91-0923

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 91-0923

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHLEEN BRAUN,

Defendant-Appellant-Petitioner.

On Petition For Review Of A Decision Of The Court Of Appeals, District I, Affirming The Order Entered In The Circuit Court For Milwaukee County, The Honorable Ted E. Wedemeyer, Jr., Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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STATEMENT OF ISSUES

1. Whether dismissal of the defendant's initial post-conviction motions due to her escape from custody acted as a "final adjudication" of the issues raised in those motions so as to bar her from raising those issues under Wis. Stat. §974.06 upon her return to custody.

The state did not raise this issue in the circuit court and that court thus did not address it. The Court of Appeals held that Ms. Braun's escape bars her post-escape motion under Wis. Stat. §974.06.

2. Whether the trial court's exclusion of a spectator, based upon its per se rule excluding members of the venire panel who were not subsequently chosen as members of the petit jury, denied Ms. Braun her right to a public trial.

The circuit court held that any violation of Ms. Braun's right to a public trial was harmless error. The Court of Appeals did not address this issue.

3. Whether Ms. Braun was denied her right to due process and a fair trial by prosecutorial misconduct consisting of (1) concealment and false statements concerning the nature of the state's plea agreement with its star witness, Earl Jeffrey Seymour, (2) bad faith cross-examination of Ms. Braun, and (3) the presentation of improper rebuttal argument which encouraged speculation about facts not in evidence, vouched for Seymour's credi-

bility, and suggested the existence of "facts" known to be false.

The circuit court determined, without an evidentiary hearing, that the prosecutor did not conceal or misstate the nature of his witness' plea agreement, that the cross-examination was not improper, and that the rebuttal argument was not improper. The Court of Appeals did not address this issue.

4. Whether the circuit court violated Ms. Braun's right to confrontation by denying her an adequate opportunity effectively to cross-examine Seymour, the only witness who actually connected her to the crime.

The circuit court held that Ms. Braun was not denied her right to confront Seymour. The Court of Appeals did not address this issue.

5. Whether the trial court violated Ms. Braun's right to confrontation by denying her an adequate opportunity effectively to cross-examine Richard Anthuber, an important corroborating witness for the state.

The circuit court held that the trial court erred in limiting the cross-examination of Anthuber, but that the error was harmless. The Court of Appeals did not address this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court having deemed the issues in this case significant enough to warrant review, both oral argument and publication are appropriate. See Wis. Stat. (Rule) 809.22 & 809.23.

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 91-0923

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHLEEN BRAUN,

Defendant-Appellant-Petitioner.

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

STATEMENT OF THE CASE

Nature Of The Case

Defendant-Appellant-Petitioner, Kathleen Braun ("Braun" or "Defendant") appeals from a decision of the Wisconsin Court of Appeals, District I, dated July 7, 1993, affirming the orders dated March 1, 1991 and March 11, 1991, Honorable Ted E. Wedemeyer, Jr., presiding, denying her motion for post-conviction relief pursuant to Wis. Stat. §974.06.

Procedural Status Of The Case

By a single count criminal complaint filed August 15, 1975, Kathleen Schaffer Braun and her husband, John

"Timmy" Braun,[1] were charged with first-degree murder in violation of Wis. Stat. §§940.01, 939.05 & 939.22(16) (1973) (R2).[2] Ms. Braun subsequently was bound over for trial (R1:3-4), and was arraigned on an information charging her with the same offense on September 10, 1975 (R3, R4).

After preliminary proceedings, a jury trial began on November 3, 1976, Hon. Max Raskin, presiding (R1:8; R42). The jury returned its verdict on December 19, 1976, finding Ms. Braun guilty as charged in the information (R1:16; Tr. 6235).

On December 20, 1976, the court, Hon. Max Raskin, presiding, sentenced Ms. Braun to life imprisonment (R1:16; Tr. 6255), and entered judgment (R9).

The defendant filed post-conviction motions pursuant to Wis. Stat. §974.02 (1975) on August 4, 1977 (R10, R11, R1:17). Following Ms. Braun's escape from Taycheedah Correctional Institution on December 22, 1977 (see R16;

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[1] 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.

[2] Throughout this Brief, reference to the record will take the following form: (R__:__), with the "R__" reference denoting the record document number and the following ":__" reference denoting the page number of the document. Pages of the trial and sentencing transcripts (R42-74) are sequentially paginated and are identified as "Tr. ____." Where the referenced material is contained in the Appendix, it will be further identified by Appendix page number as "App. ____."

R18), the trial court on May 1, 1978 orally dismissed those motions (R1:18). In 1984, Ms. Braun was returned to custody (R18) 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 (R19, R20). The parties fully briefed the issues presented in that motion (R22, R23, R24) as well as those presented in a Supplemental Motion to Vacate Judgment which was filed on December 5, 1990 (R25, R26, R27).[3] Following oral argument on December 21, 1990 (R41:2-41), the circuit court, Hon. Ted E. Wedemeyer, presiding, orally denied part of the post-conviction motion (R41:41-73). The court entered written orders denying the defendant's motion and supplemental motion for post-conviction relief on March 1 and March 11, 1991 (R30, R31, App. 6, 8).

Ms. Braun timely filed her Notice of Appeal to the Court of Appeals on April 15, 1991 (R33, R1:21). On January 27, 1992, the Court of Appeals ordered the trial court to hold an evidentiary hearing to determine the reasons underlying Judge Raskin's decision to dismiss Ms.

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[3] The judgment roll inaccurately gives the filing date of the supplemental motion and supporting memorandum as December 5, 1991 and of the opposing memorandum as December 19, 1991 (R1:19).

Braun's first post-conviction motion. The parties then 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.

(App. 10-11).

The Court of Appeals entered its decision affirming the Circuit Court on July 7, 1993 (App. 1-5). See State v. Braun, ___ Wis. 2d ___, 504 N.W.2d 118 (Ct. App. 1993). That court held that Judge Raskin's dismissal of Ms. 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.

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 the trial (R20: Exhibit A at 5). The state did reconsider and 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.

ARGUMENT

I.

THE PROCEDURAL DISMISSAL OF MS. BRAUN'S ORIGINAL POST-CONVICTION MOTIONS BECAUSE OF HER ESCAPE DOES NOT BAR RELIEF UNDER WIS. STAT. §974.06.

The Court of Appeals determined that Ms. Braun's escape, and the resulting dismissal of her initial post-conviction motions in 1978, bars her from ever obtaining relief from the constitutional violations attendant to her trial and conviction. Under that decision, the most obvious and prejudicial constitutional violation would be beyond review. In effect, if not in law, that decision sentenced Ms. Braun to life imprisonment for her escape. Ms. Braun respectfully submits that the Court of Appeals misconstrued Wis. Stat. §974.06, and that she is not barred from raising her constitutional claims by way of her §974.06 motion.

A. The State Waived Its Procedural Objection.

Initially, it should be noted that the state waived its arguments by failing to raise them in the circuit court. E.g., State v. Brown, 96 Wis. 2d 258, 291 N.W.2d 538, 541 (1980) (citations omitted) (state waived waiver argument by raising it for first time on appeal); State v. Cetnarowski, 166 Wis. 2d 700, 480 N.W.2d 790, 792 (Ct. App. 1992) (same); see United States v. Kenngott, 840

F.2d 375, 379 (7th Cir. 1987) (state waived "cause and prejudice" argument).

The state obviously knew of the prior escape, yet argued only the merits of Ms. Braun's §974.06 motion in the circuit court. Indeed, the state specifically recognized the propriety of Ms. Braun's motion (R22:2). Under these circumstances, it is appropriate to hold the state to its waiver. See Herman v. Brewer, 193 N.W.2d 540, 543 (Iowa 1972) (errors properly considered on appeal from denial of post-conviction motion; although issues were decided against defendant on prior habeas corpus action, trial court considered issues properly before it for determination with apparent consent of state).

B. Ms. Braun's Claims Were Not "Finally Adjudicated" In The Prior Proceeding.

Even if the state's procedural arguments were not waived, Judge Raskin's dismissal of the prior motions due to Ms. Braun's escape did not "finally adjudicate" the merits of the issues raised here.

The Court of Appeals relied upon Wis. Stat. §974.06(4), which provides as follows:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or 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 may not be

> the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

The Court of Appeals correctly noted that, under this statute, a defendant is not entitled to seek relief on grounds which have either been finally adjudicated or waived in the absence of "sufficient reason" (App. 3). That Court erred, however, in equating a prior procedural dismissal with "final[] adjudicat[ion]" of the issues raised in the prior proceeding (App. 4, 5).

1. Because the procedural dismissal did not in fact adjudicate the merits of the motion, it did not "finally adjudicate" the issues raised.

Section 974.06(4) sets forth three actions which will bar a post-conviction motion on a particular issue absent "sufficient reason." First, the statute bars 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.), rev. denied, 491 N.W.2d 766 (1992) (§974.06(4) permits post-conviction motion on ground not raised in prior Rule 809.30 motion).

Second, the statute bars 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 dictates 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).

The statute itself thus distinguishes 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. The most reasonable construction of this language, contrary to that of the Court of Appeals, is that "final adjudication" of an issue means something different from a procedural defect in raising it. If that language does not require a final, substantive adjudication on the merits of the issues raised, the statutory limits on when waiver or failure to raise an issue can be deemed a bar are rendered meaningless. See State v. Coogan, 154 Wis. 2d 387, 453 N.W.2d 186, 192 (Ct. App.), rev. denied, 454 N.W.2d 806 (1990). A defendant can lose the right to review of an issue by "waiving" it, as the Court of Appeals held in this case, even when that "waiver" is not knowing and voluntary. See Section I,C, infra. In other words, the Court of Appeals has essentially read out of the statute the requirement that any waiver be knowing, voluntary and intelligent.

The only rational reading of §974.06(4), consistent with its language and apparent meaning, is that an issue is "finally adjudicated" only when the substantive issue is in fact decided on its merits. The stipulation demonstrates, however, that Judge Raskin never actually considered the merits of the defendant's motions when he dismissed them in 1978 (App. 10-11). See Hall v. Alabama, 700 F.2d 1333, 1335 (11th Cir.) (dismissal of appeal with-

out 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).

The prior dismissal likewise cannot be construed as addressing the merits under the theory adopted in State v. John, 60 Wis. 2d 730, 211 N.W.2d 463 (1973). 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. This 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 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 R10,

R11). Her escape thus did not deprive the court of any evidence necessary to meeting her burden of proof and the John theory of dismissal on the merits does not apply here.

Judge Raskin's dismissal of Ms. Braun's post-verdict motions was on procedural grounds unconnected to the ultimate issues in the case. Consequently, that prior dismissal is neither a final adjudication nor the law of this case barring consideration under §974.06. See Young v. Warden, 383 F. Supp. 986, 990-91 (D. Md. 1974) (allegation of error in post-conviction motion is not "finally litigated" until court rules on the merits of the allegation), aff'd, 532 F.2d 753 (4th Cir.), cert. denied, 425 U.S. 980 (1976); Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 33-34 (Iowa 1979) ("sufficient reason" not required to raise issues on post-conviction motion because prior dismissal of appeal not an adjudication of the issues); Waters v. State, 547 A.2d 665, 667 (Md. App. 1988) (if post-conviction motion resolved without reaching merits of particular allegation, that allegation may be raised in subsequent motion); cf. 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.) (where prior appeal dismissed as moot, prior judgment not law of the case), rev. denied, 144 Wis. 2d 958, 428 N.W.2d 555 (1988); 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), rev. denied, 482 N.W.2d 105 (1992).

