[redacted]
-91-0923

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 91-0923

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHLEEN BRAUN,

Defendant-Appellant.

**Appeal From The Order Entered
In The Circuit Court Of Milwaukee County,
The Honorable Ted E. Wedemeyer, Jr.,
Circuit Judge, Presiding**

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

STEPHEN M. GLYNN
ROBERT R. HENAK
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

Attorneys for Defendant-
Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions and Statutes

Wisconsin Statutes

Other Authorities

STATEMENT OF ISSUES

1. 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 post-conviction motions court held that any violation of Ms. Braun's right to a public trial was harmless error (R41:42-44).

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

The post-conviction motions court determined, without an evidentiary hearing, that the prosecutor did not conceal or misstate the nature of his witness' plea agreement (R41:45-46), that the cross-examination was not improper (R41:46-53), and that the rebuttal argument was not improper (R41:53-55).

3. Whether the trial court violated Ms. Braun's right to confrontation by denying her an adequate oppor-

tunity effectively to cross-examine Seymour, the only witness who actually connected her to the killing in this case.

The post-conviction motions court held that Ms. Braun was not denied her right to confront Seymour (R41:56-61).

4. Whether the trial court violated Ms. Braun's right to confrontation by denying her an adequate opportunity effectively to cross-examine Mr. Richard Anthuber, an important corroborating witness for the state, concerning grounds for Anthuber's bias in favor of the state.

The post-conviction motions court held that the trial court erred in limiting the cross-examination of Anthuber, but that the error was harmless (R41:61-62).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. At such time as counsel for appellant has had sufficient opportunity to review the brief of respondent, it may be that oral argument will be unnecessary because the briefs may fully present and meet the issues on appeal. Wis. Stat. (Rule) 809.22(b). Until the brief of respondent has been reviewed, however, appellant wishes to preserve her right to request oral argument.

Appellant does not request publication of the decision in this case. Ms. Braun's entitlement to the requested relief is mandated by well established and controlling precedent which cannot reasonably be questioned or qualified in any relevant way. See Wis. Stat. (Rule) 809.23(b)1 & 3.

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 91-0923

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHLEEN BRAUN,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

Nature of the Case

Defendant-appellant, Kathleen Braun ("Braun" or "Defendant") appeals from denial of her motion for post-conviction relief by orders dated March 1, 1991 and March 11, 1991. This appeal is filed pursuant to Wis. Stat. §§808.03 & 974.06(7).

Procedural History 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] On August 26, 1975, the complaint was dismissed against Mr. Braun (R1:2). A preliminary hearing was held with regard to Ms. Braun on August 26 & 27, 1975, and September 4, 5 & 9, 1975 before the Honorable Frederick P. Kessler (R1:2-4; R34, R35, R36, R37), and Ms. Braun was bound over for trial on the charges (R1:3-4). Ms. Braun was arraigned on an information charging her with the same offense (R3) on September 10, 1975 (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 pur-

---

[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. ____."

suant 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; R18), the trial court on April 21, 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. 1, 3).

Ms. Braun timely filed her Notice of Appeal to this Court on April 15, 1991 (R33, R1:21).

---

[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).

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).

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 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).[4] Over defense objection (Tr. 1110, 1112), and despite the prosecutor's statement that the individual probably was no longer

---

[4] 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).

on jury duty (Tr. 1111), the court ordered the individual to be removed from the courtroom pursuant to its "rule" that the court "[did] not permit any juror who is on the present panel to listen to a trial in which they [sic] could have or might have been members of the jury" (Tr. 1110).

Because the facts are not disputed, whether Ms. Braun's public trial right was violated is a question of law subject to de novo review. State v. Webb, 154 Wis. 2d 320, 453 N.W.2d 628, 629-30 (Ct. App. 1990), rev'd on other grounds, 160 Wis. 2d 622, 467 N.W.2d 108 (1991).

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, 252, 414 N.W.2d 832, 838 (1987); United States v. Eisner, 533 F.2d 987, 993 (6th Cir.), cert. denied, 429 U.S. 919 (1976), it is generally recognized that "the court's discretion to order exclusion should be sparingly exercised and limited to those situations where such action is deemed necessary to further the

administration of justice." United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir.), cert. denied, 423 U.S. 937 (1975); see Stevens, 141 Wis. 2d at 254, 414 N.W.2d at 838-39. See also Waller, 467 U.S. at 45:

