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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**

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT

I.

JUDGE RASKIN'S DISMISSAL OF MS. BRAUN'S ORIGINAL POST-CONVICTION MOTIONS DOES NOT BAR RELIEF HERE.

The state argues for the first time on this appeal that Ms. Braun must be denied the relief to which she is entitled because her original post-conviction motions were dismissed after she escaped from prison.[1] State's Brief at 3-11. The state asserts that the prior dismissal "finally adjudicated" the issues raised here or, alternatively, that Ms. Braun either waived or forfeited her right to review of those claims. The state is wrong.

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[1] Ms. Braun's opening brief inaccurately stated that the dismissal took place on April 21, 1978. Braun's Brief at 3. The correct date is May 1, 1978 (R1:18).

A. The State Waived Its Argument By Failing To Raise It In The Trial Court.

The state waived its procedural, res judicata and waiver arguments by failing to raise them in the trial 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); Blonder-Tongue Laboratories v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971) (collateral estoppel and res judicata must be pled to give respondent fair opportunity to challenge the appropriateness of such arguments); United States v. Kenngott, 840 F.2d 375, 379 (7th Cir. 1987) ("cause and prejudice" argument waived).

The state does not even attempt to justify this Court's overlooking that waiver other than to cite State v. Holt, 128 Wis. 2d 110, 382 N.W.2d 679 (Ct. App. 1985). State's Brief at 1. This Court has noted, however, that the Holt rationale applies only when a pure question of law is presented. State v. Milashoski, 159 Wis. 2d 99, 464 N.W.2d 21, 25 (Ct. App. 1990), aff'd on other grounds, 163 Wis. 2d 72, 471 N.W.2d 42 (1991). "[T]he Holt approach ought not to apply where further fact-finding on the underlying question is necessary to resolution of the issue." Id.[2]

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[2] This Court in Milashoski noted that application of the waiver rule is discretionary. 464 N.W.2d at 25. Apparently exercising that discretion and finding a sufficient factual record in that case, the Supreme Court addressed the standing issue deemed waived by this Court. See 471 N.W.2d at 46-49.

The state's arguments here turn on issues of fact which, due to the state's failure to raise its procedural argument previously, have not been fully litigated. Although Ms. Braun submits that Judge Raskin clearly neither considered nor decided the merits of her original motion, see Section I, B, infra, the exact scope of that prior decision is a question of fact. Indeed, there is no written order; the only evidence that the prior motion was dismissed is the hearsay assertion on the docket sheet (R1:18). See Ball v. United States, 140 U.S. 118, 130 (1891) ("it is certainly not the law that all the gossip a clerk or prothonotary writes down in his docket, ipso facto becomes the very voice of undeniable truth"). Whether Ms. Braun knew and intended that her escape would result in barring her claims, as is required for a valid waiver, also is a question of fact.

The state's delay here deprived the defendant of an adequate opportunity to disprove the erroneous factual assumptions underlying the state's newly raised arguments.[3] As such, "[t]o relax the waiver rule in favor

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[3] By separate motion, Ms. Braun has moved this Court to supplement the record to reflect that Judge Raskin's decision rested solely upon the state's escape argument and did not actually consider or resolve the merits of Ms. Braun's motion. As is noted in that motion, there is no transcript of the oral decision and the notes of that proceeding have been destroyed. The hearing and decision thus must be reconstructed pursuant to State v. Perry, 136 Wis. 2d 92, 401 N.W.2d 748 (1987), to the extent that this Court intends to rely on that hearing and decision. Because of the state's delay in raising this issue, the defendant was not given an opportunity to correct the record under Perry.

of the state makes no sense and does not serve either the efficient administration of judicial business or the interests of justice." Milashoski, 464 N.W.2d at 25. See also 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 1978.

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.

