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STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2013AP814-CR

ANTONIO D. WILLIAMS,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE MILWAUKEE COUNTY CIRCUIT COURT
HONORABLE REBECCA F. DALLET, PRESIDING

APPELLANT'S REPLY BRIEF

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I. THE RESTRICTION ON CROSS-EXAMINATION WAS PREJUDICIAL CONSTITUTIONAL ERROR.

Introductory

There is no authoritative Wisconsin case deciding the precise issue here, *i.e.*, whether the Confrontation Clause demands an opportunity for cross-examination on bias of prosecution witnesses who have received sentence concessions from the State as to their understanding of the maximum penalty they avoided by agreeing to testify, see Appellant's Brief at 11, hereinafter AB, and no U.S. Supreme Court case deciding this issue, either, so counsel uses federal decisions here. *Cf. State v. Webster*, 114 Wis.2d 418, 426, n. 4, 338 N.W.2d 474 (1988)(Wisconsin courts not bound by lower federal court decisions) with *State v. Luu*, 2009 WI App 91, ¶16, 769 N.W.2d 125 (court persuaded by federal cases).

A. Discussion

1. Merits

The constitutional concerns outlined at AB 9-11 are crucially important when considering accomplice testimony because an accomplice confession implicating the accused is "presumptively unreliable." *Lilly v. Virginia*, 527 U.S. 116, 131 (1999). So it is Mr. Fuentez' testimony "'created a special, and vital, need for cross-examination.' " 527 U.S. at 128, quoting *Gray v. Maryland*, 523 U.S. at 194-195.

The State claims a trial court may, using a balancing test, restrict such cross-examination by excluding any exploration of the witness' subjective understanding of the maximum penalty avoided by testifying. Respondent's Brief at 10-11 (hereinafter RB), quoting *State v. Rhodes*, 336 Wis.2d 64, ¶48.

Assuming *arguendo* a balancing test must be used here, *cf.* generally Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 Geo. L.J. 1493, 1516-1528 (2006)("the very nature of the jury trial right, just like the confrontation right as construed in *Crawford*, now prohibits balancing" at 1510), the accused's interest in Confrontation Clause protection far outweighs the suggested countervailing State interests.

A trial court's restriction on cross-examination as to bias "reaches the core of Confrontation Clause concerns." *Sussman v. Jenkins*, 636 F.3d 329, 354 & n. 21 (7th Cir. 2011). The discretion to so restrict "must be informed by 'the utmost caution and solicitude for the defendant's Sixth Amendment rights.' " *Hoover v. Maryland*, 714 F.2d 301, 305 (4th Cir.1983). "To justify limiting a defendant's right to confront his accusers on issues of motive and bias, the countervailing policy interest must be concrete and articulable, not based on *speculation or surmise*." *Sussman, supra, id.*, emphasis added.

Examples of these rules from the highest Court are *Davis*

v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 247 (1974) and *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). In *Davis*, *supra*, defense sought to inform the jury a key prosecution witness was a juvenile probationer to show the witness' bias. 415 U.S. at 311. The State argued before the high Court that its "important interest in protecting the anonymity of juvenile offenders" outweighed Davis' right to cross-examine as to bias. 415 U.S. at 319. Categorically rejecting this argument, Chief Justice Burger found "The State's policy interest in protecting the confidentiality of a juvenile offender record cannot require yielding of *so vital a constitutional right* as the effective cross-examination for bias of an adverse witness." 415 U.S. at 320, emphasis added. So it is that even a concrete State's interest like juvenile privacy must yield to the demands of the Confrontation Clause.

In *Olden*, *supra*, the woman alleging rape was white and living with a black man. 488 U.S. at 229-230. Defense counsel attempted to cross-examine her about this living arrangement to demonstrate her motive to lie to her boyfriend about the incident. *Id*. at 230. The trial court excluded evidence of the living arrangement because it was too prejudicial to her for the jury to hear of her interracial relationship. *Id*. at 231. Summarily reversing, the high Court found this limitation on cross-examination "was beyond reason. Speculation as to the effect of jurors' racial bias cannot justify exclusion of cross-examination with such a strong potential to demonstrate the falsity of [complainant's] testimony." *Id*. at 232.