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

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

The court in this case excluded a member of the public from viewing the trial solely pursuant to its policy of excluding those who were on the venire panel but were not chosen to sit as jurors. None of the interests which courts have found sufficient to overcome a defendant's right to a public trial comes close to justifying the Court's actions in this case. There is no assertion here that the prior jury panelist's exclusion was necessary to protect any witness from threatened harassment or physical harm, compare Eisner, 533 F.2d at 993-94; United States ex rel. Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969), cert. denied, 397 U.S. 957 (1970); 55 A.L.R.4th 1196 (intimidation of witness), or from the trauma of publicly reliving a sexual assault, see Stevens, 141 Wis. 2d at 254-55, 414 N.W.2d at 838-39; compare United States ex

rel. Latimore v. Sielaff, 561 F.2d 691, 694-95 (7th Cir. 1977), cert. denied, 434 U.S. 1076 (1978). Nor is there any possible basis for arguing that his exclusion was necessary to protect the confidentiality of certain information, compare Lloyd, 520 F.2d at 1274-75 (testimony of undercover agent engaged in ongoing investigation); United States v. Clark, 498 F.2d 535, 537-38 (2d Cir. 1974) (government's highjacker detection profile); 54 A.L.R.4th 1156 (confidentiality of undercover witness), to avoid prejudicial influence on the jury, compare United States v. Rios Ruiz, 579 F.2d 670, 674-75 (1st Cir. 1978) (uniformed officers were asked to leave courtroom during prosecution of two police officers for beatings and assaults, with caveat they were welcome in courtroom out of uniform), or to protect health and safety of the public, compare Colletti v. State, 12 Ohio App. 104 (1919 Summit County) (influenza epidemic). The individual was not a witness in the case, compare State v. Cyrulik, 100 R.I. 282, 214 A.2d 382 (1965), nor does the record reflect that he was in any way disruptive, compare United States v. Akers, 542 F.2d 770, 772 (9th Cir. 1976), cert. denied sub nom. Wallace v. United States, 430 U.S. 908 (1977); 55 A.L.R.4th 1170 (disruption as basis for excluding spectators).

Finally, it is irrelevant that only one person rather than the entire public in fact was excluded from the courtroom. The courts have long recognized that the right to a public trial bars the arbitrary picking and

choosing of who may attend. As early as 1891, the Michigan Supreme Court held that the trial court had committed error in excluding all but "respectable citizens." People v. Murray, 89 Mich. 276, 50 N.W. 995, 998 (1891).

The Wisconsin Supreme Court similarly held in Stevens that the right to a public trial is violated where the judicial proceedings arbitrarily are closed to some members of the public, even though the media is allowed access. 141 Wis. 2d at 250-51, 414 N.W.2d at 837. See also Davis v. United States, 247 F. 394 (8th Cir. 1917) (constitutional error to exclude all persons except relatives of defendants, members of the bar, and newspaper reporters; prejudice is implied); Commonwealth v. Marshall, 356 Mass. 432, 253 N.E.2d 333 (1969) (constitutional error to exclude the defendant's family and friends); Neal v. State, 192 P.2d 294, 296 (Oklahoma Crim. App. 1948) ("It would appear that while the trial judge may for special causes exclude any spectators from the courtroom yet he cannot make the order of exclusion extend further than the special issues warrant in the particular case."); Commonwealth v. Contakos, 499 Pa. 340, 453 A.2d 578 (1982) (state constitutional right to public trial violated when judge closed courtroom to everyone except representatives of media after being notified that attempt might be made on life of next prosecution witness).

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

public trial.[5] Moreover, contrary to Judge Wedemeyer's conclusion, the denial may not be excused as harmless. 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, 111 S.Ct. 1246, 1257 (1991). See Waller, 467 U.S. at 49. Ms. Braun's conviction therefore is invalid and must be reversed.

II.

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

Numerous instances of prosecutorial misconduct pervaded Ms. Braun's trial. While the trial court sustained objections to several such instances, proper objections to numerous others were overruled. As a cumulative result of this misconduct, Ms. Braun was denied her rights to due process and a fair trial.

A. Standard Of Due Process

The Supreme Court has held that the "touchstone of due process analysis in cases of alleged prosecutorial

---

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

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, 506, 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, 120, 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).

In a similar, though slightly different line of cases, the courts have long held that the knowing use of false evidence deprives the defendant of a fair trial when the evidence is material to her guilt or punishment. See, e.g., Mooney v. Holohan, 294 U.S. 103, 112 (1935) ("[D]eliberate deception of court and jury by the presentation of testimony known to be perjured ... is ... inconsistent with the rudimentary demands of justice," violates due

process rights and denies fair trial); Pyle v. Kansas, 317 U.S. 213 (1942); Alcorta v. Texas, 355 U.S. 28 (1957) (extending Mooney to prosecutor's failure to correct false testimony); Napue v. Illinois, 360 U.S. 264 (1959) (extending Mooney to prosecutor's knowing failure to correct false testimony related solely to witness' credibility); Giglio v. United States, 405 U.S. 150 (1972) (extending Mooney to prosecutor's failure to correct testimony related to witness' credibility which prosecutor should have known was false). The test for determining whether the resulting conviction is fundamentally unfair, and thus violative of due process, is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976).

