STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2009AP898-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

Trial Court Case
No. 02-CF-314

v.

MARK D. JENSEN,

Defendant-Appellant

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED ON THE 27TH DAY OF FEBRUARY, 2008, IN THE KENOSHA COUNTY CIRCUIT COURT, JUDGE BRUCE E. SCHROEDER, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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2. Whether the admission of the letter and Jensen's statements to Officer Kosman is harmless error?

3. Whether Julie Jensen's letter to the police is a dying declaration?

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4. Whether the statements Julie Jensen made to Therese DeFazio, Tad & Margaret Wojt, Officer Ronald Kosman and Detective Ratzburg via the letter, should have been excluded as inadmissible hearsay?

Answered by trial court: No.

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant, Mark D. Jensen, requests both oral argument and publication of the Court's opinion as the U.S. Supreme Court's decision in Giles v. California reverses the Wisconsin Supreme Court's decision in State v. Jensen, 2007 WI 26, 299 Wis. 2d 267. As such, this opinion should be published.

STATEMENT OF FACTS

A criminal complaint charging the defendant-appellant, Mark D. Jensen, with first-degree intentional homicide was filed in Kenosha County on March 19, 2002 (1); State v. Jensen, 2007 WI 26, ¶3. The complaint charged Mr. Jensen with the poisoning death of his wife on or about December 3,1998. See Jensen at ¶3.

A preliminary hearing was conducted on April 23, 2002, May 8, 2002 before the Honorable Carl M. Greco, Court Commissioner wherein the State presented testimony from several witnesses including Tadeusz Wojt and Detective Paul Ratzburg. See Jensen at ¶4. Following the preliminary hearing, Mr. Jensen was bound over for trial,

and an Information charging him with first-degree intentional homicide was filed. Id. at ¶8. Mr. Jensen subsequently entered a plea of not guilty at his arraignment on June 19, 2002. Id.

Mr. Jensen filed pretrial motions challenging the admissibility of the letter received by Detective Ratzburg and oral statements Julie Jensen had allegedly made to both Wojt and Kosman. Id. at ¶9. Mark Jensen also challenged the admissibility of oral statements Julie Jensen reportedly made to her physician, Dr. Richard Borman, and her son's teacher, Therese DeFazio. Id. These motions were briefed and argued before the trial court. The circuit court evaluated each of Julie Jensen's disputed statements independently to determine their admissibility under the hearsay rules and the governing test of Ohio v. Roberts, 448 U.S. 56 (1980). Id. The court ruled that most, but not all of the statements were admissible as exceptions to the hearsay rule. Id. Julie Jensen's entire in-person statements to Kosman and the letter sent to Ratzburg were admitted in their entirety. Id. The State conceded the voice mails were inadmissible hearsay however. Id.

On May 24, 2004, Mr. Jensen moved for reconsideration on the admissibility of Julie Jensen's statements in light of the United States Supreme Court ruling in Crawford, 541

U.S. 36. See Jensen at ¶10. After a hearing on the motion, the circuit court orally announced the decision on June 7, 2004 and concluded that Julie Jensen's letter and voice mails were testimonial and therefore inadmissible pursuant to Crawford. Id. The court rejected the State's argument that the statements were admissible under the doctrine of forfeiture by wrong-doing. Id. The court also determined that Julie Jensen's statements to Wojt and DeFazio were non-testimonial, and therefore, the statements were not excluded. Id. On August 4, 2004, the circuit court issued a written order memorializing its oral rulings. Id.

The State appealed the trial court's ruling with respect to Julie Jensen's letter and her voice mail messages to Kosman. See Jensen at ¶11. Jensen subsequently cross-appealed the rulings that the statements of Wojt and DeFazio were not excluded. Id. The State of Wisconsin filed a petition to bypass, which Mr. Jensen did not oppose. Id. The Wisconsin Supreme Court granted the petition in State v. Jensen, 2007 WI 26, ¶11. The Supreme Court in State v. Jensen held that if the State could prove by a preponderance of the evidence that the accused (Mark Jensen) caused the absence of the witness (Julie Jensen), then a broad-based forfeiture by wrong-doing doctrine would apply to the confrontation rights of Mr. Jensen. See

Jensen at ¶57. As such, the cause was remanded to the circuit court for a determination of whether, by a preponderance of the evidence, Mark Jensen caused Julie Jensen's unavailability, therefore forfeiting his right of confrontation. Id.¶58. A forfeiture hearing was held on this issue on several different dates in 2007 including: 7/5/, 7/12,7/30,7/31,8/1,8/2,8/3,8/28,8/29 and 8/30/07 (303,304,306,309,311,312,313,314,315,316). At the conclusion of the hearing, the trial court concluded that the defendant-appellant, Mark D. Jensen, had waived his right to confront the testimonial statements attributed to Mrs. Jensen (317:36).

Other hearings in the Jensen case were held, including a motion to suppress based on the search of Mr. Jensen's home and seizure of his computer on October 21, 2002 (102). The issue at the motion hearing was whether the consent form signed by Mr. Jensen provided authority for police to seize Mr. Jensen's computer and hard drive (62:1-2).

At the forfeiture hearing, the State introduced various other acts evidence which was used to demonstrate the existence of a motive on the part of Mr.Jensen to murder his wife in the years preceding her death (306:26). After initially excluding the Other Acts evidence, the court admitted the evidence in an order Dated 9/28/07

(189:2;107:17). The purpose of the evidence was to show that Mr. Jensen was leaving photographs around the house to make Julie Jensen feel guilty and embarrassed about a very brief affair that she had in 1990 or 1991 (306:27). Various objections were made to this evidence and ruled on by the trial court at Mr. Jensen's trial (342:178,197-98;343:63-65;350:155-59,202,301; 353:84-85).

A jury trial commenced in Mr. Jensen's case on January 3,2008 (326). The jury trial concluded on February 21, 2008 (362). At the conclusion of the trial, the defendant-appellant, Mark D.Jensen was found guilty of first-degree intentional homicide (362:11). Thereafter, on April 6, 2009 Mr. Jensen filed a notice of appeal with the Court of Appeals to appeal his conviction (287). Thereafter, this appeal follows. The remaining relevant statements of facts will be cited to throughout the argument section of this brief due to the very large volume of material in order to prevent repetition.

ARGUMENT

I. THE WISCONSIN SUPREME COURT'S DECISION IN STATE V. JENSEN ADOPTING A BROAD FORFEITURE BY WRONG-DOING EXCEPTION TO THE CONFRONTATION CLAUSE, WAS OVERRULED BY THE UNITED STATES SUPREME COURT IN GILES V.CALIFORNIA AND JULIE JENSEN'S STATEMENTS TO OFFICER KOSMAN AND LETTER TO THE POLICE ARE THEREFORE INADMISSIBLE PURSUANT TO CRAWFORD V. WASHINGTON.

In State v. Jensen, 2007 WI 26, 299 Wis. 2d 267, 302, ¶ 57, the Wisconsin Supreme Court adopted a broad forfeiture by wrongdoing exception to the confrontation clause. In so doing, the Court concluded that if the State could prove by a preponderance of the evidence that the accused, Mark D. Jensen, caused the absence of the witness, Julie Jensen, the forfeiture by wrongdoing doctrine would therefore apply to the confrontation rights of the defendant. See Jensen at ¶57. In so doing, the Wisconsin Supreme Court looked to other cases from other jurisdictions where a defendant had forfeited his right to confrontation if the witness's absence was due to a defendant's wrongdoing. See Jensen at ¶46 citing to State v. Meeks, 88 P.3d 789, 794 (Kan. 2004). The Supreme Court further cited to Professor Friedman, a renowned expert on the Confrontation Clause for another reason to adopt a broad forfeiture by wrongdoing exception in the State of Wisconsin. Id at ¶47. In essence, therefore, the Wisconsin Supreme Court in State v. Jensen believed "that in a post-*Crawford* world the broad view of forfeiture by wrongdoing espoused by *Friedman* and utilized by various jurisdictions since *Crawford's* release is essential." State v. Jensen at ¶52. The Wisconsin Supreme Court therefore elected to

adopt a broad forfeiture by wrongdoing doctrine in Wisconsin. Id.

Since State v Jensen, the United States Supreme Court has since held in Giles v. California, 128 S.Ct. 2678, 171 L.Ed. 2d 488 (2008) that it would not approve of an exception to the confrontation clause unheard of at the time of the founding and/or 200 years thereafter. See Giles, 128 S.Ct. 2678, 2693 (2008). The broad forfeiture by wrongdoing doctrine therefore adopted by the Wisconsin Supreme Court has since been overruled by the United States Supreme Court in Giles v. California. As such, the statements that Julie Jensen gave to Officer Kosman as well as her letter to the police, the so-called "letter from the grave", are inadmissible evidence. The admission of both the letter and the statements to Officer Kosman into evidence entitle Mark D.Jensen to a new trial therefore as admission of both the letter and statements are not harmless given their content and scope in which they were used at Mr. Jensen's trial.

Additionally, the trial court during Mark D. Jensen's trial noted that the State had conceded that Mark Jensen did not kill Julie Jensen for the purposes of preventing her testimony (358:127;110:20). Further, the trial court, the Honorable Bruce E. Schroeder presiding, stated that if

Giles were reversed by the United States Supreme Court, "grave constitutional error" would have occurred in the Jensen trial (358:124). The trial court, therefore held that the letter written by Julie Jensen was a dying declaration and therefore admissible into evidence. (358:131). However, contrary to the trial court's sua sponte conclusion, the Jensen letter was not a dying declaration. As such, the Jensen letter was not admissible under this exception and Mark Jensen's confrontation clause rights were violated with the admission of the letter.

(a) standard of review.

Whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review. Jensen at ¶12; State v. Williams, 2002 WI 58, 253 Wis.2d 99, ¶7. An appellate court must accept the circuit court's findings of fact unless they are clearly erroneous Id., citing State v. Jackson, 216 Wis. 2d 646 (1998).

(i) Julie Jensen's statements, letter and voice mail messages to the police are testimonial under *Crawford* and therefore inadmissible.

1. **The *Crawford* Decision**

The confrontation clause of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront the witnesses against them. Jensen, at ¶

13; State v. Manuel, 2005 WI 75, ¶ 36, 281 Wis. 2d 554; U.S. Const.amend VI; Wis. Const. art. I, § 7. The Wisconsin Supreme Court generally applies United States Supreme Court precedent when interpreting these clauses. See State v.Hale, 2005 WI 7, ¶43, 277 Wis. 2d 593.

In Crawford v. Washington, 541 U.S. 36 (2004), the U.S. Supreme Court held that where testimonial evidence is at issue, the Sixth Amendment demands that where a witness is unavailable to testify at trial, there must be both a showing of unavailability and a prior opportunity for cross examination. See Crawford v. Washington, 541 U.S. at 33. Where testimonial statements are at issue, furthermore, the only indicia of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. Id. The Ohio v. Roberts test remains when non-testimonial statements are at issue. See State v. Manuel, 2005 WI 75, ¶54-55; Crawford, 541 U.S. at 68. Although the U.S. Supreme Court did not spell out a comprehensive definition of what "testimonial means" it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations. See State v. Jensen at ¶ 16, citing Crawford, 541 U.S. at 68.

In deciding subsequent cases involving the Confrontation Clause, the U.S. Supreme Court retained its position from Crawford that it would not define the term "non-testimonial" beyond the three formulations of the classes of testimonial statements: ex parte in-court testimony or its functional equivalent, extra-judicial statements, and statements made which an objective witness reasonably believed would be used at a later trial. State v. Jensen at ¶19, adopted in Manuel at¶39; Davis v. Washington, 126 S.Ct. 2266, 2273 (2006). The Court, however, did expand its previous discussion of what constituted testimonial statements and held that statements "are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." See Davis, 126, S.Ct. at 2273.

(ii) The Jensen letter and statements made to Officer Kosman.

In State v. Jensen, the Supreme Court was left to decide the three formations of testimonial statements from Crawford. See State v. Jensen, at ¶20. Only the third formulation was applicable to the statements at issue in the Jensen case as there were no ex parte in-court

statements or extra judicial statements made in formalized testimonial materials. Id. As such, given the third Crawford formulation, the Wisconsin Supreme Court in Jensen held that Julie's statement to the police and letter were testimonial, whereas the statements to her neighbor, Wojt, and her son's teacher, DeFazio, were non-testimonial. Id. This was so as a reasonable person in Julie Jensen's position would anticipate a letter addressed to the police and accusing another of murder would be available for use at a later trial. See Jensen at ¶27.

The Wisconsin Supreme Court in Jensen also determined that the voice mails to Officer Kosman were testimonial. Id at ¶30. The Wisconsin Supreme Court concluded that the information relayed to Officer Kosman was to further the investigation of Mark Jensen's activities. Id. In sum, therefore, the Supreme Court in Jensen concluded that Julie Jensen's letter and voice mail messages were testimonial. Id. at ¶34.

However, the Wisconsin Supreme Court in so ruling, also held that the forfeiture by wrongdoing doctrine applied to Mark Jensen's case and, thus, Mr. Jensen forfeited his confrontation rights if Mr. Jensen was found to have caused the absence of the witness (Julie Jensen) by a preponderance of the evidence. See Jensen at ¶57. In so

doing, the Jensen court adopted a broad forfeiture by wrongdoing doctrine, broader than that which was known at the time of the founding as articulated in the U.S. Supreme Court's decision in Giles v. California, 128 S.Ct. 2678, 171 L.Ed. 2d 488 (2008).

(iii) The U.S. Supreme Court's decision in Giles reverses the Wisconsin Supreme Court's decision in State v. Jensen, 2007 WI 26, as the Giles court declined to approve of the broad-based forfeiture by wrongdoing doctrine, unheard of at the time of the founding.

The U.S. Supreme Court's decision in Giles declined to approve of any exceptions to the Confrontation Clause which were unheard at the time of the founding and/or for 200 years thereafter. Giles, 128 S.Ct. at 2693. In Giles, the U.S. Supreme Court was asked to decide whether a defendant forfeited his Sixth Amendment right to confront a witness against him, when the judge determined that the wrongful act by the defendant made the witness unavailable to testify at trial. See Giles, 128 S.Ct. at 2682. The theory of forfeiture by wrongdoing accepted by the state court, according to the U.S. Supreme Court, was not a founding-era exception to the right of confrontation because the manner in which the common law forfeiture rule was applied made plain that unconfronted testimony would not be admitted without a showing that a particular

defendant intended to prevent a witness from testifying at trial. See Giles at 2684. In cases where the evidence suggested that a defendant had caused a person to be absent, but had not done so to prevent the person from testifying - as in a typical murder case involving accusatorial statements by the victim - the testimony was excluded unless it was confronted or fell within the dying-declaration exception. Id. Prosecutors did not appear to have even argued that a judge could admit unconfronted statements because a defendant committed the murder for which he was on trial. Id. The common law wrongful procurement rule was aimed at conduct designed to prevent a witness from testifying therefore according to the Supreme Court in Giles. Id. at 2686. The forfeiture rule covered this sort of conduct as the absence of such a rule would create an intolerable incentive for a defendant to bribe, intimidate or kill the witnesses against them. The courts refused to carry the forfeiture rationale any further. Id. The State's proposed exception to the right of Confrontation in Giles was not an exception established at the time of the founding therefore. Id. In sum, the U.S. Supreme Court's interpretation of the common law forfeiture rule was supported by the common law's uniform exclusion of unconfronted inculpatory testimony by murder victims in

cases in which a defendant was on trial for killing the victim, but was not shown to have done so for the purpose of preventing a victim from testifying. Id. at 2688. As the state courts view of the law was in error, the Giles court reversed the state of California. Id. at 2693.

(iv) State v. Jensen's broad forfeiture rule was contrary to the U.S. Supreme Court's decision in Giles; therefore, Julie Jensen's letter to the police and statements to Officer Kosman are inadmissible evidence and should have been excluded at Mark Jensen's trial.

As stated previously, the court in State v. Jensen adopted a broad forfeiture by wrongdoing doctrine. See State v. Jensen at ¶57. In so holding, it concluded that if the state could prove by a preponderance of the evidence that the accused (Mark Jensen) caused the absence of the witness (Julie Jensen), then the forfeiture by wrongdoing doctrine will apply to the confrontation rights of Mr. Jensen. Id. Thus, the case was remanded to the circuit court for a determination of whether or not Mark Jensen caused Julie Jensen's unavailability, and forfeited his right to confrontation. Id. at ¶58. The Giles decision however makes it clear that a broad forfeiture by wrongdoing doctrine is an exception unheard of at the time of the founding and is therefore not an exception to the confrontation clause. See Giles v. California at 2693.

Although the trial court in the Jensen case proceeded under the broad forfeiture doctrine, the evidence presented at the forfeiture hearing clearly did not establish that Mr. Jensen murdered his wife to prevent her from testifying at a future murder trial. As such, Julie Jensen's letter and the statements made to Officer Kosman are inadmissible as evidence in this case.

The forfeiture hearing was conducted by the trial court on the following dates: 7/5/07,7/12/07,7/30/07, 7/31/07,8/1/07,8/2/07,8/3/07,8/28/07,8/29/07 and 8/30/07 (303,304,306,309,311,312,313,314,315,316). At the conclusion of the hearing, the trial court concluded that the defendant (Mark Jensen) had waived his right to confront the testimonial statements attributed to Mrs. Jensen (317:36). Of course, the trial court was proceeding under the erroneous rule set down by the Wisconsin Supreme Court in State v. Jensen, 2007 WI 26. The hearing which was conducted was in essence a mini trial of the testimony that occurred at Mr. Jensen's jury trial. The testimony at the hearing included that of Tadeusz Wojt, whom testified that two weeks before Mrs. Jensen's death, she had given him an envelope and told him to take it to the police if anything should happen to her (303:24). Essentially, Mr. Wojt's testimony was that Mrs. Jensen thought Mark Jensen

was having an affair, and at some point she found that Mark Jensen had been doing research on the computer about poisoning, pulling up poison sites on the computer, and that the weekend before she died, Mrs. Jensen was very disturbed and scared as she had found two plastic syringes sticking out drawers which were halfway open (303:18-19,24,27). Further, that Mr. Jensen had offered her something to drink but she could not drink because she was scared to death that Mr. Jensen was trying to poison her (303:28-29). Margaret Wojt also testified as to observations she had made and discussions she had had with Julie Jensen on the Wednesday before her death, and that Mrs. Jensen mentioned that she had taken medicine and that she was speaking kind of slowly as if she were drunk (304:12). This is the last time in which she spoke with Mrs. Jensen (304:13). She also testified about computer usage which Mrs. Jensen had told her about as well (304:19).

Other witnesses testified at the forfeiture hearing, including Ruth Vorwald, Laura Koster, and Rhonda Mitchell-a computer crimes analyst with the Wisconsin Department of Justice who reviewed the computer hard drive seized from the home computer of Mark Jensen (308:200). Other experts also testified at the hearing including Dr. Mainland and

Dr. Christopher Long (311;312). Dr. Mainland testified as to circumstances surrounding the death of Julie Jensen (311:34). Dr. Mainland's opinion was that Julie Jensen died from ethylene glycol poisoning (311:36). Dr. Mainland also testified it was highly unlikely that someone suffering from ethylene glycol poisoning could have used the computer in the Jensen household the morning of December 2nd and evening of December 2nd, as well as December 3rd (311:49). Dr. Long's testimony was essentially that Julie Jensen's death was inconsistent with suicide, although he had originally believed that a large amount of ethylene glycol was found in Mrs. Jensen's stomach, but it was later determined that a large amount was not so found (312:25,49-50).

