STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2016AP002058 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
PETER J. HANSON,
Defendant-Appellant.

On Notice of Appeal to Review Judgment of Conviction Entered in the Circuit Court for Oconto County, the Honorable Michael T. Judge presiding, and the order denying motion for postconviction relief in the Circuit Court for Oconto County, the Honorable Michael T. Judge presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED

CASES CITED

STATEMENT OF ISSUES

I. Whether the Admission of Statements from Hanson's Deceased Wife Violated his Right to Confrontation?

The circuit court admitted these statements under the admission by a party opponent hearsay exception and did not address Hanson's confrontation claim.

II. Whether Hanson was Denied the Effective Assistance of Counsel when Trial Counsel Failed to Call Key Exculpatory Witnesses and Failed to Challenge the Improper Admission of Hanson's John Doe Testimony?

The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Rule 809.22, as Hanson's arguments are substantial and do not fall under the class of clearly frivolous upon which oral argument may be denied under Rule 809.22(2)(a). This case is appropriate for publication under Rule 809.23, as it applies an established rule of law to a factual situation that is significantly different from that in published opinions.

SUMMARY OF THE CASE

Around twenty years ago, in February 1998, the victim, Chad McLean, went missing; a month

later he was found deceased in the Pensaukee River as a result of gun shot wounds. The case went cold for over a decade. In 2009, Hanson's wife, from whom he was separated, told investigators that Hanson confessed of the murder to her, and the case was reopened. Hanson was ultimately charged and convicted, despite the State having no physical evidence tying Hanson to the murder, no murder weapon, and no motive for the killing. Indeed, the State's case was based largely on jailhouse snitch testimony. The circuit court, however, improperly allowed the jury to hear Kathy Hanson's incriminating hearsay statements; Kathy Hanson committed suicide prior to Hanson's trial. In addition, Hanson's trial counsel failed to present the testimony of several witnesses, each of whom would have shattered the State's theory.

STATEMENT OF THE CASE

On February 22, 1998, the victim, Chad McLean[1], headed to Oconto County to go fishing with his friend, Cory Byng. R 43 at 197-99. Around 4 o'clock that same day, McLean and Byng went to Byng's aunt's and uncle's house for a cookout. *Id.* at 202-04. McLean and Byng were drinking throughout their visit, and around 6:00 p.m., the two went to the Hi-Way Restaurant and Truck Stop[2] (hereinafter referred to as "Hi-Way Truck Stop") for beer and some cigarettes. *Id.* at 208-09. The two then went back to Byng's uncle's house and drank more beer. *Id.* at 215. Later that night, the defendant, Peter Hanson, and Chuck Mlados arrived at Byng's uncle's

[1] *See* Wis. Stat. § 809.86(3) permitting citation to the name of a victim of homicide.
[2] This establishment was a combination restaurant, convenience store, and gas station. The convenience store and gas station were open twenty-four hours a day, and the restaurant closed at 10:00 p.m. R 39 at 126, 135-36

house. *Id.* at 216. Around 7 p.m., Byng and McLean got into Byng's vehicle, and while Byng was backing his truck out the long driveway, he ended up running into the ditch. *Id.* at 220-21. McLean made a comment about Byng's driving and the two "scuffled." *Id.* at 221-22. Byng's uncle broke up the fight and took Byng's keys away. *Id.* at 222. Byng testified that he decided to spend the night at his uncle's house, and there were discussions as to how McLean would get home. *Id.* at 227-29. Byng testified at trial that Hanson and Mlados were supposed to give McLean a ride to the truck stop. *Id.* at 229. Around 9:30 or 10:00 p.m., McLean left with Hanson and McLean in a truck owned by Jason Hudson, son of Kenneth Hudson. R 39 at 279-80, 282. Hanson told investigators that he and Mlados dropped McLean off at the Hi-Way Truck Stop and did not know where he went after that. R 43 at 268.

The State's theory was that Hanson and Mlados never took McLean to the Hi-Way Truck Stop, and the State presented the testimony of several employees who all testified that they did not see McLean at the truck stop that evening. R 41 at 42; R 39 at 134-39, 144-49, 158-60, 174-79. In addition, the State presented video of the *inside* of the Hi-Way Truck Stop to show that McLean was not present around the time Hanson said he dropped McLean off. R 43 at 269-70. While the State presented only the inside camera views, the manager of the Hi-Way Truck Stop, Lori Delzer, testified that there were also *outside* camera views. *Id.*; R 39 at 127, 131. Ms. Delzer testified that she watched the outside feed with investigators and that investigators took custody of the tapes. R 39 at 131. The State has no idea what happened to the tape showing the

outside camera. R 44 at 107.

On February 25, 1998, McLean's mother received a call from a friend, who was supposed to give McLean a ride to work, advising that McLean was not home. R 43 at 101. On February 27, 1998, McLean's mother reported him missing. *Id.* at 103. About a month later, on March 22, 1998, McLean's body was found in the Pensaukee River, and it was determined that McLean died of multiple gunshot wounds to the head. R 43 at 279; R 39 at 85. The medical examiner was unable to determine how long McLean had been deceased but testified that the decomposition of his body was less than one would expect, assuming McLean died a month prior, when he was reported missing. R 39 at 94.

