UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 00-1096

KATHLEEN A. BRAUN,

Petitioner-Appellee,

v.

BARBARA POWELL,

Respondent-Appellant,

Appeal From A Final Judgment Granting Petition For Writ Of Habeas Corpus Entered In The United States District Court For The Eastern District of Wisconsin, Honorable Lynn Adelman, Presiding

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BRIEF OF PETITIONER-APPELLEE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel for the appellee, Kathleen A. Braun, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

(1) Kathleen A. Braun

(2) Shellow, Shellow & Glynn, S.C.
Henak Law Office, S.C.

(3)(i) N/A

(3)(ii) N/A

Dated: _____ _____
Robert R. Henak

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JURISDICTIONAL STATEMENT

The jurisdictional summary contained in the Appellant's brief appears to be complete and correct. Ms. Braun notes, however, that the Appellant did not obtain a certificate of appealability pursuant to 28 U.S.C. §2253(c)(1). Although the requirement of such a certificate for appeal under Fed. R. App. P. 22(b) is limited to the habeas petitioner, the similar requirement of a certificate of appealability under §2253 is not expressly so limited.

Given the similar language of §2253 as it existed prior to the Antiterrorism

and Effective Death Penalty Act of 1996 ("AEDPA"), this Court held that the requirement of a certificate of probable cause did *not* apply to the state. *United States ex rel. Calhoun v. Pate*, 341 F.2d 885, 887 (7th Cir. 1965), *cert. denied,* 382 U.S. 945 (1965). At least one court, however, held to the contrary. *See United States ex rel. Carrol v. LaVallee*, 342 F.2d 641 (2d Cir. 1965). Still, the *Carrol* Court granted the state 10 days in which to request a certificate of probable cause before the appeal would be dismissed. *Id.*

While counsel assumes that the Court will rule consistently with *Calhoun* if ever presented with the issue, he has found no cases addressing whether the state is required to obtain a certificate of appealability under §2253 as amended by the AEDPA.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. May habeas relief be denied for "procedural default" based, as here, upon the retroactive application of a new state procedural rule.

2. Is Ms. Braun entitled to habeas relief for denial of her right to a public trial when the trial court arbitrarily excluded a member of the public friendly to the defense.

3. Is Ms. Braun entitled to habeas relief based upon the prosecutor's concealment of exculpatory evidence and misleading the jury concerning his true agreement with the state's sole transactional witness against her.

STATEMENT OF THE CASE

This is an appeal from a district court order granting a federal habeas petition under 28 U.S.C. §2254 by a person in custody pursuant to a state court judgment of conviction. The petition claimed that Ms. Braun was denied the right to a public trial, that she was denied due process at trial because of prosecutorial misconduct, and that she was denied the right to confront the witnesses against her. (R1).[1]

On August 15, 1975, the state charged Kathleen Schaffer Braun and her husband, John "Timmy" Braun,[2] with the first-degree murder of William Weber. Wis. Stat. §§940.01, 939.05 & 939.22(16) (1973). After a 6-week trial, the jury returned its verdict on December 19, 1976, finding Ms. Braun guilty as charged (R29:SR1:16; Tr. 6235). On December 20, 1976, the court, Hon. Max Raskin,

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[1] Throughout this brief, references to documents in the record are identified by the docket sheet number as "R___"; the following ":___" reference denotes the page number of the document. When the document contains multiple exhibits, the specific exhibit is identified as well. R13:Exh A:1 thus refers to the first page of Exhibit A of the Response.

The pages of the trial transcript are sequentially numbered. References to that transcript, contained in the Answer, R13:Ex.G, Docs. 42-74, will take the form "Tr. ____."

The remaining state court appeal record is included in Docket No. 29. Reference to those documents will take the form of R29:SR__:__, with the "SR__" reference denoting the specific document in the state appeal record and the following ":__" reference denoting the page number of the document.

When the document is included in the Appendix to the Respondent-Appellant's brief, it is identified by Appendix page number as "R.App. __."

[2] At the time of this offense, the defendant's name was Kathleen Schaffer. She married Tim Braun on December 19, 1973 and took his last name (Tr. 4976). Both names are used throughout the trial transcript.

presiding, sentenced Ms. Braun to life imprisonment (R29:SR1:16; Tr. 6255), and entered judgment (R13:Ex.A).

The defendant filed post-conviction motions pursuant to Wis. Stat. §974.02 (1975) on August 4, 1977 (R29:SR10, SR11, SR1:17). Following Ms. Braun's escape from Taycheedah Correctional Institution on December 22, 1977, the trial court on May 1, 1978 orally dismissed those motions (R29:SR1:18). In 1984, Ms. Braun was returned to custody and she remains incarcerated in Taycheedah Correctional Institution.

On November 15, 1988, Ms. Braun filed her Motion to Vacate Judgment pursuant to Wis. Stat. §974.06 and a supporting memorandum (R29:SR19, SR20). That motion raised the same issues raised here, among others. The parties fully briefed the issues presented in that motion (R29:SR22, SR23, SR24). Following oral argument on December 21, 1990 (R13:Ex.G:Doc.41:2-41), the circuit court, Hon. Ted E. Wedemeyer, presiding, the post-conviction motion (*id.*:41-73; R13:Ex.D:App.6-8).

Following a directive from the Wisconsin Court of Appeals to determine the reasons underlying Judge Raskin's decision to dismiss Ms. Braun's first post-conviction motion, the parties entered into the following stipulation:

> The state ... had filed a written motion to dismiss Ms. Braun's post-conviction motions based upon her escape from Taycheedah Correctional Institution in December, 1977. Judge Raskin heard the motion on May 1, 1978. The sole basis

> presented by the state for dismissal of Ms. Braun's motions was her escape. At no point during the proceeding did the state argue the underlying merits of Ms. Braun's motions.
>
> Judge Raskin orally granted the state's motion to dismiss based upon Ms. Braun's escape. At no time during the proceeding or when setting forth his order did Judge Raskin ever discuss or purport to decide the underlying merits of Ms. Braun's motions, relying instead solely upon her escape as the basis for dismissal.
>
> While dismissing Ms. Braun's motions, Judge Raskin orally ordered that, if Ms. Braun returned within sixty days, he would set aside the dismissal, reopen her motions, hear arguments on the merits of those motions, and proceed to decide those motions on their merits.

(R13:Ex.D:App.10-11).

On July 7, 1993, the Wisconsin Court of Appeals affirmed, holding that Judge Raskin's dismissal of Braun's post-verdict motions because of her escape had the effect of "finally adjudicating" the issues raised in those motions so that Wis. Stat. §974.06(4) barred her from raising those issues later under §974.06. Accordingly, the Court declined to address the merits of Ms. Braun's claims. (R13:Ex.D:App.1-5). *See State v. Braun*, 178 Wis.2d 249, 504 N.W.2d 118 (Ct. App. 1993).

On review to the Wisconsin Supreme Court, Braun pointed out that that Court previously had held that an unappealed decision on the merits did not prevent the defendant from raising the same issue later pursuant to Wis. Stat. §974.06, *see*

Bergenthal v. State, 72 Wis.2d 740, 242 N.W.2d 199 (1976), and that, in any event, one of her prosecutorial misconduct claims had not been raised in her §974.02 motion and thus was not adjudicated by the dismissal of that motion (R13:Ex.D). The Supreme Court, however, likewise refused to address Ms. Braun's claims on their merits, holding instead (1) that Ms. Braun's escape forfeited her right to relief on her initial post-conviction motion filed under Wis. Stat. §974.02, (2) that dismissal of that §974.02 motion acted as a "final adjudication" of the claims raised in that motion and *res judicata*, barring relief on those claims on a subsequent motion under Wis. Stat. §974.06, and (3) that, given Ms. Braun's failure to allege "sufficient reason" for not raising the new prosecutorial misconduct claim in her initial motion, Wis. Stat. §974.06(4) barred review of that claim as well. (R:Ex.C:10-15), *see State v. Braun*, 185 Wis.2d 153, 516 N.W.2d 740 (1994), *reconsideration denied*, 525 N.W.2d 735 (1994).

On April 21, 1997, Ms. Braun filed her habeas petition in the District Court, seeking relief pursuant to 28 U.S.C. §2254 (R1). The parties fully briefed the substantive and procedural issues in the case (R19; R24; R26; R32; R33).

On December 13, 1999, the District Court, Hon. Lynn Adelman, presiding, entered its decision granting Braun's petition based upon the state's violation of her right to a public trial (R34; R.App. 106-72), and entered judgment ordering her release if she is not retried within 180 days of that order (R35; R.App. 105). The

state then appealed to this Court on January 10, 2000 (R37).[3]

STATEMENT OF FACTS

On November 25, 1973, the body of William Weber, a Milwaukee drug trafficker (*e.g.*, Tr. 1112), was discovered along the bank of the Calumet-Sag Canal in Cook County, Illinois (Tr. 3235-36). Weber had been shot three times (Tr. 3381), and had died as a result of a gunshot wound to the heart (Tr. 3438); his arms had been severed above the wrists (Tr. 3246, 3380-82).

