

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

Case No. 98-CF-693

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN R. MALONEY,

Defendant-Petitioner,

**PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO Wis. Stat. Sec. 974.06.**

Pursuant to Wis. Stat. Sec. 974.06, John R. Maloney petitions the Circuit Court of Brown County, the Hon. Peter J. Naze, Circuit Judge, for a writ of habeas corpus, on the grounds that his trial counsel provided ineffective assistance of counsel in Brown County Case No. 98-CF-693.

JURISDICTIONAL STATEMENT

In *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), our supreme court held that "a motion under sec. 974.06 could not be used to review issues which were or could have been litigated on direct appeal." *Id.* at 172. The statute, however, does not preclude a defendant from raising "an issue of constitutional dimension which for sufficient reason was not asserted or was inadequately raised in his original, supplemental or amended postconviction motions." *Id.* at 184. In *State v. Robinson*, 177 Wis.2d 46, 53, 501 N.W.2d 831, 834 (Ct. App. 1993), the court held that the inability of the defendant's trial counsel to assert his own ineffectiveness constitutes a 'sufficient reason' under sec. 974.06(4), Stats., for not asserting the matter in the original postconviction motion.

SUMMARY OF THE CLAIM

"The guy admitted on videotape that he was in the house that night, and that means he did it," said Winnebago County District Attorney Joseph Paulus. "This whole case was the videotape. ... If the videotape hadn't gotten in, we may not have charged the case."¹

The state's most compelling evidence that Maloney was the cause of his wife's death were incriminating surveillance videotapes of the defendant made in Las Vegas, Nevada. On June 8, 1998, Tracy Hellenbrand's attorney and special prosecutor Joseph Paulus arranged for Hellenbrand to consent to the surreptitious interception (taping) of her telephone conversations and private meetings with Maloney, and conversations were then intercepted in various Wisconsin locations, and finally, in Las Vegas, Nevada, on July 25-27, 1998. Prior to the Las Vegas taping, Wisconsin investigators were informed by Las Vegas police that Nevada permitted 'one-party consent' taping.

In various pre-trial motions, Maloney's counsel did not challenge the tapings under Wisconsin's Electronic Surveillance Control Law, or under Nevada's statutory scheme, or the analogous Federal wiretap laws. According to Maloney, his counsel believed that Hellenbrand's consent to the tapings made any such challenge frivolous. Instead, Maloney's counsel challenged only the Las Vegas tapes under a theory that Hellenbrand was acting as a law enforcement officer at the time of the tapings, and therefore Maloney should have been 'Mirandized' before the statements were obtained. Maloney's counsel asserted at various times that Maloney was in custody, or that Maloney had actually requested the presence of his attorney when Hellenbrand was interrogating him.

In what appears to be an alternate legal theory for requesting suppression, Maloney's counsel repeatedly complained, both in the motions and orally, that prosecutors knew that counsel represented Maloney when prosecutors reached the agreement with Hellenbrand's attorney that Hellenbrand would attempt to obtain a confession from Maloney. However this claim was not supported by critical facts known to counsel, nor was it ever

¹ <http://www.greenbaynewschron.com/page.html?article=115160>, August 5, 2002.

supported by any legal authority. Thus, although the trial court ultimately agreed with Maloney that prosecutors knew that counsel represented Maloney when Hellenbrand was used to obtain his statements, the trial court attached no legal significance to that finding. The Las Vegas tapes were not suppressed, and were played at trial. Moreover, there was no attempt by Maloney's counsel to suppress other statements obtained by Hellenbrand, including a statement made by Maloney to Hellenbrand on July 7, 1998, that the state claimed demonstrated Maloney's consciousness of guilt.

Maloney will demonstrate herein that his trial counsel was ineffective in failing to assert that all of the surreptitious tapings were obtained in violation of the Wisconsin's Electronic Surveillance Control Law, and specifically that the Las Vegas tape was obtained in violation of Nevada law. Maloney will also demonstrate that his trial counsel was ineffective in failing to claim that prosecutors knew that they were violating clearly mandated ethics rules when they used Hellenbrand to do what they could not ethically do themselves, and that the violation entitled Maloney to suppression of all of the evidence obtained through the use of Hellenbrand, and to dismissal of the charges against Maloney.

Counsel was ineffective in failing to move to suppress or object to Maloney's July 7, 1998, statement to Hellenbrand, as detailed below. Additional claims are made in the order of the presentation of the case in the trial court.

STATEMENT OF FACTS

The deceased, burned body of Sandy Maloney was discovered in the late morning of February 11, 1998 at her home, which had been involved in a fire. (See R.5) When investigators later concluded that Ms. Maloney's death was a homicide, John Maloney became a suspect. Maloney's live-in girlfriend, Tracy Hellenbrand (Hellenbrand), an IRS criminal investigator (R.5, at 6), suggested that Maloney hire a lawyer, and advised Maloney that her attorney, Steven Kohn, recommended that Maloney hire Attorney Gerald Boyle. Maloney first contacted Boyle by telephone on or about May 8, 1998, and first met with Boyle on or about May 12, 1998, in Madison, resulting in Boyle being formally retained. (App. 101 - Maloney affidavit; See also R.105, at 25-26). Hellenbrand accompanied Maloney to the Madison meeting, and thus

was aware that Maloney had retained Boyle (*Id.*). Boyle told Maloney that Hellenbrand was the one person he could trust (*Id.*).

Boyle promptly notified special prosecutor Joseph Paulus (Paulus) that he was representing Maloney (R.23; R.28, Paulus affidavit). After several phone discussions between Paulus and Boyle, Paulus sent a letter to Boyle, dated May 27, 1998, stating, inter alia:

As you know, the Green Bay Police Department and the State of Wisconsin Division of Criminal Investigation are investigating the circumstances surrounding the death of Sandra J. Maloney on February 10, 1998. Your client, John Maloney, is regarded as a suspect in this homicide investigation.

(App. 105; R.28, Paulus affidavit). This letter further addresses the issue of a second autopsy, requesting that if one was desired Boyle should contact Paulus immediately so that arrangements could be made. In a reply faxed to Paulus on June 2, 1998, Boyle indicated: "our decision not to request another autopsy." (Maloney affidavit; R.28, Paulus affidavit).

On June 3, 1998, Special Agent Kim Skurlinski (Skurlinski) met with Sandy Maloney's family to inform them of the contents of Boyle's letter regarding a second autopsy. Skurlinski noted in his report (Bates #698; see also R.100, at 973) that:

CATOR asked about the status of the investigation, and S/A Skurlinski advised her the investigation is still active and going forward, and both JOHN MALONEY and TRACY HELLENBRAND have hired attorneys, Gerald Boyle and Steven Kohn, respectively.

