SUPREME COURT OF WISCONSIN

Case No. 2016AP2058-CR

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

PETITION FOR REVIEW

ANA L. BABCOCK
State Bar No. 1063719
Attorney for Defendant-Appellant-Petitioner

BABCOCK LAW, LLC
130 E. Walnut Street, St. 602
P.O. Box 22441
Green Bay, WI 54305
(920) 884-6565
ababcock@babcocklaw.org

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INTRODUCTION

Peter J. Hanson petitions the Supreme Court of Wisconsin, pursuant to Wis. Stats. §§ 808.10 and 809.62, to review the decision of the Wisconsin Court of Appeals, District III, in *State of Wisconsin v. Peter J. Hanson,* Appeal No. 2016AP2058-CR, ¶ 1, filed on September 18, 2018.

ISSUES PRESENTED FOR REVIEW

I. Whether the admission of hearsay statements of a defendant's deceased wife inculpating the defendant in murder violates a defendant's right to confrontation?

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

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

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

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

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

CRITERIA SUPPORTING REVIEW

This case presents two real and significant issues of federal constitutional law and is appropriate for review pursuant to Wis. Stat § 809.62(1r)(a). First, this case presents the issue of whether a defendant's Sixth Amendment right to confrontation is violated when the court permits the jury to hear statements of a defendant's deceased wife inculpating the defendant in murder when the defendant is unable to cross-examine or otherwise confront the declarant on those statements.

Second, this case presents the issue of whether a defendant is denied his Sixth Amendment right to the effective assistance of counsel when counsel fails to challenge the admission of a defendant's John Doe testimony where such testimony was taken in violation of *Miranda*. In this case, several years after McLean was murdered, a John Doe hearing was convened, and the State called Peter Hanson, who was in custody on other charges, as a witness. Prior to the State questioning Hanson, the court conducted a colloquy with him that largely mirrored the mandates of *Miranda*; however, the court omitted one crucial advisory: that counsel would be appointed for him if he could not afford an attorney. The State subsequently questioned Hanson and he made inculpatory statements, which the State used against him at trial.

Before the court of appeals, the State did not address the issue of whether Hanson's testimony violated *Miranda*. Rather, the State argued that counsel could not be deficient because the law as to whether *Miranda* warnings are required at a John Doe hearing is unsettled. Indeed, the State coined this issue as one of first impression. While Hanson maintains that the law is clear that *Miranda* applies whenever a defendant is 1) in custody and 2) subject to questioning, regardless of whether that is in a police station, a jail, or a courtroom, this Court should use this opportunity to unequivocally reaffirm that *Miranda* warnings are required anytime a suspect is subject to custodial interrogation.

SUMMARY OF THE CASE

Over twenty years ago, in February 1998, the victim, Chad McLean, went missing; a month later he was found deceased in the Pensaukee River as a result of gun shot wounds. The case went cold for over a decade. In 2009, Hanson's wife, Kathy, from whom he was separated, told investigators that Hanson confessed the murder to her, and the case was reopened.

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

Hanson was ultimately charged and convicted, despite the State having no physical evidence tying Hanson to the murder, no murder weapon, and no motive for the killing. Indeed, the State's case was based largely on jailhouse informant testimony. The State also relied heavily on Kathy Hanson's statements incriminating her husband. But, while the jury heard Kathy's statements, it did not hear these statements from Kathy, as she had passed away prior to trial. Kathy's hearsay statements were read into the record and Hanson was unable to confront or cross-examine her on this damaging testimony. In addition, the State read Peter Hanson's inculpatory John Doe testimony to the jury even though these statements were taken in violation of *Miranda*.

