STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2015AP1083-CR

GARY LEE WAYERSKI,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN DUNN COUNTY CIRCUIT COURT, HONORABLE WILLIAM C. STEWART, PRESIDING, AND ORDER DENYING A MOTION FOR POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR DUNN COUNTY CIRCUIT COURT, HONORABLE MAUREEN BOYLE, BARRON COUNTY CIRCUIT COURT, PRESIDING

DEFENDANT-APPELLANT'S REPLY BRIEF

HUNT LAW GROUP, S.C.
829 NORTH MARSHALL STREET
MILWAUKEE, WI 53202-3910 (414) 225-0111
FAX: (414) 225-9492

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED

CASES CITED

OTHER AUTHORITIES

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2013AP1083-CR

GARY LEE WAYERSKI,

Defendant-Appellant.

Corrected Defendant-Appellant's Reply Brief

INTRODUCTION

Wayerski submits this reply brief. He does not abandon any of the arguments made in the Defendant-Appellant's Corrected Brief. To the contrary, Wayerski is confident that the Wisconsin Court of Appeals will clearly see the errors which led to Wayerski's wrongful convictions as to counts 1-8 as well as ample support for his contention that

convictions on counts 9-16 of the Second Amended Information should be voided on insufficiency of evidence grounds. The appropriate remedy for the wrongful convictions as to counts 1-8 is reversal of the convictions and the grant of a new trial on all of these counts. The appropriate remedy as to counts 9-16 is outright dismissal with prejudice. In the reply to the State's brief offered here, Wayerski prays that all of his arguments in the Corrected Brief as well as this Reply Brief convince this error correcting court that the relief requested is the only reasonable path to correct the miscarriage of justice suffered by him in this out of control prosecution.

ARGUMENT

I. Trial counsel failed to provide effective assistance of counsel.

The State argues that Wayerski's counsel was not ineffective for failure to ask Wayerski on surrebuttal testimony whether he confessed unspeakable and heinous sexual crimes at the time he was a police chief and law enforcement officer to John Clark. The victims of these crimes were two underage boys, JDP and JMH. Just before the close of all evidence in Wayerski's trial, John Clark was called as a State's witness on rebuttal. Ironically, he had pending charges against him in another county. Unbeknownst to the jury and Wayerski's trial counsel, John Clark was charged with unspeakable and heinous sexual crimes against underage children as well. (56: 1-4; 118: 77-201, 215-226, 224, 226,

233-234; 121: 6-22, 79-90, 108, 117-126, 6-128). Wayerski's Br. at 15-22. Distilled to its essentials, the State's thesis in support of affirming Wayerski's convictions and the Circuit Court Order denying Wayerski's Motion for a new trial is this:

> Trial counsel's failure to ask Wayerski whether he admitted his conduct to Clark was neither deficient nor prejudicial. At trial, the jury heard significant evidence apart from Clark's testimony that supported the guilty verdicts. This included the testimony from the two victims, JDP and JMH, and evidence from officers regarding the seizure of evidence seized from Wayerski's computer and phone . . . .
>
> Wayerski told the jury that he did not commit the crimes and trial counsel presented a defense consistent with Wayerski's innocence. When viewed against the context of the entire trial, Wayerski has not demonstrated that his trial counsel's failure to ask him the question about Clark created a substantial likelihood of a different result such that he was deprived of a fair trial and reliable outcome.

State's Br. at 8.

But in order for this Court to have a working thesis spring from the State's argument, it is time for definitions. In order to understand the importance of rebuttal evidence in any trial, especially the devastating rebuttal evidence of John Clark in Wayerski's trial, a definition of rebuttal evidence is necessary. Similarly for this Court to understand Wayerski's antithetical argument that the effect of trial counsel's failure to ask the crucial questions at the crucial last moments of Wayerski's trial did deprive the former Police chief and law enforcement officer Wayerski of a fair trial and a reliable outcome.

