05AP1285

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2005AP001285
(Brown County Case No. 01-CF-138)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID R. KASTER,

Defendant-Appellant.

Appeal From The Final Order
Entered In The Circuit Court For Brown County,
The Honorable Mark A. Warpinski,
Circuit Judge, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. In *State v. Kaster*, 2003 WI App 105, ¶¶16, 17, 264 Wis.2d 751, 663 N.W.2d 390, this Court interpreted Wis. Stat. §948.095 as requiring that the defendant be providing services to the school at the time of the alleged sexual assault. However, the jury was not required to find, and did not in fact find, that Kaster was providing such services at the time of the offense charged in Count 1. Did the absence of such a requirement and such a finding deny Kaster the rights to present a defense and to a jury verdict on all facts necessary for conviction on the offense charged in count 1.

The circuit court denied Kaster's post-conviction motion raising this claim.

2. Whether this Court's unanticipated interpretation of §948.095 as applying to the acts of volunteers not under contract to a school, but only when the volunteer is in the act of providing services to the school at the time of the alleged sexual contact, justifies reversal in the interests of justice under Wis. Stat. §752.35.

Kaster did not raise this claim before the circuit court, and that court accordingly did not decide it.

3. Whether Wis. Stat. § 948.095 is unconstitutionally vague as applied to non-employee volunteers who are not actively providing services to a school at the time of the alleged assault.

The circuit court denied Kaster's post-conviction motion raising this claim.

4. Whether the evidence was sufficient to convict Kaster of disorderly conduct as charged in Count 7 given the absence of any actual or likely resulting public disturbance.

The circuit court denied Kaster's post-conviction motion raising this claim.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Because this appeal seeks to clarify constitutional issues left unresolved in a published opinion of this Court, publication also may be appropriate under Wis. Stat. (Rule) 809.23.

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

By criminal complaint filed February 13, 2001, David Kaster was charged with four felony counts of sexual assault of a student by a school instructional staff person (Counts 1, 3, 5 & 8), contrary to Wis. Stat. §948.095, three misdemeanor counts of fourth degree sexual assault for the same conduct (Counts 2, 4 & 6), contrary to Wis. Stat. §940.225(3m), and one count of disorderly conduct (Count 7), contrary to Wis. Stat. §947.01. (R2).

Counts 1 and 2 concerned an alleged incident on March 13-14, 1999, involving Kaster and L.J.B., a 16-year-old member of the high school girls swim team Kaster had coached the preceding fall. Counts 3-6 concerned two other alleged incidents involving another swimmer, C.S.H. Count 7 concerned an alleged act of disorderly conduct on September 24, 1999, involving a third swimmer, M.B. And, finally,

Count 8 concerned an alleged incident involving a fourth swimmer, S.I.F. in November, 1999. (R2).

The case proceeded to a jury trial on September 17, 2001 (R82-R86). On September 20, 2001, the jury acquitted Kaster of Counts 3, 4, 5 and 6, but convicted him of the remaining counts (R86:931-33; R27-R34). The Court, Hon. Mark A. Warpinski, presiding, then remanded Kaster pending sentencing (R86:938-39).

By motion filed October 10, 2001 (R40), and supporting letter brief filed October 31, 2001 (R39), Kaster's trial counsel, William Appel, sought dismissal of Count 1 on the grounds that the evidence was insufficient to find that he was "providing services" at the time of the alleged sexual contact as required for conviction under §948.095. Specifically, Kaster argued that the term "providing services" must be limited to circumstances in which the defendant is under contract to the school (R39:5). He further argued that, "[t]he phrase 'providing services' without definition as to time would be too broad an interpretation and therefore be unconstitutional for failing to give adequate notice." (*id.*:6). Following arguments, the circuit court denied that motion on November 1, 2001 (R41).

On November 9, 2001, the Court, Hon. Mark A. Warpinski, presiding, sentenced Mr. Kaster to a total of 9 years, 52 days incarceration. The Court imposed a sentence of 52 days on Count 7, with credit for time served, 4½ years on Count 1, a consecutive term of 4½ years on Count 8, and a term of 9 months on Count 2, concurrent with the sentences under Counts 1 and 8. (R91:115-16). Although the Court did not impose a probationary term, it ordered sex offender treatment and other conditions to Kaster's parole term (*id.*:116-17).

By post-conviction motion filed pursuant to Wis. Stat. §974.02, Attorney Appel sought a new trial regarding Count 8 on behalf of Kaster on newly-discovered evidence and interests of justice grounds (R49; R51-R55). Following a hearing on that motion on August16, 2002, the circuit court, Hon. Mark A Warpinski, denied it (R57; R92:21-23).

On direct appeal, Kaster was represented by Attorney Steven L. Miller. There, Kaster challenged only the conviction and sentence under Count 1 on the grounds that §948.095, criminalizing sexual assault of a student by a school staff person, applies only to paid "school staff" and not to those who provide services voluntarily to a school. Kaster argued that the circuit court had denied him the right to present a defense by not giving his proposed instructions (1) limiting application of Wis. Stat. §948.095 only to those who are employed by or under contract to a school, and (2) advising that volunteers accordingly are not covered by the statute. Defendant-Appellant's Brief, *State v. Kaster*, Appeal No. 02-2352-CR (admitted as Exh.2 at the 2/25/05 post-conviction motion hearing). *See also State v. Kaster*, 2003 WI App 105, ¶¶8, 10-11, 264 Wis.2d 751, 663 N.W.2d 390 (R97:6-7; App. 41-42).

By decision dated April 22, 2003, this Court rejected that argument, as well as the included argument which it interpreted as a facial vagueness challenge to construction of the statute to cover volunteers. *Id.* ¶12 (rejecting perceived facial vagueness challenge), ¶13-16 (rejecting argument that statute does not apply to volunteers) (R97:7-9; App. 42-44). Instead, the Court held that §948.095 was properly construed as applying, not only to those employed by or under contract to a school, but also to those volunteers who are providing services to the school at the time of the alleged assault:

> Kaster maintains the only way he could have been liable under Wis. Stat. § 948.095 was if he was "under contract" on March 14, 1999, and the jury should have been so instructed. We reject Kaster's narrow reading of the statute and conclude he would be liable if he provided services to a school or school board on March 14.

Id. ¶16 (R97:9; App. 44).

The Supreme Court denied review on July 9, 2003.

On September 27, 2004, Kaster filed his Notice of Motion and Motion for Post-Conviction Relief Pursuant to Wis. Stat. §974.06 (R109). That motion raised four primary claims:

1. Although this Court in *Kaster* held that Kaster could be convicted of sexual assault by a school staff member under Count 1 even if he was not under contract to the school on the date of the alleged offense, *so long as he provided services to the school or school district on that date*, the jury was never instructed on that theory. Kaster thus was deprived of the benefit of this Court's construction of the statute, denying him the rights to present a defense and to a jury verdict on the issue of whether he was in fact providing services to the school on March 14, 1999.

2. If the statute is not construed to apply to volunteers only while they are actively providing services to the school, the conviction under Count 1 must be vacated and the count dismissed because the underlying statute, Wis. Stat. §948.095, as construed by this Court, is unconstitutionally vague as applied in this case.

3. Because the actions attributed to Kaster at most caused personal discomfort on the part of M.B. and did not risk public disturbance, the disorderly conduct conviction under Count 7 is not supported by the evidence.

4. The circuit court had no authority to impose conditions on Kaster's pre-TIS prison sentence and eventual parole release.

(R109).

The motion also explained why these claims were not barred by Wis. Stat. §974.06(4) and *State v. Escalona-Naranjo*, 185 Wis.2d 169, 517 N.W.2d 157 (1994) (R109:7-16), and raised contingent claims of ineffectiveness of counsel in the event Kaster's trial or post-conviction counsel was deemed to have waived or inadequately preserved any of these issues (R109:25-27; *see id.*:11-14). The state filed its written

response on January 25, 2005 (R117).

At the hearing on February 25, 2005, the circuit court did not decide the state's argument that Kaster's claims were barred by Wis. Stat. §974.06(4), choosing instead to address those claims on their merits (*see* R114; App. 2-35).

The court agreed that it had no authority to impose conditions on a pre-TIS prison/parole sentence and accordingly vacated those conditions (R114:3-4; App. 4-5). *See State v. Gibbons*, 71 Wis.2d 94, 237 N.W.2d 33, 35 (1976). However, the court denied Kaster's remaining claims. The court concluded that this Court already had decided the issues regarding Count 1 (R114:17-19, 22, 27-28, 31-32; App. 18-20, 23, 28-29, 32-33). Regarding the sufficiency of the evidence on the disorderly conduct charge, the court chose to "rely on the jury verdict in this matter that this constitutes disorderly conduct" (R114:9; App. 10).

The circuit court refused to hear evidence concerning either the contingent ineffectiveness claims or Kaster's argument that ineffectiveness of appellate counsel satisfied the "sufficient reason" requirement under §974.06(4) regarding the challenges to Count 1.

On the issue of trial/post-conviction ineffectiveness, the court accepted the state's concession that Attorney Appel had fully preserved the challenges to Count 1 raised here and that any waiver problems would have arisen at the appellate level (R114:11-12; App. 12-13). When presented with Kaster's claim that ineffective assistance of appellate counsel satisfied the "sufficient reason" requirement for raising the challenges to Count 1, however, the court likewise refused to allow testimony on that point. The court's rationale is inconsistent and unclear. It alternatively stated that (1) there was no ineffectiveness because Attorney Miller fully presented the issues to this Court, and (2) that it was *not* holding that the claims were adequately presented to this Court, but was instead holding only that the allegations of Kaster's §974.06 motion were somehow "conclusory" and that a hearing accordingly was not required. (R114:18-22; App. 19-23).

In an oral offer of proof, Kaster proffered that, if called to testify, his appellate counsel, Steven Miller, would have testified that he raised the issue of vagueness on Kaster's direct appeal, that he intended to fully preserve both facial and "as applied" challenges to the statute, that he did not intend to waive such a challenge, that he had no strategic or tactical reason for not fully presenting those issues, and that he had no authorization from Kaster to inadequately raise those claims (R114:19; App. 20).

On March 4, 2005, the circuit court entered a written order reflecting its prior oral decision denying Kaster's §974.06 motion (R107; App. 1). The court entered an amended Judgment of Conviction reflecting vacation of the court-imposed conditions on March 12, 2005 (R108).

Kaster timely filed his notice of appeal on May 12, 2005 (R110).

STATEMENT OF FACTS

A. Count 1 (Sexual Assault by School Staff Member)

David Kaster was a self-employed financial planner (R85:683). He was a successful college swimmer, having competed at the NCAA level (*id.*:685). He began as an assistant coach of the Ashwaubenon High School boys varsity team in 1983, eventually becoming head coach of both the boys and the girls varsity swim teams. Kaster had no other formal affiliation with the Ashwaubenon High School or the Ashwabenon School District. (R84:454, 607, 608).

Each athletic season is strictly defined by the WIAA (R84:458). The girls 1998-1999 school-year swim season began on August 11, 1998, and ended no later than November 14, 1998, the last day of state finals tournament. The boys season began on November 16, 1998, and ended on February 20, 1999, the last day of the boys state tournament. R96:Exhs. 29 & 30; R84:491-92). WIAA rules prohibit any coaching outside of these defined periods (R84:465, 483-84).

The school district separately contracted with Kaster for each

boys and each girls swimming season (R84:622). The state produced a written contract for the 1998-1999 girls season, but could not do so for the 1998-1999 boys season (*id.*:534-36; R96:Exhs. 67, 69). Nonetheless, Kaster agreed at trial that he was under contract for the boys season and had been paid for his services (R84:499-501, 507; R96:Exh. 63). The substantive language in the boys contract would have been identical to the girls (R84:620, 622; *see, e.g.*, R96:Exhs. 65, 66).

The one-page contract contains little information on the coach's duties. The 1998-1999 girls varsity contract states, in relevant part:

> The Board of Education of the Ashwaubenon School District will pay:
>
> David Kaster
>
> for the services performed in the following capacity:
>
> Swim Coach (Head Girls Varsity) at Ashwaubenon High School
>
> the amount of: $3,980.17 for the 1998-99 school year.
>
> This amount will be paid in full when authorized by the principal at the completion of the activity. The policy of the Ashwaubenon School District is to pay co-curricular/extra-curricular activities three times per year November 20th for the fall activities, January 20th for winter activities,[1] and May 20th for the spring activities.
>
> . . .
>
> It is specifically understood and agreed that Wisconsin Statutes 118.21 and 118.22 do not apply to the above co-

---

[1] This appears to be a typographical error since the season does not end until February and payments were in fact made on March 20th for all winter sports from 1999 on. March 20th is also the date contained in all subsequent contracts. (R96:Exhs. 63, 65; R84:622-23).

> curricular/extra-curricular service or compensation for such service and further that this appoint is for the 1998-1999 school year only. . . .

(R96:Exh. 67).

The contracts were expressly non-renewable (R84:487, 618-20). The school was under no obligation to extend the contract from one season to the next (*id.*:626). Nor was the school required to give notice of non-renewal (*id.*:619-20). The coach was paid once, shortly after the season, on a predetermined date. In this case, Kaster was paid on November 20, 1998, for the girls season which ended November 14, 1998, and was paid March 20, 1999, for the boys season which ended February 20, 1999. In previous years, Kaster was paid on March 5th for the boys season. (R96:Exh. 63). These predetermined pay dates apply to all coaches and do not directly correspond to the end of any particular activity's season (R84:622-23).

The state's witnesses testified that Kaster was probably *not* under any legal or contractual obligation to provide services to the school district after the WIAA-defined season ended. Greg Wendorf, Ashwaubenon H.S. athletic director from 1991-1998, initially testified that a coaching contract covered the "entire school year," even though "[c]oaches were finished with their coaching responsibilities at the end of their respective season . . .." (R84:463). He also conceded that Kaster was "probably not" required to perform any services outside the WIAA-defined season (*id.*:472).

