IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

STEPHEN TOLIVER,

Petitioner,

v. Case No. 02-C-1123

GARY R. McCAUGHTRY, Warden,
Waupun Correctional Institution,

Respondent.

RESPONDENT McCAUGHTRY'S
POST-EVIDENTIARY HEARING BRIEF
IN OPPOSITION TO PETITION FOR
A WRIT OF HABEAS CORPUS

INTRODUCTION

Respondent Gary R. McCaughtry submits this brief in opposition to petitioner Stephen Toliver's petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254.[1]

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[1] The State of Wisconsin is the real party in interest in opposition to Toliver's habeas petition. Accordingly, the terms, "the State'" or "the State of Wisconsin" will be used in this brief rather than the name of respondent McCaughtry or the designation "respondent."

The State notes that respondent McCaughtry has retired as Warden of the Wisconsin Correctional Institution, where Toliver is confined, and has been succeeded by Michael Thurmer. The State suggests that Warden Thurmer be substituted as respondent in this case.

Toliver challenges his custody under a judgment of conviction and life sentence imposed in Milwaukee County Circuit Court in March of 1992 after a jury found him guilty of first-degree intentional homicide, party to the crime, Wis. Stat. §§ 940.01 and 939.05 (1991-92), for his role in the killing of Tina Rogers in May of 1991.

This case has a long background with which this court is thoroughly familiar. The case's procedural history through the Wisconsin and federal courts is accurately described in this court's decision and order of January 31, 2006, denying Toliver's habeas petition (Doc. 41:4-7), and in the subsequent opinion of the United States Court of Appeals for the Seventh Circuit reversing this court's judgment and remanding the case for further proceedings, *Toliver v. McCaughtry*, 539 F.3d 766, 770-71 (7th Cir. 2008).

The Seventh Circuit's decision considered only two of the federal habeas issues that Toliver had pursued before this court:

1. ***Strickland***[2] issue: his claim that his state trial court counsel had provided ineffective assistance of counsel by failing to call Angeal Toliver to testify at trial and by failing to interview or call Harvey Toliver to testify, *Toliver*, 539 F.3d at 772-78; and

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

2. ***Brady***[3] issue: his claim that he was denied due process of law by the State prosecutor's failure to disclose material exculpatory evidence to the defense, a letter allegedly sent to the prosecutor by Cornell Smith, *Toliver*, 539 F.3d at 778-81.

These claims were denied in Milwaukee County Circuit Court – without the conducting of an evidentiary hearing on the claims – after Toliver raised them in a postconviction motion in June of 2000 (Doc. 19, Answer, Exs. J [motion] and K [circuit court decision]), following the reinstatement of his state court direct appeal rights. The Wisconsin Court of Appeals affirmed Toliver's conviction and the denial of his postconviction motion and its claims on the subsequent direct appeal (Doc. 19, Answer, Ex. O). The state appellate court rejected both claims in its unpublished *per curiam* opinion:

1. ***Strickland*** issue: without deciding if defense trial counsel's performance had been deficient under *Strickland*, the appellate court ruled that the failure to call Angeal Toliver and Harvey Toliver was not prejudicial because their testimony would not have affected the outcome of Stephen Toliver's trial (Doc. 19, Answer, Ex. O:22-24); and

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

2. ***Brady*** issue: without determining if the prosecutor had ever received the letter allegedly sent to him by Cornell Smith,[4] the appellate court held that the purported letter's content was not material and that its disclosure would not have affected the outcome of Toliver's trial (Doc. 19, Answer, Ex. O:17-20).

When it denied Toliver's habeas petition, this court determined that these state appellate court conclusions were reasonable applications of *Strickland* and *Brady* respectively (Doc. 41:24-27, 16-20). The Seventh Circuit disagreed, concluding (1) that the state appellate court unreasonably applied *Strickland* in holding that defense counsel's failure to call Angeal and Harvey Toliver was not prejudicial, *Toliver*, 539 F.3d at 775-78, and (2) that the state court unreasonably applied *Brady* and its progeny in holding that the Smith letter, if actually received by the prosecutor, was not material and exculpatory, *Toliver*, 539 F.3d at 780-82.

