STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Court of Appeals
Case No. 93-2703-CR

ANTONIA M. KESO,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION MOTION ORDERED AND ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT, BRANCH III, CIRCUIT JUDGE HENRY B. BUSLEE PRESIDING.

DEFENDANT-APPELLANT'S BRIEF

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The trial court answered this question in the negative.

II. WERE APPELLANT'S CONSTITUTIONAL DUE PROCESS RIGHTS VIOLATED WHEN THE COURT LIMITED THE NUMBER OF WITNESSES THAT COULD TESTIFY TO SPECIFIC INCIDENTS OF ABUSE OUTRIGHT AND BY ITS INTERPRETATION OF SEC. 967.08(2) WIS. STATS.?

The trial court answered in the negative.

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The trial court answered in the negative.

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The trial court answered in the negative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested. The defendant-appellant anticipates that the briefs of the parties will not fully address all issues of appeal. This case also raises issues of first impression for the State of Wisconsin. Finally, publication is warranted because the issues in this case implicate the general administration of justice.

STATEMENT OF THE CASE

The case against the defendant-appellant, Antonia Keso, was commenced by the filing of a criminal complaint on December 16, 1991, which charged her with party to the crime of first degree intentional homicide contrary to Sec. 940.01 and 939.05, Wis. Stats. (1) Ms. Keso made an initial appearance that day and the preliminary examination was scheduled. (112)

A joint preliminary hearing with co-defendant Bradley D. Keso was held on December 27, 1991, in which both Bradley Keso and Antonia Keso's confessions were admitted. (113) This hearing resulted in both parties being bound over for trial. (113) Subsequently, an Information was filed to which Ms. Keso entered pleas of not guilty and not guilty by reason of insanity at the arraignment on January 24, 1992. (114)

On April 13, 1992 during a motion hearing before the court, Antonia Keso modified her plea to not guilty and withdrew her insanity defense. (115: 3-4) A subsequent motion hearing was held on August 4, 1992, before the court. (117) On that date, defense counsel moved to suppress the statements of Bradley Keso based on

the Confrontation Clause. The motion was eventually denied during trial, and his confession was admitted. (117: 35; 119: 440)

A jury trial was subsequently held on August 17 through August 24, 1992 (119) which resulted in a verdict of guilty of Party to the Crime of First Degree Intentional Homicide (82).

No presentence investigation was subsequently ordered. Antonia Keso appeared for sentencing on September 23, 1992, where she was sentenced to life imprisonment with no parole eligibility for 50 years, even though the judge found that she had been abused. (121)

Antonia Keso subsequently filed a notice of intent to pursue post-conviction relief (101) and the undersigned attorney was eventually appointed to commence the representation of Ms. Keso. Antonia Keso filed a post-conviction motion (105) which was subsequently denied at a hearing on September 1, 1993. (122) A written order was entered soon after (110). This case is before the Court pursuant to a notice of appeal (111) directed at both the judgment of conviction and order denying post-conviction motion (110).

STATEMENT OF FACTS

This case did not begin, nor did it end, on December 11, 1991, with the death of Naomi Ware, Antonia's mother (119: 130). It started 21 years ago, on the day Antonia Keso was born, for that was the day Antonia started serving punishment for her very existence (119: 579-593).

From the day Antonia was born, she was deprived of love,

security, warmth and any sign of affection (119: 583, 701). From the day Antonia Keso was born, she was severely abused (119: 895, 903, 932). Antonia was severely emotionally abused as she was publicly and privately humiliated (119:320), derogated and insulted continuously for not being able to live up to her mother's expectations that were always set so high they were always out of reach (119: 537, 583, 649, 732, 803).

Antonia was forced to live in a dungeon of filth, disarray, utter dysfunction and fear (119: 173). Yet, she was supposed to live up to perfection in her world of injustice, the epitome of imperfection and cruelty (119: 649). Her diapers were not changed (119: 583), her cries were not answered (119: 583), her clothes were never cleaned, and personal hygiene was never taught (119: 604, 765).

Naomi Ware, was a very large and unhappy woman (from losing her job and her husband), who was physically and verbally, powerful and intimidating. (119: 152) At five feet, eight inches and 300 pounds (119: 262), she intimidated many adults (who feared for Toni's safety if they reported any abuse) (119: 615, 619, 644, 757 [including psychologists], 840, 871), let alone her only child (119: 871). She was powerful enough to kick a door off its hinges at Karen Clark's house when she was angry and looking for Toni who was hiding (119: 820).

Antonia could never do anything right according to her mother. She was a hopeless case that did not deserve to live (119: 643, 776). This became justification, starting at the age of two (119:

118) for shoving Antonia down to the floor when she would run to her mother when picked up from the sitter's (119: 613). This became well known justification (even to social services, teachers and friends) for:

1. Backhanding Toni as a little girl (119: 692, 699)
2. Punching her in the face (119: 814, 820)
3. Slapping her (119: 598, 846)
4. Giving her a black eye (119: 163)
5. Pushing her (119: 656, 732)
6. Pounding her with a pan (119: 845)
7. Shaking her (119: 732)
8. Striking her with a dog leash (119: 840), once to the point where the four-year-old had welts and burn marks on her legs (119: 608, 616)
9. A broken arm (119: 589)
10. Shoving her child into the shower and alternating hot and cold water (119: 835)
11. Snipping hair off Toni's show dog that would not grow back for six months so that Toni could not participate in the dog show (119: 805)
12. Burning her with a curling iron (119: 520, 537)
13. Accusing Toni of killing a dog that died of natural causes (119: 806)
14. Making her eat popcorn off the floor because the child burned herself on a bowl and dropped it (119: p.343)
15. Jailing the child in a three foot by two and a half foot dog cage at home (119: 321, 643, 746 [for spilling shampoo])
16. Jailing this child in the open back of a pickup truck (in the same dog cage) in front of her school peers during softball practice (119: 763)
17. Caging this child in the back of a pickup truck while out with friends when Toni still had an hour of curfew left (119: 812)
18. Caging her in the back of a pickup truck after school (119: 813)
19. Striking her with a board that bruised the child (119: 811)
20. Beating and bruising with a brush (119: 746, 761)
21. Whipping with dog chains (119: 537)
22. Scratching Toni's face and chin (119: 779)
23. Constantly threatening to hurt the animals if Toni did not perform to perfection (119: 810)
24. Actually slaughtering Toni's pet lamb without explanation by stabbing it to death (119: 810)
25. Locking Toni, without a coat, during winter in an unheated barn (119: 809, 838) and
26. Making a child sit at the dinner table without any

dinner, forcing her to watch others eat (119: 691)

All of this was labeled "punishment" when it was done because of some expectation Antonia could not meet (119). It was justified even if no reason was given (119: 810). It was torture (119).

