credibility of a witness, they could take into account his interest or lack of interest in the outcome of the case. When trial counsel made the choice to use the defendant to analyze his own clinical record entries, their subsequent failure to call an expert witness, who was properly qualified to render an opinion to a degree of scientific certainty in the area of clinical and forensic psychology and who did not have an interest in the outcome of the trial, constituted ineffective assistance of counsel.

### III. PREJUDICE TO THE DEFENDANT

The prosecutor in his closing argument told the jury how each count strengthened the other. Therefore, any prejudice on one count must be weighed when assessing prejudice on the other count. The prosecutor stated, in his closing argument, “Everything during the course of the trial applies to your consideration of count 1 and everything applies to your consideration of count 2.” (Trans. of Jury Trial, Day 9, p.62).

The Wisconsin Supreme Court determined how prejudice should be calculated when there are multiple deficiencies of trial counsel. *State v. Thiel*, 2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305. The multiple instances of deficient performance of Miller’s trial counsel, standing alone, are sufficient for a finding of prejudice. However, if the court should find that some deficiencies resulted in more prejudice than other deficiencies, the court can review them together to establish cumulative prejudice. “[W]hen a court finds numerous deficiencies in a counsel’s performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice.” *Thiel*, 2003 WI 111 ¶ 59, 264 Wis. 2d at 603, 665 N.W.2d at 321. Clearly, the magnitude of the errors committed in this case, individually and cumulatively, constitutes enormous prejudice to the defendant under the unique fact situation.

“[T]he deficient performance must undermine our confidence in the fairness of the trial and the reliability of the result.” *State v. Pitsch*, 124 Wis. 2d

628, 633, 369 N.W.2d 711, 714 (1985). Failure to challenge the reliability of the Wambach hearsay combined with the failure to establish that Bergum lied about sexual assault demonstrates “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the case. *State v. Thiel*, 2003 WI 111, ¶20, 264 Wis. 2d 571, 588, 665 N.W.2d 305, 314 *citing Strickland*, 466 U.S. at 694.

### CONCLUSION

The protections guaranteed by the 6th and 14th Amendments to the United States Constitution and Article 1, sections 1 and 7 of the Wisconsin Constitution compel this court to vacate the convictions of Dr. James Miller.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

Respectfully submitted,

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