The case was cold for over a decade. R 1 at 2. In 2009, detectives interviewed Hanson's wife, Kathy Hanson, around the time that Peter and Kathy were separated/divorcing. *See* R 123 at 3-4. Kathy told investigators that Peter confessed to her to killing the guy. *Id.* at 1-4. Kathy Hanson ultimately ended up committing suicide. *See* R 125 at 3. In 2012, the State initiated a John Doe proceeding into the homicide, and Hanson was charged with McLean's murder in 2013. *See* R 32, Exh. 54; R 1.

At trial, there was slim evidence connecting Hanson to the murder. The State relied heavily on its theory that McLean was never seen alive after he left the Byng residence with Hanson. R 41 at 60. The State pointed to Hanson's statement that he dropped McLean off at the Hi-Way Truck Stop, yet none of the employees recalled seeing McLean and none of the cameras showed McLean at the truck

stop. *See* R 41 at 37, 40-42. In addition, the State relied on testimony from Hanson's neighbors that they heard gunshots that evening coming from the direction of Hanson's home; however, the neighbor said there was "always" target practice activity off and on from Hanson's property. *Id.* at 43; R 39 at 211. The State had no murder weapon, but presented testimony that Hanson's neighbor had seen Hanson in the past with a .22 caliber gun. R 41 at 46. The medical examiner testified that McLean's wounds were consistent with small-caliber bullets such as a .22. R 39 at 76, 80. The State further relied on statements from Kathy Hanson, Peter's deceased wife, that she told police that Peter killed McLean. R 44 at 83-84; R 123.

The brunt of the State's case was based on the jailhouse snitch testimony of Barry O'Connor and Jeremy Dey, who testified that Hanson confessed to killing McLean. *See* R 40 at 25, 114. In addition, the State presented Kenneth Hudson, who testified that Hanson confessed to killing McLean. R 40 at 162. Hudson, however, had a personal stake in the case, as Hanson was driving Hudson's step-son's truck the night McLean disappeared. *Id.* at 153, 158, 162. In addition, Hudson testified that he was hoping his cooperation would benefit his pending cases. *Id.* at 176-77. The State's only proffered motive was that McLean either "mouthed off" or was pestering Hanson for a ride, so Hanson decided to kill him. R 41 at 51, 58. The jury found Hanson guilty and he was sentenced to life in prison without the possibility of parole. R 47.

The jury, however, did not hear the entire story, as Hanson's defense counsel, Jeffrey Jazgar,

presented no witnesses. R 44 at 124. The discovery documents provided to the defense contained the statements of several witnesses, who each undermined the State's case. These witnesses include Lila Hetrick, who told investigators that McLean called her from the Hi-Way Truck Stop looking for a ride. R 98, Exh. D. McLean indicated that he was scared and gave Ms. Hetrick three names to write down. *Id.* Similarly, another witness, Angelica Snow, told investigators that on the night McLean disappeared, she went to the Hi-Way Truck Stop around midnight and recalls seeing two males in their early twenties with baseball hats sitting on the gas station front steps. R 98, Exh. F. According to Snow, one of the males might have been McLean. *Id.*

Along these same lines, two waitresses reported seeing McLean at the 41 Truck Plaza in De Pere on February 28, 1998, *six days after* he was purportedly killed by Hanson. R 98, Exh. E. According to one of the waitresses, "there was no doubt in her mind that the person in the photo was the same guy in the restaurant." R 77, Exh. D. The exculpatory discovery materials went on, and included statements from various witnesses who witnessed a man matching McLean's description wandering around the Green Bay/Oconto area. R 98, Exh. H, I, J, K. For example, Susan Patton advised investigating officers that she saw an individual with a darker jacket with light coloring or trim and a baseball hat walking along a rural Oconto County the evening McLean disappeared. R 98, Exh. H; R 77, Exh. H. The night McLean went missing, he was wearing a plaid white and black jacket, blue jeans, and a baseball cap. R 43 at 217. Similarly, on March 2, 1998, Jerome Cichocki advised investigators that

on February 28, 1998, six days after Hanson purportedly murdered McLean, he saw a white male walking southbound on the median side of the northbound lanes of Hwy. 41. R 98, Exh. I. Cichocki stated that the male was wearing a black and white checkered flannel shirt and a black baseball hat. *Id.* Cichocki took note of the man because of where he was walking, southbound on the median side of the northbound lanes and that there were no vehicles on the side of the road suggesting anyone had car trouble. *Id.* Cichocki further advised investigators that his wife went home the same route and "where they had seen McLean earlier, there was a cardboard sign with 'Milwaukee' on it and McLean was no where around." R 98, Exh. J. Finally, the discovery materials contained evidence that another individual, Cory Byng, with whom McLean had a fight with the night McLean disappeared, confessed "I killed him, I shot him with a gun." R 98, Exh. M; R 43 at 221-22. Attorney Jazgar presented none of these witnesses. *See* R 44 at 124.

On November 20, 2015, Hanson filed a motion for postconviction relief on several grounds[3], including on grounds that Attorney Jazgar provided ineffective assistance of counsel. R 77. On July 13, 2016, the circuit court held a *Machner*[4] hearing at which Attorney Jazgar testified. R 102. Attorney Jazgar testified that he reviewed all the discovery materials in the case and that neither he nor anyone on his behalf interviewed any witnesses. R 102 at 5, 9-10. Hanson questioned Attorney Jazgar on his familiarity with the witnesses discussed above, and

[3] For strategic reasons, Hanson does not maintain all claims originally asserted in his postconviction motion.