Here, there were two justifications for restricting cross-examination on maximum penalties advanced in the court below. First, it was stated the accomplice Fuentez should not be cross-examined on the maximum penalty he faced because this would clue the jury in to the penalty Mr. Williams faced (118:4-17), the concern being, apparently, that jurors would sympathize with Mr. Williams to the State's prejudice if they knew a lengthy sentence was possible for him. Besides the fact the jury was specifically instructed not to be swayed by sympathy (124:52), it is nothing more than speculation, as in *Olden*, *supra*, 488 U.S. at 232, that jurors would have sympathy for someone accused of shooting 4 people down

with automatic weapons in a public street. *U.S. v. Chandler*, 326 F.3d 210, 216-225 (3rd Cir.2003) considered the precise issue here and rejected the Government's contention its interest in keeping knowledge of the accused's prospective sentence from the jury was paramount. 326 F.3d at 223. Following *Davis v. Alaska*, *supra*, the court concluded "that interest did not trump Chandler's entitlement under the Confrontation Clause." *Id*.

The other justification for the restriction on cross-examination advanced below was allowing such questioning would result in a mini-trial on federal sentencing law because some of the witnesses' agreements were with the U.S. Attorney. (115:24-25, 36-37 [re Xavier Turner]). This claim would make sense if the issue was what the witness potential sentence actually was, considering the complexity of federal sentencing law. But that is not the issue at all. As the *Hoover*, *supra*, court explained in detail, the "vital question . . . is what the witness understands which is probative on the issue of bias." 714 F.2d at 305. The accused must be able to present the evidence "with respect to the *magnitude* of the sentence reduction [the witnesses] believed they had earned, . . . through their testimony," *Chandler*, *supra*, 326 F.3d at 221, emphasis in original, because this is the only way "for a jury to appreciate the *strength* of [the witness'] incentive to provide testimony that was satisfactory to the prosecution." *Id*. at 222, emphasis added.

So there is little danger of a mini-trial on the applicable sentencing law since the relevant questioning is limited to the witness' actual knowledge of the maximum penalty he/she was facing. For instance, doubtless there are State's witnesses who don't know what their potential maximum penalty is, so the inquiry is over when this lack of knowledge is made known.

But even if an extended examination is needed, this is, after all, an inquiry into bias and "great latitude is allowed in this respect." *State v. Williamson*, 84 Wis.2d 370, 383, n. 1, 267 N.W.2d 337, 343, n. 1 (1978)(quoting evidence treatises).

Since there was no justification for the restriction on cross-examination here, it was reversible error to deny Mr.

Williams "the opportunity for *full* cross-examination of those witnesses concerning [their] agreements and the effect of those agreements on [their] testimony . . ." *State v. Nerison*, 136 Wis.2d 37, 46, 401 N.W.2d 1 (1987), emphasis added.

2. Harmless Error

Invoking the familiar mantra of "overwhelming evidence," the State contends any errors restricting cross-examination here were harmless. RB 11-15. But the State has skipping the first step of the test. "[T]he focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, *not* on the outcome of the entire trial." *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), emphasis added. "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error is harmless beyond a reasonable doubt." 475 U.S. at 684 followed in *State v. Rhodes*, 2011 WI 73, ¶33, 336 Wis.2d 64, 799 N.W.2d 850. The full potential of this cross-examination for bias was a jury convinced these five witnesses, including the only two, Fuentez and Turner, identifying Mr. Williams as a shooter, were lying to get their sentence concessions. Since there was no physical evidence, *i.e.*, DNA, fingerprints, hairs, etc., linking Mr. Williams to the crimes, if these five witnesses were discredited, the prosecution's case is far less than overwhelming. Counsel submits the State has failed to show the error here was harmless beyond a reasonable doubt and so reversal is appropriate on this ground alone.

II. THE SIXTH AMENDMENT VIOLATION WAS PREJUDICIAL.

A. Fourth Amendment

Since counsel never argued any 4th Amendment error, AB 12-14, counsel ignores the State's argument on this point. RB 15-18.

B. Sixth Amendment

The State contends the seizure of letters from Mr. Williams was not a Sixth Amendment violation. RB 18-19. But the court below found this seizure was a Sixth Amendment violation. (100:26-27)(105:3-4) and the State does not even attempt to show that court erroneously found the facts or misapplied the law to them. Since it does not, this contention is undeveloped and the Court may refuse to consider it. *State v. Petit*, 171 Wis.2d 627, 646-647, 492 N.W.2d 633 (Ct.App.1992).