On June 8, 1998, Hellenbrand met with Paulus, SA Gregory Eggum, Skurlinski, and IRS SA Art Temple, at Attorney Kohn's Milwaukee office. (Bates# 688; App. 107-09; R.100, at 875, 971). Skurlinski noted: "Kohn said he would consider having Tracy participate in a one-party consent to assist the investigation and would discuss that with her further" (Bates #701; *Id.*). Hellenbrand's cooperation was conditioned on her receiving a grant of 'use immunity' from the United States Attorney for the Eastern District of Wisconsin, which she obtained prior to the meeting. (App. 107; R.100, at 974-75; 986, 996).

Later the same day, Skurlinski called Hellenbrand, and:

TRACY said she would participate in any type of one-party consent, including allowing the investigators to wire her mother's condo or her car if necessary. S/A Skorlinski advised he would discuss this with DA Paulus and would get a message back to TRACY within the next couple days.

(Bates #702). Contact between Hellenbrand and Skorlinski concerning surveillance resumed June 11, 1998, when Skorlinski contacted Hellenbrand, who:

just wanted S/A Skorlinski to know that JOHN would be in the Madison area within the next few days, in case S/A Skorlinski and the other investigators decided to start any type of electronic surveillance with her. S/A Skorlinski advised TRACY that the investigators and D.A. Paulus would be having a meeting on June 12, 1998, to discuss this situation, and then D.A. Paulus would contact TRACY's attorney with a decision. The contact was then terminated.

(Bates #704-705).

On June 19, 1998, Maloney received a notice from his employer, signed by Captain Bruce Hamilton, informing him that he was required to appear before Internal Affairs investigators on June 23, 1998, to inquire into "criminal involvement," and that Maloney was "entitled to have a legal representative in attendance." (App. 106). Maloney retained Green Bay attorney Thomas J. Parins to represent him in this inquiry. (Maloney affidavit).

On June 24, 1998, Skorlinski contacted Hellenbrand in Las Vegas, Nevada. Skorlinski noted in his report:

On Wednesday, June 24, 1998, at approximately 8:00 a.m., S/A Skorlinski checked his voice mail messages and found one from TRACY HELLENBRAND, who stated that Attorney Tom Parins had left a message for her regarding the internal investigation being conducted by the Green Bay Police Department on JOHN MALONEY. The message indicated that Parins needed to talk to TRACY.

At approximately 10:25 a.m., S/A Skorlinski telephoned TRACY at the LaQuinta Motel in Las Vegas, (702) 735-1255, Room 5220, after TRACY had attempted to contact S/A Skorlinski at the AODCI. TRACY advised that yesterday she called her mother's answering machine and received the message from Parins. S/A Skorlinski advised TRACY that earlier today, he spoke with Captain Bruce Hamilton of the Internal Affairs, Green Bay Police Department, who advised that Parins is the union attorney representing JOHN. Captain Hamilton also advised that either he or

Lieutenant Al Timmerman of the Internal Affairs need to interview TRACY regarding JOHN's alibi, however, they will wait until TRACY returns to Wisconsin.

S/A Skorlinski also advised TRACY that he spoke with Winnebago County District Attorney Joseph Paulus, the special prosecutor in this case. D.A. Paulus informed S/A Skorlinski to tell TRACY that it is her decision on whether to talk to Parins and Captain Hamilton, but suggested that TRACY wait until another attempt is made to obtain an admission and/or confession from MALONEY. TRACY said she would wait and would not contact Parins. Contact was then terminated.

(Bates #734).

Additional investigators' reports (mostly authored by Agent Skorlinski, all of which were provided to counsel), detail Hellenbrand's efforts to obtain incriminating statements. Once counsel received discovery he would have been aware that investigators on numerous occasions used various forms of electronic surveillance, with Hellenbrand's consent, between June 15, 1998, and July 27, 1998, for the purpose of obtaining statements from his client.

On July 20, 1998, Skorlinski received a phone call from Hellenbrand, who stated that she *and her attorney* were concerned that Maloney might be consulting with Boyle about the questions that Hellenbrand had been asking him (Bates #775).

Maloney was arrested July 27, 1998. Maloney declined to be questioned without his attorney (R.28, at 3). The Wisconsin Criminal Complaint and warrant were filed July 29, 1998 (R.5). The Complaint relates that the Las Vegas conversations between Hellenbrand and Maloney were videotaped by investigators (R.5, at 7-8).

Maloney's counsel filed a Demand for Discovery and Inspection on October 6, 1998 (R.20). On October 16, 1998, Maloney's counsel filed a Motion to Suppress Videotapes (R.23). Maloney did not offer any input into what facts or law Boyle put into the motion, but through discussions with Boyle knew that it was Boyle's conclusion that because Hellenbrand had consented to the tapings that the tapings could not be suppressed unless Maloney argued that Hellenbrand should be held to the same rules as law enforcement officers when they conduct interrogations. During his time on the force, Maloney had never, to the best of his recollection, ever used or applied

to use wiretaps, thus Maloney had only a general idea of what should go into a motion to suppress electronic surveillance evidence (Maloney affidavit).

The Motion argues "to preserve the record" that Maloney's "Fifth and Sixth Amendment Rights were violated." (R.23, at 8). Counsel's motion included only a cursory recital of the information received through discovery, as noted above. The Motion asserts in conclusory fashion that:

Mr. Maloney submits that he hired counsel, i.e. exercised his Fifth Amendment privilege, to represent him due to the fact that he was a suspect in this matter. Mr. Maloney also submits that the prosecution in this matter was well aware of the fact that he had obtained counsel to represent him. In addition to these submissions, Mr. Maloney did not voluntarily discuss the alleged crime with Ms. Hellenbrand. To conclude this point, Mr. Maloney's desire was to have this matter dealt with only through counsel, which categorizes his desires under Edwards.

(R.23, at 9-10).

An evidentiary hearing on this motion was scheduled for December 14, 1998, however a series of in-chambers discussions occurred instead, with the parties apparently agreeing to have the issues decided on briefs (R.92, at 3). The state filed a further response on December 30, 1998, asserting: "the defendant cites cases that deal with custodial questioning or questioning after the right to counsel has attached." (R.33, at 4). The state further asserted:

At the last motion hearing defense counsel raised some concerns regarding the role of the special prosecutor in the investigative process. However, as the affidavits indicate, the investigative tactics were at the direction of Special Agent Kim Skorlinski. Further, the occasional updating of the special prosecutor on the investigative tactics does not create a problem based on the fact that there is not a 'no contact' bar until the initiation of formal adversary proceedings between the parties.

