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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP2058-CR

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

On Appeal to Review Judgment of Conviction and Order Denying Postconviction Relief, Entered in the Circuit Court for Oconto County, the Honorable Michael T. Judge Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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The circuit court allowed these statements as an admission by a party opponent and did not address Hanson's confrontation claim.

The court of appeals did not address Hanson's confrontation claim. Rather, it concluded that the error was harmless.

II. Whether trial counsel is ineffective in failing to move to suppress inculpatory statements made by a defendant at a John Doe hearing where the defendant was in custody and not properly Mirandized?

The circuit court concluded that it conducted a proper colloquy of Hanson at the John Doe hearing and thus there was no basis to suppress Hanson's statements.

The court of appeals did not address whether Hanson's John Doe statements violated *Miranda* or whether counsel was deficient in failing to challenge those statements. Instead, the court of appeals concluded that Hanson suffered no prejudice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

SUMMARY OF THE CASE

Over 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 gunshot wounds. The case went cold for over a decade. In 2009, Hanson's estranged wife, Kathy, gave a statement to police implicating Hanson in the murder, and the case was reopened.

In 2012, the State initiated a John Doe proceeding into the McLean murder, and Hanson, who was in custody on other charges at the time, was called as a witness. Before questioning, the John Doe court advised Hanson of some–though not all–of his *Miranda* warnings, seeing as he was in custody and subject to questioning. Hanson went on to give incriminating statements at the John Doe hearing.

Hanson was ultimately charged and convicted, despite the State having no physical evidence tying Hanson to the murder, no murder weapon, and no legitimate motive for the killing. Indeed, the State's case was based largely on jailhouse informant testimony. The State also relied heavily on Kathy Hanson's statements incriminating her husband. But, while the jury heard Kathy's statements, it did not hear these statements from Kathy, as she had passed away prior

to trial. Kathy's hearsay statements were read into the record, and Hanson was unable to confront or cross-examine her on this damaging testimony. In addition, the State read Peter Hanson's inculpatory John Doe testimony to the jury even though these statements were taken in violation of *Miranda*.

STATEMENT OF THE CASE

On February 22, 1998, the victim, Chad McLean, headed to Oconto County to go fishing with his friend, Cory Byng. (R. 43 at 197-99). Around 4:00 p.m. 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 (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 house. *Id.* at 216. Around 7:00 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 Mlados in a truck

owned by Jason Close.[1] (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).

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 estranged wife, Kathy Hanson. (*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). On November 1, 2012, the State convened a John Doe proceeding into the McLean murder, and Hanson, who was in custody in the Oconto County jail on other charges, was brought in to testify at the hearing. (R. 32, Ex. 54; R. 106 at 4). Prior to the State questioning Hanson, the court read several warnings to Hanson, but did not provide

[1] Close testified that he stored his truck on Hanson's property and gave Hanson permission to use it. (R.40 at 197).

the full warnings required by *Miranda.*[2] The State went on to elicit incriminating statements from Hanson at the John Doe hearing. (R. 32, Ex. 54 at 53-233). Hanson was ultimately charged with the murder in 2013. (R. 1).

Prior to trial, the State raised the issue that Hanson's John Doe statements could potentially be inadmissible, conceding that he was in custody at the time the State questioned him. (R. 55 at 4). The State argued that the statements were admissible because, "the Court gave the defendant the equivalent of the reading of his rights that a police officer would have given him at the that time . . . ." *Id.* Attorney Jazgar, Hanson's attorney, responded that because Hanson "was admonished as part of these proceedings, I'm not aware of any law that prevents the State from presenting that." (R. 51 at 21).

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.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966)

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 brunt of the State's case was based on the jailhouse informant 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. *Id.* at 162. But when Hudson gave his statement to police, law enforcement initially approached him because he had marijuana and guns in his house, which he was not allowed to possess, and advised him that he was in "trouble" with authorities. *Id.* at 170-71. While discussing the marijuana and guns with Hudson, police brought up the cold case of the McLean murder. *Id.* at 171-176. In addition, Hudson had a personal stake in the case, as Hanson the truck Hanson was driving the night McLean disappeared belonged to Jason Close, Hudson's step-son. *Id.* at 153, 158, 162. Of further concern, Hudson testified that he was hoping his cooperation in this case would benefit the case he was facing on the marijuana and gun charges. *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).