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[4] Neither the state circuit court or the state appellate court determined whether Smith had actually corresponded with the prosecutor. The appellate court decided the *Brady* claim "[a]ssuming that the correspondence took place[.]" (Doc. 19, Answer, Ex. O:19). In a footnote at that point, the appellate court observed: "The State notes that the prosecutor, responding to Stephen's [Toliver's] motion, 'alleged that he had not received [Smith's] letter' so that, at most, this court could grant an evidentiary hearing to determine the existence of the alleged correspondence" (Doc. 19, Answer, Ex. O:19 n.10).

But because the state courts had not determined whether trial counsel's prejudicial performance was deficient under the first prong of *Strickland* and had not determined if the prosecutor had actually received the exculpatory/material letter allegedly sent to him by Cornell Smith, the Seventh Circuit remanded Toliver's case to this court for further proceedings on these two matters. *Toliver*, 539 F.3d at 782. The court's remand directions were specific and limited:

> The state courts never resolved, under the first prong of the *Strickland* analysis, whether Mr. Toliver's counsel was ineffective in not interviewing Harvey and in not calling Angeal. Therefore, issues of fact concerning counsel's competence were never resolved. Similarly, the state courts never resolved whether the prosecutor had received the letter allegedly sent by Smith. On remand, the district court should resolve these issues. On the basis of its findings, the court then should determine whether the writ ought to be granted.

Id.

This court conducted an evidentiary hearing on the two remand issues on March 5, 2009. Three witness testified: Milwaukee County Assistant District Attorney Mark Williams, the prosecutor at Toliver's state court trial and subsequent state court proceedings in the case; Cornell Smith, and Stephen Toliver. After the hearing, Toliver was granted the opportunity to present the opinion testimony of an expert witness on the performance of Toliver's state court trial counsel, Attorney Terrence Keegan (Docs. 69-71, 77-78). But Toliver's habeas counsel later

advised the court that his expert was unable to provide such an opinion (Doc. 79), and no further testimony was presented. This court ordered the parties' submission of briefs on the two remand issues.

Facts material to Toliver's *Strickland* and *Brady* claims are set forth within the Argument section of this brief.

SUMMARY OF ARGUMENT

The purpose of the evidentiary hearing conducted by this court on remand from the Seventh Circuit was to resolve factual questions material to Toliver's *Strickland* and *Brady* claims – issues of fact not resolved in the state courts. Once those factual issues were determined, this court's findings were to provide the basis for its completion of the legal analysis of Toliver's claims and its determination "whether the writ ought to be granted." *Toliver*, 539 F.3d at 782.

The burden of proof on the targeted factual issues rests with Toliver. The State maintains that he failed to discharge that burden on each issue: that he failed to provide evidence establishing that his state trial court counsel – who died several years before Toliver first raised the claims before this court – acted in a professionally deficient manner in not calling Angeal Toliver or Harvey Toliver as trial defense witnesses and

not interviewing Harvey Toliver; and that he failed to prove that Cornell Smith's letter was ever received by the prosecutor. His failures of proof require the rejection of his *Strickland* and *Brady* legal claims. Toliver's failure to prove that his trial counsel acted in a manner that "fell below an objective standard of reasonableness," *Toliver,* 539 U.S. at 775, means that he failed to overcome the presumption that counsel acted reasonably and failed to satisfy the required deficient performance prong of the *Strickland* analysis. Toliver's failure to prove that Assistant District Attorney Williams ever received Cornell Smith's letter requires the rejection of his *Brady* claim on the most basic factual ground – the purported letter, however material, was not received by the prosecutor and therefore was not suppressed or withheld from the defense in violation of Toliver's due process rights.