Of course, "issues previously considered on direct appeal cannot be reconsidered on a motion under sec. 974.06, Stats." State v. Brown, 96 Wis. 2d 238, 241, 291 N.W.2d 528, 531 (citations omitted), cert. denied, 449 U.S. 1015 (1980); see Wis. Stat. §974.06(4) ("Any ground finally adjudicated ... may not be the basis for a subsequent motion..."). However, it cannot reasonably be said that Judge Raskin actually considered the merits of the defendant's motions when he dismissed them in 1978.

Although the state requested dismissal "on the merits" (R16), and the docket sheet reflects the dismissal to be "on the merits," (R1:18), the state certainly did

not argue the merits, relying solely on State v. John, 60 Wis. 2d 730, 211 N.W.2d 463 (1973) and the effect of the escape (see R16:4). Also, there is no suggestion that Judge Raskin actually considered the merits. Indeed, the docket sheet indicates the contrary, stating that, if the defendant returned within sixty days, Judge Raskin would reopen the motions and hear arguments on their merits (R1:18). If Judge Raskin already had considered the merits of the motions, reopening them would be a waste of time. See 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 from which the appellate court could determine what issues had been considered and decided; doubts must be resolved in favor of the defendant). See also Hall v. Alabama, 700 F.2d 1333, 1335 (11th Cir. 1983) (dismissal of appeal without opinion upon appellant's escape cannot be viewed as decision on merits).

The prior dismissal likewise cannot be construed as addressing the merits under the theory adopted in John, supra. In that case, the defendant filed a petition under §974.06 challenging the voluntariness of his guilty plea but escaped prior to the hearing date scheduled for receipt of his testimony on that issue. 211 N.W.2d at 463-64. The Supreme Court upheld dismissal of the petition on an abandonment theory and held that, given John's failure to appear and give testimony necessary to his voluntari-

ness challenge, the dismissal properly was on the merits. Id. at 465-66.

Ms. Braun's original motions, however, did not present issues of fact requiring her testimony. 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.

In granting the state's motion, therefore, Judge Raskin's dismissal of the defendant's motions was on procedural grounds unconnected to the ultimate issues in the case. That prior dismissal thus is not the law of this case barring consideration under §974.06. See Estate of Pfaff, 41 Wis. 2d 159, 163 N.W.2d 140 (1968) (prior dismissal of premature appeal not res judicata because it did not reach merits presented on this appeal); Matter of J.S., 144 Wis. 2d 670, 425 N.W.2d 15, 17 n.2 (Ct. App. 1988) (prior appeal dismissed as moot -- prior judgment not law of the case). Accord Young v. Warden, 383 F. Supp. 986, 990-91 (D. Md. 1974), aff'd, 532 F.2d 753 (4th Cir.), cert. denied, 425 U.S. 980 (1978); Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 33-34 (Iowa 1979); Waters v. State, 547 A.2d 665, 667 (Md. App. 1988).

See also 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 and 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.

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

The state plainly has failed to meet its burden of proving that Ms. Braun "knowingly, voluntarily and intelligently waived" her right to review of her claims. Wis. Stat. §974.06(4); cf., Schilling v. State, 86 Wis. 2d 69, 271 N.W.2d 631, 636 (1978) (state's burden to demonstrate Miranda waiver). 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 her 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).

The Supreme Court rejected the state's waiver theory 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).

Moreover, even if the escape reasonably could be viewed as a knowing waiver of her 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); 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).

D. Ms. Braun Did Not Procedurally Default On Her Claims.

By analogy to federal cases interpreting a totally different federal statute and involving totally different considerations, the state urges this Court to overrule settled Wisconsin law and to require the defendant to

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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).

show "cause and prejudice" for her "procedural default" of not properly raising her claims by direct appeal. State's Brief at 9-11. The analogy, to say the least, is imperfect. Neither the necessary precondition to application of the federal theory nor its underlying rationale are present in this case.