In mid-December, 1973, Earl Jeffrey Seymour was arrested for the murder (Tr. 1423-24, 1913). After a jury trial in which Seymour testified that he did not recall the events of the murder (Tr. 1426-27), the jury could not agree and a mistrial was declared.

Seymour subsequently entered into an agreement with the District Attorney of Milwaukee County, under which he pled guilty to second-degree murder and agreed to testify against the defendant in this case and her husband, Timmy Braun (Tr. 1428-33).

Both Seymour and the prosecutor described the agreement at trial as mandating a state recommendation of incarceration for Seymour (Tr. 822-24, 1431-32, 1597-98, 5770). In fact, however, the prosecutor had told Seymour prior to trial that the state's position regarding incarceration would be reconsidered after

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[3] Because the State of Wisconsin is the real party in interest, this brief will refer to the Appellant as "the state."

the trial (R29:SR20: Exhibit A at 5). The state did reconsider, and took no position at his sentencing regarding incarceration, so Seymour was placed on probation for the murder (*id.* at 21).

The two primary witnesses at trial in this case were Seymour and Ms. Braun. Seymour was the only witness who actually connected Braun to the shooting or dismemberment of Weber.

Mr. Seymour testified that he had known Ms. Braun since the late 1950's or early 1960's and that they were associates or friends as of November, 1973 (Tr. 1087). Seymour at that time was a drug user and trafficker (Tr. 1094).

According to Seymour, Weber was a drug dealer who sold cocaine on credit to the defendant and Tim Braun for resale (Tr. 1112-21). When Weber threatened to cut off their drug supply, Seymour, Tim and the defendant on November 11, 1973 discussed various ways of killing him and decided on a plan to shoot Weber when he arrived the next day for money Tim and the defendant owed him (Tr. 1136-38, 1207-18, 1227-29).

After obtaining a pistol on November 12, 1973 (Tr. 1218, 1222, 1224), Tim Braun left to see his probation officer to establish an alibi (Tr. 1223-24). Seymour and Ms. Braun then further discussed the logistics of the killing (Tr. 1230-34) and, when Weber arrived and asked for his money, Seymour directed him into the bedroom where Ms. Braun was waiting (Tr. 1235-36). Seymour then shot

Weber once in the back and, after Weber fell to the floor, once again in the heart (Tr. 1239-41). According to Seymour, Ms. Braun then took the gun and shot Weber in the head to make sure he was dead (Tr. 1241-42).

Seymour and Ms. Braun then covered the body and placed it in Braun's car in order to dispose of it (Tr. 1286-88, 1295). They discussed disguising the body to hamper identification (Tr. 1308-09), and then took it to Seymour's father's home in Racine and placed it in the garage (Tr. 1322). The body remained in the garage until later in the week when Seymour met with Tim Braun and the defendant and discussed disposal of the body (Tr. 1390-92). The three decided to dismember the body (Tr. 1390-92, 1395). Seymour saw Mr. Braun with the body and a saw (Tr. 1398). When Seymour returned later, the body was gone (Tr. 1399).

Ms. Braun, on the other hand, testified that on November 12, 1973, at the time when Seymour indicated that he was shooting Weber, she was shopping at the Mayfair Shopping Center (Tr. 5084-90), and that she was not involved in Weber's killing or the dismemberment and disposal of his body (Tr. 5146-48).

Further facts will be set forth in the argument as necessary.

SUMMARY OF ARGUMENT

This is an appeal by the state from the district court's grant of a habeas petition challenging Ms. Braun's continuing unconstitutional incarceration in a Wisconsin state prison. Although convicted following a jury trial, that trial suffered

from significant constitutional defects. The trial court arbitrarily excluded a spectator friendly to the defense, in violation of Ms. Braun's right to a public trial. In addition, substantial prosecutorial misconduct acted to skew the trial unfairly in favor of the prosecution on the controlling issue in the case, determination of the relative credibility of Seymour and Ms. Braun. Such misconduct deprived Ms. Braun of her constitutional right to a fundamentally fair trial and due process.

The state appellate courts, however, refused even to address these fundamental defects in the case, choosing instead to punish Ms. Braun for her prior escape from prison by denying her the right to relief previously available under state law. Because the state courts retroactively applied new procedural doctrines to deny Ms. Braun relief in this case, the district court properly held that she is not guilty of any "procedural default" and is not required to show "cause and prejudice" in order to obtain habeas relief (R34:6-17; R.App. 111-22). *E.g.*, *Ford v. Georgia*, 498 U.S. 411 (1991). Because the Wisconsin Supreme Court refused to decide her claims on their merits, moreover, the district court was correct in holding that the new restrictions on federal habeas contained in the so-called "Antiterrorism and Effective Death Penalty Act of 1996" likewise do not apply in this case (R34:17-20; R.App. 122-25). *E.g.*, *Liegakos v. Cooke*, 106 F.3d 1381 (7th Cir. 1997), *rehearing denied*, 108 F.3d 144 (7th Cir. 1997), and the state does not challenge that holding on appeal.

Much of the state's argument here regarding the violation of Ms. Braun's

right to a public trial is amply rebutted by the well-reasoned decision of the district court granting habeas relief (R34:20-47; R.App.125-52). That fact no doubt explains why the state has abandoned many of the claims it presented to that court and has chosen to present certain new arguments in an attempt to convince this Court to reverse. Regardless whether the state waived those arguments, they are meritless.

The state conceded below that there was no rational justification for the trial court's exclusion of an excused juror friendly to the defense from the courtroom during Ms. Braun's trial (R32:8 ("the state will not detain this court in attempting to justify his exclusion"); *id.*:16 (conceding the exclusion was "arbitrary"). That fact alone should resolve this case, as it is well-established that the unjustified exclusion of all or a portion of the public from a trial violates the right to a public trial, *see, e.g.*, *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 694 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978), and that such a violation constitutes a structural defect in the trial from which arises an irrebutable presumption of prejudice. *See Waller v. Georgia*, 467 U.S. 39, 49 (1984), and cases cited therein.

The state is wrong, moreover, in suggesting that relief from Braun's unconstitutional incarceration requires application of a "new rule" in violation of *Teague v. Lane*, 489 U.S. 288 (1989). As the district court found, the applicable rules mandating relief in this case were well-established long before the violation here (R34:35-45; R.App.140-50), and even if they were not, the right to a public trial is

structural and thus would fall within the *Teague* exception for new rules "implicit in the concept of ordered liberty." (R34:45-46; R.App. 150-51). *See Teague*, 489 U.S. at 307

Even if the district court had not properly concluded that habeas relief was required on the public trial claim, the judgment nonetheless should be affirmed on the grounds that the trial prosecutor and Mr. Seymour misrepresented the nature of Seymour's plea agreement, thereby denying Ms. Braun due process and a fair trial. The district court properly held that the prosecutor in fact "suppressed information favorable to petitioner and made misrepresentations to the jury" (R34:52; R.App. 157). That court erred, however, on the "hard question" of whether such misconduct mandates habeas relief (R34:52-56; R.App. 157-61).

The court noted that "Seymour was critical to the state's case because he was the only witness who connected [Ms. Braun] to the murder" (R34:52; R. App. 157). It nonetheless concluded that the misconduct was not "material" under *United States v. Bagley*, 473 U.S. 667 (1985), because "[t]he jury had before it plenty of evidence that Seymour was an unsavory, lying, drug-using criminal." (R34:56; R.App. 161).

That court, however, both applied the wrong standard for assessing prejudice from the knowing use of false evidence by the state and overlooked the fact that evidence of a witness' motive to lie in a particular was in a particular case is

qualitatively different than evidence of the witness' general propensity to lie.

STANDARD OF REVIEW

This Court's review of a district court's decision to issue or deny a writ of habeas corpus is plenary. *Freeman v. Lane*, 962 F.2d 1252, 1256 (7th Cir. 1992).

ARGUMENT

I.

WISCONSIN'S RETROACTIVE APPLICATION OF A NEW PROCEDURAL RULE TO DENY MS. BRAUN RELIEF RENDERS THE "CAUSE AND PREJUDICE" RULE INAPPLICABLE

The state asserts that Ms. Braun procedurally defaulted her claims. Powell Brief at 8-13, 14-28.[4] As Judge Adelman properly concluded below (R34:6-17; R.App. 111-22), the state is wrong.

Habeas relief will not be granted where the ultimate decision of the state courts "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A state procedural bar, for instance, may provide an independent and adequate state law ground for denying relief. *Gray v. Netherland*, 518 U.S. 152, 161-62 (1996).

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[4] The state persistently misstates Braun's position as conceding that her escape procedurally defaulted her claims. *See* State's Brief at 8, 14. Braun certainly does *not* concede procedural default. What she does not and did not dispute was the fact that her escape deprived her of the right to raise her claims *on direct appeal* (*see* R13:Ex.D:15). Her position is that, while she lost her right to a direct appeal, Wisconsin law prior to the Supreme Court decision on the appeal of her motion under Wis. Stat. §974.06 did not provide that she likewise lost her right to review of her conviction under §974.06 following her return.