Finally, other witness testified at the forfeiture hearing including Therese DeFazio, David Nehring, Officer Ronald Kosman, Joan Wise, Stacey Bauer and Joanne Klug (315;316).

The State's theory of the case as presented at the forfeiture hearing was that Mark Jensen planned and murdered his wife, and that in the course of implementing the plan, used the internet extensively to find ways to poison her (306:25). Further, the purpose of the hearing was to have the testimonial statements of Julie Jensen

admitted at the time of trial (306:25). The state also wanted to demonstrate to the trial court that it was Mark Jensen utilizing the computer to access these sites in order to establish motive (306:26). Upon reviewing the entirety of the record as well as the primary purpose behind the forfeiture hearing, it is very clear that the State did not prove that Mark Jensen killed Julie Jensen in order to prevent her from testifying in his trial. Further, the trial court held as much when it found that Mr. Jensen did not kill Julie Jensen to prevent her testimony (358:123-124). The testimonial statements of Julie Jensen in the form of a letter to the police as well as the statements to Officer Kosman pursuant to the U.S. Supreme Court's decision in Giles v. California should not have come into evidence at Mr. Jensen's trial. As will be explained, the admission of both the letter and statements to Officer Kosman were not harmless error and Mr. Jensen therefore should be entitled to a new trial.

(v) The admission of Julie Jensen's letter and statements to Officer Kosman into evidence was not harmless error, was prejudicial to Mark Jensen's case and entitles Mr. Jensen to a new trial therefore.

Violation of the confrontation clause does not result in automatic reversal, but rather is subject to harmless error analysis. State v. Stuart, 2005 WI 47, 279 Wis. 2d

659, 676, ¶39. The test for harmless error is if the beneficiary of the error, here the State, proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained", the error is harmless. See Stuart at ¶ 40, citing Chapman v. California, 386 U.S. 18 (1967), reh'g denied, 386 U.S. 987 (1967).

The Wisconsin Supreme Court has articulated several factors to aid in its harmless error analysis. These include the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case. See Stuart at ¶ 41, citing State v. Hale, 277 Wis. 2d 593, ¶61.

The burden therefore is on the State to prove beyond a reasonable doubt that a rational jury would have found Mr. Jensen guilty absent the erroneously admitted evidence, Julie Jensen's letter and the testimonial statements to Officer Kosman. See Stuart at ¶40. It is clear that under all of the circumstances found in the Jensen case, that the State cannot carry its burden of proof and Mr. Jensen is entitled to a new trial.

The Mark Jensen case was a contrast in two completely competing theories of what caused the demise of Julie Jensen. It was the State's contention that Mr. Jensen caused her demise via ethylene glycol poisoning. Julie Jensen's letter to the police supported this theory as it stated that if anything happened to her Mark Jensen should be the suspect in her death; Mr. Jensen had never forgiven her for an affair that she had seven years earlier; and that she would never take her own life because she loved her kids and that she feared for her early demise, therefore, supported the State's theory of the case that Mark Jensen murdered her (73:9;348:79). Further, the letter itself discredited the theory of the defense that Mrs. Jensen committed suicide and the letter resonated throughout the trial. Mr. Jensen was in fact asked by Detective Ratzburg to explain why his wife thought these things but he was unable to do so (348:80). The letter also referenced the fact that Mrs. Jensen would never take her own life because of her children as her children were everything to her (348:78). Further, the letter also stated that Mr. Jensen had wanted Mrs. Jensen to drink more with her in the evenings, but she would not because of the fact that she feared Mr. Jensen was trying to kill her (73:9;348:78). Finally, Mrs. Jensen, via the letter,

prayed that nothing happened to her, but was very suspicious of Mr. Jensen's behaviors and feared for her early demise, which discredited Mr. Jensen's theory of defense that Mrs. Jensen committed suicide (73:9;348:78). As such, the admission of the letter into evidence at Mr. Jensen's trial was not harmless error. See State v. Stuart, 2005 WI 47, ¶ 40-41. The importance of this erroneously admitted evidence couldn't be clearer; this evidence was used to prove the State's theory of the case and to discredit completely Mr. Jensen's theory of the case.

Further, the frequency of the error is not only found in its admission via Detective Paul Ratzburg, but is also seen in other witnesses whom testified at trial, specifically the expert witnesses, including Dr. Christopher Long whom used this letter to support his theory of the case that Mrs. Jensen was killed via homicide as opposed to suicide (339:41). Dr. Long, the State's expert, relied upon Mrs. Jensen's letter in part when coming to his conclusions. Dr. Long indicated that Mrs. Jensen reported to police she feared for her life,via the letter (339:40). It should also be noted that Dr. Long was discredited on cross-examination as he admitted that he had mistakenly said that a large concentration of ethylene

glycol was found in the stomach contents of Mrs. Jensen at her death, and that Mrs. Jensen was vomiting on December 2nd (338:195,230;339:20-21,36). This is important as Dr. Long's initial assessment was that ethylene glycol poisoning was the cause of death, in part due to the incorrect finding that the stomach had a large concentration of ethylene glycol (339:36). As such, Dr. Christopher Long was discredited on cross examination. The fact that Dr. Long relied upon Julie Jensen's letter, and that this was communicated to the jury, is further evidence that the admission of the letter is not harmless error therefore (339:40).

If the State argues that an expert witness can rely upon hearsay when reaching his or her conclusions, and that therefore the Jensen letter would be admissible via Dr. Christopher Long, such an assertion is erroneous. Just because an expert relies upon a hearsay statement when reaching a conclusion, does not mean that the statement itself can be repeated to the jury. In order to allow an expert to introduce hearsay statements to a jury, the hearsay itself must be admissible. See State v. Weber, 174 Wis.2d 98 (1993). In Weber, the court concluded that "the state was obliged to qualify the statement under some exception to the hearsay rule before the statement itself

could be admitted into evidence and used substantially for the truth of the matter asserted." See Weber at 108. When an expert therefore relies on hearsay that either doesn't meet a hearsay exception or, if it does meet a hearsay exception, is testimonial hearsay and therefore barred by the confrontation clause, a trial judge should: (1) exclude the hearsay during the expert's opinion; (2) tell the jury that the expert relied upon hearsay but exclude the details of the hearsay; (3) allow all of the hearsay followed by a limiting instruction that it is not offered for the truth of the matter asserted. See State v. Weber, 174 Wis. 2d at 107, n.6. Given the testimonial nature of the hearsay letter and the Supreme Court's opinion in Giles, it is clear that the only option that the trial court should follow is to exclude the letter in its entirety. Id.; Giles at 2693.

Additionally, the letter was also used by Dr. Mary Mainland and was in fact relied heavily upon by Dr. Mainland when she reached her conclusion that ethylene glycol poisoning and smothering was the cause of Julie Jensen's death (345:27-29). The doctor testified about the Jensen letter at trial and that she relied upon the letter and statements such as Mrs. Jensen would never take her own life because of her kids, when reaching her conclusion that

Jensen's death was a homicide (345:27). The letter should not have been admissible as evidence in Mark Jensen's case. See Weber at 107, n.6;, Giles at 2613.

Additionally, the jury heard from Officer Kosman who testified about voice mails that he received from Julie Jensen in which she said that if she were to end up dead, Mark Jensen would be the suspect (343: 41,46). Officer Kosman also testified that Mrs. Jensen's voice mail included reporting strange incidents around the home, and fears that Mr. Jensen was recording her conversations as well (343:43,76). Officer Kosman also testified that Julie Jensen had taken photographs, as well as had written a note to the neighbors, and further told Officer Kosman that the note would be turned over to the police if anything happened to her (343:54). Further, Officer Kosman testified that Julie Jensen feared that Mr. Jensen was going to kill her and make it look like a suicide (343:46,76). Again, Officer Kosman's testimony that Mark would be the suspect if Julie Jensen were to end up dead, bolstered the State's case and discredited Mr. Jensen's case. Along with the letter, Kosman's testimony also discredited Mr. Jensen's theory of defense that Julie Jensen committed suicide. Drs. Rumack, Borman, and Spiro were all called by the defense to support Mr. Jensen's

theory of the case, that Julie Jensen's death was a suicide. (351:181-83; 352:59; 354:31-33; 355:72-74). The importance of this erroneously admitted evidence in comparison to the nature of the defense and the nature of the State's case couldn't be clearer; the evidence bolstered the State's case and completely discredited Mr. Jensen's theory of defense. Therefore, the admission of Officer Kosman's testimony as well is not harmless error. See Stuart, at ¶39.

Finally, the importance of the letter and Julie Jensen's statements to Officer Kosman to the State's case is seen in both the opening and closing statements of the State. The State argued in closing that given the existence of the letter, the defense's only hope is to frame Mr.Jensen (359:100,239,270). The importance of such is further evidence that the admission of the letter and statements to Officer Kosman are not harmless error (359:44,100,239,270, 278-81).

Finally, the trial court even agreed that if the Giles case was reversed by the U. S. Supreme Court that "grave constitutional error has occurred" in the Jensen case (358:124). As such, it is clear that the admission of the letter and statements to Officer Kosman into evidence are not harmless error.

For all of the reasons set forth above, it is absolutely clear that the State cannot prove, beyond a reasonable doubt that the admission of the letter and the statements to Officer Kosman were harmless error. As such, Mr. Jensen is entitled to a new trial. State v. Stuart, at ¶ 58.

