STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
APPEAL NO. 2007AP001026

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VICTOR VASQUEZ,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING THE APPELLANT'S MOTION PURSUANT TO SEC. 974.06, STATS., THE HONORABLE WILLIAM SOSNAY, PRESIDING

APPELLANT'S BRIEF AND APPENDIX

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TABLE OF AUTHORITY

TABLE OF CONTENTS

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented by this appeal are complicated and at least one of the issues presents a novel question of constitutional due process law and, therefore, the appellant recommends oral argument and publication.

ISSUES PRESENTED

I. Whether the trial court erred in holding that the appellant failed to establish good cause for not raising his confrontation clause issue in his original appeal where the good cause offered by the appellant was that ***Crawford v. Washington*** represented a change in procedural criminal law that affected the fundamental reliability of the conviction and, therefore, ought to be applied retroactively to cases on collateral attack.

ANSWERED BY THE TRIAL COURT: No

II. Whether the trial court erred in denying appellant's Sec. 974.06, STATS., claim that his confession to police should have been suppressed because it was obtained during a time when appellant was unreasonably detained with having had his initial appearance.

ANSWERED BY THE TRIAL COURT: No.

SUMMARY OF THE ARGUMENT

I. CRAWFORD SHOULD BE APPLIED RETROACTIVELY. Vasquez argued that his conviction was based upon that admission of hearsay that corroborated his confession to policed. Because the

hearsay was testimonial it would not have been admitted under ***Crawford v. Washington.*** The trial court denied Vasquez motion on the grounds that the United States Supreme Court recently held that ***Crawford*** represented a rule of procedural criminal law that may not be applied retroactively to convictions that are on collateral attack. Although Wisconsin generally follows the federal standard of retroactivity it is not in complete lock-step. No Wisconsin case has specifcally held that ***Crawford*** does not apply retroactively to cases on collateral attack. Because the ***Crawford*** holding affects the fundamental reliability of the criminal procedure, Wisconsin should depart from the federal standard of retroactivity and permit it to apply to Sec. 974.06, STATS motions. If that is done here it is clear that Vasquez' confrontation rights were denied and he is entitled to a new trial.

II. VASQUEZ' CONFESSION WAS OBTAINED IN VIOLATION OF *RIVERSIDE*.

Vasquez was arrested on October 9, 2000. Over the next four days he was interrogated at least six times concerning this homicide. Vasquez steadfastly denied any involvement in the homicide until the last interrogation when he made statements admitting involvement. Of course, now that they had what they wanted, the police conducted no further interrogation. Significantly, Vasquez did not have his initial appearance until October 13, 2000- well after the 48 hour requirement.

Although Vasquez challenged the voluntariness of his statement before the trial court, defense counsel did not raise the exact issue presented here. because Vasquez' "confession" occurred

during a period of unreasonable delay, the statement ought to be excluded. Because the statement should have been excluded, and was not, Vasquez is entitled to a new trial.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

The defendant, Victor Vasquez ("Vasquez") was charged with first degree intentional homicide and felon in possession of a firearm arising out of an incident that occurred in Milwaukee on October 5, 2000. Vasquez entered a not guilty plea to both charges.

Vasquez was arrested on October 9, 2000. He was held in custody without an initial appearance until October 13, 2000. During this four day period Vasquez was interrogated by police as many as six times before he allegedly confessed to being involved in the shooting.

The case was tried to a jury beginning on May 30, 2001. The jury returned verdicts finding Vasquez guilty on both counts. The court sentenced Vasquez to life in prison.

Vasquez timely filed notice of intent to pursue postconviction relief and, on February 25, 2002 Vasquez filed a postconviction motion alleging that he was entitled to a new trial due to ineffective assistance of trial counsel. Specifically, Vasquez argued that trial counsel was ineffective for failing to question a juror who evinced subjective bias during *voir dire* questioning and for failing to strike this juror.

The trial court did not conduct a hearing on the motion and

denied it by a memorandum decision dated March 11, 2002. Vasquez timely appealed to the Wisconsin Court of Appeals.

