05AP767

STATE OF WISCONSIN

IN SUPREME COURT

No. 2005AP767-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD BANNISTER,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

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BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

QUESTIONS PRESENTED FOR REVIEW

1. Does the common-law corroboration rule operate as a rule of admissibility of a defendant's statement or as a rule for evaluating the sufficiency of the evidence to sustain a judgment of conviction?

   - The court of appeals did not address this issue.
   - This court should clarify that the corroboration rule operates as a rule of admissibility.

2. In viewing the trial evidence in the light least favorable to the verdict and then holding that the State failed to satisfy the corroboration re-

quirement for a conviction predicated on a defendant's confession, did the court of appeals erroneously interpret and apply the corroboration rule, including the "significant fact" doctrine?

- The court of appeals implicitly answered "No."
- This court should answer "Yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION OF THE COURT'S OPINION

Oral argument. The court has already scheduled oral argument.

Publication. The State requests publication of the court's opinion.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

This case originates in the death of Michael Wolk from an overdose of morphine (36:60 (Wolk died of "morphine toxicity . . . [which] is basically death related to the toxic effects of morphine")).

About 5:50 a.m. on January 17, 2003, Cudahy Police Officer Brian Scott responded to Wolk's residence in Cudahy (35:46-47). Officer Scott found paramedics unsuccessfully attempting to revive Wolk (35:47, 48; *see also* 36:21-22). Officer Scott called the medical examiner about 6:20 a.m. (35:48). The medical examiner took custody of Wolk's body and some items found near the body: "a kitchen spoon, a powdery substance that was at the scene, a couple of syringes and some rolling papers" (35:48).

Based on information received from various sources, including Wolk's widow and Wolk's brother (36:23, 24, 25, Pet-Ap. 194, 195, 196), Cudahy Police Detective Michael Carchesi interviewed Bannister (36:25-26, Pet-Ap. 196-97). The interview led the Milwaukee County district attorney to charge Bannister with one count of delivery of a controlled substance (2:1, Pet-Ap. 119; 3, Pet-Ap. 123). To convict Bannister of delivery of a controlled substance — here, morphine — in violation of Wis. Stat. §§ 961.14(3) and 961.41(1)(a),[1] the State needed to prove three things beyond a reasonable doubt:

1. Bannister "delivered a substance" (36:97);

2. "the substance was morphine" (36:97); and

3. Bannister "knew or believed that the substance was morphine, a controlled substance" (36:97).

Before jury selection on the first day of trial, the circuit court, defense counsel, and the prosecutor debated the admission of "proof of a controlled substance in [a deceased] person's body as being corroborative of the defense confession" (34:6-7, Pet-Ap. 132-33). Bannister, his lawyer, and the prosecutor eventually reached an evidentiary agreement that the State could present evidence (without objection from Bannister) of morphine in Wolk's body in exchange for the State not filing an

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[1] Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2003-04 edition.

amended criminal complaint charging Bannister with reckless homicide. During the discussion on this issue, this exchange occurred between the court and Bannister's lawyer:

> THE COURT: . . . You may challenge whether or not it was morphine or whether or not it was in his body, how long it had been there, so on all of those things you may challenge or not challenge, but you're not at this point asking me to eliminate, prevent the state from introducing that evidence because *you agree that it has probative value as to whether or not your defendant delivered morphine, and it is not unduly prejudicial.*
>
> (Whereupon, defense [counsel] is conferring with his client.)
>
> MR. SPANSAIL [defense counsel]: Yes, Your Honor, *that is our understanding and, yes, we would be agreeing.* In exchange, the state would not be charging [Bannister] with reckless homicide.

(34:23-24, , Pet-Ap. 149-50 (emphases added).)

Later, after jury selection but before the State began presenting evidence, the court held a ***Miranda/Goodchild*** hearing[2] (35:24-44, Pet-Ap. 168-88) on a suppression motion Bannister filed pretrial (6, Pet-Ap. 123a). After hearing testimony and counsel's arguments, the court denied Bannister's motion (35:44, Pet-Ap. 188).

At trial, the State presented four witnesses. Officer Scott (35:45-53) testified briefly about the scene at Michael Wolk's residence. He established the source of three items later tested by the Mil-

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[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

waukee County Medical Examiner's Office: "a kitchen spoon . . . [and] a couple of syringes . . . ." (35:48).

Susan Gock, the technical director for the toxicology laboratory in the Milwaukee County Medical Examiner's Office (36:4), testified that she performed "a comprehensive toxicology screen" on three items — "[o]ne spoon and two syringes" — found at the scene of Wolk's death (36:10). Gock ran the screening test because morphine turned up in tests on Wolk's blood (36:10, 15-17). Gock said Wolk's blood contained only one drug: morphine (36:17). She also said she found morphine on the spoon and both syringes (36:11).

Dr. Jeffrey Jentzen, a medical examiner for Milwaukee County (36:53), testified that "to a reasonable degree of medical certainty" (36:60), Wolk died of "morphine toxicity . . . [which] is basically death related to the toxic effects of morphine" (36:60). Dr. Jentzen testified that no opiate other than morphine caused Wolk's death (36:60).