II. JULIE JENSEN'S LETTER TO THE POLICE IS NOT A DYING DECLARATION

During Mr. Jensen's trial, the trial court, on February 15, 2008, held that Mrs. Jensen's letter to the police was a dying declaration (358:126-127). Although the State never asserted that the letter was a dying declaration, and in fact took exactly the opposite position pre-trial, the trial court sua sponte held that the letter was a dying declaration (358:127). Mr. Jensen asserted that the letter was not a dying declaration (358:127-130). For the reasons set forth below, Julie Jensen's letter is not a dying declaration. Further, the burden to show it was a dying declaration was on the State, whom asserted pretrial that the letter was not such a declaration (110:20). The letter does not meet such an exception therefore.

Pursuant to Wisconsin Statutes Sec. 908.045(3), a statement made by a declarant while believing that the

declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death, is an exception to the hearsay rule and is not excluded. See 908.045(3),Stats. Statements cannot be received as dying declarations unless they are made in belief of impending death. Oehler v. State, 202 Wis. 530, 534, 232 N.W.866 (1930). The question in determining if a statement is a dying declaration is whether the declarant, in fact, believed he was dying when he made the statement. People v. House, 566 N.Ed. 2d 259 (Ill.1990). The rule is founded upon powerful psychological forces that are assumed to be present at death's doorway; facing the "maw of death", the declarant is less likely to fabricate or even exaggerate during his or her final moments. See McCormick on Evidence, § 310 (6 Ed.). A court must therefore reject the statements unless the circumstances show that the declarant truly realized "the awful and solemn situation in which he is placed." See Mattox v. United States, 146 U.S. 140, 152 (1892).

Pursuant to Wis. Stat. § 908.045(3), a dying declaration must be about the cause or circumstances of the expected imminent death. See 908.045(3), Stats. It is the proponent's burden to prove that the evidence fits into

a specific exception to the hearsay rule. State v. Peters, 166 Wis. 2d 168, 174, 479 N.W. 2d 198 (1991).

In Mark D. Jensen's case, the first problem with Judge Schroeder's decision is that the proponent of the evidence, the State, did not offer Julie Jensen's letter as a dying declaration. As it is the State's burden to prove that the letter would fall into a specific exception to the hearsay rule, a dying declaration, and the proponent (the State) of the evidence never did so, the State has waived its right to argue that the letter is a dying declaration. (See also Holmes v. State, 76 Wis. 2d 259, 271, 251 N.W. 2d 56, 62 (1977), where the Court of Appeals concluded that to preserve one's right to appeal on the question of admissibility of evidence, a [party] must apprise the court of the specific grounds upon which the objection is based.) As it was the State's burden to prove the proffered evidence admissible, and the State specifically held that the letter was not a dying declaration, the State has failed to meet its burden. See Peters, 166 Wis. 2d at 174.

Even if this court addresses the issue, however, it is clear that Julie Jensen's letter is not a dying declaration. The State of Wisconsin even admitted as much in its brief to this Court prior to the State v. Jensen, 2007 WI 26, decision (See brief and appendix of plaintiff-

appellant at 32). Further, there is no evidence that Julie Jensen wrote the letter to either Officer Kosman or Detective Ratzburg under a belief of impending death. Near the end of the letter, it says that Jensen "pray[s] I am wrong and nothing happens. . . but I am suspicious of Mark's suspicious behavior and fear for my early demise" (73:9; App.p.146). Julie Jensen further speaks of her suspicions and also states that she will not leave David and Douglas and would not take her own life (73:9; App. 146).

Where a declarant has not given any indication of any belief in impending death, the courts will not admit a declarant's hearsay statement as a dying declaration. See e.g., People v. Smith, 164 Cal.451, 457-59, 129 P.785 (1913) where a declarant was hospitalized following a gunshot wound to the stomach with a bullet lodged in his spine and peritonitis had set in; however, under questioning from the district attorney, the declarant expressed hope that he was not going to die, denied that the doctor had told the declarant that he didn't have a chance, and said he could not say whether or not he was going to die. In United States v. Shepard, 290 U.S. 96 (1933), the Supreme Court reversed the defendant's murder conviction for poisoning his wife with bicloride of mercury based on the improper

admissions of statements by his wife. Mrs. Shepard, ill in bed, asked her nurse to retrieve a bottle of whiskey from a shelf in defendant's room and when the bottle was produced, she told the nurse that it was liquor she had drank just before collapsing. See Shepard at 99-100. Mrs. Shepard asked whether there was enough liquor left to test it for poison, insisting that the smell and taste were strange. She then added "Dr. Shepard has poisoned me". The Court rejected the government's contention that Mrs. Shepard's statements were admissible as a dying declaration or as evidence of her state of mind and reversed the conviction. See U.S. v.Shepard, 290 U.S.96 (1993).

It is absolutely clear that Julie Jensen's letter was not admissible as a dying declaration as she had given no indication of any belief in her impending death, and the circumstances failed to show that she had any such belief. The cases admitting a statement as a dying declaration involved either a declarant who stated his or her belief that he or she was dying or the declarent was told he or she was dying. See People v. Suns, 5 Cal.4th 405, 457-458, 853 P.2d 992 (1993); People v. Tahl,65 Cal. 2d 719, 725-27 (1967); U.S. v. Shepard, 290 U.S. 96, 100 (1933). As such, Julie Jensen's letter is not admissible as a dying declaration.

Finally, even if this Court found that the letter was a dying declaration, the letter is still a testimonial statement, and the U.S. Supreme Court in Crawford *did not* hold that a dying declaration would be an exception under the confrontation clause, although it did suggest that it may present such an exception to the prohibitions of the confrontation clause. See Crawford, 541 U.S.at 56, n.6. It has not been decided therefore that a dying declaration is an exception to the Confrontation Clause even if the declaration is testimonial. As such, it is Mr. Jensen's contention that Julie Jensen's letter, as a testimonial statement, is inadmissible even if this Court rules that the letter is a dying declaration as no such exception has been found by the U.S. Supreme Court in Crawford v. Washington. See Id.

III. THE TRIAL JUDGE'S PRETRIAL FINDING OF GUILT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The defendant was convicted after a jury trial presided over by a trial judge who, at an earlier forfeiture hearing, found that the defendant had forfeited his right of confrontation (317:36). This finding was based on the Wisconsin Supreme Court's newly devised, but unconstitutional, forfeiture standard: "If the trial court determines as a threshold matter that the reason the victim

cannot testify at trial *is that the accused murdered her*, then the accused should be deemed to have *forfeited* the confrontation right[.]" State v. Jensen, 2007 WI 26, ¶ 46, 299 Wis. 2d 267 (2007) (quoting and adopting the views of Professor Richard D. Friedman) (emphasis added).

However, what Professor Friedman and the court overlooked is that when a trial judge forms an opinion about a defendant's guilt prior to trial, he is no longer impartial. See Franklin v. McCaughtry, 398 F.3d 955 (7th Cir. 2005) (vacating conviction because trial judge "decided that Franklin was guilty before he conducted Franklin's trial."); See also Michael D. Cicchini, "Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under Crawford and Davis", 75 Tenn. L. Rev. 753, 776-77 (2008). Further, "A person's right to be tried by an impartial judge stems from his/her fundamental right to a fair trial guaranteed by the due process clause of the fifth amendment[.]" State v. Hollingsworth, 160 Wis. 2d 883, 893 (Ct. App. 1991). Finally, the denial of this right is a "structural error," and therefore is not subject to the so-called harmless error analysis. See Neder v. United States, 527 U.S. 1, 8 (1999).

This court should therefore remand for a new trial, because: (1) the issue is of constitutional significance

and goes to the fundamental structure of the process; (2) "[b]oth parties [have] the opportunity to fully brief this issue before this court"; and (3) "there are no factual issues which need resolution." State v. Whitrock, 161 Wis. 2d 960, 970 (1991). Further, raising the issue in the trial court would have been fruitless as the trial judge was following the Wisconsin Supreme Court's order that he make the pretrial finding, under the forfeiture doctrine. See Jensen, 2007 WI 26, ¶ 58. This doctrine was, of course, unconstitutional. See Giles v. California, 128 S. Ct. 2678 (2008). Finally, a biased trial judge also constitutes "plain-error" and can therefore be raised despite counsel's failure to raise the issue at the trial level. Virgil v. State, 84 Wis. 2d 166 (1978).

A pretrial finding of guilt is conceptually distinct from other pretrial judicial findings. Even a preliminary hearing bind-over ruling has nothing to do with guilt; instead, it is a determination of probable cause that is reached without weighing any evidence. See State v. Padilla, 110 Wis. 2d 414, 424 (Ct. App. 1982) ("The trier of fact, therefore, is not engaged in determining the truthfulness of the state's case but merely whether, if believed, the story has a plausible basis in fact."). Finally, even a finding that a defendant acted to prevent a

witness from testifying—which is the *proper* application of the forfeiture doctrine under Giles—has nothing to do with the defendant's guilt or innocence with regard to the underlying crime for which he is being tried.

Unlike these pretrial findings, a pretrial finding of guilt is unconstitutional. Further, the only distinction between Franklin and the pretrial finding of guilt in our case is that in Franklin, the trial judge formed his opinion of the defendant's guilt without any prompting from a higher court. Rather, the judge "took the highly unusual step of filing a memorandum with the state court of appeals" in a different case over which he presided, wherein he expressed his opinion of Franklin's guilt. Franklin, 398 F.3d at 957.

In our case, of course, the judge's pretrial finding of guilt was *ordered by* the Wisconsin Supreme Court under its unconstitutional forfeiture standard. Jensen, 2007 WI 26 at ¶ 58, 299 Wis. 2d at 303. However, the fact remains that the defendant was still tried by a biased judge. "The problem arises when the judge has prejudged the facts or the outcome of the dispute before her. In those circumstances, the decision maker 'cannot render a decision that comports with due process.'" Franklin, 398 F.3d at 962. Therefore, because the defendant was denied his

constitutional right to be tried by an impartial judge, this court should reverse the defendant's conviction.