Under the federal theory, there first must be a procedural default, such as violation of a state contemporaneous objection rule, see Wainwright v. Sykes, 433 U.S. 72 (1977), or failure to comply with a state rule requiring all available issues to be presented on direct appeal, Smith v. Murray, 477 U.S. 527, 533 (1986); Reed v. Ross, 468 U.S. 1 (1984), which bars review in state court as a matter of state law. See 3 Lafave & Israel, Criminal Procedure §27.4(a) at 328-29 (1984). This concept of procedural default, however, is foreign to Wisconsin law in the context of this case.

Unlike the state procedural rules in Reed and Murray, significant constitutional issues must be considered on a post-conviction motion under Wisconsin law even though the issue might properly have been raised on direct appeal. Bergenthal v. State, 72 Wis. 2d 740, 242 N.W.2d 199, 203 (1976); Loop v. State, 65 Wis. 2d 499, 222 N.W.2d 694 (1974). See also State v. Coogan, 154 Wis. 2d 387, 453 N.W.2d 186, 192 (Ct. App. 1990); State v. Klimas, 94 Wis. 2d 288, 288 N.W.2d 157, 162-63 (Ct. App. 1979) (refusing to apply federal "deliberate by-pass" rule (precur-

sor to "cause and prejudice" rule relied upon by the state here)). Although "[a] sec. 974.06 motion is not a complete substitute for an appeal," "[t]his simply means that not every issue which can or should be raised on direct appeal can also be raised by this post-conviction motion." Loop, 222 N.W.2d at 696. Specifically, §974.06 is limited to jurisdictional and constitutional claims, see, e.g., State v. Nicholson, 148 Wis. 2d 353, 435 N.W.2d 298, 301 (Ct. App. 1988), such as alleged violations of a defendant's rights to due process, confrontation and a public trial. Thus, "[m]erely because a direct appeal was not taken does not mean that a 974.06 motion cannot be made later." Loop 222 N.W.2d at 696.

Given this controlling case law directly contrary to the state's position,[5] there was no fatal procedural default here. Ms. Braun is in the same position as if she had never filed any prior post-conviction motion. E.g., Stanford, supra; cf. Pick, supra. See also Section I.B., supra, and cases cited.

This case also fails to meet the rationale for the federal "cause and prejudice" standard. While federal courts clearly have an interest in protecting federal rights, federal habeas review of state convictions must also account for "the State's interest in the integrity of its rules and proceedings and the finality of its judg-

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[5] The state ignores this controlling case law in this court. However, the state conceded the validity of this law in the court below (R22:2).

ments, an interest that would be undermined if the federal courts were too free to ignore procedural forfeitures in the state courts." Reed, 468 U.S. at 10. See also 3 Criminal Procedure, §27.4 at 329. This concern for comity has no relevance to state post-conviction review of its own convictions.

The federal "cause and prejudice" requirement espoused by the state thus is barred by Wisconsin law. Even if it was not so barred, it is clearly inapplicable in this case because neither the preconditions for that requirement nor its rationale are satisfied here.

II.

ARBITRARY EXCLUSION OF A SPECTATOR DENIED MS. BRAUN HER RIGHT TO A PUBLIC TRIAL.

Confronted with a case in which it must concede that the partial closure of the defendant's trial cannot be justified under any possible standard, see State's Brief at 12, 17 (conceding "arbitrary exclusion"), and that the exclusion violated Ms. Braun's right to a public trial, id. at 22, the state challenges instead the necessary result of those concessions and the long settled rule that such violation of a defendant's right to a public trial can never be harmless error. For the most part, the state simply misstates or misinterprets the cases and holdings upon which it relies.

A. Ms. Braun Was Denied Her Right To A Public Trial.

The state argues that, because the concededly arbitrary closure of Ms. Braun's trial was only partial and not complete, she was not denied her right to a public trial. State's Brief at 13-18. This argument ignores the very authorities upon which the state relies.