The only legal effect of the prior dismissal, therefore, 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 provided by law.

While Ms. Braun's escape denied her the right to direct appeal, it did not, as the Court of Appeals held, deny her the right to collateral relief on her constitutional claims under §974.06. See, e.g., Bergenthal v. State, 72 Wis. 2d 740, 242 N.W.2d 199, 203 (1976) (significant constitutional issues must be considered under §974.06 even if issue could have been raised on direct appeal); Loop v. State, 65 Wis. 2d 499, 222 N.W.2d 694 (1974).

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

Even if the trial court's dismissal had the effect of denying Ms. Braun's motions on their merits,

that decision is not a "final adjudication" barring her from raising the issues under §974.06. This Court's decision in Bergenthal v. State, 72 Wis. 2d 740, 242 N.W.2d 199 (1976), is 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. This 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 this Court had resolved the issue on direct appeal and denied the motion. This Court disagreed. 242 N.W.2d at 202.

This Court also rejected the state's argument,

essentially that relied upon by the Court of Appeals here, 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).

A trial court's denial of post-verdict motions filed under Wis. Stat. §974.02 as a necessary predicate for an appeal never taken thus does not constitute such a "final adjudication" of the issues raised as would bar subsequent relief under §974.06. Such a decision on the merits is no more a "final adjudication" under §974.06(4) than is 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).

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, is entitled to a decision on the merits of her claims.

3. Wis. Stat. §805.03 is inapplicable here.

Although not cited by either party, the Court of Appeals referred to Wis. Stat. §805.03 as supporting its decision (App. 5). Section 805.03 authorizes dismissal on the merits in civil cases for failure to prosecute. That court's radical interpretation of that statute is wholly inappropriate and, in any event, inapplicable here.

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. (See App. 10-11).

Finally, even if the dismissal could be found to be on the merits, Bergenthal renders that conclusion irrelevant. A trial court's decision "on the merits" on a post-verdict motion under §974.02 simply is not a final adjudication of the issues raised in that motion for purposes of §974.06(4). See Section I, B, 2, supra.

C. Ms. Braun Did Not Knowingly, Voluntarily And Intelligently Waive Her Right To Review Of Her Claims.

Recognizing that the narrow ground for decision in John did not mandate its conclusions in this case, the Court of Appeals sought to rely on that decision's discussion of the view that escape effects a waiver of the right to review (App. 4-5). This Court, however, specifically rejected the waiver theory of escape in John:

> The difficulty with the ground of waiver is the element of knowledge of the collateral effect of an escape. True, an escapee knows he has become a fugitive from justice -- this is a natural consequence of his act; but is it foreseeable as a natural result that all pending litigation will be dismissed?

211 N.W.2d at 465. The obvious answer to this rhetorical question is "No." See also Ruetz v. Lash, 500 F.2d 1225 (7th Cir. 1974) (escape does not constitute knowing decision to forego state remedies and thus does not result in waiver);[4] McKinney v. United States, 403 F.2d 57, 59 (5th Cir. 1968) (more than mere escape needed to establish waiver).

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[4] Ruetz has been criticized for applying the narrow, "deliberate by-pass," definition of waiver. See Lewis v. Duckworth, 680 F.2d 508, 509 (7th Cir. 1982). Wisconsin courts, however, have rejected the "deliberate by-pass" definition as too broad. See State v. Klimas, 94 Wis. 2d 288, 288 N.W.2d 157, 162-63 (Ct. App. 1979), rev. denied, 95 Wis. 2d 745, 292 N.W.2d 874, cert. denied, 449 U.S. 1016 (1980).

This Court has defined waiver as "a voluntary and intentional relinquishment of a known right." Brown, 291 N.W.2d at 541 (citation omitted). "[W]aiver is established by showing that the party against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of his right and the facts on which those rights depended." Walberg v. State, 73 Wis. 2d 448, 243 N.W.2d 190, 197 (1976); see Brown, 291 N.W.2d at 541.

Ms. Braun did not "knowingly, voluntarily and intelligently waive" her right to review of her constitutional claims. Whatever effect Ms. Braun's escape may in fact have had on her then-pending motions, nothing about her actions suggests that she either knew or intended that the escape would act to waive her right to review of those claims. "The courts must presume that a defendant did not waive his rights; the prosecution's burden is great... ." North Carolina v. Butler, 441 U.S. 369, 373 (1979). As such, waiver cannot be inferred from a silent record. See Tague v. Louisiana, 444 U.S. 469 (1980).

Even if the escape reasonably could be viewed as a knowing waiver of Ms. Braun's right to direct appeal, the assumption that she knew she would also waive her right to collateral review upon her return is wholly unreasonable. See Williams v. Holbrook, 691 F.2d 3, 13, 15 (1st Cir. 1982) (prisoner whose first habeas petition was dismissed following her escape entitled to review of new

petition following her return to custody); Brinlee v. Crisp, 608 F.2d 839, 857 (10th Cir. 1979) (prisoner's prior escapes were not such a deliberate by-pass of state procedures as to constitute a waiver of federal habeas claims), cert. denied, 444 U.S. 1047 (1980).

The Court of Appeals' rationale thus does not comport with either the language of §974.06(4) or the John decision upon which it relies. Nor is that rationale consistent with prior decisions concerning the effect of procedural dismissals. The Court of Appeals' decision on this issue should be reversed.

D. Not All Of Ms. Braun's §974.06 Arguments Were Raised In Her Initial Motion And Thus Could Not Be Barred By Denial Of That Motion.

The Court of Appeals erroneously assumed that all of Ms. Braun's §974.06 issues had been raised previously in her §974.02 motion (see App. 3, 5). They were not. Specifically, the 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 R11). Nor was the prosecutor's failure to inform defense counsel prior to or during trial of the true nature of that plea

agreement.[5]

Because these issues were neither raised nor adjudicated in Ms. Braun's post-verdict motions, the dismissal of those motions cannot bar her relief on those issues under §974.06. E.g., Bergenthal, supra.

II.

THE TRIAL 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 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).[6] Over defense objection (Tr. 1110, 1112), 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

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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 (R11:8). A review of the transcript of that statement, however, reflects that the 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 §974.06 motion, was that no recommendation of any incarceration would be required.

[6] The apparent basis for the individual's excusal from the jury was his asserted friendship with defense counsel and his having met the defendant (Tr. 1111).

[sic] could have or might have been members of the jury" (Tr. 1110).

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). See also Wis. Const. Art. I, §7; Wis. Stat. §256.14 (1975) (currently Wis. Stat. §757.14).

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. See also State ex rel. Newspapers, Inc. v. Circuit Court, 124 Wis. 2d 499, 506-07, 370 N.W.2d 209, 213 (1985), cert. denied, 474 U.S. 1061 (1986); State ex rel. LaCrosse Tribune v. Circuit Court, 115 Wis. 2d 220, 242, 340 N.W.2d 460, 470 (1983).

While the defendant's right to a public trial is not absolute, see, e.g., State ex rel. Stevens v. Circuit Court, 141 Wis. 2d 239, 414 N.W.2d 832, 838 (1987), "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 determine whether the closure order was properly entered."

(Quoting Press-Enterprise Co. v. Superior Court of

California, 464 U.S. 501, 510 (1984)).

The 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. Such a policy plainly is not the "overriding interest" required to justify such exclusion.

The trial court's exclusion of a member of the public from the trial thus denied Ms. Braun her right to a public trial. Moreover, contrary to the circuit court's conclusion, the denial may not be excused as harmless. It is well established that 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, 111 S.Ct. 1246, 1257 (1991). See Waller, 467 U.S. at 49; United States ex rel. Bennett v. Rundle, 419 F.2d 599, 608 (3d 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).[7] Ms.

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[7] Levine v. United States, 362 U.S. 610 (1960), relied upon by the state in the Court of Appeals, 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

FOOTNOTE CONTINUED ON NEXT PAGE

Braun's conviction therefore is invalid and must be reversed.

III.

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

A. Misconduct

Numerous instances of prosecutorial misconduct pervaded Ms. Braun's trial.

1. Misrepresentations re Seymour's plea agreement.

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 (R20:Exhibit A at 5). Counsel for Ms.

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[7] FOOTNOTE CONTINUED FROM PREVIOUS PAGE

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.

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, made no specific sentence recommendation (R20: Exhibit A at 6-8). Seymour was placed on probation (Id. at 21).

2. Bad faith cross-examination of Ms. Braun.

During the course of its cross-examination of Ms. Braun, the state asked several questions which either insinuated or directly asserted facts known to be untrue, as well as other improper questions, in an obvious attempt improperly to undermine her credibility in the eyes of the jury.

The prosecutor asked a number of questions framed in terms of "when did you first remember ...," insinuating that Ms. Braun had given prior contrary statements when he knew that she had not: (Tr. 5234 "When did you recall seeing the money put in a desk drawer?"); id. ("When did you recall seeing that?"); 5235 ("When did you remember that you wanted to drive the Triumph?"). Defense counsel's motion for a mistrial based on these questions, as well as for prior improper questions, was denied (Tr. 5236-37).

Also during cross-examination, the prosecutor asked questions insinuating that Ms. Braun left Milwaukee for California because of her knowledge that the victim's body had been found in Chicago, even though he knew that there was no publicity concerning the body's discovery until after she had left (Tr. 5340). Defense counsel's objection (Tr. 5340-41, 5343-44) was overruled (Tr. 5344).

The prosecutor's last point in cross-examining Ms. Braun concerned her marriage to Tim Braun after leaving Milwaukee and after being arrested in Nevada (Tr. 5362-64). In the course of that cross-examination, the prosecutor asked the following question, despite the fact that he knew or should have known that the asserted "fact" was false:

> Q. What suddenly moved or prompted you to get married after your arrest in Elko, Nevada? It couldn't have been the fact that a husband can't testify against a wife, could it?

(Tr. 5363).[8] While defense counsel's objection was sustained and the jury was instructed to disregard the statement (id.), the prosecutor was allowed to ask, over objections that the question was repetitious and sarcastic, "Well, what suddenly prompted this romance in the desert?" (Id.). Defense counsel's request to be heard

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[8] As the prosecutor knew or should have known, the husband-wife privilege in Wisconsin does not bar a husband from testifying against his wife but merely bars testimony concerning "private communication by one to the other made during their marriage." Wis. Stat. §905.05.

further (id.) and his subsequent motion for a mistrial (Tr. 5385) were denied, as were his subsequent requests for instructions to the jury concerning the spousal privilege and the impropriety of the question (Tr. 5384-85, 5711-13).

In addition to these particular instances of misconduct concerning which defense objections were overruled or mistrial motions denied, the prosecutor on numerous occasions during his cross-examination of Ms. Braun made clearly improper and prejudicial side comments on the record within the hearing of the jury (Tr. 5261, 5309, 5310, 5315-16, 5358) and on at least two occasions asked her whether other witnesses had lied (Tr. 5259, 5294).

3. Misconduct during rebuttal argument.

Finally, in closing, defense counsel raised the fact that three persons who would have been expected to corroborate important portions of Seymour's testimony had not been called to testify by the state. The failure to call these individuals was raised in light of the jury instruction that it is ordinarily inappropriate to convict on the uncorroborated testimony of an accomplice (Tr. 5879-82, 5902-03).