The Court of Appeals summarily affirmed Vasquez's conviction by order dated March 7, 2003.

On June 12, 2003 the Wisconsin Supreme Court denied Vasquez' petition for review.

On January 19, 2005, Vasquez filed a *pro se* petition for habeas corpus in the United States District Court for the Eastern District of Wisconsin. The State moved to dismiss that petition as being untimely filed and the court granted the motion.

On March 27, 2007 Vasquez filed a motion pursuant to Sec. 974.06, STATS., raising the issues that are presented in this appeal. The trial court did not conduct a hearing on the motion and denied it in all respects on April 4, 2007. Specifically, the court reasoned that the recent United States Supreme Court case ***Whorton v. Bockting*** (05-595) established that ***Crawford v. Washington,*** 541 U.S. 36 (2004) was not retroactive and, therefore, Vasquez could not pursue a "Crawford claim" in a Sec. 974.06, STATS. motion. Additionally, the court held that no "Riverside" violation occurred.

II. FACTUAL BACKGROUND

On October 5, 2000 Officer Leon Butts and his partner arrived at the El Rey grocery store parking lot and found Norberto LeBlanc (aka Pedro Martinez) in his vehicle with multiple gunshots wounds and that his injuries were found to be incompatible with life. LeBlanc was pronounced dead and the parties stipulated that the cause of death was the numerous gunshot wounds.

While searching the vehicle in which LeBlanc's body was found the police recovered a cell phone. Detectives determined that not long before they were called to the scene the cell phone had received calls from (414) 384-5867- a number that police detectives claimed was associated with Vasquez (Trans: 5-31-01 pm p. 67)

Hector Cirino testified that he lived in the duplex unit below Vasquez. In the late afternoon of October 5, 2000, Vasquez came down and asked him (Cirino) to drive him (Vasquez) to the El Rey grocery store and Cirino agreed. (Trans: 6-4-01 p.m. p. 73) According to Cirino, once they got to the El Rey parking lot Vasquez got out and approached a white car that was parked there. After a moment Vasquez returned and said, "Let's go." (Trans: 6-4-01 p.m. p. 77). Cirino then drove home and testified that he arrived at approximately 5:30 p.m. (Trans: 6-4-01 pm p. 79) Cirino told the jury that Vasquez did not go into the store, he was gone for about ten minutes, and that he (Cirino) did not hear any gunshots while Vasquez was gone.

Priscilla Chairez testified that at about 6:40 p.m. on October 5, 2000 she was coming out of the El Rey grocery store and when she heard four or five gunshots in the parking lot. She looked up and saw a Hispanic (according to detective she said "Puerto Rican") male get out of the open door of a black car and that the man had a gun in his hand. (Trans: 6-5-01 p. 56) Police later showed her a photo array and Chairez picked out Vasquez as the person she saw getting out of the car where the man was shot. (Trans: 6-5-01 p. 77)

On direct examination Chairez was examined as follows:

Q Sometime after 6:55 p.m. on October 5, when you were still at the El Rey store, did you talk to a detective-- Mark Walton?

A I don't remember his name, but I talked to a detective.

Q Did you tell him what you saw and so on?

A Yes.

Q Now, when you spoke to the detective, the Hispanic male that you saw, you described him a little differently than just Hispanic; correct?

A Yeah.

Q How did you describe him?

A He was like medium sized and a little bit medium-sized weight.

Q You described him as a Puerto Rican male, didn't you?

A I said he-- he looked like it, but then he looked Hispanic. I wasn't really sure.

Q So you could have described him to the detective as a Puerto Rican male?

A I could have, but--

(Trans: 6-5-01 p.m. p. 64 to 65)

Detective Walton was then called as a witness by the State. His testimony on this point went as follows:

Q Did Miss Chairez tell you during your interview, oh, within about a half an hour after you arived on the scene on October 5, that she looked up and observed a Puerto Rican male across the aisle standing by a black Cadillac?

A Yes, she did.

* * *

Q Did she tell you that the Puerto Rican male grabbed the handle of the passenger door and opened the door?

