STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2007AP2711-CR
(Walworth County Case No. 2005CF80)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD J. MCGUIRE,

Defendant-Appellant-Petitioner.

Appeal from the Judgment and the Final Order Entered in the Circuit Court for Walworth County, The Honorable James L. Carlson, Circuit Judge, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I.

THE 36-PLUS-YEAR DELAY IN BRINGING THESE CHARGES PREJUDICED MCGUIRE'S DEFENSE AND JUSTIFIES DISMISSAL

A. Because the Tolling Provisions Cannot Constitutionally Apply to McGuire, the Charges Were Barred by the Six-Year Statute of Limitations

The state does not dispute that, because more than six years passed between the alleged offenses and the filing of charges against McGuire, those charges must be dismissed unless saved by the tolling provision of Wis. Stat. §939.74(3). However, that provision cannot apply where, as here, doing so denies the defendant the right to present a defense. McGuire's Brief at 8-14.

1. As applied here, §939.74(3) violates the Privileges and Immunities Clauses of the United States Constitution

The limitless tolling of the statute of limitations for non-residents under §939.74(3) violates the Privileges and Immunities Clauses of the United States Constitution where, as here, none of the purposes of the tolling provision are served and the resulting delay substantially impinges upon the defendant's right to present a defense. McGuire's Brief at 8-12. Beyond citing the decision on a different question in ***State v. Sher***, 149 Wis.2d 1, 437 N.W.2d 878 (1989), the state does not dispute that the purposes of the tolling provision are not served here.

The state's reliance upon ***Sher***, State's Brief at 7-11, is misplaced. Although Sher labeled his claim an "as applied" challenge, the state identified it as a facial challenge and the Court addressed it as such. The quotes cited by the state for the contrary assertion address a *separate* issue of statutory interpretation concerning whether a literal reading of the statute would create an "absurd result" given the facts of the case. *See* 437 N.W.2d at 879 (distinguishing the issues presented).

The state's assertion that ***Sher*** is somehow controlling here is wrong in any event. The essence of an "as applied" challenge is that the statute is unconstitutional as applied to the unique facts of the case. Given that the charges against Sher were filed a mere two years after expiration of the default, six-year limitations period, he could not and did not allege that the delay denied him anything more than the protection of the statute of limitations. 437 N.W.2d at 882. Here, in contrast, the 30-year delay beyond the limitations period denied McGuire, not merely a statutory limitations defense, but his fundamental constitutional right to present a defense. Because the circumstances in ***Sher*** are not reasonably comparable to McGuire's, any "as applied" holding hidden within ***Sher*** is not controlling here.

It is irrelevant that some states have no statutes of limitations for felonies, or that Wisconsin has no statute of limitations or extended limitations on some offenses. State's Brief at 9-10. Those statutes do

not treat non-citizens differently than citizens, and thus do not raise privileges and immunities clause problems. *See* ***Taylor v. Conta***, 106 Wis.2d 321, 328, 316 N.W.2d 814, 818 (1982) (purpose of clauses to prevent discrimination against citizens of other states).

Nor is it relevant that other states, including Illinois, have similar tolling provisions, that the language of such provisions (like Wisconsin's) would apply to a case such as McGuire's, or that such provisions (like Wisconsin's) have survived facial constitutional challenges. State's Brief at 10-11 (and cases cited). The issue here is whether *Wisconsin's* tolling provision violates the constitution *as applied* to the specific facts of this case. McGuire's Brief at 8-12 establishes that it does. Beyond its misplaced citation to ***Sher***, the state fails to suggest otherwise.

2. As applied in this case, §939.74(3) violates McGuire's rights to equal protection and due process

a. Equal Protection

Because the 36-year delay in bringing these charges infringed on McGuire's fundamental right to present a defense and was unsupported by any compelling governmental interest, application of the tolling provision denied him equal protection. McGuire's Brief at 12-14. The state does not dispute the absence of any compelling interest that limitless delay is "precisely tailored" to promote, arguing instead merely that charging delay cannot impinge upon the right to present a defense and that a rational basis supports the facial validity of the tolling provision. State's Brief at 11-13.