Of critical importance to this appeal, the State presented excerpts of Hanson's John Doe testimony at trial. (R. 44 at 82-105). Indeed, the State concluded its case-in-chief with this evidence. *Id.* at 117. Through Hanson's John Doe testimony, the State also introduced the hearsay

statements of Hanson's estranged–and then deceased–wife, Kathy. *Id.* at 82-85. In particular, the State presented that "Kathy confronted [Peter] and said [Peter was] responsible for Chad McLean's death[,]" and "she was telling people that [Peter] had shot Chad McLean[.]" *Id.* at 83. Prior to the admission of these statements, Hanson objected on confrontation grounds, and the State responded that these statements showed a consciousness of guilt. *Id.* at 71-73. The circuit court allowed the statements, concluding that they were admissible as an admission by a party opponent. *Id.* at 81-82. The State placed considerable emphasis on this testimony in closing argument, focusing on Hanson's response to Kathy's accusation and the inconsistencies that existed between Hanson's prior statements to police. (R. 41 at 38, 57-58). The jury found Hanson guilty, and he was sentenced to life in prison without the possibility of parole. (R. 47).

On November 20, 2015, Hanson filed a motion for postconviction relief raising several issues[3], including that Attorney Jazgar provided ineffective assistance of counsel in failing to object to the admission of Hanson's John Doe testimony on grounds that his statements violated *Miranda*. (R. 77); *Miranda v. Arizona*, 384 U.S. 436 (1966). On July 13, 2016, the circuit court held a *Machner*[4] hearing at which Attorney Jazgar testified. (R. 102). As to the issue of Hanson's John Doe testimony, Attorney Jazgar testified that he did not believe *Miranda* applied at a John Doe hearing. (R. 102 at 26). The circuit court denied Hanson's motion,

[3] Hanson raised additional issues in his postconviction motion, which he did not maintain on appeal.

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

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).

Hanson appealed the denial of his postconviction motion as well as the court's decision at trial to permit the hearsay testimony of Kathy Hanson. The court of appeals affirmed the conviction. *State of Wisconsin v. Peter J. Hanson,* Appeal No. 2016AP2058-CR, filed on September 18, 2018. As to Hanson's confrontation challenge, the court of appeals did not address the merits of his claim; rather, the court concluded that any error was harmless. *Id.*, ¶ 1. Specifically, the court of appeals explained that the jury heard the same evidence through other witnesses. *Id.*, ¶ 14. Similarly, the court of appeals denied Hanson's ineffective assistance of counsel claim, concluding that Hanson was not prejudiced because Hanson's John Doe testimony duplicated other untainted testimony. *Id.*, ¶¶ 31-32. In so doing, the court of appeals did not address whether Hanson's *Miranda* rights were violated when he was subjected to a custodial interrogation at the John Doe hearing without first receiving full warnings or whether counsel was deficient in failing to object to the admission of his un-Mirandized statements. *Id.* This Court granted review.[5]

[5] Hanson did not request review of his claim that trial counsel was ineffective in failing to call witnesses who would have undermined the State's theory of guilt, given the highly factual nature of that issue.

ARGUMENT

I. THE ADMISSION OF HEARSAY STATEMENTS OF HANSON'S DECEASED WIFE INCULPATING HIM IN MURDER VIOLATED HANSON'S RIGHT TO CONFRONTATION

A. Introduction

At trial, the jury heard that Kathy Hanson, Peter Hanson's estranged wife, told police that he was responsible for Chad McLean's death and that he shot McLean, but Kathy was not a witness at trial, as she was deceased. (R. 44 at 82-84; R. 32, Ex. 54 at 118.) Instead, the State entered these statements, over Hanson's confrontation objection, through the reading of Peter Hanson's testimony at the John Doe hearing. (R. 44 at 71-72, 82-84). This left Hanson unable to confront one of the most inculpatory "witnesses" against Hanson; Hanson was unable to cross-examine Kathy on the basis of her accusation, was unable to reveal Kathy's motive to fabricate this allegation, and was unable to test the veracity of Kathy's statements.

B. Standard of Review

The issue of whether the 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.