The state is, of course, correct that the public trial right is not absolute. See, e.g., State ex rel. Stevens v. Manitowoc Co. Cir. Ct., 141 Wis. 2d 239, 414 N.W.2d 832, 838 (1987). As such, a sufficiently overriding state interest may overcome the presumption of openness, thus authorizing either partial or total closure to the extent necessary to protect that interest. Id. at 838-39; see Braun's Brief at 8-10.

The state also is correct that certain courts have applied a less stringent standard where the closure is partial rather than complete. State's Brief at 14-16. Those cases generally hold that the state's interest necessitating a partial closure need only be "substantial" rather than "overriding." See, e.g., Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir.), cert. denied, 110 S. Ct. 373 (1989); United States v. Sherlock, 865 F.2d 1069, 1076 (9th Cir. 1989); Douglas v. Wainwright, 714 F.2d 1532, 1540 (11th Cir. 1983), vacated, 468 U.S. 1206 (1984), reinstated on remand, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985); Renkel v. State, 807 P.2d

1087, 1091-92 (Alaska App. 1991). But see Stevens, 414 N.W.2d at 838 (applying "compelling interest" standard in partial closure case).

The exact standard is irrelevant, however, because the state properly concedes that the exclusion here was arbitrary. State's Brief at 12, 17. As such, it was not justifiable under any such standard. See Braun's Brief at 9-10.

The state nonetheless speculates that "the defendant received the protections guaranteed by the public trial right despite the exclusion of Mr. Mane." State's Brief at 16. The import of this statement is unclear. It is well settled that a defendant need not show resulting prejudice from an improper closure. See, e.g., Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984); Levine v. United States, 362 U.S. 610, 627 n.1 (1960) (Brennan J., dissenting); United States ex rel. Bennett v. Rundle, 419 F.2d 599, 608 (3rd Cir. 1969); Davis v. United States, 247 F. 394, 398-99 (8th Cir. 1917). See also 156 A.L.R. 265, 296 (1945) (and cases cited); 48 A.L.R.2d 1436, 1454 (1956) (and cases cited).

Even the cases cited by the state for the contrary position are in accord, see, e.g., Nieto, 879 F.2d at 753 n.15; Douglas, 714 F.2d at 1542; Renkel, 807 P.2d at 1094; Commonwealth v. Penn, 562 A.2d 833, 840 (Pa. Super. Ct. 1989), cert. denied, 112 S. Ct. 69 (1991), or failed to address the issue after finding sufficiently

compelling reason for the closure, see Sherlock, supra; State v. Rusin, 568 A.2d 403, 405 (Vt. 1989).[6]

To the extent that the state intends to derive a more lenient constitutional standard from its quotation from Renkel referring to the "key question" being whether the "public nature" of the trial was preserved, State's Brief at 15; see id. at 21, the state is misleading this Court. The Renkel quotation relies on Douglas, the relevant holding of which is as follows:

> Total exclusion is proscribed absent a most compelling justification. ... In other cases, where neither all members of the public nor the press are excluded, the "public's" nature of the proceedings may be retained sufficiently so that a lesser justification for the partial closure will suffice to avoid constitutional deprivation. In those partial closure cases where the interests underlying the public trial right are not protected, however, a compelling justification for the closure, as in total closure cases, must be shown.

714 F.2d at 1540-41.

The state also misleads this Court concerning the decision in Levine, which the state falsely asserts applied a harmless error analysis. See State's Brief at 17-18, 24, 25. Levine, plain and simple, was a due process

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[6] Counsel has found only two cases to the contrary. Reagan v. United States, 202 F. 488 (9th Cir. 1913), subsequently was repudiated by the very circuit responsible for its illegitimate birth. See Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944). In State v. Burney, 276 S.E.2d 693 (N.C. 1981), the Court found no violation of the defendant's public trial right but then stated in dicta, without discussion or analysis, that the violation would be harmless in any event. Id. at 698.

waiver case. See 362 U.S. at 617, 619. Because the defendant there did not request that the proceedings be opened, he was not denied due process. Id. Harmless error was neither applied nor discussed. The absence of "deliberately enforced secrecy" or "prejudice attributable to secrecy" were 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 state's assertion to the contrary blatantly misrepresents the Court's actual decision.