STATEMENT OF THE CASE

On February 22, 1998, the victim, Chad McLean, headed to Oconto County to go fishing with his friend, Cory Byng. R 43 at 197-99. Around 4 o'clock that same day, McLean and Byng went to Byng's aunt's and uncle's house for a cookout. *Id.* at 202-04. McLean and Byng were drinking throughout their visit, and around 6:00 p.m., the two went to the Hi-Way Restaurant and Truck Stop[1] (hereinafter referred to as "Hi-Way Truck Stop") for beer and some cigarettes. *Id.* at 208-09. The two then went back to Byng's uncle's house and drank more beer. *Id.* at 215. Later that night, the defendant, Peter Hanson, and Chuck Mlados arrived at Byng's uncle's house. *Id.* at 216. Around 7 p.m., Byng and McLean got into Byng's vehicle, and while Byng was backing

[1] This establishment was a combination restaurant, convenience store, and gas station.

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

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

The case was cold for over a decade. R 1 at 2. In 2009, detectives interviewed Hanson's wife, Kathy Hanson, around the time that Peter and Kathy were separated/divorcing. *See* R 123 at 3-4. Kathy told

investigators that Peter confessed to her to killing the guy. *Id.* at 1-4. Kathy Hanson ultimately ended up committing suicide. *See* R 125 at 3. In 2012, the State initiated a John Doe proceeding into the McLean murder, and Hanson was charged in 2013. *See* R 32, Exh. 54; R 1.

At trial, there was slim evidence connecting Hanson to the murder. The State relied heavily on its theory that McLean was never seen alive after he left the Byng residence with Hanson. R 41 at 60. The State pointed to Hanson's statement that he dropped McLean off at the Hi-Way Truck Stop, yet none of the employees recalled seeing McLean and none of the cameras showed McLean at the truck stop. *See* R 41 at 37, 40-42. In addition, the State relied on testimony from Hanson's neighbors that they heard gunshots that evening coming from the direction of Hanson's home; however, the neighbor said there was "always" target practice activity off and on from Hanson's property. *Id.* at 43; R 39 at 211. The State had no murder weapon, but presented testimony that Hanson's neighbor had seen Hanson in the past with a .22 caliber gun. R 41 at 46. The medical examiner testified that McLean's wounds were consistent with small-caliber bullets such as a .22. R 39 at 76, 80. The State further relied on statements from Kathy Hanson, Peter's deceased wife, that she told police that Peter killed McLean. R 44 at 83-84; R 123. Kathy Hanson did not testify at trial, as she was deceased, and the State presented these hearsay statements through Peter Hanson's prior John Doe testimony. R 74 at 71-72, 83-84. Hanson objected that the admission of Kathy's statements violated his right to confrontation, and the court overruled the objection. *Id.* at 71, 81-82.

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

On November 20, 2015, Hanson filed a motion for postconviction relief on several grounds[2], including on grounds that Attorney Jazgar provided ineffective assistance of counsel in failing to call defense witnesses[3] and failing to object to object to the admission of Hanson's John Doe testimony on grounds that his statements violated *Miranda*. R 77; *Miranda v. Arizona*, 384 U.S. 436 (1966). On July 13, 2016, the circuit court held a *Machner*[4] hearing at which Attorney Jazgar testified. R 102. As to the issue of Hanson's John Doe testimony, Attorney Jazgar testified that he did not believe *Miranda* applied. R 102 at 26.

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

[3] Given the highly factual nature of this issue, Hanson does seek review on this point.

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

The circuit court denied Hanson's motion. As to the issue of Hanson's John Doe testimony, the circuit court concluded that, "the colloquy between Peter Hanson and the Court satisfies any right that the defendant had to an attorney at a John Doe proceeding." R 106 at 7.