This court should deny Toliver's habeas petition.

ARGUMENT

I. TOLIVER HAS FAILED TO DISCHARGE HIS BURDEN OF PROVING THAT HIS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT. THE GRANTING OF RELIEF ON THE BASIS OF HIS CLAIM OF INEFFECTIVENESS OF COUNSEL IS NOT WARRANTED.

A. Nature of the issues before the court on Toliver's *Strickland* claim.

To prevail on his claim that his trial counsel was ineffective in failing to call Angeal and Harvey Toliver – his wife and cousin, respectively, *Toliver*, 539 F.3d at 775 – and to interview Harvey Toliver, Toliver must satisfy both the deficient performance and prejudice prongs of *Strickland*'s two-part test. *Strickland*, 466 U.S. at 687, 697. Each prong presents a mixed question of law and fact, in which findings of historical fact – what was done or not done, why, and to what effect – are analyzed pursuant to legal standards to arrive a final determination. *Strickland*, 466 U.S. at 698.

At this stage of the proceedings, there is no question before the court on the prejudice prong. The Seventh Circuit's decision is controlling at this point: the court has ruled that the Wisconsin Court of Appeals incorrectly and unreasonably determined that counsel's failings in this regard did not satisfy the prejudice prong of *Strickland*. *Toliver*,

539 F.3d at 775-78. The remand on Toliver's *Strickland* claim was for the purpose of making factual determinations and deciding the legal question of whether trial counsel's conduct satisfied the deficient performance prong of *Strickland*.

B. Legal standards governing assessment of deficient performance under *Strickland*.

Because the Wisconsin Court of Appeals, rejected Toliver's *Strickland* claim solely on the prejudice prong – without addressing he deficient performance prong – federal habeas review of the deficient performance issue is *de novo* and not circumscribed by AEDPA standards and deference toward the state court's conclusion. *Toliver*, 539 F.3d at 775.

The legal standards to be applied in determining whether challenged conduct of defense counsel constituted deficient performance under *Strickland* are well–established. In assessing an attorney's performance in a counsel ineffectiveness case, a court

> must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that

> determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, 466 U.S. at 690.

The presumption of adequate assistance has a definite meaning and purpose in the evaluation of ineffectiveness claims. It requires that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland,* 466 U.S. at 689 (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

A trial attorney's selection of trial tactics and exercise of professional judgment "is substantially the equivalent of the exercise of discretion." *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). As a result, a reviewing court should afford counsel's actions a high degree of deference. *See Strickland*, 466 U.S. at 689. In legal representation, as in most other areas of human endeavor, perfect performance is seldom encountered and cannot realistically be required. Professionally

competent assistance encompasses a "wide range" of behaviors, and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

The Sixth Amendment's guarantee of the right to counsel cannot assure flawless decision-making, professional wisdom, or winning strategy. On a claim of ineffectiveness, a court "address[es] not what is prudent or [even] appropriate, but only what is constitutionally compelled." *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984). And "[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate." *Dean v. Young*, 777 F.2d 1239, 1245 (7th Cir. 1985). "A defendant 'is not entitled to the ideal, perfect defense or the best defense but only to one which under all the facts gives him reasonably effective representation.'" *State v. Rock,* 92 Wis. 2d 554, 560, 285 N.W.2d 739 (1979) (quoting *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973)). What the sixth amendment guarantees is a right to reasonable decision-making and actions by defense counsel. When professional performance is subjected to scrutiny, it may always appear

that counsel could have done more, searched further, argued harder, and chosen more wisely. But until and unless all attorneys are manufactured with iron-clad guarantees of flawless representation, the question in assessing claims of deficient performance will remain: was counsel's action reasonable? The critical issue is "whether counsel acted reasonably" in the judgments and decisions under challenge. *Burger v. Kemp*, 483 U.S. 776, 789 n.7 (1987).