Jack Klabesadel, the athletic director since the fall of 1998 (*id.*:473, 475) first testified that the only thing required of coaches outside the WIAA-defined season was attendance at the awards banquet (*id.*:482). He also conceded that Kaster was "not under contract according to our district office after the swim season and his evaluation[s are] complete . . .." (*id.*:486). While a coach can provide some limited services to the athletic program and the team outside of the WIAA-defined season, "that would be voluntary, up to the coach. They're not required to." (*Id.*:494).

Both Wendorf and Klabesadel noted that it was not uncommon to have contact with coaches in the off-season which may include budget planning, equipment requests, schedules, evaluations, fund raising, and the spring awards banquet (R84:449, 476-79, 489-90). Wendorf conceded, however, that equipment requests were usually received in January or February, although there may be some follow-up contact, and scheduling issues were usually taken care of before the end of the season (*id.*:449-50, 455). Klabesadel conceded the summer fundraising was completely voluntary (*id.*:455, 489-90). Evaluations were also usually turned in within a couple of weeks of the season ending (*id.*:488).

All of these possible out-of-season contacts, however, were generalizations. Wendorf did not know, for example, when Kaster turned in his equipment requests (*id.*:456). Neither of these witnesses specifically identified any out-of-season contacts involving Kaster after February 20, 1999, which were directly related to his coaching duties.

Kaster trestified he provided his budget requests for new equipment in December or January. After the season all he had to do was make sure the equipment was turned in and inventoried, which he usually accomplished before the state finals. (R85:698).

The offense charged in Count 1 was alleged to have occurred early on March 14, 1999, at Kaster's home, some three weeks after the boys season ended. L.J.B., the complainant, was at a party with her friends and became uncomfortable "with everyone drinking" (R83:265). She decided to leave and drove to Kaster's house, arriving at 10 to 10:30 p.m. (*id.*:266). Another swimmer was there watching a movie with Kaster. After the movie ended, the other swimmer left and L.J.B. stayed alone with Kaster (*id.*:267). According to L.J.B., Kaster felt her breasts as they were watching television (*id.*:269).

B. Count 7 (Disorderly Conduct)

Viewing the evidence most favorably to the prosecution, M.B. testified that, in the fall of 1999, she was a 14-year-old freshman

member of the swim team that Kaster coached (R83:316-17, 321). On September 24, 1999, M.B. was present for an early morning practice with three other swimmers when Kaster spoke with her privately in the boy's locker room (*id.*:321-26).

M.B. stated that the lights were off and that Kaster put his arm around her and began speaking with her in a soft voice about swimming, her boyfriend, what she had done with guys, and how things were going with his wife. (*id.*:323-24). M.B. claimed that he kissed her on the back of the neck and, when she stated that it made her feel "uncomfortable," he said that no one else had a problem with it and that something must be wrong with her (*id.*:324). M.B. then left the room and went back to the pool and continued her workout (*id.*:326).

M.B. testified that this incident bothered her, scared her, and made her feel "extremely nervous and uncomfortable" (*id.*:324-25).

ARGUMENT

I.

GIVEN THIS COURT'S INTERPRETATION OF WIS. STAT. §948.095, KASTER WAS DENIED THE RIGHTS TO PRESENT A DEFENSE AND TO A JURY VERDICT ON ALL NECESSARY ELEMENTS OF THE OFFENSE CHARGED IN COUNT 1

A. This Court's Interpretation of §948.095 Requires Proof that a Non-employee or Volunteer be Providing Services to the School at the Time of the Alleged Sexual Contact

Count 1 charged Kaster with sexual assault by a school instructional staff person in violation of Wis. Stat. §948.095(2), which at the time provided as follows:

> Whoever has sexual contact or sexual intercourse with a child who has attained the age of 16 years and who is not the defendant's spouse is guilty of a Class D felony if all of the following apply:

> (a) The child is enrolled as a student in a school or a school district.
>
> (b) The defendant is a member of the school staff of the school or school district in which the child is enrolled as a student.

Wis. Stat. §948.095(2) (1999-2000). The statute defined "school staff" as meaning

> any person who provides services to a school or a school board, including an employee of a school or a school board and a person who provides services to a school or a school board under a contract.

Wis. Stat. §948.095(1)(b) (1999-2000).

On the direct appeal in this case, this Court construed §948.095 as applying to the acts of a person who provides services to a school as a volunteer, even though the legislature had expressly deleted a provision extending the definition of "school staff" to include "a person who provides services to a school or a school board as a volunteer." *See State v. Kaster*, 2003 WI App 105, ¶¶11, 15-16, 264 Wis.2d 751 663 N.W.2d 390 (App. 7-9). According to this Court, Kaster "would be liable if he provided services to a school or school board on March 14." *Id.* ¶16 (App. 9).

Under this Court's interpretation of "school staff," therefore, a non-employee defendant not under contract to the school must have been in the act of providing services to the school at the time of the alleged assault. *See also id.* ¶17 ("Finally, we conclude that the evidence at trial was sufficient to allow the jury to conclude that Kaster was providing services to the school or school board when he committed the March 14 assault") (App. 44-45).

Assuming that the statute applies to volunteers at all, this limitation makes sense. While this Court held that "school staff" must be construed to cover persons who provide services to a school on a purely voluntary basis, nothing in the language, logic, or history of that

statute or the Court's decision suggests that it covers their conduct while they are not in the act of providing such services. Those under contract reasonably may be deemed to "provide services" on a continual basis. The same cannot rationally be said of an intermittent volunteer, however.

Restricting application of the statute to only those volunteers who are actively providing services to the school at the time they have sexual contact with a student also is necessary to avoid significant constitutional problems. Since the legislature did not intend the absurd result of applying the statute to anyone who ever had volunteered for a school, there must be some rational basis for distinguishing those volunteers covered by the statute and those who are not. Any interpretation of the statute expanding its scope beyond those volunteers actively providing services to the school would render it unconstitutionally vague as applied to those who are not actively providing such services at the time of the alleged sexual contact. *See* Section III, *infra*.

B. In Light of this Court's Interpretation of §948.095, Kaster Was Denied the Rights to Present a Defense and to a Jury Verdict Beyond a Reasonable Doubt on All Facts Necessary for Conviction

This Court in *Kaster* answered the question directly presented to it in the sense that it rejected Kaster's claim that §948.095 applies only to those under contract to a school and not to volunteers, and that the evidence was sufficient for conviction given that holding. However, it did not answer a related question regarding exactly what a jury must be told regarding the requirement that the defendant was "providing services to a school" at the time of the alleged sexual contact.[2]

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[2] Because this Court neither addressed nor decided the issue presented here, the circuit court was wrong in holding that it was somehow bound by the decision in *Kaster* to deny Kaster's claim (R114:17-19, 22, 27-28, 31-32; App. 18-20, 23, 28-29, 32-33). *See* Section IV, *infra*.

Kaster was not on notice of this Court's interpretation of the statute at the time of the trial in this case and accordingly was unable to target his presentation of the facts and his arguments to the jury on the critical fact required for conviction that he was actively providing services to the school at the time of the sexual contact alleged in Count 1. He was, in other words, denied his right to present a defense on that element of the offense.

Attorney Appel's closing argument certainly attempted to focus the jury's assessment on the question of whether Kaster was actively providing services to the school at the time he allegedly assaulted L.J.B. (R86:889-902). However, the instructions did not require a jury verdict on that requirement:

> The fourth element requires that the defendant was a member of the school staff of the school or school district in which that person named in the Count was enrolled as a student.
>
> School staff means any person who provides services to a school or school board, including an employee of a school or school board and a person who provides services to a school or a school board under a contract.

(R86:860).

Given this conflict between attorney argument and court's instructions, the instructions control:

> Arguments by counsel cannot substitute for an instruction by the court. Arguments by counsel are likely to be viewed as statements of advocacy, whereas a jury instruction is a definitive and binding statement of law.

State v. Perkins, 2001 WI 46, ¶41, 243 Wis.2d 141, 626 N.W.2d 762. Here, as in *Perkins*, the jury was expressly instructed to base its verdict on the court's instructions rather than on the attorneys' arguments. (*See*

R86:844).

Because the jury was not instructed that it must find that Kaster was providing services to the school at the time of the alleged assault on March 14, 1999, Kaster was denied a jury verdict on that essential element of the offense. The jury was left to assume inaccurately that, because Kaster previously had provided services to the school and anticipated providing such services in the future, this was enough to render him a "school staff" member. This Court's decision, however, indicates that this is not enough. Rather, the jury must find "that Kaster was providing services to the school or school board *when he committed the March 14 assault.*" *Kaster*, ¶17 (emphasis added) (R97:9-10; App. 44-45).

Had Kaster had the benefit of this Court's interpretation, it would have nullified much of the state's argument on Count 1. The state used the general "provides services" instruction at trial to argue that the dispute over whether Kaster was under contract at the time of the alleged assault was irrelevant. Instead, it argued that, because Kaster had "contact" with the school after the season ended, he was still "providing services," and thus liable as a "school staff member" even for acts taken between any times Kaster actually provided services to the school. (R86:880-82, 912-14). Under this Court's interpretation, however, intermittently providing services to a school is not sufficient; the sexual contact must take place while the defendant is actively providing services to the school.

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The Sixth Amendment, as enforced against the states through the Fourteenth, generally mandates that the jury, rather than the judge, make that determination. *E.g.*, *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (Constitutional due process and jury trial guarantees require that any fact (other than prior conviction) which increases the maximum

penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt).

The Supreme Court accordingly has long recognized that instructions which relieve the state of its burden of proving all facts or elements necessary for conviction beyond a reasonable doubt violate due process. *E.g.*, *California v. Roy*, 519 U.S. 2 (1996) (per curiam) (instruction which omitted necessary element violated due process); *Carella v. California*, 491 U.S. 263, 265-66 (1989) (jury instructions relieving state of burden of proving every element of charged offense beyond reasonable doubt violate due process); *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Because the jury instructions here did not require a finding that Kaster was providing services to the school at the time of the alleged assault, and accordingly failed to require a jury verdict beyond a reasonable doubt on every fact or element necessary for a finding of guilt, Kaster was denied his rights to due process. *See also State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753 (1997); *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149 (1994).[3]

C. The Error Was Not Harmless

Although the Wisconsin Supreme Court has held that harmless error analysis applies to errors such as this, *see State v. Gordon*, 2003 WI 69, ¶¶34-40, 262 Wis.2d 380, 663 N.W.2d 765, the state cannot rationally suggest that "'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Gordon*, ¶36 (citation omitted). It therefore understandably chose not to raise such a claim below (*see* R114; R117; App. 2-35).

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[3] For the same reasons stated in *Peete*, 517 N.W.2d at 152, and *Howard*, 564 N.W.2d at 762-63, Kaster cannot be deemed to have waived this claim by not having objected to the failure of the instruction to require that he was actively providing services to the school at the time of sexual contact. The issue presented is one of statutory construction and what the jury was required to find for conviction.

While this Court previously held that the evidence was minimally sufficient for conviction, *i.e.*, that a reasonable jury could "conclude that Kaster was providing services to the school or school board when he committed the March 14 assault," *Kaster*, ¶17 (R97:9-10; App. 44-45), that is not the standard for harmlessness.

Harmless error analysis does not permit this Court to interpose itself as some sort of "super-jury." *Neder v. United States*, 527 U.S. 1, 19 (1999). Where, as here, the defendant contested the issue and the evidence viewed most favorably to the defendant supports his theory, it is for the jury to determine whether to believe it. *Neder*, 527 U.S. at 19 ("where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the court] should not find the error harmless"). *Compare id.* at 17 (jury instruction that improperly omits an essential element from the charge constitutes harmless error if "a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error"); *State v. Harvey*, 2002 WI 93, ¶48, 254 Wis.2d 442, 647 N.W.2d 189 (instructional error harmless where "[t]he elemental fact on which the jury was improperly instructed is undisputed and indisputable"); *State v. Tomlinson*, 2002 WI 91, ¶63, 254 Wis.2d 502, 648 N.W.2d 367 (improper mandatory conclusive presumption harmless where presumed fact beyond question).

Here, the evidence was solidly in dispute regarding whether Kaster was under contract at the time of the alleged assault, and the jury easily could have credited the testimony of the school athletic directors that he was not. Absent that theory, there is no evidence that Kaster was "providing services" to the school as a volunteer at the time L.B.J. came to his home to watch television the night of March 14, 1999. Under these circumstances, any "harmless error" argument by the state would be frivolous.

II.

BECAUSE THIS COURT INTERPRETED §948.095 IN A MANNER NOT ANTICIPATED BY THE PARTIES, REVERSAL OF THE CONVICTION ON COUNT 1 IS APPROPRIATE IN THE INTERESTS OF JUSTICE

Regardless whether Kaster is otherwise entitled to relief from the conviction on Count 1, the interests of justice require grant of relief pursuant to Wis. Stat. §752.35 because Kaster did not have the benefit of this Court's unanticipated interpretation of Wis. Stat. §948.095, the jury was not instructed on that interpretation, and the real controversy accordingly was not fully tried. *See Vollmer v. Luety*, 156 Wis.2d 1, 456 N.W.2d 797 (1990). The Court's discretionary authority to reverse in the interests of justice furthers its obligation to do justice in an individual case. *Id.*, 456 N.W.2d at 803.

This court may exercise its discretion to reverse in the interests of justice under §752.35 without regard for whether the circuit court misused its discretion under Wis. Stat. §805.15(1). *See Stivarius v. DiVall*, 121 Wis.2d 145, 358 N.W.2d 530, 534 & n.5 (1984).

Also, while this Court held in *State v. Allen*, 159 Wis.2d 53, 464 N.W.2d 426 (Ct. App. 1990), that interests of justice claims cannot be raised under §974.06, the Supreme Court recently questioned that position, labeling this Court's "exceedingly narrow view of the broad grant of power of discretionary reversal" as "strange" given the statutory language. *See State v. Armstrong*, 2005 WI 118, ¶113, n.25, ___ Wis.2d ___, ___ N.W.2d ___. *See also State v. Allen*, 157 Wis.2d 265, 459 N.W.2d 461 (1990), *vacating* 154 Wis.2d 804, 454 N.W.2d 44 (Ct. App. 1990), in which the Supreme Court vacated this Court's original *Allen* decision for reconsideration in light of *Volmer* despite this Court's prior conclusion that interests of justice reversals are not appropriate in §974.06 cases.

