00-2916CR(D)

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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 00-2916-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

GLENN E. DAVIS,

Defendant-Respondent-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Review of a Decision of the Court of Appeals, District II, Reversing a Nonfinal Order Entered in the Circuit Court for Ozaukee County, the Honorable Tom R. Wolfgram, Presiding

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The Wisconsin Association of Criminal Defense Lawyers ("WACDL") respectfully submits this nonparty brief, pursuant to Wis. Stat. (Rule) 809.19(7)(a).

ARGUMENT

WACDL concurs in Mr. Davis' position that this Court should not overrule that part of the decision in *State v. Richard A.P.*, 223 Wis.2d 777, 589 N.W.2d 674 (Ct. App. 1998), *rev. denied*, 225 Wis.2d 489, 594 N.W.2d 383 (1999), acknowledging the admissibility of exculpatory expert opinion evidence regarding a pertinent trait of the accused's character. While relevant evidence of the defendant's innocense may make the state's case more difficult to prove, a hardship of the prosecution "does not justify disregard of the rights of the defendant in order to overcome the state's difficulty." *Pleau v. State*, 255 Wis. 362, 38 N.W.2d 496, 498 (1949).

A. *Richard A.P.* Is Fully Consistent With Wisconsin Law.

The relevant issue presented in *Richard A.P.* was whether the

trial court's exclusion of expert character evidence, to the effect that the defendant had no diagnosable sexual disorder and thus was unlikely to commit acts of child molestation, was reversible error and denied the defendant his rights to due process and to present a defense. The trial court excluded the evidence as irrelevant because the expert could not testify that the absence of such a disorder absolutely excluded the possibility that Richard could have committed the offense. The Court of Appeals reversed, holding that the evidence was relevant, as the state conceded before that Court, *see* 589 N.W.2d at 681, and admissible as expert opinion evidence regarding a pertinent trait of the accused's character under Wis. Stat. §§904.04(1)(a), 904.05, and 907.02. 589 N.W.2d at 681-82.

Because *Richard A.P.* is fully consistent with existing Wisconsin law and fundamental fairness, there is no reason to overrule that decision.

Pursuant to Wis. Stat. §904.04(1)(a):

> **(1) Character evidence generally.** Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> > (a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same.

Opinion testimony is a permissible method of proving character:

> **(1) Reputation or opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

Wis. Stat. §904.05. Under Wisconsin law, moreover, such opinion evidence may be provided by an expert. *E.g.*, *King v. State*, 75 Wis.2d 26, 248 N.W.2d 458, 464-65 (1977). Indeed, in some circumstances,

the evidence *must* be provided by an expert. *E.g.*, *State v. Pulizzano*, 155 Wis.2d 633, 456 N.W.2d 325, 335-36 (1990) (whether defendant's suffering of sexual abuse as child made it more likely she committed charged abuse falls under Wis. Stat. §904.04(1)(a), but requires expert testimony).

In *King v. State*, 75 Wis.2d 26, 248 N.W.2d 458 (1977), the defendant was convicted of murder but claimed the shooting was accidental. In support of that claim, he presented evidence of two experts to the effect that he had a "passive-aggressive personality" and that persons having that trait "typically responded to stress by avoidance or nonresponse rather than by overt hostile acts." 248 N.W.2d at 462-63, 464.

This Court held that this evidence was properly admitted:

> In offering the expert testimony of the psychologist, as it related to the defendant's character, the defendant was properly relying upon the provisions of sec. 904.04(1)(a), Stats., and sec. 904.05(1) . . .. Thus in this first-degree murder case, the defendant was entitled to place into evidence not only opinion testimony but expert opinion testimony concerning his general character trait of nonhostility and nonaggressiveness.

248 N.W.2d at 464-65.[1]

As the state readily conceded in *Richard A.P.*, evidence that the defendant has no diagnosable sexual disorder and thus was unlikely to have sexually assaulted a child is highly relevant to an allegation of

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[1] While holding that the defense evidence was admissible, the Court rejected the defendant's challenge to the state's use of extrinsic evidence in rebuttal. 248 N.W.2d at 465-68.

In subsequent cases, the Court has found it unnecessary to address the issue raised in this case. *See Pulizzano*, 456 N.W.2d at 335-36 (unnecessary to decide if "battering parent syndrome" evidence admissible under §904.04(1) because state failed to present expert testimony); *State v. Friedrich*, 135 Wis.2d 1, 398 N.W.2d 763, 766-770 (1987) (Court need not decide whether expert testimony that defendant charged with sexually assaulting his 14-year old niece failed to match profile of incestuous sex offenders should have been admitted under §904.04(1)(a) and *King* because counsel did not raise that theory in trial court).

child molestation. 589 N.W.2d at 681. Pursuant to Wis. Stat. §904.01, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." To be relevant, therefore, an item of proof need not prove a matter by itself; it need only be a "single link in the chain of proof." *State v. Brewer*, 195 Wis.2d 295, 536 N.W.2d 406, 412 (Ct. App. 1995); *cf. Lasecki v. State*, 190 Wis. 274, 280, 208 N.W. 868 (1926) (reasonable doubt re premeditation arises from intoxication evidence showing either "an inability to form *or an improbability that there was formed* a premeditated design" to kill (emphasis added)). *See also McKoy v. North Carolina*, 494 U.S. 433, 440 (1990):

> "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"

(quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985)).