Cudahy Police Detective Michael Carchesi testified about his interview of Bannister. During the interview, Bannister "told [Detective Carchesi] that he had on eight to ten occasions given Steve [Wolk] or his brother [Michael Wolk] morphine at [Bannister's] residence on Bender Avenue" (36:41, Pet-Ap. 212; *see also* 36:75, Pet-Ap. 219). The deliveries "occurred from mid December of '02 to mid January of '03" (36:41, Pet-Ap. 212; *see also* 36:42, 75, Pet-Ap. 213, 219). Bannister "told [Detective Carchesi] that he gave morphine to Steve on three or four occasions and to his brother Michael on three or four occasions . . . approximately every

third day or in that range" (36:42, Pet-Ap. 213; *see also* 36:75, Pet-Ap. 219).

After the State rested (36:83; Pet-Ap. 227), Bannister did not testify and did not present any other evidence (36:84).

The jury found Bannister guilty of delivering morphine (16, Pet-Ap. 124). The court sentenced Bannister to five years' confinement in prison followed by three years of extended supervision (21, Pet-Ap. 118).

On appeal, the court of appeals reversed the judgment of conviction, holding that the State had not sufficiently corroborated Bannister's statement admitting his deliveries of morphine to the Wolk brothers. ***State v. Bannister***, 2006 WI App 136, ¶ 12, ___ Wis. 2d ___, 720 N.W.2d 498, Pet-Ap. 109.

This court granted the State's petition for review.

STANDARDS OF REVIEW

A. Standard Of Review Of A Common-Law Rule Or Privilege.

"The nature and scope of a common law privilege is a question of law which this court reviews de novo. *See generally Kensington Development v. Israel*, 142 Wis. 2d 894, 899-900, 419 N.W.2d 241 (1988); *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974)." ***State v. Hobson***, 218 Wis. 2d 350, 358, 577 N.W.2d 825 (1998).

B. Standard Of Review For Sufficiency Of The Evidence.

When reviewing the sufficiency of the evidence following a jury verdict, an appellate court must view the trial evidence in the light most favorable to the verdict. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Thus, "when faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 506-07. Moreover, the court of appeals "is by the [Wisconsin] Constitution limited to appellate jurisdiction" and therefore cannot "mak[e] any factual determination where the evidence is in dispute." ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980).

> The court of appeals erroneously predicate[d] its reversal on its own independent review of the evidence presented at trial. . . . "'[The appellate court does] not sit as a judge or jury making findings of fact. Such findings have already been made, in this case by a jury, and our function in reviewing those findings is simply to decide "whether the evidence adduced, believed and rationally considered by the jury, was sufficient to prove the defendants' guilt beyond a reasonable doubt." *Lock v. State*, 31 Wis. 2d 110, 114, 142 N.W.2d 183 (1966).'"

State v. Peotter, 108 Wis. 2d 359, 367, 321 N.W.2d 265 (1982).

SUMMARY OF THE STATE'S POSITION

If the court retains the common-law requirement of corroboration of a defendant's confession or admission, the court should clarify that the re-

quirement operates as a rule of admissibility rather than a rule of evidentiary sufficiency. The rationale for the requirement implies that a trial court should evaluate the sufficiency of corroboration before admitting a confession into evidence rather than evaluate the sufficiency of the corroborating evidence after the fact-finder has heard the confession. The court should require that when a defendant moves to exclude a confession, the defendant's motion must specify whether the defendant claims inadequate corroboration as a basis for exclusion. The court should also require the circuit court to decide the motion before jeopardy attaches.

The court of appeals erroneously interpreted and applied Wisconsin's corroboration requirement, including the "significant fact" doctrine. In reaching its decision, the court of appeals improperly engaged in appellate fact-finding. In interpreting and applying the corroboration requirement to the confession in this case, the court of appeals imposed a greater burden on the State than Wisconsin case-law standards permit. Under a proper application of the corroboration requirement, the evidence at trial sufficiently corroborated Bannister's confession.

ARGUMENT

I. THE COURT SHOULD CLASSIFY THE RULE OF CORROBORATION AS A RULE OF ADMISSIBILITY, NOT AS A RULE OF EVIDENTIARY SUFFICIENCY.

Over the years, Wisconsin courts have addressed the corroboration rule in an array of cases.[3] Under this common-law doctrine[4] adopted by this court and currently in force in Wisconsin, a defendant's confession cannot suffice by itself to convict the defendant of a crime. *See, e.g.*, ***State v. Hauk***, 2002 WI App 226, ¶ 20, 257 Wis. 2d 579, 652 N.W.2d 393. The rationale for the rule and the

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[3] *E.g.*, ***Larson v. State***, 86 Wis. 2d 187, 271 N.W.2d 647 (1978); ***State v. Verhasselt***, 83 Wis. 2d 647, 266 N.W.2d 342 (1978); ***State v. Schultz***, 82 Wis. 2d 737, 264 N.W.2d 245 (1978); ***Triplett v. State***, 65 Wis. 2d 365, 222 N.W.2d 689 (1974); ***Jackson v. State***, 29 Wis. 2d 225, 138 N.W.2d 260 (1965); ***Barth v. State***, 26 Wis. 2d 466, 132 N.W.2d 578 (1965); ***Holt v. State***, 17 Wis. 2d 468, 117 N.W.2d 626 (1963); ***Potman v. State***, 259 Wis. 234, 47 N.W.2d 884 (1951); ***State v. DeHart***, 242 Wis. 562, 8 N.W.2d 360 (1943); ***Griswold v. State***, 24 Wis. 144 (1869); ***State v. Hauk***, 2002 WI App 226, 257 Wis. 2d 579, 652 N.W.2d 393.