A Yes, she did.

> Q Did she tell you that she observed the Puerto Rican male to, quote, immediately start shooting, end quote.
>
> A After he had bent into the car, she said that.

(Trans: 6-5-01 a.m. p. 110)

Eventually, police brought in Vasquez for questioning. He was interrogated numerous times over the course of several days. During the questioning Vasquez repeatedly denied that he was in any way involved in the shooting; however, at one point Vasquez exclaimed, "My life is over. I own the Mazda. I will do at least twenty." (Trans: 6-4-01 p. 22) The detectives interpreted this comment as a admission of guilt by Vasquez. Ultimately, Vasquez told detectives that he knew Pedro Martinez, that he (Vasquez) owned a blue Mazda and that this was the car he used when he asked Hector Cirino to drive him to El Rey on October 5. (6-4-01 a.m. p. 25) Detectives also testified that Vasquez told them that he had known Pedro Martinez for some time and that he called Martinez "uncle". (6-5-01 am p. 35). According to detectives, Vasquez explained that Martinez was a drug dealer who made a lot of money and that he and Vasquez later had a dispute over money. At one point Martinez threatened to kill Vasquez. *Id.* Thus, Vasquez purportedly told police, he killed Martinez in self-defense.

ARGUMENT

I. VASQUEZ IS ENTITLED TO A NEW TRIAL BECAUSE THE STATE INTRODUCED HEARSAY STATEMENTS OF A KEY WITNESS THAT VIOLATED VASQUEZ'S RIGHTS UNDER THE CONFRONTATION CLAUSE.

The State's case relied heavily on Vasquez's "confession." However, a criminal conviction cannot be based solely on a confession. The confession must be corroborated in some significant way by other evidence. Here, the significant corroboration that the State relied upon was the testimony of Priscilla Chairez concerning the identification of the shooter. On direct examination Chairez was unsure as to the ethnic backround of the shooter (i.e. Hispanic or Puerto Rican). As the witness herself explained, there is a significant difference between the appearance of Hispanics as opposed to Puerto Ricans. Understandably, then, Vasquez's attorney did not cross-examine Chairez on this point. Rather than rely on this uncertain testimony, though, the State revisited the issue with a police detective who restated Chairez's identification testimony in a far more certain and coherent manner than the witness herself did. Obviously, Vasquez could not meaningfully cross-examine the detective on this point. Thus, there was a confrontation clause violation. The error was not harmless because the confrontation violation related to critical corroboration evidence.

A. The "Crawford" rule, although procedural, should apply retroactively to cases on collateral attack under Sec. 974.06, STATS..

Because Vasquez did not raise this issue in his original appeal the only legal authority for filing a motion at this point is found in Sec. 974.06, STATS. That section provides:

> (1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Additionally, the Wisconsin Supreme Court has made clear that the remedy under Sec. 974.06, STATS is not available unless there is some good reason why the defendant did not raise the issue in an original appeal under Sec. 809.30, STATS. In ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) the supreme court stated:

> We need finality in our litigation. Section 974.06(4) compels a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion. Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation. Id. at 185. A defendant must raise all grounds of relief in his original supplemental or amended motion for postconviction relief. Id. at 181. If a defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a new postconviction motion unless there is a sufficient reason for the failure to allege or adequately raise the issue in the original motion. Id. at 181-82.

In 2004 the United States Supreme Court decided ***Crawford v. Washington***, 124 S.Ct. 1354 (2004). In that case the Supreme Court settled once-and-for-all that the confrontation clause prohibits the

use of "testimonial hearsay" regardless of whether the hearsay falls under some "firmly rooted" exception to the hearsay rule.

In this case the trial court rejected Vasquez's Sec. 974.06, STATS. motion based primarily on the recent Supreme Court holding in ***Whorton v. Bockting***, 127 S. Ct. 1173, 1181 (U.S. 2007). ***Whorton*** stands for the proposition that ***Crawford*** creates a new rule of criminal procedure and, therefore, under ***Teague v. Lane***, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989), it may not be applied retroactively to cases on "collateral review."