The central legal issue at trial was whether §948.095 applied at

all to the acts of volunteers, or whether it was limited (as suggested by its legislative history) to the acts of those either employed by the school or in a contractual relationship with it at the time of the alleged assault. The parties based their cases on the resolution of this issue.

The possibility that some volunteers who provided services to a school would be covered while others would not was not anticipated or resolved. Kaster accordingly was unable to present a full defense that he was neither under contract nor otherwise providing services to the school *at the time of the alleged assault* as required by this Court's decision on his direct appeal. Nor was he on notice that he should request jury instructions and present argument to the jury directly addressing that requirement for conviction.

The actual requirements for conviction were not known to the parties prior to this Court's decision on Kaster's direct appeal. The parties thus were not able to focus their evidence and arguments to those requirements and the jury accordingly was not instructed on the specific facts it must find for a verdict of guilt. The real controversy of whether Kaster was in fact providing services to the school at the time of the alleged sexual contact charged in Count 1 therefore was not fully tried.[4]

III.

IF NOT CONSTRUED TO COVER SEXUAL CONDUCT OF VOLUNTEERS ONLY WHEN ACTIVELY PROVIDING SERVICES TO A SCHOOL, WIS. STAT. §948.095 IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO SUCH VOLUNTEERS

The language of this Court's decision on Kaster's direct appeal

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[4] Under the "real controversy not tried" category of "interests of justice" cases, "it is unnecessary . . . to first conclude that the outcome would be different on retrial" prior to ordering a new trial. *Vollmer*, 456 N.W.2d at 805. As amply demonstrated in Section I,C, *supra*, however, the facts of this case establish just such a probability of acquittal upon retrial.

requires that, for the acts of someone who is neither an employee nor under contract to a school to fall within §948.095, the alleged assault must take place while the person is actively providing services to the school. *Kaster*, ¶¶16, 17 (R97:9-10; App. 44-45). Under that interpretation, Kaster is entitled to reversal and a new trial on Count 1. *See* Sections I & II, *supra*.

Should the decision or the statute be construed otherwise, however, so that the acts of volunteers falling within the statute are not so limited, then the statute is unconstitutionally vague as applied to those not so employed or under contract (such as the jury could have viewed Kaster as of March 14 in this case) who have volunteered their time to a school, but who are not in the act of providing such services at the time of the alleged assault. Such individuals, and especially those alleged to have violated the statute before this Court's interpretation of it, have no notice from the language of the statute or otherwise that their actions are covered.

Also, it would be patently absurd to construe the statute to cover anyone who has ever provided services to a school as a volunteer, and the legislature cannot be assumed to have intended such a result. *E.g.*, *Janssen v. State Farm Mut. Auto. Ins. Co.*, 2002 WI App 72, ¶16, 251 Wis.2d 660, 643 N.W.2d 857. There accordingly must be some mechanism for differentiating those volunteers who are covered and those who are not.

The circuit court may be correct that volunteers who provide services "on a regular basis to students" may prove as much a risk as do school employees (R86:831). However, the statute, even as construed after the fact by this Court, provides no standards for assessing whether a particular volunteer's services to the school are sufficiently "regular" to bring within the statute the volunteer's conduct performed while not in the act of providing such services.

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of ordinary notice that will enable ordinary people to understand what conduct it

prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. Rockford, 408 U.S. 104, 108-109 (1972) (footnotes omitted).

To the extent that this Court's construction of §948.095 does not limit its application to employees or those under contract to a school and to those volunteers who are actively providing services to the school at the time of the alleged assault, that statute is unconstitutionally vague as applied to volunteers on both grounds identified in *Morales, supra*. An ordinary volunteer would be unable reasonably to determine when, other than at those times he is actively providing services to the school, his conduct may be deemed to fall within the statute. For similar reasons, a law enforcement officer, judge or jury is left without discernable guidance for assessing when a volunteer's acts are covered.

Because §948.095 is unconstitutionally vague as applied to individuals such as Kaster who are neither employees nor under contract to the school at the time of the alleged assault, the conviction and sentence under Count 1 must be vacated and that count dismissed.

IV.

THE CHALLENGES RAISED HERE TO KASTER'S CONVICTION ON COUNT 1 WERE NEITHER ADDRESSED NOR DECIDED ON KASTER'S DIRECT APPEAL

Contrary to what the circuit court believed, the issues Kaster raises here regarding Count 1 were neither addressed nor decided by this Court on his direct appeal. Indeed, the right to present a defense and right to a jury verdict claims raised here could not have been raised on Kaster's direct appeal because they did not exist before this Court construed §948.095 as applying to volunteers, but only if they were actually providing services to the school *at the time of the alleged assault*. *See Kaster*, ¶¶16, 17 (R97:9-10; App. 44-45). It is that very proviso added by this Court which provided the legal basis for Kaster's claim here that he was denied the rights to present a defense and a jury verdict on the issue of whether he was in fact providing services to the school *specifically on March 14, 1999*.

The interpretational issue before this Court on Kaster's direct appeal was black and white; either volunteers were included or they were not. *See* Defendant-Appellant's Brief at 1-3, *State v. Kaster*, Appeal No. 02-2352-CR. The intermediate position ultimately recognized by this Court, applying the statute to volunteers, but only so long as they were providing services to the school at the time of the alleged sexual contact, was not anticipated. As such, the consequences of such a ruling were not addressed by the parties or resolved by the Court.

This Court likewise did not previously address or decide the constitutional vagueness "as applied" argument raised here. Attorney Miller argued that interpretation of §948.095 to cover the acts of volunteers would render the statute unconstitutionally vague, both on its face and as applied. *See* Defendant-Appellant's Brief at 16-17, *State v. Kaster*, Appeal No. 02-2352-CR. However, this Court held only that

applying §948.095 to volunteers would not render that statute *facially* unconstitutional for vagueness. *Kaster*, ¶12 (R97:7-8; App. 42-43). The present appeal addresses a separate issue --whether §948.095 is unconstitutionally vague *as applied* to non-employees (such as the jury could have viewed Kaster as of March 14 in this case) who have volunteered their time to a school, but who are not in the act of providing such services at the time of the alleged assault. A facial challenge to a statute is different from an "as applied" challenge. *See, e.g., In re Commitment of Bush*, 2005 WI 103, ¶17, ___ Wis.2d ___, ___ N.W.2d ___.

Of course, this vagueness issue arises only if this Court's prior decision is construed, contrary to its language, as not requiring proof that the volunteer/defendant in fact was providing services to the school at the time of the alleged assault. If it is construed as requiring such proof, then Kaster is entitled to a new trial because he was denied the opportunity to defend and a jury verdict on that necessary element of the state's proof. *See* Sections I & II, *supra*. If it is not so construed, then Kaster is entitled to a new trial on the grounds that the statute is unconstitutionally vague as applied to him. *See* Section III, *supra*.

Because neither the right to present a defense/entitlement to jury verdict claim nor the vagueness-as-applied claim alleged here was addressed or decided by this Court on Kaster's direct appeal, the court below is incorrect in asserting that this Court's decision was, in effect, "law of the case" barring Kaster from raising his claims here. *E.g., Pabst Corporation v. City of Milwaukee*, 193 Wis. 522, 213 N.W. 888, 889 (1927) ("Law of the case" consists of provisions of law actually decided and applicable to facts in judgment on former appeal); 18 *Moore's Federal Practice* §134.23[4] & fn. 11(3d ed. 2005) (lower court retains discretion to decide issues not actually decided by appellate court).

V.

THE EVIDENCE WAS LEGALLY INSUFFICIENT FOR CONVICTION UNDER COUNT 7 (DISORDERLY CONDUCT)

Count 7 charged Kaster with disorderly conduct in violation of Wis. Stat. §947.01 based on his alleged interaction with M.B. in the boys locker room during a practice of the girls swim team (R2).

The burden in a criminal case is on the state to prove every fact necessary for conviction of the crime charged beyond a reasonable doubt. *E.g.*, *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358, 364 (1970). "The standard for reviewing the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Rushing*, 197 Wis.2d 631, 541 N.W.2d 155, 159 (Ct. App. 1995) (citing *Jackson*, 443 U.S. at 319); *see State v. Hayes*, 2004 WI 80, ¶56, 273 Wis.2d 1, 681 N.W.2d 203.

This Court reviews challenges to the sufficiency of the evidence necessary to support a verdict *de novo*. *State v. Wanta*, 224 Wis.2d 679, 592 N.W.2d 645, 650 (Ct. App. 1999) (citation omitted).

In addressing disorderly conduct under Wis. Stat. §947.01, the Supreme Court held in *State v. Schwebke*, 2002 WI 55, ¶30, 253 Wis.2d 1, 644 N.W.2d 666, 676-77 (2002), that "[c]onduct is not punishable under the statute when it tends to cause only personal annoyance to a person." Citing *In re Douglas D.*, 2001 WI 47, ¶27, 243 Wis.2d 204, 626 N.W.2d 725. Rather,

> the disorderly conduct statute requires, at a minimum, that, when the conduct tends to cause or provoke a disturbance that is private or personal in nature, there must exist the real possibility that this disturbance will spill over and cause a threat to the surrounding community as well.

Schwebke, ¶31.

Even viewing the evidence most favorably to the state, the acts alleged concerning M.B. simply do not constitute disorderly conduct under *Schwebke*. All the alleged actions took place in the locker room, with only Kaster and M.B. present. While allegedly annoying to her, none threatened to cause a disturbance within the meaning of the statute. Indeed, after objecting to Kaster's conduct as making her "uncomfortable," M.B. merely left the locker room, returned to the pool and continued her workout.

The state below pointed to the possible "irrational" actions of M.B.'s father if he subsequently learned of Kaster's actions and the negative reactions likely from school officials and the other swimmers. (R117:4). However, whether particular conduct constitutes disorderly conduct must be judged on an objective standard. *Schwebke*, ¶24. Non-criminal conduct thus cannot be rendered criminal by the possible irrational reactions of a third party.

The state's position below that a negative view of one's actions by the public necessarily renders those actions disorderly conduct (R117:4) likewise is baseless, effectively criminalizing a broad swath of everyday conduct. The disorderly conduct statute was not intended to criminalize every boorish action or comment made in public, let alone in private.

It cannot rationally be argued that a subsequent reaction to certain conduct, even a negative or critical reaction, necessarily constitutes the type of public disturbance or threat required for conviction. Everyday conduct and comments, including those by police officers and prosecutors, often (and often justifiably) cause a negative public response or even disgust. But, contrary to the state's underlying assumption, criticism, disgust, or the taking of offense at certain conduct is not the same as a "public disturbance" under the statute. Acts may be viewed as stupid, demeaning, or offensive, and draw a corresponding public reaction, without constituting the crime of disorderly conduct, unless, that is, the state's overly broad view prevails.

Compare, for instance, the types of conduct and likely public reactions deemed sufficient by the appellate courts. In *Schwebke*, the defendant sent a number of anonymous and unsolicited letters to a young woman, her sister, and a friend. Although technically "private," the letters demonstrated a sort of stalking behavior that necessarily evoked fear and concern among both the recipients and those close to them for the victims' safety. *Schwebke*, ¶¶32, 42-44. Similarly, in *In re Douglas D.*, 2001 WI 47, 243 Wis.2d 204, 626 N.W.2d 725, the Court held that the statute could apply to threatening communications from a student to a teacher, not merely because the teacher became upset, but because the communications jeopardized the proper functioning of the school itself. *Id.* ¶28. *See also Schwebke*, ¶28 fn 5 and cases cited therein.

In contrast, the facts as alleged by M.B., a single instance of claimed misconduct by a known individual, present no such likelihood of public *disturbance*. As demonstrated by these cases, "public disturbance" is not the same as "public disapproval."

Personal annoyance or discomfort is all that was alleged and proved with regard to M.B. Nothing in the evidence suggests any "real possibility that this disturbance will spill over and cause a threat to the surrounding community as well." *Schwebke*, ¶31.

Because the evidence was insufficient to establish a necessary element of the offense charged in Count 7 of the information, the conviction and sentence under that count must be vacated and that count dismissed. *See, e.g., State v. Wulff*, 207 Wis.2d 143, 557 N.W.2d 813, 818 (1997).

VI.

SUFFICIENT REASON FOR NOT RAISING ISSUES ON DIRECT APPEAL

Although the right to a jury verdict and to present a defense and sufficiency issues raised here were not raised on Kaster's direct appeal,

he is not barred from raising them now under Wis. Stat. §974.06(4) as construed in *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994). Nor is he barred from raising his vagueness claim should the Court hold that all aspects of the claim raised here were not presented on Kaster's direct appeal.

A motion under Wis. Stat. §974.06 remains appropriate where, as here, the defendant has "sufficient reason" for not having raised, or for having inadequately raised, the issue on a prior motion or appeal. Wis. Stat. §974.06(4); *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753, 761-62 (1997).[5]

A. Novelty Constitutes "Sufficient Reason" as to the Challenges to Count 1

Because the issues did not become ripe for decision until this Court's decision defining the scope of the statute, sufficient reason exists for raising Kaster's claims that §948.095 is unconstitutionally vague as applied to the conduct alleged in Count 1, that he was denied the rights to present a defense and to a jury verdict on all elements of that charge, and that the real controversy regarding that count was not tried.

Kaster and Attorney Miller could not have known prior to this Court's decision exactly how it would interpret the statute, so that any vagueness challenge at that point based on how that interpretation applied to Kaster's alleged conduct was purely hypothetical. Counsel and Kaster likewise could not have known prior to that decision that the Court would construe the statute as requiring proof beyond a reasonable doubt that he actually provided services to the school on March 14, 1999.