R.33, at 4. The "last motion hearing" referred to above was held on December 14, 1998. (R.92). The transcript does not reflect what counsel's 'concerns' were,² but whatever they were counsel never offered any authority challenging the assertion that prosecutors can isolate themselves from the restrictions of the no-contact rule by simply leaving the 'tactics' to the investigator. Counsel never offered any authority challenging the state's assertion that the no-contact

² In Counsel's summary of the in-chambers conference there is no mention of any concern with the role of the prosecutor in the investigation. Counsel merely stated that prosecutors were "extraordinarily well-known" and "well-respected." R.92, at 5.

rule does not apply pre-charging. Counsel failed to cite to Skorlinski's reports that contradict Paulus's assertion that Paulus was disconnected from the everyday workings of the investigation.

Another brief filed by counsel on December 30, 1998, (R.34), addressed the state's proposed use of various 'other acts' witnesses, and again argued for suppression of the videotape. On the last page counsel again alleged, without citation to authority, that 'the authorities and Ms. Hellenbrand knew that [Maloney] was represented by counsel' (*Id.* at 8). Bridget Boyle's affidavit (R.34) indicates that counsel was aware that Paulus sent a letter to Kohn commemorating the June 12, 1998, agreement between Paulus and Kohn, however it appears that counsel never submitted the letter to the court in support of their argument.

AT TRIAL

During jury selection the state inquired whether any of the members of the panel had “ever expressed an opinion to someone about the guilt or innocence of John Maloney in regard to these crimes.” (R.97, at 73). Paulus clarified his question by asking whether or not anyone on the panel ever said, “I think he did it, or I think he didn’t do it.” (*Id.* at 74). Eight jurors responded by raising their hands. Paulus, without asking what opinion the jurors had expressed, asked those 8 jurors whether the opinion they expressed was so strongly held that they could not “put that aside and simply operate on what happens in the courtroom?” No juror responded to this question. (*Id.*)

One juror who indicated he had expressed an opinion, Mr. Sewell Greely, served on the jury throughout the trial (R.104, at 1899). Greely further indicated that he knew several of the state's witnesses, specifically Joe Deuster; that Greely's son was a lieutenant on the fire department, and that he knew several firemen and police officers (*Id.* at 64); that he had neighbors who worked for the police department (*Id.* at 80).

Also during voir dire, three jurors, Edmund Balcer (See, R.97, at 99, 102-03), Earl Paul (See R. 97, at 83-84, 108-09), and Dawn Pecor (R.97, at 86-87), indicated that they had known someone who had presented themselves as a good spouse or a good parent, but surprisingly had engaged in some form of family violence or physical abuse.

Juror Balcer also stated that he worked at the City of De Pere Fire Department as a paramedic, and that he knew one of the state's witnesses, Dick Bartlett (R.97, at 18, 103); that he knew the Medical Examiner, Al Klimek (*Id.* at 20); that his father was a Chicago police officer and that he worked with the De Pere police (*Id.* at 32, 81); that in his employment he had seen domestic violence over the years (*Id.* at 67, 99); that his house had been vandalized 'about four years ago' (*Id.* at 93); that he had taken specialized training or courses about fire investigation, and worked with the Illinois Fire Marshall investigating fires, and had been 'on the scene' investigating fires in Green Bay, and that he had "learned about this fire scene" from the newspapers (R.97, at 102-03).

Juror Paul also stated that he had a friend who was a Door County police officer (*Id.* at 66); that his wife's first cousin is "Patrick Hitt with the Brown County District Attorney (*Id.* at 80); that he knew someone at work who was going through a divorce whose wife tried to kill him (*Id.* at 108-09).

Juror Pecor also stated that her girlfriend's father was a Green Bay fireman, and that he knew John Maloney (*Id.* at 70); that she used to work with a woman whose husband was a Green Bay police officer (*Id.* at 76); that '16 years ago' her car was vandalized while she was in a tavern (*Id.* at 91-92); that she had gone through a divorce (*Id.* at 108).

Despite all of these responses, Boyle asked no follow-up questions of jurors Greely, Balcer, Pecor, and Paul, who were selected and served through the verdict (*see id.* at 110-123; R.104, at 1899). Perhaps, as Boyle suggested, it was because he didn't hear their responses (*Id.* at 119).

In opening statement counsel 'submitted' that Maloney would testify:

Now, these are two great lawyers. I know my business. They're not going to try to fool me, and I'm not going to try to fool them. And neither of us are going to try to fool you, folks. Please, please just listen to the evidence. Keep an open mind.

You're going to hear Tracy Hellenbrand. You're going to hear John Maloney. He doesn't have to take the witness stand. But I'm submitting to you now it's my intention on calling him, and I want you to get the time lines and see how they answer questions, and you will arrive at sufficient information with which to make the appropriate decision.

R.97, at 192.

In the state's case in chief Skorlinski testified, without objection, that the July 7, 1998, video surveillance tape shot at the Green Bay Holiday Inn, would show Maloney denying any role in his wife's death, but one statement that Skorlinski found "interesting" (R.100, at 885) occurred when Hellenbrand was "asking him [Maloney] for the truth, and he said. 'And what if I tell you that? What's to stop you in two or three days or even tonight from packing up your stuff and going back to Madison and calling Skorlinski?'" (*Id.*). The state, without objection, played a portion of the tape containing this statement (R.100, at 886). Skorlinski indicated that Hellenbrand developed "a lot" of the interrogation "themes" (R.100, at 1001). The tapes reveal that Maloney "each and every time" denied killing Sandy Maloney (R.100, at 1002). But when Maloney's counsel tried to get Skorlinski to agree that Maloney's denials caused Skorlinski to have his own doubts, he opened a wide door:

Q I understand that, and you're great, and I know you from the past. You're terrific. But you had to say maybe he didn't do it?

A I did not believe his denials.

R.100, at 1004.

The highlight of the trial, at least for the state, was the showing of several hours of surveillance videotape shot in a Las Vegas hotel room. (R.100, at 891, et seq.; Trial exhibits 135, 136 (transcript)). The tapes show Maloney and Hellenbrand in a continuous confrontation that borders on the physical. Counsel stipulated to the introduction of the tapes and the transcript of the tapes, permitting Paulus to ask Skorlinski: "Do you agree with Mr. Boyle the video is clearly the best evidence of this case?" (R.100, at 892). The importance to the state of the videos was summarized by Skorlinski, who observed, without objection, "He [Maloney] admits to being there [Sandy Maloney's house] on the tape in Las Vegas" (R.100, at 992).