[4] *State v. Machner,* 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)

Attorney Jazgar could not recall the specifics of each witness and could not identify any strategic reason for failing to call each witness. *See* R 102 at 10-23. Hanson also asserted that Attorney Jazgar was ineffective in failing to challenge the admissibility of Hanson's John Doe testimony on grounds that such testimony violated the tenets of *Miranda*. *Miranda v. Arizona*, 384 U.S. 436 (1966). Attorney Jazgar testified that he did not believe *Miranda* applied. R 102 at 26.

The circuit court denied Hanson's motion challenging Attorney Jazgar's failure to call witnesses, reasoning that "it was a reasonable trial strategy for Jazgar to refrain from calling witnesses based upon his trial strategy as stated at the *Machner* hearing and at trial." R 106 at 4. With regard to Hanson's claim that Attorney Jazgar failed to challenge his John Doe testimony, the circuit denied Hanson's motion, concluding that, "the colloquy between Peter Hanson and the Court satisfies any right that the defendant had to an attorney at a John Doe proceeding." R 106 at 7. This appeal follows.

ARGUMENT

I. The Admission of Statements from Hanson's Deceased Wife Violated his Right to Confrontation

At trial, the State, over Hanson's objection, presented to the jury the following John Doe testimony of Peter Hanson, which contained hearsay statements of Kathy Hanson:

Q: Did you ever talk to your wife Kathy about Chad McLean's death?

A: Well, of course. We talked about it a lot.

Q: Okay. And at times Kathy confronted you and said you were responsible for Chad McLean's death?

A: Not to my face she didn't. She went to the police.

Q: At some point within the year before she passed away, isn't it a fact that Kathy confronted you about the Chad McLean death?

A: No. She never – we didn't talk about it anymore. It wasn't until she kept trying to put me in jail for little stuff that then all the sudden she went to the police and accused me of – that she thought that I killed Chad McLean.

Q: But specifically she was telling people that you had shot Chad McLean?

A: Well, not that I know of.

Q: Well –

A: She told the police.

Q: Who told you that she was saying that you killed Chad McLean?

A: Laskowski.

R 44 at 71-72, 83-84.

Prior to the admission of these statements, Hanson objected, asserting that Peter Hanson's John Doe testimony contained statements from Kathy Hanson. *Id.* at 71. Hanson argued that the admission of these statements violates his right to confrontation under *Crawford. Id.; Crawford v.*

Washington, 541 U.S. 36, 42 (2004). The court ruled that the statements were admissible pursuant to the admission by a party opponent hearsay exception. R 44 at 81-82. The court, however, failed to address the crux of Hanson's argument: that the multi-level hearsay statements of Kathy Hanson violated his right to confrontation. *See id.*

A. Standard of Review

Whether admission of hearsay evidence violates a defendant's right to confrontation presents a question of law, which this Court reviews de novo. *State v. Weed,* 2003 WI 85, ¶ 10, 263 Wis. 2d 434, 666 N.W.2d 485.

B. The admission of Kathy Hanson's hearsay statements violated Hanson's right to confrontation

The Sixth Amendment mandates that a criminal defendant has the right to confront the witnesses against him. U.S. Const. Amend. VI; *Crawford*, 541 U.S. at 42 (2004). This fundamental protection requires the State to present its witnesses in court to provide live testimony that can be subject to cross-examination. *Crawford,* 541 U.S. at 43. For the confrontation clause to apply, the hearsay statements must be "testimonial" in nature. *Id.* at 51; *State v. Manuel*, 2005 WI 75, ¶ 37, 281 Wis. 2d 554, 697 N.W.2d 811.

To qualify as "testimonial," the statements must be a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Manuel,* 281 Wis. 2d 554, ¶ 37 (quoting *Crawford*,

541 U.S. at 51). The term "testimonial" can be characterized by three different formulations including the following:

> (1) '[*E*] *x parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'
>
> (2) '[E]xtrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'
>
> (3) '[S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'

Manuel, 281 Wis. 2d 554, ¶ 37 (quoting *Crawford*, 541 U.S. at 51-52)(internal citations omitted).

In general, statements made to law enforcement officials about a crime are considered testimonial. *State v. Rodriguez*, 2006 WI App 163, ¶ 22, 295 Wis. 2d 801, 722 N.W.2d 136. There are, however, several exceptions to this rule, such as when victims make excited utterances to officers responding in an emergency situation or where a witness' statements were not made in response to police interrogation. *See id*, ¶¶ 23-26.

In this case, there can be little dispute that Kathy Hanson's statements were testimonial in nature. First, Kathy Hanson's statements to police occurred while she was in custody at the jail. R 123.

Second, the investigator advised Kathy Hanson that he was investigating the McLean homicide and asked her questions related to such. *Id.* As a result of this interrogation, Kathy Hanson made several statements implicating Peter Hanson in the crime. *Id.* Accordingly, these comments were testimonial in nature and subject to the confrontation clause. *Crawford,* 541 U.S. at 43. The admission of these statements thus violated Hanson's Sixth Amendment right to confront his accusers. *See id.*

Hanson objected to the admission of these statements on grounds that this evidence violated his right to confrontation. R 44 at 71. The court deemed the statements admissible pursuant to the admission by a party opponent hearsay exception. *Id.* at 81-82. The court, however, failed to appreciate that Peter Hanson's statement contained a second layer of hearsay from Kathy Hanson, and it never ruled on the confrontation component. *See id.*

C. The error was not harmless

When a defendant's right to confrontation is violated, reversal is not automatic; rather, the Court considers whether the error was harmless beyond a reasonable doubt. *State v. Hale*, 2005 WI 7, ¶¶ 59-60, 277 Wis. 2d 593, 691 N.W.2d 637. The State bears the burden to establish that the error was harmless and must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434 (citing *State v. Harris*, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397).