Failure to comply with such a state procedural rule thus may prevent federal habeas review of the defaulted claim unless the petitioner can demonstrate cause and prejudice for the default. *Id.*

The state's reliance on this general rule to assert that Ms. Braun procedurally defaulted on her claims in state court is misplaced, however. It's newfound argument that Braun's objection to the public trial violation was somehow deficient fails on a number of grounds. It's argument based on the Wisconsin Supreme Court's decision in Braun's case also fails because it is well-established that retroactive application of a new state procedural rule is not an adequate and independent state ground barring federal review of federal constitutional claims. *E.g., Ford v. Georgia*, 498 U.S. 411, 423-25 (1991); *Liegakos v. Cooke*, 106 F.3d 1381, 1384-85 (7th Cir. 1997), *rehearing denied*, 108 F.3d 144 (7th Cir. 1997).

A. Allegedly Insufficient Objection.

The state claims for the first time on this appeal that trial counsel's objection to the public trial violation might have been insufficient to provide Judge Raskin an opportunity to comprehend and rule on counsel's objection. State's Brief at 9, 16-17. However, the state never previously raised such a claim anywhere in these proceedings and accordingly has waived it. *E.g.*, *Hernandez v. Cowan*, 200 F.3d 995, 996-97 (7th Cir. 2000). That assertion also cannot support a finding of procedural default as the Wisconsin courts did not rely on any perceived deficiency

in the objection as grounds for denying relief. Habeas relief is barred by an independent and adequate state law ground only where the ultimate decision of the state courts in fact rests on that ground.

The argument, in any event, is meritless. The trial court ordered removal of a member of the public and defense counsel objected, specifically referencing the right to a public trial (Tr. 1110-1112). Given the context of the objection, it is silly to suggest that Judge Raskin did not understand that counsel's objection to the exclusion was based on Braun's right to a public trial. *See also State v. Marks*, 194 Wis.2d 79, 533 N.W.2d 730, 732 (1995):

> As a rule, we will not elevate form over substance when addressing waiver arguments. . . . Where the grounds of the objection are obvious, the specific ground of objection is not important.

(Citations omitted).

The state's new argument accordingly must be rejected. The Wisconsin courts did not rely on any perceived defect in counsel's objection and would not have, even if the state had raised that claim.

B. Wisconsin's Retroactive Application of a New Procedural Bar to Relief

Because the Wisconsin Supreme Court retroactively applied new procedural rules to deny Braun relief, the district court properly held that she did not "procedurally default" her claims and need not show "cause and prejudice." (R34:6-

17; R.App. 111-22).

Ms. Braun's 1988 motion raised two different types of claims: those which she had raised on her initial §974.02 motion which was dismissed due to her escape, and the due process/prosecutorial misconduct claim which was *not* included in that initial motion but was first raised in her §974.06 motion. The Wisconsin Supreme Court addressed the two separately, *Braun*, 516 N.W.2d at 745, and so will Ms. Braun.

1. Issue Not Raised On Initial Post-Conviction Motion/Direct Appeal

Ms. Braun advised the Wisconsin Supreme Court that not all of the issues raised in her §974.06 motion had been raised in her initial §974.02 motion (R13:Ex.D:21-22). Specifically, the trial prosecutor's misconduct in misrepresenting Seymour's plea agreement as requiring a state recommendation of incarceration and permitting Seymour to lie about the true nature of that agreement while testifying was not included in the post-verdict motion (*see* R29:SR11). Nor was the prosecutor's failure to inform defense counsel prior to or during trial of the true nature of that plea agreement.[5]

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[5] The post-verdict motion did include an allegation that the prosecutor misstated the nature of the agreement in his opening statement (R29:SR11:8). As the district court found, however (R34:7 n.4; R.App. 112), that objection was to a different misstatement than that alleged in Ms. Braun's §974.06 motion (Tr. 822-24). The objection in the initial motion was that the prosecutor described the agreement as requiring a "prison" recommendation while the written agreement stated merely an "incarceration" recommendation, which could include jail rather than prison (*id.*). The actual agreement, the concealment and misrepresentation of which forms the basis for Ms. Braun's

Prior to the Wisconsin Supreme Court's decision in this case, and the companion case in *State v. Escalona-Naranjo*, 185 Wis.2d 169, 517 N.W.2d 157 (1994), it was well-established that a Wisconsin defendant's failure to raise an issue on direct appeal did not bar raising that issue under Wis. Stat. §974.06. In *Bergenthal v. State*, 72 Wis.2d 740, 242 N.W.2d 199, 202-03 (1976), the Wisconsin Supreme Court held that criminal defendants were entitled to judicial consideration of constitutional challenges to their convictions and incarceration under Wis. Stat. §974.06 "[e]ven though the issue might properly have been raised" on the defendant's direct appeal. For eighteen years, the lower courts in Wisconsin consistently followed that holding. *E.g.*, *State v. James*, 169 Wis.2d 490, 485 N.W.2d 436 (Ct. App. 1992); *State v. Coogan*, 154 Wis.2d 387, 453 N.W.2d 186, 192 (Ct. App. 1990); *State v. Klimas*, 94 Wis.2d 288, 288 N.W.2d 157, 162-63 (Ct. App. 1979), *cert. denied*, 449 U.S. 1016 (1980).

Only in *Escalona-Naranjo* did the Wisconsin Supreme Court overrule *Bergenthal* and reinterpret the "successive petitions" provision of Wis. Stat. §974.06(4) in such a manner as to require an assertion of "sufficient reason" for not raising one's constitutional claims on a prior direct appeal. The lower Wisconsin courts following *Bergenthal* and the plain language of the statute had construed

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§974.06 motion, was that no recommendation of *any* incarceration would be required.

The Wisconsin Supreme Court recognized that the two claims were different and squarely addressed them as such (R13:Ex.C:12-15).

§974.06(4) as imposing such a requirement only where the defendant had omitted the claim from a prior motion under §974.06. *E.g. James, supra*. Braun had filed no such prior §974.06 motion.

Given this history, this Court in *Liegakos* held that retroactive application of *Escalona-Naranjo* to bar relief to Wisconsin defendants is not an independent and adequate state law ground and thus does not permit invocation of the "cause and prejudice" rule. 106 F.3d at 1384-85 ("[T]he doctrine of *Escalona-Naranjo* is not an 'adequate' state ground for appeals briefed before its announcement"). Review of Braun's prosecutorial misconduct claim thus is not barred under *Coleman*.

2. Issues Raised in Initial §974.02 Motion

The Wisconsin Supreme Court also held that review of the issues raised in Ms. Braun's initial §974.02 motion, including her public trial claim, were barred on the grounds that the dismissal of that motion upon her escape constituted a "final adjudication" of her claims, having *res judicata* effect on future attempts to litigate the same claims (R13:Ex.C:13). Once again, however, the district court was correct that this conclusion was radically different from prior law in Wisconsin (R34:8-16; R.App. 113-21).

First, there was no clear prior holding that a procedural dismissal such as this could have the effect of a final adjudication on the merits. To the contrary, prior Wisconsin law indicated that a procedural dismissal merely returned the parties to the

position they were in prior to the dismissed motion. Second, the Wisconsin Supreme Court previously had held that relief under §974.06 was proper even though the defendant had obtained a prior ruling on the merits of the same issue under §974.02 but then failed to appeal it; the prior §974.02 decision did not bar relief.

As this Court explained in denying rehearing in *Liegakos*, "only a procedural rule in force at the time of the acts done (or omitted) by the defendant establishes the sort of 'independent and adequate state ground' that blocks collateral review under §2254." 108 F.3d at 145. The original decision in *Liegakos* more fully explains this point:

> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457, 78 S.Ct. 1163, 1169, 2 L.Ed.2d 1488 (1958), holds that a rule of procedure is not adequate to prevent federal collateral review when the defendant could not be "deemed to have been apprized of its existence" at the time he omitted the procedural step in question. See also *Barr v. Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 1736, 12 L.Ed.2d 766 (1964) (state procedural rules "not strictly or regularly followed" do not bar review). *James v. Kentucky*, 466 U.S. 341 , 348-51, 104 S.Ct. 1830, 1835-37, 80 L.Ed.2d 346 (1984), generalized these holdings when concluding that only a "firmly established and regularly followed state practice" prevents federal review. What this means is practice is that the state rule of practice must have been in place, and enforced, "by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424, 111 S.Ct. 850, 857-58, 112 L.Ed.2d 935 (1991). See also *Trevino v. Texas*, 503 U.S. 562, 566-68, 112 S.Ct. 1547, 1549-50, 118 L.Ed.2d 193 (1992); *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363, 1380-81 (7th Cir. 1994) (en banc). *Ford* holds that a rule of state procedure adopted by the state's highest court two years after the defendant's trial was not an adequate ground. The Supreme Court did not require Ford to show that he relied

> on the old rules; all that mattered was what the announced rules were on the date of the act or omission said to work the forfeiture. The inquiry is objective, which greatly simplifies the task of application.