As a result of the severe abuse, Toni as a child, had symptoms of Tourette Syndrome (119: 646). She would make a barking sound while watching television or while she was not interacting with others (119: 646)

These are incidents that were testified to in trial by witnesses (119). What went on behind closed doors, one will never know. However, we do know that all of these endless crimes went on for 19 years, and yet, none were charged (119).

Naomi loved her dogs more than her own child (119: 680, 702, 758). Naomi once fell while holding two-year-old Toni in one hand and her books in another and she was more concerned about the condition of the books than falling on her own child because, according to Naomi, "Toni had suffered worse and survived" (119: 635).

It is no surprise that even the trial court determined that Antonia was an abused child. (119: 938)

Antonia cried for help. She tried to run away multiple times and attempted suicide, even at a young age (119: 514, 723, 853, 886, 906). She pleaded with social services to remove her from her mother's home, but they only had deaf ears, even after so many contacts (119: 873). Naomi told the court that Toni needed residential treatment and went through 16 professionals before she

could find one that would label Toni with bi-polar disorder (119: 874) Eventually the social service doctors who disagreed with this diagnosis removed Toni from all medications. (119: 874)

When Toni's pleas were finally heard, and she was removed from the home, she was finally granted one month to live a normal life. In that one month, Antonia's grades went from B-C's to A's and B's (119: 593). She was manager for the basketball team and had a nice boyfriend (119: 875). But most importantly, she was granted the opportunity to make friends (something her mother had always told her she was incapable of doing) and have the freedom to laugh and express ideas without the unpredictable threat of torture (119: 591, 875)

However, the permanent scar of emotional abuse were too difficult to break and the bonds of control were still tight, even while Toni was in foster care (119: 878). Naomi wanted Toni institutionalized for life because she was "crazy." There were constant fights over money because Naomi wanted control over Toni's S.S.I. checks. (119: 878) However, soon her mother influenced her daughter to come back, contrary to what the Department of Social Services recommended (119: 878, 880). Shortly, the child who only wanted to be accepted and loved by her mother would agree in hope, to what eventually became a dark death (119: 910). Toni returned to her mother, as Dr. James Braaksma testified, because the relationship, as long term and as severe as it was, was enmeshed. (119: 910) Her mother was the one constant in her life since her father died when she was four years old. It is as difficult for

the abused child to move away as it is for the abusive parent to let go. (119: 117, 910)

The physical wounds were healed, but permanent scars were left. The invisible wounds (the emotional scars), were continuously reopened upon this reunion. Not even marriage would freed Toni from her mother's control. Toni's striving for adult independence would be continually controlled financially by mother (119: 345). The door to freedom was once again closed (119: 910).

The cumulative effect of all of these crimes, according to Dr. Braaksma, is what lead up to the personal crime that was committed in this case (119: 916). The financial control and arguments caused Toni to "snap."(119: 916) As even Detective Mylan Fink admitted, overkill happens when a great deal of emotion and passion are released. (119: 388) The fact that Toni and Naomi did not live together did not constitute a cooling off period, Dr. Braaksma said. (119: 929) According to Dr. Braaksma a person could lapse for days, even years, and not cool off (119: 930).

It is not unusual in matricide cases to have a violent murder (119: 933). However, the violence is not the focus, although the District Attorney would like the Court to believe it is. The violence is a symptom of 19 years of abuse and no help by "the system," even after 27 or 28 contacts (119: 150). It proves that this crime was personal and unrepeatable; that Toni is not a danger to society.

There is no dispute that Naomi was violently murdered. (119) There is no dispute that Antonia played a role in the murder. (119:

533) However, the murder does not stand alone. (119: 916). Even Naomi knew she had created a volatile relationship, for she knew that either she would kill Toni or Toni would kill her on the basis of the cumulative events that marred Toni's 19 years of existence (121). Any thought or motive to kill was a direct result of 19 years of torture. There can be no isolating of any of these events in this psychological game of warfare and survival (119: 916). Toni was a severely abused child (119: 916). Dr. Braaksma clearly stated, that the likelihood of confrontation, after the severe abuse that existed in this case, was great and reasonable (119: 933). This was a reasonable response to an unreasonable situation.

Toni has now been in prison for two years. During those two years Toni has never once had a violent episode (122). It is ironic that this is the first time in her life that she has some predictable structure of discipline, free from the control of mother (122). She understands that what she did was wrong and that she now knows there were other options (121). However, it is easier to see this in freedom than it was to understand while trapped in insanity and control. Toni has nightmares in her sleep about the abuse. (119: 528) When she wakes, she often finds her hands bloody from pounding the cement walls of her cell. (119: 528) After serving 21 years of her life in prison, she still has another 48 years to go. The system that allowed her no escape from torture until it was too late, has now caged her again (121).

Further facts will be stated in the arguments below.

I. THE TRIAL COURT VIOLATED ANTONIA KESO'S CONSTITUTIONAL RIGHT TO CONFRONTATION BY ADMITTING CO-DEFENDANT BRADLEY KESO'S

VIDEOTAPED CONFESSION INTO EVIDENCE BECAUSE BRADLEY KESO NEVER TESTIFIED AT TRIAL AND THIS ERROR WAS NOT HARMLESS.