Only now that this Court has defined what it views as the proper scope of §948.095 is the impact of that interpretation as applied to the

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[5] The Supreme Court overruled a different portion of *Howard* on other grounds in *State v. Gordon*, 2003 WI 69, 262 Wis.2d 380, 663 N.W.2d 765.

allegations against Kaster apparent. Because it was only this Court's decision which held that the state must prove that Kaster was in fact providing services to the school on March 14, 1999, he could not have previously argued that he was denied the right to present a defense and to a jury verdict on that issue. Likewise, because it would be an interpretation by this Court backing away from that proof requirement which would deprive Kaster of notice and fail to set discernable standards for decision as applied to Kaster's alleged actions, he could not have fully raised his vagueness argument previously.

The "sufficient reason" requirement does not require that counsel either predict future court actions or make every possible objection or argument on the off-chance the Court may act in a particular way or another. As the Supreme Court held in *Howard*, it is "impractical to expect a defendant to present a legal argument until a higher authority adopts it." 564 N.W.2d at 762 (agreeing with this Court's conclusion). It is established, therefore, that "sufficient reason" is shown when the legal basis for a claim did not exist until after the defendant's prior efforts at post-conviction relief. *See also Escalona-Naranjo*, 517 N.W.2d at 162 n.11 (discussing *State v. Klimas*, 94 Wis.2d 288, 288 N.W.2d 157 (Ct. App. 1979)). That is precisely the situation here.

B. Ineffectiveness of Appellate Counsel Constitutes "Sufficient Reason" as to the Challenges to Count 1

Should this Court deem the bases for Kaster's challenges to Count 1 not sufficiently novel to constitute "sufficient reason" for Attorney Miller's failure adequately to raise them on Kaster's direct appeal, then that failure itself constitutes "sufficient reason" allowing Kaster's claims to proceed.

"Sufficient reason" exists under Wis. Stat. §974.06(4) whenever the claim that a defendant seeks to raise under §974.06 was omitted from, or inadequately raised in, a prior direct appeal due to the ineffectiveness of post-conviction or appellate counsel. *State ex rel.*

Rothering v. McCaughtry, 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996). *Accord Murray v. Carrier*, 477 U.S. 478 (1986) (ineffective assistance of appellate counsel meets stricter federal "cause and prejudice" standard permitting federal habeas review despite failure adequately to present underlying issue to state courts). Indeed, it must be sufficient, as the ineffective assistance of counsel under those circumstances renders the initial appeal or post-conviction proceedings themselves constitutionally defective. *Murray*, 477 U.S. at 488; *see State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540, 540-41 (1992).

Although post-conviction or appellate counsel is not constitutionally ineffective solely because the attorney fails to raise every potentially meritorious issue, *see Smith v. Robbins*, 528 U.S. 259, 287-88 (2000) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)), counsel's decisions in choosing among issues cannot be isolated from review. *E.g.*, *id.*; *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). "Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely on the grounds [it is] improper to review appellate counsel's choice of issues, the right of effective assistance of counsel on appeal would be worthless." *Id.*

The test for ineffectiveness is two-pronged. First, counsel's performance must have been deficient, and second, the deficiency must have prejudiced the defense. *See, e.g.*, *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The same standard applies, with appropriate modifications, to assess the constitutional effectiveness of post-conviction or appellate counsel. *Smith, supra*; *see State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis.2d 468, 673 N.W.2d 369.

> The Seventh Circuit has summarized the standards as follows:
>
> [W]hen appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient . . . and when that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial," we will deem the lack of effective assistance prejudicial.

Mason v. Hanks, 97 F.3d 887, 893 (7th Cir. 1996) (state appellate

attorney's failure to raise preserved hearsay issue constituted ineffective assistance of appellate counsel, mandating federal habeas relief); *see, e.g., Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994) (failure to raise preserved discovery issue on appeal deemed ineffective); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) ("His lawyer failed to raise either claim, instead raising weaker claims . . .. No tactical reason--no reason other than oversight or incompetence--has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had").

Should this Court deem Kaster's challenges to Count 1 insufficiently novel to justify Attorney Miller's failure to raise them adequately on Kaster's direct appeal, then those challenges satisfy these requirements. Each issue is legitimate and, if not so novel as to excuse Miller's failure to raise them, then by necessity each is an obvious issue. Attorney Miller certainly recognized the vagueness claim as important as he raised a contingent vagueness claim on appeal of Defendant-Appellant's Brief at 16-17, *State v. Kaster*, Appeal No. 02-2352-CR; Defendant-Appellant-Petitioner's Petition for Review at 3, 16-17, *State v. Kaster*, Appeal No. 02-2352-CR. To the extent that the Court holds that Attorney Miller could have raised the "vagueness as applied" claim with greater precision on the direct appeal, then he acted unreasonably in failing to do so. The aspects of that claim emphasized here, concerning the total lack of either notice or discernable standards for distinguishing between those school volunteers subject to Wis. Stat. §948.095 and those who are not, would have been obvious to one assessing a vagueness claim, as he was, and would have only strengthened the vagueness argument actually made.

Although the circuit court denied Kaster an opportunity to present evidence on this matter, his offer of proof established that Attorney Miller intended to preserve these issues and had no tactical or strategic reason for excluding them from Kaster's appeal (R114:19; App. 20). Any perceived defect in counsel's actions in raising them accordingly would constitute deficient performance rather than acts

pursuant to a reasoned appellate strategy.

The prejudice prong of that analysis also is met here given that each of the omitted errors would have resulted in reversal if timely and adequately raised. *See* Sections I-III, *supra*.

C. The "Sufficient Reason" Requirement Does Not Apply to Kaster's Sufficiency of the Evidence Claim

The state below asserted that Kaster must stand convicted of disorderly conduct, a crime he did not commit, simply because his attorney did not challenge that conviction on direct appeal. (R117:2-3, 4-5). This "finality uber alis" approach, however, is consistent with neither common sense, common justice, nor (not surprisingly) controlling authority.

Kaster's challenge to the sufficiency of the evidence on the disorderly conduct charge was and is based not only upon §974.06, but upon Wis. Stat. §973.13 as well.[6] "When a court imposes a sentence greater than that authorized by law, §973.13 voids the excess." *State v. Spaeth,* 206 Wis.2d 135, 556 N.W.2d 728, 736-37 (1996) (applying § 973.13 to sentence imposed upon conviction for OAR).

The "sufficient reason" requirement does not apply to claims under §973.13. In *State v. Flowers*, 221 Wis.2d 20, 586 N.W.2d 175, 176-77, 178-79 (Ct. App. 1998), this Court relied upon §973.13 to allow challenge to a faulty repeater enhancement despite the defendant's three prior post-conviction motions. This Court reasoned that the enhancer applies *only* if the state satisfies its burden of proof and that, "[i]f the State does not meet the proof requirements of [Wis. Stat.] §973.12(1), the trial court is *without authority* to sentence the defendant

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[6] Section 973.13 provides as follows:

> Excessive sentence, errors cured. In any case where the court imposes a maximum penalty in excess of that authorized by law, such excess shall be void and the sentence shall be valid only to the extent of the maximum term authorized by statute and shall stand commuted without further proceedings.

as a repeat offender." *Id.*, 586 N.W.2d at 179 (emphasis in original, citation omitted). This Court concluded that, "if a defendant is sentenced under a penalty enhancer and the State has either failed to prove the prior conviction or gain the defendant's admission for such facts, then §973.13 becomes applicable." *Id.*

> To adopt the State's argument would promote finality, but at the expense of justice. It would raise the specter of a defendant being incarcerated for a term (possibly years) in excess of that prescribed by law simply because he or she failed to raise the issue earlier. Such a result is in direct conflict with the explicit language of §973.13. The State is without authority to incarcerate individuals for a term longer than the maximum term authorized by law. Therefore, we conclude that the express statutory mandate in §973.13 to alleviate all maximum penalties imposed in excess of that prescribed by law applies to faulty repeater sentences and is not "trumped" by a procedural rule of exclusion.

Id.

In *State v. Hanson*, 244 Wis.2d 405, 628 N.W.2d 759, 763-64 (2001), the Supreme Court approved both the rationale and holding in *Flowers*, holding that "to allow the imposition of a criminal penalty where none is authorized by the legislature, simply on the basis of waiver, would ignore the dictate of §973.13." *Id.*, 628 N.W.2d at 764. *See also State v. Saunders*, 2002 WI 107, ¶7 n.8, 255 Wis.2d 589, 649 N.W.2d 263.

Because the evidence was insufficient to authorize the conviction and sentence for disorderly conduct, *see* Section IV, *supra*, the circuit court was without authority to impose sentence on that count. As in *Flowers*, therefore, the sentence on that count must be vacated under §973.13, even in the absence of a finding of "sufficient reason" for not having raised the issue previously.

D. "Sufficient reason" exists where, as here, the defendant did not know the basis for a claim and intentionally omit it from a prior post-conviction motion

Regardless whether prior counsel's failure to raise or adequately argue a claim constitutes "sufficient reason" in a particular case under *Escalona-Naranjo* and §974.06(4), that standard is satisfied where, as here, the defendant did not himself knowingly and intentionally omit the claim from a prior post-conviction motion.

Section 974.06(4) does not define "sufficient reason," nor has the Supreme Court. In assessing the scope of the "sufficient reason" standard, however, it is important to keep in mind that this standard, adopted from the Uniform Post-Conviction Procedures Act (1966), *see Escalona-Naranjo*, 517 N.W.2d at 160, was established long before the United States Supreme Court appended the restrictive "cause and prejudice" standard to the federal habeas statute. Indeed, the Commissioners' Comment to the Uniform Act states that the provision was intended to implement the relatively liberal standards for successive petitions controlling at the time the Uniform Act was approved:

> The Supreme Court has directed the lower federal courts to be liberal in entertaining successive habeas corpus petitions despite repetition of issues, *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). By adopting a similar permissiveness, this section will postpone the exhaustion of state remedies available to the applicant which *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) holds is required by statute for federal habeas corpus jurisdiction, 28 U.S.C. Sec. 2254. Thus, the adjudication of meritorious claims will increasingly be accomplished within the state court system.

11 U.L.A. 528 (West 1974).

Fay and *Sanders* reflected the position that criminal defendants should not be penalized by the defaults of their attorneys in which they themselves did not participate. *Sanders* directed the federal courts to

consider successive petitions on the merits unless: (1) the specific ground alleged was heard and determined on the merits on a prior application, or (2) the prisoner personally either deliberately withheld an issue previously or deliberately abandoned an issue previously raised. 373 U.S. at 15-19. *Fay* similarly held that federal habeas relief would not be denied on the basis of "procedural default" unless the inmate had "deliberately by-passed the orderly procedure of the state courts," 372 U.S. at 438, by personal waiver of the claim amounting to "'an intentional relinquishment or abandonment of a known right or privilege,'" *id.* at 439 (citation omitted).

Only years after the standards of *Fay* and *Sanders* were incorporated into Wisconsin law with the adoption of §974.06(4) did the United States Supreme Court replace those standards with the restrictive "cause and prejudice" standard for purposes of federal habeas. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). Construction of the "sufficient reason" standard in §974.06(4) thus must be made in light of the permissive standards of *Sanders* and *Fry*, not the preclusive standard of *Wainwright*. While barring the type of strategic withholding of claims condemned in *Escalona-Naranjo*, that section does not act to promote finality at the expense of justice. *Cf. Hayes v. State*, 46 Wis.2d 93, 175 N.W.2d 625, 631 (1970) ("It is more important to be able to settle a matter right with a little uncertainty than to settle it wrong irrevocably").[7] Rather, a petitioner's lack of knowledge or informed personal involvement in the failure previously to present an issue constitutes "sufficient reason" to permit the person claiming unlawful confinement to raise his or her claims under §974.06.

The Supreme Court's decision in *State v. Howard*, 211 Wis.2d 269, 564 N.W.2d 753 (1997), further supports this construction of the "sufficient reason" standard. In *Howard*, the Supreme Court addressed a challenge under §974.06 based upon *State v. Peete*, 185 Wis.2d 4, 517 N.W.2d 149 (1994). *Peete* had held that conviction for a dangerous

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[7] *Hayes* was overruled on other grounds in *State v. Taylor*, 60 Wis.2d 506, 210 N.W.2d 873, 882 (1973).

weapon enhancer under Wis. Stat. §939.63(1)(a), requires not merely simple possession of the weapon, but also proof that the defendant "possessed the weapon to facilitate commission of the predicate offense." 517 N.W.2d at 150; *see id.* at 153-54.

The *Howard* Court reaffirmed *Peete*, and further held that Howard's failure to raise his "nexus" claim on direct appeal did not bar relief under Wis. Stat. §974.06(4) and *Escalona-Naranjo*, 564 N.W.2d at 761-62. The Court distinguished *Escalona-Naranjo* on the grounds that Escalona-Naranjo had known the basis for his ineffective assistance of counsel claims at the time he failed to raise them on direct appeal. However, the Court deemed it "impractical to expect a defendant to present a legal argument until a higher authority adopts it." *Id.* at 762 (agreeing with court of appeals' conclusion).

The Supreme Court in *Howard* further emphasized Howard's actual ignorance of the legal basis for his claim at the time of the prior challenge to his conviction:

> Unlike the defendant in *Escalona-Naranjo*, Howard was not aware of the legal basis for his present motion at the time of his trial and sentencing. Nor was Howard aware of the nexus requirement at the time of his earlier postconviction motions and appeal.

Id. Thus, even though Howard technically had the same opportunity to raise the claim as did Peete before him, the Court held that Howard's case represented an example of "sufficient reason" under §974.06(4). *Id.*

This approach likewise is fully consistent with the Supreme Court's analysis in *Escalona-Naranjo*. The Court there was concerned with abuses caused by the strategic withholding of certain claims. The Court emphasized that it intended neither to "forego[] fairness for finality" nor to "abdicate [its] responsibility to protect federal constitutional rights." 517 N.W.2d at 164. The Court summarized its holding in language barring claims that were intentionally withheld from a prior motion while permitting those of which the defendant

previously had no knowledge:

> Section 974.06(4) was not designed so that a defendant, upon conviction, could raise some constitutional issues on appeal and strategically wait to raise other constitutional issues a few years later. Rather, the defendant should raise the constitutional issues *of which he or she is aware* as part of the original postconviction proceedings.