106 F.3d at 1385.

a. Because the procedural dismissal did not in fact adjudicate the merits of the motion, it did not "finally adjudicate" the issues raised under pre-*Braun* law.

As construed by the Wisconsin courts prior to *Braun* in 1994, §974.06(4) set forth three actions which would bar a post-conviction motion on a particular issue absent "sufficient reason." First, the statute barred relief on a successive §974.06 motion based upon any ground that was finally adjudicated or not raised in a defendant's original, supplemental or amended §974.06 motion. *Nichols v. State*, 73 Wis. 2d 90, 241 N.W.2d 877, 880 (1976) ("The statute makes clear that, if the issue is initially raised under 974.06, there is no right to raise the same issue again under that statute"); *see State ex rel. Dismuke v. Kolb*, 149 Wis. 2d 270, 441 N.W.2d 253, 254 (Ct. App.), *rev. denied*, 443 N.W.2d 313 (1989). *Compare State v. James*, 169 Wis. 2d 490, 485 N.W.2d 436 (Ct. App. 1992) (§974.06(4) permits post-conviction motion on ground not raised in prior §974.02/Rule 809.30 motion).

Second, the statute barred relief on grounds which the defendant "knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure

relief." Wis. Stat. §974.06(4). The "knowing and intelligent" standard was included specifically to avoid the prior, more restrictive waiver and forfeiture doctrine in favor of the permissive standard then required by the United States Supreme Court. *See* Uniform Post-Conviction Procedure Act, §8 (Commissioner's Comment); Comment, *Wisconsin Post-Conviction Remedies--Habeas Corpus: Past, Present and Future*, 1970 Wis. L. Rev. 1145, 1153-54.

Finally, although not set forth in the statute, the "law of the case" doctrine dictated that "issues previously considered on direct appeal cannot be reconsidered on a motion under sec. 974.06, Stats." *State v. Brown*, 96 Wis. 2d 238, 291 N.W.2d 528, 531 (citations omitted), *cert. denied*, 449 U.S. 1015 (1980); *State v. Witkowski*, 163 Wis. 2d 985, 473 N.W.2d 512, 514-15 (Ct. App. 1991).

Prior to *Braun*, therefore, the statute distinguished between (1) waiver of an issue, which must be knowing, voluntary and intelligent, (2) forfeiture of an issue by failing to raise it in a prior §974.06 motion, and (3) final adjudication of such an issue on direct appeal. Even after *Braun*, it is clear that Ms. Braun did not "waive" her right to relief (R13:Ex.C:9 n.3), and she did not forfeit her rights to raise the claims under the "successive petitions" rule of §974.06(4) as construed prior to *Escalona-Naranjo* because she did not make a prior §974.06 motion. *E.g.*, *James*, *supra*.

It was at best unclear prior to *Braun*, however, whether a defect in raising

an issue, resulting in a procedural dismissal without adjudication of the merits, resulted in a "final adjudication" of a claim. While the Supreme Court had not decided the issue, the most rational reading of §974.06(4) prior to *Braun*, consistent with the statute's language and apparent meaning, was that an issue was "finally adjudicated" only when the substantive issue was in fact decided on its merits. *See Hall v. Alabama*, 700 F.2d 1333, 1335 (11th Cir.) (dismissal of appeal without opinion upon appellant's escape cannot be viewed as decision on merits), *cert. denied*, 464 U.S. 859 (1983). *See also State v. Wills*, 69 Wis. 2d 489, 230 N.W.2d 827, 829 (1975) (appeal of successive post-conviction motion proper where there was no written decision of trial court on prior motion from which the appellate court could determine what issues had been considered and actually decided; doubts must be resolved in favor of the defendant). Indeed, one of the reasons often given to justify "fugitive dismissals" is the avoidance of unnecessary decisions on the merits. *See Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970).

State v. John, 60 Wis. 2d 730, 211 N.W.2d 463 (1973), did not hold otherwise. In that case, the defendant filed a petition under §974.06 challenging the voluntariness of his guilty plea but escaped prior to the evidentiary hearing scheduled for receipt of his testimony on that issue. 211 N.W.2d at 463-64. The Supreme Court upheld dismissal of the petition on a default theory. It further held that, given John's failure to appear and give testimony necessary to meet his burden of proof on

his voluntariness challenge, the dismissal properly was on the merits in that particular case. *Id*. at 465-66.

Ms. Braun's original motions, however, did not present issues of fact requiring her testimony (*see* R29:SR10, SR11). Her escape thus did not deprive the court of any evidence necessary to meeting her burden of proof and as the District Court held (R34:11-12; R.App. 116-17), the *John* theory of dismissal "on the merits" did not apply here. In order to meet its burden of showing a "firmly established and regularly followed state practice," *James v. Kentucky*, 466 U.S. at 348-49, it is not enough to claim, as the state does here, that the petitioner violated "the spirit of" a prior decision. State's Brief at 21.[6]

The parties' stipulation in this case demonstrates, moreover, that Judge Raskin never actually considered the merits of the defendant's motions when he dismissed them in 1978 (R13:Ex.D:App. 10-11). Rather, the dismissal of Ms.

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[6] The state's reliance on *Bargas v. Burns*, 179 F.3d 1207, 1212 (9th Cir. 1999), *cert. denied,* ___ S.Ct. ___ (2000), State's Brief at 19-20, is misplaced. That court relied on well-established Nevada law requiring petitioners to raise all claims in their first habeas petition in order to avoid procedural default. Although there was no state case directly on point, it was clear that such a requirement also would bar a petitioner from raising a claim in a second petition when, having raised the claim in a first petition and lost, he failed to appeal that denial.

The rule relied upon in *Bargas* obviously follows from that established in Nevada courts. The rule in *John* that denial of a motion for failure to produce evidence on the defendant's escape results in a denial "on the merits," however, does not similarly encompass the separate rule established in *Braun* that a fugitive dismissal is "on the merits" even when the escape does not interfere with the petitioner's ability to establish the factual basis for her claims. *John* is based on the logical premise that the missing petitioner cannot meet her burden of proof, while *Braun* is based more on punitive or policy grounds having nothing to do with burdens of proof.

Braun's post-verdict motions was on procedural grounds unconnected to the ultimate issues in the case. Consequently, that prior dismissal was neither a final adjudication nor the law of the case barring consideration under §974.06, at least as the law existed prior to *Braun*. *See, e.g.*, *Estate of Pfaff*, 41 Wis.2d 159, 163 N.W.2d 140 (1968) (prior dismissal of premature appeal not *res judicata* because it did not reach merits presented on this appeal); *Matter of J.S.*, 144 Wis. 2d 670, 425 N.W.2d 15, 17 n.2 (Ct. App. 1988) (where prior appeal dismissed as moot, prior judgment not law of the case); *Aiello v. State*, 166 Wis.2d 27, 479 N.W.2d 178, 180 (Ct. App. 1991) (unappealed procedural dismissals of prior detainer requests under Interstate Agreement on Detainers not *res judicata* because each of the prior proceedings was dismissed before the merits of the case could be reached).[7]

Under pre-*Braun* law, the only legal effect of the prior procedural dismissal in Wisconsin was to place the parties in the same position as if the motions had not been made. *See Pick v. Pick*, 245 Wis. 496, 499, 15 N.W.2d 807 (1944):

> Manifestly, the dismissal of an appeal for failure to comply with the statutory requirements remits the parties in the case to prior existing conditions, leaving unimpaired the statutory rights to take and perfect an appeal at any time within the period

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[7] Contrary to the state's suggestion, State's Brief at Wis. Stat. §805.03 is irrelevant. Section 805.03 is a purely civil statute which simply has no application in criminal cases. *See State v. Braunsdorf*, 98 Wis. 2d 569, 297 N.W.2d 808, 816 (1980); *cf. State v. Clark*, 162 Wis. 2d 406, 469 N.W.2d 871 (Ct. App. 1991) (criminal court has no inherent authority to dismiss). Moreover, the effect of dismissal on the merits authorized by that statute applies only to dismissals under that very statute. *See* Wis. Stat. §805.03 ("Any dismissal *under this section* operates as an adjudication on the merits... ." (emphasis added)). Judge Raskin did not rely on §805.03.

provided by law.

While Ms. Braun's escape denied her the right to direct appeal, therefore, nothing in Wisconsin law prior to *Braun* required that the procedural dismissal after her escape also have the effect of a final adjudication on her claims, denying her the right to collateral relief on those constitutional claims under §974.06 upon her return to custody. The new procedural rule to the contrary announced in *Braun* thus was not well-established at the time it was used to deny relief to Ms. Braun. As such, it was not an independent and adequate state law ground sufficient to mandate denial of habeas relief absent a showing of "cause and prejudice." *E.g.*, *Ford*, *supra*; *Liegakos*, 106 F.3d at 1385.

b. The dismissal did not "finally adjudicate" the issues raised even if that dismissal was "on the merits."