Dennis Webster, the first uncalled witness, could have been called by the prosecutor to corroborate Seymour's testimony that Tim had obtained the gun from

Webster if that testimony were true (Tr. 5879). He was not called for the simple reason that Webster was interviewed by the state and denied that he was the source of the gun (Tr. 5924-27). In short, Webster was not called to testify because he would have contradicted rather than corroborated the government's key witness (Tr. 5926).

The second uncalled witness referred to in the defense summation was Tim's federal probation officer. Seymour had testified that Tim had stated he was going to fabricate an alibi by seeing his probation officer. The prosecution could have corroborated this by calling the probation officer to testify concerning whether Tim in fact had contacted him that day, but failed to do so (Tr. 5880-81). The prosecutor never suggested why the probation officer was not called (see Tr. 5924-27).

The third and most important uncalled witness was the landlady at Weber's apartment (Tr. 5902-03). Seymour testified that, soon after the murder, he and Ms. Braun burglarized Weber's apartment and that this woman saw them arrive (Tr. 2002-04). Ms. Braun testified that she was not with Seymour; the landlady thus could not have seen her. The prosecution did not call the landlady on either direct or rebuttal to corroborate Ms. Braun's participation because she was not in fact at home when Seymour says that she saw them (Tr. 5927-28). Once again, the missing witness in fact would have contradicted rather than corroborated the prosecution's star witness (see id.).

The prosecutor thus knew that at least two of these persons in fact would have contradicted its star witness (Tr. 5926-28). Nonetheless, he was permitted to argue, over objection, that the state had contacted the witnesses and that it was not trying to hide the witnesses. The prosecutor also suggested to the jury that their failure to testify could be based on lack of memory or lack of cooperation (Tr. 6014-15).

B. The Misconduct Violated Due Process.

As a cumulative result of this misconduct, Ms. Braun was denied her rights to due process and a fair trial. The "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 220 (1982). The question generally is whether the prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974), quoted in Darden v. Wainwright, 477 U.S. 168, 181 (1986). Thus, the courts have held that prosecutorial misconduct results in deprivation of a fair trial where, absent the misconduct, the trial's outcome probably would have been different. E.g., State v. Dombrowski, 44 Wis. 2d 486, 171 N.W.2d 349, 360 (1969). The probability of prejudice is especially high where, as

here, "the pattern of misconduct by a prosecutor is egregious and repetitive." Hoppe v. State, 74 Wis. 2d 107, 246 N.W.2d 122, 130 (1976). Under such circumstances, even "objection and curative instructions may be insufficient to dispel the prejudice to the defendant." Id., citing Berger v. United States, 295 U.S. 78 (1935).

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 due process rights. "Due process requires the prosecutor to disclose all exculpatory evidence, including impeachment evidence relating to credibility of witnesses for the prosecution," including disclosure of the terms of any plea agreements. State v. Nerison, 136 Wis. 2d 37, 401 N.W.2d 1, 5, 8 (1987), citing United States v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963). The prosecutor's failure to disclose this information also deprived Ms. Braun of her full due process 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 state's false arguments and factual assertions, its failure to correct Seymour's false testimony

concerning the true nature of the deal and its misleading questions of Ms. Braun, further violated Ms. Braun's right to due process. E.g., Miller v. Pate, 386 U.S. 1 (1967) (prosecutor's knowing misrepresentation in presentation of evidence and summation that shorts were stained with blood rather than with paint deprived defendant of due process); Giglio v. United States, 405 U.S. 150 (1972).

Bad faith inquiry of defense witnesses of the "when did you stop beating your wife?" variety utilized by the prosecutor in this case also has been soundly and consistently condemned by the courts. See, e.g., United States v. Silverstein, 737 F.2d 864, 867-68 (10th Cir. 1984); United States v. Cardarella, 570 F.2d 264, 267-68 (8th Cir.), cert. denied, 435 U.S. 997 (1978). See also State v. Richter, 232 Wis. 142, 286 N.W. 533 (1939) (improper for prosecutor to insinuate facts without presenting evidence in support of those insinuations).

The violation is especially egregious where, as here, the prosecutor incorporates within his questions not merely ignorant speculation but assertions of fact which he knows or should know to be false. The same constitutional principles which bar the use of false evidence likewise bar misleading the jury by use of questions, arguments and factual assertions which the prosecutor knows or should know to be false. See, e.g., Miller v. Pate, supra; United States v. Meeker, 558 F.2d 387 (7th

Cir. 1977).

The state's rebuttal argument also was fundamentally improper for at least three reasons. First, because no evidence was introduced to explain why the three individuals did not testify, the prosecutor's argument "violated the fundamental rule, known to every lawyer, that argument is limited to the facts in evidence." United States v. Fearns, 501 F.2d 486, 489 (7th Cir. 1974). See also State v. Parker, 55 Wis. 2d 131, 197 N.W.2d 742, 748 (1972), cert. denied, 409 U.S. 1110 (1973); State v. Richardson, 44 Wis. 2d 75, 170 N.W.2d 775, 780 (1969). Such arguments denied Ms. Braun not only her right to due process, but her right to confrontation as well. See, e.g., Parker v. Gladden, 385 U.S. 363 (1966) (bailiff's prejudicial statements to jury denied defendant right to confrontation).

Second, the prosecutor's argument impermissibly vouched for the credibility of his star witness by insinuating to the jury that he possessed other information not presented to the jury which supported his witness' credibility. E.g., United States v. Creamer, 555 F.2d 612, 617 (7th Cir.), cert. denied, 434 U.S. 833 (1977), citing Lawn v. United States, 355 U.S. 339, 359-60 n.15 (1958).

Finally, the prosecutor knew that the three individuals neither suffered from a lack of memory nor refused to cooperate with the prosecution. Rather, he

knew that the reason at least two of the witnesses were not called to testify was exactly the reason which defense counsel asked the jury to infer: each of the witnesses would contradict, rather than corroborate, his star witness. The prosecutor's suggestion, indeed his direct assertion, to the contrary violated due process. Miller v. Pate, supra.

A closely analogous case is United States v. Dailey, 524 F.2d 911 (8th Cir. 1975), in which the defendant presented an alibi defense. Although his younger brother may have been able to corroborate a portion of his alibi testimony, Dailey did not call him as a witness. The government consequently subpoenaed him to rebut that alibi. After interviewing him, however, the prosecutor decided the brother should not testify. The prosecutor then argued in summation that the defendant's failure to call his brother as an alibi witness suggested that the brother's testimony would not corroborate that alibi. The Court of Appeals reversed.

> Though the prosecutor had brought the younger Dailey to the courthouse and satisfied himself that Stephen Dailey would not rebut the defense alibi, he was permitted to infer in his argument that the defendant's own brother, sitting a few steps from the witness stand, would not testify favorably for him... . [I]t was clearly unfair for the prosecutor to argue an inference that Stephen Dailey's testimony would be unfavorable when he knew it would not... . In this case, ... the prosecutor deliberately misled the jury in a

> close case, and the court did not rectify the error.

524 F.2d at 917 (citations and footnotes omitted).

The prosecutor's misconduct in this case was both extensive and serious; it directly affected the central issues in the case. Moreover, the prosecutor's case had inherent weaknesses. See, e.g., Dudley v. Duckworth, 854 F.2d 967, 972 (7th Cir. 1988) ("admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dubious witnesses"), cert. denied, 490 U.S. 1011 (1989).

The factual questions in this case were extremely close, turning 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) (although evidence overwhelming if prosecution witness believed, improprieties which negatively affected defendant's credibility were prejudicial where jury had reason to doubt prosecution witness). The prosecutor's misconduct accordingly denied Ms. Braun her right to due process.

IV.

BECAUSE MS. BRAUN WAS DENIED HER RIGHT TO CONFRONT THE WITNESSES AGAINST HER, HER CONVICTION MUST BE VACATED.

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The Wisconsin Constitution similarly requires that the defendant have a right "to meet the witnesses face to face." Wis. Const. Art. I, §7. Ms. Braun was denied this right when she was not given adequate opportunity to expose fully the biases, motives, and lack of credibility of the witnesses against her.

A. Earl Jeffrey Seymour.

During the cross-examination of Earl Jeffrey Seymour, the court sustained objections to numerous questions designed to elicit responses relevant to the witness' credibility, bias, motives for testifying, and ability to recall. Defense counsel was barred from eliciting Seymour's current understanding of his plea agreement and his hopes and expectations, and the extent of his vulnerability, with regard to his pending sentence (Tr. 1578, 1580, 1581, 1784), the number of times he had committed perjury (Tr. 1710-11), and the fact he took LSD in an attempt to be found incompetent to stand trial in this case (Tr. 1649-52, 1746-47). The court similarly

refused to allow defense counsel to inquire concerning Seymour's hopes and expectations with regard to disposition of possible federal charges for importation of marijuana (Tr. 1677-79). The court also allowed Seymour to assert his Fifth Amendment privilege to a number of questions (Tr. 1636, 1668; see 1435-39), denied defense counsel's motion to strike Seymour's testimony on the grounds that cross-examination was impermissibly restricted, and failed sufficiently to determine the legitimacy of Seymour's invocation of the privilege (Tr. 4849-50).

The combined effect of these rulings was to deny Ms. Braun her right to confrontation. Violation of a defendant's right to confrontation is not limited to those circumstances involving denial of all rights to cross-examine. See, e.g., Davis v. Alaska, 415 U.S. 308 (1974); Smith v. Illinois, 390 U.S. 129, 131 (1968). The right of confrontation involves not merely some cross-examination, but rather requires the opportunity for effective cross-examination. Davis, 415 U.S. at 318.

According to the United States Supreme Court:

> a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness."

Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986), quoting

Davis, 415 U.S. at 318. See also State v. Lenarchick, 74 Wis. 2d 425, 247 N.W.2d 80, 92 (1976).

"[T]he exposure of a witness' motivation in testifying is a proper and important function of cross-examination." Van Arsdall, 475 U.S. at 678-79. This Court thus has recognized the legitimacy of inquiry into whether a witness has been influenced by a hope or expectation of leniency. Lenarchick, 247 N.W.2d at 92. See also Gordon v. United States, 344 U.S. 414, 422 (1953). Only by fully exposing Seymour's hopes, expectations and vulnerability could the defense establish the extent to which he was biased, possessed ulterior motives, or "otherwise lacked that degree of impartiality expected of a witness at trial" and "make a record from which to argue why" any or all of these factors existed. Davis, 415 U.S. at 318 (emphasis added). Similarly, "[n]othing is more probative of a witness' willingness to lie under oath than evidence that the witness has, under similar circumstances, lied under oath." Sherer v. United States, 470 A.2d 732, 738 (D.C. App. 1983), cert. denied, 469 U.S. 931 (1984).

Also, where a prosecution witness' invocation of the Fifth Amendment on cross-examination "creates a 'substantial danger of prejudice by depriving [the defendant] of the ability to test the truth of the witness's direct testimony,' relief is warranted." See United States v. Lyons, 703 F.2d 815, 819 (5th Cir. 1983) (quoting United States v. Diecidue, 603 F.2d 535, 552 (5th Cir. 1979),

cert. denied, 445 U.S. 946 (1980)); see United States v. Rogers, 475 F.2d 821, 827 (7th Cir. 1973).

Where, as here, the court has cut off proper cross-examination, the inquiry becomes "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Van Arsdall, 475 U.S. at 684.