B. Concealment And False Statements Concerning Nature Of 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.

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

The state's actions in concealing the true nature of its deal with Seymour and in misleading the jury as to the true nature of that deal, both by false statements and by failing to correct Seymour's false testimony, violated a number of Ms. Braun's constitutional rights. First, "[d]ue process requires the prosecutor to disclose all exculpatory evidence, including impeachment evidence relating to credibility of witnesses for the prosecution." State v. Nerison, 136 Wis. 2d 37, 54, 401 N.W.2d 1, 8 (1987), citing United States v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963). See also Giglio, supra. The state obviously knew that Seymour's credibility was the primary issue at the trial; yet it failed to disclose this important piece of evidence which discredited its star witness. See also United States v. Cervantes-Pacheco, 826 F.2d 310, 315-16 (5th Cir. 1987), cert. denied sub nom., Nelson v. United States, 484 U.S. 1026 (1988) (due process requires "complete and timely"

disclosure of the terms of the agreement and surrounding circumstances); Nerison, 136 Wis. 2d at 46, 401 N.W.2d at 5 (same).

The prosecutor's failure to disclose this information further deprived Ms. Braun of her full right to confront the witnesses against her. See, e.g., State v. Lenarchick, 74 Wis. 2d 425, 446-48, 247 N.W.2d 80, 91-92 (1976) (recognizing right of defendant to cross-examine an accomplice about prosecutorial concessions in exchange for testimony implicating the defendant). The defendant's right to a fair trial requires "the opportunity for full cross-examination of ... witnesses concerning the agreements and the effect of the agreements on the testimony of those witnesses." Nerison, 136 Wis. 2d at 46, 401 N.W.2d at 5. See also Davis v. Alaska, 415 U.S. 308 (1974).

Finally, the state's false assertions in opening and closing arguments, as well as its failure to correct Seymour's false testimony concerning the true nature of the deal, further violated Ms. Braun's right to due process. The facts of this case fall squarely within the Mooney to Giglio line of cases. Moreover, it is only Seymour's testimony which in any way connected Ms. Braun to his killing of William Weber. The misconduct did not simply affect Seymour's general credibility as would his narcotics addiction. Rather, the concealed agreement provided him with a specific and overwhelming reason to frame Ms. Braun in this particular case and possibly avoid pris-

on. As such, there can be no question but that the misleading of the jury concerning the true nature of the plea agreement could have affected the judgment of the jury.

C. The State's Bad Faith Cross-Examination Of Ms. Braun Deprived Her Of Her Due Process Right To A Fair Trial.

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 ob-

jection (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).[6] 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 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 oc-

---

[6] 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.

casions 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).

Bad faith inquiry of defense witnesses of the "when did you stop beating your wife?" variety utilized by the prosecutor in this case 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) (prosecutor insinuated facts he could not prove); United States v. Cardarella, 570 F.2d 264, 267-68 (8th Cir.), cert. denied, 435 U.S. 997 (1978) (asking whether defendant previously admitted his guilt to the prosecutor); Richardson v. United States, 150 F.2d 58 (6th Cir. 1945); Miller v. State, 439 So. 2d 800, 802-04 (Ala. Cr. App. 1983) (asking whether witness had a "pattern of beating his wives" required reversal despite objection and curative instruction); People v. DiPaolo, 366 Mich. 394, 115 N.W.2d 78 (1962); State v. Flowers, 262 Minn. 164, 114 N.W.2d 78 (1962). By asking questions that have no basis in fact the prosecutor can leave in the minds of the jurors damaging and prejudicial but false and inadmissible ideas that cannot adequately be rebutted by the testimony of witnesses or instructions from the court. See also State v. Richter, 232 Wis. 142, 286 N.W. 533 (1939) (improper for prosecutor to insinuate facts without present-

ing 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, see, e.g., Giglio, supra, 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, 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); United States v. Meeker, 558 F.2d 387 (7th Cir. 1977); United States v. Dailey, 524 F.2d 911, 917 (8th Cir. 1975) (prosecutor's misleading of jury with argument known to be false mandated reversal).

Interrogation designed to elicit from the defendant allegations that other witnesses are liars also consistently has been condemned. E.g., Freeman v. United States, 495 A.2d 1183, 1187-88 (D.C. App. 1985); People v. Cornes, 80 Ill. App. 3d 166, 399 N.E.2d 1346, 1352 (1980) (but issue waived by failure to object); People v. Ochoa, 84 A.D.2d 637, 446 N.Y.S.2d 339 (1982) (repeated questioning whether prosecution witnesses lied, argument concerning facts not in evidence, and explanation in summation why informant was not present denied defendant right

to fair trial and mandated reversal).