IV. THE OTHER ACTS EVIDENCE WAS NOT RELEVANT TO ANY PERMISSIBLE PURPOSE, AND THE RISK OF UNFAIR PREJUDICE SUBSTANTIALLY OUTWEIGHED ANY PROBATIVE VALUE.

The defense objected to numerous other acts of a highly sexual and prejudicial nature. (See, e.g., 342:178,197-98; 343:63-65; 350:155-59,202,301; 353:84-85.) The law governing other acts is Sec. 904.03, 904.04, Stats., and State v. Sullivan, 216 Wis. 2d 768 (1998). Other acts are admissible only if offered for an acceptable purpose, if relevant, and not "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by . . . needless presentation of cumulative evidence." Id. at 772-73. Further, "other acts evidence should be used sparingly and only when reasonably necessary." State v. Veach, 2002 WI 110, ¶ 48, 255 Wis. 2d 390.

A. The other acts evidence

Some other acts evidence—e.g., that Julie Jensen had an affair (343:74), and that Mark Jensen had an affair (342:4-93)—was admitted to show motive. However, *impermissible* other acts were also admitted. Some (the *secondary* other acts) were ostensibly used to show the

"signature of the accused." (349:14.) This "signature" was then ostensibly used to show that Mark Jensen committed the *primary* other act, which in turn was ostensibly used to show a motive to kill.

1. Secondary other acts—1998 and 2002 penis pictures. The state introduced penis pictures found on Mark's computer *in 1998*, in order to admit penis pictures from *2002*. The state's first attempt to use the 2002 penis pictures was denied because 2002 was too remote in time, and there was already "abundant evidence in the record that the defendant has a fetish or an obsession with penises." (349:24; 350:147). However, when the state renewed its request, the court stated:

> So why don't you offer those? . . . Rather than something from 2002, four years after the woman died. . . . Now, if you brought in something—or even—well, I won't say anymore. Something from 1998 would strike me as extremely probative. (350:150)

The state then produced the 1998 pictures (349:20-21). The court held:

> *Now, that's where the 2002 photographs come into play*. . . . the jury could decide: Well, that makes more likely that it was Mark Jensen who was looking up these sites in *1998* . . . which makes more likely that he is the one who planted the pictures (the *primary* other act) . . . (350:191)

2. *Secondary other acts—1998-2000 sex talk*. There is still another *secondary* other act, i.e., evidence that is purported to prove the primary other act by showing the "signature of the accused." (349:14.) The state was allowed to question *Kelly* Jensen, Mark's current wife, about intimate and highly personal discussions she had with Mark between 1998 and 2000 regarding *her* sexual history. Kelly's testimony consisted of "exceedingly private, intimate details," including descriptions such as "blow job" and "oral sex," and details of her partners' penis sizes and their sexual positions. (342:190-94,199-204.)

> [T]he peculiar nature of this and the reason it's being admitted is just the fact that she—someone would be questioning her about this and recording this. . . . and that's what makes it peculiar. (342:196)

More specifically, the court believed that this evidence showed that Mark Jensen's "fetish about penises" made it more likely that he was responsible for the *primary* other act of leaving the pornographic photos around his own house (348:97). The judge also allowed the prosecutor to ask these questions because "He's not trying to prove *she's* sleazy. He's trying to prove that *the defendant* is sleazy." (342:199.)

3. *The primary other act—1993-1996 porno photos at the Jensen residence*. All of the *secondary* other acts were offered to prove this *primary* other act: Between 1993 and 1996—two to five years removed from the alleged crime—someone was leaving pornographic photographs around the Jensen home (343:43, 51-65), and making hang-up phone calls (343:59-60). The photos, which had been destroyed by police (343:52, 56), were of sexual acts between men and women, including cunnilingus (343:53, 56). Strangely, Julie Jensen reported to police that she was convinced that it was *she* in the photos; however, the police assured her it was not (343:165).

At that time, the police and Julie Jensen believed that Mr. Perry Tarica was responsible for the photos (343:57,70). Mr. Tarica was even cited for harassment (343:221-222). Further, one of the phone calls was traced to Tina Thomas, with whom Mark Jensen had no connection (351:175). Despite this, court admitted this *primary* other act against Mark to prove his "motive and intent to kill his wife." (351:3.)

> [I]f the heart of the Defendant was so filled with malice towards this woman that he would [leaving porno photos around the house], that would be something the jury could properly take into consideration in determining whether or not, when he became romantically involved with someone

else, he would seek her (Julie's) death. (348:105-06; 349:12.)

B. The other acts were *not* relevant to prove motive or signature.

1. The primary other act did not show motive. Even assuming that the *primary* other act was true—that Mark sought to punish Julie by leaving pornographic pictures around the house from 1993 to 1996—this in no way makes it more likely that Mark killed Julie Jensen in December of 1998. First, motive is a "cause or reason that moves the will and induces action . . . or that which leads or tempts the mind to indulge in a criminal act." State v. Cartagena, 99 Wis. 2d 657, 668-69 (1981). It cannot be said that leaving photos around the house tempted Mark Jensen's mind to commit homicide.

Second, in order to serve as evidence of motive, there must be some conceivable link between the other act and the crime, such as time and circumstance. See, e.g., State v. Cofield, 238 Wis. 2d 467 (2000) (reversible error because "there is no evidence that the prior [other acts] provided a reason for committing the charged offenses or that there was some link between them."). Third, at one point it was asserted that the *primary* other act was also relevant to show Julie's state of mind, or the context of the marriage.

The *primary* other act, however, does not show Julie's state of mind, as she believed that Mr. Perry Tarica was the perpetrator of the act. (343:57-70) Additionally, the context of the marriage had already been shown through numerous hearsay statements. Finally, none of the other acts ever satisfied *any* acceptable purpose. Sec. 904.04(2), Stats.

2. *The secondary other acts did not show "the signature of the accused."* Even more damaging was the state's intimate exploration of Mark Jensen's sexual fetishes. In the trial judge's own words, this evidence "proved that the defendant is sleazy." (342:199.) Further, the *secondary* other acts—that is, Mark Jensen's interest Kelly Jensen's sexual history and the size of her ex-lovers' penises, or his collection of penis photos—in no way proved that Mark Jensen committed the *primary* other act.

These *secondary* other acts were even less relevant to the *primary* other act than the *primary* other act was to the alleged crime. In order to be admitted to prove "signature" or identity, the other acts must be incredibly similar to the thing to be proved. In fact, "[t]he standards of probativeness and relevancy are stricter when other-acts evidence is used to show identity because of the

greater prejudice . . ." State v. Kuntz, 160 Wis. 2d 722,749 (1991). For example, the other act of having oral sex with one teen does *not* prove identity in a defendant's trial for having oral sex with another teen two weeks later. See State v. Rushing, 197 Wis. 2d 631 (Ct. App. 1995). Likewise, the other act of possessing a gun does *not* prove identity in a defendant's trial for homicide by use of a similar gun three weeks later. See State v. Hereford, 195 Wis. 2d 1054 (Ct. App. 1995).

In our case, there was even *less* similarity in time—i.e., the other acts were separated by many *years,* not weeks—as well as in circumstance. In fact, the *primary* other act sought to be proved consisted of sex photos of sex acts between men and women, including acts that didn't even involve a penis, such as cunnilingus (343:53). Consequently, Mark Jensen's penis obsession and "fetish about penises"—as evidenced by the *secondary* other acts—did absolutely nothing to link Mark to the *primary* other act. Thus, there was no signature "signature" or identity. (349:23-24; 348:98.) The same holds true for the size of Kelly's ex-lover's penises. All this proves is Mark Jensen's "obsession with penises," and does nothing to link him to the male-female sex photos left around the

house (the *primary* other act), some of which didn't even involve penises.

C. **The risk of unfair prejudice substantially outweighed probative value.**

In addition to *not* being probative of a permissible purpose, the lurid other acts carried an incredibly high risk of unfair prejudice. As the prosecutor conceded:

> All of the evidence we're presenting indicating he murdered his wife is *fair* prejudice. Evidence that we would present that, oh, let's say we were prosecuting somebody for murder and we were *presenting evidence that he was a sex pervert* that had nothing to do with murder, that's *unfair* prejudice. . . . (333:277.)

Wisconsin courts agree, describing it as the risk that the jury will draw a forbidden propensity inference. See, e.g., State v. Fishnick, 127 Wis. 2d 247 (1985). Further, the "receipt of evidence of the defendant's bad character or commission of specific disconnected acts is prejudicial error." Hart v. State, 75 Wis. 2d 371, 395 (1977).

In our case, the trial court acknowledged that the other acts were used for a forbidden propensity inference: that Mark Jensen was a sex pervert. Kelly Jensen's intimate sexual history was recounted in lurid detail to prove that Mark Jensen had a "fetish about penises," (348:97) and "to prove that the defendant is sleazy" (342:199). Likewise, the penis photos were used to prove his "kinkiness" and "strange sexual practices" (349:15).

Collectively, this proved his "obsession with penises and their length and size and so on and so forth." (350:147.) These words—fetish, sleazy, kinky, strange, and obsession—proved that Mark was a sex pervert, the very thing the state conceded was unfair prejudice. See, e.g., State v. Payano, 312 Wis. 2d 224 (Ct. App. 2008) (reversing conviction where other acts "created the perception that [the defendant] was a drug dealer, despite the fact that he was not charged with a drug-related offense.").