The right to present a defense is rooted in the Sixth Amendment's confrontation and compulsory process clauses as well as the Fifth and Fourteenth Amendments' guarantee of due process. *See* ***Rock v. Arkansas***, 483 U.S. 44, 51-52 (1987). A defendant's right to present a defense includes the right to offer testimony by witnesses and to compel their attendance. ***Chambers v. Mississippi***, 410 U.S. 284 (1973); ***Washington v. Texas***, 388 U.S. 14, 19 (1967). "[F]ew rights are more fundamental than that of an accused to present witnesses in

his own defense." ***Chambers***, 410 U.S. at 302. That right is infringed whenever the defendant is denied important exculpatory evidence.

Also, ***Sher's*** finding of a rational basis for the tolling provision on its face when confronted with a mere eight-year delay in charging says nothing about whether that same basis can be deemed rational where, as here, the 36-year charging delay served none of the supposed justifications for the provision. Whatever incremental assistance tolling may provide to law enforcement dissipates over time while the damage to the defendant's right to present a defense increases.

b. Due Process

As explained in McGuire's Brief at 14, application of the limitless tolling provision of §939.74(3) to permit prosecution in McGuire's case some 36-plus years after the alleged offenses, rationally serves none of the asserted purposes for that provision. As such, the provision violates due process as applied to McGuire.

The state, however, ignores this claim, focusing instead solely on McGuire's *separate* showing that due process bars this prosecution irrespective of the statute of limitations.

B. The Charges Were Barred by Due Process

Despite McGuire's detailed showing to the contrary, McGuire's Brief at 14-20, the state blithely asserts without explanation that Supreme Court authority somehow requires proof of improper prosecutorial motive for such a claim. State's Brief at 13-16. The state also makes the related mistake of assuming that it is only *prosecutorial* delay that denies the defendant due process. *Id.* at 13-15.

However, the principle of due process "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). The due process focus on issues of pre-charging delay thus is not on whether the prosecutor denied the defendant due process, but whether "compelling the respondent to stand trial" under the circumstances presented "violates those 'fundamental conceptions of justice which lie at the

base of our civil and political institutions' . . . and which define 'the community's sense of fair play and decency." ***United States v. Lovasco***, 431 U.S. 783, 790 (1977) (citations omitted).

The violation here thus consists, not of wrongful prosecutorial delay, but of the state's actions in forcing to trial one who has been denied a fair opportunity to defend himself.

Beyond its mistaken focus on prosecutorial delay, the state does not address the reasons for the delay here, nor has it suggested any valid justification for the complainant's decision to delay reporting the alleged offenses for more than three decades. As explained in McGuire's Brief at 18-19, the delay was unjustified and, when balanced against the resulting substantial prejudice to McGuire's defense as required by ***Lovasco*****,** ***supra***, violated his rights to due process.

The state's final assertion is that the same unjustified delay that resulted in the deaths of numerous critical witnesses and the destruction of much of the physical evidence should be used to deny McGuire, not just his ability effectively to defend himself at trial, but also the right to any relief on appeal. State's Brief 17-19. According to the state, because the witnesses are dead and the physical evidence destroyed, we cannot know whether they would have corroborated McGuire's defense. *Id.*

Contrary to the state's suggestion, State's Brief at 17, McGuire need not prove that he would have been acquitted but for the delay. The Supreme Court has not defined the "actual prejudice" required under ***Lovasco***, although that term generally requires only a reasonable probability of a different result. *E.g.*, ***Strickland v. Washington***, 466 U.S. 668, 693-94 (1984).

It is true that, due to the complainants' unreasonable delay in making their allegations, we have no statements or depositions from Dr. Harry Bender regarding the critical fact of whether he lent the Fontana cottage to McGuire. However, we do know from his widow (although the jury did not) that he was very possessive of the cottage, was not close to McGuire, and never lent the cottage out to non-family members

to her knowledge (R96:126-28, 131-32). We also know that Loyola Academy recorded such things as the use of fleet vehicles and the dates and reasons for Jesuit absences from the school, evidence that could have rebutted the complainants' stories if their delay in reporting their allegations had not resulted in the records' destruction.