[4] ***Hauk***, 257 Wis. 2d 579, ¶ 20 (characterizing the corroboration requirement as "a common law rule"). "Neither the United States Supreme Court nor the Wisconsin Supreme Court has ever held that the corroboration rule is required by the State or federal constitutions." ***Id.*** ¶ 20 n.4. *See also* 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 145, at 593 (6th ed. 2006) [hereinafter MCCORMICK 6TH] ("Constitutional considerations . . . do not demand it.").

rule's practical application, however, appear to conflict. This court should resolve the conflict.

A. The Rationale For The Corroboration Rule Implies The Rule Operates As A Rule Of Admissibility (Or Exclusion).

> The [corroboration] requirement has traditionally been based upon concern that convictions might result from false confessions, and widespread agreement remains that the need to assure accuracy remains at least a major basis for the requirement. There has, however, been no consensus on the nature and sources of inaccuracy that support the rule.
>
> Traditionally and generally, the requirement appears to have a relatively modest objective — protecting against the risk of conviction for a crime that never occurred.[5] Thus the target inaccuracies are

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[5] The corroboration rule traces to *Perry's Case*, 14 Howell St. Tr. 1312 (1660), in which John Perry, the servant of a man named William Harrison, confessed after extensive interrogation that he and his mother and brother

> had robbed and murdered Harrison and that they had dumped the body in a swamp. Even though searchers failed to find Harrison's body in the swamp and even though Perry's mother and brother vigorously denied Perry's story, Perry, his mother, and his brother were convicted and executed entirely on the strength of Perry's confession. Some years after the unfortunate Perrys had been executed, Harrison returned home to Gloucestershire. In a letter to a local knight, Harrison explained that he had been kidnapped, shipped to Turkey, and sold into slavery, and that he had eventually escaped and returned to England.

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very limited. A Maryland court, for example, commented that the requirement serves the limited purpose of preventing a mentally unstable person from confessing to and being convicted of a crime that never occurred.

Often, however, the objectives are stated more broadly although frequently quite generally. The Delaware [Supreme Court], for example, asserted that its rule "serves to protect those defendants who may be pressured to confess to crimes that they either did not commit or crimes that did not occur." The Washington [Supreme Court] indicated that the rule is designed to combat, first, risks of inaccuracy arising from misinterpretation or misreporting by witnesses who testify to what defendants admitted and, second, risks of inaccuracy with regard to what defendants said. These latter sources of inaccuracy, the court continued, include not only force or coercion but also the possibilities that a confession was "based upon a mistaken perception of the facts or law." The Michigan Supreme Court indicated that the requirement serves "to minimize the weight of a confession and require collateral evidence to support a conviction," which it regarded as desirable on the apparent assumption that confessions are of dubious reliability and prosecutors should be encouraged to develop and use other evidence of guilt.

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David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817, 828 (2003) (citing 14 Howell St. Tr. at 1312-22 (1660)). *See also* Richard A. Leo *et al.*, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 502; Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the* Corpus Delicti *as a Condition of Admitting an Extrajudicial Confession*, 27 U.S.F. L. REV. 385, 400 (1993); Case Note, Carol Woods Frazier, *Corroboration of Confessions in the Theft by Receiving Context: Is Proof of Theft Enough?*, 44 ARK. L. REV. 805, 810 (1991).

1 Kenneth S. Broun et al., *McCormick on Evidence* § 145, at 595-96 (6th ed. 2006) [hereinafter *McCormick 6th*] (footnotes omitted) (footnote added). In addition, the corroboration rule originated in a time when courts imposed restrictions on the use of confessions because the common law then denied defendants the opportunity to testify in their own defense and to refute under oath their out-of-court admissions and confessions. John H. Wigmore, *A Students' Textbook of the Law of Evidence* § 200 (1935).

In Wisconsin, the Wisconsin Court of Appeals has observed, "[t]he primary rationale for the corroboration rule is that it helps to insure the reliability of the confession." ***Hauk***, 257 Wis. 2d 579, ¶ 24 (citing *Holt v. State*, 17 Wis. 2d 468, 480, 117 N.W.2d 626 (1963)). "[T]he main concern behind the corroboration rule is that an accused will feel 'coerced or induced' when he or she 'is under the pressure of a police investigation' and make a false confession as a result." ***Id.*** ¶ 25.[6] *See also* ***State ex***

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[6] The court of appeals then observed that "[a] number of courts have questioned the continuing viability of this rationale after *Miranda v. Arizona*, 384 U.S. 436 (1966)." ***Hauk***, 257 Wis. 2d 579, ¶ 25 n.6. "Wigmore maintains that no corroboration rule is needed and that existing requirements are, in the hands of unscrupulous defense counsel, 'a positive obstruction to the course of justice.' Commentators have often agreed." MCCORMICK 6TH, *supra* note 4, § 145, at 596 (footnotes omitted). The availability of constitutionally based protections afforded by ***Miranda***, 384 U.S. 436, and ***State ex rel. Goodchild***, 27 Wis. 2d 244, and the disappearance of legal prohibitions on defendants' opportunities to testify in their own defense under oath have already substantially undercut the principal justifications for the corroboration rule. The impending growth in audio and video

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rel. Washington v. Schwarz, 2000 WI App 235, ¶ 21, 239 Wis. 2d 443, 620 N.W.2d 414 ("The purpose of the confession corroboration rule is to produce confidence in the truth of the confession . . . so that a criminal conviction is not grounded on the admission or confession of the accused alone.").