The risk was further exacerbated because there was already ample evidence of motive on the record, including each spouse's affair. Where ample evidence already exists, "[e]vidence of prior crimes or occurrences should be sparingly used . . . " State v. Harris, 123 Wis. 2d. 231, 236 (Ct. App. 1985). In our case, for example, before admitting the 2002 penis pictures, the court had first *excluded* the evidence because "it's cumulative. I think—I think you've put abundant evidence in the record that the defendant has a fetish or an obsession with penises . . . I'm troubled by your seeking to put in evidence from 2002, what was on the computer in 2002." (350:147.)

Additionally, the risk of unfair prejudice was exacerbated by the court when it prohibited defense counsel

from asking the panel in voir dire if they "had strong views" on pornography, or felt it "ought to be unlawful." (327:122). Instead, the court would only permit very tailored questions, despite counsel's timely objection (327:122-23). The court also stated that counsel "won't be allowed any follow-up" questions. (327:123-24.) These limitations were harmful given counsel's concern that "the last thing I want is for there to be a juror sitting there who just when pornography comes up just sees red and is just—you know, the whole subject just causes visceral anger." (327:122-23.)

The risk of unfair prejudice was also exacerbated by the court's failure to limit the *presentation* of the sex evidence. Conversely, in State v. Murphy, 188 Wis. 2d 508, 523 (1994), our state supreme court praised the "prudent cautionary procedures employed by the trial court" such as "streamline[ing] the presentation of the other acts evidence so as to avoid a protracted presentation . . ." Id. In our case, however, the court admitted massive amounts of cumulative, explicit sex evidence because "I'm of the belief that the jury should get as much information as possible[.]" (349:24.) Then, in a bizarre twist, the court even used the highly prejudicial nature of the

evidence to justify admitting even *more* sex-related evidence:

> I'm telling you that with all of the lurid material that's already been spread on this record—and you can argue that it shouldn't have been but it's there. With all the material that's already on this record, I find it hard to believe that some stored or printed pornographic pictures are going to push the jury over the edge. (350:170.)

This reasoning also infected the presentation of the penis picture web sites, where the prosecutor was allowed to name each one and, as the court even noted, "constantly have this repetition of these salacious sites." (350:301.) This included names such as "erectguys.com" (350:294), "gaymanland.com" (350:295), and "blowjobcentral.com" (350:297). Defense counsel objected, as the drawn-out presentation only inflamed the jury and prejudiced Mark .Jensen.

V. THE STATEMENTS OF JULIE JENSEN TO TADEUSZ AND MARGARET WOJT, POLICE OFFICER RON KOSMAN, THERESE DEFAZIO, AND DETECTIVE PAUL RATZBURG ARE HEARSAY AND NOT SUBJECT TO ANY EXCEPTION AND THEREFORE ARE INADMISSIBLE.

In State v. Jensen, 2007 WI 26, 299 Wis. 2d 267, the Supreme Court was asked to decide whether or not certain statements of Julie Jensen were testimonial or non-testimonial statements and whether or not the testimonial statements could be admitted at trial if it was determined

that Mr. Jensen forfeited his right to confrontation. The Supreme Court, however, noted that in State v. Manuel, 2005 WI 75, ¶ 60, 281 Wis. 2d 554, this Court held that non-testimonial statements still should be evaluated for confrontation clause purposes under the test of Ohio v. Roberts, 448 U.S. 56 (1980). See Jensen at ¶ 12, n.5. The circuit court's findings under Roberts admitting some statements and excluding others were not the basis for the original appeal to the Wisconsin Supreme Court therefore. See Jensen at ¶33,n.11. A trial court's decision to admit evidence is discretionary, and an appellate court reviews the decision for a proper exercise of discretion. See Manual at ¶24. After reviewing the statements that Julie Jensen gave to Therese DeFazio, Tad and Margaret Wojt, Officer Ronald Kosman, as well as the letter which was addressed to Kosman and Ratzburg, it is Mark D. Jensen's contention that all said statements represent inadmissible hearsay, and should have been excluded by the trial court. The following represents a summary fashion of each one of the statements. Therese DeFazio testified that Julie Jensen told her:

> That she had an affair which made Mark angry, critical and controlling, that Mark was trying to kill her by attempting to put drugs in her food and was going to give her an overdose; that Mark was trying to make it look like suicide and was trying

> to paint her as being depressed and crazy; that she gave a letter to her neighbor, intended for the police, telling them that if she died, it was not suicide and further that she would not have committed suicide because she loved her children too much; that Mark would turn off the computer which had a list on it and run away whenever she would enter the room; and, finally, that she wasn't good with computers (334:130, 133-34,137-38,141,146,147-48,151-52).

Next, Tadeusz Wojt, Jensen's next door neighbor testified that Julie said to him the following:

> That Mark was writing down website names about poison, and leaving them near the computer; Mark would leave for work and leave poison websites upon the computer screen; Mark was suspiciously trying to get her to drink something, and one time was chasing her around with a huge glass of wine; that Mark was either trying to poison,kill her, or trying to drive her crazy so he could take the kids; that Tad should give the envelope with "the letter" to the police if anything happened to her; she did not believe she would live until Monday(339:107-110,112,116-17,120).

Margaret Wojt testified that Julie Jensen said that Mark was planning something, but didn't know what (340:7). Further, that Mark would kill her before he divorced her (340:9). The letter which Mr. Wojt was referring to was addressed to Officer Kosman and Detective Ratzburg and is summarized as follows:

> If anything happened to her (Mrs.Jensen), Mark should be the supect; Mark has never forgiven her for an affair she had with a "creep" seven years earlier; Mark is a avid surfer on the internet; that Mark wants her to drink more with him in the evenings, but she will not; that she would never take her own life because she loves her kids and her kids mean everything to her; and that she prays that

> she's wrong and nothing happens to her, but she is suspicious of Mark's suspicious behaviors and fears for her early demise. However, she will not leave her children, David and Douglas (348-1; 78:9). Ap.p.146).

Finally, Officer Kosman testified:

> [I]f she(Julie) were found dead, Mark would be the suspect(343:41,46). Further, Mark was going to kill her(Julie) and make it look like a suicide (343: 46,76).

As for the first set of statements to Therese DeFazio, the trial court at a pretrial hearing held on October 8, 2003, that Julie Jensen's statements to Ms.DeFazio about her fears that Mark Jensen was trying to kill her, attempting to put drugs in her food and trying to make it look like a suicide was directly relevant and admissible as a then existing mental state (108:54). Because Julie Jensen's statements are statements of "memory or belief", they do not satisfy the state of mind exception under § 908.03(3) and are inadmissible.

The rule allows the admission of statements to prove how a declarant feels, but does not allow the admission of a declarant's statements of the cause of those feelings to prove that certain events occurred. State v. Kutz, 2003 WI App. 205, ¶ 60, 267 Wis. 2d 531. In Kutz therefore, six hearsay statements from the victim, where the victim indicated that the defendant had threatened to kill her

and further said that if she (the victim) ever left him (the defendant), the victim would never live to see her children grow up and they could bury all four of them on a hill, were inadmissible to prove state of mind. See Kutz at ¶55,62. Nor were they admissible under any other exception, statement of recent perception, excited utterance or otherwise. See Kutz at ¶ 63-65. The same is true with the statements made by Julie Jensen to Therese DeFazio that Mark Jensen was trying to kill her by attempting to put drugs in her food via overdose, and/or trying to make it look like a suicide. Such statements do not meet any such exception, then existing mental or emotional state, statement of recent perception, excited utterance or otherwise. See Kutz, at ¶65. A declarant's statement regarding his or her feelings is admissible to prove only how a declarant feels, not to prove that certain events occurred as the statements were being used to prove solely that Mark Jensen was trying to kill Julie Jensen via a drug overdose, and trying to make it look like suicide. See Kutz at ¶60. Nor are the statements admissible as a statement of recent perception or an excited utterance. See Kutz at ¶ 63-64. This is so as the statements do not apply as "the aural perception of an oral statement statement privately told to a person". Id. at ¶ 63.

Further, the threats are not excited utterances either as the declarant (Julie Jensen) could not have still been under the stress of the excitement from the night before when the threat that Mark was trying to kill her was allegedly made. Id. at ¶65. These statements indicate that Mrs. Jensen's fear was aroused over the previous weekend, but the statements were not made to Ms. DeFazio until the following Wednesday when she (Julie) came in, November 25. See State v. Kutz at ¶ 65; (334: 138-139). The trial court's conclusion to the contrary therefore admitting these statements constitutes an erroneous exercise of the trial court's discretion as they clearly should not have been admitted. See Kutz at ¶ 62-66.

The same is true of the statements to Tad Wojt. The trial court ruled on these matters at a pretrial hearing on September 4, 2003 (107:60). The fact that Mrs. Jensen had found something on the computer having to do with poison was admitted as an excited utterance (107:60). In fact, the trial court ruled that all statements made to Mr. Wojt by Julie Jensen were admissible as excited utterances, with the exception of the statement that Mr. Jensen was going to poison her (107:68; 339:117). None of the statements, as absolutely pointed out in State v. Kutz, could qualify as excited utterances however. The fact that Mr. Jensen left

poison websites on a computer screen, and had been writing down website names about poison are not excited utterances as there is no indication that Julie Jensen was still under the stress of the excitement when communicating with Mr. Wojt. See State v. Kutz at ¶ 65. Nor would the fact that Mr. Jensen was trying to get Julie Jensen to drink something and was chasing her with a glass of wine qualify as an excited utterance either as this incident is not such a startling event that would qualify as an excited utterance. Id. Nor is there any indication that Julie Jensen was still under the stress of such excitement when communicating with Mr. Wojt either. See Id.