Even if the state trial court's dismissal had the effect of denying Ms. Braun's motions on their merits, that decision was not a "final adjudication" with *res judicata* effect barring her from raising the issues under §974.06 according to Wisconsin law prior to *Braun* in 1994. Prior to that date, the decision in *Bergenthal v. State*, 72 Wis.2d 740, 242 N.W.2d 199 (1976), was controlling.

In *Bergenthal*, the defendant was convicted of first-degree murder. During the trial, he had requested *in camera* inspection by the trial court of certain allegedly exculpatory materials possessed by the state. That court reviewed the materials,

found nothing exculpatory, and sealed them in a brown envelope for appeal purposes. On motions after verdict, the defendant raised 100 claims of error and again challenged the failure to disclose. The trial court again reviewed the documents *in camera* and again ruled that they were not exculpatory. 242 N.W.2d at 202.

Bergenthal appealed, raising 99 claimed errors, but not the trial court's failure to disclose the contents of the envelope. *Id*. The Wisconsin Supreme Court affirmed the conviction. *See State v. Bergenthal*, 47 Wis.2d 668, 178 N.W.2d 16 (1970), *cert*. *denied*, 402 U.S. 972 (1971).

Bergenthal then challenged suppression of the materials by motion under §974.06. The trial court held that the Supreme Court had resolved the issue on direct appeal and denied the motion. On appeal, the Supreme Court disagreed. 242 N.W.2d at 202.

That Court also rejected the state's argument, the same as that it ultimately adopted in *Braun*, that the defendant should be precluded from raising an issue under §974.06 which was fully preserved by denial of a post-verdict motion and which could have been raised on direct appeal:

> Even though the issue might properly have been raised on appeal, it presents an issue of significant constitutional proportions and, therefore, *must* be considered in this motion for post-conviction relief.

Id. at 203 (emphasis added), *citing Loop v. State*, 65 Wis.2d 499, 222 N.W.2d 694

(1974).[8]

Beamon v. State, 93 Wis.2d 215, 286 N.W.2d 592 (1980), did not alter Wisconsin law under *Bergenthal* to the effect that a circuit court decision on a post-verdict motion under §974.02 did not constitute a "final adjudication" barring the subsequent presentation of the same claims under §974.06. Rather, that case merely held that, having rejected Beamon's claim on direct appeal, the Supreme Court would not consider it again under Wis. Stat. §974.06. That decision said nothing about the *res judicata* effect of a circuit court's unappealed dismissal of a post-conviction motion. *See also State v. Brown*, 96 Wis. 2d 238, 291 N.W.2d 528, 531 (1980) ("issues previously considered on direct appeal cannot be reconsidered on a motion under sec. 974.06, Stats."(citations omitted)).

Prior to *Braun*, therefore, *Bergenthal* provided that a trial court's denial of post-verdict motions filed under Wis. Stat. §974.02 as a necessary predicate for an appeal never taken did not constitute such a "final adjudication" of the issues raised as would bar subsequent relief under §974.06. Such a decision on the merits was no more a "final adjudication" under §974.06(4) than was the same trial court's decision on the issues prior to or during trial. *See*, *e.g.*, *Loop*, 222 N.W.2d at 696 (defendant entitled to pursue §974.06 relief even if no direct appeal filed).

This is not, as the state suggests, an "unwarranted expansion" of

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[8] This language amply rebuts the state's suggestion that review was discretionary, State's Brief at 25 n.3. The Court clearly stated that such claims "must be considered."

Bergenthal, State's Brief at 24-25, but exactly what that decision held: a petitioner was entitled to collateral review of claims actually brought, decided, and not appealed on direct review. Braun, like Bergenthal, filed post-verdict motions. Braun's motions, like Bergenthal's, were denied by the circuit court. Braun, like Bergenthal, did not appeal the denial of the issues sought to be raised under §974.06. Braun, like Bergenthal, sought relief under §974.06 and was entitled to a decision on the merits of her claims under Wisconsin law as it existed prior to the Supreme Court's decision in her case.

Because the Wisconsin Supreme Court applied a new procedural rule as to the binding effect of a prior §974.02 decision to block Braun's claim for relief in state court, that rule fails to meet the requirements of an independent and adequate state law ground. For this reason as well, therefore, Ms. Braun need not show cause and prejudice. Here, as in *Ford*, "to apply [*Braun* and *Escalona-Naranjo*] retroactively to bar consideration of a claim [subject to dismissal on initial post-conviction motion] would ... apply a rule unannounced at the time of petitioner's [§974.02 motion] and consequently inadequate to serve as an independent state ground within the meaning of *James [v. Kentucky*, 466 U.S. 341 (1984)]." *Ford*, 498 U.S. at 424. *See also Liegakos*, *supra*.

II.

THE COURT'S EXCLUSION OF A SPECTATOR DENIED MS. BRAUN HER RIGHT TO A PUBLIC TRIAL.

During the course of the trial, the court observed that Mr. Mane, an individual who had been on the venire panel but had been excused following voir dire, was present in the courtroom watching the trial (Tr. 1110).[9] Over defense objection (Tr. 1110, 1112), and despite the prosecutor's statement that the Mr. Mane probably was no longer on jury duty (Tr. 1111), the court ordered the individual to be removed from the courtroom pursuant to its "rule" that the court "[did] not permit any juror who is on the present panel to listen to a trial in which they [sic] could have or might have been members of the jury" (Tr. 1110).

The district court properly held that the exclusion of Mr. Mane from the courtroom violated Ms. Braun's right to a public trial and requires grant of the writ (R34:20-47; R.App. 125-52). The state below conceded that the exclusion of Mr. Mane from the courtroom was "arbitrary" and without a justifiable basis (R32:8, 16). The law, moreover, is well-established that such violations of the right to a public trial mandate reversal without requiring a showing of resulting prejudice.

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[9] The apparent basis for the individual's removal from the jury was his asserted friendship with defense counsel and his having met the defendant (Tr. 1111; *see* Tr. 838-39).

A. The Arbitrary Exclusion of a Member of the Public Friendly to the Defense Denied Ms. Braun her Right to a Public Trial

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... public trial." U.S. Const. amend. VI. This fundamental right has long been recognized as applicable in state proceedings. *Argersinger v. Hamlin*, 407 U.S. 25, 27-28 (1972); *see In re Oliver*, 333 U.S. 257 (1948).

The right to a public trial acts "as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Oliver*, 333 U.S. at 270.

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions....

Id. at 270 n.25, quoting 1 Cooley, *Constitutional Limitations* (8th Ed. 1927) at 647. *See Waller v. Georgia*, 467 U.S. 39, 46 (1984); *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). Such a public trial makes the proceedings known to potential material witnesses, *Waller*, 467 U.S. at 46; *Oliver*, 333 U.S. at 270 n.24; 6 J. Wigmore, *Evidence* §1834 (Chadbourn rev. 1976) ("Wigmore"), tends to assure testimonial trustworthiness by increasing the probability that false testimony will be

detected, *Waller*, 467 U.S. at 46; Wigmore §1834, and increases confidence in the judicial system, *Oliver*, 333 U.S. at 270 n.24; Wigmore §1834.

While the defendant's right to a public trial is not absolute, *see*, *e.g.*, *United States v. Eisner*, 533 F.2d 987, 993 (6th Cir.), *cert. denied*, 429 U.S. 919 (1976); *State ex rel. Stevens v. Circuit Court*, 141 Wis.2d 239, 252, 414 N.W.2d 832, 838 (1987), it is recognized that "the court's discretion to order exclusion should be sparingly exercised and limited to those situations where such action is deemed necessary to further the administration of justice." *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1274 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975); *see Stevens*, 141 Wis.2d at 254, 414 N.W.2d at 838-39. *See also Waller*, 467 U.S. at 45:

> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determined whether the closure order was properly entered."

(Quoting *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984)).

The trial court in this case excluded a member of the public from viewing the trial solely pursuant to its policy of excluding those who were on the venire panel but were not chosen to sit as jurors. None of the interests which courts have found sufficient to overcome a defendant's right to a public trial comes close to justifying the court's actions in this case. There is no assertion here that the prior jury panelist's

exclusion was necessary to protect any witness from threatened harassment or physical harm, *compare Eisner*, 533 F.2d at 993-94; *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969), *cert. denied*, 397 U.S. 957 (1970); 55 A.L.R.4th 1196 (intimidation of witness), or from the trauma of publicly reliving a sexual assault, *see Stevens*, 141 Wis.2d at 254-55, 414 N.W.2d at 838-39; *compare United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 694-95 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978). Nor is there any possible basis for arguing that his exclusion was necessary to protect the confidentiality of certain information, *compare Lloyd*, 520 F.2d at 1274-75 (testimony of undercover agent engaged in ongoing investigation); *United States v. Clark*, 498 F.2d 535, 537-38 (2d Cir. 1974) (government's highjacker detection profile); 54 A.L.R.4th 1156 (confidentiality of undercover witness), to avoid prejudicial influence on the jury, *compare United States v. Rios Ruiz*, 579 F.2d 670, 674-75 (1st Cir. 1978) (uniformed officers were asked to leave courtroom during prosecution of two police officers for beatings and assaults, with caveat they were welcome in courtroom out of uniform), or to protect health and safety of the public, *compare Colletti v. State*, 12 Ohio App. 104 (1919 Summit County) (influenza epidemic). The individual was not a witness in the case, *compare State v. Cyrulik*, 100 R.I. 282, 214 A.2d 382 (1965), nor does the record reflect that he was in any way disruptive, *compare United States v. Akers*, 542 F.2d 770, 772 (9th Cir. 1976), *cert. denied sub nom. Wallace v. United States*, 430 U.S.