Should the Court decide to consider the State's contention, it makes one claim and cites one case in support of it. The State argues "placing contraband inside an envelope in Mr. Williams' prison cell does not imbue that contraband with Sixth Amendment protections" and quotes *Maine v. Moulton*, 474 U.S. 159, 176 (1985) in support of its claim. RB 18.

But there was no factual finding the seized letters were contraband and even had there been such finding, counsel submits the time-honored rule "a search is not made legal by what it turns up," *U.S. v. DiRe*, 332 U.S. 581, 595, 68 (1947), applies to Sixth Amendment violations as well as to Fourth Amendment ones. As to *Moulton*, *supra*, its holding was incriminating statements elicited from an accused by a co-defendant who had an agreement with the State were a prejudicial Sixth Amendment violation when introduced at trial, 474 U.S. at 179-180, and this ruling is no aid to the State. If, by the particular quotation from *Moulton* the State has selected, RB 19, it means to imply the police came across Mr. Williams letters "by luck or happenstance," 474 U.S. at 176, the facts belie this claim. The State's own quotation from the testimony shows the officer, seeing the envelope was marked "for my attorney," deliberately opened it and examined the documents inside. RB 17, quoting (98:28).

Therefore, the State's argument on this point is meritless.

C. Impeachment

1. Merits

Finally, the State joins the issue presented in the opening brief, AB 12-14, and argues the use of the "Big Homie" letter for impeachment at trial was harmless error. RB 19-21.

Unsupported by any authority, the State first claims *Kansas v. Ventris*, 556 U.S. 586 (2009), cannot be confined to its facts and so authorizes impeachment of any witness with information obtained via a Sixth Amendment violation. RB 19-20. But there is not even a hint in *Ventris*, *supra*, it was intended to be so extended. On the contrary, the *Ventris* Court explicitly found "no distinction" between a Sixth Amendment violation and any other constitutional violation for impeachment purposes. 556 U.S. at 594; AB 13. And, again, the impeachment exception to all other exclusionary rules does not extend to any witness other than the accused. *James v. Illinois*, 493 U.S. 307, 312-320, 110 S.Ct. 648 (1990). Therefore. the State's reliance on *Ventris* is misplaced and its argument is meritless.

2. Harmless Error

Counsel submits the harmless error rule does not apply to deliberate Sixth Amendment violations providing the State with evidence it then uses against the accused. AB 13-14. A number of federal circuits follow this rule. *Shillinger v. Haworth*, 70 F.3d 1132, 1140-1142 (10th Cir.1996)(adopting per se rule presuming prejudice); *Bishop v. Rose*, 710 F.2d 1150, 1156 (6th Cir.1983)(following other circuits); *U.S. v. Levy*, 577 F.2d 200, 209 (3rd Cir.1978)(prejudice inquiry ends when confidential attorney-client info is disclosed to prosecutors); *Briggs v. Goodwin*, 698 F.2d 486, 494-495 (D.C. Cir.1983)("Mere possession by the prosecution of otherwise confidential knowledge about the defense strategy or position is sufficient to establish detriment to the criminal defendant.").

Here, of course, the State not only had possession of the letter seized in violation of the Sixth Amendment but it also

unconstitutionally used it at trial to impeach Mr. Williams' alibi witness. *James*, *supra*, 493 U.S. 307. So even for those federal courts requiring a showing of detriment to the accused, there is prejudicial error. See *U.S. v. Danielson*, 325 F.3d 1054, 1070-1071 (9th Cir.2003)(adopting rule that after accused shows deliberate violation of atty-client confidences, burden shifts to prosecution to show information not used against accused); *U.S. v. Mastroianni*, 749 F.2d 900, 908 (1st Cir.1984)(same).

So, if it is true "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel," *Moulton*, *supra*, 474 U.S. at 171, then reversal is justified on this ground to protect that sacred right and deter further official attempts to interfere with it.

III. MISTRIAL WAS JUSTIFIED.

The State contends there could be no prejudice from the error because the court below gave a curative instruction; the jury must have followed it; yadda, yadda, yadda. RB 22-26. Balderdash!