Further, the court allowed Mr. Wojt at trial to testify that Julie Jensen told Tad Wojt that Mark Jensen was trying to poison her. However, at a pretrial hearing on September 4, 2003, the trial court ruled such a statement inadmissible(107:68). It appears that the trial court's conclusion at trial was based upon the Supreme Court's decision in State v. Jensen, 2007 WI 26 adopting a very broad forfeiture by wrongdoing exception. The trial court therefore held that all of the statements of Julie Jensen were admissible over any confrontation or hearsay objection (334:3). However, contrary to the trial court's decision, this would represent an erroneous exercise of

discretion even if the decision were upheld on appeal as a defendant does not waive hearsay objections even if the forfeiture by wrongdoing exception applies. See State v. Jensen, 2007 WI 26, 299 Wis. 2d 267. Further, another statement which came out during Mr. Wojt's testimony was that Mr. Wojt said that Julie Jensen believed that Mark Jensen was going to inject her with something (339:116). However, at a pretrial motion hearing on September 4, 2003, the trial court had ruled this statement inadmissible (107:84). Again, the trial court erroneously exercised its discretion when it allowed this statement into evidence based upon its conclusion that Mr. Jensen had forfeited his right to object to any hearsay therefore as well. See Id.

Further, Mrs. Jensen's statement to Mr. Wojt that she did not think she was going to live throughout the weekend also is hearsay not subject to any exception (339:117). It clearly is not an excited utterance as the trial court found (107:85). Nor is it a then-existing mental state as the state of mind exception does not allow a declarant's statement of conduct by another to prove the truth of that conduct solely because that conduct is relevant to a declarant's state of mind. See State v. Kutz at ¶ 59; (See also U.S. v. Shepard, 290 U.S. 96, 54 S.Ct. 22 (1933), where the U.S. Supreme Court held that exclusions of

statements of memory or belief to prove the fact remembered is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind). Nor is this statement an excited utterance either as there is no indication that Julie Jensen was still under the stress of the excitement from the night previously, nor is there a basis for inferring that she did not have time to reflect and/or that there was not a break in the stress caused by the excitement of the previous night. See 903.03(2),Stats.; State v. Huntington, 216 Wis. 2d 671, 681-83 (1998); Kutz at ¶65.

The letter which Julie Jensen wrote to Officers Kosman and Ratzburg also is inadmissible hearsay. The trial court ruled it was an excited utterance (108:153-54). The letter was also referred to in the testimony of Therese DeFazio when Ms. DeFazio testified if Mrs. Jensen died it was not suicide, and that she (Julie) would not have committed suicide because she loved her children. The letter should have been excluded as the "act of letter writing usually provides as much time as the writer might want to fabricate or misrepresent his thoughts . . ." See United States v.

Harris,942 F.2d 1125, 1130 n.5(7 Cir.1991), analyzing State of Mind exception; see also *Judicial Council Committee's Notes* (1974) to 908.03(3),Stats. ("The only required condition is that the pain be then existing and it, of course, should be a spontaneous declaration rather than a solicited statement that has lost its spontaneity. The latter element is reflected in the decisions that fear a narative of the declarant's complaints or state of mind"). A similar case to the Jensen case is a case out of New Jersey, State v. Downey, 206 N.J. Super, 382, 502 A. 2d 1171, 1175-77 (1986), where the Court reversed a murder conviction where the trial court improperly admitted a letter from the deceased stating that if anything happened to him, his wife should be the first suspect. See State v. Downey, 502 A. 2d at 1175-77. The court emphasized the prejudice of such evidence including the prosecutor's summation which referred to the letter as "a voice from the grave". Id. The Jensen letter does not fall within the state of mind exception to the hearsay rule and is inadmissible hearsay therefore. Harris at 1130, n.5. Further, the act of letter writing itself is contrary to the excited utterance exception. Compare to State v. Boschra, 178 Wis. 2d 628, 640-41 (1992) wherein the court concluded that statements made within a few hours after the

declarant suffered a repeated and aggravated sexual assault and threat of death should she report it, made to the first people the declarant talked to after the incident, is an event of such an extreme nature that it has been found to justify a lapse of a few hours. In the Jensen case there is a much longer time lapse, and the letter was delivered weeks later to the police. See also Kutz at ¶65. Therefore, even if this court were to hold that State v. Jensen, 2007 WI 26, 299 Wis. 2d 267, was decided correctly, the letter is still inadmissible hearsay and should have been excluded from Mr. Jensen's trial. The trial court's decision to the contrary is an erroneous exercise of discretion.

The same reasoning applies to the statements to Officer Kosman that if Julie Jensen wound up dead, Mark Jensen would be the suspect, and that Mark was going to kill her and make it look like a suicide (343:41,46,77). Initially, the trial court ruled that the voice mails were inadmissible hearsay. See State v. Jensen, 2007 WI 26 at ¶30, n.10. Further, the statement that Mark was going to make it look like suicide was admissible as a then-existing mental state (108:28) However, at trial, Officer Kosman testified to exactly what was in the voice mails. Again, it appears that the trial court's conclusion was that Mr.

Jensen forfeited his right to confront his accuser on confrontation and/or hearsay grounds(334:3). However, as pointed out previously, State v. Jensen did not hold that hearsay would be admissible even if a defendant forfeited his right to confront his accusers. See Jensen at ¶30. As such, the statements in the voice mail that if she wound up dead, Mark would be the suspect, should have been excluded at trial but were not. Further, the statements that Mark should be the suspect and that Mark was going to kill her and make it look like a suicide is not an excited utterance, nor is it a then-existing mental state nor is it subject to any other exceptions. It is not a then-existing mental state as the statement was used to only prove that Mark Jensen is the killer if she died, not to prove up her mental state when making the statement. See Kutz at ¶57. Nor is it an excited utterance as there is no indication that Julie Jensen was under the stress of any excitement. Id. at ¶64. Nor is it a statement of recent perception as she is not describing any event. See Id. at ¶65. These statements are also inadmissible hearsay therefore, regardless of whether or not they are testimonial. As such, the trial court should have excluded this statement at trial. The trial court's conclusion to the contrary is

an erroneous exercise of the trial court's discretion. See Manual at¶24

Finally, Margaret Wojt also testified at trial that Julie Jensen told her that Mark was planning something, but didn't know what, and that Mark Jensen would kill her before he divorced her (340:7,9). The trial court let these statements in due to Mr. Jensen forfeiting his rights under confrontation and or hearsay (334:3) Again, these statements are inadmissible hearsay, not subject to any exception and should have been excluded by the trial court. The statements certainly are not admissible under the then-existing mental state exception as the statement that Mark Jensen would kill her before he divorced her was only to prove that he made this threat and further to prove the truth of an event that occurred in the past, namely, that Mr. Jensen actually killed Mrs. Jensen. See State v. Kutz, at ¶57; Judicial Council Committee's note, sub. (3), § 908.03(3), Stats. Further, none of the statements were excited utterances as there is no indication as to when these statements were made. See 908.03(2), Stat. Nor is the statement that Mark was planning something but she didn't know what a statement of recent perception, excited utterance or then existing mental state either. See Kutz at ¶62-64 Further, neither of the statements constitute

statements of recent perception as a statement of recent perception does not include an oral statement heard by a declarant. See State v. Stephens, 171 Wis. 2d 106, 119 (1992); State v. Kutz, at ¶ 63. As such, these statements made to Margaret Wojt are also inadmissible.

Finally, the question is whether or not the admission of all the statements to Therese DeFazio, Tad Wojt, Margaret Wojt, Officer Ronald Kosman and Detective Ratzburg via the letter, constitutes harmless error. It is clear that the beneficiary of the error, here the State, cannot prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained in the Jensen case. See State v. Stuart, 2005 WI 487, ¶ 40; Chapman v. California, 386 U.S. 18 (1967). It goes without saying that the admission of the letter into evidence was extremely damaging to Mr. Jensen's right to a fair trial as more specifically set forth in the harmless error analysis in Argument I. Further, the remaining statements to DeFazio, Wojt, and Kosman recited herein were all used to show that Mark Jensen killed his wife as opposed to suicide. The frequency and importance of this testimony as well as Julie Jensen's letter to the police could not be clearer; without this evidence, it is likely that the State could never have proven beyond a reasonable doubt that Mr.

Jensen had killed his wife. See Stuart at ¶ 40; State v. Hale, 277 Wis.2d 593, ¶ 61. The importance of the letter, furthermore, was seen throughout the State's case and was relied upon by experts in coming to their conclusions and opinions, as more specifically stated in the harmless error analysis given in Argument I herein. Given the nature of the defense and the nature of the State's case, it is clear that the admission of the letter, as well as the statements to Therese DeFazio, Tad and Margaret Wojt and Officer Ronald Kosman contributed to the verdict, and the State cannot prove beyond a reasonable doubt that this evidence did not contribute to the verdict obtained. See Stuart at ¶40.

VI. THE SEARCH OF MARK JENSEN'S HOME AND SEIZURE OF HIS COMPUTER WITHOUT A WARRANT EXCEEDED THE SCOPE OF THE CONSENT TO SEARCH.

A motion hearing was held on October 21, 2002 regarding the motion to suppress the search of Mr. Jensen's home and seizure of his computer (102). The issue at the motion hearing was whether or not the consent form signed by Mr. Jensen provided authority for the police to seize whatever items they wished from Mr. Jensen's home including Mr. Jensen's computer and hard drive(62:1-2). It was Mr. Jensen's position that the consent form did not authorize the police to seize Mr. Jensen's computer as Mr. Jensen

would not have reasonably believed that the list of items which included "letters, writings, papers, materials" included other large household items like his computer (62:2). Therefore, it was Mr. Jensen's position that the computer evidence should have been suppressed.