Id. (emphasis added).

As stated in Kaster's offer of proof below, Attorney Miller did not in fact advise Kaster of the possibility of raising any of the substantive claims identified in this motion at the time of his direct appeal, and Kaster did not in fact authorize him to withhold those claims on his direct appeal (R114:19; App. 20). Accordingly, Kaster meets the "sufficient reason" requirement of §974.06(4) and must be allowed to proceed with his claims.

CONCLUSION

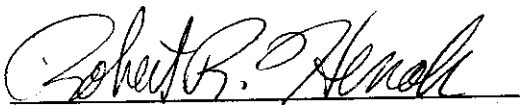
For these reasons, David Kaster respectfully asks that the Court reverse the order denying his post-conviction motion, dismiss the charge of disorderly conduct, vacate the judgment of conviction on Count 1, and order a new trial on that count.

Dated at Milwaukee, Wisconsin, July 28, 2005.

Respectfully submitted,

DAVID R. KASTER,
Defendant-Appellant

HENAK LAW OFFICE, S.C.



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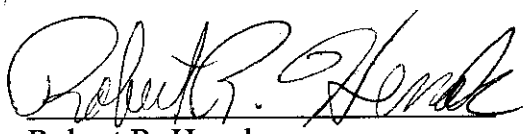
Kaster CA Brf1.wpd

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 brief produced with a proportional serif font. The length of this brief is 10,818 words.



Robert R. Henak

Brf cert.wpd

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2005AP001285
(Brown County Case No. 01-CF-138)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID R. KASTER,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT

Record No.	Description	App.
R107	Order denying Kaster's Motion pursuant to Wis. Stat. §974.06 (3/4/05)	1
R114	Transcript of post-conviction motion hearing (2/25/05)	2
R97	Decision of Court of Appeals in State v. David R. Kaster, Appeal No. 02-2352-CR (4/22/03)	36

STATE OF WISCONSIN : CIRCUIT COURT : BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

DAVID R. KASTER,

Defendant.

Case No. 01-CF-138
Hon. Mark A. Warpinski

FILED

MAR - 8 2005

CLERK OF COURTS
BROWN COUNTY, WI

ORDER

For the reasons stated on the record on February 25, 2005, that portion of Mr. Kaster's Motion for Post-Conviction Relief Pursuant to Wis. Stat. §974.06 seeking vacation of the conditions placed on Kaster's parole at the original sentencing is GRANTED.

For the reasons stated on the record on February 25, 2005, Mr. Kaster's Motion in all other regards is DENIED.

Dated this 8th day of March, 2005.

Hon. Mark A. Warpinski
Circuit Court Judge

MAR - 8 2005

STATE OF WISCONSIN CIRCUIT COURT COUNTY OF BROWN

BRANCH II

STATE OF WISCONSIN,)
)
Plaintiff,)
)
Vs.) Case No. 01 CF 138
)
DAVID R. KASTER,)
)
Defendant.)

HONORABLE MARK A. WARPINSKI
JUDGE PRESIDING
February 25, 2005
Postconviction Motion Hearing

APPEARANCES:

DANA JOHNSON, Assistant District Attorney
Law Enforcement Center
300 East Walnut Street, P.O. Box 23600
Green Bay, Wisconsin 54305-3600
Appearing on behalf of the Plaintiff.

ROBERT R. HENAK, Attorney at Law
1223 N. Prospect Avenue
Milwaukee, Wisconsin 43202
Appearing on behalf of the Defendant.

DAVID R. KASTER, the defendant, appearing In-person.

Carol H. Thomas, RPR, Official Court Reporter

8:41:53

TRANSCRIPT OF PROCEEDINGS

10:41:14 THE COURT: This is State of Wisconsin versus David Kaster, 01 CM 138. State appears by Assistant District Attorney Dana Johnson. The defendant appears in-person and with his attorney, Robert Henak. Is it Henak?

MR. HENAK: Henak, yes.

10:41:27 THE WITNESS: We're here on postconviction motions pursuant to 974.06. Mr. Henak, if I understand it correctly, you have five bases upon which I should grant relief and a new trial.

MR. HENAK: Well, yeah, one is combined, the right to a jury trial, right to -- right to a jury verdict; right to present a defense is actually two but it's combined in my motion.

THE COURT: The, the first as I understand it was that Count 1 was not fully tried because the jury was not properly instructed or you weren't given an opportunity to present the defense on that issue. Number two, is that Count 1 should be -- there should be another trial or it should be dismissed because the statute is unconstitutionally vague.

MR. HENAK: As applied to volunteers, yes.

THE COURT: In this case.

MR. HENAK: In this case.

10:42:24 THE COURT: That the disorderly conduct
10:42:29 ought to be vacated, the conviction; that number four,
10:42:32 the conditions of sentence should be deleted; and number
10:42:35 five, ineffective assistance of counsel with respect to
10:42:38 trial counsel and appellate counsel.
10:42:41 MR. HENAK: Actually technically it's
10:42:42 postconviction counsel and yes, that's the fifth one
10:42:44 that I forgot. It's a contingent ineffectiveness claim
10:42:50 basically to protect Mr. Kaster's rights if the State
10:42:53 should ever argue that these issues were waived. And
10:42:58 the appellate counsel issue comes in for the sufficient
10:43:02 reason and that's why we need to have Mr. Miller testify
10:43:06 on that.
10:43:06 THE COURT: Where is he?
10:43:08 MR. HENAK: I believe that I was authorized
10:43:10 to have him testify by telephone.
10:43:12 THE COURT: By me?
10:43:16 MR. HENAK: When the case was scheduled I
10:43:17 had requested that.
10:43:20 THE COURT: Well, okay, let's.
10:43:22 MR. HENAK: I am sorry.
10:43:22 THE COURT: Let's take care of a couple of
10:43:24 things here. First of all, with respect to the
10:43:26 conditions imposed upon sentence regarding Mr. Kaster's
0:43:33 release from prison. I agree with you, I can't impose

10:43:38 those conditions. Under the old law, that's improper.
10:43:41 Under the new law, it's our obligation. So, I'm going
10:43:46 to vacate all of those conditions. I think that's up to
10:43:50 the parole board to determine not this Court. So with
10:43:53 respect to that issue, I agree.
10:43:55 Now, with respect to the disorderly conduct,
10:44:01 that's a legal issue as I see it. You're asking me to
10:44:04 interpret the facts that the jury -- that were presented
10:44:09 and the determination made by the jury.
10:44:11 MR. HENAK: Yes. Viewing the facts in a
10:44:14 light most favorable to the state, that no rational jury
10:44:19 could find the way that it did. And if I could just
10:44:22 make sure the Court did receive my reply memorandum.
10:44:26 THE COURT: Yes. Well, go ahead. Take a
10:44:29 few minutes to tell me about the disorderly conduct, why
10:44:31 I should set that aside.
10:44:34 MR. HENAK: Okay. Well, the requirements
10:44:36 under the *Schwebke* decision the Supreme Court recognized
10:44:40 that personal annoyance in a -- for instance a private
10:44:45 circumstance like was testified to by Miss Brittain in
10:44:48 this case is not alone sufficient to justify a
10:44:51 conviction for disorderly conduct. There has to be
10:44:55 something more, something that creates a real
10:44:57 possibility that there would be a public disturbance.
0:45:00 You don't have to actually create a public disturbance

10:45:05 obviously, but there has to be a real possibility of it.
10:45:07 What the state argues, is that you have that possibility
10:45:09 one because Miss Brittain was concerned about her father
10:45:12 doing something irrational; and two, because if it was
10:45:18 known that Mr. Kaster had done this, then people would
10:45:22 disapprove of it. The state refers to it as a
10:45:26 disturbance. I believe more accurately it would be
10:45:29 people would disapprove. But under the law you cannot
10:45:32 criminalize disapproval or doing something that may be
10:45:37 offensive. There has to be something more than that and
10:45:40 I think that the decision in *Schwebke* shows what kind of
10:45:43 things there has to be to justify a criminal conviction
10:45:47 as opposed to just a moral objection or community
10:45:53 disagreement.

10:45:54 And in *Schwebke* as the Court may recall,
10:45:58 that involved an individual who sent anonymous letters
10:46:03 to a woman and I believe it was her sister and another
10:46:07 friend over a period of time. Basically it was viewed
10:46:10 as stalking behavior and I think reasonably so. The
10:46:14 kind of thing that even though it is private in the
10:46:18 sense that you send a letter to one individual, it's
10:46:20 not, you know, a reporter shouting at police officers
10:46:28 and insisting that he has a right to be some place.
10:46:32 It's private but it had a public result because the
10:46:40 woman's friends all became concerned about what is going

10:46:44 to happen, what is this guy going to do next.
10:46:48 Understandable concern for her safety and what might
10:46:52 actually happen in the future.
10:46:54 The gentleman friend, he had received
10:46:58 letters suggesting that he was gay and that had actually
10:47:02 created a problem in his -- where he worked in a fire
10:47:06 station. Because other people started kidding him about
10:47:12 that and treating him differently because of that. Not
10:47:17 just, you know, disapproving of the letter but affecting
10:47:22 him. There is nothing similar to that in this
10:47:26 particular case.
10:47:26 THE COURT: Mr. Johnson, what do you say to
0:47:29 that?
10:47:29 MR. JOHNSON: Well, number one the first
10:47:31 thing I want to indicate to the Court is, I don't think
10:47:33 you have to look at the disorderly conduct charge and
10:47:37 decide that substantively. Because my number one
10:47:41 position is all these issues under 974.06 had been
10:47:46 previously decided or if not, should have been decided
10:47:49 by a previous motion.
10:47:50 THE COURT: Mr. Henak, why wasn't this
10:47:52 brought up previously? Because didn't you have a
10:47:55 postconviction -- didn't your client have one post --
10:47:58 MR. HENAK: Yeah.
0:48:02 THE COURT: Why wasn't it bought up at that

time?

MR. HENAK: My understanding from Mr. Miller and from Mr. Appel is that they believed that the disorderly conduct was concurrent. That's one of the reasons.

THE COURT: He already got credit for time served?

MR. HENAK: He got credit for time served but that 52 days did not then apply to the nine year sentence on the other counts. So it wasn't concurrent it was consecutive. And I attached the PRC report, Program Review Committee report which indicates that he in fact didn't get -- did get credit for that.

I think there also was probably an understanding that this is only a misdemeanor and you want to focus on the felonies.

THE COURT: So you think that was ineffective of counsel to do that?

MR. HENAK: No, no. I'm withdrawing any suggestion about that.

THE COURT: Then it's something that should have been brought up and wasn't?

MR. HENAK: And that it could have been brought up, yes.

THE COURT: And wasn't?

MR. HENAK: Right.

THE COURT: And you don't claim the failure to do it was ineffective assistance of counsel?

MR. HENAK: No, no. My basis on this is under 973.13, the *Flowers* decision, that you cannot impose a sentence on someone for an act which is -- you can't impose an unauthorized sentence. Under *Flowers* the Court held that 973.13 applied when the state failed to prove an enhancer provision.

THE COURT: But now in this case my recollection and maybe you can correct me if I'm wrong, is that Mr. Appel made an argument about this disorderly conduct and the fact that it was in a locker room and there wasn't anyone else around. I thought I had heard something about that and that that's something the jury took into consideration in making this determination.

MR. HENAK: I am sure that they probably did.

THE COURT: Well, if they did, then it seems to me that that's a fact issue, that unless you can satisfy me that there is no fact that would support this jury finding, I have to -- I have to pay some respect to that jury verdict.

MR. HENAK: Oh, definitely, definitely you do. And my argument is under the *Schwebke* decision and

10:50:12 the requirements for a finding of guilt under disorderly
10:50:14 conduct, the facts even viewed most favorably to the
10:50:19 state, you know, taking everything that they say as
10:50:21 true, a reasonable jury could not find guilt beyond a
10:50:24 reasonable doubt.
10:50:24 THE COURT: Well, but these arguments were
10:50:27 advanced to the jury, and I'm not going to set aside a
10:50:30 jury verdict on that issue. I'm satisfied and I'm
10:50:34 willing to rely on the jury verdict in this matter that
10:50:37 this constitutes disorderly conduct. So I'm going to
10:50:41 deny your motion on count -- or on issue number three.
10:50:47 Now, with respect to ineffective assistance
10:50:51 of counsel for Mr. Appel. I looked at your brief in
10:50:57 this matter and I'm at a loss to understand why I should
10:51:02 even be considering that. Because you say in your brief
10:51:08 that this issue of arguing whether the statute is
10:51:16 constitutionally vague as applied to the defendant,
10:51:20 didn't ripen until after the Court of Appeals had made
10:51:23 that determination.
10:51:25 Well, if it didn't ripen until that time,
10:51:27 how can I except Mr. Appel to make that argument? He
10:51:31 clearly made arguments about whether a volunteer should
10:51:34 be covered on this; he made arguments with respect to
10:51:40 the status of Mr. Kaster as a volunteer; and that this
10:51:44 conduct that involved the victims here occurred outside

10:51:49 1 the coaching season. And I specifically remember that
10:51:52 2 there was testimony in this record that addressed the
10:51:55 3 fact that Mr. Kaster had an office at the school, that
10:51:59 4 he had a continuing obligation to meet with the, the
10:52:04 5 swimmers; that he was in contact with the athletic
10:52:08 6 director with respect to issues of supplies being
10:52:11 7 purchased for the next budget year. And this was an on
10:52:14 8 going thing that there were open swims that he came to
10:52:17 9 the school to supervise and to observe on behalf of the
10:52:20 10 swimmers and the jury heard all of that. And Mr. Appel
10:52:27 11 argued even at the jury instruction conference that I
10:52:30 12 ought not give the, really the enhancer of it being a
10:52:33 13 public school employee or volunteer or official.
10:52:37 14 Now, I'm at a loss to understand what's
10:52:41 15 ineffective then about the assistance that Mr. Appel
10:52:44 16 provided.
10:52:45 17 MR. HENAK: The reason why this is presented
10:52:48 18 is because I have been doing appellate work for 17 years
10:52:51 19 in Wisconsin and it never ceases to amaze me the
10:52:54 20 creativity of appellate counsel for the state. There
10:52:58 21 have been several case in which I believed as the Court
10:53:01 22 does here, there was no possibility of ineffectiveness
10:53:04 23 of trial counsel. But the appellate counsel for the
10:53:08 24 state have argued nonetheless that an issue was waived
0:53:10 25 and have convinced the Court of Appeals to hold their

10:53:14 way.