C. Factual Landscape

At trial, the State read the jury the following excerpt from Hanson's John Doe Testimony, 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: No. She didn't do that until she was trying to put me away before she died.
>
> Q: Okay. But regardless of the timing, at some point Kathy Hanson 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.

Q: Okay. And did you confront her about that then?

A: No. She was dead. I didn't know until after she died.

Q: Question, have you ever told anybody that her dying was the best thing that ever happened to you?

A: Yeah.

Q: How many people have you told that to?

A: A couple.

Q: Okay. And with her not around, she obviously can't be a witness against you in any homicide case; agreed?

A: That ain't why it was the best thing. You just don't know how the last four years was with her."

(R. 44 at 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 71-72. Hanson argued that the admission of Kathy's statements,

via the reading of his John Doe testimony, violates his right to confront Kathy under *Crawford.* *Id.; Crawford v. Washington*, 541 U.S. 36, 42 (2004). The State responded that these statements were admissible as evidence of consciousness of guilt because Hanson "in some ways rejoiced that she's not available." (R. 44 at 73). Specifically, at the John Doe hearing, Peter Hanson acknowledged telling people that Kathy's death was "the best thing that ever happened to [me]." (R. 32, Ex. 54 at 166-67). According to the State, "If a person hadn't done something wrong, they wouldn't be wishing this ill will on this person. . . ." (R. 44 at 77).

The circuit court did not adopt the State's reasoning that these statements evidenced a consciousness of guilt; rather, the court ruled that the statements were admissible as an admission by a party opponent. *Id.* at 81-82. The circuit court, however, failed to address the crux of Hanson's argument: that the multi-layer hearsay statements of Kathy Hanson, admitted through Peter Hanson's John Doe testimony, violated his right to confrontation. *Id.* at 71-72, 81-82.

D. The Confrontation Clause

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. 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 testimonial hearsay statements to be admissible, the Sixth

Amendment requires that the declarant be unavailable and that the defendant had a prior opportunity to cross-examine the declarant. *State v. Manuel*, 2005 WI 75, ¶ 36, 281 Wis. 2d 554, 697 N.W.2d 811.

In this case, it is undisputed that Kathy was an unavailable witness and that Hanson did not have an opportunity to cross-examine her on her statements; thus, the focus of this issue will be on whether her statements were "testimonial hearsay."

E. Kathy's Statements Were Hearsay

Buried in a footnote in *Crawford*, the Court noted that "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59, n. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). In *Street*, the State introduced the defendant's detailed confession to police at trial. *Street*, 471 U.S. at 411. The defendant argued that the confession was coerced because it was derived from a statement another individual previously gave to police; specifically, that police read the other individual's statement to the defendant and directed him to say the same thing. *Id.* In rebuttal, the State presented the officer who elicited the defendant's confession, and the officer denied reading the other individual's statement. *Id.* To corroborate his denial, the officer read the other individual's statement to the jury to show the differences between the defendant's statement and that from the other individual. *Id.* at 411-412. The other individual did not testify at trial and, before his statement was read to the jury, the judge twice cautioned

the jury that the statement was admitted "'not for the purpose of proving the truthfulness of his statement, but for the purpose of rebuttal only.'" *Id.* at 412.

The Court held that the other individual's statement was not hearsay because it was not used to prove what happened at the murder scene, but rather, it was used to prove the circumstances surrounding the defendant's confession. *Id.* at 414. The Court explained that if the statement was used to infer that the other individual's statement proved that the defendant committed the murder, it would have been hearsay. *Id.* But the Court concluded that it was not hearsay because the jury was pointedly instructed "'not to consider the truthfulness of [the other] statement in any way whatsoever.'" *Id.* at 414-15.

In this case, unlike in *Street*, Hanson did not open the door by relying on Kathy's statements in his defense, thereby permitting the State to bring the full details of her statements to light in rebuttal. Rather, the State used Kathy's statements in its case-in-chief. (*See* R. 44 at 70). More importantly, unlike in *Street*, the jury was never instructed that it could not use Kathy's statements for their truth or that it could consider the statements only to evaluate Hanson's response to her death. *See id.* at 82-84. Of most concern, the jury *did* use the statements for their truth. The jury narrowed in on Kathy's statements, requesting to see additional details of what she told police. (R. 36; R. 41 at 99).