D. The State's Misconduct During Rebuttal Argument Deprived Ms. Braun Of Her Due Process Right To A Fair Trial.

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.).

No evidence was presented concerning the three individuals, whether they were contacted by the prosecution, or why they were not called to testify. Yet, the prosecutor was permitted to argue over defense objection (Tr. 6015) the following:

> Now, Mr. Shellow also mentions the fact that -- he mentions the name of a man named Dennis Webster. He talks about a landlady. He talks a [sic] federal probation officer. I will only state this:
>
> Those people were contacted by the state --
>
> . . .

> And for whatever reason the State didn't produce them, we weren't trying to hide them from you. We are not trying to secrete them from you, but there are several reasons why witnesses don't get called to testify in criminal trials. Among them are lack of memory, lack of cooperation, whatever the reason. You can't think of the reasons and [sic] these witnesses are not called to testify.

(Tr. 6014-15).

This argument was improper for at least three reasons: it encouraged the jury to speculate concerning facts not in evidence, it impermissibly vouched for the credibility of the prosecutor's key witness, and it misled the jury by stating or suggesting the existence of facts known to be false.

1. **The rebuttal argument encouraged speculation about facts not in evidence.**

Prosecutors may, of course, "make arguments reasonably inferred from the evidence presented." United States v. Vargas, 583 F.2d 380, 385 (7th Cir. 1978) (citations omitted); see, e.g., Embry v. State, 46 Wis. 2d 151, 160, 174 N.W.2d 521, 526 (1970). However, no evidence was introduced to explain why the three individuals did not testify. Thus, 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 ABA

Standards for Criminal Justice, The Prosecution Function ¶3-5.9 (1986). "The prejudice to a defendant of inviting conviction on facts -- if they be such -- dehors the record is counter to the basic concept of fairness." United States v. Grossman, 400 F.2d 951, 956 (4th Cir.), cert. denied, 393 U.S. 982 (1968). See also State v. Parker, 55 Wis. 2d 131, 142-43, 197 N.W.2d 742, 748 (1972), cert. denied, 409 U.S. 1110 (1973); State v. Richardson, 44 Wis. 2d 75, 83, 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). There is a point where, as here, "the inference asked to be drawn will be unreasonable enough that the suggestion of it cannot be justified as a fair comment on the evidence but instead is more akin to the presentation of wholly new evidence to the jury, which should only be admitted subject to cross-examination, to proper instructions and to the rules of evidence." Vargas, 583 F.2d at 385. See, e.g., United States v. Doyle, 771 F.2d 250 (7th Cir. 1985). See also Commonwealth v. Bolden, 323 A.2d 797, 798 (Pa. Super. 1974) (a prosecutor "must refrain from making irrelevant or prejudicial remarks and may only refer to matters in evidence and the fair deductions and logical inferences therefrom"); Ochoa, supra (prosecutorial misconduct including

inter alia attempts to explain why police informant did not testify denied defendant right to fair trial and mandated reversal); People v. Eanes, 43 A.D.2d 744, 350 N.Y.S.2d 718, 720 (1973) (error for prosecutor to explain absence of informant in summation); People v. Brophy, 122 Cal. App. 2d 638, 265 P.2d 593, 601-03 (1954) (in response to missing evidence argument, prosecutor explained why a bullet was not introduced into evidence and showed it to jury; reversible error despite sustained objection and curative instruction).

It is irrelevant that the prosecutor here ended his argument with an admonition that the jury should not speculate as to the reasons why the witnesses were not called. Such an admonition is akin to an order not to think about pink elephants, or one like that of the Wizard of Oz to "ignore the man behind the curtain." It is impossible, and it is disingenuous to suggest otherwise. See, e.g., Jacobs v. State, 101 Nev. 356, 705 P.2d 130, 132 (1985) (reversing a murder conviction in part because of the prosecutor's statement in summation that he "'will not tell you to put yourselves in Mrs. Jacobs' position looking down the barrels of the shotgun, because that would be improper,'" despite "the prosecutor's resourceful disavowal after the fact of any intention to make an improper argument").

2. The rebuttal argument impermissibly vouched for the credibility of the key prosecution witness.

The vital issue in this case was the relative credibility of Seymour and Ms. Braun. Thus, the state's failure to corroborate important allegations by Seymour which would be easily corroborated if true severely undermined its case. While conceding to the court that two of the missing witnesses would contradict, rather than corroborate, its key witness, the state was allowed to argue on rebuttal that the witnesses were contacted and, implicitly if not explicitly, that those witnesses in fact would corroborate Seymour's testimony.