The statement of Bradley Keso (119: Exhibit 32) that was offered by the State was objectionable because it violated Antonia Keso's confrontation rights under the Sixth Amendment to the United States Constitution and Article 1, Section 7 of the Wisconsin Constitution. A timely objection on such confrontational grounds was made prior to the trial court permitting the statements and videotape to be admitted into evidence. (118: 35; 119: 440) Further, this error was not harmless.

A. The Constitutional Right to Confrontation in a Codefendant Case.

There is a unanimous belief between the United States Supreme Court and other courts that the right of confrontation and cross-examination are essential and fundamental requirements for the conduct of a fair trial which is this country's constitutional goal. Lee v. Illinois, 476 U.S. 530, 540, 106 S.Ct. 2056 (1986).

The United States Supreme Court in Bruton v. United States, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968) established the principle that the statement of a co-defendant which implicated the defendant could not be used in a joint trial where the co-defendant had not taken the witness stand and thus could not be cross-examined. The Court clearly stated, "The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." Id. at 129. This very principle was violated in this case. The jury could not

get the videotaped confessions out of their minds during deliberations as is evidenced by their request to see them again (119: 968). Clearly, the jury's focus was on the statements.

The only eye-witness to the homicide testified against defendant-appellant without cross-examination and, having good reason to cast away blame, implicated her as the instigator of the alleged murder plot, as the first aggressor at the scene, and as a "mezmerizing" sorceress directing the bloody execution of her mother. The admission of Brad Keso's confession was plain error, in violation of Bruton v. United States, 391 U.S. 123 (1968) and its progeny.[1] In light of the effect such damning, and un-cross-examined, testimony must have had on the jury's decision to return a first degree murder verdict, as opposed to some lesser included offense, it cannot be said, as this Court must if it is to uphold the verdict, that the error in admitting the Keso confession was harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969).

It is likewise clear under Wisconsin law that, "[t]he confession of an accomplice inculpating the accused is presumptively unreliable as to the parts detailing the accused's conduct or culpability, since the accomplice may desire to shift

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[1]Because this was not a joint trial, the context in which most Bruton issues are raised, there is no question here that the confession implicated Antonia or that redactions or curative instructions might have blunted that effect. Rather, the confession of Keso was introduced solely to implicate defendant-appellant. Under these circumstances, its admission plainly violated defendant-appellant's Confrontation Clause rights. See, e.g., Delaware v. Van Arsdall, 475 U.S. 673, 682, n.5 (1986).

the blame, curry favor with the authorities, or divert attention to another." State v. Myren, 133 Wis.2d 430, 395 N.W.2d 818, 821 (1986) (citing Lee v. Illinois, 476 U.S. 530, 545, 106 S.Ct. 2056 (1986)). Unless this presumption of unreliability is rebutted in the case of an accomplice inculpating the accused, such a confession cannot be used against the accused at trial without the benefit of cross-examination, and its admission violates the accused's right of confrontation, rendering hearsay analysis academic. Id. The Myren court clearly stated, "[t]he right of confrontation is satisfied in a constitutional sense only where a meaningful cross-examination of the witness who actually uttered the assertion is possible." Id. at 821 (citing Virgil v. State, 84 Wis.2d 166, 186, 267 N.W.2d 852, 862 (1978)).

In Lee, the prosecution argued, just as in this case, that the accomplice's confession fit within the declaration-against-interest exception, a "firmly rooted hearsay exception." Lee v. Illinois, 476 U.S. at ___, 106 S.Ct. at 2063. The United States Supreme Court emphasized, however, "the [Confrontation] Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' State v. Myren, 133 Wis.2d 430, 395 N.W.2d at 821 (Wis. App. 1986) (citing [Roberts], at 65, 65 L.Ed.2d 597, 100 S.Ct. 2531 [at 2539], 17 Ohio Ops2d 240, quoting Snyder v. Massachusetts, 291 U.S. 97, 107, 78 L.Ed. 674, 54 S.Ct. 330, 90 ALR 575 (1934)."Id., 476 U.S. at ___, 106 S.Ct. at 2064, 90 L.Ed.2d at 528. The United States Supreme Court stated:

> We reject respondent's categorization of the hearsay involved in this case as a simple "declaration against penal interest." That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant."

Id., n.5.

Therefore, according to the Wisconsin Supreme Court, "Lee makes a hearsay analysis academic in the instant case [where you have a case involving a co-defendant's confession]," therefore, we turn to a Confrontation Clause analysis. Myren, 395 N.W. 2d at 821. Under a Confrontation Clause analysis, the presumption of reliability may only be rebutted and such a statement may meet Confrontation Clause standards, only if it is supported by a "showing of particularized guarantees of trustworthiness." Myren, 395 N.W.2d at 821-22 (citing Lee v. Illinois, 476 U.S. at ___, 106 S.Ct. at 2064, 90 L.Ed.2d at 528, citing Roberts, 448 U.S. at 66, 100 S.Ct. at 2539).

According to the United States Supreme Court, "Obviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased. But a confession is not necessarily rendered reliable simply because some of the facts it contains 'interlock' with the facts in the defendant's statement." Lee, 476 U.S. at 545, 106 S.Ct. 2056 (1986). The Court goes on to say, "If those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own

confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment." Id. In other words, "when the discrepancies between the statements are not insignificant [i.e. if the two statements give altogether different versions of how the murders were committed, including different participation in the planning and execution], then the codefendant's confession may not be admitted." Id.

Further, the Court's later decisions make clear that the admission of Brad Keso's selectively interlocking confession in this case was not harmless. In Cruz v. New York, 481 U.S. 186, 192 (1987), the Court recognized that the more "interlocking" the confessions are, the greater the likelihood that the erroneous admission of the accomplice's confession will be devastating.

> A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession.