908 (1977); 55 A.L.R.4th 1170 (disruption as basis for excluding spectators).

Finally, it is irrelevant that only one person rather than the entire public in fact was excluded from the courtroom. The courts have long recognized that the right to a public trial bars the arbitrary picking and choosing of who may attend. Arbitrary exclusion of *any* member of the public is a violation of the right to a public trial mandating reversal. *See, e.g., Addy v. State*, 849 S.W.2d 425 (Tex. App. 1993) (arbitrary exclusion of defendant's friends mandated reversal). Indeed, as early as 1891, the Michigan Supreme Court held that the trial court had committed error in excluding all but "respectable citizens." *People v. Murray*, 89 Mich. 276, 50 N.W. 995, 998 (1891).

The Wisconsin Supreme Court similarly held in *Stevens* that the right to a public trial is violated where the judicial proceedings arbitrarily are closed to some members of the public, even though the media is allowed access. 141 Wis.2d at 250-51, 414 N.W.2d at 837. *See also Davis v. United States*, 247 F. 394 (8th Cir. 1917) (constitutional error to exclude all persons except relatives of defendants, members of the bar, and newspaper reporters; prejudice is implied); *Commonwealth v. Marshall*, 356 Mass. 432, 253 N.E.2d 333 (1969) (constitutional error to exclude the defendant's family and friends); *Neal v. State*, 192 P.2d 294, 296 (Oklahoma Crim. App. 1948) ("It would appear that while the trial judge may for special causes exclude any spectators from the courtroom yet he cannot make the order of exclusion

extend further than the special issues warrant in the particular case."); *Commonwealth v. Contakos*, 499 Pa. 340, 453 A.2d 578 (1982) (state constitutional right to public trial violated when judge closed courtroom to everyone except representatives of media after being notified that attempt might be made on life of next prosecution witness).

The trial court's arbitrary exclusion of a member of the public from the trial thus denied Ms. Braun her right to a public trial.[10]

While the state is correct that some courts have applied a "triviality standard" under certain, very limited circumstances, it ignores those limitations, and the district court was correct in explaining why those cases do not apply here (R34:27-29; R.App. 132-33). The Tenth Circuit explained these cases in *United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994). The Court there observed that a short, unintentional closure does not violate the right to a public trial because "the denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom." *Id.*

Peterson v. Williams, 85 F.3d 39 (2nd Cir. 1996), for instance, involved an inadvertent courtroom closure of about fifteen minutes while the defendant testified, after which the error was discovered and the courtroom reopened. There followed

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[10] The violation here is especially egregious in light of the fact that the excluded spectator was friendly to the defense. *See*, *e.g.*, *Marshall*, *supra*; *Thompson v. People*, 156 Colo. 416, 399 P.2d 776 (1965) (defendant denied right to public trial where spectators, including defendant's friends but not including press, court officials and parties' relatives, were excluded).

a final argument which summarized the defendant's testimony. Because the closure was "1) extremely short, 2) followed by a helpful summation, and 3) entirely inadvertent," it was held not to violate the public trial right. 85 F.3d at 44. Of course, none of those decisive factors is present here.

Snyder v. Coiner, 510 F.2d 224 (4th Cir. 1975), the other decision cited for the "de minimis" or "triviality" analysis, likewise does not help the state. The court there specifically noted both that there was valid justification for requiring any new spectators to wait until a recess to enter the courtroom during closing arguments and that, unlike here, no one was required to leave the courtroom. *Id.* at 230.

United States ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), likewise does not help the state. This Court there specifically held that the public trial right is violated whenever the trial judge excludes some portion of the public without "substantial justification," and that exclusion under such circumstances mandates reversal without a showing of prejudice. *Id.* at 694. Here, of course, the state has conceded that there was no justification for excluding Mr. Mane from the courtroom.

Given the ample authority to the contrary, there is no possible justification for the state's claim that the district court's decision here is somehow erroneous or "unprecedented." State's Brief at 31-33. As this Court held in *Latimore*, it was already well-established in 1977 that the arbitrary exclusion of even some portion of

the public from the trial violated the public trial right and mandated reversal. 561 F.2d at 694.

Indeed, the state still has failed to cite a single case holding that the arbitrary exclusion of a portion of the public (or even a single spectator) falls outside the protection of the public trial right. The cases it cites for that proposition certainly do not support it. *See* State's Brief at 31-32. Rather, those cases either (1) involved a legitimate basis for the exclusion, *see United States v. Michaud*, 48 C.M.R. 379, 388 (1973) (exclusion to avoid overcrowding courtroom); *People v. Dawson*, 444 N.Y.S.2d 333, 334 (App. Div. 1981) (exclusion of gawkers in rape trial), *cert. denied*, 458 U.S. 1112 (1982); *People v. Jones*, 442 N.Y.S.2d 999 (App. Div. 1981) (same); *Young v. State*, 352 So.2d 815, 818 (Miss. 1977) (spectator excluded to avoid confusing witness); (2) found error but overlooked established law and subjected public trial violation to harmless error analysis, *In re Wagner*, 119 Cal. App. 3d 90, 173 Cal. Rptr. 766, 773 (1981); *People v. Hargrove*, 400 N.Y.S.2d 184, 184-85 (App. Div. 1977) (Hopkins, J., concurring) (although majority presumably disagreed and found sufficient basis for exclusion), *cert. denied*, 439 U.S. 846 (1978); *State v. Robillard*, 508 A.2d 709, 713-15 (Vt. 1986) (overlooking *Waller* decided two years earlier), (3) required application of plain error analysis and a showing of prejudice because the defendant failed to object to the exclusion, *United States v. Garland*, 364 F.2d 487, 489 (2d Cir.), *cert. denied*, 385 U.S. 978 (1966), or (4) did not even

involve closure or exclusion, *Hampton v. People*, 465 P.2d 394, 399 (Colo. 1970) (fact that all but one entrance to courthouse locked during Saturday trial proceedings not public trial violation).

York v. State, 380 N.E.2d 1255, 1258-59 (Ind. App. 1978), also cited by the state, falls into the same category as *Snyder, supra*. The exclusion of two attorneys, unlike here, was inadvertent and brief and no one was required to leave the courtroom.

Thus, none of the authorities cited by the state supports its assertion that the district court somehow erred in holding that the arbitrary removal of a member of the public violated her right to a public trial.

B. The Public Trial Violation Mandates Release or a New Trial Without a Showing of Resulting Prejudice

Contrary to the state's argument, denial of the right to a public trial may not be excused as harmless. As the district court observed (R34:32-43; R.App. 137-48), it is and was well established that a properly objected to violation of the right to a public trial "require[s] reversal without any showing of prejudice and even though the values of a public trial may be intangible and unprovable in any particular case." *Arizona v. Fulminante*, 499 U.S. 279, 294-95 (1991). *See Waller*, 467 U.S. at 49. The same is true regardless whether the closure is partial or complete. *See, e.g.*, *id.* at 49-50; *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3d Cir. 1969); *United States v. Kobli*, 172 F.2d 919, 921 (3rd Cir. 1949); *Tanksley v. United States,*

145 F.2d 58, 59 (9th Cir. 1944); *Davis v. United States*, 247 F. 394, 398-99 (8th Cir. 1917); *Renkel v. State,* 807 P.2d 1087, 1094 (Alaska App. 1991). *See also* 156 A.L.R. 265, 296 (1945) (and cases cited); 48 A.L.R. 2d 1436, 1454 (1956) (and cases cited).[11]

> Because the public trial guarantee not only prohibits secrecy but also reflects a preference for an open forum, prejudice to the defendant is implied whenever the trial judge lacks substantial justification for excluding spectators, and an affirmative showing of harm is unnecessary to establish a violation of the defendant's right to public trial.

United States ex rel. Latimore v. Sielaff, 561 F.2d 691, 694 (7th Cir. 1977) (citations omitted).

Prejudice need not be shown in such cases because violation of the public trial right is a structural defect which defies analysis under the harmless error standard. *Fulminante*, 499 U.S. at 309-10. The public trial right is one of those "basic protections" without which

> "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal

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[11] *Levine v. United States*, 362 U.S. 610 (1960), relied upon by the state in the Wisconsin appellate courts, did not hold otherwise or permit a harmless error analysis. *Levine*, plain and simple was a due process waiver case. *See id.* at 617, 619. Because the defendant there did not request that the proceedings be opened, he was not denied due process. *Id.* Harmless error was neither applied nor discussed. The absence of "deliberately enforced secrecy" or "prejudice attributable to secrecy" was raised solely in relation to the Court's inability to find adequate reason to overlook the defendant's failure to object to the closure. *Id.* at 619-20. The decision in no way questions the established principle that, upon proper objection, violation of the public trial right requires reversal without a showing of prejudice.

punishment may be regarded as fundamentally fair."