Especially when viewed in light of all the other errors and misconduct which skewed the trial in favor of the state, the constitutional violation here cannot reasonably be considered harmless because "[a] reasonable jury might have received a significantly different impression of [Seymour's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." Van Arsdall, 475 U.S. at 680. Seymour was the state's key witness, and the only witness who connected Ms. Braun with his killing of William Weber. His testimony with regard to her involvement in that killing and the subsequent disposal of the body was not cumulative of other evidence at trial. While other witnesses corroborated certain tangential portions of his testimony, significant portions were directly contradicted both by physical evidence and by other witnesses, including Ms. Braun.

Seymour's testimony was not "short and primarily cumulative." Lyons, 703 F.2d at 819. Rather, that testi-

mony provided a "crucial link in the proof" against Ms. Braun. Davis, 415 U.S. at 317. The court's restrictions on cross-examination and the exercise by Seymour of his privilege against self-incrimination combined to deprive the defense of the opportunity to show the jury the full range of his biases, prejudices, opportunities to fabricate, and motives for such fabrication. Ms. Braun's right to confront the witnesses against her consequently was denied and relief is required. See also Olden v. Kentucky, 488 U.S. 227 (1988).

B. Richard Anthuber.

Richard Anthuber also testified for the state and corroborated Seymour's testimony that Seymour had made statements, prior to his arrest, implicating both Seymour and Ms. Braun in the killing (Tr. 2491, 2502-03). The defense attempted to demonstrate Anthuber's bias in favor of the state by establishing that, approximately six months prior to the trial, the same prosecutor trying Ms. Braun's case had strongly recommended that Anthuber be sentenced on an unrelated drug case to probation rather than jail, despite the fact that he was known to be a serious drug offender and could have been sentenced to up to 30 years imprisonment (Tr. 2513-14; see Tr. 2517-22). It was only after he was placed on probation that Mr. Anthuber became a witness for the state against Ms. Braun (Tr. 2521). The state's objection to this cross-examina-

tion was sustained (Tr. 2521), and the prosecutor emphasized the corroborative nature of Anthuber's testimony in his closing argument (Tr. 5808).

The circuit court properly found that the trial court's restriction on Ms. Braun's cross-examination of Anthuber was constitutional error (R41:62). See Lenarchick, 247 N.W.2d at 92. See also United States v. Dickens, 417 F.2d 958, 960 (8th Cir. 1969) ("Whether or not a promise was actually made by the Assistant United States Attorney was irrelevant; the crucial factors were the witness' motive, state of mind and expectation in testifying.").

This error was not harmless. Anthuber's testimony corroborated an important part of Seymour's testimony. As such, denying Ms. Braun an adequate opportunity to demonstrate Anthuber's biases effectively added to Seymour's credibility in the eyes of the jury.

CONCLUSION

For these reasons, Ms. Braun respectfully submits that the Court of Appeals erred in finding her §974.06 motion barred. She further submits that the trial court's arbitrary exclusion of a spectator favorable to the defense violated her right to a public trial and the combined effect of the prosecutorial misconduct and the denial of confrontation was to skew the trial unfairly in favor of the prosecutor on the controlling issue in the

case, determination of the relative credibility of Seymour and Ms. Braun. Both alone and cumulatively, these errors deprived Ms. Braun of her constitutional right to a fundamentally fair trial and due process.

For these reasons, Ms. Braun respectfully asks that this Court reverse the decision of the Court of Appeals, reverse her conviction and remand this case for a new trial.

Dated at Milwaukee, Wisconsin, October 11, 1993.

Respectfully submitted,

KATHLEEN BRAUN,
Defendant-Appellant-Petitioner.

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 91-0923

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHLEEN BRAUN,

Defendant-Appellant-Petitioner.

APPENDIX

Record No.	Description	App.
--	Court of Appeals Decision	1-5
30	Circuit Court Order dated March 1, 1991	6-7
31	Circuit Court Order dated March 11, 1991, denying Motion to Vacate Judgment	8
--	Stipulation	9-16
41:41-73	Transcript of Circuit Court's Reasons for Denying §974.06 Motion	17-49

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contract obligation to submit to arbitration. The issue of arbitrability addresses whether the arbitrator exceeded his or her powers, because an arbitrator who purports to act against one not bound to submit to arbitration exceeds the powers that can only be derived from a contractual obligation to submit to arbitration. A party who does not participate in the arbitration proceedings may raise the issue in a motion to vacate the award filed under sec. 788.10(1)(d), Stats.

[9, 10] In addressing the issue raised in this appeal, we have assumed that Lundberg did not participate in the arbitration proceedings and that he consistently voiced his objections to the demand for arbitration. This is consistent with the facts as presented by him. Scholl counters by asserting that Lundberg did not communicate any objection to arbitration directly to him. He also claims that Lundberg participated in the process by asking that the location of the hearing be in Iowa and by appearing and asking for a postponement of the hearing. There has been no evidentiary hearing nor findings of facts on these issues. Therefore, it is premature to consider whether Lundberg may be estopped from claiming that the underlying dispute is not subject to arbitration. *See Pilgrim Inv. Corp. v. Reed*, 156 Wis.2d 677, 685, 457 N.W.2d 544, 548 (Ct.App.1990) (partial participation in the arbitration process, without a reservation of rights, can estop a party from challenging the contract to arbitrate). It is also premature for this court to review the issue of whether Lundberg, despite his resignation, remained subject to the brokers association's arbitration requirement. Therefore, we remand the matter to the circuit court for further proceedings.

Judgment reversed and cause remanded.

STATE of Wisconsin, Plaintiff-Respondent,

v.

Kathleen BRAUN, Defendant-Appellant.†

No. 91-0923.

Court of Appeals of Wisconsin.

Submitted on Briefs Aug. 11, 1992.

Opinion Released July 7, 1993.

Opinion Filed July 7, 1993.

Defendant filed postconviction motion. The Circuit Court, Milwaukee County, Ted E. Wedemeyer, Jr., J., denied motion, and defendant appealed. The Court of Appeals, Schudson, J., held that postconviction motion, which was dismissed "on the merits" due to defendant's escape, was "finally adjudicated," and, thus, defendant was barred from raising same issues in subsequent postconviction motion filed following her recapture.

Affirmed.

1. Criminal Law ⇐998(21)

When defendant has attempted to obtain relief in earlier postconviction proceeding, and when grounds for relief have either been finally adjudicated or waived, defendant will not be entitled to seek relief unless defendant proves that there is no basis for relief that was either adequately raised previously or was not raised for some other sufficient reason. W.S.A. 974.06(4).

2. Criminal Law ⇐1042

State did not waive its procedural, res judicata and waiver arguments by failing to raise them in trial court at postconviction hearing, where parties' stipulation regarding what happened at earlier postconviction motion hearing, in combination with case chronology confirmed by court records, provided undisputed factual basis upon which Court of Appeals could resolve

† Petition for review pe[redacted]

purely legal issue presented on appeal from denial of subsequent postconviction motion.

3. Criminal Law ⇐998(21)

Postconviction motion, which was dismissed "on the merits" due to defendant's escape, was "finally adjudicated," and, therefore, defendant could not raise same issues in subsequent postconviction motion filed after her recapture, even though trial court, at no time during proceeding or when setting forth its order, discussed or purported to decide underlying merits of initial postconviction motion. W.S.A. 805.03, 974.06(4).

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐998(21)

Fact that defendant was not required to provide testimony for litigation of her postconviction motion did not preclude determination that motion, which was dismissed "on the merits" due to her escape, was "finally adjudicated," and, thus, that dismissal of that motion barred subsequent postconviction motion raising same issue that was filed following defendant's recapture. W.S.A. 974.06(4).

5. Criminal Law ⇐1131(5)

"Fugitive dismissal rule" reflects long-established legal principle that court may dismiss defendant's appeal if defendant is no longer within court's custody and control.

See publication Words and Phrases for other judicial constructions and definitions.

On behalf of the defendant-appellant, the cause was submitted on the briefs of Shellow, Shellow & Glynn, S.C., with Stephen M. Glynn and Robert R. Henak, of counsel, of Milwaukee.

On behalf of the plaintiff-respondent, the cause was submitted on the briefs of James E. Doyle, Atty. Gen., and Daniel J. O'Brien, Asst. Atty. Gen.

Before SULLIVAN, LaROCQUE and SCHUDSON, JJ.

SCHUDSON, Judge.

In this appeal, we consider the appellate rights of a defendant who escaped from prison while her postconviction motion was pending in the trial court, and who again sought postconviction relief after her recapture. More specifically, we consider whether Braun, following her recapture, is precluded from seeking postconviction relief under sec. 974.06, Stats., raising issues she had previously raised in her pre-escape motion for a new trial, which was dismissed "on the merits" because of her escape—a dismissal from which she never filed a direct appeal. Because the claims of error alleged in the pre-escape motion for a new trial were "finally adjudicated" by the dismissal of Braun's pre-escape motion, we conclude that she cannot resurrect those claims with a post-escape motion under sec. 974.06. We affirm.

On December 19, 1976, a jury found Kathleen Braun guilty of first-degree murder, party to a crime. Braun was sentenced to life imprisonment to be served at the Taycheedah Correctional Institution. Braun filed a motion for a new trial with the trial court asserting: denial of a public trial; prosecutorial misconduct; denial of her right of confrontation based upon a witness' exercise of Fifth Amendment rights; limitations on the cross-examination of the State's chief witness; and alleged misconduct in the prosecutor's closing argument to the jury.

In December of 1977, while her motion was pending, Braun escaped from prison. The State moved to have Braun's motion dismissed on the grounds of abandonment or waiver because of Braun's escape. The judgment roll entry from the May 1, 1978, motion hearing indicates that the State's motion was granted "on the merits," but that the court would set aside the decision and allow Braun to petition the court to reopen her motion if she appeared within 60 days. Braun never appeared before the court within the sixty-day period, and never filed a direct appeal from the trial court's dismissal of her motion.

Braun was recaptured in 1984. In November of 1988, she filed a sec. 974.06 motion raising many of the same issues she had raised in her pre-escape motion for a new trial. In 1991, the trial court considered the merits of those issues and denied Braun's motion. She now appeals.

Because the transcript from the 1978 motion hearing was no longer available, on January 27, 1992, we ordered the trial court to hold an evidentiary hearing to determine the reasons underlying the trial court's decision to deny 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 60 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. Section 974.06(6), Stats., states that "[p]roceedings under this section shall be considered *civil* in nature, and *the burden of proof shall be upon the [prisoner].*" (Emphasis added.)

[1] Sec. 974.06(4), Stats., states:

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. *Any ground finally adjudicated* or not so raised, or 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 may not be the basis for a subsequent motion,* unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

(Emphasis added.) Restated, where a defendant has attempted to obtain relief in an earlier proceeding and where the grounds for relief have either been finally adjudicated or waived, the defendant will not be entitled to seek relief unless the defendant proves that there is a basis for relief that was either inadequately raised previously or was not raised for some other sufficient reason.

[2] The State argues that Braun's appeal is barred by section 974.06(4)'s ban on resurrecting claims that were "finally adjudicated" by the previous dismissal.[1] Braun counters that the grounds of her pre-escape motion were never "finally adjudicated" because the underlying issues were not considered by the trial court. She concludes, therefore, that dismissal of her motion "on the merits" due to her escape "was on procedural grounds unconnected to the ultimate issues in the case."