481 U.S. at 192.

It should be noted that in Myren, the statement of the codefendant was taken under oath during the preliminary hearing of Myren, and yet, it was found to violate the Confrontation rights of the accused. Here we have an unsworn arrest confession that was taken in a police station. Further, Brad Keso was the first to confess, and he did so while Antonia was in a completely different room. (119: Exh. 32) Surely, there was great motive for him to exculpate himself.

It is clear that Brad Keso's confession was offered as substantive evidence, just as the confession was in Lee. While there was some physical evidence, without the two confessions, no one could prove who the main actor was, if it was premeditated, and what a possible motive would be. There were only two witnesses to this murder, Bradley and Antonia Keso. These statements were offered in an attempt to prove First Degree Homicide in and of themselves, apart from any physical evidence.

There is no showing here of particularized guarantees of trustworthiness to support the admission of Bradley Keso's confession. Although the statement was similar to Antonia's (119: Exhibit 2) in describing the time, date and location of the homicide, it was strikingly different in attributing to Antonia rather than to Bradley Keso the initiation of the acts which lead to the death of mother, Naomi Ware.

The reliability was further undermined when Brad Keso tried to convince and induce Antonia many times to change her story, both verbally and in letters (by promising to have the children she always wanted, by telling her she would only be in treatment for a year if she listened to him, and that he loved her) (119: p.562-564). This resulted in Antonia writing a letter to Brad Keso's mother taking the full blame and completely absolving Brad, which could never be corroborated by the physical evidence in this case (Brad had human blood on his clothes)(119: 493-499). Further, Brad tried to convince even a friend to take the complete rap for him. (119) It must be remembered that even Toni's statement was taken

after she had spoken with Brad, a conversation that was not completely heard by anyone. (119: 69)

The two confessions do not "interlock" as to the participation of the crime and therefore, do not meet the Constitutional standard. First, there is disagreement as to how the crime was initiated. In her statement, while Toni admits discussing killing her mother before they get to Naomi's house, at the home she tells Brad that she does not want to go through with the murder. Toni is later surprised as she takes the groceries out to the car and hears her mother scream. Brad knocks Naomi down the stairs and begins choking her. (119: Exh.2) Brad clearly states, in direct contrast, that Toni was the one who initiated the whole incident alone and knocked down a 5' 8" woman who weighed 300 pounds. Therefore, the two statements diverge as to the use of the rope and the choking, which was one of the causes of death. They diverge on who was the initiator, which goes directly to the intent element of homicide.

The statements also diverge as to the knife. Brad blames Toni for initiating the idea about using it and jamming it into the eye. Yet, he goes on to say that even he did not have the strength to pull it out (119: Exh.32) This contradicts Toni's statement that it was Brad's idea because she did not know what to do with it and he shoved it in in order to penetrate the brain to make sure that Naomi was dead.

Additionally, the two statements clearly diverge as to the use of the axe. Brad blames this completely on Toni (119: Exh.32). Toni said Brad was the one who used it. (119: Exh.2) Clearly,

Toni's confession does not corroborate Brad's on the key elements of this crime. Therefore, admission of his confession was error.

B. This Constitutional Error Was Not Harmless.

There is no doubt that the error of admitting Brad Keso's confession without any opportunity for cross-examination was not de minimis and contributed to her conviction by destroying her defense. The state cannot prove the converse.

When an error exists, as it does in this case, the verdict must be set aside unless the Court is sure that the error did not influence the jury or had such slight effect as to be de minimis. Myren, 133 Wis.2d 430, 395 N.W.2d at 823-24 (1986)(citing State v. Dyess, 124 Wis.2d 525, 542, 370 N.W.2d 222, 231 (1985). The test under Dyess, is whether there is a reasonable probability that the error contributed to the conviction. Dyess, 124 Wis.2d at 543, 370 N.W.2d at 231-32. If it did, reversal and a new trial must result. Id. Further, the burden of proving no prejudice is on the beneficiary of the error, here the State. Id. (citing Billings, 110 Wis.2d at 667, 329 N.W.2d 192). Therefore, "[t]he state's burden is to establish that there is no reasonable possibility that the error contributed to the conviction." Id. at 232.

In Dyess, the Court found that the trial court erred on the very basis of the defendant's defense in the case and that to err in that particular - in respect to the defense upon which Dyess based his case - is almost ipso facto prejudicial." Id. at 234. The error was to the "crucial and controlling feature of the crime," and therefore, judgment should be reversed unless we can be

sure that the error did not contribute to the guilty verdict after looking at the totality of the record. Id.

In Toni's case, there is no doubt that this error contributed to her conviction. Brad Keso's confession made Toni the main and ruthless actor who initiated this violent and bloody murder by knocking her mother down and choking her, stabbing her mother in the eye, hitting her mother with a shovel and finishing the job with an axe. According to Brad, the sole reason for his involvement was because he was "manipulated" by Toni. (119: Exh. 32)

No jury, no reasonable person, could possibly put the violence out of their minds. No jury understands why a child kills. The defense most definitely had their work cut out for them in our system of archaic legal definitions that do not recognize the impact of abuse. By Brad implicating Toni as the initiator, and it being her word solely against his, the statements took on greater weight and shaded the defense of abuse and provocation. Further, he harmfully prejudiced any chance Toni had to mitigate the intent element of homicide.

Since the time Antonia gave her statement, she has never denied that she played a role in this murder or that she wanted her mother out of her life because she wanted to be free of abusive control. There is no dispute that murder is wrong and that a murder was committed. There is no dispute that she does not have a complete defense. However, she is entitled to a fair and just trial. She was entitled to have a full and fair opportunity to

show the jury how her judgment was clouded by 19 years of dehumanizing treatment. Although the average non-abused person might find it ridiculous that an argument over finances would result in death, an abused child would see financial control differently. This was her only defense, her only chance to be convicted of Second Degree murder, a lesser offense. This defense is difficult enough, it was not harmless to destroy it by painting her by her husband (the only other witness) as a violent ruthless manipulator. There is no way that the state can prove beyond a reasonable doubt that this evidence was de minimis and did not have great impact. If it was so de minimis, then why did they introduce it? If it was so de minimis, then why did the jury ask to see it again? It was clearly not cumulative and it was clearly offered to be substantive evidence to stand on its own to disprove Antonia's statement.