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

ARGUMENT

I. The admission of hearsay statements of Hanson's deceased wife inculpating him in murder violated Hanson's right to confrontation

At trial, over Hanson's objection, the State read the jury the following excerpt from Hanson's John Doe Testimony, which contained hearsay statements of Kathy Hanson:

> Q: Did you ever talk to your wife Kathy about Chad McLean's death?
>
> A: Well, of course. We talked about it a lot.
>
> Q: Okay. And at times Kathy confronted you and said you were responsible for Chad McLean's death?
>
> A: Not to my face she didn't. She went to the police.
>
> Q: At some point within the year before she passed away, isn't it a fact that Kathy confronted you about the Chad McLean death?
>
> A: No. She never – we didn't talk about it anymore. It wasn't until she kept trying to put me in jail for little stuff that then all the sudden she went to the police and accused me of – that she thought that I killed Chad McLean.
>
> Q: But specifically she was telling people that you had shot Chad McLean?
>
> A: Well, not that I know of.
>
> Q: Well –
>
> A: She told the police.

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

A: Laskowski.

R 44 at 71-72, 83-84.

The State did not call Kathy Hanson as a witness, as she was deceased at the time of trial. *See id.*; R 125 at 3. Rather, the State entered these statements through the reading of Peter Hanson's testimony at the John Doe hearing. R 44 at 82-84. Prior to the admission of these statements, Hanson objected, asserting that Peter Hanson's John Doe testimony contained statements from Kathy Hanson. *Id.* at 71. Hanson argued that the admission of these statements violates his right to confrontation under *Crawford. Id.; Crawford v. Washington*, 541 U.S. 36, 42 (2004). The trial court ruled that the statements were admissible pursuant to the admission by a party opponent hearsay exception. R 44 at 81-82. The circuit court, however, failed to address the crux of Hanson's argument: that the multi-level hearsay statements of Kathy Hanson violated his right to confrontation. *See id.* Likewise, the court of appeals did not address Hanson's confrontation claim; rather, it concluded that any error was harmless. *State of Wisconsin v. Peter J. Hanson,* Appeal No. 2016AP2058-CR, ¶ 1, filed on September 18, 2018.

A. The Confrontation Clause

The Sixth Amendment mandates that a criminal defendant has the right to confront the witnesses against him. U.S. Const. Amend. VI; *Crawford*, 541 U.S. at 42 (2004). This fundamental

protection requires the State to present its witnesses in court to provide live testimony that can be subject to cross-examination. *Crawford,* 541 U.S. at 43. For the confrontation clause to apply, the hearsay statements must be "testimonial" in nature. *Id.* at 51; *State v. Manuel*, 2005 WI 75, ¶ 37, 281 Wis. 2d 554, 697 N.W.2d 811.

To qualify as "testimonial," the statements must be a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Manuel,* 281 Wis. 2d 554*,* ¶ 37 (quoting *Crawford*, 541 U.S. at 51). The term "testimonial" can be characterized by three different formulations including the following:

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

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

In general, statements made to law enforcement officials about a crime are considered

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

B. The admission of statements of Hanson's wife violated the Confrontation Clause

In this case, there can be little dispute that Kathy Hanson's statements were testimonial in nature. First, Kathy Hanson's statements to police occurred while she was in custody at the jail. R 123. Second, the investigator advised Kathy Hanson that he was investigating the McLean homicide and asked her questions related to such. *Id.* As a result of this interrogation, Kathy Hanson made several statements implicating Peter Hanson in the crime. *Id.* Accordingly, these comments were testimonial in nature and subject to the confrontation clause. *Crawford,* 541 U.S. at 43. The admission of these statements thus violated Hanson's Sixth Amendment right to confront his accusers. *See id.*

C. The error was not harmless

When a defendant's right to confrontation is violated, reversal is not automatic; rather, the Court considers whether the error was harmless beyond a reasonable doubt. *State v. Hale*, 2005 WI 7, ¶¶ 59-60, 277 Wis. 2d 593, 691 N.W.2d 637. The State bears the burden to establish that the error was harmless and must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict

obtained." *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434 (citing *State v. Harris*, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397).