Despite counsel's assertion at Opening that Maloney would testify (R.97, at 192), Maloney did not testify or explain his appearance on the tapes. See R.103, at 1595-98.

In Closing Argument the state asserted: "But as we know, through *concessions by the defense... these crimes* took place on the night of February 10." (R.103, at 1783; state's closing argument). "Not all this speculation and guesswork about Tracy Hellenbrand" (*Id.* at 1790). Maloney's counsel did not object to Paulus's assertion that: "He [Maloney] knows she's got nothing to do with this." (R.104, at 1813).

Additional facts will be supplied below as necessary to the development of the argument in which they are cited.

ARGUMENTS

Standard of Review - Burden of Proof

The Sixth Amendment right to counsel is the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). To prevail on his claim for denial of effective assistance of counsel, Maloney must show that his trial counsel's performance was deficient and that this deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry determines whether counsel's assistance was reasonable under prevailing professional norms and considering all the circumstances. *Id.* at 688. A defendant must overcome the presumption that, under the circumstances, the challenged action of trial counsel might be considered sound trial strategy. *Id.* at 689.

Attaching the label 'strategy' does not insulate counsels' decision-making from analysis. See *State v. Felton*, 110 Wis.2d 485, 502, 329 N.W.2d 161, 169 (1983) (reviewing court does not ratify a lawyer's decision simply because it is labeled "trial strategy" by trial court). "Trial counsel's decisions must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied." *Id.* at 503, 329 N.W.2d at 169. This standard "implies deliberateness, caution, and circumspection" and the decision "must evince reasonableness under the circumstances." *Id.* at 502, 329 N.W.2d at 169.

Under the prejudice prong, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the

proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Finally, the court can consider the cumulative effect of the errors committed by counsel in determining whether counsel was ineffective. See *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996).

FIRST CLAIM

Summary of the argument: Counsel was ineffective when they failed to claim that a Wisconsin prosecutor cannot, even pre-charging, ethically contact a represented party, either directly or through a third person when the prosecutor knows that the party is represented by counsel; and when they failed to seek dismissal of the action or suppression of the statements obtained based on the unauthorized contact.

Not later than May 29, 1998, Paulus told Boyle that Maloney was Paulus's only suspect. In addition, by June 3, 1998, Skorlinski and the other investigators knew that Boyle's firm represented Maloney. Not later than June 24, 1998, the entire *prosecutorial unit*³ knew that Attorney Parins represented Maloney before the Green Bay Fire and Police Commission on allegations of misconduct arising out of the death of Sandy Maloney. And once counsel received discovery, they were aware that Paulus had directed Hellenbrand to avoid talking to Attorney Parins until she had obtained the admissions that Paulus was seeking.

Unfortunately, the Motion to Suppress Videotape, as well as counsel's subsequent filings, failed to assert the facts known to counsel regarding the nature and the scope of the prosecution's acts in using Hellenbrand, and contain no citations to any authority that would have given the trial court the framework for ruling that Paulus, through his use of Hellenbrand, violated Maloney's due process rights as protected by the Fifth Amendment in *unethically* obtaining and attempting to obtain statements from Maloney, and what the remedy for that misconduct should be. This issue was not raised with

³ See *Jones v. State*, 69 Wis. 2d 337, 348-49, 230 N.W.2d 677 (1975), holding that the prosecutorial unit, which includes both the district attorney's and law enforcement offices, must be viewed as one for the purposes of discovery.

the prominence it required. *State v. Ledger*, 175 Wis.2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993).

Counsel's failure to cite to any authority in support of his claim coupled with his grossly incomplete proffer of facts probably lead to the trial court's failing to consider the claim at all, despite the state's suggestion of the appropriate analytical framework in R.33. Indeed, the state's Argument on Pending Motions (R.33) asserting that the no-contact rule does not apply pre-charging indicates that prosecutors knew that counsel was alleging an ethical violation, but prosecutors failed to cite to *legal authority in the controlling jurisdiction* contrary to its position. See SCR 20:3.3. If prosecutors knew to argue the parameters of the no-contact rule then they knew of the argument made below! It was Maloney's counsel that was unaware of the dimensions of the no-contact rule, and the support for the rule in federal and state case law.

Despite being clued-in by the state that *not all* courts have held that charging triggers the no-contact rule, counsel never asserted that Wisconsin would hold that the no-contact rule applied pre-charging. Because counsel failed to adequately brief the issue, the trial court, in its Decision of January 28, 1999 (R.41) attached no legal significance to its findings that *Paulus knew* that Maloney was represented when he arranged to have Hellenbrand covertly interrogate Maloney.

The argument that counsel should have made goes like this:

The ABA Model Rules of Professional Conduct Rule 3.8(b) ("Special Responsibilities of a Prosecutor") has been adopted by the Wisconsin Supreme Court, see SCR 20:3.8. Furthermore, the Wisconsin Supreme Court has adopted the ABA's "no-contact" Model Rule 4.2, see SCR 20:4.2.

While the rules of professional conduct are not intended to create substantive rights, see SCR chapter 20, preamble, courts have found it appropriate to use their supervisory powers to suppress evidence gathered through prosecutorial misconduct that violates ethical rules. *In United States v. Hammad*, 858 F.2d 834, 842 (2nd Cir. 1988), the Second Circuit announced that suppression could be appropriate where an incriminating statement is obtained through violations of the rules limiting attorneys' communications with represented parties. The Tenth Circuit announced an even stronger rule

in *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir. 1973), holding that suppression at trial was required in such cases. In *United States v. Killian*, 639 F.2d 206, 210 (5th Cir. 1981) the Fifth Circuit ruled that where the U.S. Attorney's office ordered FBI agents to interview a defendant awaiting trial in custody and in absence of counsel in "truly reprehensible" and "highly improper and unethical" violation of ABA DR 7-104(A), suppression of resulting statements would probably have been appropriate sanction if government had not voluntarily declined to use them.

In *United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993) the Ninth Circuit agreed that a prosecutor who negotiated a plea agreement directly with the defendant behind defense counsel's back violated the California rule tracking ABA Rule 4.2, but vacated the district court's dismissal of the indictment on ground that there was no showing of substantial prejudice to the defendant. In *Disciplinary Proceedings Against Brey*, 171 Wis.2d 65, 490 N.W.2d 15 (1992) the court suspended the license of a prosecutor who, in addition to other misconduct, communicated directly with a represented defendant in violation of SCR 20:4.2; See *In re Disciplinary Proceedings Against Dumke*, 171 Wis.2d 47, 489 N.W.2d 919 (1992) (same).