The prosecutor's argument thus also violated the well-established rule that a prosecutor may not vouch for the credibility of his witnesses, either by injecting his personal opinion on credibility or by insinuating to the jury that he possesses other information not presented to the jury which supports 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). A prosecutor "carries a special aura of legitimacy about him." United States v. Bess, 593 F.2d 749, 755 (6th Cir. 1979). The jury is aware that he has prepared and presented the case and consequently, may have access to matters not in evidence, United States v. Modica, 663 F.2d 1173, 1178-79 (2d

Cir. 1981), cert. denied, 456 U.S. 989 (1982), which the jury may infer to have precipitated such remarks. As such, "[a] jury may not easily forget or overlook what it has been told by a state representative." Government of Virgin Islands v. Turner, 409 F.2d 102, 104 (3d Cir. 1968).

The prosecutor's rebuttal contained an insinuation by the government that it had independent evidence corroborating Seymour's testimony. This clearly was improper and deprived Ms. Braun of a fair trial. See Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967) (statement by prosecutor that government had "every opportunity to check out and to judge" credibility of its witnesses and "in that context, we offered you their testimony" held to be improper vouching); United States v. Roberts, 618 F.2d 530, 533-35 (9th Cir. 1980) (prosecutor stated during argument that officer who had been present throughout trial had been monitoring witness' testimony for its truthfulness and witness' plea agreement would be called off if he lied); United States v. Berry, 627 F.2d 193, 198 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981) (prosecutor's argument that government had kept its witnesses separated to insure truthfulness of their testimony was improper); United States v. Wiley, 534 F.2d 659, 665 (6th Cir.), cert. denied sub nom., O'Donnell v. United States, 425 U.S. 995 (1976) (prosecutor asserted that his main witness had given same testimony before other juries that found his testimony truthful); Leary v. United

States, 383 F.2d 851, 865 (5th Cir. 1967) ("We made sure, before putting them on the stand, that our witnesses were telling the truth."), rev'd on other grounds, 395 U.S. 6 (1969); Commonwealth v. Reed, 446 A.2d 311, 314 (Pa. Super. 1982) (reversal required where prosecutor implied that investigation had verified testimony of witness).

3. The rebuttal argument asserted and suggested the existence of facts known to be false.

The prosecutor knew that the three individuals neither suffered from a lack of memory nor refused to co-operate with the prosecution. Rather, he knew that, at least with regard to Webster and the landlady, the reason the witnesses were not called to testify was exactly the reason which defense counsel asked the jury to infer. The prosecutor knew that 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.

As previously discussed, it is well-settled that due process "cannot tolerate a ... criminal conviction obtained by the knowing use of false evidence." Miller v. Pate, 386 U.S. 1, 7 (1967) (citation omitted) (prosecutor's misrepresentation concerning nature of stain on physical evidence violated due process). See, e.g., Napue, 360 U.S. at 270 ("'The [prosecutor] has the responsibility and duty to correct what he knows to be false

and elicit the truth.'"). See also ABA Standards for Criminal Justice, The Prosecution Function ¶3-5.8(a) (1986).

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 the defendant's 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 the 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 here similarly argued facts, or "suggestions," which he knew were untrue. He misled the

jury and the court did nothing. Cloaked in the guise of an admonition against speculation, the argument actually suggested that there were facts which the prosecutor knew and the jury did not, that these facts would explain the witnesses' absence and that their testimony in fact would corroborate that of Seymour. The truth was that the "facts" implicitly suggested or expressly asserted by the argument were untrue, and that the prosecutor failed to call the witnesses not because of a lack of memory or co-operation, but because their testimony would controvert the prosecutor's case. As such the government's rebuttal denied Ms. Braun a fair trial, and her conviction therefore must be vacated. E.g., Dailey, supra. See also Caldwell v. Mississippi, 472 U.S. 320 (1985) (prosecutor's misleading of jury concerning its responsibilities in capital sentencing procedure rendered resulting death sentence unconstitutional); United States v. Santana-Camacho, 833 F.2d 371 (1st Cir. 1987) (despite defendant's failure to object, court reverses conviction for transporting illegal alien where prosecutor erroneously stated in summation that defendant had entered United States illegally); United States v. Toney, 599 F.2d 787, 790-91 (6th Cir. 1979) (prosecutor asserted in summation that no evidence corroborated defendant's story while knowing such evidence existed but was excluded as hearsay).

E. The State's Misconduct Mandates Vacation Of Ms. Braun's Conviction.

The United States Supreme Court has indicated that, "while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). He has an obligation to do justice.

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Id.