Under ***Teague***, a new rule of criminal procedure is not applied retroactively to cases on collateral review unless it falls under either of two well-delineated exceptions. ***Teague***, 489 U.S. at 307. First, a new rule of criminal procedure should be applied retroactively to cases on collateral review if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Id*. Second, a new rule of criminal procedure should be applied retroactively to cases on collateral review if it encompasses procedures that "'are implicit in the concept of ordered liberty."

"While ***Teague***, read narrowly, applies only to federal habeas corpus proceedings, Wisconsin has adopted the ***Teague*** framework in all cases involving new rules of constitutional criminal procedure on collateral review pursuant to Wis. Stat. § 974.06." ***State v. Lagundoye***, 2004 WI 4, P14 (Wis. 2004)

Although Wisconsin generally follows the ***Teague*** principles of retroactivity it does not always. *See, e.g.,* ***State ex rel. Schmelzer v. Murphy***, 201 Wis. 2d 246, 256-59, 548 N.W.2d 45 (1996) where the

Wisconsin Supreme Court did not strictly follow the ***Teague*** rule in holding that new rules concerning claims of ineffective assistance of counsel may be applied retroactively in collateral attacks.

The Wisconsin Supreme Court's most recent statement concerning the application of the ***Teague*** standard and retroactivity was in ***State v. Lagundoye***, 268 Wis.2d 77, 88, 674 N.W.2d 526 (2004), where the Wisconsin Supreme Court explained:

> [a] new rule of substantive criminal law is presumptively applied retroactively to all cases, whether on direct appeal or on collateral review. *(citations omitted)* Second, Wisconsin follows the federal rule announced in ***Griffith v. Kentucky***, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), that new rules of criminal procedure are to be applied retroactively to all cases pending on direct review or non-finalized cases still in the direct appeal pipeline. ***State v. Koch***, 175 Wis.2d 684, 694, 499 N.W.2d 152 (1993).

It does not appear that the Wisconsin Supreme Court has ever expressly held that ***Crawford*** may not be applied retroactively to cases on collateral attack under Sec. 974.06, STATS.

There are compelling reasons why the Wisconsin state courts ought not expressly adopt the holding of the ***Whorton.*** One of the ***Teague*** exceptions is where it encompasses procedures that 'are implicit in the concept of ordered liberty." In ***Crawford,*** the Supreme Court wrote that:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford 541 U.S. at 61.

It is difficult to understand how the proscription of the United States Constitution that reliability of evidence be tested in a particular way in not a procedure that is implicit in the concept of ordered liberty.[1] Wisconsin should again decide not to walk in lock-step with the federal ***Teague*** standard of retroactivity. The crucible of cross-examination is the best and most effective manner of testing the reliability of evidence in a criminal case.

B. Detective Walton's testimony concerning Chairez's description of the shooter was hearsay and no foundation was established otherwise.

In ***Crawford,*** 124 S.Ct. 1354 (2004) the United States Supreme Court settled once and for all that the Sixth Amendment confrontation clause applies to all "testimonial hearsay" presented during a criminal trial- not just to witnesses who are present and testify. The court spent time defining "testimonial statements" but left "for another day" its precise definition. The court did make clear that statements made to police while they are investigating a crime are the superlative example of such statements.

In ***Crawford,*** the court wrote:

> Accordingly, we once again reject the view that the Confrontation

1 Here is how the United States Supreme Court explained it: "First, the rule does not implicate 'the fundamental fairness and accuracy of the criminal proceeding' because it is not necessary to prevent "an "'impermissibly large risk"' " of an inaccurate conviction, ***Summerlin***, *supra*, at 356, 124 S. Ct. 2519, 159 L. Ed. 2d 442. ***Gideon v. Wainwright***, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, the only case that this Court has identified as qualifying under this exception, provides guidance. There, the Court held that counsel must be appointed for an indigent defendant charged with a felony because, when such a defendant is denied representation, the risk of an unreliable verdict is intolerably high. The Crawford rule is not comparable to the Gideon rule. It is much more limited in scope, and its relationship to the accuracy of the factfinding process is far less direct and profound. Crawford overruled Roberts because Roberts was inconsistent with the original understanding of the Confrontation Clause, not because the Crawford rule's overall effect would be to improve the accuracy of factfinding in criminal trials. With respect to testimonial out-of-court statements, Crawford is more restrictive than Roberts, which may improve the accuracy of factfinding in some criminal cases." ***Whorton v. Bockting***, 127 S. Ct. 1173 (U.S. 2007)

> Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of Evidence for the time being." 3 Wigmore § 1397, at 101; accord, ***Dutton v. Evans***, 400 U.S. 74, 94 (1970) (Harlan, J., concurring in result). Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.

Thus, the Supreme Court observed that historically, "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." ***Crawford***. The court went on, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."

Therefore, the Supreme Court held:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law — as does ***Roberts***, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Here, Chairez was called as a witness by the State. She testified that she was in the parking lot of El Rey when she heard gunshots. She looked up saw a "Hispanic" man of medium build getting out of a black automobile and that the man had a gun in his

hand. When pressed by the prosecutor, Chairez *admitted* that she told a police detective that the man was Puerto Rican but at trial she explained that he looked Hispanic/Puerto Rican but is not sure which. The topic was delved into no further by the prosecutor.

Later the State called Milwaukee Police Detective Mark Walton. Walton who, without objection from defense counsel, testified that Chairez said that man she saw in the parking lot was Puerto Rican. Walton's testimony gave the impression that Chairez was much more affirmative in her identification of the man as a Puerto Rican than she conveyed from the witness stand at trial.

Under any definition of "testimonial hearsay", Chairez's statements to Detective Walton fit the bill. The statements were made while the witness was seated in a squad car and were made in response to police questioning. Whether the statements fall under some exception to the hearsay rule or whether they are defined out of the statutory hearsay rule is beside the point. They are out-of-court statements offered for the truth of the matter.

The next question, then, is whether the issue is made moot by the fact that Chairez did testify at the trial and was therefore subject to confrontation.

The functional purpose of the confrontation clause is to promote reliability in a criminal trial by ensuring the defendant a *meaningful* opportunity for cross-examination. ***Kentucky v. Stincer***, U.S. , 107 S. Ct. 2658, 2664 (1987) (citing ***Lee v. Illinois***, U.S. , 106 S. Ct. 2056 (1986)). This opportunity to cross-examine the accuser presupposes the presence of the defendant at trial, ensuring that convictions will not be based on the charges of unseen, unknown,

and thus unchallengeable individuals.

It is a rare case, then, where a confrontation violation occurs even though the witness appears at trial and testifies. It happened in this case, though.

Chairez testified on direct examination concerning her ability to identify the shooter and her ability to identify his ethnic background. Her testimony on this point was equivocal. Thus, defense counsel had *no reason* to cross-examine her on testimony that was not helpful to the State.

Then, after Chairez was apparently no longer available as a witness, the State called Detective Walton to present the Chairez identification testimony in a much more coherent and affirmative manner. It was plainly the State's plan all along to rely not necessarily on the Chairez identification testimony but, rather, on the police detective's more convincing rendition of her statement.[2]

Thus, Vasquez had no *meaningful* opportunity to cross-examine Chairez because at the time she testified there was no reason to confront her with anything because she was not sure of the ethnic background of the shooter. In the final analysis, the whole purpose of the Fourth, Fifth, and Sixth Amendments to the constitution is fair play. It is grossly unfair to permit the State to rely not upon the actual testimony of a witness but, rather, upon a sanitized police version of what the witness supposedly said.

2 The prosecutor told the jury in his opening statement that, "And you'll hear testimony from a 13 year-old scared young lady, and I'm not quite sure what she's going to tell you in court today . . . I don't know what she'll tell you here in court today or in the next few days, but when listening to her testimony, remember-- she's a 13 year-old girl. Remember these proceedings and the magnitude of them when assessing her credibility and judging it." (Trans: 5-31-01 am p. 7)

Vasquez could not meaningfully cross-examine Detective Walton on Chairez's identification.