In *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973), the Seventh Circuit suppressed statements taken in the absence of counsel known to be representing the *not yet indicted* defendant, citing "ethical questions" and DR 7-104(A). But because there is no *per se* rule, the appropriateness of exclusion as a sanction for a prosecutor's ethical violation is to be determined on a case-by-case basis. See *Hammad*, 858 F.2d at 842.

Other courts have recognized that a violation of a Code of Professional Responsibility by a prosecutor in his conduct of a criminal investigation may be the kind of outrageous and offensive conduct that is grounds for dismissal of the indictment or information. See *United States v. Russell*, 411 U.S. 423, 431-32 (1973); *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985); *United States v. Omni International Corp.*, 634 F.Supp. 1414 (D. Md. 1986); *People v. Auld*, 815 P.2d 956 (Colo. App. 1991);); *State v. Steadman*, 152 Wis.2d 293, 302, 448 N.W.2d 267, 271 (Ct. App. 1989); *State v. Hyndman*, 170 Wis.2d 198, 208-09, 488 N.W.2d 111, 115 (Ct. App. 1992).

Paulus knew that two law firms, concerning, in whole or in part, the matter of the death of Sandy Maloney, represented Maloney. By June 8, 1998, Maloney was Paulus's only suspect. But Paulus decided to ignore the ethical restraints on prosecutors, as detailed below, and invaded two attorney-client relationships in order to secure sufficient information to charge John Maloney.

As indicated above, Wisconsin has adopted the ABA Model Rule 4.2, a rule that prohibits a prosecutor from contacting a party or person who the prosecutor knows is represented by counsel. The rule as adopted in Wisconsin is SCR 20:4.2, which states that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The term "party" and "represented" have been construed broadly to conform to the drafters' intent and purpose for the rule. See *United States v. Jamil*, 546 F. Supp. 646 (D.C. E.N.Y. 1982), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983) (person who retains counsel as protection against grand jury investigation is a represented party within an ethical context even if adversarial proceedings have not yet begun).⁴ Pre-charging prosecutorial contact, like Paulus had with Maloney, through Hellenbrand,⁵ was held unethical under SCR 20:4.2, in **Ethics Opinion E-91-6**, Wisconsin Ethics Opinions,⁶ citing to *United States v. Hammad*, 858 F.2d at 837-38; *United States v. Lemonakis*, 485 F.2d 941, 955 (2nd Cir. 1973; and *United States v.*

⁴ In 1995 the ABA amended Model Rule 4.2 by replacing the word "party" with the word "person." The ABA stated that the purpose of the change was to clarify that the rule applies to any "person" represented by counsel, not merely a litigant "party." Most commentators and jurisdictions agree with this interpretation. See ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* (Fourth Edition, 1999), pp. 400-401.

⁵ Under SCR 20:8.4(a), it is professional misconduct for a lawyer to violate the rules of professional conduct through the acts of another. Biskupic's assertion in R.33 that Paulus was insulated from responsibility because Skorlinski was responsible for *tactics* was disingenuous. See for example *Haigh v. Matsushita*, 676 F.Supp 1332 (E.D. Va. 1987)(lawyer's active encouragement and support basis for sanctions).

⁶ <http://www.wisbar.org/ethop/formal/ethics211.pdf>. See, also **E-92-6** applying ethical rules to state prosecutors; <http://www.wisbar.org/ethop/formal/ethics217.pdf>. See also, Public Reprimand Summaries, *Wisconsin Lawyer*, Vol. 73, No. 5, May 2000 (prosecutor reprimanded under 20:4.2, <http://www.wisbar.org/wislawmag/2000/05/disc2.html>).

Lopez, 765 F.Supp. 1433, 1445-50 (N.D. Cal. 1991) (App. 110); See also **E-96-3**, Revised.⁷ (App. 113).

These cases all hold that pre-charging or pre-indictment contact with a suspect represented by counsel violates Rule 4.2 of the ABA Model Rules of Professional Conduct, its predecessor DR 7-104(A)(1), or substantially similar rules adopted by courts of all 50 states and the District of Columbia. Remedies for violations of the no-contact rule range from suppression of the unethically obtained information to dismissal of all charges. *Id.* see also *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); *United States v. Sam Goody, Inc.*, 518 F. Supp. 1223, 1224-25 n. 3 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

The no-contact rule, by its terms, means it is irrelevant to determining whether Paulus violated the rule that Maloney initiated some contacts with Hellenbrand after June 8, 1998, and it is irrelevant that Hellenbrand initially offered to wear a wire because that offer was made to the prosecution before Boyle was retained. Moreover, Hellenbrand's June 8th agreement involved more than disclosure of what she had *already learned*. See *United States v. Feffer*, 831 F.2d 734 (7th Cir. 1987).

Under any applicable standard Paulus's conduct in authorizing Hellenbrand to contact Maloney was egregious. Despite being informed that Hellenbrand was inquiring into Maloney's conversations with Boyle, Paulus never directed Hellenbrand to "back off." It is hard to conceive of a more egregious attempt to intrude into the attorney-client relationship.

Furthermore, Paulus had *personal communications* with Boyle and his office prior to Paulus's June 8, 1998, discussions with Attorney Kohn and Hellenbrand. Paulus knew that Hellenbrand had recommended that Maloney hire Boyle, and it is reasonable to assume that Attorney Kohn had told Paulus that Kohn and Boyle were friends. Paulus knew that Hellenbrand, because of her personal and intimate relationship with Maloney, because of her law enforcement training, and because her status as an informant pursuant to an immunity agreement would provide extra incentive for her to be intrusive, would be an especially effective intruder.

⁷ <http://www.wisbar.org/wislawmag/1997/04/ethics.html>.

Further, the number and extent of the communications between Boyle and Paulus prior to June 8, 1998, were a clear indication to Paulus that Boyle was not a lawyer that Maloney simply "had on retainer" for the purpose of avoiding investigation, see *United States v. Pinto*, 850 F.2d 927, 934 (2nd Cir. 1988).

Incredibly, Paulus further authorized Hellenbrand to intrude into the attorney client relationship between Maloney and Attorney Parins, a relationship Maloney was *entitled to by statute*. Paulus 'suggested' that Hellenbrand intrude into Parins's attorney-client relationship with Maloney in order to attempt to obtain sufficient information to prosecute Maloney.⁸ The blatant intrusion into that relationship by Paulus certainly contributes to the claim that Paulus's conduct was egregious and that Paulus *knew* his conduct was not *authorized by law*.