Factors to be considered in determining whether the prosecutor's misconduct denied the defendant a fair trial and due process include the severity of the misconduct, see Modica, 663 F.2d at 1181, the frequency of the misconduct, Berger, 295 U.S. at 89, the centrality of the misconduct to the critical issues of the case, Hawthorne v. United States, 476 A.2d 164, 172 (D.C. App. 1984), the strength of the curative measures adopted, Modica, 663 F.2d at 1181, the strength of the state's case, see id., and the extent to which the prosecutor sought to exploit the misconduct for tactical reasons, thereby compounding the prejudicial effect, e.g., United States v. Iverson, 637 F.2d 799, 804 n.15 (D.C. Cir. 1981).

As shown, the prosecutor's misconduct in this case was both extensive and serious and directly affected the central issues in the case. As in Berger, the misconduct here was not "slight or confined to a single instance, but ... was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." 295 U.S. at 89. Moreover, the prosecutor's case had inherent weaknesses. See, e.g., Dudley v. Duckworth, 854 F.2d 967, 972 (7th Cir. 1988), cert. denied, 490 U.S. 1011 (1989) ("admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dubious witnesses."). The factual questions in this case were extremely close, turning as they did almost entirely on the relative credibility of Ms. Braun and Seymour. If the jury either believed Ms. Braun or disbelieved Seymour, it would have had to acquit her. The prosecutor's conduct, however, both improperly bolstered Seymour's credibility and equally improperly undermined that of Ms. Braun. There can be no doubt that such manipulation affected the jury's determination of the factual issues and consequently its finding of guilt. Cf., United States v. Wolf, 787 F.2d 1094, 1098-99 (7th Cir. 1986).

The importance of Seymour's testimony to the prosecution's case cannot be overstated: he was the linchpin of the state's theory. The prosecutor obviously recognized the critical nature of this testimony, and he fur-

ther realized the importance of the plea agreement to the jury's determination of credibility: he discussed Seymour and his deal in his opening statement, and he brought out the arrangement during Seymour's direct examination (Tr. 822-24; 1431-32). Under these circumstances, the state's failure to disclose entirely its agreement with its star witness, and its inaccurate characterizations of the agreement during its argument and presentation of testimony are intolerable in a criminal justice system which incorporates the concept of due process of law. Just as the prosecutor recognized the significance of Seymour's testimony, so too should this court. Given the findings of fact and conclusions of law which flow from this activity, the court is compelled to find that the prosecution's misconduct requires a new trial for Kathy Braun.

The trial court's failure to sustain defense counsel's objections to most of the prosecutor's improper remarks and questions essentially placed the court's sanction on the misconduct in the eyes of the jury, further enhancing its prejudicial effect. See, e.g., Graves v. United States, 150 U.S. 118 (1893) (court's failure to sustain proper objections to improper prosecutorial remarks concerning absence of defendant's wife essentially told jury that it could use that absence against defendant when legally it could not; conviction reversed). See also Williams v. United States, 168 U.S. 382 (1897) (court's failure to sustain objection to prosecutor's improper re-

marks within hearing of jury contributed to reversal because it tended to prejudice the defendant's right to a fair and impartial trial). The court's belated pattern instruction that the arguments of counsel are not evidence was insufficient to overcome the resulting prejudice. Modica, 663 F.2d at 182.

Finally, the prosecutor took full advantage of his ability to mislead the jury, even to the extent of repeating false testimony and making false statements in his summation. See Iverson, supra. The prosecutor's foul blows deprived Ms. Braun of due process and the fair trial to which she was entitled. The resulting conviction therefore must be vacated.

III.

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. On numerous occasions, Ms. Braun was denied this right when she was not given adequate opportunity to expose fully the witnesses' biases, motives, and lack of credibility of the witnesses against her.

A. Because The Court Denied Ms. Braun An Adequate Opportunity Effectively To Cross-Examine Earl Jeffrey Seymour, She Was Denied Her Right To Confrontation.

During the cross-examination of the 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.

On numerous occasions, defense counsel attempted to elicit Seymour's 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 court, however, limited such examination to Seymour's understanding at the time of his plea agreement and would not allow examination of his then-current understanding, hopes and fears at the time of his testimony (id.).

While permitting defense counsel to ask whether Seymour had committed perjury at his prior trial for the murder of William Weber (Tr. 1709), the court sustained an objection to the question "And how many times did you commit perjury?" (Tr. 1710). The court subsequently sustained an objection to the question "How many questions were asked of you at that trial that you knowingly answered falsely?" (Tr. 1710-11).

While his murder case was pending, and while in-

carcerated at Central State Hospital, Seymour took LSD in an attempt to be found incompetent to stand trial (Tr. 1649-52, 1746-47). While permitting defense counsel to elicit the fact that Seymour had been taking LSD (Tr. 1649-52), the court denied counsel an opportunity to explore why he had been taking it (Tr. 1652), and denied a mistrial motion based, in part, on this denial (Tr. 1759).