This rationale implies that the corroboration requirement operates as a rule of admissibility (or exclusion). *See, e.g.*, John William Strong, *McCormick on Evidence* § 145, at 561 (4th ed. 1992) [hereinafter *McCormick 4th*] ("Judicial discussions are . . . often couched in terms that suggest the re-

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recording of defendants' and suspects' statements buttresses the view the corroboration rule has outlived its usefulness and that other mechanisms afford equal or better protection. *See* Wis. Stat. §§ 938.195, 938.31(3) (created by 2005 Wis. Act 60, §§ 27, 28, effective December 31, 2005) (recording custodial statements of juveniles); Wis. Stat. § 968.073 (created by 2005 Wis. Act 60, § 31, effective January 1, 2007) (recording custodial statements of adults); Wis. Stat. § 972.115 (created by 2005 Wis. Act 60, § 40, effective January 1, 2007) (admissibility of defendant's statements); *see also* ***In re Jerrell C.J.***, 2005 WI 105, ¶ 59, 283 Wis. 2d 145, 699 N.W.2d 110 (exercising its supervisory power, this court "require[s] that all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention"); *cf.* Leo, *supra* note 5, at 528 ("A fourth factor relating to reliability is whether the confession and the interrogation preceding the confession were electronically recorded."); *id.* at 530 ("Recording creates an objective, comprehensive, and reviewable record of the interrogation process and relieves judges from having to rely on subjective credibility judgments to resolve a 'swearing contest' between a suspect and a law enforcement officer over what transpired during the interrogation.").

quirement also goes to admissibility (or exclusion). Under such an approach, production of corroborating evidence is required to render the out-of-court confession admissible."); Comment, Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 Wis. L. Rev. 1121, 1136 ("The primary purpose of the corroboration rule is to prevent 'errors in conviction based upon untrue confessions alone.' The rule attempts to accomplish this by excluding poorly corroborated confessions from evidence." (footnote omitted)); Richard A. Leo *et al.*, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 487 ("Historically, judges, as the gatekeepers of reliable evidence, were charged with assessing the extent of corroboration before allowing confession evidence to go to the jury."); *id.* ("the voluntariness and corroboration rules . . . act as exclusionary rules, respectively holding that neither an involuntary nor an uncorroborated confession may be admitted against a defendant in a criminal trial").

If the corroboration rule operates as an admissibility (or exclusion) standard, a defendant who seeks to preclude use of his or her confession based on lack of corroboration should seek pretrial suppression on that ground. ***State v. Allen***, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 682 N.W.2d 433.

B. Decisions Of Wisconsin Courts Treat The Corroboration Rule As A Rule Of Evidentiary Sufficiency, Not As A Rule Of Admissibility.

Wisconsin cases addressing claims of inadequate corroboration typically look to the evidence presented at trial to determine whether the State has satisfied the corroboration requirement.[7] Thus, the jury hears and sees the evidence, including the confession, and the trial court and appellate courts later determine whether the evidence sufficiently corroborates the confession.

In ***Larson v. State***, 86 Wis. 2d 187, 271 N.W.2d 647 (1978), Larson asserted the evidence did not suffice to convict him. He contended that "his statement to the police [was] incredible in light of the physical facts and the substance of the entire statement must be ignored and without his statement there is no evidence of intent to kill." ***Id.*** at 198. Holding that "every fact in Larson's statement, except for those relating to the murder itself, was corroborated," ***id.***, this court relied on evidence introduced at trial as the basis for the requisite corroboration. The circuit court had admitted Larson's statement following a pretrial suppression hearing at which the court found the

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[7] See cases cited in note 3, *supra*. *Accord* 1 JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 145, at 561 (4th ed. 1992) [hereinafter MCCORMICK 4TH] ("The sufficiency of corroboration is generally presented and addressed as a matter of the sufficiency of the prosecution's evidence.").

statement "voluntary and therefore admissible as evidence at trial." ***Id.*** at 191.

In ***State v. Verhasselt***, 83 Wis. 2d 647, 266 N.W.2d 342 (1978), the circuit court held a ***Miranda/Goodchild*** hearing[8] and ruled Verhasselt's incriminating statement voluntary and admissible. ***Id.*** at 652. In response to Verhasselt's claim of inadequate corroboration of his confession, ***id.*** at 661, this court reviewed the evidence introduced at trial and concluded "[t]he confession [was] amply corroborated by independent evidence," ***id.*** at 662.