Moreover, Governmental misconduct in the form of a pre-indictment invasion of a defendant's attorney-client relationship may constitute a deprivation of the defendant's right to due process. See *United States v. Schell*, 775 F.2d 559, 562-63, 566 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Marshank*, 777 F. Supp. 1507, 1521-23 (N.D. Cal. 1991) (concluding pre-indictment intrusion into the attorney-client relationship was so pervasive and prejudicial as to warrant dismissal of the indictment); *United States v. Voigt*, 89 F.3d 1050 (3rd Cir.), *cert. denied*, 519 U.S. 1047 (1996) (applying due process principles to a pre-indictment intrusion into the defendant's relationship with his attorney); see also *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980); *In re Grand Jury Proceedings*, 33 F.3d 1060, 1062 (9th Cir. 1994) ("The Sixth Amendment can apply when the government's conduct occurs pre-indictment.").

Had counsel made the above argument Hellenbrand's testimony concerning what Maloney said to her after June 8, 1998, whether offered by Hellenbrand or another witness, would have been suppressed; the Las Vegas videos would have been suppressed, along with most of the testimony of

⁸ Paulus's intrusion into Maloney's relationship with Attorney Parins nonetheless impaired important constitutional rights. See *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967) ("[T]he freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.").

Phillip Ramos (R.100, at 1042-1055), James Vaccaro (R.100, at 1055-1062), and others, to the extent that their testimony was based on information obtained as a result of the illegal intrusion into the attorney-client relationship, pursuant to *Wong Sun v. United States*, 371 U.S. 471 (1963), and its Wisconsin progeny. There was nothing so subtle or esoteric about the 'no-contact' argument that it is one most lawyers would not have thought of however conscientious they might be. See, e.g., *Thomas v. Gilmore*, 144 F.3d 513, 515 (7th Cir. 1998); *Wade v. Franzen*, 678 F.2d 56, 58 (7th Cir. 1982).

SECOND CLAIM

Summary of the argument: Trial counsel was ineffective when they further failed to challenge the admission of the Las Vegas video, or any of the intercepted conversations, under Wisconsin's Electronic Surveillance Control Law, and under the Nevada Supreme Court's decision in *Lane v. Allstate*, *infra*.

Maloney's counsel, mistakenly believing that Hellenbrand's consent, by itself, made the tapes admissible, failed to challenge any of the surreptitiously taped conversations under Wisconsin's Electronic Surveillance Control Law, Wis. Stats. Secs. 968.27-968.37, and failed to challenge the admission of the Las Vegas videotape under the holding in *Lane v. Allstate*, *infra*, interpreting the applicable Nevada statutory scheme. See NRS 200.610 thru 200.690;⁹ NRS 179.410 thru NRS 179.515.¹⁰ A videotape *with sound* is covered under the WESCL, and the Nevada statutory scheme. See, e.g., *United States v. Haimowitz*, 725 F.2d 1561, 1581-82 (11th Cir. 1984) (the audio component of a video recorder is subject to Title III).

Since Wisconsin investigators proceeded with the Las Vegas videotaping only after receiving assurances that Nevada permitted one-party consent interception of aural communications, Maloney clearly had a right to challenge the use of the Nevada videotape under Nevada law. *Elkins v United States*, 364 U.S. 206, 221- 222, 4 L.Ed. 2d 1669, 80 S.Ct. 1437 (1960); See also *Washington v. Brown*, 940 P.2d 546 (Wash. 1997), *cert. denied*, 118 S. Ct. 1192 (1998) (statements admitted as permitted by California law); *State v. Kennedy*, 134 Wis. 2d 308, 320, 396 N.W.2d 765, 769 (Ct. App. 1986)(the

⁹ <http://www.leg.state.nv.us/NRS/NRS-200.html>

¹⁰ <http://www.leg.state.nv.us/NRS/NRS-179.html>

manner and method of obtaining evidence is governed by the law of the jurisdiction in which the evidence is secured).

On December 8, 1998, two months before Maloney's trial began, the Nevada Supreme Court held that Nevada's statutory scheme required that all parties were required to consent to intercepted communications. *Lane v. Allstate Insurance Co.*, 114 Nev. 1176, 969 P.2d 938 (1998) (Nevada did not adopt provision in federal wiretapping act that permits interception of wire communications with one party's consent). The prohibited interceptions in *Lane* took place between April, 1992, and May, 1993. *Id.* *Lane* brought Nevada into sync with other 'all-party consent' states that have interpreted one-party consent videotaping to be prohibited under the general statutory scheme. See for example, *State v. Knobel*, 777 P.2d 985 (Or. Ct. App. 1989). Thus, under Nevada's statutory scheme, as interpreted in *Lane*, the hidden videotaping without which the state could not have secured a conviction was illegal and should have been suppressed.

But whether analyzed under Nevada or Wisconsin law, the hidden videotaping in Las Vegas was illegal. First, Maloney's counsel argued that Hellenbrand was 'acting as a law enforcement officer' because that assertion was critical to counsel's claim under *Miranda* and *Russell* that the videotaping was illegal. Boyle should have argued that Hellenbrand was *not acting*, as the term is found in 968.31(2), "*under color of law.*"

In the WESCL context the limitations on legality of taping may be determined by whether or not an individual is acting 'under color of law.' See Wis. Stats. Secs. 968.31(2)(b), (c). An argument by Boyle that Hellenbrand was not 'acting under color of law' would no doubt have been successful. When this court held that Hellenbrand was not 'acting in the capacity of a law enforcement officer,' the ruling impliedly held that Hellenbrand was not acting 'under color of law.'

Moreover, under *United States v. Haimowitz*, 725 F.2d 1561, 1582 (11th Cir. 1984), *United States v. Horton*, 601 F.2d 319, 322 (7th Cir. 1979), and *United States v. Craig*, 573 F.2d 455, 476 (7th Cir. 1977), for purposes of the WESCL, Hellenbrand is viewed as a person not acting under color of law and therefore her actions should have been analyzed to determine whether her purpose in intercepting communications was to commit "other injurious acts." Wis. Stat. sec. 968.31(2)(c); *Thomas v. Pearl*, 998 F.2d 447, 451 (7th Cir.

1993); *State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 261 N.W.2d 147, 154 (1978).

The burden of proving that an interception was unlawful because it was made for a purpose that constitutes an 'injurious act' lies with the party claiming that the interception was unlawful. *United States v. Phillips*, 540 F.2d 319 (8th Cir. 1976) *cert. denied*, 429 U.S. 1000 (1976). In discussing the term "injurious act" under the Federal Wiretap Act, the Eighth Circuit Court of Appeals stated that:

it seems apparent from the context in which the statute was enacted that the sort of conduct contemplated was an interception by a party to a conversation with an intent to use that interception against the non-consenting party in some harmful way and in a manner in which the offending party had no right to proceed.