In this case, the court of appeals did not address Hanson's Confrontation claim; rather, it concluded that any error was harmless, explaining that this evidence duplicated other untainted evidence. *State of Wisconsin v. Peter J. Hanson,* Appeal No. 2016AP2058-CR, ¶ 14, filed on September 18, 2018. Specifically, the court cited to two witnesses who claimed Hanson confessed the murder to them and another witness who claimed Hanson told him his wife made a statement to police about his involvement in the killing. *Id.* However, there was considerable reason to doubt the credibility of these witnesses.

The first witness, Kenneth Hudson, testified that Hanson told him he killed McLean. R 40 at 162. But Hudson had a personal stake in the case, as Hanson was driving Hudson's step-son's truck the night McLean disappeared. *Id.* at 153, 158, 162. In addition, Hudson testified that he was hoping his cooperation in this case would benefit his pending cases. *Id.* at 176-77. The remaining two witnesses, Barry O'Connor and Jeremy Dey, were jailhouse informants who claimed Hanson confessed to shooting McLean. *Id.* at 24-46; 113-14. As to O'Connor, around the time he shared this information with law enforcement, he was awaiting sentencing on criminal charges and made repeated requests for Huber privileges and extensions. *Id.* at 46-49. Similarly, Dey, who had reviewed paperwork on Hanson's arrest, testified that Hanson confessed to shooting McLean while the two were in jail

together. *Id.* at 108-112, 114.

The testimony of jailhouse informants has been subject to great scrutiny. While the Supreme Court has refused to impose a bright line rule excluding jailhouse informant testimony, it has cautioned that, "[t]he likelihood that evidence gathered by self-interested jailhouse informants may be false cannot be ignored." *Kansas v. Ventris*, 556 U.S. 586, 594, n. *, 597 n. 2 (2009). Indeed, the Ninth Circuit has held such testimony to be inherently unreliable. *Sivak v. Hardison*, 658 F.3d 898, 916 (9th Cir. 2011).

Such questionable testimony cannot be relied upon to conclude that the erroneous admission of testimony in violation of the Confrontation Clause was harmless, particularly in light of the other evidence. The State had no physical evidence tying Hanson to the crime, no eyewitness testimony to the murder, and the only motive proffered by the State was that McLean may have mouthed off or pestered Hanson for a ride, thereby driving Hanson to kill McLean. R 41 at 51, 58.

The State's burden to establish harmless error is high; the State must show "*beyond a reasonable doub*t that the error complained of *did not contribute* to the verdict obtained." *Hunt*, 360 Wis. 2d 576, ¶ 26 (citing *Harris*, 307 Wis. 2d 555, ¶42)(emphasis added). In this case, the jury took particular note of Kathy Hanson's statements when it asked the court to provide those statements during deliberations. R 36. Under these circumstances, the State has not established *beyond a reasonable doubt* that the erroneous admission of Kathy Hanson's hearsay statements, in violation of the Confrontation Clause,

did not contribute to the verdict. Accordingly, Hanson is entitled to a new trial.

II. Trial counsel was ineffective in failing to challenge the admissibility of inculpatory statements made by Hanson at a John Doe hearing where he was in custody and not properly Mirandized.

On November 1, 2012, prior to being charged with this case, Hanson was in custody in the Oconto County jail on an unrelated matter. R 106 at 4. On this same date, a John Doe hearing was convened with regard to the McLean matter, and Hanson was called to testify. *Id.* Prior to questioning, the court conducted a colloquy with Hanson regarding his right to remain silent, his right to counsel, his right to assert certain privileges, etc. R 32, Exh. 54 at 48-52. The court, however, failed to advise Hanson that if he could not afford counsel, counsel would be appointed for him. *See id.*

During the pretrial phase, Attorney Jazgar raised no motions challenging the admissibility of Hanson's testimony made during the John Doe case. The State actually raised the issue that these statements could potentially be inadmissible, conceding that Hanson was in custody during the John Doe testimony and inquiring as to whether Hanson would challenge such. R 55 at 4. Attorney Jazgar responded that he did not believe there was anything that prevented the State from using the testimony. R 51 at 21. At trial, the State presented Hanson's inculpatory un-Mirandized statements made at the John Doe hearing against him. R 44 at 82-105.