C. The violation was not harmless error

"The determination of a violation of the confrontation clause 'does not result in automatic reversal, but rather is subject to harmless error analysis.'" ***State v. Weed***, , 263 Wis. 2d 434, 666 N.W.2d 485 (2003).

To determine whether an error is harmless, the court must focus on the effect of the error on the jury's verdict. The test is whether it appears beyond a reasonable doubt the error did not contribute to the verdict rendered. That is, it must be clear beyond a reasonable doubt that a rational jury would have convicted absent the error. *See* ***Neder v. United States***, 527 U.S. 1, 18, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999).

While it is ordinarily very difficult to demonstrate that a confrontation violation is not harmless, in this case it is easy. The State's case against Vasquez depended almost entirely upon his confession to police. Nonetheless, the "confession" itself was extremely suspect because Vasquez maintained his innocence over the course of five sessions of interrogation. Only during the sixth interrogation session did he make incriminating statements. While a defendant's "confession" must always be corroborated, under the circumstance of this case it seems absolutely critical.

A criminal conviction may not be grounded solely on the admissions or confessions of the accused. ***Triplett v. State***, 65 Wis.2d 365, 371-72, 222 N.W.2d 689, 693 (1974). While all of the elements of the crime need not be proved independently of the

accused's confession, there must be corroboration of a "significant fact" to sustain a conviction. *Id*. at 372, 222 N.W.2d at 693.

Here, the only real "significant fact" is the identification of Vasquez as the shooter.[3] The confrontation violation in this case, then, goes directly to the heart of the sole significant fact- the identity of the shooter. Chairez' testimony concerning the ethnic background of the shooter is extremely important. As Chairez testified, there is a significant different between persons of Puerto Rican decent and persons of Hispanic decent- Puerto Ricans generally have a much darker complexion.[4] The difference is much greater than the difference between, for example, Germans and English. Thus, to mistake an Hispanic male for a Puerto Rican male is the equivalent of getting a suspect's hair color wrong or being unable to identify gender. It is a significant error that goes directly to the reliability of the witness's identification.

Here, then, Chairez said on direct examination that she was "unsure" of the shooter's ethnic background. This is an important fact that the jury should have been left to consider. Rather than simply leaving this evidence for the jury to consider, though, the State "cleaned it up" by restating through the mouth of Detective Walter.

Plainly, the confrontation violation had a profound effect on the jury's verdict.

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3 The "intent to kill" element is not a significant fact since the evidence makes it obvious that whoever shot Martinez intended to kill him.

4 Chairez testified that she is Mexican which she considers to be "Hispanic". Puerto Ricans have a much darker complexion according to her.

II. VASQUEZ WAS HELD FOR AN UNREASONABLE AMOUNT OF TIME WITTHOUT AN INITIAL APPEARANCE AND IT WAS DURING THIS PERIOD OF UNREASONABLE DELAY THAT HE "CONFESSED" TO THE HOMICIDE- THEREFORE, VASQUEZ IS ENTITLED TO A NEW TRIAL BECAUSE THE ILLEGALLY OBTAINED CONFESSION WAS INTRODUCED AS EVIDENCE AT TRIAL.

Vasquez was arrested on October 9, 2000. Over the next four days he was interrogated at least six times concerning this homicide. Vasquez steadfastly denied any involvement in the homicide until the last interrogation when he made statements admitting involvement. Of course, now that they had what they wanted, the police conducted no further interrogation. Significantly, Vasquez did not have his initial appearance until October 13, 2000- well after the 48 hour requirement.

Although Vasquez challenged the voluntariness of his statement before the trial court, defense counsel did not raise the exact issue presented here. As will be set forth in more detail below, this was ineffective assistance of counsel and should be found to be good cause for permitting Vasquez to raise the issue in this Sec. 974.06, STATS. motion. Finally, because Vasquez' "confession" occurred during a period of unreasonable delay, the statement ought to be excluded. Because the statement should have been excluded, and was not, Vasquez is entitled to a new trial.