To succeed in establishing counsel's deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* The non-specificity of this standard mandates that it be applied deferentially:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-34 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

> presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana*, 350 U.S. [91)]at 101 [1955]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 690 (citation omitted).

Because of *Strickland*'s strong presumption that a challenged counsel was effective, it is clear that "[t]he defendant bears the burden of proof for an ineffective assistance of counsel claim[.]" *United States v. Pergler*, 233 F.3d 1005, 1008-09 (7th Cir. 2000).[5]

C. Historic facts.

It appears that the historic facts of this case relating to Toliver's *Strickland* claim – as they are reflected in the state court record and the record created before this court – are not in dispute. Whether those facts are sufficient to satisfy Toliver's burden of proving that counsel's performance was unreasonable under prevailing professional norms is very much in dispute.

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[5] Wisconsin applies a clear and convincing evidence standard to the burden of proof in counsel ineffectiveness cases. *See, e.g., State v. Flores*, 158 Wis. 2d 636, 645 n.5, 462 N.W.2d 899 (Ct. App. 1990). Other states impose the same standard. *See, e.g., Tall v. State*, 25 P.2d 704, 708 (Alaska Ct. App. 2001); *Thompson v. State*, 702 N.E.2d 1129, 1131 (Ind. Ct. App. 1998).

The undisputed historic facts on the *Strickland* claim – fairly described, for the most part, in Toliver's supporting memorandum (Doc. 85:4-7) – show the following:

- the affidavits of Angeal Toliver, Stephen Toliver's wife and mother of his children, and of Harvey Toliver, Stephen Toliver's cousin, describe the testimony they would have given on direct examination had they been called to testify at Stephen Toliver's trial. The affidavits are attached to Toliver's supporting memorandum and their contents are described in the Seventh Circuit's opinion, *Toliver*, 539 F.3d at 772-73. Neither Angeal Toliver or Harvey Toliver testified at the evidentiary hearing before this court. The State agreed at that hearing to accept the affidavit contents as stating the matters the witnesses would testify to if called (Ev. Hrg. Tr. at 61-63).
- Angeal Toliver's affidavit recites that Angeal Toliver told Attorney Keegan, Toliver's trial counsel, what she could testify to and that he did not call her at trial.
- Harvey Toliver's affidavit recites that he told Stephen Toliver that he would speak to Attorney Keegan if necessary, that Stephen told

him he should expect to hear from Keegan, but that the attorney did not contact Harvey.

- Attorney Keegan died in 1997 and was obviously unavailable to testify at the evidentiary hearing in this court.[6]
- Stephen Toliver testified at the evidentiary hearing in this court that Attorney Keegan told him that Harvey Toliver was related to Stephen, "might not be believable" and that "we didn't need him" to testify (Ev. Hrg. Tr. at 53).
- Stephen Toliver further testified before this court that Attorney Keegan told him that while he put Angeal Toliver on the defense witness list he chose not to call her because of his concern that the jury would not believe her because she was the mother of his children (Ev. Hrg. Tr. at 55).
- Stephen Toliver emphasized in his testimony that Keegan told him that he did not plan to call Angeal and Harvey because they were too close to Stephen and "[h]e thought . . . that the jury would think they was just lying to protect me" (Ev. Hrg. Tr. at 56).

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[6] The State notes that Keegan died several years before Toliver raised his current *Strickland* claim in his 2000 postconviction motion in Milwaukee County Circuit Court – and plainly before he filed his current habeas petition in this court. Thus, at the time the current claim challenging Keegan's conduct of the defense was first raised in the state courts, the attorney was no longer available to testify about his conduct of the defense.