A. Hanson's John Doe testimony violated the requirements of *Miranda*

Prior to questioning a defendant in custody or otherwise deprived of his freedom, the defendant must first be warned that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, *if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."* *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966)(emphasis added). These warnings must be administered when the defendant is 1) in custody and 2) is subject to questioning. *Id.* at 447.

In this case, the State violated *Miranda* when it elicited testimony from Hanson at a John Doe hearing without first ensuring that the proper warnings were given. On November 1, 2012, prior to being charged with this case, Hanson was in custody in the Oconto County jail on an unrelated matter. R 106 at 4. Indeed, the State conceded that Hanson was in custody at the time for purposes of *Miranda*. R 55 at 4. On this same date, a John Doe hearing was convened with regard to the McLean matter, and Hanson was called to testify. *Id.* Prior to testifying, the court conducted the following colloquy with Hanson:

> THE COURT: Mr. Hanson, you are advised that you are appearing in a John Doe proceeding before me, Judge Michael T. Judge, for Oconto County.

Under Wisconsin law, the circuit judge has the power to subpoena witnesses and compel testimony before this John Doe proceeding. You are directed to answer all questions put to you, remembering your oath that you just gave.

If you believe that a truthful answer to any question asked of you would incriminate you, that is, subject you to criminal prosecution, you may refuse to answer the question on the grounds that it may incriminate you. Do you understand that sir?

THE WITNESS: Yes.

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

THE WITNESS: Yes.

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

THE WITNESS: Yes.

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

THE WITNESS: Yes.

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

THE WITNESS: Yes.

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

THE WITNESS: Yes.

THE COURT: You are appearing before this John Doe proceeding without an attorney. Do you understand that Attorney Vince Biskupic, before you, represents the State of Wisconsin and may not and cannot act as your attorney in this matter?

THE WITNESS: Yes.

THE COURT: Do you understand that if you do not have an attorney but wish to consult with one about these proceedings or have an attorney appear with you, you would be required to return and testify at a future time?

THE WITNESS: Yes.

THE COURT: Mr. Hanson, do you wish to have an attorney present with you at this time?

THE WITNESS: No.

THE COURT: Has anyone made any threats or promises to persuade you to give up your right to consult with an attorney or have an attorney appear with you during this John Doe proceeding?

THE WITNESS: No.

R 32, Exh. 54 at 48-52.

In conducting this colloquy, the court failed to advise Hanson that if he could not afford counsel, counsel would be appointed for him, as required by

Miranda. *See id.*; *Miranda*, 384 U.S. at 478-79.

Following this colloquy, the State went on to question Hanson and elicited incriminating statements, which it used against him at trial. R 44 at 82-105. Because Hanson was in custody, was subject to questioning, and was not given his full *Miranda* warnings prior to such, his John Doe testimony should have been suppressed. *Miranda*, 384 U.S. at 447, 478-79.

B. Attorney Jazgar was deficient in failing to challenge the admission of Hanson's John Doe testimony

The 6th Amendment guarantees a criminal defendant the right to the effective assistance of counsel. U.S. Const. Amend VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To show that counsel was ineffective, a defendant must prove the following: (1) that counsel's performance was deficient and (2) that such deficiencies prejudiced the defendant. *Strickland*, 466 U.S. at 687. To prove that counsel was deficient, the defendant must show that counsel's performance fell below an objectively reasonable standard. *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d. 305. In this case, Attorney Jazgar fell below an objectively reasonable standard when he failed to challenge the admission of Hanson's damaging statements that were elicited in violation of *Miranda*.