We also know that, but for the complainants' delay, other unbiased occupants of the Jesuit living quarters would have been available to address the likelihood the someone could have lived with McGuire and participated in the activities alleged by the state without detection. Such evidence would have rendered unnecessary both the testimony of Dr. Ryan, who was impeachable based on his longtime friendship with McGuire, and the rebuttal allegations of Eugene Pfretzchmer and Michael Shrak, whose claims that they had been to McGuire's room while students, despite rules strictly limiting them from doing so, left the unfairly prejudicial suggestion that McGuire might have molested them as well.

The complainant's delay also deprived McGuire and the jury of the corroborating and clarifying testimony of Fr. Renke and others who attended the meetings preceding S.P.C.'s transfer to a different school. Yet, we also know from Renke's contemporaneous notes that S.P.C. admitted that, contrary to his allegations at trial, his physical interactions with McGuire never went beyond a kiss and baby oil rubs, and that nothing happened between them in Wisconsin during the period before Christmas, 1968, when, according to his trial allegations, McGuire molested him in Fontana (R41:179-89; R39:Exh.44). Given the absence of live supporting testimony, however, Renke's notes were easily twisted by the state into "corroboration" of S.P.C.'s allegations. *See* State's Brief at 28, 30-31.

The state thus is correct that the complainants' nearly 40-year delay in bringing these charges, with the resulting death or failing memory of vital defense witnesses and destruction of critical physical evidence, has made it impossible to determine whether those charges are based in fact, in fantasy, or in fraud. It does not follow, however, that we can only speculate regarding what the missing evidence would

show. Although rendered impeachable or inadmissible as a result of the complainants' delay, what we do know supports McGuire's defense.

C. The Prejudicial Delay Justifies Reversal in the Interests of Justice

The state's "interests of justice" argument tracks and expands upon its faulty claim that McGuire's defense was not prejudiced by the pre-charging delay. State's Brief at 27-31. The real controversy regarding whether the complainants' belated allegations are true is not fully tried merely because the few remaining witnesses gave "as clear a picture as possible" under the circumstances. State's Brief at 28-29. Nor is it valid to claim that certain allegations were "undisputed," *id.* at 30, when McGuire's ability to dispute them was destroyed because all the unimpeachable witnesses who could do so are dead due to the complainants' delay.[1]

The state's dismissive "catch-all" label, State's Brief at 31, ignores the independent significance of this Court's authority to reverse in the interests of justice under Wis. Stat. §751.06. That provision authorizes the Court to insure justice in a given case without assigning culpability and without requiring a cognizable constitutional violation. *E.g.*, ***State v. Hicks***, 202 Wis.2d 150, 549 N.W.2d 435 (1996) (basing reversal on interests of justice rather than ineffectiveness of counsel).

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[1] The state's improper suggestion that McGuire has never claimed actual innocence, State's Brief at 31, is patently false, ignoring both McGuire's not guilty plea and his assertion of innocence at sentencing (R64:69).

II.

MCGUIRE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Trial counsel's performance was deficient

1. Failures regarding Elita Bender

Focusing almost exclusively on a misplaced prejudice argument, the state does not seriously argue that Attorney Boyle acted reasonably in simply ignoring Elita Bender, a witness who he knew could have substantially damaged the state's case regarding S.P.C. by demonstrating that it was unlikely that her husband, Dr. Harry Bender, had given McGuire a key to the Fontana cottage. *See* State's Brief at 21-24. Nor could it. McGuire's Brief at 23-26.

The conclusory suggestion that Elita's testimony would not be admissible, State's Brief at 25, is both irrelevant to the issue of deficient performance and wrong. Boyle could not know the basis and admissibility of Elita's testimony *until and unless he had interviewed her*. There also is no rational basis for excluding evidence that, based on Elita's personal observations of her husband's character and actions over the four decades that she knew him, it is unlikely that he would have lent keys to the cottage to anyone outside his immediate family. Such testimony is relevant, as it makes S.P.C.'s claim less likely, Wis. Stat. §904.01, is based on Elita's personal knowledge and observations rather than hearsay, Wis. Stat. §906.02, and establishes Dr. Bender's habit or routine possessiveness toward his cottage, Wis. Stat. §904.06. Indeed, Boyle unsuccessfully sought admission of the same evidence through V.H.B.'s sister (R40:211-12).