Id. at 310 (citation omitted). Yet, proving actual prejudice in such a case is nearly always a practical impossibility. *See Waller*, 467 U.S. at 49 n.9. The state's argument thus would render the public trial guarantee a right in name only, to be denied without consequence.

Nor does it help to disguise the state's "harmless error" argument in terms of "proportionality" as it did below (R32:18-23) or "windfalls," as it reformulates that argument here. State's Brief at 33-34. Of course, when the violation occurs not during the trial itself, but rather during some other evidentiary proceeding such as a suppression hearing or a preliminary hearing, a new trial may not be appropriate. *E.g.*, *Waller*, 467 U.S. at 49-50; *Bennett*, 419 F.2d at 608-09; *State v. Webb*, 160 Wis.2d 622, 467 N.W.2d 108, *cert. denied,* 502 U.S. 889 (1991). The previously closed hearing may be ordered reheld in public. In such cases of wholly non-trial closures, and only in such cases, is the court permitted to conduct the "proportionality" analysis proposed by the state. This is not such a case; the trial itself was not fully public.

Waller contradicts the state's position, not the district court's. *Waller* holds that prejudice is presumed from a public trial violation, but that any remedy for such a violation must be commensurate with the violation itself. Accordingly, if the violation affects a pretrial hearing, but not the trial, then a new trial is not appropriate.

If the violation affects the trial itself, however, and there is no other way to restore the public nature of the trial, then the only proportional remedy is a new trial. *Compare United States v. Canady*, 126 F.3d 352 (2d Cir. 1997) (public nature of otherwise public, nonjury trial violated by judge's issuance of written decision; remedy ordered was remand for a public pronouncement of decision), *cert. denied*, 522 U.S. 1134 (1998).

The state's attempt to require Braun to establish resulting prejudice thus flies directly in the face of *Waller* and the "consistent view" of the long-established line of cases upon which it was based. *See*, *e.g.*, *Waller ,*467 U.S. at 49 n.9; *Levine v. United States*, 362 U.S. 610, 627 n.1 (1960) (Brennan J., dissenting); *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3rd Cir. 1969); *Davis v. United States*, 247 F. 394, 398-99 (8th Cir. 1917). *See also* 156 A.L.R. 265, 296 (1945) (and cases cited); 48 A.L.R.2d 1436, 1454 (1956) (and cases cited).

The state's position also ignores the recognition in these cases that proving actual prejudice (or the opposite, lack of prejudice), is nearly always a practical impossibility. *E.g.*, *Waller*, 467 U.S. at 49 n.9. Indeed, even if "harmless error" analysis applied, the very same imponderables which mandate *per se* reversal render impossible the state's meeting of its burden of proving harmlessness in this case. Beyond bald speculation and conclusory allegations, the state makes no attempt to meet that burden. Because the burden of showing harmlessness in a habeas case rests

upon the state, *O'Neal v. McAninch*, 513 U.S. 432, 438-39 (1995), such speculation about whether the violation in fact was harmless simply cannot meet the state's burden.[12]

C. Relief is Not Barred by the *Teague* Rule.

The state persists in claiming that relief in this case requires application of new law to the effect that violation of the public trial right mandates reversal without a showing of resulting prejudice. State's Brief at 34-41, citing *Teague v. Lane*, 489 U.S. 288 (1989). The district court's thoughtful and accurate decision, however, demonstrates why that position is meritless (R34:35-46; R.App. 140-51).[13]

Simply put, *Waller* did not alter the relevant law on this point one iota. With only one or two rogue exceptions in which the court's overlooked established law, the courts consistently have held contrary to the state's position, both before and after that decision. *E.g.*, *Waller*, 467 U.S. at 49 and n.9 ("The parties do not question the consistent view of the lower federal courts that the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the

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[12] While the actual standard for prejudice is slightly more forgiving of state errors on habeas, *see Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), the burden remains on the state to disprove prejudice, *O'Neal*, 513 U.S. at 438-39.

[13] The state below claimed only that the automatic reversal rule for public trial violations recognized in *Waller* constituted a "new rule" (R32:23-32). To the extent its claim on appeal can be read more broadly as addressing the standards for assessing a public trial violation in the first place, it has waived such a claim by not raising it below. *Hernandez*, 200 F.3d at 996-97. In any event, the state is wrong for the reasons stated by the district court.

public-trial guarantee.").[14] This Court, of course, was in accord even prior to the violation in Braun's case. *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 694 (7th Cir. 1977) ("[W]henever the trial judge lacks substantial justification for excluding spectators, . . . an affirmative showing of harm is unnecessary to establish a violation of the defendant's right to public trial" (citations omitted)).[15]

The state's reliance on the concurring opinion in *Ayala v. Speckard,* 131 F.3d 62, 73-75 (2nd Cir. 1997) (en banc) (Walker, J., concurring), is misplaced. The issue there, and Judge Walker's comments, were limited to consideration of the separate procedural requirement in *Waller* that the court *sua sponte* consider alternatives to a partial closure even if the defendant does not request them. *Id.* at 74. Judge Walker did not there address application of *Teague* to the established rule that a defendant need not establish resulting prejudice from a public trial violation.

The state's argument appears to be based on the assumption that the *Teague* bar applies whenever there is no binding Supreme Court precedent on point. That is not the law, however. Because this case is not controlled by the AEDPA, the Court is not limited to Supreme Court precedent in assessing whether a pronounce-

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[14] *Levine v. United States*, 362 U.S. 610 (1960), *see* Supp. Brief at 28-29, applied a waiver/"plain error" analysis and cannot reasonably be read as applying a harmless error analysis. *See* Braun's Brief at 29 n.9.

[15] The state's suggestion that there was some doubt over whether the public trial right applied to the states in 1977, State's Brief at 37 n.6, is just silly. As the Third Circuit recognized in 1969,"it is now clear that the provision is applicable to the states by virtue of the due process clause of the Fourteenth Amendment". *Bennett*, 419 F.2d at 603.

ment is a "new rule." *See Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir. 1996) (en banc). Even though the Supreme Court had not needed to address the implied prejudice rule prior to *Waller*, the Court there properly held that the rule already was well-established at that point. 467 U.S. at 49.

As the district court found, moreover, the public trial right is central to an accurate determination of guilt or innocence, *Fulminante*, 499 U.S. at 310, so that *Waller* would be fully retroactive in any event under the second exception to the *Teague* rule (R34:45-46; R.App. 150-51). *See Teague* 489 U.S. at 311-14.

The state also argues that others illegally incarcerated in Wisconsin's prisons may also seek relief should this Court uphold Braun's right to relief here. State's Brief at 39-40. However, the fact that a decision following the law here might also help vindicate the rights of other victims of similar violations is no cause to shirk the Court's obligation to do justice in this case.

Because the rule recognized in *Waller* was not "new," and, in any event, concerned a structural defect in the trial not subject to harmless error analysis, the district court properly held that relief is not barred by *Teague* (R34:35-46).

III.

PROSECUTORIAL MISCONDUCT DEPRIVED MS. BRAUN OF HER RIGHT TO DUE PROCESS AND A FAIR TRIAL.

Throughout his testimony (Tr. 1431-32, 1597-98) and the prosecutor's

opening (Tr. 822-24) and summation (Tr. 5770), Seymour's plea agreement was described as mandating a state recommendation of incarceration for his second degree murder conviction. In fact, as was well known to the prosecutor, he had informed Seymour and his counsel prior to Ms. Braun's trial that the state's position with regard to incarceration would be reconsidered after that trial (R29:SR20:Exhibit A at 5). Counsel for Ms. Braun was not informed of that fact prior to the trial and the only suggestion of such a change was a single oblique reference during Seymour's direct testimony (Tr. 1432). The state's incarceration position in fact *was* reconsidered after the trial, and the prosecutor, after making an extremely favorable statement with regard to Seymour's performance (R29:SR20:Exhibit A at 6-8), made no specific sentence recommendation (*Id*. at 8). Seymour was placed on probation (*Id*. at 21).

The district court properly concluded that the state's concealed the true nature of its deal with Seymour and misled the jury as to the true nature of that deal, both by false statements and by failing to correct Seymour's false testimony (R34:49-52; R.App. 154-57). It erred, however, in holding that those violations were harmless (*Id*.:52-56; R.App. 157-61).[16]

Again, the district court was correct that the prosecutor "suppressed

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[16] Although Ms. Braun did not file a notice of cross-appeal, "[i]t is well accepted . . . that without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982).

information favorable to [Ms. Braun] and made misrepresentations to the jury" (R34:52; R.App. 157). The state's actions in concealing the true nature of its deal with Seymour and in misleading the jury as to the true nature of that deal, both by false statements and by failing to correct Seymour's false testimony, violated a number of Ms. Braun's constitutional rights.