In this case, the State cannot show that the

error did not contribute to the verdict. Of most significance, the jury took particular note of Kathy Hanson's statements when it specifically asked the court to provide it with Kathy Hanson's statement to police. R 36. Thus, the State would be hard-pressed to argue that the jury did not consider statements Hanson purportedly made to his wife in reaching its verdict.

II. Hanson was Denied the Effective Assistance of Counsel when Trial Counsel Failed to Call Key Exculpatory Witnesses and Failed to Challenge the Improper Admission of Hanson's John Doe Testimony.

A. Standard of review

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Trawitzki,* 244 Wis. 2d 523, ¶ 19, 628 N.W.2d 801 (2001). This Court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Findings of fact include "the circumstances of the case and the counsel's conduct and strategy." *State v. Knight,* 168 Wis. 2d 509, 514, n. 2, 484 N.W.2d 540 (1992). Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which this Court reviews de novo. *State v. Thiel,* 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305.

B. A defendant has Sixth Amendment right to the effective assistance of counsel

The 6th Amendment guarantees a criminal defendant the right to the effective assistance of

counsel. U.S. Const. Amend VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To show that counsel was ineffective, a defendant must prove the following: (1) that counsel's performance was deficient and (2) that such deficiencies prejudiced the defendant. *Strickland*, 466 U.S. at 687. To prove that counsel was deficient, the defendant must show that counsel's performance fell below an objectively reasonable standard. *Thiel*, 264 Wis. 2d 571, ¶ 19. To show that counsel's deficient performance was prejudicial, the defendant must show a reasonable probability that but for counsel's errors, the outcome would have been different. *Id.*, ¶ 20. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The focus is not on the outcome of the trial but on the reliability of the proceedings. *Id.*

C. Attorney Jazgar was ineffective in failing to call key witnesses and in failing to move to suppress Hanson's John Doe testimony

1. Attorney Jazgar was deficient in failing to call key witnesses

The State's theory was that Hanson killed McLean on the night of February 22, 1998. *See* R 41 at 42. The State had no murder weapon, no physical evidence tying Hanson to the crime, and the only motive proffered by the State was that McLean may have mouthed off or pestered him for ride, thereby driving Hanson to kill him. *See id.* at 58. Hanson told officers that he dropped McLean off at the Hi-Way Truck stop and left. R 43 at 157, 185. The State's theory was that Hanson never took McLean to

the Hi-Way Truck stop and that McLean was never seen alive after he left the Byng residence with Hanson. R 41 at 41, 60. Attorney Jazgar presented no witnesses at trial. R 44 at 124. In addition, Attorney Jazgar testified that neither he nor anyone at his direction even *interviewed* any witnesses. R 102 at 9-10. However, the discovery materials provided to Attorney Jazgar outlined several witnesses to support Hanson's theory that he dropped McLean at the Hi-Way Truck Stop and that saw an individual closely matching McLean's description several days after Hanson purportedly murder McLean.

a. Lila Hetrick

In 2001, Lila Hetrick gave a statement to police that she received a call from McLean, from the Hi-Way Truck Stop looking for a ride. R 98, Exh. D. At the time, Hetrick did not have enough gas to pick him up and told McLean that she would have to wait until her parents got back. *Id.* Hetrick went on to say that she spoke to McLean a second time that night and that McLean was scared and gave investigators the impression that there were people there waiting for Chad. *Id.* Hetrick stated that "Chad gave her 3 names and that she wrote them down on a piece of paper that she cannot find." *Id.* Hetrick went on to say "in order for Chad to avoid suspicion while he was on the phone that he read off the menu to her." *Id.*

Presenting the testimony of Ms. Hetrick would have undermined the State's argument that Hanson never took McLean to the Hi-Way Truck Stop and would have supported the defense theory that

Hanson did not commit the crime. R 41 at 41; R 98, Exh. D. During the motion hearing, Attorney Jazgar testified that he could not recall the name Lila Hetrick. R 102 at 10. Attorney Jazgar testified that he did not recall reviewing the discovery related to Hetrick but that he did not dispute that such reports were indeed contained in discovery. *Id.* at 10-11. Attorney Jazgar could not explain why he failed to call Ms. Hetrick as a witness and conceded that her testimony would not have hurt the defense case. *Id.* at 11. Because Ms. Hetrick's testimony would have undermined the State's case, and because Attorney Jazgar provided no strategic reason for failing to call her, his performance was deficient. Hanson will address the prejudice prong in totality below.

b. Angelica Snow

On March 27, 1998, Angelica Snow told investigators that on the night McLean disappeared, she went to the Highway Truck Stop around midnight and recalled seeing two males in their early twenties with baseball hats sitting on the station front steps. R 98, Exh. F. According to Snow, one of the males might have been McLean. *Id.* Like Hetrick, Snow's testimony would have undermined the State's argument that Hanson never took McLean to the Hi-Way Truck Stop and would have supported the defense theory that Hanson committed this crime. The State presented the testimony of several truck stop employees, all of whom testified that they never saw McLean at the truck stop. R 39 at 134-39, 144-49, 152-55, 158-60, 162-65, 174-79. However, all of these employees ended their shifts between 9:00 p.m. and 11:00 p.m., *an hour before* Snow reports that she saw a man that might have

been McLean. *See id.*; R 98, Exh. F. Snow's testimony would have further undermined the State's witnesses and undermined the State's theory in general.