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).

In response to a number of questions, Seymour was allowed to assert his Fifth Amendment privilege (Tr. 1636, 1668; see 1435-39). The court denied defense counsel's motion to strike Seymour's testimony on the grounds that cross-examination was impermissibly restricted and that the court failed sufficiently to determine the legitimacy of Seymour's invocation of the privilege (Tr. 4849-50).

Finally, the court rejected three different jury instructions proposed by the defense concerning proper assessment by the jury of Seymour's credibility in light of his hopes and expectations of leniency at his sentencing (Tr. 5674-76, 5696-5700, 5710, see R20:Exhibits B, C, & D). Instead, the court merely touched upon the issue in its theory of defense instruction, noting that it was the defendant's theory that Seymour testified falsely in part due to his hopes that such testimony would favorably af-

fect his sentence (Tr. 6065-66).

The United States Supreme Court has noted that "[t]here are few subjects, perhaps, upon which the [federal courts] have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405 (1965). The combined effect of these rulings was to deny Ms. Braun that right.

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; United States v. De Gudino, 722 F.2d 1351, 1354 (7th Cir. 1983). As the court observed in De Gudino,

> [i]n order for a cross-examination to be effective, defense counsel must be permitted to expose the facts from which the fact-finder can draw inferences relating to the reliability of the witness. Counsel must be able to make a record from which to argue why the witness might be biased ... [W]hen reviewing the adequacy of a cross-examination, the question is whether the jury had sufficient information to make a discriminating appraisal of the witness's motives and bias.

722 F.2d at 1354 (citations and footnote omitted). "In

order for a cross-examination to be effective, the fact-finder must be presented with information sufficient to appraise the witness's bias. Thus, when limiting cross-examination, a trial court may not withhold information that is necessary to such an appraisal." Id. at 1354 n.4. See also State v. Lenarchick, 74 Wis. 2d 425, 446-48, 247 N.W.2d 80, 92 (1976).

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.

"[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id. at 678-79. In order to test the truth of a witness's testimony, defense counsel thus is entitled not only to elicit answers to questions whether a witness is biased, prejudiced, possessed ulterior motives or "otherwise lacked that degree of impartiality expected of a witness at trial," but rather, must be allowed to "make a record from which to argue why" any or all of these factors may exist. Davis, 415 U.S. at 318 (emphasis in original). The

jurors are "entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on [a witness'] testimony which provided 'a crucial link in the proof. . . of petitioner's act.'" Davis, 415 U.S. at 317 (citation omitted). See also Lenarchick, 74 Wis. 2d at 447-48, 247 N.W.2d at 92.

The legitimacy of inquiry into whether a witness has been influenced by a hope or expectation of leniency has been recognized in this state, Lenarchick, 74 Wis. 2d at 447-48, 247 N.W.2d at 92, as well as the federal courts, see, e.g., Gordon v. United States, 344 U.S. 414, 422 (1953); United States v. Price, 617 F.2d 455 (7th Cir. 1979). The only way truly to demonstrate the significance of Seymour's hopes and expectations was to bring out the full extent of his exposure to punishment if he did not receive the hoped-for leniency. Only by fully demonstrating 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 in original). Moreover, it is the hopes and expectations of the witness at the time he testifies which determine whether that testimony in fact is influenced thereby. Id. at 317 n.5 (quoting 3A Wigmore §940, p. 776

(Chadbourne Rev. 1970)).

The same general analysis applies whether the right is denied due to limitations imposed by the trial court on the defendant's cross-examination of a government witness or to a witness' assertion of his Fifth Amendment privilege. See United States v. Lyons, 703 F.2d 815, 818-19 (5th Cir. 1983); cf., Davis, supra (assertion of state privilege preserving the confidentiality of juvenile adjudications of delinquency violated defendant's confrontation rights). Where, as here, 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." Lyons, 703 F.2d at 819 (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).

The court's severe restrictions on defense cross-examination concerning Seymour's prior history of false testimony and attempts to defraud the criminal justice system further added to denial of Ms. Braun's right to effective cross-examination and confrontation. As one court has observed, "[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).

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. The factors to be considered in a particular case include:

> The importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. Id.

Especially when viewed in light of all of 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, sig-

nificant portions were directly contradicted both by physical evidence and by other witnesses, including Ms. Braun.

Prejudice resulting from the denial of an opportunity to cross-examine on these matters is significantly heightened "when the witness bears a special relationship to the defendant," Lyons, 703 F.2d at 819, such as where, as here, the witness is alleged to be an accomplice and potential co-defendant. San Fratello v. United States, 340 F.2d 560, 565 n.6 (5th Cir. 1965); United States v. Ritz, 548 F.2d 510 (5th Cir. 1977). See also United States v. Harris, 462 F.2d 1033 (10th Cir. 1972), in which the court held that "the incriminating testimony of an accomplice whose credibility is accepted is almost hopelessly damaging to the defense. Great leeway should be accorded the defense in establishing such a witness' subjective reasons for testifying." Id. at 1035.