First, "[d]ue process requires the prosecutor to disclose all exculpatory evidence, including impeachment evidence relating to credibility of witnesses for the prosecution." *State v. Nerison*, 136 Wis.2d 37, 401 N.W.2d 1, 8 (1987), *citing United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963). *See also Giglio v. United States*, 405 U.S. 150 (1972). The state obviously knew that Seymour's credibility was the primary issue at the trial; yet it failed to disclose this important piece of evidence which discredited its star witness. *See also United States v. Cervantes-Pacheco*, 826 F.2d 310, 315-16 (5th Cir. 1987), *cert. denied sub nom.*, *Nelson v. United States*, 484 U.S. 1026 (1988) (due process requires "complete and timely" disclosure of the terms of the agreement and surrounding circumstances); *Nerison*, 401 N.W.2d at 5 (same).

This Court and others have recognized that the defendant's rights to due process require full disclosure of the terms of the agreements struck with a witness, the opportunity for full cross-examination of such witnesses concerning the agreements and the effect of the agreements on their testimony, and instructions

cautioning the jury carefully to evaluate the weight and credibility of the testimony of such witnesses. *E.g.*, *United States v. Fallon*, 776 F.2d 727, 734 (7th 1985); *United States v. Dailey*, 759 F.2d 192, 200 (1st Cir. 1985). *See also Hoffa v. United States*, 385 U.S. 293 (1966). By concealing the true nature of its agreement with Seymour, the state succeeded in denying Ms. Braun these due process protections and seriously undermined the fairness and reliability of her trial.

The prosecutor's failure to disclose this information further deprived Ms. Braun of her full right to confront the witnesses against her. *See*, *e.g.*, *State v. Lenarchick*, 74 Wis.2d 425, 247 N.W.2d 80, 91-92 (1976) (recognizing right of defendant to cross-examine an accomplice about prosecutorial concessions in exchange for testimony implicating the defendant). The defendant's right to a fair trial requires "the opportunity for full cross-examination of ... witnesses concerning the agreements and the effect of the agreements on the testimony of those witnesses." *Nerison*, 401 N.W.2d at 5. *See also Davis v. Alaska*, 415 U.S. 308 (1974).

Finally, the state's false assertions in opening and closing arguments, as well as its failure to correct Seymour's false testimony concerning the true nature of the deal, also violated Ms. Braun's right to due process under a different but related line of cases. In those cases, the courts have long held that the knowing use of false evidence deprives the defendant of a fair trial when the evidence is material to her guilt or punishment. *See*, *e.g.*, *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)

("[D]eliberate deception of court and jury by the presentation of testimony known to be perjured ... is ... inconsistent with the rudimentary demands of justice," violates due process rights and denies fair trial); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Alcorta v. Texas*, 355 U.S. 28 (1957) (extending *Mooney* to prosecutor's failure to correct false testimony); *Napue v. Illinois*, 360 U.S. 264 (1959) (extending *Mooney* to prosecutor's knowing failure to correct false testimony related solely to witness' credibility); *Giglio, supra* (extending *Mooney* to prosecutor's failure to correct testimony related to witness' credibility which prosecutor should have known was false).

Contrary to the district court's holding, these violations were not harmless (R34:52-56; R.App.157-61). First, that court applied the wrong standard for materiality, requiring a "reasonable probability that if the prosecutor had disclosed the plea agreement the outcome of the trial would have been different." (R34:52; R.App. 52). That standard would have been appropriate if the prosecutor had merely withheld exculpatory evidence, *Bagley*, 473 U.S. at 682, 685. Where, as here, the prosecutor affirmatively misleads the jury, and allows his witness to do so, however, the test for determining whether the resulting conviction is fundamentally unfair, and thus violative of due process, is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). The evidence plainly meets that standard here.

It is only Seymour's testimony which in any way connected Ms. Braun to his killing of William Weber. The misconduct did not simply affect Seymour's general credibility as would his narcotics addiction. Rather, the concealed agreement provided him with a specific and overwhelming reason to frame Ms. Braun in this particular case and possibly avoid prison. As such, there can be no question but that the misleading of the jury concerning the true nature of the plea agreement could have affected the judgment of the jury.

The case had inherent weaknesses. *See*, *e.g.*, *Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989) ("admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dubious witnesses."). The factual questions in this case were extremely close, turning as they did almost entirely on the relative credibility of Ms. Braun and Seymour. If the jury either believed Ms. Braun or disbelieved Seymour, it would have had to acquit her. The prosecutor's conduct, however, both improperly bolstered Seymour's credibility and equally improperly undermined that of Ms. Braun. There can be no doubt that such manipulation affected the jury's determination of the factual issues and consequently its finding of guilt. *Cf.*, *United States v. Wolf*, 787 F.2d 1094, 1098-99 (7th Cir. 1986).

The Court should also consider that the prosecutor sought to exploit the misconduct for tactical reasons, thereby compounding the prejudicial effect. *E.g.*,

United States v. Iverson, 637 F.2d 799, 804 n.15 (D.C. Cir. 1981). The prosecutor took full advantage of his ability to mislead the jury, even to the extent of repeating false testimony and making false statements in his summation. *See Iverson*, *supra*.

The state had already advised Seymour before he testified that its position regarding incarceration would be reconsidered after the trial (R29:SR20:Exhibit A at 5). There thus was a major difference between what the jury was told about Seymour's agreement (*i.e.*, that the state *would* recommend incarceration), and what in fact was the agreement (*i.e.*, that the state *may or may not* recommend incarceration depending on what happened at Braun's trial). The state bolstered Seymour's credibility in the eyes of the jury by claiming that his agreement with the state mandated a state recommendation of incarceration while the state and Seymour well knew that the prosecutor had agreed to reconsider that recommendation once the trial was over.

The district court's reference to trial counsel's argument that Seymour might receive something other than prison time (R34:53; R.App.158), overlooks the fact that the prosecutor and Seymour specifically denied the possibility of anything other than an incarceration recommendation. Without the concealed evidence that the plea agreement did not in fact mandate a prison recommendation but rather turned on Seymour's performance at trial, Ms. Braun's argument had no solid evidentiary basis and no doubt was viewed by the jury as mere speculation. The ability to

speculate and to ask the jury to do so is not the equivalent of presenting evidence that the desired inference is in fact the case and that both the prosecutor and the state's key witness had lied about it.

While the district court certainly is correct that "[t]he jury had before it plenty of evidence that Seymour was an unsavory, lying, drug-using criminal," (R34:56; R.App. 161), it overlooks the fact that each of the factors it cites as providing a basis for impeaching Seymour took place *prior* to trial and the effect of each existed without regard to either the perceived quality of his testimony or the results he was able to attain at Braun's trial. Seymour's actual testimony at trial and the results of that trial could effect only one thing -- the state's recommendation at sentencing. How he testified could not change *any* of the factors cited by the respondent as impeaching his credibility; it only could change the state's sentencing recommendation. The concealed evidence, and Seymour's willingness to lie about it, thus were qualitatively different from the impeachment evidence actually presented at trial.

Moreover, the prosecutor's misconduct did not simply affect Seymour's general credibility, as would his narcotics addiction, for example. Rather, the revised agreement provided him with a specific and overwhelming reason to frame Ms. Braun in this particular case. That misconduct withheld from the jury the critical fact that Seymour still had the possibility of avoiding prison, but only if he succeeded in

framing Ms. Braun. Under no reasonable construction could that misconduct be deemed harmless.

The importance of Seymour's testimony to the prosecution's case cannot be overstated: he was the linchpin of the state's theory. The prosecutor obviously recognized the critical nature of this testimony, and he further realized the importance of the plea agreement to the jury's determination of credibility: he discussed Seymour and his deal in his opening statement, and he brought out the arrangement during Seymour's direct examination (Tr. 822-24; 1431-32). Under these circumstances, the state's failure to disclose entirely its agreement with its star witness, and its mischaracterizations of the agreement during its argument and presentation of testimony are intolerable in a criminal justice system which incorporates the concept of due process of law.

Just as the prosecutor recognized the significance of Seymour's testimony, so too should this Court. The prosecutor's foul blows deprived Ms. Braun of due process and the fair trial to which she was entitled.

CONCLUSION

The District Court properly held that the arbitrary exclusion of Mr. Mane denied Ms. Braun a public trial and entitled her to habeas relief. That Court erred, however, in holding that she was not entitled to relief on her prosecutorial misconduct claim as well. Braun therefore respectfully asks that this Court affirm the

judgment below granting the requested writ of habeas corpus.

Dated at Milwaukee, Wisconsin, April 24, 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2000, I caused 15 hard copies of the Brief of Petitioner-Appellee and one copy of the Brief on digital media, to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of each document and one copy of the Brief on digital media to be mailed, properly addressed and postage prepaid, to counsel for the respondent, Mr. Daniel J. O'Brien, Assistant Attorney General, Wisconsin Department of Justice, P.O. Box 7857, Madison, Wisconsin 53707-7857.

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Robert R. Henak