If this is found to be harmless error, then the Confrontation Clause of the United States Constitution no longer exists. Surely, this error must be found to have violated the more stringent requirements of Article One, Section Seven, of the Wisconsin Constitution which grants the defendant the right to a "face to face" confrontation with their accusers. Especially, a defendant who was an abused child who participated in killing a parent, an act that society does not want to face.

II. APPELLANT'S CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT LIMITED THE NUMBER OF WITNESSES THAT COULD TESTIFY TO SPECIFIC INCIDENTS OF ABUSE OUTRIGHT AND BY ITS INTERPRETATION OF SEC. 967.08(2) WIS. STATS.

Under the law of Wisconsin, in order for a defendant to prove

the lesser included offense of First Degree Homicide, that being Second Degree Homicide, a defendant must prove "adequate provocation." This proving of "adequate provocation" constituted Antonia's entire defense for it was the defense's theory that 19 years of abuse had a cumulative effect which provoked the murder in this case. Thus, it was necessary for the defense, in order to put forth a full and fair defense, to be allowed to call witnesses that could testify to specific incidents of abuse. However, the Court limited the testimony of many witnesses and completely excluded others.

A. The Court was in error when it excluded unavailable witnesses from testifying by telephone pursuant to Sec. 967.08(2) Wis. Stats.

Defense counsel filed a Motion to Request Use of Telephone Testimony pursuant to Sec. 967.08(2) Wis. Stats. (119:623) The motion itself listed 12 witnesses that could testify to specific incidents of abuse but were unavailable because they were out of town and could not be available for trial. The Court denied the defense motion for this telephonic testimony by stating that a jury trial may be waived telephonically but that Sec. 967.08(2) Wis. Stats. has nothing to do with taking of testimony by telephone before a jury in a jury trial proceeding (119:623). Upon being denied the motion, defense counsel moved to dismiss because of a constitutional denial of a defense (119:632, 119:570). The judge attempted to further support his position by stating that this evidence was cumulative (119:632, 119:570).

The number of witnesses listed in the motion included people

who formerly knew both Naomi Ware and Toni Keso over the years, including a godparent of Toni's, who was living in Delaware. All of these witnesses would have been able to directly talk about the relationship between Naomi and Toni, the way Naomi treated Toni, and what they observed as far as physical and verbal abuse of Toni by her mother over the years (119:571). This testimony was most definitely directed towards the question of provocation (119:571).

The language of Sec. 967.08(2)(b), is what became the controversy for the trial court. This section states, "Waiver of preliminary examination under Sec. 970.03, competency hearing under Sec. 971.41(4), or jury trial under Sec. 972.02(1)." Surely, this language does not limit the opportunity for the defense to offer telephone testimony for only waivers of jury trials. Telephone testimony of unavailable defense witnesses in criminal trials, has been and should continue to be admitted. It is the right of the defense to be able to put forth a proper defense, and it is the right of the defense to the confrontation of witnesses, it is not the State's right. Here, the defendant's right to a fair trial was severely limited by the denial of this testimony. Especially, since they were denied admission on the basis of a misinterpretation of a Wisconsin statute. While the trial court tried to explain its ruling by stating that these witnesses were cumulative, there is nothing on the record to substantiate this point and thus this is prejudicial error. (119: 632)

B. It was error for the Court to severely limit some witnesses' testimony about specific instances of abuse, and it was error to find certain witnesses completely inadmissible.

Under State v. Felton, 110 Wis. 2d 485, 329 NW 2d 161, 163 (1983), it was concluded that the evidence of outside witnesses in that case in respect to the decedent's husband's act of violence was cumulative, and, hence, the exclusion of those witnesses was not prejudicial. However, in that trial, the defendant testified about specific acts of violence and so did her children, all of whom lived with the decedent, and were eyewitnesses to many events.

This is different from our case, because the only two people who lived in the home on a day-to-day basis were Antonia and Naomi. There were no other family witnesses who could testify to the day-in, day-out abuse and thus, the defense was forced to rely upon the accounts of outside witnesses to concretely prove this defense.

The closest relative to testify was Toni's half-sister Allison Hooker (119:579-593). She was the only witness offered by the defense who ever lived with the decedent and Antonia for any length of time, because it was her father that was married to Naomi. However, she was not allowed to testify to the relationship between Naomi and Allison's father nor her relationship with Naomi herself. Therefore, incidents of abuse and cruelty within this family were not allowed to be elicited in front of the jury (119:593).

In addition, another witness, Stephany Walter, was not allowed to testify to a specific instance where Naomi struck Toni and knocked her backwards. The judge found this testimony irrelevant under Felton. At this point the judge claimed that there was no proof of abuse for the preceding two years before Naomi's death and

limited the witnesses (119:602). This testimony was clearly relevant and supported the defense's provocation defense.

Another witness, Mary Jo Keating, who was a juvenile intake worker that worked on Toni's case, was prevented from testifying to the high risk of the situation between Naomi and Toni and about how the complaints were assigned (119:857). She was on the case from 1984 to 1990, so her testimony was very relevant to the years immediately preceding the death of Naomi.

Even more witnesses were disallowed including one witness that would have testified to Toni requesting protection (119:861); another witness who could have testified to Naomi being the protective payee of Toni's social security benefits until the date of her marriage (119:861); and most importantly, the foster mother, Dorothy Kumma, from Michigan, who could have testified to the most current situation before Naomi's death (119:866-867). Dorothy Kumma could have testified to how Toni was when she was away from her mother, how well she did there, the fact that she had good grades, that she was a cheerleader, that she was on the student council and that she was doing extremely well at that time (119:866). Further, she could have testified about phone calls that were received from Naomi Ware in which Toni did not know how to emotionally handle them and that Toni would need her help in dealing with those phone conversations (119:866). She would also have testified about the treatment arrangements that had been made and the conditions of the clothing and other things that were brought to the foster home when Toni was placed there, as well as

Toni's lack of social skills and personal hygiene, along with the need to train her in those skills even though she was 16 years old (119:866-867). However, this witness was never allowed to testify, even though she could have been the most enlightening to the jury as to the effects that this abuse had had on Toni at the ages of 16 and 17. This would have enlightened the jury as to the cumulative effects of the abuse for up to 17 years at that point. However, the jury was never given an opportunity to hear this testimony.