Finally, the court's refusal adequately to instruct the jury on assessment of Seymour's credibility in light of his hopes and expectations of leniency at sentencing prejudiced both Ms. Braun's confrontation of the witness and her theory of defense. The trial court is obligated to exercise its discretion with regard to jury instructions "to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." State v. Dix, 86 Wis. 2d 474, 486, 273 N.W.2d 250, 256 (citations omitted), cert. denied, 444 U.S. 898 (1979); see

State v. Vick, 104 Wis. 2d 678, 690, 312 N.W.2d 489, 495 (1981). "The instructions should be specific and tailored to the evidence." Dix, 86 Wis. 2d at 487, 273 N.W.2d at 256 (citations omitted).

By refusing adequately to instruct on this issue, the court made it impossible for the jury to have a framework within which to understand the cross-examination that was permitted of Seymour. While touching upon this issue in its theory of defense instruction, the court did not adequately address the issue and, as a result, weakened the cross-examination. Instead of firmly stating the law, the court merely identified this issue as the "defendant's theory."

Seymour's testimony in this case was not "short and primarily cumulative." Lyons, 703 F.2d at 819. Rather, that testimony provided a "crucial link in the proof" against Ms. Braun. Davis, 415 U.S. at 317. The court's restrictions on cross-examination and its failure to provide the jury with guidance concerning the proper assessment of Seymour's hopes and expectations of leniency, as well as 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. Because The Court Denied Ms. Braun An Adequate Opportunity Effectively To Cross-Examine Richard Anthuber She Was Denied Her Right To Confrontation.

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 prosecutor objected on the ground the recommendation was based on Anthuber's prior informant activities unrelated to Ms. Braun's case (Tr. 2518). The objection was sustained (Tr. 2521), and the prosecutor emphasized the corroborative nature of Anthuber's testimony in his closing argument (Tr. 5808).

As Judge Wedemeyer found, the trial court's restriction on Ms. Braun's cross-examination of Anthuber was constitutional error (R41:62). That restriction flies di-

rectly in the face of the principle that the constitutional right of confrontation necessarily includes the right to cross-examination aimed at eliciting the biases and motives of adverse witnesses:

> To influence the testimony, it would not have been necessary for the state to have made any promises to the witness. Although no promises had been made to Nolte, he may well have been testifying favorably to the state in the hope and expectation that the state would reward him by dropping or reducing pending charges. Even though that expectation were absurd, defense counsel had the right and duty to explore the witness' motives.
>
> . . .
>
> The denial of the right of the defendant to elicit possible prejudice or bias of that witness constituted prejudicial error.

Lenarchick, 74 Wis. 2d at 447-48, 247 N.W.2d at 92.

The fact that Anthuber previously had reaped the substantial benefit of the state's bounty clearly demonstrates a basis for bias on his part in favor of the state. In addition, while apparently no charges were then pending, Anthuber was on probation and, especially in light of his narcotics background, no express promises were necessary for him to realize the importance of staying on the state's good side. In denying her an opportunity to demonstrate Anthuber's bias and motives, the court denied Ms. Braun her right to confront him. E.g., Van Arsdall, supra; Lenarchick, supra. 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."); United States v. Anderson, 881 F.2d 1128, 1138 (D.C. Cir. 1989) (same).

This error was not harmless. Anthuber's testimony corroborated parts 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

The trial court's exclusion of a spectator favorable to the defense violated Braun's constitutional right to a public trial. 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 Braun. Both alone and cumulatively, these errors deprived Braun of her constitutional right to a fundamentally fair trial and due process.

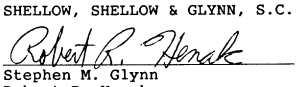
For these reasons, Ms. Braun respectfully asks that this Court reverse her conviction and remand this case for a new trial.

Dated at Milwaukee, Wisconsin, July 15, 1991.

Respectfully submitted,

KATHLEEN BRAUN, Defendant-
Appellant

SHELLOW, SHELLOW & GLYNN, S.C.



Stephen M. Glynn
Robert R. Henak

P.O. ADDRESS:

222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

8592P

APPENDIX OF DEFENDANT-APPELLANT

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 91-0923

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KATHLEEN BRAUN,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

KATHLEEN BRAUN,

Defendant.

Case No. I-4977

ORDER

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

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

BEST COPY AVAILABLE

CIRCUIT COURT MILWAUKEE COUNTY SEAL