During the pretrial phase, Attorney Jazgar raised no motions challenging the admissibility of Hanson's testimony made during the John Doe hearing. The State actually raised the issue that

these statements could potentially be inadmissible, conceding that Hanson was in custody during the John Doe testimony and inquiring as to whether Hanson would challenge such. R 55 at 4. In addition, the State appeared to concede that Hanson was subject to questioning when it did not argue against such. *See id.* Indeed, the State implicitly acknowledged that *Miranda* applied to Hanson under those circumstances, when its only argument to the Court was that the dictates of *Miranda* were satisfied. *Id.* at 4. Attorney Jazgar agreed with the State, advising that he did not believe there was anything preventing the State from presenting these statements. R 51 at 21. In doing so, Attorney Jazgar failed to identify that Hanson was not given *full Miranda* warnings, and he should have challenged the admission of those statements.

At the *Machner* hearing, Attorney Jazgar testified that he did not challenge Hanson's statements because he did not believe that the *Miranda* warnings applied at a John Doe hearing. R 102 at 26. However, it was not the nature of the hearing that mandated the *Miranda* warnings, it was the nature of the questioning; that is, that Hanson was in custody and subject to questioning. *Miranda*, 384 U.S. at 447. Indeed, the State paved the way for Attorney Jazgar to challenge this evidence, by raising the issue on its own accord. R 55 at 4. But Attorney Jazgar missed it. Because *Miranda* required that Hanson be advised of these warnings and because the dictates of *Miranda* are clear, Attorney Jazgar was deficient for failing to challenge the admission of these statements at trial.

C. Hanson was prejudiced by the presentation of his John Doe testimony.

To show that counsel's deficient performance was prejudicial, the defendant must show a reasonable probability that but for counsel's errors, the outcome would have been different. *Thiel*, 264 Wis. 2d 571, ¶ 20. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The focus is not on the outcome of the trial but on the reliability of the proceedings. *Id.*

The State placed considerable emphasis on Hanson's John Doe testimony, focusing on Hanson's response to Kathy's confrontation and any inconsistencies that existed between Hanson's prior statements to police. R 45 at 38, 57-58. Indeed, through Hanson's statement, the State admitted Kathy Hanson's inadmissible hearsay, which Hanson challenges on different grounds above. *Supra* at 9-15; R 44 at 83. Not only was Hanson prejudiced by the State's emphasis on this testimony in persuading the jury to convict Hanson, but also the record shows that the jury took specific note of Kathy Hanson's statement when it asked for "anything that may pertain to Kathy Hanson's statement to the police." R 41 at 99. In this regard, it is important to note that this is the only question that came from the jury, thereby establishing that they put considerable emphasis on this testimony. *See id.* Given the weak evidence against Hanson, the impermissible admission of his John Doe testimony undermines confidence in the proceedings.

D. The court of appeals decision

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

As discussed above, given that there was no physical evidence connecting Hanson to the murder, given that the brunt of the State's case focused on testimony of jailhouse informants and those looking to benefit from their inculpatory statements, and given that the jury took particular note of Kathy Hanson's statements, the impermissible admission of Hanson's John Doe testimony undermines confidence in the outcome. Accordingly, Hanson is entitled to a new trial.

CONCLUSION

Based on the above reasons, Hanson requests that this Court grant the petition for review.

Dated this 1st day of October, 2018

Respectfully submitted,

_____

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

BABCOCK LAW, LLC
130 E. Walnut Street, Suite 602
P.O. Box 22441
Green Bay, WI 54305
(920) 884-6565
ababcock@babcocklaw.org

CERTIFICATION AS TO FORM/LENGTH

I certify that this petition for review conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and 809.62(4) for a petition produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this petition is 5,417 words.

Dated this 1st day of October, 2018

Signed:

_____

ANA L. BABCOCK
State Bar No. 1063719
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION OF COMPLIANCE
WITH RULE 809.62(4)(b) and 809.19(12)

I hereby certify that:

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

This electronic petition is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 1st day of October, 2018

Signed:

_____

ANA L. BABCOCK
State Bar No. 1063719
Attorney for Defendant-Appellant-Petitioner

APPENDIX

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