- On March 24, 2009, shortly after the evidentiary hearing in this court, Toliver's habeas counsel, Attorney Mullins, requested permission to submit additional evidence in the form of testimony from a criminal defense lawyer who, after reviewing the transcript of Toliver's trial, would offer an expert opinion on whether Attorney Keegan performed inadequately and deficiently in not calling Angeal and Harvey Toliver to testify at trial (Doc. 69). This court granted the request and set a schedule for the serial naming and submission of expert reports and the conducting of a further evidentiary hearing (Doc. 71). The time for Toliver's initial submission of an expert report was twice extended at Toliver's request (Margin order of 6/25/09; Doc. 78). On December 1, 2009, Attorney Mullins advised the court that his retained criminal defense expert was not able "to provide an opinion as to Mr. Keegan's effectiveness" without reviewing trial counsel's file or payment vouchers submitted by Keegan to the Wisconsin Public Defender's Office, neither of which were available (Doc. 79). Thus, no expert opinion testimony on Attorney Keegan's performance was presented to this court.

D. Application of facts to law – Toliver has failed to discharge his burden of proving that his trial counsel's performed unreasonably and deficiently under prevailing professional norms.

In assessing a claim of ineffectiveness counsel, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). The State submits that Toliver has not discharged his burden of overcoming the strong presumption that his trial counsel's decision not to call Angeal and Harvey Toliver as witnesses and not to interview Harvey might be considered sound trial strategy.

The only evidence presented by Toliver at the evidentiary hearing in this case bearing upon defense counsel Keegan's decision not to call Angeal and Harvey was evidence that Keegan concluded – and told Stephen Toliver -- that a jury would disbelieve their testimony, and thereby harm rather than help the defense, because of their family relationship to Toliver. The Seventh Circuit, reviewing a cold record prior to the evidentiary hearing in this case and before any evidentiary inquiry had been conducted at which Keegan's decision-making might have been

probed, concluded that "the only reason that we can discern for not calling Angeal and Harvey was their relationship with Mr. Toliver and the resulting possibility of bias." *Toliver*, 539 F.3d at 775. The Seventh Circuit rejected the possible bias of the witnesses as a reasonable basis for not calling them. *Id.* And the court of appeals further held that without interviewing Harvey Toliver, defense counsel could have made a reasonable strategic decision not to call Harvey. *Id.* As a result, from a record where the reasons for Attorney Keegan's decision not to call the witnesses had never been the subject of inquiry, the Seventh Circuit said that "on the record as presently constituted, it appears that the performance of Mr. Toliver's trial counsel fell below an objective standard of reasonableness." *Toliver*, 539 F.3d at 775. But that was not a final and conclusive determination. It was a preliminary observation, an appearance, a tentative conclusion. The court ordered a remand for a full examination of the "issues of fact concerning counsel's competence." *Toliver*, 539 F.3d at 782.

At the evidentiary hearing on remand, the burden was upon Toliver to demonstrate that Attorney Keegan's decision not to call Angeal and Harvey as witnesses was unreasonable and unprofessional and could not be considered sound trial strategy. Yet the evidentiary hearing produced

nothing more by way of testimony than what the Seventh Circuit had surmised in its decision: the only explanation provided by Toliver at the evidentiary hearing for Keegan's decision not to call Angeal and Harvey was what the court of appeals said was "the only reason that we can discern for not calling Angeal and Harvey . . . their relationship with Mr. Toliver and the resulting possibility of bias." *Toliver*, 539 F.3d at 775. Conveniently, Toliver's testimony followed the opinion of the court of appeals.

But even if Toliver's testimony did not merely mimic the Seventh Circuit's surmise, there are even stronger reasons for concluding that Toliver has not overcome the presumption that Keegan's decision-making might be considered sound trial strategy.