In ***State v. Schultz***, 82 Wis. 2d 737, 264 N.W.2d 245 (1978), the circuit court held a pretrial suppression hearing. ***Id.*** at 743. Following the hearing, the court concluded that Schultz had "knowingly and intelligently waived [his] rights in accordance with *Miranda*," ***id.*** at 747, and had made his statement voluntarily, ***id.*** at 751. This court affirmed those rulings. ***Id.*** at 750, 751. Separately, this court addressed Schultz's claim of inadequate corroboration of the incriminating statement. ***Id.*** at 752-55. Relying on evidence introduced at trial, ***id.*** at 753 ("[o]ther evidence adduced at trial"), 754 ("[e]vidence independent of this statement was brought forth at trial to corroborate [Schultz's] version of events"), the court declared Schultz's statement adequately corroborated by "evidence independent of [Schultz's] statement," ***id.*** at 755.

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[8] ***Miranda***, 384 U.S. 436; ***State ex rel. Goodchild***, 27 Wis. 2d 244.

In ***Triplett v. State***, 65 Wis. 2d 365, 222 N.W.2d 689 (1974), the circuit court held "[a] hearing on the admissibility of the confession." ***Id.*** at 366. The court held that Triplett made his confession voluntarily and after "being advised of his constitutional rights." ***Id.*** at 366-67. This court upheld that ruling against a claim that the evidence did not support the voluntariness of Triplett's oral statements and written confession. ***Id.*** at 369. In response to Triplett's claim that the confession lacked sufficient corroboration and, therefore, the State failed to produce sufficient evidence to sustain the conviction, ***id.*** at 371-72, this court found sufficient corroboration in the evidence produced at trial, ***id.*** at 372-73.

In this court's pre-***Miranda*** decision of ***Jackson v. State***, 29 Wis. 2d 225, 138 N.W.2d 260 (1965), police officers saw needle marks in Jackson's forearms and questioned her about her use of narcotics. ***Id.*** at 229. She admitted using heroin the previous day, and the officers arrested her for illegal use of heroin. ***Id.*** Jackson contended that "there was insufficient credible evidence to establish beyond a reasonable doubt her guilt of the offense charged . . . [because of] the basic principle that proof of commission of a crime cannot be grounded on the admissions or confession of the accused alone." ***Id.*** at 231. This court found sufficient corroboration in the officers' observation of the fresh needle marks and in a laboratory report:

> The principal evidence adduced of the offense consisted of the aforestated admissions which defendant made to Officers Randa and Thelen when they questioned her about the fresh needle marks on her forearms. However, these needle marks, together with the laboratory report that traces of opium alkaloid were found on some of the seized paraphernalia,

did supply sufficient corroborating evidence to sustain the conviction. As this court observed in *Holt v. State*:

> "All the elements of the crime do not have to be proved independently of an accused's confession; however, there must be some corroboration of the confession in order to support a conviction. Such corroboration is required in order to produce a confidence in the truth of the confession. The corroboration, however, can be far less than is necessary to establish the crime independently of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test."

We have no hesitancy in holding that there was sufficient credible evidence upon which the trial court could find defendant guilty of the offense charged beyond a reasonable doubt.

Id. at 231-32 (footnote omitted).

In ***Barth v. State***, 26 Wis. 2d 466, 132 N.W.2d 578 (1965), the State at oral argument in this court "disavowed the three . . . items" on which the circuit court based its conclusion that the State adequately corroborated the defendant's confession. ***Id.*** at 468. Instead, the State referred this court to a police detective's trial testimony as corroborating the confession. ***Id.*** After reviewing the testimony, this court found the corroboration inadequate. ***Id.*** at 469. Concluding that the State "failed to submit sufficient evidence to establish a *corpus delicti* by evidence independent of Mr. Barth's extrajudicial confession," ***id.***, the court reversed the conviction.

In ***Holt v. State***, 17 Wis. 2d 468, 117 N.W.2d 626 (1963), Holt "contend[ed] that her admissions

and confession were illegally obtained and should not have been received in evidence against her." ***Id.*** at 478. This court wrote that "[i]t is unquestionably true that without her own declarations Mrs. Holt could not have been found guilty of murder." ***Id.*** The circuit court had denied Holt's pretrial motion to suppress the evidence, including her incriminating statement. ***Id.*** at 473. Concluding that Holt made her statement voluntarily, this court affirmed the circuit court's order. ***Id.*** at 478. Separately, Holt "contend[ed] that there was insufficient evidence to convict her in that the *corpus delicti* was not proved by evidence independent of her confession and that there was insufficient proof that the infant was alive at the time it was placed in the furnace." ***Id.*** at 480. Rejecting Holt's contention and declaring Holt's confession adequately corroborated by evidence presented at trial, ***id.*** at 481-82, this court set forth the current corroboration standard:

> All the elements of the crime do not have to be proved independently of an accused's confession; however, there must be some corroboration of the confession in order to support a conviction. Such corroboration is required in order to produce a confidence in the truth of the confession. The corroboration, however, can be far less than is necessary to establish the crime independently of the confession. If there is corroboration of any significant fact, that is sufficient under the Wisconsin test.