[3] "[F]inally adjudicated" is not defined in sec. 974.06, Stats., the Criminal Code, or the appellate rules. As defined by

1. Braun argues the State "waived its procedural, res judicata and waiver arguments by failing to raise them in the trial court." The State acknowledges that the "issue was not presented to the trial court at the postconviction hearing." The State argues, however, that under *State v. Holt,* 128 Wis.2d 110, 124–125, 382 N.W.2d 679, 686–687 (Ct.App.1985), we may reach this threshold issue. We agree. The parties' stipulation regarding what happened at the May 1, 1978, motion hearing, in combination with the case chronology confirmed by the court records, provide the undisputed factual basis upon which we are able to resolve a purely legal issue.

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our courts, however, an adjudication "is the giving of a judgment," and "[a] judgment is a final determination of the rights of the parties." *Great Lakes Trucking Co. v. Black*, 165 Wis.2d 162, 168, 477 N.W.2d 65, 67 (Ct.App.1991); *see* sec. 806.01. Stats. ("A judgment is the determination of the action."). The issue for this court, therefore, is whether Braun's pre-escape motion was "finally adjudicated" by a dismissal that resulted from her escape.

In *State v. John*, 60 Wis.2d 730, 211 N.W.2d 463 (1973), the Wisconsin Supreme Court considered whether a trial court properly dismissed a defendant's post-conviction motion due to his escape where "the merits of the petition were not passed upon or considered by the trial court." *John*, 60 Wis.2d at 732, 211 N.W.2d at 464. In *John*, the defendant escaped while his post-conviction motion was pending. *Id.* at 731–732, 211 N.W.2d at 463–464. On the scheduled hearing date, when the trial court was informed that John could not be produced to testify on his motion, the court dismissed the motion. *Id.* John appealed the trial court's dismissal of his motion. *Id.* at 732, 211 N.W.2d at 464.

Concluding that dismissal was proper, the supreme court noted, "We think the trial court properly dismissed the [defendant's post-conviction motion] and, *while the record does not show it was dismissed on its merits, we believe that is the proper effect of the dismissal.*" *Id.* (emphasis added). Thus, while the trial court's dismissal because of the defendant's escape was not explicitly based on the merits of the defendant's motion, the supreme court held that the dismissal operated as a dismissal "on the merits" due to the defendant's escape. Similarly, the grounds upon which Braun now seeks relief were raised in her pre-escape motion, and the dismissal due to her escape "finally adjudicated" her motion "on the merits."

[4, 5] Braun attempts to distinguish *John*, pointing out that she, unlike *John*, was not required to provide testimony for the litigation of her post-conviction motion. We do not, however, find this distinction determinative. Although *John's* failure to appear and testify at the post-conviction motion hearing resulted in the supreme court's decision on the "narrower ground" that *John* "abandoned his application for relief on the merits," *id.* at 736, 211 N.W.2d at 465–466, the court also, with implicit favor, looked to the grounds underlying the "fugitive dismissal rule," [2] includ-

2. The fugitive dismissal rule reflects the long-established legal principle that a court may dismiss a defendant's appeal if the defendant is no longer within the court's custody and control. *See Smith v. United States*, 94 U.S. 97, 24 L.Ed. 32 (1876); *Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970). The United States Supreme Court expanded this principle to hold that dismissal of an appeal even after the defendant had been recaptured was proper. *See Estelle v. Dorrough*, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975). For a discussion of the various reasons for this rule and the legal theories upon which it is premised, see *Ortega-Rodriguez v. United States*, — U.S. —, — — —, 113 S.Ct. 1199, 1203–1205, 122 L.Ed.2d 581, 591–593 (1993), and *State v. Bono*, 103 Wis.2d 654, 655–656, 309 N.W.2d 400 (Ct.App. 1981).

Recently, the United States Supreme Court revisited the fugitive dismissal rule in *Ortega-Rodriguez*, — U.S. —, 113 S.Ct. 1199, 122 L.Ed.2d 581. In *Ortega-Rodriguez*, the defendant escaped after conviction but prior to sentencing. *Id.* at —, 113 S.Ct. at 1202, 122 L.Ed.2d at 589. The Supreme Court reversed the Eleventh Circuit's dismissal of the defendant's appeal, which had been premised on the fugitive escape rule. The Supreme Court held that before an appellate court can dismiss a defendant's appeal, there must be "some connection between a defendant's fugitive status and his appeal." *Id.* at —, 113 S.Ct. at 1208, 122 L.Ed.2d at 597.

We note that *Ortega-Rodriguez* did leave open the possibility that an appellate court could, under appropriate circumstances, dismiss an appeal because of fugitive status predating a defendant's appeal where, for instance, a long escape might prejudice the prosecution in locating witnesses and presenting evidence at a retrial following a successful appeal, or where a defendant's misconduct at the trial court level might make "'meaningful appeal impossible,' or otherwise disrupt the appellate process so that an appellate sanction is reasonably imposed." *See id.*, — U.S. at — — —, 113 S.Ct. at 1208–1209, 122 L.Ed.2d at 597–598 (citations omitted). The Supreme Court also noted that where a defendant's case is pending before the trial court and the defendant escapes, "flight can be deterred with the threat of a wide range of penalties available to [the trial] judge." *Id.* at —, 113 S.Ct. at 1207, 122 L.Ed.2d at 596.

ing waiver, mootness and abandonment, in reaching its decision. *Id.* at 732–735, 211 N.W.2d at 464–465. Applicable to the fugitive dismissal rule, and equally applicable to this dismissal that "finally adjudicated" Braun's motion "on the merits," the supreme court in *John* commented:

> "Courts should not so coddle those who are defiant of its authority and the law, and who yet ask for its relief, that it is blinded to such inconsistencies. 'If the law supposes that', Dickens has Mr. Bumble say, 'the law is a ass, a idiot.' "

Id. at 735, 211 N.W.2d at 465 (citation omitted). Nothing about the ultimate theory upon which the supreme court affirmed the dismissal of John's motion detracts from the supreme court's recognition of a trial court's "inherent power ... to dismiss" when a party "obstruct[s] the administration of justice," and its conclusion that the dismissal operated as a dismissal "on the merits" due to the defendant's escape. *See Id.* at 735–736, 211 N.W.2d at 465–466.

Trial courts "have the power, both inherent and statutory, to prevent unwarranted delay and the proliferation of stale [matters before the court]." *Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 174 Wis.2d 381, 395, 497 N.W.2d 756, 761 (Ct.App.1993). Under sec. 805.03, Stats., a trial court has authority to dismiss a claim for failure to prosecute or for failure to obey an order of the court. "Any dismissal" for such failure "operates as an adjudication on the merits unless the court ... otherwise specifies...." Section 805.03, Stats. Here, because of her escape, Braun failed to prosecute her motion for a new trial, which resulted in a dismissal "on the merits," and thus, she is precluded from renewing her claims in a post-escape, sec. 974.06(4) motion.

Braun invoked the judicial system of this state by bringing her motion for a new trial. Simultaneously, she contemptuously flouted that same system by escaping. Approximately eleven years after her conviction and four years after her recapture, Braun sought relief from that same system, on the same grounds. We hold that she is precluded from doing so. Under secs. 974.06(4) and 805.03, Stats., and *State v. John*, Braun's motion was "finally adjudicated" and the dismissal was "on the merits" due to her escape.

Orders affirmed.

STATE of Wisconsin, Plaintiff–Respondent,

v.

Kriss KNIESS, Defendant–Appellant.

No. 93–0628–CR.

Court of Appeals of Wisconsin.

Submitted on Briefs June 18, 1993.

Opinion Released July 27, 1993.

Opinion Filed July 27, 1993.

Motorist was convicted of his sixth successive offense of driving after suspension by the Circuit Court, Lincoln County, Raymond F. Thums, J., and he appealed from sentence imposed. The Court of Appeals, Cane, P.J., held that trial court was not limited to imposing civil penalties, but could require jail time of defendant.

Affirmed.

Automobiles ⇐359

Trial court is limited to imposing civil penalties on, and may not require jail time of, a defendant convicted on at least five occasions of driving after suspension only where suspension was based solely on defendant's failure to pay fine or forfeiture; limitation does not imply if at least one

The *Ortega-Rodriguez* holding and the fugitive dismissal rule are not dispositive in this case. We are not *dismissing* Braun's appeal, but rather, we are *affirming* the dismissal of Braun's postconviction motion.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

KATHLEEN BRAUN,

Defendant.

FILED
CRIMINAL DIVISION
MAR 1 1991
GARY J. BARCZAK
CLERK OF COURTS

Case No. I-4977

ORDER

Petitioner moves to vacate a judgment of conviction previously filed on November 15, 1988, and for an order pursuant to Section 974.06 setting aside the judgment of conviction entered on December 20, 1976, by the Honorable Max Raskin, thereby effectuating a new trial.

The basis for petitioner's motion is that the State failed to disclose exculpatory evidence, i.e., affecting the credibility of the State's main witness, Earl Jeffrey Seymour, and in failing to do so deprived the petitioner of the fair trial. In considering this motion the Court has had an opportunity of reviewing its oral decision and the basis for it and the materials submitted to it by counsel for the petitioner.

During the trial the credibility and motivation of Seymour was strongly tested and challenged through lengthy cross-examination. From a reading of such cross-examination there can be no doubt that petitioner successfully brought to the jury's attention the motivation of Seymour for implicating petitioner Braun. Braun's motivation is self-evident, and it was made

abundantly clear to the jury for them to consider in evaluating the charge brought against petitioner. The new material submitted to this Court from heretofore undisclosed police records corroborates Seymour's motivation but is nothing more than cumulative to the matter of motivation already brought to the jury's attention. Indeed, the heretofore undisclosed evidence would strengthen the petitioner's claim for improper motivation, but the essence of the undisclosed evidence is not of any significant different nature that in the judgment of this Court would have changed the outcome of the jury's verdict. As a result it is this Court's conclusion as a matter of law that petitioner was not denied her right to a fair trial.

Dated at Milwaukee, Wisconsin, this 1st day of March, 1991.

BY THE COURT

Jul E. Wedemeyer, Jr.

Jul E. Wedemeyer, Jr.,
Circuit Judge, Br. 34

CIRCUIT COURT MILWAUKEE CO. WISCONSIN
SEAL

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. I-4977

KATHLEEN BRAUN,

Defendant.

ORDER

For the reasons stated on the record on December 21, 1990, the defendant's Motion to Vacate Judgment pursuant to §974.06, Wis. Stats., is DENIED.

Dated at Milwaukee, Wisconsin, March 11, 1991.

BY THE COURT:

Hon. Ted E. Wedemeyer, Jr.
Circuit Court Judge, Br. 34

8312P

FILED
CRIMINAL DIVISION
MAR 11 1991
GARY J. BARCZAK
CLERK OF COURTS

CIRCUIT COURT MILWAUKEE COUNTY WISCONSIN SEAL

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. I-4977
(Appeal No. 91-0923)

KATHLEEN BRAUN,

Defendant.

FILED
CRIMINAL DIVISION
MAR 10 1992
GARY J. BARCZAK
CLERK OF COURTS

STIPULATION, FINDINGS AND DECISION

The State of Wisconsin, by Assistant Attorney General Daniel J. O'Brien and the defendant, Kathleen Braun, by her attorneys, Shellow, Shellow & Glynn, S.C. and Robert R. Henak, stipulate that the attached affidavits of Attorneys Robert R. Henak and Stephen M. Glynn, dated November 8, 1991, accurately state the facts set forth therein and that the statements in Attorney Glynn's affidavit accurately reflect the reasons underlying Judge Raskin's May 1, 1978 decision to deny Ms. Braun's post-conviction motion.