Evidence of a defendant's good character is admissible, not because good people never commit crimes, but because good character evidence is circumstantial evidence that the defendant is unlikely to have committed the act charged. 2 *Weinstein's Federal Evidence* §404.11[2][a] at 404-22 (2d Ed. 1997).[2] Similarly, evidence that an expert could find no evidence of any diagnosable sexual disorder in an individual charged with sexual assault of a child is relevant and admissible, not because the absence of such a disorder absolutely precludes one from committing this type of crime, but because it renders that outcome unlikely. *See also* Mueller & Kirkpatrick, *Evidence* §4.12 at 265 (1999) (Federal equivalent of §904.04(1)(a) invokes "historic exception" to rule against admission of character evidence, permitting the accused to "offer evidence of a pertinent trait

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[2] *See also* Advisory Committee Notes to Fed. R. Evid. 404, quoted in West's Federal Criminal Code and Rules (2001 ed.) at 251.

of his character to support an inference that he was unlikely to have committed the charged offense").

While the strength of character evidence varies, the Supreme Court has recognized that such evidence may be decisive in a given case:

> The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing.

Edgington v. United States, 164 U.S. 361, 366 (1896).

The fact that the evidence is presented by an expert, moreover, does not alter the standard of relevance. *See* Advisory Committee Notes to Fed. R. Evid. 405, quoted in West's Federal Criminal Code and Rules (2001 ed.) at 253 (citing as permissible opinion evidence "the opinion of the psychiatrist based upon examination and testing"). Pursuant to Wis. Stat. §907.02, testimony of a qualified expert is admissible if specialized knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." Experts regularly are permitted to testify in terms of likelihoods and probabilities short of absolute certainty. *See, e.g., State v. Peters*, 192 Wis.2d 674, 534 N.W.2d 867, 873 (Ct. App. 1995) (affirming admission of DNA, statistical probability evidence). Under Wisconsin law, the absence of absolute certainty goes only to the weight of that evidence, not its admissibility. *Id.*, 534 N.W.2d at 873.

Because evidence of the type at issue here can be highly relevant to an individual's defense, especially in a "one on one swearing contest," the exclusion of such evidence in a particular case may violate not only state rules of evidence, but that defendant's constitutional rights to due process and to present a defense as well. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 40 (1987) (recognizing criminal defendant's "right to put before the jury evidence that might influence the determination of the guilt"); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). *See also* Advisory Committee Notes to Fed. R. Evid. 404, quoted in West's Federal Criminal Code and Rules (2001 ed.) at 251

(rule permitting character evidence to show that guilty is unlikely "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions . . .").

It is especially ironic that the state here is seeking a ruling declaring such expert testimony invariably inadmissible, given its reliance on exactly this type of expert testimony in virtually every Chapter 980 proceeding it has ever prosecuted. There simply is no substance to the state's attempted distinction between "likelihood of offense" evidence presented by the state and that presented by the defense. *See* State's Brief at 16 n.3. Either expert evidence concerning the likelihood of an individual committing a sexual offense is relevant and admissible under Rule 907.02 or it is not.[3] In either case, it is for the jury under Wisconsin law to determine whether the expert's assessment of the likelihood of offense is to be credited. *See, e.g., State v. Walstad,* 119 Wis.2d 483, 351 N.W.2d 469 (1984) (relevant expert testimony admitted; reliability determined by jury); *Peters*, 534 N.W.2d at 873 (same).

Finally, the fact that admission of relevant, exculpatory evidence of the defendant's innocense likely will result in attempted rebuttal by the state has never been viewed as valid grounds for excluding such evidence. Contrary to the state's suggestion, State's Brief at 12, the "real issue in the case" is the defendant's guilt or innocense; the complainant's credibility is, at best, a subsidiary issue. Circumstantial evidence of the defendant's innocence thus does not distract the jury from the central issue in the case, but instead goes to the very core of what the trial is about.

United States v. MacDonald, 688 F.2d 224 (4th Cir. 1982), does not hold otherwise. The expert testimony in *MacDonald* was excluded, not because such evidence is irrelevant or inherently confusing, but because the district court determined that the costs of the evidence outweighed the benefits on the particular facts of that case under Fed.

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[3] WACDL notes that there is no perfect correspondence here because, under Wis. Stat. §904.04(1)(a), the state may offer evidence of the defendant's character only if the defendant presents such evidence first.

R. Evid. 403. The court held that, *given that the defendant already had presented 13 character witnesses to testify regarding his nonviolent nature*, there was no overriding need to risk extending the trial and confusing the jury by admitting cumulative expert testimony on the same point. 688 F.2d at 227-28. Nothing in that decision supports the wholesale exclusion of expert character evidence. Indeed, the Court noted the opinion of the Advisory Committee on the Federal Rules that such evidence should be admitted absent circumstances making such evidence unduly prejudicial under Rule 403 in a particular case. *Id.* at 228 n.7.