First, because Attorney Keegan died in 1997 – several years before Toliver first raised the *Strickland* claim presented in this habeas action in a postconviction motion in the state circuit court, and more than a decade before the post-remand evidentiary hearing in this case – the one person best capable of explaining his decision-making has never been able to testify. As a result, the best evidence possible on the relevant issues has never been presented. No genuine explanation from the most material witness has been provided. What this court is left to consider is conjecture, surmise, and self-serving testimony from a habeas petitioner

who may have tailored his testimony to fit what the Seventh Circuit described as "the only reason" it could discern from an empty record for Keegan not calling the witnesses. The question is whether that skimpy showing satisfies Toliver's burden of proof on his counsel ineffectiveness claim. The State submits it cannot. If it did, surmise and speculation would be substituted for reliable evidence. Attempting to divert attention from this thin evidence, Toliver argues in his supporting memorandum in this court, at 9, that "the State has not produced any evidence supporting trial counsel's decisionmaking[.]" But this sleight of hand does not work – the burden is on Toliver to show that counsel's performance was inadequate; he bears the burden of overcoming the strong presumption that his counsel's performance reflected sound trial strategy. The State does not bear the burden of supporting defense counsel's decision.

By its reference to the absence of testimony from the deceased Attorney Keegan, the State does not suggest that the unavailability of an attorney whose conduct is challenged – whether the unavailability is due to death, infirmity, or other condition – requires the denial of a defendant's claim of counsel ineffectiveness. Such a rule is too harsh. It would be equally unfair to permit a defendant to claim deficient performance has been established simply because counsel's

unavailability results in a record void of any obvious strategic reason for counsel's conduct. Either result – allowing one party or the other to benefit simply from the absence of prior counsel – is unacceptable. Recognizing as much, Wisconsin caselaw provides that where counsel is unavailable to explain his challenged actions or rebut a defendant's challenge to his effectiveness, a defendant raising a *Strickland* claim needs to support his claim by corroborating evidence – "letters from the attorney to the client, transcripts of statements made by the attorney or any other tangible evidence which would show the attorney's ineffective representation." *State v. Lukasik*, 115 Wis. 2d 134, 140, 340 N.W.2d 62 (Ct. App. 1983). In Toliver's case, Toliver relies only upon testimony from himself and affidavits from Angeal and Harvey containing hearsay reports of statements allegedly made by Attorney Keegan.

Second, Toliver asked for the opportunity to secure and present expert opinion testimony on the inadequacy of Keegan's performance, thereby demonstrating his acceptance of his burden of proof on his habeas challenge to Keegan's effectiveness. But after a long period of delay for the purpose of securing such testimony, Toliver advised the court that his expert could not provide an opinion on Keegan's effectiveness. Thus, Toliver conceded that he cannot present expert

testimony that Keegan's actions were unreasonable under prevailing professional norms.

Toliver's "evidence" on Attorney Keegan's performance is not sufficient to discharge his burden of rebutting the presumption that the attorney's challenged actions might have reflected a sound trial strategy. That presumption cannot be overcome by the absence of affirmative evidence. Because he has failed to show that Keegan's performance was unreasonable under prevailing professional norms, Toliver has failed to prove that his trial counsel's performance was deficient. The Seventh Circuit's conclusion that counsel's performance was prejudicial does not suffice. Without the required proof and showing of deficient performance, Toliver is not entitled to the granting of a writ of habeas corpus on his *Strickland* claim.

II. THE EVIDENCE AT THE EVIDENTIARY HEARING IN THIS COURT FAILS TO ESTABLISH THAT THE PROSECUTOR RECEIVED CORNELL SMITH'S LETTER. TOLIVER'S *BRADY* CLAIM SHOULD BE DENIED.

Toliver's *Brady* claim can be easily resolved. The Seventh Circuit ruled that the Wisconsin Court of Appeals had unreasonably applied *Brady* and its progeny in holding that, if it was actually received by the

prosecutor, was not material and exculpatory. *Toliver*, 539 F.3d at 780-82. The Seventh Circuit remanded the case to this court with a simple direction on Toliver's *Brady* claim: conduct a hearing to determine "whether the prosecutor had received the letter allegedly sent by Smith." *Id.* However material and exculpatory, the State did not violate its duty to disclose exculpatory evidence to the defense if the evidence – the letter purportedly sent to Assistant District Attorney Mark Williams by Cornell Smith – was never received by Williams and was never in the State's possession.