Even if the state's argument was not frivolous, the very same imponderables which mandate per se reversal render impossible the state's meeting of its burden of proving harmlessness beyond a reasonable doubt under State v. Dyess, 124 Wis. 2d 525, 370 N.W.2d 222 (1985). Indeed, beyond bald speculation and conclusory allegations, the state had mad no attempt to meet that burden.

B. The Public Trial Violation Mandates Reversal And Grant Of A New Trial.

The state's argument that grant of a new trial is not required despite the public trial violation here is, at best, meritless. Violation of the public trial right by improper exclusion of spectators mandates reversal and a new trial regardless whether the closure is partial is complete. See, e.g., Waller, 467 U.S. at 49-50; Nieto, 879 F.2d at 753 n.15; Bennett, 419 F.2d at 608; Tanksley, 145 F.2d at 59; United States v. Kobli, 172 F.2d 919, 921

(3d Cir. 1949); Davis, 247 F. at 398-99; Renkel, 807 P.2d at 1094. See also Section II, A, supra.

Of course, when the violation occurs not during the trial itself but rather during some other evidentiary proceeding such as a suppression hearing or a preliminary hearing, a new trial may not be appropriate. E.g., Waller, 467 U.S. at 49-50; Bennett, 419 F.2d at 608-09; State v. Webb, 160 Wis. 2d 622, 467 N.W.2d 108 (1991). In such cases of wholly non-trial closures, and only in such cases, is the court permitted to conduct the "proportionality" analysis proposed by the state. But this is not such a case.

The state also fails to cite a single case supporting its truly novel theory that a defendant waives her constitutional right to a public trial unless she files an interlocutory appeal during the trial. State's Brief at 21-22. A defendant may pursue such an extraordinary remedy, see, e.g., Stevens, supra, but clearly is not required to do so. Indeed, the state's theory would require such mid-trial petitions from essentially every alleged trial error in order to "adequately limit the remedy" without requiring a new trial. An error in admitting evidence would require a mid-trial appeal so that the evidence would be excluded. An error excluding evidence would require such an appeal to direct the trial court to admit the evidence. Moreover, in order to insure the vi-

ability of this limited remedy, the entire trial would have to be stayed in every case pending the outcome on appeal. The state's new theory is not and should not be the law.

The state's retroactivity argument is even more meritless, if such a thing is possible. With the exception of its blatant misrepresentation of the holding and analysis in Levine,[7] State's Brief at 24, 25, 29, 30, the state fails to cite a single case suggesting that harmless error analysis applies to a public trial violation. This is not surprising as the cases consistently have held that such an analysis does not apply. See Section II, A, supra. There simply is no question of retroactivity because Waller did not alter the law on this point one iota.

In any event, the public trial right clearly "is designed to enhance the accuracy of criminal trials." Solem v. Stumes, 465 U.S. 638, 643 (1984). See Jones v. Henderson, 683 F. Supp. 917, 921 (E.D.N.Y. 1988); Santos v. Brown, 596 F. Supp. 214, 219 (D.R.I. 1984). There can be no reasonable assertion of detrimental reliance on prior law or that retroactive application of Waller will have a negative effect on the administration of justice because Waller simply did not change the law.

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[7] As previously discussed, Levine was a waiver case which neither applied not even discussed harmless error.

III.

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

For the most part, the state's attempts to explain away its violation of Ms. Braun's due process right to a fair trial are amply rebutted by her opening brief. See Braun's Brief at 12-34. She will respond to only a few assertions.