Id. at 480.[9]

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[9] Two versions of the confession-corroboration rule exist. The *corpus delicti* version requires that independent evidence prove some or all elements of the crime before the fact-finder can consider the confession. Mullen, *supra* note 5, at 388-89. The "trustworthiness" version requires cor-

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In ***Potman v. State***, 259 Wis. 234, 47 N.W.2d 884 (1951), Potman "contended . . . that the judgment convicting her of the crimes charged in the information cannot be sustained because . . . the State failed to establish the *corpus delicti* independent of her extrajudicial confessions or admissions." ***Id.*** at 243. Rejecting the *corpus delicti* corroboration rule as "the rule in this state," ***id.*** at 243 (relying on *State v. DeHart*, 242 Wis. 562, 8 N.W.2d 360 (1943)), this court affirmed the conviction:

> [I]t was not necessary to establish the *corpus delicti* independent of the facts stated in her confessions and admissions which had to be proved to establish the commission of a crime in violation of sec. 351.24, Stats. Thus by defendant's confessions and admissions it was duly established that at the times stated in the information that she was single and had never married, and that she concealed the death of the two infants in question, — which were issues of her body and which if born alive would be illegitimate children, — so that it may not be known whether or not

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roboration by "at least some evidence of any sort tending to produce confidence in the truth of the confession." Frazier, *supra* note 5, at 816. *See also* MCCORMICK 4TH, *supra* note 7, § 145, at 559-60. The standard in ***Holt***, 17 Wis. 2d 468, embraces a "trustworthiness" version of the corroboration rule, not the *corpus delicti* version. *Cf.* MCCORMICK 4TH, *supra* note 7, § 145, at 559 n.31 ("Wisconsin has not expressly adopted the 'federal approach[ ]' [of *Opper v. United States*, 348 U.S. 84 (1954),] but it has rejected the *corpus delicti* formulation in favor of a very similar approach which requires only 'corroboration of any significant fact" (quoting *Holt*, 17 Wis. 2d at 480, and citing *Larson*, 86 Wis. 2d 187).).

> such issue was born alive or not or whether the infant was not murdered. The proof to that effect is all that was required to establish beyond a reasonable doubt that defendant was guilty of the crimes charged in the information.

Id. at 243-44.

In ***State v. DeHart***, 242 Wis. 562, 8 N.W.2d 360 (1943), DeHart did not object to the admission of his confession. ***Id.*** at 567. In response to his contention that the State had not corroborated the confession, this court relied on trial evidence as sufficiently corroborating the confession:

> The evidence furnished by the confession obviously established the *corpus delicti*, as well as defendant's guilt, and we shall not labor the point. While, without the confession, defendant would doubtless have been entitled to a directed verdict, evidence as to the location and condition of the body and expert testimony that the condition of the bones was consistent with buckshot wounds inflicted at close range, sufficiently corroborated the confession.

Id. at 566. In addition, this court found corroboration in other admissions by DeHart. ***Id.*** at 568 ("Aside from the confession, there were corroborating admissions"; other witnesses' testimony about defendant's admissions "strongly evidences reliability of the confession"). This court declared that "[t]he jury was entitled to conclude that the confession was trustworthy and believable." ***Id.*** at 568.

In ***Griswold v. State***, 24 Wis. 144 (1869), this court declared that evidence introduced at trial corroborated Griswold's confession. ***Id.*** at 148. Consequently, the court concluded that the case did not present the issue, advanced by Griswold, of

"whether *extra-judicial confessions, uncorroborated* by any other proof of the *corpus delicti*, are of themselves sufficient to found a conviction of the prisoner." ***Id.*** (emphases in original).

In ***Hauk***, 257 Wis. 2d 579, the court of appeals discussed the purpose and application of the corroboration rule, ***id.*** ¶¶ 22-24, and held that the rule did not apply to Hauk's "confession . . . to a *friend* before a police investigation was even initiated," ***id.*** ¶ 25. Nonetheless, the court also held that the trial testimony of two of Hauk's friends sufficiently corroborated Hauk's confession. ***Id.*** ¶ 26.

As shown by the foregoing review of the principal Wisconsin cases on corroboration,[10] Wisconsin trial and appellate courts routinely treat the corroboration requirement as a mechanism for assessing the sufficiency of trial evidence to corroborate the confession rather than for assessing coercion or reliability as a basis for admitting or excluding the confession in the first instance.

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[10] *See also* ***Freeman v. State***, 51 Wis. 2d 537, 539-40 187 N.W.2d 191 (1971) (confession corroborated by evidence presented at trial); ***Richardson v. State***, 171 Wis. 309, 177 N.W. 10 (1920) (same).

C. If This Court Retains The Corroboration Requirement, The Court Should Classify The Requirement As One Of Admissibility Rather Than Evidentiary Sufficiency.

The rationale for the corroboration requirement (protecting against coerced, hence unreliable, confessions) seems at odds with the way Wisconsin courts determine the adequacy of corroboration (assessing the trial evidence after the fact-finder has heard and seen all the evidence, including the confession). The rationale implies a need to keep uncorroborated confessions away from the jury in the first instance, not a procedure that allows the jury to hear the confession and then have the trial and appellate courts decide whether the State presented sufficient evidence at trial to corroborate the confession.