C. The error in denying the above-mentioned witnesses to testify was not harmless.

The error in denying this evidence was not de minimis and did not have such a slight effect on the jury as to not influence the outcome. Therefore, the verdict must be set aside. State v. Myren, 133 Wis. 2d 430, 395 N.W. 2d 823-24 (1986) citing State v. Dyess, 124 Wis. 2d 525, 542, 370 N.W. 2d 222, 231 (1985). Once again, there is a reasonable probability that this error contributed to the conviction. Dyess, 124 Wis. 2d 543, 370 NW 2d 231, 32. Further, the burden of proving no prejudice is on the beneficiary of the error, the State. Id. Here, the State cannot meet its burden because there is a reasonable probability that the error contributed to the conviction. This error prevented testimony that would have tied all of the cumulative events together.

After all, it was the State's contention throughout this whole trial that incidents of abuse, which it labeled as a "rocky relationship," that occurred when a child was young was no justification for murdering a mother later in life. By the court

denying testimony of a witness who also lived with Naomi Ware to testify as to the impact that it had on her (let alone on Toni) and by further denying the testimony of the foster care mother in Michigan who could testify to Toni's behavior at later ages to tie in the cumulative abuse theory, was most definitely not harmless error because it most definitely denied Antonia's right to prove her defense under Dyess, 124 Wis. 2d 525, 370 N.W. 2d 222.

III. THE CURRENT DEFINITION OF "ADEQUATE PROVOCATION" DOES NOT PROTECT THE CONSTITUTIONAL RIGHTS OF AN ABUSED CHILD ACCUSED OF FIRST DEGREE HOMICIDE OF A PARENT.

Antonia Keso was the victim of severe, long-term physical and psychological abuse at the hands of her mother. The evidence adduced at trial did not merely show that this was a "rocky relationship." Though the state argues that this was a "troubled relationship" and that Naomi was "domineering," the evidence in this case permitted the conclusion that Antonia was permanently affected by 19 years of physical and mental abuse by her mother and could have "snapped." Yet, the law does not recognize her or many other children's torment under the current restrictive definition of provocation.

A. What is "Adequate Provocation?"

The instruction that was given for provocation under Wisconsin Criminal Jury Instruction 1012 was the following:

> "Provocation" means something which the defendant reasonably believed the intended victim had done which caused the defendant to lose self-control completely at the time of causing death.
>
> "Provocation" can consist of a long history of abuse. You must determine what the defendant believed and also whether the defendant's belief was reasonable. The standard for whether a belief was reasonable is what

> an ordinary person who is an abused child would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense.
>
> "Adequate Provocation" means sufficient provocation to cause complete loss of self-control in an ordinary person who is an abused child.
>
> "Complete loss of self-control" is an extreme mental disturbance or emotional state. It is a state in which a persons' ability to exercise judgment is overcome to such an extent that the person acts uncontrollably. It is the highest degree of anger, rage, or exasperation.
>
> Therefore, it is for you to determine whether the defendant was so provoked that he completely lost self-control and whether an ordinary person who is an abused child would have completely lost self-control under the same circumstances.

The purpose of this instruction as Comment 1 to Wis. J-I Criminal 1012 states, is for a case where First Degree Intentional Homicide is charged, there is evidence of "adequate provocation," and the lesser included offense of Second Degree Intentional Homicide is to be submitted to the jury. Under Comment 2 to Wis. J-I Criminal 1012, it states that when the issue of adequate provocation "has been placed in issue by the trial evidence, the State must prove <u>beyond a reasonable doubt</u> that the facts constituting the defense did not exist in order to sustain a finding of guilt" for a violation of Sec. 940.01 (3). The comment goes on to say that this statute codifies prior Wisconsin law which had established that when evidence of a defense is admitted, the absence of that defense becomes a fact the state must prove to establish guilt for the crime charged. There was no denial that adequate provocation was placed at issue which is why the Court submitted Jury Instruction 1012 in the first instance. (119: 950-955).

As Comment 11 states, adequate provocation mitigates First Degree Intentional Homicide to Second Degree Intentional Homicide. Thus, the absence of the mitigating circumstance becomes the additional fact necessary to constitute the more serious crime, furnishing the distinction between the two degrees of intentional homicide in the State of Wisconsin.

Comment 12 refers to Section 939.44 (2) Wis. Stats. which provides: "adequate provocation is a defense only to first degree intentional homicide and mitigates that defense to second degree intentional homicide." Therefore, Section 940.05 (3) specifically provides that provocation is only a defense to a charge of Second Degree Intentional Homicide. At no time during this appeal are we arguing for manslaughter or complete exoneration. We have not denied involvement in a homicide.

While it will be argued by the State that the proper instruction was submitted to the jury in that it did include the consideration of an abused child's perspective, the definition of "complete loss of self-control" is still bound by the "heat of passion" definition under prior law. Comment 9 states that "adequate provocation" under Section 939.44 is intended to be a codification of Wisconsin decisions defining "heat of passion". Therefore, in a case such as this one, the defense is put in a position of meeting the manslaughter definition of provocation even though a second degree homicide verdict may be the appropriate charge. This burden does not fit the needs for justice of an abused child, such as Antonia.