The relevant hearing testimony is fairly described in Toliver's supporting memorandum in this court, at 20-24. It can be easily summarized: Cornell Smith testified that he wrote the letter from and sent it to prosecutor Williams in June of 1991, that Williams responded to the letter shortly thereafter, that he had retained neither a copy of his letter to Williams or Williams' response, and that he believed Williams' response had been stolen while Smith was in prison at the Waupun Correctional Institution. Prosecutor Williams testified that he had no recollection of receiving a letter from Smith and was certain that he had not responded to such a letter, that he had conducted several searches of his files to determine if a letter from Smith had ever been received and

no such letter had been found, and that his standard practice – indeed, his habit and routine – is to retain any case correspondence he receives.

To his credit, Toliver does not argue in his supporting memorandum in this court that Williams was not credible in his testimony. He concedes that Williams – a long-time veteran of the Milwaukee District Attorney's Office with almost two decades of experience in prosecuting homicide cases – was candid in his testimony. Instead, Toliver appears to argue that Williams was either simply mistaken in his belief and testimony that he could find no letter from Smith and did not respond to his letter, or that – due to his heavy workload – he simply failed in this case to maintain his habit and routine of preserving and filing correspondence relating to his homicide cases.

The State submits that this court should credit Williams' testimony as more believable and convincing than Smith's, but not on the mere basis of their respective status as lawyer-prosecutor and prison inmate. Instead, the State submits that Williams' testimony about his habit and routine in preserving case correspondence, and his evident appreciation of the importance of his constitutional obligation to preserve and disclose exculpatory evidence are persuasive evidence on which to credit his testimony that he did not receive the letter allegedly sent by Cornell Smith. Such a letter, if sent, would have possessed evident significance

and would have warranted preservation and disclosure, even if it was based on hearsay.

Assessing Smith's testimony, this court can reasonably conclude that because Smith's letter was seeking consideration from Williams in Smith's criminal case, Smith had good reason to take care to preserve copies of his letter to Williams and Williams' supposed response to it. But Smith retained neither. The existence of either letter, therefore, appears less believable.

Based upon these circumstances and this court's assessment of the demeanor and testimonial presentation of Williams and Smith, the State submits that this court should credit Williams' testimony as the more credible. And if the witnesses' testimony were deemed equally believable, the burden of supporting his *Brady* claim by the greater weight of the credible evidence, or by clear and convincing evidence, rested with Toliver. *See generally*, *Collier v. Davis*, 301 F.3d 843 (7th Cir. 2000); United States v. Young, 20 F.3d 758, 764 (7th Cir. 1994). This compels the conclusion that if the testimony of Williams and Smith were equally credible, Toliver would not have discharged his burden of proving that the State received and then suppressed the Smith letter.

This court should find that Williams' testimony was more credible, that Smith's letter was not received by the prosecutor, and that – as a

result – the State did not fail to disclose exculpatory material evidence to the defense in violation of its due process obligations under *Brady*.

CONCLUSION

For the reasons argued above, respondent respectfully requests that this court deny Toliver's Petition for a Writ of Habeas Corpus.

Dated at Madison, Wisconsin, this 21st day of June, 2010.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

CERTIFICATE OF SERVICE

Re: ***Stephen Toliver v. Gary R. McCaughtry***
Case No. 02-C-1123
Judge Gorence

I hereby certify that on the 21st day of June, 2010, the **RESPONDENT McCAUGHTRY'S POST-EVIDENTIARY HEARING BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF HABEAS CORPUS** was electronically filed with the Clerk of the Court, on behalf of the respondent, using the ECF system which will send notification of such filing to the following participating ECF party:

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s/ William L. Gansner
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