During the motion hearing, Attorney Jazgar testified that he could not recall the name Angelica Snow. R 102 at 13. Attorney Jazgar testified that he did not dispute that the reports related to Ms. Snow were indeed contained in discovery. *Id.* at 14. Attorney Jazgar could not explain why he failed to call Ms. Snow as a witness. *Id.* Because Ms. Snow's testimony would have undermined the State's case, and because Attorney Jazgar provided no strategic reason for failing to call her, his performance was deficient.

c. Pamela Smith and Beatrice Ambrosius

According to the report of Detective Thyes, two waitresses reported seeing McLean at the 41 Truck Plaza in De Pere on February 28, 1998, *six days* after he was purportedly killed by Hanson. R 98, Exh. E. On March 1, 1998, Detective Thyes showed a photo of McLean to Pamela Smith (né Madison) and Beatrice Ambrosius (né Treichel), waitresses at the 41 Truck Plaza, and both women stated that the photo looks like the person in the restaurant yesterday morning. *Id.*

On July 14, 2014, a defense investigator interviewed Ms. Smith, and Smith confirmed her prior statement. According to Smith, "there was no doubt in her mind that the person in the photo [of McLean shown to her by the detective] was the same guy in the restaurant." R 77, Exh. D. Smith further

indicated that the man in the photo was sitting with another man and that her attention was drawn to them because they never spoke to each other, despite sitting in a booth together. *Id.* Smith stated "she got 'vibes' the two men were pissed off at each other" by "the looks they gave each other." *Id.*

During the motion hearing, Attorney Jazgar testified that he could not recall the names Pamela Madison or Beatrice Treichel. R 102 at 11. Attorney Jazgar testified that he did not dispute that the reports related to Ms. Madison and Ms. Treichel were indeed contained in discovery. *Id.* at 10-11. Attorney Jazgar could not explain why he failed to call Ms. Madison and Ms. Triechel as witnesses but conceded that their testimony would not have been hurtful to the defense case. *Id.* at 13. Because Ms. Madison's and Ms. Triechel's testimony would have undermined the State's case, and because Attorney Jazgar provided no strategic reason for failing to call them, his performance was deficient.

d. Susan Patton

Officer Jansen's notes from March 30, 1998 indicate that he interviewed a woman named "Susan." R 98, Exh. H. In 2014, a defense investigator followed-up with this woman, Susan Patton, and she stated that she advised investigating officers that she saw an individual with a darker jacket with light coloring or trim and a baseball hat "walking with head down." R 77, Exh. H. Ms. Patton stated that on February 22, 1998, she was driving home on Sandalwood Road in Oconto and saw a male walking along the side of the road. *Id.* Ms. Patton stated that the male's head was facing down and he

walked "real slow." *Id.* Ms. Patton indicated that he was wearing a dark colored jacket with white stripes and a baseball cap. *Id.* Ms. Patton took note of the male because it was very foggy that night and she saw two vehicles traveling fast given the foggy conditions, and was concerned that the male was going to get hit by the vehicles. *Id.* Patton's description of the male is consistent with the clothing McLean was wearing that night, specifically, Cory Byng testified that McLean was wearing a "plaid white and black jacket, blue jeans, and I think a hat[,] . . . a baseball cap." R 43 at 217. Ms. Patton's testimony would have been particularly relevant, given that McLean went missing in the dead of winter in a rural area, where it would be unusual for someone to be walking around in the evening.

During the motion hearing, Attorney Jazgar testified that he could not recall the name Susan Patton. R 102 at 14. Attorney Jazgar testified that he did not dispute that the report related to Ms. Patton was indeed contained in discovery. *Id.* at 14. Attorney Jazgar could not explain why he failed to call Ms. Patton as a witness. *Id.* at 14. Because Ms. Patton's testimony would have undermined the State's case, and because Attorney Jazgar provided no strategic reason for failing to call her, his performance was deficient.

e. Jerome Cichocki

On March 2, 1998, Jerome Cichocki contacted Detective Zettel and advised that on February 28, 1998, six days after Hanson purportedly murdered McLean, he saw a white male walking southbound on the median side of the northbound lanes of Hwy. 41.

R 98, Exh. I. Cichocki stated that the male was wearing a black and white checkered flannel shirt and a black baseball hat, which likewise matches the description of McLean. *Id.;* R 43 at 217. Cichocki took note of the man because of where he was walking, southbound on the median side of the northbound lanes and that there were no vehicles on the side of the road suggesting anyone had car trouble. *Id.* Cichoki called Detective Zettel back later that day indicating that he recalled something else he had forgotten to tell Detective Zettel. R 98, Exh. J. Specifically, that his wife went home the same route and "where they had seen McLean earlier, there was a cardboard sign with 'Milwaukee' on it and McLean was no where around." *Id.*

During the motion hearing, Attorney Jazgar testified that he could not recall the name Jerome Cichocki. R 102 at 14-15. Attorney Jazgar testified that he did not dispute that the reports related to Mr. Cichocki were indeed contained in discovery. *Id.* at 15. Attorney Jazgar could not explain why he failed to call Mr. Cichocki as a witness. *Id.* at 16. Similar to Ms. Patton, Mr. Cichocki's testimony of seeing a man matching McLean's description walking down a rural highway in the middle of winter would have undermined the State's theory that Hanson killed McLean on February 22, 1998. Because Mr. Cichocki's testimony would have undermined the State's case, and because Attorney Jazgar provided no strategic reason for failing to call him, his performance was deficient.