The "heat of passion" requirement is still based on the Old West myth that when a human being is set off emotionally to the point where they will kill, they are set off by an almost immediate incident that causes the actor to immediately react. This myth assumes that both the actors are of equal power and can act during their "heat of passion"; and that they had equal physical strength. However, as has been proved by the "battered woman's syndrome", a woman does not have equal strength and thus usually waits until the aggressor is asleep or in a compromising position to attack. In State v. Felton, 110 Wis. 2d 485, 329 N.W. 2d 161, 172-73 (1983), for the first time, the Wisconsin Courts recognized the cumulative effect that abuse can have upon an ordinary person. However, even the "battered woman's syndrome" situation is different than that of a battered child. Further, it must be remembered that the factors founded in State v. Felton, resulted from an appeal from a second degree murder conviction in an attempt to reduce that conviction to a manslaughter case which is different from what we are arguing in this case.

Several factors distinguish the violence perpetrated against children by their parents from violence visited by one adult on another.

First, as a general proposition children occupy an inherently more vulnerable position than adults. As the United States Supreme Court has stated:

> "[Y]outh is more than a chronological fact. It is a time and condition of life when a person is most susceptible to influence and to psychological damage. Our history is replete

> with laws and judicial recognition that minors, especially in the early years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective and judgment expected of adults." Eddings v. Oklahoma, 443 U.S. 635 (1982) quoting Bellotti v. Baird, 442 U.S. 622, 635 (1979).

Second, is the duration and nature of the abuse. An abused child, like Antonia Keso, was not assaulted once, but rather was the victim of a series of hundreds of different physical and psychological attacks. Moreover, these varied assaults have occurred, as they did in the instant case, over a period of years; not minutes, hours or days.

Parent-instigated violence also differs from traditional adult/adult violence (of the non-domestic type) in the power inequities inherent in the parent-child relationship itself. Children do not occupy an equal role in society to their parents. As Chief Justice Rehnquist pointed out in Schall v. Martin, "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the state must play its part as parens patriae." Schall v. Martin, 467 U.S. 253, 265 (1984)(emphasis added). Integral, in fact, to the exercise of this control is that parents are legally permitted to corporally punish their children. In this regard parents (as well as teachers in certain states) under the purview of legitimate, non-abusive physical punishment are specifically excepted from the criminal laws of assault and battery as well as civil tort

liability. It is absolutely impermissible under any conditions or circumstances for that same adult acting in a non-parental role to hit any other adult under any circumstances except for self-defense or defense of others.

Moreover, an adult acting in his or her capacity as a parent has extremely wide latitude with regard to the circumstances under which he or she may strike his or her child. Children however do not enjoy such legal license to physically protect themselves from this parental punishment. It may be argued by some that the state's child protective services system functions to protect children from those parents who abuse their license to physically harm their children, but as in the instant case where CPS did not respond or in the tragic cases where children are murdered, such assurances are of little comfort.

Another distinguishing characteristic between parental violence and adult/adult violence is, as was the circumstance in the instant case, parents are inherently bigger and stronger than their children.

The final factor affecting the nature and quality of parental violence which places a battered child such as Antonia in a more vulnerable position than a similarly situated adult is the non-interference by adult family, friends and neighbors to prevent the abuse [in our case we had adult participation as adults agreed with Naomi that Toni had not met her standards and deserved punishment]. In addition, ineffective action by agencies, such as Social Services, as in this case, to fulfill the legally mandated role to

protect the battered child sends a distinct message.

Despite child abuse laws, a parent exercises absolute de facto control over the life of her child. The failure of school officials and social services to follow-up and effectively help Antonia at the early and even the late stages made it eminently reasonable for Antonia to perceive decedent's control over her as being absolute and iron clad.

This unrestricted domination resulted in Antonia Keso being the victim of hundreds of crimes throughout the years she lived with decedent, crimes which continued when she moved out, and crimes which went completely unpunished. "Abuse" is a rather benign term for describing the unspeakable horrors decedent visited on Antonia. Rather the decedent's mistreatment - some hundreds of incidents including everything from burning Toni to stabbing her pet lamb to death - amounted to torture not abuse.

Children, like Toni, who become adults stunted in maturity because of their past, are just as trapped and are in just as perilous a situation as a kidnapped adult or one falsely imprisoned and brutalized. No Vietnam Vet is miraculously cured of years of imprisonment and torture by being freed. When your captor is your parent, one who you are supposed to depend on for love and security, and one who is still exerting mental abuse, it does not matter that you do not live with that person. Over seventeen years of physical imprisonment and the continuation of mental imprisonment are never erased. Because the violence was parental, however, current law presumed it is less serious and thus not

deserving of the full protection and consideration any adult resident would be accorded had she found herself in the same position as Antonia Keso.

The cumulative effects of all of these above factors places the abused child who kills the parent in a fundamentally different position than an adult responding to the single episode or even multi-episode violence of another adult.

Events five years prior to the killing are as relevant as events which occurred one day before the homicide; in fact such events are perhaps more relevant to understanding the essence of the child's torment. For it is the cumulative effect (contrary to the belief of the trial court) of the violence over the years which causes the post-traumatic stress. See generally, S. Hicks, Admissibility of Expert Testimony on the Psychology of the Battered Child, 11 Law and Psychology Review 103 (1988); Post, Adolescent Parricide in Abusive Families, 51 Child Welfare No. 7, 445 (1982).

With regard to post-traumatic stress disorder it is specifically the intrusive re-experiencing of prior trauma which explains two crucial points to understanding Antonia's reactions on the day of the homicide: a: why a child would be in fear or traumatized even when the aggressing parent is present and not actively physically abusive; and b: why when the parent is abusive, that the child's response is even greater than the actual abusive event. The extremely traumatic effects of abuse are felt by the child even in the parent's absence; effects that the current definition of "provocation" do not recognize.

With regard to the traumatic events which engender this syndrome the American Psychiatric Association included:

> "serious threat to one's life or physical integrity; a serious threat to one's...close relatives or friends;...In some cases the trauma may be learning about a serious threat or harm to a close friend or relative...The essential feature of this disorder is the development of characteristic symptoms following a psychologically distressing event that is outside the range of usual human experience..." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (Third Edition-Revised), at 247 (1987)

Other victims of post-traumatic stress include Vietnam War veterans, concentration camp victims, rape victims and those held hostage.