B. The Foreign Decisions Relied Upon by the State Do Not Support Altering Established Wisconsin Law.

There is no relevant conflict between *Richard A.P.* and the decisions of this Court supporting admission of expert character evidence and those foreign decisions relied upon by the state which oppose it. The foreign decisions rely upon different rules of evidence than are applicable in Wisconsin.

For instance, several of the state's cases base exclusion on the *Frye* "general acceptance" standard for admission of scientific evidence expressly rejected by this Court in *State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984).[4] *See State v. Elbert*, 831 S.W.2d 646 (Mo. Ct. App. 1992); *State v. Cavallo*, 443 A.2d 1020, 1023-29 (N.J. 1982) (although relevant and otherwise admissible as expert opinion evidence, proffered evidence excluded for not having achieved "general acceptance"); *State v. Floray*, 715 A.2d 855, 860-61 (Del. Super. Ct. 1997) (trial level court); *State v. Tlamka*, 511 N.W.2d 135, 138-42 (Neb. App. 1993).[5]

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[4] As the Court held in *Walstad*, "expert testimony is admissible if relevant and will be excluded only if the testimony is superfluous or a waste of time. The *Frye* concept is alien to the Wisconsin law of evidence." 351 N.W.2d at 486.

[5] The court in *State v. Cavaliere*, 663 A.2d 96 (N.H. 1995), appears to apply a similar test, although purporting to apply the standard in *Daubert v.* (continued...)

Others are based on state evidentiary rules excluding opinion testimony on an ultimate issue in the case, a ground for exclusion not applicable in Wisconsin in light of Wis. Stat. §907.04.[6] *See Pendleton v. Commonwealth*, 685 S.W.2d 549, 553 (Ky. 1985) (evidence improper "because it is an opinion on the ultimate fact, that is, innocence or guilt. Consequently, it invades the proper province of the jury"); *Duncan v. State*, 500 S.E.2d 603, 608 (Ga. App. 1998) (same); *State v. Hubert*, 481 N.W.2d 329, 333 (Iowa 1992) (same); *State v. Armstrong*, 587 So.2d 168, 170 (La. App. 1991) (same).

Yet another bases exclusion on a state evidentiary rule which provides that character may be proved only by reputation evidence and not by opinion testimony. *See Floray,* 715 A.2d at 859-60. Wisconsin law, of course, is to the contrary. Wis. Stat. §904.05(1) ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation *or by testimony in the form of an opinion*" (emphasis added)).

The remaining decisions cited by the state are inapplicable or unpersuasive because they either exclude *state* profile evidence, *State v. McMillan*, 590 N.E.2d 23, 32 (Ohio App. 1990), exclude the evidence under the peculiar facts of the case, *State v. Miller*, 709 P.2d 350 (Utah 1985) (evidence relevant but properly excluded where expert did not examine or treat defendant), find waiver and thus do not decide whether the evidence is admissible, *Commonwealth v. Trowbridge*, 647 N.E.2d 413, 419 (Mass. 1995); *State v. Gallup*, 779 P.2d 169, 171-72 (Ore. App. 1989), or merely assert in conclusory terms that the

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[5](...continued)
Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The court reversed admission of the evidence based on the perception that the expert's testimony conflicted with that of others in same area of expertise.

In Wisconsin, such a disagreement would go only to the weight, and not the admissibility of the evidence. *See Walstad*, 351 N.W.2d at 487 ("Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible").

[6] Rule 907.04 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

evidence is properly excluded, *State v. Roberts*, 393 N.W.2d 385, 388 (Minn. App. 1986); *State v. Campbell*, 904 S.W.2d 608, 616 (Tenn. Crim. App. 1995). This Court properly rejects authority which "neither expresses any convincing reasons [nor] contains a discussion of the problem." *Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 121 N.W.2d 249, 254 (1963).

Contrary to the state's claims, therefore, nothing about the different treatment accorded expert character testimony by foreign courts undermines the recognized admissibility of such evidence under Wisconsin's Rules of Evidence. Again, the state overlooks the fact that much of its argument would apply equally to bar expert testimony by *state* witnesses in "sexual predator" proceedings.

CONCLUSION

For these reasons, as well as for those stated in Mr. Davis' Reply Brief, there exists no valid reason why this Court should depart from established Wisconsin law to carve out a special exception excluding relevant and exculpatory expert character evidence. This Court accordingly should reject the state's attempt to overrule *Richard A.P.*

Dated at Milwaukee, Wisconsin, March 12, 2002.

Respectfully submitted,

WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Amicus Curiae

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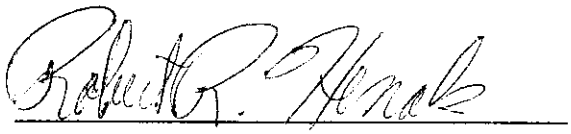

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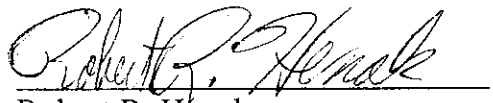
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,775 words.



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