f. Tina Krake

According to the discovery materials, investigators had evidence that another individual confessed to killing McLean. On December 6, 2004, Investigator Laskowski followed up on a 911 call reporting that Tina Krake has information regarding the unsolved McLean homicide. R 98, Exh. M. Krake stated that five years ago, Krake was at a bar with David Athey, Cory Byng, and Mike Georgia. Byng later pulled Krake outside and started to cry, hugged Krake and said "I killed him, I shot him with a gun." *Id.* Byng said that "he was using coke and flipped out and killed him." Investigator Laskowski later conducted a photo lineup with Krake and she "immediately without hesitation picked out Cory Byng." *Id.*

During the motion hearing, Attorney Jazgar testified that he did not dispute that the reports related to Tina Krake were indeed contained in discovery. R 102 at 18. In addition, Attorney Jazgar did not have a specific recollection of the confession that Cory Byng made to Ms. Krake and could not identify any strategic reasons for failing to present this evidence. *Id.* at 19. The testimony of Tina Krake that Cory Byng confessed to killing McLean would have undermined the State's theory that Hanson killed McLean, particularly given that McLean and Byng had a fight the night McLean went missing. R 43 at 220-22.

Accordingly, Attorney Jazgar was deficient in failing to call the above witnesses, as these witnesses would have significantly undermined the State's case and bolstered the defense theory, as discussed in

detail above.

2. Hanson was prejudiced by counsel's failure to call the above witnesses

A defendant is prejudiced if "trial counsel's failure to investigate and present at trial facts that would cast doubt on the credibility of the State's principal witnesses undermines our confidence in the verdict." *State v. Jeannie M.P.*, 286 Wis. 2d 721, 741, 703 N.W.2d 694 (Ct. App. 2005). The State's theory was that Hanson and Mlados never took McLean to the Hi-Way Truck Stop, and the State presented the testimony of several employees who all testified that they did not see McLean at the truck stop that evening. *Id.* at 274; R 39 at 134-39, 144-49, 158-60, 174-79. Presenting the testimony of Hetrick and Snow, establishing that McLean was at the Hi-Way Truck Stop that evening, would have cast considerable doubt on the State's witnesses.

The State further relied on the fact that "Chad's never seen anywhere else. He's not alive on Monday, he's not alive on Tuesday, he's not alive past that Sunday night." R 41 at 60. However, the testimony of Susan Patton, that she saw a man — wearing clothing matching the description of what McLean was wearing that day — wandering around a rural road on the night McLean disappeared (the middle of winter), supported the defense theory that Hanson dropped McLean off at the Hi-Way Truck Stop and undermined the State's theory that McLean was last seen with Hanson. R 98, Exh. H; R 77, Exh. H. Similarly, the testimony of Pamela Smith that "there was no doubt in her mind that the person in the photo [of McLean shown to her by the detective]

was the same guy" seen *six days later* in the 41 Truck Plaza restaurant undermines the State's theory that McLean was never seen alive past Sunday night. R 98, Exh. E; R 77, Exh. D. Likewise, the testimony of Jerome Cichocki that he saw a man wearing clothing matching McLean's description walking down highway 41 *six days later* undermines the State's theory. R 98, Exhs. I, J. Finally, evidence that Cory Byng – who had a fight with McLean the night he disappeared – confessed to murdering McLean would have been powerful evidence undermining the State's case that Hanson committed this crime. R 98, Exh. M; R 43 at 221-22.

3. This Court should not adopt the postconviction court's reasoning.

The circuit court made few factual findings in its decision on Hanson's postconviction motion, but the court did find that Attorney Jazgar could not identify any strategic reason for failing to call the witnesses outlined. R 106 at 2. The court then, curiously, denied Hanson's motion, reasoning that "it was a reasonable trial strategy for Jazgar to refrain from calling witnesses based upon his trial strategy as stated at the *Machner* hearing and at trial." *Id.* at 4. While the court reviews the issue of whether counsel's performance satisfied the constitutional standard de novo, Hanson will address the flaws in the circuit court's reasoning. See *Thiel,* 264 Wis.2d 571, ¶ 21.

First, the postconviction court improperly, and over Hanson's objection, allowed the State to elicit Attorney Jazgar's hindsight view of the case,

particularly with regard to failing to call Ms. Krake.[5] R 102 at 32. Attorney Jazgar offered reasons why he would *generally* be hesitant to place blame on another party before the jury. *Id.* at 14. However, Attorney Jazgar made it clear that he could not "specifically address Mr. Hanson's case . . . ." *Id.* at 39. The law requires that the Court review "counsel's perspective *at the time of trial*," and should avoid determinations made in hindsight. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990)(emphasis added). Because the law requires the court to evaluate counsel's perspective at the time of trial, and because Attorney Jazgar offered no strategic reasons for failing to present the above witnesses, it was improper for the court to find that Attorney Jazgar made a reasonable strategic decision. *Id.*; R 106 at 4.