10:53:15 THE COURT: Now, let me ask this question:
10:53:18 Why wasn't this brought up at the first go round of
10:53:21 motions after verdict under 974.06?

10:53:24 MR. HENAK: The first postconviction
10:53:28 motions. First of all ineffectiveness has to be brought
10:53:32 up in a postconviction motion. It can't just be brought
10:53:35 up for the first time on appeal. Postconviction motions
10:53:38 at the original direct appeal, were filed by Mr. Appel.
10:53:41 He obviously could not allege his own effectiveness. So
10:53:45 under, I think it's *Henthorne* and I can't remember the
10:53:48 other, other cases, the Court of Appeals has clearly
10:53:51 held that when the same attorney represents a defendant
10:53:55 both at trial and on appeal for postconviction, that is
10:54:00 sufficient reason to then come back later and raise the
10:54:03 ineffectiveness claim.

10:54:05 THE COURT: Mr. Johnson.

10:54:06 MR. JOHNSON: From my view, looks like
10:54:09 they're saying that Mr. Appel was somewhat ineffective
10:54:13 in not preserving some issues that they want to argue
10:54:16 now. I think he preserved all the issues for appeal,
10:54:19 and the appellate attorney, Steve Miller, had those
10:54:23 available. So I don't understand the argument that Mr.
10:54:25 Appel is ineffective.

10:54:28 THE COURT: And I agree with that. I think

10:54:29 in order for me to get into a quote *Machner* hearing on
10:54:34 ineffective assistance of counsel, I ought to have some
10:54:39 showing that there is a basis for going ahead. And I
10:54:41 don't see it from the offerings that have been made here
10:54:44 and the arguments that I listened to, that Mr. Appel's
10:54:47 assistance would have been in any way ineffective and
10:54:52 I'm not going to entertain that motion for those
10:54:54 reasons.

10:54:55 I think that under 974.06 you have to make
10:54:58 some showing other than just conclusory allegations that
10:55:03 there have been ineffective assistance of counsel and I
10:55:07 haven't seen it. I haven't seen any factual basis upon
10:55:09 which I could rely that would authorize me or compel me
10:55:11 to go ahead on that issue.

10:55:12 MR. HENAK: If I could get some
10:55:13 qualification on that, Your Honor. Are you saying my
10:55:16 allegations that he had no, you know, legitimate,
10:55:20 strategic or tactical reasons for waiving any of these
10:55:24 issues is insufficient; or are you saying as the state
10:55:27 has said, that all the issues that we seek to raise have
10:55:30 been preserved?

10:55:31 THE COURT: I think so. I think they have
10:55:33 been preserved and as I listen further into your brief,
10:55:36 you're really saying where you think the fall down
10:55:38 occurred was at the appellate counsel level.

10:55:42 MR. HENAK: That probably is accurate, but
10:55:43 again, I have to submit these.
10:55:47 THE COURT: You do what you have to do.
10:55:48 MR. HENAK: I have to submit these and since
10:55:50 the state has made now a binding concession, I do not
10:55:53 have to be concerned about the appellate counsel coming
10:55:57 back and whipsawing me. So I appreciate that and I
10:56:01 thank the Court for that and in light of that I have no
10:56:03 reason for Mr. Appel to remain. He can --
10:56:07 THE COURT: Mr. Appel, you can leave if you
10:56:09 like. All right.
10:56:10 MR. APPEL: Okay. Thank you.
10:56:12 THE COURT: Now, with respect to ineffective
10:56:14 assistance of counsel for appellate counsel, it's my
10:56:19 understanding that based upon what you have written Mr.
10:56:24 Henak, that Attorney Miller did raise the
10:56:30 constitutional, the constitutionally vague aspect of
10:56:33 this, but apparently you think he didn't pursue it as
10:56:37 strenuously as it should have been.
10:56:39 MR. HENAK: The issue again here is: Yes,
10:56:42 he raised it -- and by the way I have provided counsel
10:56:45 for the state copies of his opening brief to the Court
10:56:51 of Appeals and also the petition for review. I think to
10:56:54 make the record complete here, I would submit those to
10:56:58 the Court as well. It's my understanding that Mr.

10:57:00 Johnson does not object to those being received.
10:57:03 MR. JOHNSON: That is correct.
10:57:04 THE COURT: Do you want to have these marked
10:57:06 as exhibits for purposes of today's proceedings? What
10:57:54 page would you refer me to?
10:57:56 MR. HENAK: Okay. Which is that, if you
10:57:59 could tell me which exhibit.
10:58:00 THE COURT: Exhibit 2 is the defendant's
10:58:02 brief and appendix in the Court of Appeals.
10:58:06 MR. HENAK: Exhibit 1 would be the petition
10:58:08 for review. The petition for review would be on issues
10:58:13 stated on page three. And he also argued it on pages 16
10:58:18 and 17.
10:58:26 THE COURT: So on issue three or on page
10:58:30 three of the petition for review to the Supreme Court?
10:58:33 MR. HENAK: Yes.
10:58:34 THE COURT: It says that number three is the
10:58:36 broad definition of school staff ultimately endorsed by
10:58:41 the trial court and Court of Appeals unconstitutional
10:58:44 result for failing to give notice of liability and
10:58:46 proper standards for adjudication.
10:58:48 MR. HENAK: Yes.
10:58:48 THE COURT: Is that the vagueness issue that
10:58:50 you seek to address?
10:58:51 MR. HENAK: Yes.

10:58:51 THE COURT: And then on pages.
10:58:53 MR. HENAK: 16 and 17 I believe it is. Of
10:58:56 the -- of the same petition he argues it.
10:58:59 THE WITNESS: All right. And how about at
10:59:01 the Appellate Court?
10:59:02 MR. HENAK: The Appellate Court, it's page
10:59:06 17.
10:59:18 THE COURT: And that's also vague and
10:59:22 ambiguous?
10:59:23 MR. HENAK: Well, the ambiguousness I think
10:59:26 is part of the vagueness; but it's primarily that one
10:59:29 paragraph dealing with the vagueness argument.
10:59:31 THE COURT: Tell me this then, Mr. Henak:
10:59:34 How is it that you think I can find, if there has been
10:59:36 ineffective assistance of appellate counsel, where the
10:59:41 appellate counsel raises it to the Court of Appeals, the
10:59:47 Court of Appeals rejects it, he raises it again on
10:59:49 petition for review to the Supreme Court and the Supreme
10:59:52 Court decides not to accept the case? What's
10:59:55 ineffective about that?
10:59:57 MR. HENAK: Well, first of all there are two
10:59:59 separate things. One, the Court of Appeals did not
11:00:01 reject the vagueness as applied argument. They only
11:00:06 rejected what they perceive to be a facial vagueness.
11:00:09 That is that you can't -- that it has to be vague in all

11:00:12 of its applications, not as applied, even though I
11:00:18 believe that Mr. Miller did raise the vagueness as
11:00:22 applied. The Court of Appeals did not decide it, that's
11:00:25 one issue.
11:00:26 THE COURT: But that's not his fault.
11:00:28 MR. HENAK: But that is --
11:00:28 THE COURT: How could he be ineffective if
11:00:31 the Court of Appeals presented with those options
11:00:33 chooses to go a different route?
11:00:35 MR. HENAK: I am addressing two separate
11:00:36 things but we have to keep them separate. First one is
11:00:39 we have sufficient reason to raise it now because the
1:00:43 Court of Appeals never decided it, that's number one.
11:00:45 Number two, ineffectiveness of appellate counsel would
11:00:49 provide sufficient reason. Again, this is a case in
11:00:52 which I am concerned that -- although I believe that
11:00:56 he's satisfactorily raised it, I am concerned that some
11:00:59 creative attorney from the attorney general's office is
11:01:03 going to say that, no, he didn't adequately raise it
11:01:05 that he should have maybe, you know, briefed it several
11:01:09 more pages before we can actually challenge that in
11:01:13 federal court.
11:01:14 I do not want to have to get to federal
11:01:18 court on this case and have some creative attorney
1:01:22 general come in and say we should have done something

more.

THE COURT: Now, Mr. Henak, what you are in effect asking me to do is second guess the United States Supreme Court. Because really, they were presented with this argument about whether it is constitutionally vague as applied to your client and they refused to hear the matter.

And now, you're asking me to come back and to revisit this issue that was presented to the Court of Appeals, and not followed by whatever logic they use, a request for a review before the Supreme Court was made and denied and then you bring it to me and say the Court of Appeals didn't do their job, in effect. I don't think this is the place where that remedy is to be granted. I think if you think you're entitled to relief, it should have been to the Supreme Court and they -- they chose not to rehear or to review the matter.

MR. HENAK: But I believe the Court is confusing the, the -- both the purpose and the result of a petition for review and denial of petition for review. A petition for review denial has absolutely no presidential value, none. It's merely saying we're not going to hear it. It's not saying we think the Court of Appeals is right; it's not saying we think the Court of

11:02:42 Appeals is wrong. Same thing as denied in the United
11:02:45 States Supreme Court. It has absolutely no presidential
11:02:48 value. The question then is: What is the affect of the
11:02:50 Court of Appeals decision? And when we look at
11:02:54 974.06(4), which is what the state is arguing should bar
11:02:59 relief here, that only applies where the issue was
11:03:02 actually decided. The issue was not decided here in a
11:03:05 Court of Appeals and therefore it is still open for
11:03:08 decision.
11:03:09 THE COURT: That is a question of semantics,
11:03:11 Mr. Henak. Because the issue was raised there and the
11:03:13 issue was decided by the Court of Appeals. You just
11:03:16 don't like the decision. And a recourse was made
11:03:19 available to you to resolve this. I can't step in now
11:03:23 and readjust the Court of Appeal's decision. And I'm
11:03:27 not going to. I don't think that there has been any
11:03:30 showing of ineffective assistance of counsel for
11:03:33 appellate counsel that would compel me to hold an
11:03:36 evidentiary hearing and I think you have a burden to
11:03:39 show something more than just conclusory allegations
11:03:43 about this and I'm satisfied that you haven't presented
11:03:45 any facts that would support the right to have such a
11:03:47 hearing.
11:03:48 MR. HENAK: Could I provide an oral offer of
1:03:50 proof then of what Mr. Miller would testify to, to make

11:03:54 1 the record absolutely clear?
11:03:56 2 THE COURT: Go ahead.
11:03:56 3 MR. HENAK: If called to testify, Mr. Miller
11:03:58 4 would testify that number one he did raise the vagueness
11:04:03 5 argument in the Court of Appeals.
11:04:06 6 Number two, that he intended to fully and
11:04:07 7 adequately preserve the issue of vagueness in the Court
11:04:11 8 of Appeals, both I believe facially and as applied, as
11:04:16 9 provided or as argued in my postconviction motion; that
11:04:21 10 he had no strategic or tactical reason not to fully
11:04:25 11 present that issue in the Court of Appeals; and that he
11:04:28 12 did not intend to waive anything by the way that he
11:04:32 13 presented it in the Court of Appeals.
11:04:34 14 Number two, that he did not at any time
11:04:39 15 speak with Mr. Kaster and get a, you know, authorization
11:04:45 16 from him to somehow inadequately present the issue to
11:04:50 17 the Court of Appeals. If it was inadequate it's just
11:04:54 18 because -- it was not intentional that it would be
11:04:57 19 inadequate.
11:04:57 20 THE COURT: See I don't think it's
11:04:59 21 inadequate. He briefed it, he raised it, he briefed it.
11:05:03 22 The Court of Appeals decide to reject it. How much work
11:05:07 23 is a person supposed to do? You can't say, well, they
11:05:10 24 have to do enough for me to win because there is no
11:05:13 25 guarantee of a win.

11:05:14 I'm going to find that there's been no showing of ineffective assistance of counsel. There's been no factual basis upon which I should conduct a hearing under 974.06 proceeding in this matter. Because I find that this is all a conclusory allegation and not supported by the facts.

11:05:31 MR. HENAK: Well, if I could get clarification. Again, the Court appears to be confusing two things: Conclusory allegations go to exactly what you're presenting and how you're presenting it not why you're presenting. And it seems to me what the Court is actually saying is there wasn't in fact any ineffectiveness because Mr. Miller in fact presented this adequately.

11:05:51 THE COURT: No, I'm not saying that at all, Mr. Henak. All I'm saying is that as I understand it, under a 974.06 motion, if all you present are conclusory allegations, I don't have to conduct an evidentiary hearing. And that's what I'm finding and nothing more. And nothing more. So that I'm not going to hold a hearing on ineffective assistance of counsel in this matter. Now, having said that --

11:06:17 MR. JOHNSON: Judge, could I say one thing?

11:06:18 THE COURT: Go ahead.

1:06:20 MR. JOHNSON: I agree with the Court's

11:06:21 decision on that and also I want to place on the record
11:06:24 just so it's noted that I do disagree with the defense
11:06:28 position that that issue was facially decided on
11:06:34 constitutionality of the statute, but not as applied.
11:06:38 Because I don't know how much more clear the Court of
11:06:41 Appeals could be that the statute on space is, is
11:06:44 constitutional. Then they also went on in the state
11:06:47 versus Kaster decision, 264 Wis.2d, 751 to go on to
11:06:52 indicate that the jury instruction you gave as applied
11:06:55 to the facts in this case was sufficient. They went on
11:06:58 to say the standard jury instruction, definition of
11:07:00 school staff, the instruction which adequately covers
11:07:05 the law applicable to the facts, we would not find error
11:07:08 by the trial court. The Wisconsin Jury Instructions,
11:07:10 the one you gave, the 2139 adequately instructed the
11:07:15 jury.