And so, Wayerski turns first to Black's Law Dictionary, Sixth Edition, for a definition of rebuttal evidence:

> Evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party. That which tends to explain or contradict or disprove evidence offered by the adverse party. Layton v. State, 261 Ind. 251, 301 N.E.2d 633, 636. Rebuttal occurs during the trial stage where evidence is given by one party to refute evidence introduced by the other party. Evidence which is offered by a party after he has rested his case and after the opponent has rested in order to contradict the opponent's evidence.

Id. at 1267

Next, a helpful definition of surrebuttal evidence can be found in the decisions of United States Courts of Appeals. "Surrebuttal is merited where (1) the government's rebuttal testimony raises a new issue, which broadens the scope of the government's case, and (2) the defense's proffered surrebuttal testimony is not tangential, but capable of discrediting the essence of the government's rebuttal testimony." *United States v. Moody,* 903 F.2d 321, 331 (5th Cir. 1990); *see also United States v. Wilson,* 134 F.3d 855, 867 (7th Cir. 1998); *United States v. King*, 879 F.2d 137, 138 (4th Cir. 1989). It is worth noting that in *United States v. Murray*, 736 F. 3d 652, 657 (2d Cir. 2013), the United States Court of Appeals for the Second Circuit applied the above paradigm and found reversible error in the district court's denial of surrebuttal evidence.

Clark's testimony that Wayerski confessed to sexually assaulting the boys , JDP and JMH, must be scrutinized in the context of the final moments of Wayerski's trial. In these final moments , the State landed the most devastating blow against Wayerski and Wayerski's chance for acquittal on any of the charges against him. For brevity's sake, see Wayerski's Corrected Br. at 15-22. (56: 1-4; 118: 77-201, 215-226, 224, 226, 233-234; 121: 6-22, 79-90, 108, 117-126, 6-128).

Trial counsel is a man who admits his mistakes. And honorable men, one would expect, do so without hesitation and without excuses and without specious claims that their errors were "tactical and strategic." Wayerski's counsel is just such a man. He in not so many words said that his performance was deficient and Wayerski was prejudiced because he failed to ask questions of Wayerski that he should have asked. To put a fine point on all of the above, he failed to ask Wayerski, did you confess to Clark that you had sexually assaulted JDP and JMH? Did you confide to Clark that you had allowed JDP and JMH to view pornography? To be sure, there were countless moments in this trial that profoundly ensured that Wayerski's trial was not a search for the truth, but a miscarriage of justice. And tragically, this moment was the pinnacle error which also ensured that Wayerski would be convicted. Wayerski was never given the opportunity to repel Clark's claim that Wayerski confessed. And the jury was deprived of

the most important opportunity to search for the truth and find it. A contest of purported facts that became no contest at all. A confession that was never denied. A rebuttal without a surrebuttal. (121: 6-22, 79-90, 117-126, 6-126, 126-128) Harmless error? Not at all! Not one chance that this error at this moment in the trial could be construed as harmless.

II. The circuit court improperly exercised its discretion when it denied Wayerski's motion for a change of venue.

What needs to be said in reply to the State's Br. at 8-11 has been said and said well in Wayerski's Corrected Brief at 23-25. No point in repeating the point.

III. The circuit court did erroneously exercise its discretion when it admitted evidence of a sexually oriented nature.

The virtual tsunami of grotesque and irrelevant homosexual pornographic photos, homosexual sadomasochistic bondage pornographic computer searches and website visits, and homosexual sadomasochistic text messages virtually guaranteed that the jury would convict Wayerski because it was so horrific that no jury could withstand it. (97; 116: 201-237; 117: 89-197, 109, 101-117). Maybe a little evidence of a sexual nature, maybe even a little relevant sexual evidence

might be admissible in some trial in some county in the State of Wisconsin but not the enormity and overwhelmingly unfairly prejudicial evidence heard by Wayerski's jury.

Wayerski's jury would have been half drunk on whiskey not to think he was a sexual monster for viewing legal pornography that was this graphic and communicating private homosexual text messages that were as detailed regarding proposed but never proven homosexual liaisons and intimate exchanges with adults regarding acts of bondage and sadomasochism.