SHELLOW, SHELLOW & GLYNN, S.C.
Attorneys for Defendant,
KATHLEEN BRAUN

By: Robert R. Henak
Robert R. Henak

Date: 3/6/92

STATE OF WISCONSIN

By: Daniel J. O'Brien
Daniel J. O'Brien
Assistant Attorney General

Date: March 9, 1992

FINDINGS AND DECISION

Based upon the above stipulation of the parties in this action, the Court makes the following findings of fact with regard to the reasons underlying Judge Max Raskin's May 1, 1978 decision to deny Kathleen Braun's post-conviction motion:

1. The state, through ADA Bruce Lowe, 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.

2. 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.

3. While dismissing Ms. Braun's motions, Judge Raskin orally ordered that, if Ms. Braun returned within 60 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.

BY THE COURT:

Ted E. Wedemeyer, Jr.
Circuit Court Judge

Date: MAR 1 0 1992

9264P

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 91-0923

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHLEEN BRAUN,

Defendant-Appellant.

AFFIDAVIT OF ROBERT R. HENAK

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Robert R. Henak, being first duly sworn on oath, states as follows:

1. I am an attorney licensed to practice law in the State of Wisconsin. I am one of the attorneys representing the defendant in this appeal. I also was one of the attorneys representing her concerning the post-conviction motions currently at issue in this case.

2. I make this affidavit in support of Ms. Braun's Motion to Supplement or Correct Defective Record.

3. It is my understanding that no transcript of the May 1, 1978 proceedings in this case ever was prepared

and that there is no written order reflecting Judge Max Raskin's order dismissing Ms. Braun's original post-conviction motions.

4. Upon receipt of the state's brief on this appeal, I attempted to determine whether a transcript could be prepared concerning the proceedings on May 1, 1978. I therefore contacted Ms. Marilynn Miller, the court reporter in charge of assignments at the Milwaukee County Circuit Court Administrator's office. She informed me that Ruth Schieble, the court reporter for that hearing, is totally retired. Ms. Miller also informed me that it would be impossible to get a transcript of the proceeding and decision because the court only keeps court reporters' notes for ten years, so they do not have anything older than 1981.

Robert R. Henak

Robert R. Henak

Subscribed and sworn to before me
this 8th day of November, 1991.

Susan J. [illegible]

Notary Public, State of Wisconsin
My commission: expires 11/21/93

8937P

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 91-0923

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHLEEN BRAUN,

Defendant-Appellant.

AFFIDAVIT OF STEPHEN M. GLYNN

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Stephen M. Glynn, being first duly sworn on oath, states as follows:

1. I am an attorney licensed to practice law in the State of Wisconsin. I am one of the attorneys representing the defendant in this appeal. I also was one of the attorneys representing her during the trial and original post-conviction motions in this case.

2. I make this affidavit in support of Ms. Braun's Motion to Supplement or Correct Defective Record.

3. I understand from Attorney Robert Henak of

this office that there is no transcript of the proceedings in this case on May 1, 1978 when Judge Raskin granted the state's motion to dismiss Ms. Braun's original post-conviction motions. I also understand from Mr. Henak that the court reporter's notes from the proceeding have been destroyed.

4. The purpose of this affidavit is to reconstruct the essence of the proceedings which took place on May 1, 1978. I was present representing Ms. Braun on that date and this affidavit is based upon my personal observations of what happened.

5. The state, through ADA Bruce Lowe, 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.

6. 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.

7. While dismissing Ms. Braun's motions, Judge Raskin orally ordered that, if Ms. Braun returned within

60 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.

Stephen M. Glynn

Subscribed and sworn to before me
this 8th day of November, 1991.

Elrose L. Alexander
Notary Public, State of Wisconsin
My commission: expires: 4-26-92

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MR. GLYNN: I'm just -- I'm noticing we have file stamps on this. Could I see your judgment roll, please? Do you have that handy?

Yeah, Judge. With all respect, I think you don't have it, because the judgment roll doesn't have it. And yet if I can pass it up will you accept my representation it was in fact filed?

THE COURT: I don't question it.

MR. O'MEARA: No objection.

MR. GLYNN: So if it's all right, could I look in my file and see if I got an extra and just leave it with you?

THE COURT: I assume Mr. O'Meara got it because he responded. That's where I looked at this. I said what has this got to do with anything.

MR. GLYNN: Yeah. I've got an extra.

May the record reflect that I'm tendering to the clerk two separately stapled documents, one entitled supplemental motion to vacate judgment, which consists of a three page motion, three page affidavit of counsel, and a five page exhibit, and then a separate document which is a fairly brief four page memo in support of the supplemental motion to vacate judgment.

Thank you.

THE COURT: All right. Okay. What I'm going

to do is -- you are going to have to bear with me because this is going to take a considerable amount of time. I've got a flock of things to go through here and I'm going to reflect on my -- my judgment on -- on these various issues. Some of them will be in response to what you gentlemen argued, others probably not going to hit the nail as you are defining it before me because I may see it a little bit differently. But I -- in order to get this thing where you eventually want it I think we have to go through this and I think you both understand it.

First -- I'm going to take -- my remarks are going to be pretty much based on the outline in Defendant's brief, in the table of contents. I'll pretty well follow that as they go down. I don't think I'm going to be missing anything. If I do, it's unconscious.

First of all, on the issue of whether the trial court's exclusion of a spectator denied Mrs. Braun -- or Ms. Braun her right to a public trial.

There is no question from reading the record there were objections by defense counsel to the trial court excluding the individual. I'm going to approach this two ways.

I have been faced with this same type of -- of issue, not precisely the same, but in the same area

recently on a number of cases in which -- not only the public issue, but on whether an accused must be present at a significant portion, or at a significant point in time. There is a lot of law that's been developed recently on that. And I -- it's my judgment that our Supreme Court is going to have to take a look at that, 'cuz they have not hit it head on. And I don't think the Webb case hits it head on either.

In my judgment Webb is confined to its facts. But it's my judgment that they are going to have to go somewhere in between the standard of is it prejudicial, and the standard of State vs. Dyess they are going to have to look at it and they are going to have to decide what they want to do.

It's my judgment that regardless of the -- of the old tried and true principals of constitutional law I think they will eventually come to the remedy must be proportional to the error they are attempting to correct. And in that respect I -- for the purposes of this decision today I'm going to rely on the -- the actual standard that was set up in State vs. Dyess, that is, whether it was constitutional or not there has to be -- and I'm aware of the language -- that this deficiency is prejudicial.

Keeping that -- that in mind, I'm going to

decide this issue on the question of whether there is a reasonable possibility of undermining the confidence of the outcome of the trial. And on the basis of that I don't believe that it is. So I'm not going to reverse on that ground for those reasons stated, regardless of how you may feel about my reasoning process.

MR. GLYNN: Certainly frames the issue.

THE COURT: Okay.

Moving on to what would be point two, I guess. Miss Braun next claims there were instances of prosecutorial misconduct and that this conduct deprived her of due process and a fair trial. We're here getting into -- I recognize this -- we're getting into a question of whether all these -- these pin pricks amount to violation of due process, violation of a fair trial. And that's a pretty tough issue to decide.

It's easy on -- on a lot of habeas motions where you come up with this -- there is a simple issue. But I think there is a -- there is a body of law that acknowledges that there are instances where maybe one of these things in violation does not amount to a violation of due process, but in the total picture and total framework of things, it could constitute the equivalency of violation of due process or fair trial. So with that in mind I have decided to go after every one of these

items and see where they fit.

First off is whether there was a concealment and false statements concerning the nature of Seymour's plea agreement. This is going to be a little bit lengthy. It's my -- it's my perception of -- of how the arguments have been presented -- and again I may be wrong -- but it's my perception as to how the arguments were presented that Miss Braun argues that the State concealed the true nature of the plea agreement with Seymour. That the State mislead the jury by false statements, and in failing to correct Seymour's false statements, this deprived her of a full opportunity -- full cross-examination of the witness concerning the plea agreement, plus the effect of the agreement and the testimony of certain other witnesses.

As I gathered from -- and I read all 6,000 pages of this transcript -- that the substance of plea agreement is contained on Page 1,432 of the trial transcript. There Seymour testified that the D.A. would recommend a prison term but would not be specific. This version was modified, in my judgment, in that the D.A. would take into consideration everything that he, Seymour, had done since the murder to the time of sentencing and make whatever recommendations they feel appropriate at the time of sentencing. The only

certainty appeared to be as of November 15th when he testified -- and that's a key day in my thinking here -- was that a prison term would be recommended.

When I compared the examination of Seymour on Page 1,432 of the trial transcript with Defendant's Exhibit A at Pages 5 and 6 in their brief, the record in my judgment reveals no grounds for a reasonable interpretation that the State failed to disclose the terms of the agreement as they existed as of the date of trial.

In my judgment it was important to remember that Seymour testified under -- on November 15th, 1976, that closing arguments occurred on December 18th, that the verdict was rendered on December 19th, that January 25th Sutton met with the D.A., and Seymour was sentenced January 31st, 1977. It was with that sequence of dates that I've come to that conclusion in that portion of this suggested appeal.

The next item, three, would be the prosecutor's cross-examination of Braun. Did it constitute bad faith and deprive her of due process? Let's see. Let's see. Miss Braun in this -- in this area of assertion she maintained that the State, during the course of its cross-examination of her asked several questions with either insinuated or directly asserted facts known by the

prosecution to be untrue, as well as other improper questions, in a clear attempt to undermine her credibility.

I'm going to examine each one of these so that there is no question that I considered them.

Braun first claimed that the State asked her whether her husband, Tim, was arrested in Arizona in November, 1971, when it knew or should have known that such was not the case.

In this example the prosecutor asked Braun:

"Now, Timmy was arrested in Arizona, wasn't he?

Answer: No, sir.

Question: Wasn't he charged?

Answer: You may be referring to New Mexico. That time was spring.

Question: All right. We'll get to that."

Here defense counsel properly interposed an objection and in-chambers conference ensued.

Transcript reveals that there was confusion about the instance of arrest when it occurred as borne out by the questions and answers of the witness after the chambers conference. The trial court ruled that the problem could be eliminated and cleared up by cross-

examination.

It's my judgment -- and again we're all looking over shoulders -- the manner in which the trial court handled this objection was not an abuse of discretion. He properly determined that any confusion that existed, and it appears that there was some confusion about it, could be cleared up by appropriate cross-examination.

The next example of suggested prosecutorial misconduct is the State asked Ms. Braun whether she ever knew that a particular car was registered in the name of William Weber, the victim of this crime. The Defendant claimed that the State knew the car was not so registered. Braun answered:

> "No, sir. I've never seen the title to that car."

That's at Page 5,231. Only -- let's see here. Oh, yeah. Only the -- only the -- here the defense counsel asserted that the District Attorney knew that the car wasn't registered in William Weber's name.

My judgment on this is that that position, that argument, doesn't necessarily impute knowledge to the District Attorney. The District Attorney mentioned or suggested Weber's ownership of the Cougar automobile. I wasn't able to find any demonstrated connection as to whether the District Attorney knew in whose name the car

was registered. This -- the parties persisted in this a little bit, and I noticed that no objection was made during final argument to the statement by the District Attorney. In any event -- yeah, that's my comment on that.