Unwilling to let the court below decide whether this, in that court's own words, "very prejudicial" incident (123:132) would be admissible, the prosecutor, following to a T the pattern of misconduct this Court has identified, took the gamble he would get "little more than a rebuke from the trial court," *State v. Sigarroa*, 2004 WI App 16, ¶29, and won.

Why he would take this risk in major trial, counsel has no clue, except to note in counsel's experience prosecutors nervous about winning trials are wont to take risks toward the end of them. See, *e.g.*, *State v. Burton*, 2007 WI App 237, ¶4 (prosecutor introduces objectionable evidence on last day of case-in-chief).

Whatever the State's motives, it successfully planted in the jurors' minds the idea that Mr. Williams, on trial for killings committed with automatic weapons, was accustomed to using such weapons. This was prejudicial and reversible error.

IV. THE *BRADY* EVIDENCE WAS MATERIAL.

The State makes reference to the discovery statute, §971.23(h), *Wis. Stats.* and cases interpreting it. RB 28-29. This is not a statutory issue so these references are irrelevant.

The State presents two reasons why the withheld police report was not material. RB 30-31. First, it contends there was overwhelming evidence of Mr. Williams' guilt. RB 30. But, again, there was no hard physical evidence linking Mr. Williams to the crimes, *i.e.*, DNA, fingerprints, hairs, etc., and most of the State's testimony was from witnesses who either had made deals with the State or who had multiple criminal convictions or both. See, *e.g.*, (113:108-109 [Lateena Shaw, 4 priors])(113:130 [Deon Cowser, 1 prior])(116:206 [Michael Terry, 12 priors] & 117:32-35 [plea deal])(113:16-18 [Xavier Turner, 3 priors] & 114:109-114 [plea deal]), etc. And see AB 7-9 (referencing deals for 5 witnesses). The State points to forensic cell phone tower evidence it claims placed the three accuseds "at Questions that night . . ." RB 30, RB 15, but the record belies this claim. When the State asked the phone analyst to summarize his testimony for the jury, he could only swear his data showed "a number of calls were made from each of the phones [belonging to the accuseds] in the *area* – in the area where the homicide occurred . . ." (121:61), emphasis added. On cross, trial counsel clarified this area was measured in miles. (121:61-64). The State's evidence might have been overwhelming had there been no reason to doubt its criminally involved witnesses. Since, as noted, there was plenty of reason for such doubt, this was a much closer case than the State imagines.

The other reason the State claims the withheld police report was not material is it believes the report was only cumulative impeachment. RB 30-31. Not so. The police report was hard evidence directly contradicting Mr. Nabors' and Ms. Warrens' testimony on the key point of whether codefendant Washington was acting as a lookout at Questions on the night of the killings. AB 19-20. Thus, this report could have conclusively proved these witnesses were lying as to the very specifics they were put on the stand to prove! This is categorically different impeachment than the generalized

reasons to doubt based on priors or plea deals.

Therefore, the State's contentions on this point are meritless.

V. DISCRETIONARY REVERSAL IS APPROPRIATE.

The State responds to counsel's suggestion cumulative error can justify discretionary reversal with one point: "their [*i.e.*, the errors] total impact cannot be greater than the sum of their parts . . ." RB 32-33. If that were true, then the state supreme court was wrong to find in *State v. Thiel*, 2003 WI 111, ¶4, ¶59-¶62, 264 Wis.2d 571, 665 N.W.2d 305 that the cumulative effect of counsel's errors violated the Sixth Amendment and justified reversal. And the U.S. Supreme Court must have been wrong in *Taylor v. Kentucky*, 436 U.S. 478, 487, n. 15, 99 S.Ct. 1350, 56 L.Ed.2d 468 (1978) when it found "the cumulative effect of the potentially damaging circumstances of the case violated the due process guarantee of fundamental fairness . . ."). Since these courts were not wrong, the State must be and counsel again submits, if the individual errors here are not reversible, then this is an appropriate case for discretionary reversal.

Conclusion

Counsel respectfully submits the foregoing demonstrates the State's arguments are without merit and prays the Court to reverse and remand for a new trial.

Dated: January 24, 2014

Respectfully submitted,

_____

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STATE OF WISCONSIN

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DISTRICT I

STATE OF WISCONSIN,

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CERTIFICATIONS

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I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

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I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

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Timothy A. Provis

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I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on January 24, 2014. I further certify that the brief was correctly addressed and postage was prepaid.

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