Wayerski was not on trial for his homosexual interests or for viewing adult homosexual sadomasochistic and bondage erotica or texting other adults with similar interests. But it did seem so. Adults across the land may view similar images and videos depicting adult homosexual erotica, sadomasochism and bondage. They also are free to engage in texting other adults with similar interests without fear of prosecution. Many of those who choose to do so are of heterosexual, bisexual and transgender orientation; many are homosexuals. Homosexuality is not a crime. The private intimate consenting acts of homosexuals are no longer illegal in these United States. *See Lawrence v. Texas*, 539 U.S. 558 (2003). And homosexuals also now have as much of a right to marry each other as heterosexuals. *Obergefell v. Hodges* , 576 U.S. ___ (2015). Times have indeed changed.

For further discussion of why the State is profoundly wrong and reversible error occurred, Wayerski refers the Court to his discussion of this graphic and inflammatory and unfairly prejudicial sexual propensity evidence and why none of this evidence should have been heard by this jury. See Wayerski's Corrected Br. at 26-34.

IV. The prosecution's Brady, Giglio, and Kyles violation warrants a new trial.

Wayerski does not have much to add on this point. The law is the law. And despite the State's invitation to change law that has been in existence for decades upon decades, that is not going to happen. *Brady v. Maryland,* 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150, 154 (1972), *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). The State's argument is certainly a clever one. But it must fail because it has never been a burden on the defendant to search for whatever impeachment evidence on CCAP he may find. Such evidence is only a hint of impeachment evidence. Moreover, only the prosecution in this case had exclusive information and exclusive control as to the back story of every charge pending against Clark that could have been used in impeachment of Clark's credibility and bias and every police report and every video tape interview of any child Clark may have assaulted. And more importantly, Clark was never confronted with, if it did exist, any confession by Clark on a recorded video or audio police

interrogation. This information, and all of this information, it must be emphasized, was only and at all times in the exclusive control of the State. *See* State's Br. at 24-29. And *See Also* Wayerski's Corrected Br. at 34-43.

V. The jury's seven guilty verdicts on a charge of sexual assault of a child by a person who works or volunteers with children is not supported by sufficient evidence.

The State contends on this point:

> The jury found Wayerski guilty of seven counts of sexaul assault of a child by a person who works or volunteers with children, contrary to Wis. Stat. § 948.095(3)(a) (38:1-2). Wayerski argues that the State presented insufficient evidence to convict [him] of this offense. He contends that nothing within subsection 948.095(3)'s plain language or the legislative history suggests that the Legislature intended to extend liability to law enforcement officers. Wayerski's Br. 46-49. As a State will demonstrate, the circuit court properly rejected this challenge to sufficiency of the evidence.

State's Br. at 30-31.

Wayerski disagrees. Wayerski's Corrected Br. at 44-48. To take things to a constitutional analysis, Wayerski offers the following. Wayerski also maintains that the state's application of § 939.617, Wis. Stats., in this case is barred by the constitutional due process requirement of definiteness. This is also known as the "fair warning doctrine," and is related to the vagueness doctrine which bars enforcement of a statute which fails to

provide notice of a prohibited act or fails to provide sufficient guidelines for those who enforce the law. *United States v. Lanier*, 520 U.S. 259, 265-66, 117 S.Ct. 1219 (1997). Long ago, Justice Holmes described this legal doctrine as "fair warning ... in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Id.*, quoting *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931). Due process also bars courts "from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id. See also*, *Bouie v. City of Columbia*, 378 U.S. 347, 353, 84 S.Ct. 1697, 1703 (1964); *Rabe v. Washington*, 405 U.S. 313, 93 S.Ct. 993, 31 L.Ed.2d 258 (1972) (state obscenity law conviction reversed because it rested on an unforeseeable judicial construction of the statute. "[A]ffected citizens lacked fair notice that the statute would be thus applied"). A party's challenge to the vagueness of a statute involves a two-prong test:

> The first prong of the vagueness test is concerned with whether the statute sufficiently warns persons "wishing to obey the law that [their] ... conduct comes near the proscribed area." The second prong is concerned with whether those who must enforce and apply the law may do so without creating or applying their own standards.