A. Concealment and False Statements Concerning The Nature Of Seymour's Plea Agreement.

The record demonstrates that the prosecutor knew at the time he was telling the jury that Seymour's plea agreement mandated a state recommendation of incarceration that such was not the case. See Braun's Brief at 14-15. Nonetheless, the post-conviction court held to the contrary (R41:45-46) and implicitly denied Ms. Braun's request for an evidentiary hearing (see R41:8). At the very least, a hearing was required here given the evidence in the record. E.g., Keller v. State, 75 Wis. 2d 502, 249 N.W.2d 773 (1977).

The state's assertion that Ms. Braun was able to argue that Seymour might receive something other than prison time, State's Brief at 34-36, totally misses the point. The prosecutor and Seymour specifically denied the possibility of such a recommendation. Without the con-

cealed evidence that the plea agreement did not in fact mandate a prison recommendation but rather turned on Seymour's performance at trial, Ms. Braun's argument no doubt was viewed by the jury as mere speculation.

B. Bad Faith Cross-Examination Of Ms. Braun.

With one exception, the state's attempts to rebut the showing concerning the prosecutor's bad faith cross-examination of Ms. Braun requires nothing more than a reference to her opening brief at 17-21. The state's assertion that "[t]he prosecutor had every right to respond in kind," however, seriously misrepresents the decision in United States v. Young, 470 U.S. 1 (1985). That case explicitly rejected such a "right" even if defense counsel could be viewed as having acted improperly. Id. at 12. The issue under Young is whether the prosecutor's misconduct here deprived the defendant of her right to a fair trial in light of the entire record, including any alleged defense misconduct. Id. at 12-13. Clearly, it did.

C. State's Misconduct During Rebuttal Argument.

The state attempts to argue that its blatant misstatements of fact,[8] encouragement of speculation and

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[8] The prosecutor admitted to the trial court that the reason he did not call two of the witnesses was that they would contradict Seymour's testimony (Tr. 5924-28), but argued to the jury that he had contacted the witnesses and was not trying to hide them from the jury (Tr. 6015).

vouching for its witnesses were proper prosecutorial responses to defense counsel's argument calling upon the jury to draw reasonable, and in this case perfectly accurate, inferences that the reason the prosecutor failed to call certain witnesses was because their testimony would be unfavorable to the state. State's Brief at 43-47. The state is wrong once again. Braun's Brief at 21-30.

Such a "missing witness" inference is fully appropriate where, as here, "there is a reasonable relationship between the failure to produce the witness and the inference that the testimony, had it been placed before the jury, would have been unfavorable to the party's cause." State v. Sarinske, 91 Wis. 2d 14, 280 N.W.2d 725, 743 (1979) (citations omitted). Given the state's burden of proving guilt and court's instructions that "[t]he defendant is not required to prove her innocence" (Tr. 6054), and that "ordinarily, it is unsafe to convict upon the uncorroborated testimony of a person who claims to be an accomplish" (Tr. 6063), the trial court was clearly correct that defense counsel's argument was totally proper (Tr. 5881). See also Feldstein v. Harrington, 4 Wis. 2d 380, 90 N.W.2d 566 (1958) (error to bar counsel from arguing missing witness inference).

IV.

MS. BRAUN WAS DENIED HER RIGHT TO CONFRONTATION.

The fallacy of the state's confrontation argument

is demonstrated by Ms. Braun's opening brief at 34-46. The debate therefore will not be prolonged here.

CONCLUSION

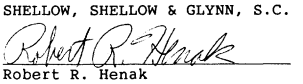
For these reasons and those previously stated, Ms. Braun asks that this Court reverse her conviction and remand this case for a new trial.

Dated at Milwaukee, Wisconsin, November 8, 1991.

Respectfully submitted,

KATHLEEN BRAUN
Defendant-Appellant

SHELLOW, SHELLOW & GLYNN, S.C.



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