A. Defense counsel's failure to raise this issue was ineffective assistance of counsel and, therefore, Vasquez should be permitted to raise the issue in this motion.

Defendants who can establish that they were deprived of their

statutory right to direct appellate review of their criminal convictions because of ineffective assistance of counsel are entitled to have their direct appeal rights reinstated, regardless of the presence or absence of other factors. *See* ***Roe v. Flores-Ortega***, 528 U.S. 470, 476-77 (2000) If counsel's error in commencing the postconviction process causes deprivation of the entire process, prejudice is presumed. ***Flores-Ortega***, 528 U.S. at 481-86 (it is unfair to require an indigent, perhaps pro se, defendant to demonstrate that a hypothetical appeal might have had merit before any advocate has ever reviewed the record in search of grounds for appeal; rather, defendant need only show that, but for counsel's deficient performance, the defendant would have appealed); *see also* ***State ex rel. Seibert v. Macht***, 244 Wis. 2d 378, 627 N.W.2d 881 (2001) where the Supreme Court applied the same reasoning the Chapter 980 commitments. The proper habeas remedy is to restore the respondent to the position he or she would have occupied but for counsel's ineffectiveness. ***Betts v. Litscher***, 241 F.3d 594, 597 (7th Cir. 2001); see also ***Seibert***, 244 Wis. 2d 378.

Plainly, the issue ineffective assistance of postconviction counsel must ordinarily be raised in a petition for habeas corpus filed in the Court of Appeals. Here, though, the claim of ineffective assistance of postconviction counsel is not being raised in the context of a motion to reinstate Vasquez's original Sec. 809.30, STATS. appeal rights. Rather, the issue is being raised in order to establish "good cause" for Vasquez failing to raise certain of the issues in his original appeal. Postconviction counsel did not "entirely deprive" Vasquez of his appeal rights. The problem is that

not all of the issues of arguable merit were raised and, therefore, postconviction counsel was ineffective.

Thus, in order to establish ineffective assistance of postconviction counsel, even to the level necessary to merely constitute "good cause" under ***Naranjo***, Vasquez must show that counsel's errors were prejudicial. The prejudice prong of the analysis will be developed in those sections of this memorandum pertaining to the merits of the issues which were overlooked.

B. Vasquez's "confession" occurred during a period of unreasonable delay and, therefore, should have been suppressed.

In ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991) the United States Supreme Court held that, following a warrantless arrest, due process requires that there must be a probable cause determination within 48 hours. ***Riverside***, 500 U.S. at 56-58; see ***State v. Koch***, 175 Wis.2d 684, 696, 499 N.W.2d 152, 159 (holding ***Riverside*** rule applicable in Wisconsin), *cert. denied*, 510 U.S. 880, 114 S.Ct. 221, 126 L.Ed.2d 177 (1993). Specifically, the court in ***Koch,*** stated, "[W]e conclude that in order for Wisconsin criminal procedure to comply with the requirements of ***Gerstein*** and ***Riverside*** a judicial determination of probable cause to support a warrantless arrest must be made within 48 hours of the arrest. This probable cause determination can be made at a nonadversarial proceeding and the arrested person is not required to physically appear before the judge. The probable cause determination can be made at the initial appearance or in combination with any other pre-trial proceeding, so long as the determination is made within 48 hours of the arrest." ***Koch***, 499 N.W.2d at 160.

An alleged Riverside violation is waived unless it is raised before the trial court. ***United States v. Alvarez-Sanchez***, 511 U.S. 350, 114 S.Ct. 1599, 1605 n. 5, 128 L.Ed.2d 319 (1994). Thus, if this issue has merit, which it apparently does, it was ineffective assistance of trial counsel for failing to raise the issue.