If this court retains the corroboration requirement,[11] the State recommends that the court clas-

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[11] The State doubts the utility of the corroboration requirement. *See supra* note 6. This court could abrogate or modify the corroboration rule.

If a Wisconsin common-law rule "aris[es] from English decisions rendered before 1776," ***State v. Boehm***, 127 Wis. 2d 351, 356 n.2, 379 N.W.2d 874 (Ct. App. 1985), the Wisconsin Constitution requires the rule to "continue part of the law of this state until altered or suspended by the legislature," WIS. CONST. art. XIV, § 13. "Article XIV, section 13 of the Wisconsin Constitution preserves the English common law in the condition in which it existed at the time of the American Revolution until modified or abrogated." ***State v. Hobson***, 218 Wis. 2d 350, 359, 577 N.W.2d 825 (1998) (footnote omitted). The corroboration rule did not ex-

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sify the issue of corroboration as one of admissibil-

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ist as established English common law before 1776, however. *See* Leo, *supra* note 5, at 502-03 ("English courts were reluctant to adopt the [corroboration] rule and never quite absorbed it into the common law. . . . The first court to recognize the rule appears to have been the North Carolina Supreme Court, which described it in 1797 in *State v. Long*" (footnotes omitted).); Moran, *supra* note 5, at 829 (corroboration rule "never actually became a part of the English common law"); Frazier, *supra* note 5, at 811 ("The *corpus delicti* rule in England . . . remained an unsettled question" as late as 1784); Comment, Corey J. Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1126 ("the corroboration requirement was never universally accepted [by English courts] and was not applied to prosecutions other than murder"); *cf.* Mullen, *supra* note 5, at 400-01 ("It is unclear whether the *corpus delicti* rule ever became part of English common law or whether the cases discussed simply predisposed English courts to skepticism when the 'body of the crime' was not unquestionably proven. If a rule comparable to the modern one existed at English common law, it was an ill-defined feature of the law related to homicide and was rarely, if ever, extended to other crimes" (footnotes omitted).).

Consequently, if this court concludes that current conditions warrant abrogating or modifying Wisconsin's common-law corroboration rule, this court can do so. Moreover, this court has overturned common-law rules where they no longer serve sound policy. *See, e.g.*, ***State v. Hobson***, 218 Wis. 2d 350, 380-81, 577 N.W.2d 825 (1998) (prospectively "abrogat[ing] the common law defense of forcibly resisting an unlawful arrest in the absence of unreasonable force"); ***Hayes v. State***, 46 Wis. 2d 93, 101-05, 175 N.W.2d 625 (1970) (revising the common-law rule holding that circuit court lacked inherent power to revise its judgment and sentence after the execution of the sentence had commenced), *overruled on other grounds by State v. Taylor*, 60 Wis. 2d 506, 523, 210 N.W.2d 873 (1973).

ity for the circuit court to resolve pretrial as a preliminary question within the scope of Wis. Stat. § (Rule) 901.04(1).[12] The rationale for the rule — keeping unreliable confessions from the fact-finder — points toward treating the requirement as one of assessing the sufficiency of the corroboration before deciding whether to admit the confession or admission.

Procedurally, the court should require that a defendant seeking exclusion of a confession or admission as inadequately corroborated specifically identify inadequate corroboration as the basis for the motion. *Cf.* ***State v. Allen***, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 682 N.W.2d 433 (pleading standards for pretrial and postconviction motions);[13]

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[12] *But see* MCCORMICK 6TH, *supra* note 4, § 145, at 597 ("There is no justification for treating the rule as one related to admissibility of defendant's admissions; the requirement should be only one of evidence sufficiency."). From the State's viewpoint, however, treating the corroboration rule as a standard for admissibility avoids the double-jeopardy bar that arises if the circuit court or an appellate court concludes, after jeopardy has attached, that the trial evidence did not sufficiently corroborate the defendant's confession and that, without the confession, the State failed to produce sufficient evidence to sustain the conviction. Resolving the issue pretrial would also conserve judicial and other legal resources by forestalling a trial where the prosecutor learns beforehand that, contrary to the prosecutor's belief, the court does not regard a confession as adequately corroborated.

[13] A defendant may make pretrial and postconviction motions. . . . At a minimum, a motion, whether made pretrial or postconviction, must "[s]tate with particularity the [factual and legal] grounds for the motion," Wis. Stat. § 971.30(2)(c) (2001-02), and