In any event, the State's purported use of Kathy's statements was a ruse employed to get Kathy's unconfronted testimonial statements before the jury. Quoting from Professor Blinka's treatise on Wisconsin evidence,

> The exemption, however, should not license wholesale evasion by the expedient of offering the statement "not for its truth." When the State proffers a statement for a nonhearsay purpose, close attention should be paid to the relevancy of, and need for, this use of the evidence." [6]

7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 802.302, at 715 (3d ed. 2008).

Here, a close look reveals that this evidence did not reveal a consciousness of guilt. Hanson did admit to telling people that his wife's passing was the best thing that happened to him, but the two had been separated, Kathy had an affair, and Kathy kept reporting "little stuff" to Hanson's probation officer to try to put him in jail. (R. 32, Ex. 54 at 84, 118, 165-66). Hanson explained, "You just don't know how the last four years was with her." *Id.* at 166.

The State argued that "If a person hadn't done something wrong, they wouldn't be wishing this ill will on this person . . . ." (R. 44 at 77). Sadly, it is not uncommon for people to wish ill will on their estranged spouse for a whole host of reasons, and the record revealed several reasons Hanson had to feel scorned by Kathy. (R. 32, Ex. 54

[6] Professor Blinka also noted, "It seems odd that a view of the confrontation right rooted in the 1790s (or so it is said) hinges upon a modern assertion-oriented definition of hearsay founded in non-constitutional (evidence) law." *Id.*

at 84, 118, 165). A number of inferences could have been drawn from Hanson's comment about the passing of his estranged wife: perhaps her death meant that there would be no dispute over child custody, property division, or maintenance in a divorce; maybe Peter received life insurance proceeds; etc. But there was nothing in the record to support the inference that his comment was related to a sense of relief that she could no longer testify against him. Indeed, even if Kathy was alive and motivated to testify against him at trial, Hanson could have invoked the spousal privilege to prevent her from testifying as to any purported confession he made to her. Wis. Stat. § 905.05(1) (2011-12).

The conclusion that Hanson "rejoiced" in Kathy's death because it rendered her unable to testify was unsupported by the record. And any suggestion of a consciousness of guilt was far too attenuated, particularly when weighed against the incriminating nature of Kathy's unconfronted statements. Kathy's statement to police directly inculpating Hanson in the murder is "the principal evil at which the Confrontation Clause was directed" at its founding, and the Framers would not have intended for the State's feigned reliance on non-constitutional evidence law to eradicate Hanson's right to confront Kathy. *See*, *Crawford*, 541 U.S. at 50-51, 55.

F. Kathy's Statements were Testimonial in Nature

For the Confrontation Clause to apply, the hearsay statements must be "testimonial" in nature. *Id.* at 51; *Manuel*, 281 Wis. 2d 554, ¶ 37. 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). Statements made to police officers during the course of interrogation "fall squarely within [the] class" of statements protected by the Sixth Amendment. *Crawford*, 541 U.S. at 53.

In this case, there can be little dispute that Kathy Hanson's statements were testimonial in nature.[7] 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.

[7] Indeed, before the Court of Appeals, the State did not refute Hanson's argument that these statements were testimonial.

Id. As a result of this interrogation, Kathy Hanson made several statements implicating Peter Hanson in the crime. *Id.* But without Kathy on the stand, Hanson was unable to cross-examine her on the basis of her accusation, was unable to reveal her motives to fabricate this allegation, and was unable to test the veracity of her statements. Accordingly, these comments were testimonial in nature and subject to the Confrontation Clause; the admission of these statements violated Hanson's Sixth Amendment right to confront his accusers. *Crawford,* 541 U.S. at 43.

G. 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 (quoting *State v. Harris*, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397).

In this case, the admission of Kathy's statement implicating Hanson had a damaging effect. As an initial matter, the jury took particular note of her statement, requesting additional details as to what she told police. (R. 36). Based on this alone, the State cannot show beyond a reasonable doubt that this evidence did not contribute to the verdict.