The third example is that Braun asserts that the form of questions used by the State implied that a prior contrary judgment had been -- statement had been given where the State knew that none had been given. And, of course, we -- here we get into art form and phraseology. The objected to phraseology; "when did you first remember," "when did you recall seeing," "when do you recall seeing," "when do you remember that," -- Braun objected to the prefatory interrogatory language. She claimed that in each instance the State knew contrary -- the fact to be contrary, and therefore the cross-examination was improper, and therefore a mistrial ought to be granted.

Here, other than the assertion that the State knew that there was no basis for the phraseology utilized and the possible negative inferences, I really don't believe I have been presented with any data supporting the inference of improper cross-examination.

In the position which I sit I just don't have a divining rod and I can't speculate as to what should have

been phrased and how it should have been phrased and the reasons why and why not, at least to the status of the record that I examined.

The next example that Braun claims is that during cross-examination the Stated asked questions insinuating that she left Milwaukee for California because of her knowledge that the victim's body had been found in Chicago. Here Braun -- yeah -- here Braun cries fowl because the State knew that there had been no publicity concerning the body's recovery until after -- after she left Milwaukee. Braun's counsel, at his own suggestion, took up the objection later in the hearing. He argued to the court it was uncontroverted that Weber's body wasn't identified until four days after Braun had left Milwaukee for the west coast. The trial court replied to Braun's counsel -- let's see -- that the questions concerning the -- yeah, that's it --

> "The questions concerning the subject matter were posed in cross-examination and if it left an undesirable impression it could be cleared up very easily on redirect."

That's a quote.

Trial court noted that the State had great latitude during cross-examination to put questions of the form used and thus overruled the objection. Braun's

counsel did ,in fact, on redirect, on Page 5,366, clarify the reason for Braun's leaving Milwaukee when she did, and thus in my judgment the trial court didn't misuse its discretion here in the way it ruled on the objections.

The next example. During cross-examination the State cross-examined Braun about her marriage to Tim and -- Tim Braun after leaving Milwaukee and after being arrested in Nevada. The following exchange took -- yeah -- took place between the prosecutor and Braun:

> "Question: What suddenly moved or prompted you to get married after your arrest in Alco, Nevada? It couldn't have been the fact a husband can't testify against a wife, would it?"

I -- I am reading all this in -- well, never mind. Before Braun's counsel could formulate and formalize an objection, the trial court intervened and instructed the jury to disregard the statement.

The State then asked Braun when -- what suddenly prompted the romance in the desert. Again defense counsel objected on the ground of repetition, and he was overruled there.

He next objected because the question was sarcastic. The trial court ordered the question answered Counsel for Braun then remarked further:

"There is no desert out there."

He was admonished by the trial court and he apologized. Shortly thereafter on questioning the circumstances of the marriage was cleared up.

So this is -- this is one of those situations where you got two good counsels going at it and they are using every skill that they have in their bag and each counsel had its turn on the stage and each used his own form and his own force. And I think the trial court -- considering the frequent clashes that took place over art form, I think the game was played out pretty well and I don't believe the trial court misused its discretion in the way it handled that exchange.

Counsel for Miss Braun alludes to some other instances or remarks by the prosecutor and claims to have constituted bad faith inquiry of defense witnesses. I went through the record on this. There were seven instances of this alleged type of conduct, on Pages 561, 5,309, 5,310, 5,315, 5,316, 5,259 and 5,294. In five of these instances defense counsel's objections were sustained.

Again in these exchanges sometimes vanities got bruised in the game of one-upmanship, and I don't think there was reversible error. I have a note here that in a trial of this nature many times the Marquis of

Queensbeery Rules are ignored but it comes with the arena in which you play, and both counsels knew it. I -- I couch those remarks. Particularly in view of the instruction concerning remarks of counsel that was given by the trial court, and I don't believe that the exchanges that took place rose to a level of bad faith or any kind of egregious conduct to warrant any type of a mistrial.

The next item relates to the prosecutor's misconduct during rebuttal argument deprived Miss Braun of her due process right to a fair trial. And I have got in mind here the comments both of you made minutes ago. This is my response on that matter, and I'm not sure that it's satisfactorily on the nose, when I listened to your arguments about it, but when I reviewed the record my reflections and judgments are somewhat as follows:

It's my judgment that the State -- it mainly relied on the testimony of a -- of the accomplice, Mr. Seymour. I don't think there is any dispute about that. During his testimony Seymour stated that Braun had obtained the gun from Webster; that Braun said he was going to fabricate an alibi by seeing his probation officer and that the landlady of Weber saw him and Miss Braun arrive at Weber's apartment. Braun denied being with Seymour and therefore -- in reference to the

apartment situation, therefore, the landlady couldn't have seen her.

Defense counsel's closing argument pointed out to the jury that these three individuals who might have corroborated Seymour's testimony weren't called as witnesses and he questioned why they were not called. I'm sure that this was done in the context of the admonitions that are contained in the normal accomplice testimony instructions regarding uncorroborated testimony.

Here the D.A. -- I think he felt the effect of defense counsel's argument and he attempted to explain why the three witnesses weren't called.

My -- my reaction, quite frankly, when I went through all that was that I -- and I may be -- I may have missed something here -- that if everyone was so certain that there wasn't going to be any corroboration, I think those witnesses could have been called, but perhaps they were unavailable. And I don't know.

However, needless to say, I couldn't find any law that requires the State to corroborate accomplice testimony, and it was -- it's a gamble to use when you are using that type of testimony. The instruction is such, it almost mitigates it if the jury pays any attention to that instruction. And I think it's strictly

a question of trial tactics, and as a result I don't think there is any question -- I don't think there is any question -- I don't think there is any error here that would warrant a new trial or vacation of judgment.

The sum and substance of all of those is that defense counsel argues that all that mandates a vacation of the conviction, and I think it's quite obvious from my earlier comments that I will deny that for all the reasons that I earlier stated.

We move on now to some other matters, and I want to get these cleaned up because I think this may clarify some of the remarks I made earlier.

Did the court violate Braun's right to due process by failing to authorize the production of certain exculpatory evidence? The source of this claim of error is the denial of the trial court of defense counsel's request to examine any and all documents that may be exculpatory in nature to Braun. During the course of the trial I -- yeah -- during the course of the trial it became evident that -- that not all of the exculpatory materials had been turned over to the defense, or at least it appeared that way, and that was the position that was maintained.

The trial court ordered whatever materials that were felt to be -- felt to be exculpatory to be released

in camera. The trial court subsequently released some of the documents to defense but withheld others. Those were sealed in an envelope which was originally State's Exhibit No. 22, but it was renumbered to Court's Exhibit No. 2.

This exhibit, by order of the court, was returned to the Milwaukee Police Department. In order to get to the heart of this matter I ordered the exhibit be returned to this Court for examination, and, in fact, I examined it. I have it here and I find no problem with allowing you to see it. You may come to a different judgment because you know more about the case than I do, but having completely reviewed the documents, it's my judgment that in looking at the contents of materials that are contained in this envelope that Judge Raskin didn't misuse its discretion in ruling that the documents it contained were not exculpatory. But I -- I think I see nothing wrong with them being allowed to be examined, and they are here for examination.

We next get into item seven, which is whether Braun was denied a right to confrontation in that the trial court denied her adequate opportunity to effectively cross-examine Seymour regarding several subjects.

In this -- in support of this claim, Braun's

claim points to the following examples: At Page 1,710, in quotes:

> "How many times did you commit perjury?"

The District Attorney objected on the basis that the question was immaterial. The trial court sustained the objection.

Shortly after that defense counsel asked:

> "How many questions were asked of you at that trial which you knowingly answered falsely?"

Again the trial court sustained an objection to the question.

Here Braun claims error in failing to allow sufficient exploration of this topic to impeach Seymour's credibility.

I respectfully -- yeah -- I disagree. In examining this issue I reviewed the entire portion of the transcript that covers the cross-examination of Seymour concerning the perjury that he committed in his own trial. That's from Page 1,709 to 1,717. The rulings of the trial court, in my judgment, did not deter defense counsel from his purpose of laying Seymour's previous perjury before the jury. Pages 1,711 to 1,713, in my judgment, amply reflect defense counsel's success in his

efforts. I don't think Miss Braun was denied an opportunity -- sufficient opportunity to explore. In my judgment it is a legitimate area of inquiry.

Braun alleges also that -- and this gets awfully complicated -- question that not being allowed to question Seymour about his understanding at the time of trial of the consequences of his plea bargain agreement. This was probably the most complicated part of this. To put this into some kind of proper perspective I -- obviously I reviewed the testimony.

On cross-examination Seymour was in effect asked about whether he understood the penalty distinctions between a sentence for first degree murder and second degree murder. Seymour responded and stated the difference.

Then he was asked his understanding when he would be eligible for release from prison or parole if convicted of first degree murder. The trial court somehow or other got involved in the middle here and -- and rendered the opinion that the material date was the date when the plea agreement was made, not his understanding on the day that -- of Braun's trial.

Seymour was asked whether he had a present understanding as to his eligibility for parole date if convicted of first degree murder. He responded

affirmatively. He stated that when he pled guilty to the reduced charge of second degree murder he had an understanding. When, however, he was asked if his present understanding was the same as when he pled guilty, he responded no. Defense counsel asked how this understanding had changed. The State objected. The trial court ruled only his understanding as of the date of his plea was material.

Next defense counsel asked Seymour of his current understanding about eligibility for release of one convicted of first degree murder. Seymour responded his understanding was the same as the day he pled guilty.

Seymour was then asked if he had developed any expectations as to how long it is -- actually is before a person who is convicted of first degree murder is released. The State objected that the question was immaterial, and the objection was sustained.

Seymour then asked -- was then asked if at the time he pled guilty to the second degree murder he had any expectation as to how long it would be before he would be released, if he had been convicted of first degree murder. He responded:

"I expected to do fifteen years."

When asked if his expectations were still the same when he was testifying, the State objected as to the

materiality, and again the State was sustained.

Defense counsel next asked Seymour at the time he pled to second degree if he knew one who was convicted of second degree may be placed on probation. Seymour responded, no, but now he knew it.

When defense counsel then asked Seymour if he knew that one incarcerated for second degree murder is eligible for release substantially earlier than for first degree murder, the trial court reminded defense counsel of his earlier ruling on the materiality of the date factor.

In response to further questions Seymour stated that at the time he pled it was his understanding he could do more time for second degree murder than for first, although he believed parole eligibility was less. He stated he pled guilty to second degree after he had struck an agreement with the D.A.'s Office.

Now, here it's my judgment that defense counsel and -- it was obvious defense counsel was not satisfied with the method in which the trial court restricted his examination of Seymour as to Seymour's hopes and expectations. But in my judgment the record reveals defense counsel more than sufficiently attacked Seymour's credibility and the basis for the attack by calling attention to the significance of the plea agreement in

terms of exposure to the penal system, eligibility dates for parole, dates of release and -- in respect to second degree homicide vis-a-vis first degree homicide.

So in viewing the totality of the record in regard to this context, it's my judgment that although it may have allowed defense counsel more latitude in its cross-examination, the trial court stated the reasons why it was restricting the time frame in which questions could be posed, and in doing so explicated its reasons for its discretionary ruling. As a result, I don't believe the trial court misused its discretion in its evidentiary rulings in regard to this area of inquiry, and owing to the considerable cross-examination defense engaged in regarding the plea agreement and its consequences, I do not believe that she was denied opportunity to effectively cross-examine Seymour, and therefore I don't believe there was a -- a denial of a right to confrontation.