Warrantless searches are per se unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions. State v. Sanders, 2008 WI 85, 311 Wis. 2d 257, 267; State v. Kieffer, 217 Wis. 2d 531, 541 (1998). The consent search is one such exception. See 968.10(2), Stats. However, a consent search is constitutionally reasonable only to the extent that the search remains within the bounds of the actual consent. See State v. Douglas, 123 Wis. 2d 13, 22, 365 N.W. 580 (1984). The question whether or not a search is constitutional is a question of constitutional fact. See Sanders at § 25; Kieffer, 217 Wis. 2d at 541. An appellate court upholds the circuit court's findings of evidentiary or historical facts unless those facts are clearly erroneous. Id. Further, the court determines the application of constitutional principles to those evidentiary facts independent of the circuit court but benefiting from their analysis. Id.

Government agents may not obtain consent to search on a representation that they intend to look only for specified items and subsequently use that consent to conduct a general exploratory search. United States v. Dichiarinte, 445 F.3d 126,129 (7th Cir. 1971). A general search occurs, for example, when police enter a residence in a firearms warrant and seize over 600 additional items. State v. Pender, 2008 WI Ap. 47, 308 Wis. 2d 428, 436; U.S. v. Medlin, 842 F.2d 1194, 1199 (10th Cir. 1988). It also takes place when police seize "anything of value" - including a lawn mower, televisions, coveralls, and a socket set - based upon a warrant for four specific guns and marijuana. See Pender at ¶ 13; U.S. v.Foster, 100 F.3rd 846, 848, 850 (10th Cir.1996).

In Mr. Jensen's case, the consent form which Mr. Jensen signed did not allow the officers to seize the computer. The consent form stated as follows:

> I do hereby authorize the said Police Officer(s) to take from my premises, automobile, and/or person any letters, writings, paper, materials, or other property they may desire. (39:4) (App. p.147)

The consent to search form limited the consent to the seizure of documents and similar items. Further, the object of the search, as expressed by Detective Ratzburg was that the officers intended to search for evidence of

the person who had previously harassed Julie Jensen to determine if he might have broken in or been involved in her death (102:54-55). No reasonable person would have anticipated that a search for evidence relating to a death would have extended to seizing and searching Mr. Jensen's home computer. As the 7th Circuit Court of Appeals observed, "if government agents obtained consent or a warrant to search for a stolen television set, they must limit their activity to that which is necessary to search for such an item; they may not rummage through private documents and personal papers". See Dichiarinte, 445 F. 2d at 129, n.3. Further, government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search. Id. at 129. Seizure of Mr. Jensen's computer therefore exceeded the scope of his consent and must be suppressed. See Wong Sun v. U.S., 371 U.S. 471 (1963).

Finally, regarding the consent, Detective Ratzburg testified at the hearing that he told Mr. Jensen that he wanted to examine his house to see what he could come up with (104:164). This would constitute a general exploratory search, not unlike that found by the 7th Circuit Court of Appeals in U.S. v. Dichiarinte, 445 F.2d. at 129, wherein

the court held that government agents may not obtain consent to search for certain items and use that as a license to conduct a general exploratory search. Here, Detective Ratzburg's contention that he would "see what he would come up with" is a general exploratory search and is beyond the scope of any consent given by Mr. Jensen and therefore is also invalid on that basis. Further, Detective Ratzburg admitted that when he searched Mr. Jensen's residence he did not get any specific consent to seize the computer (104:163). Further, at trial when Detective Ratzburg was asked the same question as to whether or not Mr. Jensen gave consent to take the computer, Detective Ratzburg responded "no" (347:231-37).

The question remains whether or not the admission of the computer evidence and seizure of the hard drive was harmless error. Mr. Jensen submits that this evidence was not harmless error. See State v. Stuart, at ¶40. The importance of this evidence was reiterated throughout the trial as the websites and poison websites which were admitted into evidence all came from Mr. Jensen's home computer (335:107-168). Further, the State attempted to link the poison websites to Mr. Jensen's use of the computer to show that Mr. Jensen was looking up websites on the computer, and that Mr. Jensen used this information to

poison his wife. As such, this evidence and the admission of this evidence was not harmless error and Mr. Jensen's conviction therefore should be reversed on this basis as well. See State v. Stuart, 2005 WI 47, ¶39

VII. THIS COURT SHOULD REVERSE MARK D. JENSEN'S CONVICTION IN THE INTERESTS OF JUSTICE

Discretionary reversal in the interests of justice is appropriate whenever the real controversy has not been fully tried or it is probable that justice has for any reason miscarried. State v. Wyss, 124 Wis.2d. 681,735, 370 N.W. 2d 745 (1985); State v. Schumacher, 144 Wis. 2d 388,401, 424 N.W. 2d 672 (1988). In determining whether a new trial should be ordered, the Court must determine whether the real controversy has been fully and fairly tried and be convinced that there has been no miscarriage of justice viewing the case as a whole. Wagner v. American Family, 65 Wis. 2d 243,253, 222 N.W. 2d 652 (1974). In an appeal to the Supreme Court, the Supreme Court has the power of discretionary reversal pursuant to 751.06, Stats. See 751.06, Stats.

In Garcia v. State the major facts in dispute at trial were identification of the defendant and his alibi, and the case was a close one, all material evidence was not presented to the jury because of the failure to present

exculpatory testimony of the defendant's friend who was a confessed participant to the charged shooting. Garcia v. State, 73 Wis. 2d 651, 245 N.W. 2d 654 (1976). As the jury could have been influenced by such testimony, the Supreme Court in the interests of justice, ordered a new trial. See Garcia v. State, at 655-56.

In State v. Penigar, the trial court erroneously admitted the false testimony of a rape victim that she had never had sexual intercourse prior to the disputed assault, the erroneously admitted evidence had such a pervasive effect on the trial that the real controversy was not fully tried and the judgment of conviction was reversed pursuant to the Supreme Court's discretionary power of reversal in the interests of justice. See Penigar, 139 Wis. 2d 569, 572, 408 N.W. 2d 28 (1987). In State v. Watkins, the trial court heard inadmissible and damaging testimony regarding a defendant's prior arrest, the trial court's heavy emphasis on retreat evidence in a prosecution for first degree intentional homicide raised serious questions about the analysis of the evidence, the Court concluded that the real controversy had not been fully and fairly tried in a prosecution for first degree intentional homicide in which a defendant asserted that the killing had occurred by accident. See Watkins, 2002 WI 101, 255 Wis. 2d 265. Thus,

the Supreme Court reversed the conviction of the defendant for second degree intentional homicide based on imperfect self-defense. See Watkins, at¶¶86,90,96.

In Mr. Jensen's case, it is clear that the real controversy has not been fully tried, and further that Mr. Jensen's conviction must be reversed in the interests of justice. The erroneously admitted evidence as outlined in this brief, which included the letter of Julie Jensen to the police, as well as the statements that Julie Jensen made to Officer Kosman as reiterated in Argument I herein, had such a pervasive effect during the trial that this Court must reverse in the interests of justice. As stated previously, the admission of this evidence was not harmless (see Argument I, harmless error).

Further, as specifically outlined in the remaining portions of this brief, the other inadmissible hearsay of Julie Jensen to Tad and Margaret Wojt, Officer Ronald Kosman and Detective Ratzburg via her letter to the police, and Therese DeFazio, should not have been admitted at trial as already previously argued in Argument V herein. The effect of this evidence on the verdict could not be clearer, as more specifically argued in the harmless error analysis in Argument I and V herein. As such, it is likely that justice has miscarried and Mr. Jensen's conviction

should be reversed on this basis as well. See State v. Watkins, 255 Wis.2d 265,¶96.

Regarding the other acts evidence, the cumulative and prejudicial affect of this inadmissible evidence, when combined with the other errors which occurred in this case, it is clear that reversal is warranted. When looking at the case as a whole, therefore, which also includes the impermissible search and seizure of Mr. Jensen's computer, the inadmissible other acts evidence which came in at trial, the judicial bias of the trial court, as well as the other arguments reiterated herein, it is clear that justice has miscarried and Mr. Jensen's conviction should be reversed. See Wagner, 65 Wis. 2d at 253; Schumacher, 144 Wis.2d at 401.

CONCLUSION

A defendant is entitled to a fair trial, not a trial won at any and all costs. It is clear that the Giles' decision reversed State v. Jensen, 2007 WI 26. As such, the broad-based forfeiture by wrongdoing exception to the Confrontation Clause as adopted by the Wisconsin Supreme Court was erroneous, and the admission of Julie Jensen's letter and statements to Officer Kosman therefore should have been excluded at trial. The admission of Julie Jensen's letter and statements to Officer Kosman

furthermore was not harmless error. Further, the inadmissible hearsay of Julie Jensen which was admitted at trial also is not harmless error. Judicial Bias, Impermissible other acts evidence, an illegal search and seizure of Mr. Jensen's computer are all further compelling reasons for this Court to reverse Mr. Jensen's conviction. Finally, for the remaining arguments herein, Mr. Jensen's conviction should be reversed in the interests of justice.

Dated this 29th day of June, 2009.

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CERTIFICATION

I certify that this brief of appellant meets the form and length requirements of Rule 809.19(8)(b) and (c) as amended by Court Order of June 18, 2009 in that it is:

> Typewritten (pica, 10 spaces per inch, mono font, double-spaced, 1-1/2 inch margins on left and 1 inch on other three sides)

The length of the Brief is 68 pages.

Dated this 29th day of June, 2009.

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CERTIFICATION RE APPENDIX

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 s.809.19(2)(a) and that contains as a minimum:(1) a table of contents; (2) the findings or opinion of the trial court; and(3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if 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.

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

Dated this 29th day of June, 2009.

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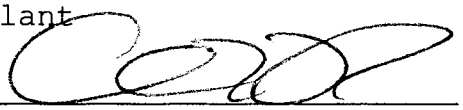
By 
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