After years and years of abuse, anger and frustration can become pent up or repressed. Such cumulative effects of abuse can cause someone to one day "snap," especially if mental abuse is still continuing. However, our current legal definitions of provocation do not recognize modern discoveries of the devastating consequences of repressed child abuse. Repressed responses to childhood torture should as a matter of law reduce criminal culpability in the same way as the Old West concept of hot blood.

IV. THE APPELLANT'S STATUTORY RIGHTS AND CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE TRIAL COURT FAILED TO ADVANCE HER PAROLE ELIGIBILITY DATE ON THE BASIS THAT "NEW FACTORS" WERE REQUIRED.

Antonia Keso's statutory rights and constitutional rights were violated when the trial court failed to advance her parole eligibility date on the basis that "new factors" were required.

While developments subsequent to sentencing, such as a positive adjustment to the prison setting or change of the defendant's attitude, are factors to be considered relative to parole or pardon and are not "new factors" for changing the length of a sentence, these are of great relevance here. State v. Machner, 101 Wis. 2d 79, 303 N.W. 2d 633 (1981); State v. Gibbons, 71 Wis. 2d 94, 237 N.W. 33 (1976); State v. Wuensch, 69 Wis. 2d 467, 230 N.W. 2d 665 (1975); State v. Lynch, 105 Wis. 2d 164, 312 N.W. 2d 871 (Ct. App. 1981). This was the basis of Antonia's post-conviction motion to modify sentence that was denied on September 1, 1993. (105, 122).

Under the "life means life" statute, Section 983.014, Wis. Stats., the court sets the parole eligibility date for persons sentenced to life imprisonment, as was done in this case (at 50 years). When this is done, the parole board has no power to modify the date that is set for parole eligibility. Therefore, it is possible the developments subsequent to sentencing, although not "new factors", may provide the basis for a motion to modify sentence if the motion seeks only to move up the parole eligibility date. Patrick J. Devitt, Wisconsin Criminal Defense Manual (1991). Antonia Keso's post-conviction motion to modify sentence, sought only to move up the parole eligibility date.

It was the Court's and the State's position that since no "new factors" were presented, that there was no need to modify any portion of the sentence. Therefore, the fact that Antonia has had no violent episodes while in prison, in contrast to her counterpart, Brad Keso, was considered irrelevant and not a basis

to modify. Further, Ms. Keso's remorse and desire to seek to view mother figures positively was also not considered.

Ms. Keso has been taught since a young age that she was not good enough to be given a chance and that she could be treated like an animal and locked in a cage. When will this abused child, who has already served over twenty years of her cruel sentence between abuse and actual jail, be given the opportunity to be reviewed by a parole board in thirteen years, instead of 50. In thirteen years the rehabilitation could completely take place if Ms. Keso would be given the opportunity to have treatment, an opportunity that has not been offered as of yet and an opportunity that is greatly needed, as Ms. Keso continues to be socialized and educated. Ms. Keso is entitled as a human being to have an incentive to achieve for once in her life. There was no doubt in the trial court's mind at the time of sentencing that Ms. Keso had a "nineteen year odyssey of hate and abuse rendered against her by her mother that ultimately lead..." to the murder of her mother. (121: Page 31). There was also no doubt in the court's mind that Ms. Keso needed psychological help due to this abuse, psychological help that she has not been getting at Taycheedah. Therefore, the court recognized that she was different from her counterpart, Bradley Keso who had never been abused. Yet, she is treated the same while Bradley Keso has been disciplined multiple times for violent incidents in prison which is just additional proof of the difference in culpability between these two actors.

Antonia proved that, while in foster care, she could be a

contributing member to society. After years of abuse, in a sort time she could turn her grades around, make friends and assume leadership positions (119: 866-67). All she ever needed was someone to believe in her and give her love. However, all she has received is a "system" that did not protect her from abuse and is now saying no matter what you do or how you progress it is meaningless until she is 70 years old.

CONCLUSION

There are no easy homicide cases. Courts, like society in general, are shocked when homicide occurs and particularly when the homicide is particularly brutal.

However, it is in precisely those circumstances when the courts need to put passions aside and apply meticulously well established rules of law. There is no question that the court's actions of permitting the tape recorded confession of Bradley Keso was a flagrant violation of defendant-appellant's rights of Confrontation, which virtually eliminated any possibility of the jury concluding that she should be convicted of a lesser includable offense. The defendant-appellant's conviction should be reversed for that reason alone.

Moreover, society and the legal system understand and have compassion for the little girl who is burned by curling irons and beaten repeatedly by dog leashes. It has immense sympathy for children who are tortured and murdered by their parents every year. However, the system shuts off if the young child somehow survives the vicious tortures and at age nineteen, after years of

brutalization, strikes out. Under our current state of the law, the tortured child is treated no differently than a contract murderer.

The courts must recognize that the emotional scars of a lifetime of torture should be no less a factor in minimizing criminal culpability than hot blood. If Antonia Keso would have participated in the murder of her mother as she was being beaten, the law would not hestitate to apply the current definitions of provocation.

However, because the law has not recognized the psychological reality that the passion, that the heat, of a lifetime of torture can be triggered long after the abusive situation and be as real as if it was occurring contemporaneously. Because of defendant-appellant's lifetime of abuse, this Court should determine as a matter of law that defendant-appellant's criminal culpability is diminished.

Finally, Antonia Keso, no matter what she does is destined to be incarcerated until she is 70 years old. No one suggests that the crime of homicide is not serious; no one suggests that the crime of homicide should not be punished. However, a twenty-year-old tortured child deserves better treatment than a contract murderer.

While the system failed Antonia Keso repeatedly in the past, it is time for the system to give her some hope, something which her mother denied during her life and now continues to deny in her death.

For these reasons, defendant-appellant respectfully requests the Court to vacate the judgment of guilt, and order a new trial.

Respectfully Submitted,

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