In addition, Kathy's statement had an even greater effect given the weak evidence in support of guilt. Notably, the State had no physical evidence implicating Hanson in the murder, no murder weapon, no direct witnesses, and no legitimate motive for the killing. Instead, the State's case was based largely on the testimony of jailhouse informants and those looking to better their own circumstances. (R. 40 at 8-61; 105-133; 138-183; R. 44 at 16-20). The court of appeals relied on this informant testimony in concluding that Kathy's statements duplicated other unchallenged testimony. *State of Wisconsin v. Peter J. Hanson,* Appeal No. 2016AP2058-CR, ¶ 14, filed on September 18, 2018. In particular, the court cited to three witnesses who claimed that Hanson confessed the killing to them. *Id.* As "critical to [its] harmless error analysis[,]" the court referenced "two" witnesses who testified that Hanson said that he confessed the killing to his wife and one witness who claimed that Hanson said his wife made a statement to police against him. *Id.*

This evidence, however, was not duplicative. As an initial matter, there was only one witness who testified that Hanson told him he confessed the killing to his wife, not two. Barry O'Connor testified that Hanson told him he told his wife "He killed somebody." (R. 40 at 29). But Kathy's statements admitted through Hanson's John Doe testimony did not reference a confession from Hanson; rather, her statements appeared as though she had direct first-hand knowledge of the killing. (*See* R. 44 at 83-84). Similarly, Jeremy Dey testified that Hanson told him "Just that him and his wife were going through a squabble and she made a statement to the cops against him about it." *Id.* at 117.

Unlike Kathy's statements admitted through Hanson's John Doe testimony, Dey did not testify as to what Kathy told police about Hanson's involvement. *Id.*; R. 44 at 83-84. The State attempted to solicit additional information relating to Kathy, but Hanson's objection was sustained, so the jury never heard this information. (R. 40 at 117).

In addition, Hanson himself acknowledged, under oath, that Kathy said he was responsible for McLean's death and that she said he shot McLean, as opposed to the multi-layer hearsay introduced through O'Connor and Dey, giving the unconfronted evidence a much more direct and powerful effect. *Id.* at 29, 117; R. 44 at 83. Finally, there was considerable reason to doubt the credibility of these witnesses, who were both jailhouse informants. (R. 40 at 14, 108). While the Supreme Court of the United States has declined to impose a bright line rule excluding jailhouse informant testimony, it has cautioned that "[t]he likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored." *Kansas v. Ventris*, 556 U.S. 586, 594, 597, n. 2 (2009). These witnesses certainly had their own interests in helping the State. As to O'Connor, around the time he shared this information with law enforcement, he was awaiting sentencing on criminal charges and made repeated requests for Huber privileges and extensions. (R. 40 at 46-49). Similarly, Dey was waiting to "see what [his] sentencing is going to be," which would occur before the same judge that presided over Hanson's trial: Judge Judge. *Id.* at 133.

As to the witnesses who claimed Hanson confessed to them, these included the jailhouse informants O'Connor and

Dey. *Id.* at 22-24, 113-14. In addition, Kenneth Hudson testified that Hanson told him he killed McLean. *Id.* at 162. But when Hudson gave his statement to police, law enforcement initially approached him because he had marijuana and guns in his house, which he was not allowed to possess, and advised him that he was in "trouble" with authorities. *Id.* at 170-71. While discussing the marijuana and the guns with Hudson, law enforcement brought up the cold case of the McLean murder. *Id.* at 171-176. Also, Hudson 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. Of further concern, Hudson testified that he was hoping his cooperation in this case would benefit his charges in his marijuana and guns case. *Id.* at 176-77.

Such questionable testimony cannot be relied upon to conclude that the erroneous admission of testimony in violation of the Confrontation Clause was harmless, particularly where there was no physical evidence to corroborate these purported confessions. The State had no physical evidence tying Hanson to the crime, no eyewitness testimony to the murder, and no legitimate motive. Given this and the fact that the jury took particular note of Kathy Hanson's statements when it asked to see additional details of her statements to police, the State cannot show *beyond a reasonable doubt* that the erroneous admission of Kathy Hanson's hearsay statements, in violation of the Confrontation Clause, *did not contribute* to the guilty verdict. (R. 36); *Hunt*, 360 Wis. 2d 576, ¶ 26. Accordingly, Hanson is entitled to a new trial where Kathy's unconfronted testimonial hearsay is excluded.

II. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE ADMISSIBILITY OF INCULPATORY STATEMENTS MADE BY HANSON AT A JOHN DOE HEARING WHERE HE WAS IN CUSTODY AND NOT PROPERLY MIRANDIZED

A. Introduction

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. 55 at 4; R. 106 at 4). On this same date, a John Doe hearing was convened with regard to the McLean murder, and Hanson was brought in to testify. (R. 32, Ex. 54; R. 106 at 4). Prior to questioning, the court conducted a colloquy with Hanson regarding his right to refuse to answer incriminating questions, his right to counsel, his right to assert certain privileges, etc. (R. 32, Ex. 54 at 48-52). The court, however, failed to advise Hanson that if he could not afford counsel, counsel would be appointed for him, as required by *Miranda*. *See id.; Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).

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 questioning and inquiring as to whether Hanson would challenge such. (R. 55 at 4). Attorney Jazgar responded that because Hanson "was admonished as part of these proceedings, I'm not aware of any law that prevents the State from presenting that." (R. 51 at 21). At trial, the

State presented Hanson's inculpatory un-*Mirandized* statements from the John Doe hearing as evidence of guilt. (R. 44 at 82-105).

B. Standard of Review

A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801. This Court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Whether counsel's performance was deficient and prejudicial is a question of law, which this Court reviews de novo. *Id.*

C. The State's Questioning of Hanson, who was in Custody, at the John Doe Hearing Without Full Warnings Violated the Requirements of *Miranda*

Prior to questioning a defendant who "is taken into 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*, 384 U.S. at 478-79 (emphasis added). These warnings must be administered when the defendant is 1) in custody and 2) is subject to questioning. *Id.* at 467-68.

In this case, the State violated *Miranda* when it questioned Hanson, who was in custody, at the John Doe hearing without first ensuring that the proper warnings were given. 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. 55 at 4; R. 106 at 4). Indeed, the State conceded that Hanson was in custody at the time for purposes of *Miranda*. (R. 55 at 4). On this same date, a John Doe hearing was convened with regard to the McLean murder, and Hanson was called to testify. (R. 32, Ex. 54; R. 106 at 4). Prior to testifying, the court conducted the following colloquy with Hanson:

> 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, Ex. 54 at 48-52).

In conducting this colloquy, the court failed to advise Hanson that if he could not afford counsel, counsel would be appointed for him, as required by *Miranda*. *See id.*; *Miranda*, 384 U.S. at 478-79. Following this colloquy, the State went on to question Hanson and elicited incriminating statements, which it used against him at trial. (R. 44 at 82-105). Because Hanson was in custody, was subject to questioning, and was not given his full *Miranda* warnings prior to such, his John Doe testimony should have been suppressed. *Miranda*, 384 U.S. at 467-68, 478-79.

D. Attorney Jazgar was Deficient in Failing to Challenge the Admission of Hanson's John Doe Testimony

The Sixth 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, 686-87 (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. *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305. In this case, Attorney Jazgar fell below an objectively reasonable standard when he failed to challenge the admission of Hanson's damaging statements that were elicited in violation of *Miranda*.

During the pretrial phase, Attorney Jazgar raised no motions challenging the admissibility of Hanson's statements made at the John Doe hearing. The State actually raised the issue that these statements could potentially be inadmissible, conceding that Hanson was in custody during the John Doe questioning and inquiring as to whether Hanson would challenge such. (R. 55 at 4). The State implicitly acknowledged that *Miranda* applied to Hanson under those circumstances, when its only argument was that "the Court gave the defendant the equivalent of the reading of his rights that a police officer would have given him at that time . . . ." *Id.* Attorney Jazgar responded that because Hanson "was admonished as part of these

proceedings, I'm not aware of any law that prevents the State from presenting that." (R. 51 at 21). In doing so, Attorney Jazgar failed to identify that Hanson was not given full *Miranda* warnings, and he should have challenged the admission of those statements.