State v. Pittman, 174 Wis.2d 255, 276, 496 N.W.2d 74 (1993) *Id.* (citations omitted).

The vagueness doctrine, "requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' " *State v. Princess Cinema of Milwaukee, Inc*., 96 Wis.2d 646, 657, 292 N.W.2d 807 (1980) (quoting *Smith v. Goguen*, 415 U.S. 566, 572–73, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)). After a reading of all of the cases cited above, Wis. Stat. § 948.095(3)(a) (38:1-2) does not pass constitutional muster. Nor can it be said that the jury verdicts for the seven counts in question are supported by sufficient evidence. (38:1-8).

VI. A new trial should be granted in the interests of justice under Wis. Stats., § 752.35.

Appellate courts may fairly conclude that the real controversy has not been fully tried "when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case" or "[w]hen the jury had before it evidence not properly admitted which so clouded a crucial issue." Wis. Stats., § 752.35.

This error correcting court only applies this statute sparingly. But Wayerski's trial is so uniquely a miscarriage of justice that the statute must be applied. If this court considers every argument in his Corrected Brief at 17-49, but also weighs

heavily all of the above arguments found and refined and clarified in this Reply Brief. The gravity of all of these errors must be evaluated cumulatively as well as individually.

Wayerski has a few parting thoughts before he ends the arguments in this Reply Brief. Imagine, if you will, a courtroom in any county, in any branch, in any circuit court of this State. And further muse upon the following hypothetical questions in the above paradigm in the context of a simple credibility contest. The State calls a police chief to the stand. The defense calls two juvenile delinquents in the same credibility contest. Whose account of crucial events would any court or jury readily accept as credible? Of course, the answer is easy and not surprising. The police chief's account would carry the day. Similarly, whose account of crucial events would any court or jury readily accept as credible when a police chief and a career criminal square off in a credibility contest? Again the answer is easy and not surprising. No room for doubt in this hypothetical. Only a deaf, dumb, and blind circuit court or jury would ever accept a factual account of events offered by a career criminal over a different and truthful account by a police chief.

John Clark, the career criminal, who arrived on that witness stand armed with lies and nothing but lies was able to bamboozle the jury in this rebuttal and surrebuttal credibility contest. And Gary L. Wayerski, police chief, lost the most

important credibility contest of his career, but only because his lawyer failed to put before him the questions that would have saved him.

A low rent thug, John Clark, was able to pull one over on a police chief. The jury was taken for a ride, bamboozled, and hoodwinked. Wayerksi's trial was a rigged game. From a prison cell, his voice must be heard by this Court if there is any justice. It may be his last chance. It may not be his last chance. But one thing is for sure. This falsely accused police chief from a northern Wisconsin village will not give up. Not today and not in the future!

CONCLUSION

For the reasons set forth in a much more detailed fashion in his Corrected Brief and the refined points offered by Wayerski in this Reply Brief, Gary L. Wayerski asks this Court to enter judgments of acquittal on Counts 9 through 16 and grant him a new trial on Counts 1 through 15.

Dated at Milwaukee, Wisconsin, this 27th day of June, 2016.

Respectfully submitted,

Gary L. Wayerski Defendant-Appellant

HUNT LAW GROUP S.C.

/s/Edward J. Hunt
Edward John Hunt
Attorney at Law
State Bar No. 1005649

Mailing Address:
HUNT LAW GROUP, S.C.
829 North Marshall Street
Milwaukee, Wisconsin 53202-3910
(414) 225-0111; Fax: (414) 225-9492

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,910 words.

Dated at Milwaukee, Wisconsin, this 27th day of June, 2016

/s/Edward J. Hunt
Edward J. Hunt
Attorney at Law
State Bar No. 1005649

Mailing Address:

HUNT LAW GROUP S.C.
829 North Marshall Street
Milwaukee, Wisconsin 53202-3910
(414) 225-0111; Fax: (414) 225-9492

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief which complies with the requirements of s. 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed served on today's date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Milwaukee, Wisconsin, this 27th Day of June, 2016.

/s/Edward J. Hunt
Edward J. Hunt
Attorney at Law
State Bar No. 1005649