Likewise, in a case within somewhat similar facts, the court, in, ***State v. Aniton***, 183 Wis.2d 125, 515 N.W.2d 302, 304 Wis.App. 1994), explained,

> Aniton argues that the State failed to secure his initial appearance "within a reasonable time," as required by § 970.01(1), STATS. Aniton also argues, and the State concedes, that he did not have the benefit of a judicial finding of probable cause within forty-eight hours of his warrantless arrest, as required by ***County of Riverside v. McLaughlin***, 500 U.S. 44, 54-60, 111 S.Ct. 1661, 1669-71, 114 L.Ed.2d 49 (1991). Aniton contends that these two defects violated his constitutional rights and caused the circuit court to lose subject-matter jurisdiction. Aniton asserts that these defects required dismissal of the complaint with prejudice. We conclude that Aniton's guilty plea waived his right to challenge the alleged violation of § 970.01(1), STATS., and the conceded violation of ***Riverside*** 's forty-eight hour rule.
>
> A guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea. ***Mack v. State***, 93 Wis.2d 287, 293, 286 N.W.2d 563, 566 (1980). Thus, Aniton has waived any constitutional defects of which he complains. In contrast, the circuit court's subject-matter jurisdiction is derived from law, is not waivable and may be raised despite a guilty plea. ***Id.*** Therefore, if any of Aniton's alleged errors affected the trial court's jurisdiction over the subject matter, as Aniton asserts they do, his guilty plea would not affect his right to review of those issues.
>
> Criminal subject-matter jurisdiction is the "power of the court to inquire into the charged crime, to apply the applicable law and to declare the punishment." ***Id***. at 294, 286 N.W.2d at 566. The circuit court's subject-matter jurisdiction attaches when the complaint

> is filed. See ***State v. Estrada***, 63 Wis.2d 476, 492, 217 N.W.2d 359, 367, cert. denied, 419 U.S. 1093, 95 S.Ct. 687, 42 L.Ed.2d 686 (1974). The circuit court lacks criminal subject-matter jurisdiction only where the complaint does not charge an offense known to law. See ***Mack,*** 93 Wis.2d at 295, 286 N.W.2d at 567.

As Judge Schudson noted in ***Aniton***, "Although Aniton's guilty plea waived his right to appellate review of a ***Riverside*** violation, it is important to emphasize that a guilty plea does not preclude appellate discretion to review the reasonableness of a ***Riverside*** violation." 515 N.W.2d at 304.

Further,"The appropriate remedy for a ***Riverside*** violation is suppression of evidence that is obtained as a result of the violation-i.e., after the point at which the delay became unreasonable. *See* ***id.***, 175 Wis.2d at 699-700, 499 N.W.2d at 160; see also ***State v. Smith***, 131 Wis.2d 220, 236-240, 388 N.W.2d 601, 608-610 (1986). A ***Riverside*** violation, however, is not a jurisdictional defect causing a trial court to lose competency over the case." ***State v. Golden***, 185 Wis.2d 763, 519 N.W.2d 659, 661 (Wis.App. 1994).

> But, the right to interrogate after arrest is limited and must be for the purpose of determining whether to release the suspect or if he has been arrested without a warrant to make a formal complaint. An arrest upon warrant would seem to presuppose sufficient evidence and its purpose is to cause the arrested person to be brought before a magistrate, sec. 954.04, Stats., so that the criminal process of determining guilt or innocence can commence. A detention for a period longer than is reasonably necessary for such limited purpose violates due process and renders inadmissible any confession obtained during the unreasonable period of the detention.

Phillips v. State, 29 Wis. 2d 521, 534-535 (Wis. 1966).

Here, Vasquez was detained for more than twice the allowed period of time before he was given his initial appearance. Moreover,

during that period of time he was interrogated five times during which he denied any involvement in the homicide. Only after he had been in jail for nearly four days did Vasquez give an inculpatory statement. Then, of course, he was charged and brought immediately before the court.

Such a procedure violates every notion of due process.

CONCLUSION

For these reasons the Court of Appeals should reverse the order of the trial court denying Vasquez' motion for a new trial and order that the motion be granted.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2007.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 5958 words.

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Dated this _____ day of _____, 2007:

_____

Jeffrey W. Jensen

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
2007AP001026

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VICTOR VASQUEZ,

Defendant-Appellant.

APPENDIX

A. Record on Appeal

B. Order denying postconviction motion

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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

notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2007

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