Second, even if there is a basis to show that Attorney Jazgar made a strategic decision not to call the above witnesses, such a decision must nonetheless be reasonable. *State v. Felton,* 110 Wis. 2d 485, 501–03, 329 N.W.2d 161 (1983)(stating that while matters of trial strategy are generally left to counsel's professional judgment, counsel may be found ineffective if the strategy was objectively unreasonable). Attorney Jazgar testified that his defense theory was that the State did not meet its burden and presenting defense evidence undermines such a theory. R 102 at 30, 37. However, using a simple burden of proof or beyond a reasonable doubt defense does not preclude a defendant from presenting doubt. Indeed, presenting doubt is

[5] The court overruled Hanson's objection, reasoning, " I'm allowing everything in here, Counsel. There were no objections from the State against the defense, and let's just go ahead and get all the information out that you want to get out, which you will probably do in your briefs anyway." R 102 at 33.

cohesive with such a defense. In addition, the fact that Attorney Jazgar did not even *interview* these witnesses is illuminating. R 102 at 9-10. This is not a situation where Attorney Jazgar was aware of the strengths and weaknesses of a witness and made a calculated decision not to call the witness; rather, it appears that Attorney Jazgar performed a languid investigation and planning of trial strategy. *See id.*

The court further concluded that the result of the proceedings would not have been any different had Attorney Jazgar presented the above evidence. Specifically, the court reasoned that the testimony of Kenneth Hudson, Barry O'Connor, and Jeremy Dey was so compelling that the jury would have still found Hanson guilty. R 106 at 4. However, justifying a life sentence on the basis of two jailhouse snitches and another individual who has a personal stake in the case is absurd.

According to O'Connor, Hanson told him years back at a bar one night that "they had accidentally killed somebody and that in a shed, and there was – he went in the house, and he had blood on his hands, his wife seen him, and they got rid of the body in the river by his house." R 40 at 25. O'Connor explained that he was later in jail with Hanson and Hanson told him not to say anything or the same thing would happen to him. *Id.* at 19. O'Connor, apparently then concerned for his safety, decided to share the information with law enforcement. *Id.* at 30. Around this same time, O'Connor was awaiting sentencing on charges and was making repeated requests of the judge for Huber privileges and extensions. *Id.* at 46-49.

Similarly, Jeremy Dey, who was in jail with Hanson after his arrest on the murder charges, testified that Hanson gave Dey a bunch of paperwork from his attorney related to the murder. R 40 at 108, 112. Dey explained that Hanson was "bragging because he wasn't going to get caught with it." *Id.* at 113. According to Dey, Hanson "said he shot him[,]" referring to "Chad McLean." *Id.* at 114.

Finally, Kenneth Hudson testified that Hanson purportedly told him, "Chad McLean got what he – and that he shot him." *Id.* at 162. However, Hudson had a stake in the case, as Hanson was driving his step-son's (Jason) truck that evening. *Id.* at 153, 158. In addition, Hudson testified that he believed that testifying against Hanson would help his pending cases. *Id.* at 176-77.

Thus, this Court should not adopt the circuit court's conclusion that the testimony of two jailhouse snitches, which is inherently unreliable, and the testimony of someone with a personal stake in the case and hoping to gain an advantage on his pending cases is so overwhelming as to not undermine confidence in the outcome. R 40 at 19, 25, 30, 46-49, 108, 112-14, 153, 158, 162, 176-77. *Sivak v. Hardison*, 658 F.3d 898, 916 (9th Cir. 2011),

C. Attorney Jazgar was deficient in failing to challenge Hanson's John Doe testimony

On November 1, 2012, prior to being charged with this case, Hanson was in custody in the Oconto County jail on an unrelated matter. R 106 at 4. On this same date, a John Doe hearing was convened

with regard to the McLean matter, and Hanson was called to testify. *Id.* Prior to testifying, the court conducted a colloquy with Hanson regarding his right to remain silent, his right to counsel, his right to assert certain privileges, etc. R 32, Exh. 54 at 48-52. The court, however, failed to advise Hanson that if he could not afford counsel, counsel would be appointed for him. *See id.*

During the pretrial phase, Attorney Jazgar raised no motions challenging the admissibility of Hanson's testimony made during the John Doe case. The State actually raised the issue that these statements could potentially be inadmissible, conceding that Hanson was in custody during the John Doe testimony and inquiring as to whether Hanson would challenge such. R 55 at 4. Attorney Jazgar responded that he did not believe there was anything that prevented the State from using the testimony. R 51 at 21.

1. *Miranda* requires that one in custody and subject to questioning must be advised of his rights.

Prior to questioning a defendant in custody or otherwise deprived of his freedom, the defendant must first be warned that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, *if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."* *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966)(emphasis added). These warnings must be administered when the defendant

is 1) in custody and 2) is subject to questioning. *Id.* at 447.

2. *Miranda* applied to Hanson's statements and Hanson was not advised of his full Miranda warnings.

In this case, the State conceded that Hanson was in custody for *Miranda* purposes. R 55 at 4. In addition, the State appeared to concede that Hanson was subject to questioning when it did not argue against such. *See id.* Indeed, the State implicitly acknowledged that *Miranda* applied to Hanson under those circumstances, when its only argument to the Court was that the dictates of *Miranda* were satisfied. *Id.* at 4. Attorney Jazgar agreed with the State, advising that he did not believe there was anything preventing the State from presenting these statements. R 51 at 21.

Prior to Hanson testifying at the John Doe hearing, the court advised him of the following:

> THE COURT: Mr. Hanson, you are advised that you are appearing in a John Doe proceeding before me, Judge Michael T. Judge, for Oconto County.
>
> Under Wisconsin law, the circuit judge has the power to subpoena witnesses and compel testimony before this John Doe proceeding. You are directed to answer all questions put to you, remembering your oath that you just gave.
>
> If you believe that a truthful answer to any question asked of you would incriminate you, that is, subject you to criminal prosecution, you may refuse to answer the question on the grounds that it may incriminate you. Do you

understand that sir?