Meredith v. Gavin, 446 F.2d 794, 799 (8th Cir. 1971).

Clearly, Hellenbrand was not taping Maloney out of a legitimate desire to protect herself and her own conversations from later distortion or other unlawful or injurious uses by the other party. See *Meredith v. Gavin*, 446 F.2d at 798-799, note 5; *State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 571, 261 N.W.2d 147 (1977). Because Hellenbrand's purpose was to injure Maloney, the taping, in total, was illegal pursuant to sec 968.31(2)(c).

Even if Hellenbrand could be deemed to be acting 'under color of law' Maloney was entitled to question whether her consent was voluntary. *United States v. Brandon*, 633 F.2d 319, 322-23 (7th Cir. 1979), *cert. denied*, 444 U.S. 937 (1979). To meet *its burden* to prove consent, *the state* would have been required to show that Hellenbrand voluntarily cooperated "knowing what the law enforcement officers were about." *United States v. Bonanno*, 487 F.2d 654, 658 (2nd Cir. 1973). Clearly, this would have required Paulus to demonstrate that Hellenbrand cooperated 'knowing' that Paulus was violating the ethics rule prohibiting pre-charging contact with represented persons, clearly an illegal purpose. Therefore, even if Hellenbrand was acting 'under color of law' all of the interceptions of communications were illegal under sec. 968.31(2)(b), and should have been suppressed.

Finally, sections 968.29 and 968.30, Stats., preclude the use in evidence of intercepted communications unless pretrial notice was given to permit the opponent to test the lawfulness of the interception before its contents are admitted into evidence. *See* secs. 968.29(5) and 968.30(8) and (9). Paulus failed to provide the required notice, but the error went unchallenged. *See State v. Gil*, 208 Wis. 2d 531, 561 N.W.2d 760 (Ct. App. 1997).

Counsel failed to make the meritorious argument that the state's use of 'intercepted communications' was illegal under the WESCL, and under applicable Nevada statutory and case law, a challenge that clearly had merit. Because the motion would have been successful, and because there isn't any valid strategic reason for failing to bring this motion it is clear that counsel's performance was deficient and prejudicial. The tapes were critical to the state's case; their admission was the strongest evidence the state presented that Maloney caused his wife's death. The argument presented above would have virtually obligated the trial court to deprive the state of its most powerful piece of evidence against Maloney. The tapes and all derivative evidence should have been suppressed, but counsel failed to make the argument. Because that failure was not based on sound strategy, and not based on a correct understanding of the applicable law, counsel was ineffective, and Maloney is entitled to a new trial.

THIRD CLAIM

Summary of the argument: Counsel was ineffective in failing to move to have improperly disclosed information redacted from the criminal complaint, and then move to have the redacted complaint dismissed for lack of probable cause.

The Complaint relates that a conversation between Hellenbrand and Maloney "was videotaped by representatives of the Wisconsin Department of Justice, Green Bay Police Department, and the Las Vegas Police Department." (R.5, at 7-8). Page 8 of the complaint discloses a summary of inculpatory statements made by Maloney during this videotaping.

Because counsel asserted that the Las Vegas communications were unlawfully obtained, counsel was entitled to and should have moved to strike the references to the videotaping contained in the complaint, pursuant to *State*

v. Gilmore, 201 Wis. 2d 820, 549 N.W.2d 401 (1996), and further moved to have the complaint dismissed and reissued *under seal* without references to the illegal and improperly disclosed intercepted communications. Review of the redacted Complaint would have resulted in a finding of no probable cause, and dismissal of the complaint. Counsel's performance in this regard was deficient and Maloney was prejudiced by this deficiency.

To the extent that counsel's assertion that the videotapes were illegally intercepted was deficient in that it failed to allege violations of the WESCL, and thereby failed to trigger the remedy afforded under *Gilmore*, counsel was ineffective in failing to so allege, as indicated and for the reasons argued above.

FOURTH CLAIM

Summary of the argument: Counsel was ineffective in failing to individually voir dire 4 jurors, all of whom served on the jury that rendered a verdict, all of whom were subjectively biased.

First, the extensive pre-trial publicity should have been a clue to counsel that the jury panel may have been tainted, therefore special caution should have been taken to assure that any lack of impartiality be painstakingly examined during voir dire. See [Sam] *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The transcript of counsel's voir dire reveals that he individually questioned only two jurors, and asked no questions of the four mentioned hereinabove.

The totality of Juror Greely's responses drive a conclusion that Juror Greely, and the three jurors mentioned above, were subjectively biased. See *State v. Lindell*, 2000 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223. The logical assumption is that Juror Greely held the opinion that Maloney was guilty, and that he had expressed that opinion to others. Paulus's question elicits a response far more revealing than indicated at first blush. It's one thing to have a passing thought that Maloney was guilty. It's quite another to hold that opinion to the degree that you express it to someone else. Moreover, Juror Greely's opinion is the sort that casts sufficient doubt upon his impartiality such that his silent assent to Paulus's rehabilitative question does not cure the bias. *Irvin v. Dowd*, 366 U.S. 717 (1961) (where juror expressed opinion that

defendant was guilty, later expression of impartiality "can be given little weight").

There is nothing unusual about this sort of retroactive determination of juror bias. E.g., *State v. Delgado*, 223 Wis. 2d 270, 588 N.W.2d 1 (1999) (post-conviction hearing conducted to determine whether juror who gave an erroneous answer during voir dire was actually biased); see also *State v. Traylor*, 170 Wis. 2d 393, 399-400, 489 N.W.2d 626 (Ct. App. 1992) (deficient performance when attorney failed to strike or further question potentially biased jurors).

Counsel's failure to follow-up with jurors Greely, Balcer, Paul, and Pecor, probably resulted in the seating of biased jurors.

FIFTH CLAIM

Summary of the argument: Counsel was ineffective in not objecting to Skorlinski's testifying that Maloney asked Hellenbrand: "And what if I tell you that? What's to stop you in two or three days or even tonight from packing up your stuff and going back to Madison and calling Skorlinski?" (R.100, at 885).¹¹

Counsel was ineffective in failing to challenge Skorlinski's recitation of Maloney's question to Hellenbrand, which was clearly hearsay. Parenthetically, virtually all of the direct questioning of Skorlinski elicited unobjected to hearsay. Second, as detailed above, the statement is one of many that was obtained from the "fruit of the poisonous tree" and for that reason alone was inadmissible. Moreover, counsel should have challenged the admission of Maloney's 'question' because it is categorically not an *admission* under Wis. Stat. sec. 908.01(4)(b), and it is not a *statement against interest* under Wis. Stat. Sec. 908.045(4). It is just inadmissible and highly prejudicial hearsay.