At the *Machner* hearing, Attorney Jazgar testified that he did not challenge Hanson's statements because he did not believe that the *Miranda* warnings applied at a John Doe hearing. (R. 102 at 26). However, it was not the nature of the hearing that mandated the *Miranda* warnings, it was the nature of Hanson's status; that is, that Hanson was in custody and subject to questioning. *Miranda*, 384 U.S. at 478. Indeed, the State paved the way for Attorney Jazgar to challenge this evidence, by raising the issue on its own accord. (R. 55 at 4). All Attorney Jazgar had to do was not concede the point. Hanson acknowledges that there is no binding authority requiring that all witnesses at a John Doe hearing be read *Miranda* warnings before being questioned.[8] But one critical fact differentiated Hanson from a general witness: he was in custody at the time he was questioned.

[8] Although Hanson asserts that *Miranda* warnings should be required to be read to all putative defendant witnesses at a John Doe hearing, whether in custody or not, for the reasons outlined in Justice Brennan's concurring opinion in the fragmented decision of *Mandujano*. *U.S. v. Mandujano*, 425 U.S. 564, 593-600 (1976)(Brennan, J. concurring). As Justice Brennan articulated, "'[A] defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury.'" *Id.* at 598 (quoting *Michigan v. Tucker*, 417 U.S. 433, 441 (1974). This reasoning is even more compelling when applied to a John Doe hearing, as opposed to the grand jury proceeding at issue in *Mandujano*, because Wisconsin's John Doe proceedings "afford substantially more protection to a potential accused than does a grand jury." *State v. Doe*, 78 Wis. 2d 161, 164-65, 254 N.W.2d 210 (1977).

And *Miranda* makes clear that "if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms [of his rights]." *Miranda*, 384 U.S. at 467-68.

E. Hanson was Prejudiced by the Presentation of his John Doe Testimony

To show that counsel's deficient performance was prejudicial, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "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. *Theil,* 264 Wis. 2d 571, ¶ 20.

The State placed considerable emphasis on Hanson's John Doe testimony, focusing on Hanson's response to Kathy's allegations and the inconsistencies that existed between Hanson's prior statements to police. (R. 41 at 38, 57-58). Indeed, through Hanson's statement, the State presented Kathy Hanson's inadmissible hearsay, which Hanson challenges on different grounds above. (*Supra* at 9-21; R. 44 at 83). Not only was Hanson prejudiced by the State's emphasis on this testimony in persuading the jury to convict him, but also 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. 36; R. 41 at 99).

The court of appeals did not address the issue of whether Hanson's John Doe testimony was taken in violation of *Miranda* or whether counsel was deficient in failing to move to suppress these statements. *State of Wisconsin v. Peter J. Hanson,* Appeal No. 2016AP2058-CR, ¶ 31, filed on September 18, 2018. Rather, the court of appeals denied relief on grounds that Hanson suffered no prejudice as a result. *Id.* In doing so, the court of appeals relied on the same harmless error analysis discussed above in concluding that the jury would have convicted Hanson even without the John Doe testimony. *Id.*, ¶ 32.

As discussed above, given that there was no physical evidence connecting Hanson to the murder, given that the brunt of the State's case focused on the unreliable and uncorroborated testimony of jailhouse informants and those looking to benefit from their inculpatory statements, and given that the jury took particular note of Kathy Hanson's statements, the impermissible admission of Hanson's John Doe statements undermines confidence in the outcome and the reliability of the proceedings. *Supra* at 18-21. Without Hanson's incriminating John Doe testimony and Kathy Hanson's unconfronted statements, the jury was left with little evidence to support guilt. Accordingly, Hanson is entitled to a new trial where a jury can evaluate whether the State has established guilt beyond a reasonable doubt without the use of this erroneously admitted evidence.

CONCLUSION

Based on the above reasons, this Court should remand for a new trial.

Dated this 4th day of February 2019

Respectfully submitted,

_____

Ana L. Babcock
State Bar. No. 1063719
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief for review conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) for a brief produced using the following font:

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, maximum of 60 characters per full line of body text. The length of this brief is 7,287 words.

Dated this 4th day of February 2019

Signed:

_____

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Attorney for Defendant-Appellant-Petitioner

CERTIFICATION 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 4th day of February 2019

Signed:

_____

Ana L. Babcock
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CERTIFICATE AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19 (2)(a) and that contains:(1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23 (3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated this 4th day of February 2019

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APPENDIX

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