THE WITNESS: Yes.

THE COURT: Do you understand that your answers to questions put to you may be used against you by this John Doe or in another legal proceeding?

THE WITNESS: Yes.

THE COURT: Do you understand that if you would testify falsely, you may be criminally prosecuted for perjury or false swearing committed during your testimony before this John Doe proceeding?

THE WITNESS: Yes.

THE COURT: Under Wisconsin law, several types of confidential communications are privileged. These include communications between spouses, between a health care provider and patient, between attorney and client, and between a person and a member of the clergy. Do you understand that you may refuse to answer any question asked of you if it would require you to reveal conversations which are privileged by law?

THE WITNESS: Yes.

THE COURT: Do you understand that there are no other lawful grounds upon which you may refuse to answer questions before this John Doe proceeding?

THE WITNESS: Yes.

THE COURT: Now, Mr. Hanson, you are also advised that you have the right to have an attorney present with you during your testimony. However, your attorney would not be allowed to ask questions, cross-examine other witnesses, or argue before me, the judge. Do you understand that?

THE WITNESS: Yes.

> THE COURT: You are appearing before this John Doe proceeding without an attorney. Do you understand that Attorney Vince Biskupic, before you, represents the State of Wisconsin and may not and cannot act as your attorney in this matter?
>
> THE WITNESS: Yes.
>
> THE COURT: Do you understand that if you do not have an attorney but wish to consult with one about these proceedings or have an attorney appear with you, you would be required to return and testify at a future time?
>
> THE WITNESS: Yes.
>
> THE COURT: Mr. Hanson, do you wish to have an attorney present with you at this time?
>
> THE WITNESS: No.
>
> THE COURT: Has anyone made any threats or promises to persuade you to give up your right to consult with an attorney or have an attorney appear with you during this John Doe proceeding?
>
> THE WITNESS: No.

R 32, Exh. 54 at 48-52.

Attorney Jazgar, however, failed to identify that the Court did not provide Hanson *all* the rights required under *Miranda*, specifically, the Court did not advise Hanson that if the could not afford counsel, one would be appointed for him prior to any questioning. *Id.*; *Miranda,* 384 U.S. at 478-479.

Because the mandates of Miranda were not satisfied, Attorney Jazgar should have moved to suppress Hanson's John Doe testimony. During the *Machner* hearing, Attorney Jazgar likewise testified

that he did not believe that the Miranda warnings applied at a John Doe hearing. R 102 at 26. The circuit court concluded that it conducted a proper colloquy to satisfy a defendant's right to counsel at a John Doe Hearing. R 106 at 7. The circuit court, however, missed the point. Specifically, Hanson did not assert that the fact of the John Doe proceedings itself mandated the colloquy; rather, the circumstances surrounding the interrogation, that Hanson was in custody and subject to questioning, that mandated full *Miranda* warnings. R 77 at 9-10. Because *Miranda* required that Hanson be advised of these warnings and because the dictates of *Miranda* are clear, Attorney Jazgar was deficient for failing to raise such. *State v. Oswald,* 2000 WI App 2, ¶ 49, 232 Wis. 2d 62, 606 N.W.2d 207 (stating that "Deficient performance is limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue.").

3. Hanson was prejudiced by the Presentation of his John Doe testimony.

The State placed considerable emphasis on Hanson's John Doe testimony, focusing on Hanson's response to Kathy's confrontation and any inconsistencies that existed between Hanson's prior statements to police. R 44 at 38, 57-58. Indeed, through Hanson's statement, the State admitted Kathy Hanson's inadmissible hearsay, which Hanson challenges on different grounds above. *Supra* at 8-13*;* R 44 at 83. Not only was Hanson prejudiced by the State's emphasis on this testimony in persuading the jury to convict Hanson, but the record shows that the jury took specific note of Kathy Hanson's statement

when it asked for "anything that may pertain to Kathy Hanson's statement to the police." R 41 at 99. In this regard, it is important to note that this is the only question that came from the jury, thereby establishing that they put considerable emphasis on this testimony. *See id.* Given the weak evidence against Hanson, the impermissible admission of his John Doe testimony undermines confidence in the proceedings.

4. The Court should not adopt the circuit court's postconviction reasoning

The circuit court performed a lean analysis of this issue and made no factual findings on this issue; rather, it made a legal conclusion that, "the colloquy between Peter Hanson and the Court satisfies any right that the defendant had to an attorney at a John Doe proceeding." R 106 at 7. In so concluding, the postconviction court focused solely on the nature of the John Doe proceedings and did not address Hanson's Miranda claim. Because this issue is a question of law, this Court should review this issue de novo and conclude that *Miranda* applied in these circumstances, as discussed above. *Supra* at 26-31; *State v. City of Oak Creek,* 2000 WI 9, ¶ 18, 232 Wis.2d 612, 605 N.W.2d 526

CONCLUSION

Based on the above errors, Hanson requests that this Court vacate the judgment of conviction and remand for a new trial.

Dated this_____ day of March, 2017

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,108 words.

Dated this_____ day of March, 2017

Signed:

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CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this 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 this_____ day of March, 2017

Signed:

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CERTIFICATE AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality.

Dated this_____ day of March, 2017

Signed:

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APPENDIX

TABLE OF CONTENTS OF APPENDIX