¹¹ The 'that' in this statement, according to Skorlinski, who monitored the conversation, was 'the truth.' (*id.*)

Hearsay statements against an unavailable declarant's¹² interest are admissible as an exception to the hearsay rule. See Wis. Stat. Rule 908.045(4). The exception for statements against interest is based on the assumption that people do not make statements that are damaging to themselves unless they have a good reason to believe that those statements are true. *State v. Stevens*, 171 Wis. 2d 106, 113, 490 N.W.2d 753, 757 (Ct. App. 1992).

While an express admission of culpability is not required, see *Dutton v. Evans*, 400 U.S. 77 (1970), the statement against penal interest must be "solidly inculpatory" in a "real and tangible way" to be admissible. *United States v. Hoyos*, 573 F.2d 1111, 1115 (9th Cir. 1978). First, Maloney's statement, in total, isn't about him - it's about Hellenbrand, implying that Hellenbrand can't be trusted. Second, Maloney's question doesn't imply that "the truth" (R.100, at 885) would *tend* to subject him to criminal liability, and the state conceded as much, when Skorlinski testified that Maloney's statement was merely "interesting." (*Id.*). See *Ryan v. State*, 95 Wis.2d 83, 97, 289 N.W.2d 349, 355 (Ct. App. 1980), *overruled on other grounds by State v. Anderson*, 141 Wis.2d 653, 416 N.W.2d 276 (1987).

Counsel was ineffective in failing to advance these additional grounds for exclusion of Maloney's statement to Hellenbrand. The statement was an important part of the state's presentation (it was presented twice) and heavily relied upon by the state in closing (See R.103, at 1815-16). Its inclusion into the evidence was not harmless.

SIXTH CLAIM

Summary of the argument: Counsel was ineffective when he asked Skorlinski whether Maloney's denials caused Skorlinski to have his own doubts - with the entirely predictable result that ordinarily would have been inadmissible under the rule in *State v. Haseltine*, *infra*.

According to Maloney his counsel believed that all of Maloney's denials on the various tapes would be compelling evidence of Maloney's innocence. That last-ditch strategy might have been effective, at least until

¹² This case involves the State's offer of a declarant-defendant's statement through a nondefendant third-party witness during its case-in-chief.

counsel "opened the door" to Skorlinski's response that Skorlinski did not believe Maloney's denials. Skorlinski's answer was especially damaging to Maloney because counsel's unfortunate question put Maloney's credibility into issue on the central issue of the case: whether Maloney "did it."

This question to Skorlinski was immediately preceded by counsel's statement that he knew Skorlinski, and that Skorlinski was "great" and "terrific." But given Skorlinski's testimony up to that point, wasn't his answer entirely predictable? It was not reasonable for counsel to believe that obsequiousness (another inexplicably recurrent theme of counsel's) would persuade Skorlinski to support Maloney's defense. When Skorlinski indicated that *he didn't believe Maloney's denials*, did counsel still believe that Skorlinski was 'terrific'? Apparently; he never indicated otherwise.

Moreover, counsel's unfortunate question elicited an ordinarily inadmissible response. See *State v. Haseltine*, 120 Wis.2d 92, 352 N.W.2d 673 (Ct. App. 1984)("No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."); see also *State v. Romero*, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988). It was counsel's question, and nothing else, that "opened the door" for Skorlinski's attack on Maloney's credibility. Additionally, counsel's question would have led a reasonable juror to conclude that Maloney's ultimate silence meant that Maloney could not respond to Skorlinski's statement, and that's why Maloney didn't testify.

Because the outcome of the case depended largely upon the jury's credibility determinations, and because the introduction of inadmissible evidence undermined Maloney's credibility, there is a reasonable probability that this error affected the outcome of the trial.

Thus, counsel was ineffective because he, 1) enabled the state's witness to impeach his client on the critical issue of the case, and 2) waived any argument that Skorlinski's answer created an unfair inference that Maloney's denials were inconsistent with his silence at trial, as was later argued by Paulus without objection. See *United States v. Gant*, 17 F.3d 935, 941 (7th Cir. 1994).

CONCLUSIONS

Counsel failed to make meritorious arguments in support of the motion to suppress the evidence obtained through the use of Hellenbrand, regardless of whether it would be presented directly or by playing of tapes of intercepted communications. The arguments and objections that counsel failed to make at trial resulted in the introduction of evidence that had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Therefore, counsel was ineffective because:

Counsel failed to argue that Paulus knowingly violated a prosecutor's ethical obligation not to contact a represented person directly or through a third party, and that the violation herein was sufficiently egregious to warrant suppression of all statements made by Maloney to Hellenbrand after June 8, 1998, and to dismiss the Information;

Counsel failed to argue that the wiretap and derivative evidence was inadmissible because the surveillance was illegal under Wisconsin's Electronic Surveillance Control Law, and that the Las Vegas tapes were subject to suppression under *Lane v. Allstate, supra.*;

Counsel failed to move to strike from the complaint the references to the illegally obtained and disclosed intercepted communications, and then to have the redacted and *sealed* complaint dismissed;

Counsel's failure to ask any follow-up questions of 4 arguably subjectively biased jurors denied Maloney a fair and impartial jury;

Counsel failed to issue any challenge to the inadmissible hearsay testimony of Skurlinski concerning Maloney's July 7, 1998 statement to Hellenbrand, or to the playing of the tape of the illegally intercepted conversation.

Counsel opened the door to Skurlinski's opinion that Maloney was a liar when counsel asked if Maloney's denials caused Skurlinski to doubt whether Maloney "did it."

The sum of the errors committed by counsel support a finding that counsel's performance was deficient and that Maloney was prejudiced by the deficient performance.

THEREFORE: John R. Maloney has met his burden under Wis. Stat. Sec. 974.06(3) for the granting of a hearing, and hereby requests that a date and time for a hearing be set in the Circuit Court for Brown County.

Dated this _____ day of March 2003.

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APPENDIX

Record No.	Description	App.
--	Affidavit of John R. Maloney	101
--	Paulus letter to Boyle, May 27, 1998	105
--	Internal Affairs correspondence of June 19, 1998	106
--	Memo of Interview of Hellenbrand (misdated as June 6, 1998)	107
--	E-91-6, Unauthorized communication	110
--	E-96-3-REVISED, Prosecutor's communications	113