11:07:15 Finally we conclude evidence at the trial
11:07:17 was sufficient to allow the jury to conclude that Kaster
11:07:20 was providing services to the school or school board
11:07:22 when he committed the March 14th assault.

11:07:24 So not only facially looked at the statute,
11:07:27 they looked at how the jury instruction was used here
11:07:29 and applied to the facts and found this jury could
11:07:32 factually find he did commit that assault on March 14th.
1:07:35 So I disagree with that position.

11:07:37 THE COURT: Well, I've denied the request
11:07:40 for an evidentiary hearing because I think that you all
11:07:44 -- all that has been presented are conclusory
11:07:46 allegations and I'm satisfied for the reasons that I
11:07:49 stated and I'll also adopt the argument advanced by the
11:07:52 state as part of the reasoning for the purposes of that
11:07:55 denial.
11:07:56 That would leave us then, it would seem to
11:07:59 me, with the first two arguments that you advance, Mr.
11:08:07 Henak, were that this case was not fully tried because
11:08:11 the jury was not properly instructed or you were not
11:08:13 given an opportunity or your client was not given an
1:08:16 opportunity to provide a defense on those issues. But I
11:08:19 think the Court of Appeals decision resolves that. As
11:08:23 much as your client doesn't want that to be the case, I
11:08:27 think it has been resolved. The Court has found that
11:08:31 that jury instruction was proper, and that your client
11:08:37 vigorously defended that through Mr. Appel. Now what am
11:08:43 I missing on that, Mr. Henak?
11:08:45 MR. HENAK: What I believe the Court is
11:08:47 missing is that there was no argument on the direct
11:08:55 appeal because the defense did not then exist. That
11:08:58 even a volunteer has to be providing services at the
11:09:01 time of the alleged assault. That just being a
1:09:04 volunteer at some point, or an intermittent volunteer is

not enough for conviction. The Court of Appeals said there had to be evidence that he was providing services to the school on March 14th of 1999. The Court did not address because it wasn't presented to it, because the lawyers didn't know that they should have presented it.

THE COURT: Present what?

MR. HENAK: The -- okay, what the Court of Appeals -- or what the defense attorneys argued at trial in this case and on appeal, was that the statute does not apply to volunteers. You have to be under contract or be an employee. So there's that dichotomy. If you're a volunteer you're innocent; if you're an employee, you're guilty.

THE COURT: That's not the way this case unfolded before the jury, not at all. The way it unfolded before the jury is that Mr. Appel argued that he wasn't providing services at the time, because he wasn't employed at the time. He clearly, he clearly made that argument.

Now, are you saying that because -- well, unless I was at a different trial in this case, it's my recollection that Mr. Appel argued that a volunteer couldn't be providing services if, if it was -- because there was that issue of -- wasn't it that the word volunteer was taken out of the statute?

11:10:31 MR. HENAK: Yes.

11:10:31 THE COURT: In the draft, and I think Mr. Appel brought that to the Court's attention when we had the jury instruction conference in this matter. And then I remember that, that we spent a considerable amount of time looking at contract dates, and looking at when the, the swimmers were in season and all the rest of that to determine whether he was actually providing services at the time this incident occurred.

Now, why isn't that a defense based on the way the matter was presented then and the way that the Court of Appeals determined the outcome of this case now?

MR. HENAK: The way it was presented then and again, the distinction at trial made by the defense attorneys in their proffers of jury instructions, was that you are not providing services unless you were either under contract or an employee. The Court rejected that.

The defense attorney then proffered an instruction saying that if you are only a volunteer providing services, you are not providing services to the school. The Court rejected that. There was no intermittent -- you know, intermediate argument that some volunteers are covered and some aren't. The way

11:11:45 1 the issue was presented in the Court of Appeals and you
11:11:47 2 can see that from the Court of Appeals brief by Mr.
11:11:50 3 Miller, is that this Court erred in refusing the defense
11:11:56 4 instructions. That is, not limiting it to those who are
11:11:59 5 employed or providing services under a contract. The
11:12:05 6 Court of Appeals rejected that. And it only rejected
11:12:08 7 that, it didn't reject any intermediate ground. But in
11:12:12 8 rejecting that, the Court said that since you could find
11:12:16 9 that Mr. Kaster was providing services on March 14th,
11:12:21 10 even if he wasn't under contract, then he was guilty or
11:12:26 11 a jury could find him guilty.
11:12:29 12 The issue here is not whether he was under
1:12:31 13 contract, whether he wasn't under contract whether a
11:12:34 14 volunteer is covered. The Court of Appeals has decided
11:12:37 15 that, I concede that. The question is: Which
11:12:39 16 volunteers are covered. And the Court of Appeals, what
11:12:42 17 it decided, was that if you are providing services at
11:12:47 18 the time that you commit the offense, then it's covered.
11:12:51 19 THE COURT: Regardless of your status.
11:12:53 20 MR. HENAK: Right. Regardless of whether
11:12:55 21 you're a volunteer or whether you're under contract. I
11:12:58 22 think the difference between a volunteer and under
11:13:01 23 contract is when you're under contract you're providing
11:13:03 24 services the entire time you're under contract. When
1:13:06 25 you're an employee, you're providing services the entire

11:13:09 1 time you're an employee. So it doesn't matter whether
11:13:11 2 the sexual assault takes place at your house at 1:00 in
11:13:14 3 the morning while you are watching television like here
11:13:16 4 or whether it was at school while you're actually
11:13:18 5 teaching a class.
11:13:19 6 When you're talking volunteers though,
11:13:23 7 intermittent volunteers are not constantly providing
11:13:26 8 services to the school. They provide services to the
11:13:28 9 school when they're actually providing services.
11:13:31 10 For instance, I help out with a, a middle
11:13:34 11 school play. I helped with the stage crew several
11:13:39 12 years. So from November to February three nights a week
1:13:43 13 I'm there helping the kids, you know, deal with that.
11:13:45 14 If I sexually assaulted someone while I was helping,
11:13:49 15 then I would be guilty of this offense.
11:13:52 16 However, if I sexually assaulted somebody
11:13:54 17 now, you know, am I covered or not? I think the Court
11:14:00 18 of Appeals says no, I'm not covered because I am not
11:14:03 19 providing services at the time of the alleged contact.
11:14:06 20 And the reason why this matters here, is because Mr.
11:14:10 21 Johnson, I believe admitted in his closing argument,
11:14:15 22 that it doesn't really matter whether he's under
11:14:18 23 contract or not because we have all of these other
11:14:18 24 intermittent periods after, I guess it was February
1:14:22 25 20th, whenever it was, when the boys' season closed, in

11:14:27 which Mr. Kaster provided services.

11:14:29 But there was no allegation anywhere that he
11:14:32 was actually providing services on the night of March
11:14:35 14th, 1999.

11:14:36 THE COURT: That was argued -- but that was
11:14:38 argued to the jury by Mr. --

11:14:40 MR. HENAK: It was argued to the jury but
11:14:41 they did not have a jury instruction that they had to
11:14:44 find that. They had a jury instruction merely saying in
11:14:47 broad terms that if you're providing services then you
11:14:52 can be convicted. And Mr. Johnson took very good
11:14:55 advantage of that in his closing arguments, saying it
1:14:59 doesn't have to be the exact time because he's providing
11:15:02 services at these other times.

11:15:03 So the jury was left to believe inaccurately
11:15:07 in light of the Court of Appeals decision, that they
11:15:10 could convict Mr. Kaster even if he wasn't actually
11:15:13 providing services on the date and the time that he was
11:15:16 allegedly touched Miss Bienash and that's why it's a
11:15:19 problem.

11:15:20 THE COURT: Mr. Johnson.

11:15:20 MR. JOHNSON: Here's what I just heard:
11:15:22 That the jury instruction you gave was not sufficient;
11:15:26 the Court of Appeals says it was. And then there's this
1:15:30 argument that goes on that only if the -- the defendant

in this case was actually providing services to the school at the time of the alleged assault could be found guilty; the Court of Appeals decided that as well saying, we conclude the evidence at that trial was sufficient to allow the jury to conclude that Kaster was providing services to the school or school board when he committed the March 14th assault.

Both those issues were decided, your instruction was the right instruction, the standard instruction; and the jury could find that and they did. So I don't, he's asking that they should have been given a different jury instruction, but the Court of Appeals said you gave the right -- correct one and said the jury could find that there was sufficient evidence to find that.

MR. HENAK: If I could reply.

THE COURT: Go ahead.

MR. HENAK: Number one, the Court of Appeals was never asked to decide whether the jury instruction was inaccurate in light of its other finding that you have to have actually providing services at the time of the offense. They were not asked to decide that. They did not decide that. What they were asked to decide is whether a volunteer is covered or not. They said under the statute a volunteer is covered under these

11:16:45 circumstances. They weren't asked whether the
11:16:46 particular jury instruction was inaccurate in any other
11:16:52 way.
11:16:52 THE COURT: But how could it be inaccurate
11:16:56 if the Court of Appeals found that there were sufficient
11:16:58 facts presented in this record to allow the jury to find
11:17:01 that he was providing services on the 14th, if they said
11:17:04 that the jury instruction covered all manner of
11:17:07 relationship that Mr. Kaster had with the Ashwaubenon
11:17:10 School District at the time that this occurred? What
11:17:13 else would you instruct that jury under those
11:17:17 circumstances?
1:17:18 MR. HENAK: The requirement, the element
11:17:21 that he had to be providing services at the time of the
11:17:26 offense. Not some general time frame, you know, before
11:17:31 or after the offense but at the time of the offense that
11:17:36 nexus.
11:17:36 THE COURT: They found, Mr. Henak, that he
11:17:38 was providing services at the time of this offense.
MR. HENAK: No.
11:17:39 THE WITNESS: Because that was the question
11:17:41 that was asked of the jury: Was he, they were
11:17:45 instructed on that matter and the Court of Appeals has
11:17:49 already decided that and now you're saying that the jury
1:17:52 should have been instructed that you, ladies and

11:17:56 gentlemen of the jury, if you find that he wasn't
11:17:57 actually under contract at the time but was providing
11:18:00 services on the date of the incident can find him
11:18:03 guilty; but if in fact you find that he wasn't under
11:18:07 contract and was a volunteer, under those circumstances
11:18:11 you would have to find that on specifically the day,
11:18:15 March 14th, 1999, that he was in fact providing services
11:18:20 on that date.
11:18:21 The jury was presented with the argument
11:18:24 that Mr. Kaster, really, I think never left the service
11:18:32 of the high school because he was there all the time
11:18:36 with open swims and monitoring all of this and watching
1:18:40 out how everybody was doing and ordering up supplies and
11:18:44 all of that. I think this jury could reasonably have
11:18:46 found that he never, ever left even though his contract
11:18:49 was for a specified time. The athletic director defined
11:18:54 that Mr. Kaster was required to provide budget
11:18:59 information which was outside the actual contract
11:19:02 period. That he was afforded -- I think he even had
11:19:06 keys to the school so he could get in and open up the
11:19:08 pool when he wanted to have open swims and all the rest
11:19:11 of that sort of stuff. So that entrusted with all those
11:19:15 things, a jury found that he was providing services on
11:19:18 that date.
1:19:18 MR. HENAK: Your Honor, if I could, that's,

11:19:20 1 that's inaccurate. The jury found what the Court
11:19:23 2 instructed them to find which was that he was providing
11:19:27 3 services. Nowhere in the instructions was the Court --
11:19:31 4 was the jury required to find that he was particularly
11:19:34 5 providing services on that date and the Court of Appeals
11:19:34 6 did not hold that he was providing services on that
11:19:39 7 date. It held that a reasonable jury could find that he
11:19:42 8 was providing services on that date. That's a different
11:19:45 9 question.
11:19:45 10 THE COURT: I don't think so. And I
11:19:46 11 disagree with your assessment of all of this. I think
11:19:49 12 this issue has been resolved by the Court of Appeals
1:19:53 13 when they decided that in fact the jury instruction was
11:19:58 14 proper and that a reasonable jury could find that he was
11:20:01 15 providing services on that date. I don't know what else
11:20:06 16 we can do about that determination of the Court of
11:20:10 17 Appeals. Really you're asking me to reverse the Court
11:20:14 18 of Appeals on this. When you peel away all of the
11:20:17 19 arguments, it is that I ought to reverse the Court of
11:20:20 20 Appeals. And I think that that's really the Supreme
11:20:24 21 Court's prerogative, not this trial court's prerogative.
11:20:26 22 I don't think you've really provided any
11:20:28 23 fact that would allow me to consider conducting any type
11:20:30 24 of an evidentiary hearing in this matter for reversing
1:20:36 25 the decision and ordering a new trial. I don't think I

11:20:39 can find that under this record.

11:20:44 I'm going to deny your motions for the
11:20:47 reasons that I have stated, other than to say that any
11:20:54 conditions that I imposed on his probation are vacated.
11:20:59 Because I agree with you that as the law existed at that
11:21:04 time, this was -- was what judges who were here before I
11:21:09 was, called old law cases. This wasn't a truth in
11:21:12 sentencing case where these conditions could have been
11:21:14 applied and so I have to vacate those conditions in this
11:21:20 matter.

11:21:25 MR. JOHNSON: I have nothing further, Your
11:21:25 Honor.

1:21:25 THE COURT: Anything further, Mr. Henak?

11:21:27 MR. HENAK: No, Your Honor, I will prepare
11:21:28 an order which basically will say for the reasons stated
11:21:30 on the record on today's date the motion to vacate the
11:21:37 conditions placed on Mr. Kaster's sentence are vacated.
11:21:43 The defense motion otherwise is denied.

11:21:46 THE COURT: And if you got an order in that
11:21:49 for Mr. Johnson, you wouldn't object to my signing it
11:21:52 would you?

11:21:52 MR. JOHNSON: No.

11:21:53 THE COURT: Just to expedite, if you want to
11:21:56 fax that to the district attorney, send a hard copy
1:21:59 here. If I don't receive an objection in five days.