Which brings us up to the reason why we are under the vacation statute and which we are considering this whole matter.

The next item relates to whether the trial court denied Braun adequate inquiry or opportunity to effectively cross-examine Anthuber, A-n-t-h-u-b-e-r. Anthuber was a corroborating witness for the

State. Braun desired to show through cross-examination Anthuber's bias in favor of the State by questioning him whether the State strongly recommended probation for him at sentencing in a prior unrelated drug case. After much discussion Braun's counsel made an offer of proof, which was denied by the court.

From reading Anthuber's testimony the presumed intended purpose for having him testify was to present to the jury a statement made by Seymour to Anthuber to the effect that Seymour told Anthuber about Braun's participation in the killing and dismemberment of Weber, the victim.

Anthuber testified, however, that when he confronted Braun about the contents of the statement, she denied any knowledge of the slaying and dismemberment.

Here it's my judgment that we're here in an area of corroborating witness and whether there was any bias present. It's my judgment that there was error committed here in not allowing him to pursue that bias by the defense. But again, under the Dyess rule I just -- it's my judgment it doesn't rise to the level of reversible area -- error, in view of all the other evidence that exists in the record.

Item nine. Braun next claims that the admission of numerous unreliable hearsay statements

denied her the right to confront witnesses.

Let's see. First of all, we have the testimony of Miss Maloney. Maloney testified that Weber was a dealer of cocaine, that she lived with him for a number of years. Four years, I believe. She testified that the two Brauns came to Weber's apartment and snorted cocaine. The defense objected to an answer by Maloney to the question that Weber said he was going to make a drop for a friend.

In my judgment there is no question this was hearsay, but again I don't think it was central and I don't think it was crucial in the case. This whole area -- this whole part of the trial really involved the normal way of life -- I guess that's the best way I can put it -- of people who were living in the drug culture at that time, and the error here at best is a small point. And it -- in my judgment it's bagatelle -- doesn't amount to much.

There is another area here that's alleged, that is the admission of evidence by Willie McClain.

Here Braun claims her right to confrontation was violated by admission of unreliable hearsay through Willie McClain. Braun objected to McClain's testifying as to a statement made to him by either Tim Braun or Kathy -- and it's unclear from the record who exactly

made the statement -- in which McClain was informed that if he was going to say anything to the police if they asked about Bill. McClain testified as saying, if the pressure got too heavy I wasn't going to take their fall and that, yes, I would.

Here, from my recollection of the record, McClain already knew that Weber was dead. McClain testified then that Tim and Kathy -- now this is in quotes -- said:

"We are going to split."

And then they left. That's at Page 2,930.

Prior to receiving this testimony in a chambers conference by way of an offer of ,proof the trial court ruled on Page 2,627:

"I will permit the testimony to be given. This is in the presence of the Defendant and is not hearsay," close quotes.

That was the trial court's ruling.

This is at best a troublesome area. I -- in Weinstein there was a discussion -- there was quite a discussion about this area and they indicate -- and I'm quoting here --

"That the most troublesome cases are cases of this sort because they involve an ambiguous response in which a party remains

silent after a statement damaging to the person is made and in the person's presence," close quotes.

I think Weinstein indicates normally human reaction would be to deny such a statement if it's untrue.

The cases that are cited there seem to hold that a number of factors, including the circumstances in which a statement is made, by whom made, and who was involved, are to just -- name just a few of the factors. And I pretty much relied on U.S. vs. Sears at 613 Fed. 2nd, 904, 9th Circuit case.

And there it -- the court held that it would not allow admission by silence unless the trial court finds that sufficient factual foundational facts have been introduced for the jury, reasonably to conclude that the Defendant did actually hear, understand and accede to the statement.

Now, where does this take us? Well, I know that both of you know that whether evidence is properly admissible is a matter of trial court discretion. And the question is whether the trial court misused its discretion in admitting certain evidence. And a sub-rule of that is that the court won't be reversed if it arrives at the right conclusion for the wrong reasons when it exercises its discretion, provided that the record

reveals sufficient basis for proper exercise of discretion.

Here, in reviewing all -- I went through this a couple times. It's my -- it's my perception and judgment that the court implicitly admitted the statement as an adopted admission. From the record I -- I conclude that for the following reasons:

One, Tim and Karen, they -- they were in the -- they were in that small cubical in McClain's office.

There were only three people present.

The only matter that transpired between the parties, according to the testimony, is Braun's inquiry whether McClain would speak to the police about the problems -- in quotes -- "Bill."

McClain knew Bill was dead and he told them he was disturbed about being harassed by the police at work concerning their difficulty.

And it's my judgment that there was sufficient record from which the court could find that the statement, regardless of who made it, would normally require a response by the parties present, in order to exculpate themselves from it's implications. And I believe there is sufficient evidence that Miss Braun heard the statement, she understood it, she acquiesced in it, and therefore the statement is corroborative that a

conspiracy of sorts existed and was taking place and that she adopted the substance of its contents.

Number ten. Braun contends that several superficial non-constitutional trial errors, combined with all the others, clearly constitute constitutional error. I view the whole thrust of the defense argument in terms of using this statute.

Let's see. We have got four statements that Braun refers to that were mae by Seymour. One relates to discussion with Braun about taking the Weber body out of the front door in a parka 'cuz it would appear that Weber was drunk. That's at Page 1,294.

Seymour testified that Braun said Weber arrived in a Triumph automobile, at Page 1,297.

Seymour testified about a conversation where with Braun allegedly mentioned a large sum of money and large amount of cocaine located in Weber's apartment and raised the topic of hampering identification of the body. at Page 1,308.

And then at Page 1,326 Seymour testified that Braun suggested that Weber's clothes be removed to prevent identification.

There is -- if my memory serves me correctly, here the State argued originally that Braun was aware of these statements through the contents -- the total

contents of the preliminary examination -- that's the reason I went back through the preliminary this morning -- and through some other documents that they were given exposure to. The State argued that it was impossible to anticipate every word that every witness might utter and they shouldn't be held to such a narrow standard.

Braun, in reply, however, claimed that subject matters -- that the subject matters of the four statements were never revealed to them.

The trial court indicated it would review the preliminary transcripts and all the other documents turned over to defense over the weekend and in effect rule on the objections. It should be noted that the prosecution denied ever having any statements regarding carrying Weber out as if he were drunk. Until the promised review the trial court tentatively denied motions for a mistrial.

From review of the records -- unless I missed it -- it appears that the trial court never reached a final determination on these denial of defense motions. I don't know. Maybe it was taken up and I missed it in the record. I couldn't find it.

So what do I do in reference to all these things? Well, it's my judgment -- and I'm sure that Mr. Glynn will, in some other court, take a marvelous

example to my comments now -- from my impression of reading that preliminary and -- plus looking at the conversations and the testimony about the automobile and the -- all the conversation that went on about the cocaine and the cross-examination about it, that, one, they knew the subject matters were going to be covered, or they were clever enough to pick up on it and explore them thoroughly, or they in fact got knowledge of them in advance in the preliminary. And I may not have covered every one of these instances, but that's my general impression, and that's my ruling.

Now, some other items here. Let's see. Braun argues that Greg Orr was permitted to testify over defense objections about statements made by Braun, concerning which notice was not given to her until the morning of Orr's testimony.

Braun objected to the tardiness of the notice, properly so. Orr testified about how frightened and on edge Tim and Kathleen appeared on November 15th, 1973, and that Kathleen indicated a desire to speak to him. If I got this correct, Orr testified -- was allowed to testify that one of them indicated:

"You won't believe what happened" --

that's in quotes.

Braun asked him, in his presence, asked Tim:

"Should we tell him what happened."

And Orr was allowed to testify to this. I think that's at Page 3,722 to 3,735.

Subsequently defense counsel cross-examined Orr for seven pages on this -- on the nature of these remarks. I think that -- it's at or about 3,780. Through all this, on cross-examination Orr stated that the previous night was the first time that he had spoken to the district attorney.

The trial court denied a motion to strike and a motion for mistrial.

And going through this record, this part of it, I -- I didn't find anything in the record to indicate that the prosecutor knew what Orr was going to say until the very moment prior to interviewing or either giving -- either interviewed him, then gave a statement to defense counsel, or he gave him access to defense counsel. Anyway, in my judgment the circumstances in which it exist and the connection, I don't believe the trial court misused its discretion in the way it handled it.

There is objection -- argument raised on the theory of defense instruction. The trial court refused to give defense counsel's requested instruction marked No. 88 and 106. The court instead gave an alternate version, which according to Braun didn't fully express to

the jury the Defendant's position.

Again this is one of these issues that a trial judge runs into when we start talking about -- how do you term the expression -- it's an art form. I -- I concede, there isn't any solution. There is no final solution on this.

The Defendant submitted two theories of defense instructions, as I indicated, and they had originally drafted an instruction that -- that suggested Seymour was framing Braun, that the -- but the court disallowed that; comments, you can argue that. And then there was some off-handed remark about, it may be denied. I just -- didn't quite understand what that meant in the record.

Defense counsel then asked if he could resubmit a new defense theory of case -- of -- theory of case instruction, which the court -- trial court agreed he could.

Defense counsel then submitted requested instruction No. 106. Requested instruction 106 reads as follows:

"It is the Defendant's theory of this case the Earl Jeffrey Seymour testified falsely upon this trial because of his expectation that such testimony would result in his being granted immunity for certain

crimes which he committed and his hope that such testimony would favorably affect his sentence on the charge of second degree murder to which he pled guilty. If the evidence you have heard in support of the Defendant's theory creates in your mind a reasonable doubt of the Defendant's guilt, then you must find her not guilty."

The State objected to the last sentence of the submitted instruction 106. The trial court in response to Braun's argument that to change the last -- that to change -- that -- yeah -- the trial court's response to Braun's argument that to change the last paragraph would be to substantially water down the theory, the court replied that the purpose of his change was to give the instruction an evenhanded approach. The court agreed that it was inclined to give the defense's request but would modify it to give it a more evenhanded approach.

The final result was the trial court altered the requested instruction 106, last paragraph, to read as:

"If upon all the evidence you have heard and the evidence in support of Defendant's theory there is created in your mind reasonable doubt of the Defendant's guilt,

then you must find her not guilty."

In the contents -- contention of all the instructions that were read to the jury -- the jury was instructed that Defendant pled not guilty, was instructed on the burden resting on the State, the presumption of innocence and necessity of the State proving every element of the charged offense and duty to acquit if it did not believe her guilty beyond a reasonable doubt.

The rest -- in my judgment an adequate -- there was an adequate awareness of the defense of Braun's theory of defense, disagreement over the manner of expression notwithstanding. I'll cite State vs. Davidson, 44 Wis. 2nd, 77, for that proposition.

So the sum and substance of all of this, acknowledging that this Court is a way station for what may continue in the future, and I'm denying the motion to vacate. I'll take a look at the new evidence when I've reviewed Mr. Glynn's materials that he submitted to me today.

And the -- the sealed documents are for -- for you to peruse, to see whether I missed something.

MR. O'MEARA: Thank you for your patience.

MR. GLYNN: Thank you, Judge.

MR. O'MEARA: Thank you.

MR. GLYNN: And I say that sincerely. We're