2. Failures regarding Robert Goldberg

The state likewise does not seriously claim that Boyle acted reasonably in failing even to speak with Robert Goldberg prior to trial, focusing instead on possible reasons why he might have acted reasonably in not calling Goldberg as a witness. State's Brief at 24-26. Once again, the state ignores the applicable legal standards. One cannot make a reasonable decision whether to call a witness to testify without

first conducting a reasonable investigation, *e.g.*, ***Wiggins v. Smith***, 539 U.S. 510, 522-23 (2003), something Boyle failed to do here. *See* McGuire's Brief at 27-28. Boyle knew that Goldberg had information helpful to the defense and, although he was concerned about certain other information being disclosed, also knew that simply talking with Goldberg would not disclose it. He also knew that only Goldberg would be in a position to defuse the assertions in S.P.C.'s police statement that so concerned Boyle (since McGuire would not be testifying), and that only Goldberg would be in a position to provide him the names of other potential witnesses (as he ultimately did when questioned by post-conviction counsel) who could testify without the potential risks of Goldberg testifying himself. *Id.*

C. Trial Counsel's Deficient Performance Prejudiced McGuire's Defense at Trial

The state's real argument regarding Boyle's unreasonable failure to investigate Elita Bender and Robert Goldberg is that the absence of their testimony did not prejudice the defense. *See* State's Brief at 21-26. The evidence, however, demonstrates the contrary. *See* McGuire's Brief at 28-30.

The state bases much of its argument on assertions that are simply false. It claims that Elita Bender's testimony regarding her husband's possessiveness would be hearsay and thus inadmissible, State's Brief at 21, 23, ignoring the fact that it was based on her personal observations of her husband over a period of nearly 40 years. It claims that she could only testify regarding his actions after their marriage in 1971, again ignoring the fact they had been dating for nearly a decade at that point, that he was very possessive of the cottage both before and after their wedding, and that there was never a suggestion that Fr. McGuire and Dr. Bender were close (R96:115, 120, 126-28, 131-33).

The state suggests that Gertrude Bender's unsworn police statements rebut Elita's testimony. State's Brief at 22. Gertrude was V.H.B.'s mother and thus was inherently biased. She also was ill and

never testified at trial (R40:18, 186-87), *and the hearsay police statements cited by the state were therefore excluded* (R40:190-96).

The state's assertion that no one could "know for certain," despite Elita's testimony, whether Dr. Bender gave McGuire a key is not the applicable standard. The question at trial is whether her testimony raised a reasonable doubt and on an ineffectiveness claim is whether, but for counsel's errors, there exists a reasonable probability of a different result. *E.g.*, ***Strickland v. Washington***, 466 U.S. 668, 694 (1984).

Also false is the state's assertion that Goldberg met V.H.B. and S.P.C. through McGuire and that McGuire shared dinner with them. State's Brief at 24-26. Goldberg met John Gooch and Eugene Pfretzschmer through McGuire, and met V.H.B. and S.P.C. through Pfretzschmer (R96:46-48). McGuire was not at the dinners where V.H.B. and S.P.C. were together (*id.*:60).

The state also merely ignores the significance of evidence that S.P.C. and V.H.B. lied about not knowing each other as early as 1971. State's Brief at 25-26. While it is correct that they would have had no reason to lie about that relationship if they had no reason to hide it, *id.*, their early friendship also demonstrates an innocent opportunity for S.P.C. to have seen the cottage without McGuire, thus undermining a significant prong of the state's case.

Finally, the state's recitation of the supposed risks of having Goldberg testify to disclose the complainants' perjury ignores the fact that much, if not all, of the exculpatory information could have been provided by his sister, Barbara Davidson, with no such risk. Boyle, however, lost that opportunity by failing to conduct a reasonable investigation of Goldberg's information.

CONCLUSION

For these reasons, Donald McGuire respectfully asks that the Court reverse the judgment of conviction and direct, in order of priority, (1) that the charge against him be dismissed, or (2) that a new

trial be granted.

Dated at Milwaukee, Wisconsin, December 3, 2009.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,967 words.

____

Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 3rd day of December, 2009, I caused 22 copies of the Reply Brief of Defendant-Appellant-Petitioner to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

____
Robert R. Henak

Consol. McGuire SCT Reply.wpd