11:22:02 Can you have that up here next Friday?

11:22:04 MR. HENAK: Definitely. I hope to get back in my office and get it fax'd back today.

11:22:07

11:22:09 THE WITNESS: Thank you. Drive carefully.

(Proceedings concluded.)

11:22:20

State of Wisconsin)
) Ss:
County of Brown)

I, Carol H. Thomas, RPR, hereby certify that I am the official court reporter for Circuit Court, Branch II, Brown County, Wisconsin, that I have carefully compared the 31 pages with my stenographic notes, and that the same is a true and correct transcript.

Dated at Green Bay, Wisconsin, the 5th day of May, 2005.

Carol H. Thomas, RPR

COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-2352-CR
STATE OF WISCONSIN

Cir. Ct. No. 01-CF-138

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID R. KASTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. David Kaster appeals a judgment entered on a jury verdict convicting him of two counts of sexual assault of a student by school staff and one count each of fourth-degree sexual assault and disorderly conduct. He also appeals an order denying his motion for postconviction relief. Kaster only challenges one of his convictions for sexual assault of a student, contending he

was not "school staff" at the time of the assault. Specifically, he argues the trial court erred when it failed to give his proposed jury instruction interpreting "school staff" and that the evidence was insufficient to convict him based on this interpretation. We disagree and affirm the judgment and order.

BACKGROUND

¶2 Kaster was the boys' and girls' swimming coach at Ashwaubenon High School during the 1998-99 school year and had been involved with the swim teams at the school since 1983. He was not a teacher nor did he hold any other position at the school. He held separate contracts for the boys' and girls' teams. Kaster and the school district entered into new contracts every year, and the 1998-99 school year contracts were specifically for that term.[1] In that school year, the girls' swimming season ended on November 14, 1998, and the boys' ended on February 20, 1999. In February 2001, Kaster was charged with several crimes stemming from allegations that he had sexual contact with four members of the girls' team. One of the incidents was alleged to have occurred on March 14, 1999.

¶3 Among the charges against Kaster were four counts of sexual assault of a student by a school instructional staff person under WIS. STAT. § 948.095.[2]

[1] Kaster's contract for the 1998-99 girls' coaching position stated in relevant part: "It is specifically understood and agreed that ... this appointment is for the 1998-99 school year only."

Only the contract for 1998-99 was submitted into evidence. It is undisputed the boys' contract contained identical language.

[2] WISCONSIN STAT. § 948.095 provides:

> **Sexual assault of a student by a school instructional staff person. (1)** In this section:
>
> (a) "School" means a public or private elementary or secondary school.

(continued)

One of these charges was for the March 14 incident. Kaster submitted jury instructions for § 948.095. His proposed instructions first defined the "providing services" portion of "school staff" to mean "the jury must find that the defendant was providing services under a contract to be the high school swimming coach." The instructions also read, "'under contract' means the person has an ongoing legally enforceable obligation to provide services as specified under the terms and conditions of a valid contract." Kaster requested the jury be instructed regarding contract ambiguity and construction; specifically, that a contract is ambiguous if it is susceptible to two different meanings and ambiguous contracts must be resolved against the drafter. Finally, Kaster proposed the jury be instructed that § 948.095 did not apply to volunteers.

¶4 Kaster argued that his only connection to Ashwaubenon High School was his coaching contracts and that he could be guilty only if he was under contract at the time of the assault. He maintained "school staff" had to be narrowly construed to include only school employees, contract personnel, or a

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> (b) "School staff" means any person who provides services to a school or a school board, including an employe of a school or a school board and a person who provides services to a school or a school board under a contract.
>
> **(2)** Whoever has sexual contact or sexual intercourse with a child who has attained the age of 16 years and who is not the defendant's spouse is guilty of a Class D felony if all of the following apply:
>
> (a) The child is enrolled as a student in a school or a school district.
>
> (b) The defendant is a member of the school staff of the school or school district in which the child is enrolled as a student.

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

similarly situated paid service provider of ascertainable duration. Because his only relationship with the school was through his contract, Kaster contended the jury should have been instructed he needed to be under contract to be found guilty. He alternatively claimed that any services he may have been providing to the school at the time of the assault were voluntary and not covered by WIS. STAT. § 948.095. Kaster based this argument on the statute's legislative history, pointing to an earlier draft that had specifically included volunteers, but that had been removed before the law's enactment.

¶5 During his trial, Kaster elicited testimony from various school officials and staff members to support his defense theory. Gary Wendorf, the school's past athletic director, testified coaching contracts covered the entire year, but also said coaches finish their duties at the end of the athletic season. He said Kaster was "probably not" required to perform any services outside the season. Jack Klabesadel, the current athletic director and director during the 1998-99 school year, testified the only requirement for coaches outside the seasons was to attend an awards banquet and also said Kaster was "not under contract according to our district office after the swim season and his evaluation" were complete. Klabesadel added that he would have no financial control over a coach after the season ended. During the 1998-99 school year, however, Klabesadel said he contacted Kaster after the end of the season regarding the swim teams' budgets and scheduling, as well as Kaster's evaluations and to plan fundraising. In addition, Klabesadel said Kaster conducted "open swims" at the school's pool. Both Wendorf and Klabesadel testified coaches might engage in some out-of-season activities such as fundraising or planning, but that such activities would be voluntary.

¶6 At the instruction conference, the court refused Kaster's instructions and opted to give the standard instruction, WIS JI—CRIMINAL 2139.[3] The court reasoned that the purpose of WIS. STAT. § 948.095 was to protect students from people who provide services to students on a regular basis and also determined this should apply to persons such as coaches, whether or not they were volunteers. Noting the statute's breadth, the court reasoned it was not intended to cover "someone who delivers soda to the school ... or reseals the gym floor." However, the court added that Kaster's narrow interpretation would exclude a volunteer coach, a person § 948.095 was plainly intended to cover. In addition, the court determined § 948.095 applied regardless of the existence of a contract and added, "the state can argue to the jury that services provided makes Mr. Kaster subject to the application of the statute irrespective of whether a contract exists." Subsequently, Kaster also requested the "volunteer" portion of his instruction, which the court again denied.

¶7 The jury convicted Kaster of two counts of sexual assault of a student, including the March 14 incident, one count of fourth-degree sexual assault and one count of disorderly conduct. He now appeals the sexual assault of a student conviction stemming from the March 14 incident.

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[3] The court gave the following instruction regarding the definition of school staff:

> The fourth element requires that the defendant was a member of the school staff of the school or school district in which that person named in that Count was enrolled as a student.
>
> "School staff" means any person who provides services to a school or school board, including an employe of a school or school board and a person who provides services to a school or a school board under a contract.

DISCUSSION

¶8 Kaster argues that the trial court denied him a defense because it failed to give his proposed jury instruction. Whether a jury instruction is appropriate given the facts of a case is a legal issue subject to independent review. *See* ***State v. Pettit***, 171 Wis. 2d 627, 637-38, 492 N.W.2d 633 (Ct. App. 1992). Kaster's proposed instruction is based on an interpretation of WIS. STAT. § 948.095. The interpretation of a statute is also a question of law we review independently. ***Agnes T. v. Milwaukee County***, 189 Wis. 2d 520, 525, 525 N.W.2d 268 (1995). We first look to the statutory language and attempt to interpret it based on "the plain meaning of its terms." ***State v. Williquette***, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986). If the legislative intent can be determined from the clear and unambiguous language of the statute itself, the statute's terms will be applied in accordance with the statute's plain language. ***In re J.A.L.***, 162 Wis. 2d 940, 962, 471 N.W.2d 493 (1991).

¶9 Only if there is ambiguity do we resort to rules of construction and extrinsic materials, such as legislative history, in an effort to determine legislative intent. *See* ***id.*** A statute is ambiguous if reasonable persons could disagree as to its meaning. ***Williquette***, 129 Wis. 2d at 248. "When construing statutes we are to give them their common-sense meaning to avoid unreasonable and absurd results." ***Janssen v. State Farm Mut. Auto. Ins. Co.***, 2002 WI App 72, ¶16, 251 Wis. 2d 660, 643 N.W.2d 857. Further, we must give meaning to each word of a statute. ***Kollasch v. Adamany***, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981).

¶10 Kaster argues his proposed instruction that the jury must find him to be "providing services under a contract" was appropriate because the definition of "school staff" in WIS. STAT. § 948.095 must be limited to "school employees,

contract personnel, or similarly situated paid service providers of ascertainable duration." In making this argument, he relies on a rule of construction, *ejusdem generis*, which limits the meaning of general words to specific words associated with the general words. *See* ***Quesenberry v. Milwaukee County***, 106 Wis. 2d 685, 693, 317 N.W.2d 468 (1982). Kaster contends the phrase "any person who provides services" is limited by the more specific "employe" and "under contract," both of which suggest a "paid position of ascertainable duration."

¶11 Kaster argues WIS. STAT. § 948.095 is ambiguous because an interpretation of "school staff" that would apply to "literally anyone who provides services to a school" would create an absurd result and be unconstitutional for failing to give notice to persons subject to the statute. He maintains that such a broad interpretation renders "employe" and "under contract" superfluous and that the legislature could not have intended to include such a large group of people within the statute. Kaster also argues § 948.095 must be construed to exclude volunteer services because an earlier draft expressly *included* volunteers. He contends the legislature's removal of the phrase shows its intent not to include persons providing volunteer services to a school.

¶12 We are not persuaded. We agree the phrase "provides services" is very broad, but this does not necessarily make the statute unconstitutional or ambiguous. While statutes must have a reasonable degree of clarity, exacting precision is not required unless the statute affects constitutionally protected interests. ***Dog Federation v. City of South Milwaukee***, 178 Wis. 2d 353, 359-60, 504 N.W.2d 375 (Ct. App. 1993). If a statute or ordinance does not directly affect constitutionally protected interests, we may not hold it facially invalid for vagueness even though doubts as to the applicability of the challenged language in marginal fact situations may be conceived. ***Id.*** WISCONSIN STAT. § 948.095 does

not implicate any constitutionally protected interests. Instead, it prohibits sexual assault of students by persons providing services to the schools the students attend. While its application would perhaps be questionable in certain situations, such as those noted by the trial court, we may not invalidate the statute based on these hypothetical situations. *See* ***Dog Federation***, 178 Wis. 2d at 359-60.

¶13 We also reject Kaster's claim that his interpretation is necessary to avoid making "employe" and "under contract" superfluous. He contends that interpreting "providing services" broadly makes "employe" and "under contract" wholly unnecessary because they would be included within "providing services." Kaster's interpretation, however, also leaves "employe" and "under contract" superfluous. A "paid position of ascertainable duration" ostensibly includes an "employe" and persons "under contract."

¶14 Instead, the appropriate interpretation of WIS. STAT. § 948.095 would be to view an "employe" and persons "under contract" as examples of persons included within the group of people that provide services to a school or school board. This interpretation is supported by the statute's language that "a person who provides services" *includes* an "employe" and persons "under contract." These phrases are illustrative, and nothing in the statute's language suggests they were meant to limit the definition of "a person who provides services." We agree this group is broad and, while we share Kaster's and the trial court's concerns that interpreting this phrase to include delivery persons or ushers at sporting events might not be precisely what the legislature intended by creating WIS. STAT. § 948.095, this problem is for the legislature, not us, to remedy.

¶15 Similarly, we reject Kaster's argument that WIS. STAT. § 948.095 does not apply to volunteers. A volunteer "provides services" to a school or

school board. That the two examples in § 948.095 involve persons with paid positions does not change the broad definition of "school staff." While Kaster argues the legislature's removal of volunteers from the statute's final draft shows its intent not to include them, we cannot look to legislative history when interpreting an unambiguous statute. *See* ***J.A.L.***, 162 Wis. 2d at 962. Instead, we must look to the statute's language, as enacted, and we conclude that volunteers are included within the statute's definition of "school staff."

¶16 Based on the foregoing, we conclude the trial court did not deny Kaster a defense by giving the standard jury instruction. Kaster maintains the only way he could have been liable under WIS. STAT. § 948.095 was if he was "under contract" on March 14, 1999, and the jury should have been so instructed. We reject Kaster's narrow reading of the statute and conclude he would be liable if he provided services to a school or school board on March 14. The standard jury instruction's definition of "school staff" essentially matches § 948.095's definition and provides no further explanations. If the instructions given adequately cover the law applicable to the facts, we will not find error by the trial court. ***State v. Lenarchick***, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976). WISCONSIN JI—CRIMINAL 2139 adequately instructs the jury on § 948.095.

¶17 Finally, we conclude that the evidence at trial was sufficient to allow the jury to conclude that Kaster was providing services to the school or school board when he committed the March 14 assault. Kaster's contract with the school district was for the 1998-99 school year. While Kaster argues that his coaching duties were done at the end of the boys' season on February 20, Klabesadel testified he had out-of-season contact with Kaster for planning, scheduling, budgeting and evaluation purposes. Klabesadel also testified that he and the school's swimming pool director coordinated open swims with Kaster. These

open swims were outside of the swim teams' seasons and were open to all students, not just swim team members. Although Wisconsin Interscholastic Athletic Association rules prevented Kaster from coaching at these events, he was allowed to supervise his athletes if they decided to attend. Finally, Klabesadel testified he contacted Kaster during the summer of 1999 regarding fundraising for the upcoming girls' season. This evidence is sufficient to allow the jury to conclude that Kaster was providing services to Ashwaubenon's High School or school board on March 14, 1999.

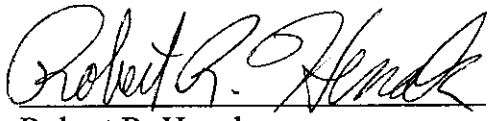
¶18 Finally, Kaster argues we should exercise our discretionary reversal authority under WIS. STAT. § 752.35 (2001-02) because the real controversy was not fully tried due to the trial court's failure to instruct the jury as he requested. Because we have concluded the trial court did not err, we reject this argument.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 28th day of July, 2005, I caused 10 copies of the Brief and Appendix of Defendant-Appellant David R. Kaster to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.



Robert R. Henak

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