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Steve on three to four occasions and to his brother Michael on three to four occasions. I believe he said approximately every third day or in that range." In other words, Bannister confessed to giving Michael Wolk morphine pills three to four times over the span of thirty-four days. If, as the detective related, Bannister gave Michael Wolk the morphine pills three to four times approximately every third day, depending on when he started and stopped, the deliveries to Michael could have been easily concluded by mid-December. Thus, under this scenario, it would be extremely unlikely that any morphine found in Wolk's body on January 17, 2003, was obtained from Bannister unless Wolk saved some, and thus, does not corroborate the confession. Even if we assume that the deliveries occurred nearer to the time of Wolk's death, as was suggested by the prosecutor in his opening statement, when he claimed the last morphine exchange occurred two days before Wolk's death, the evidence of morphine in Wolk's body is not a significant fact corroborating Bannister's confession that he gave morphine pills to Wolk, it corroborates only that Wolk used morphine. This is so because Michael Wolk was a drug addict who regularly used illicit drugs. Consequently, the finding of morphine in his body was not a remarkable or important discovery. Just as a diabetic would have traces of insulin in the bloodstream, evidence of morphine would be expected in the bodies of morphine addicts. A significant fact is a meaningful and particularized fact that produces confidence in the truthfulness of the confession. Based on the evidence produced at trial, the finding of morphine in Wolk's body was not a significant fact corroborating Bannister's confession. Here, no other facts or circumstances supporting Bannister's confession were ever produced. No morphine pills or evidence of morphine pills were found next to Wolk's body, and the expert witnesses were unable to pinpoint the source of the morphine. No independent eyewitness testified to any drug exchanges between Bannister and the Wolks. Further, Bannister's confession did not yield any unusual information or circumstances that would not be widely known. Thus, under the

> circumstances present here, without additional evidence, the finding of morphine in Michael Wolk's morphine-addicted body is not sufficient to corroborate Bannister's confession claiming to have given morphine pills on prior uncertain dates to the deceased.

Bannister, 2006 WI App 136, ¶¶ 10-11, Pet-Ap. 107-09 (footnotes omitted). In a footnote, the court added:

> This is the most specific testimony that the officer gave regarding the number of visits of the two men. At other times the officer stated that Bannister told him that he delivered morphine to either Steven or Michael Wolk eight to ten times, about every third day within the thirty-four-day span.

Id. ¶ 11 n.8, Pet-Ap. 108.

B. The Court Of Appeals Repeatedly Erred In Its Application Of Wisconsin's Corroboration Requirement.

1. The court of appeals erroneously characterized Wisconsin's corroboration requirement.

The court of appeals' errors begin with its characterization of Wisconsin's corroboration requirement "as the *corpus delicti* rule." ***Id.*** ¶ 9. As already noted, *see supra* note 9, Wisconsin long ago rejected the *corpus delicti* version of the corroboration rule and instead adopted a "trustworthiness" version. The Wisconsin rule, as typically applied, requires only that evidence at trial corroborate — not prove — "*any* significant fact" in the confession. ***Holt***, 17 Wis. 2d at 480 (emphasis added).

Even under the stricter *corpus delicti* version of the corroboration requirement, "only 'slight' corroborating evidence is often required, and this can be circumstantial as well as direct." *McCormick 4th*, *supra* note 7, § 145, at 559 (footnotes omitted).

2. The court of appeals engaged in appellate fact-finding, including drawing inferences and conclusions unsupported — even contradicted — by the record.

The court of appeals also erred in its application of the standard of review for determining the sufficiency of the corroboration of Bannister's confession. While noting that it "independently review[s] whether the evidence presented meets the corroboration standard," ***Bannister***, 2006 WI App 136, ¶ 9, Pet-Ap. 107, the court did not acknowledge any standard for deciding on *which* of the presented evidence it could properly rely when making its independent review.

When viewed in terms of evidence presented at trial, the sufficiency of corroboration necessarily depends on which evidence the fact-finder could properly rely. When reviewing the evidence following a jury verdict, an appellate court must view the trial evidence in the light most favorable to the verdict. ***Poellinger***, 153 Wis. 2d at 507. Thus, "when faced with a record of historical facts which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law." ***Id.*** at 506-07. Moreover, the court of appeals

"is by the [Wisconsin] Constitution limited to appellate jurisdiction" and therefore cannot "mak[e] any factual determinations where the evidence is in dispute." ***Wurtz***, 97 Wis. 2d at 107 n.3. "'[The appellate court does] not sit as a judge or jury making findings of fact. Such findings have already been made, in this case by a jury . . . .'" ***Peotter***, 108 Wis. 2d at 367.

In this case, viewing the evidence in the light most favorable to a verdict means viewing the evidence in the light that best supports corroboration. The court of appeals essentially refused to do so, going so far as to declare "facts" based on inferences unsupported by the evidence. In effect, "[t]he court of appeals erroneously predicate[d] its reversal on its own independent review of the evidence presented at trial." ***Id.***

For example, the court wrote that "the deliveries to Michael could have been easily concluded by mid-December." ***Bannister***, 2006 WI App 136, ¶ 11, ___ Wis. 2d ___, Pet-Ap. 108-09. This purely conjectural inference lacks *any* support in the record. Detective Carchesi testified that Bannister stated that deliveries to Michael and Steve Wolk *began* in "mid December of 2002" and *ended* in "mid January of 2003" (36:42, Pet-Ap. 186; *see also* 36:41, 75, Pet-Ap. 212, 219). Bannister told Detective Carchesi that he delivered morphine "eight to ten times, total, approximately, every third day" (36:75, Pet-Ap. 219; *see also* 36:41, Pet-Ap. 212). The record does not contain *any* evidence permitting an inference that Bannister's deliveries could have ended in mid December. Rather, Bannister told Detective Carchesi the deliveries ended in "mid January of 2003," bringing the final delivery

morphine to Wolk. Bannister told Detective Carchesi that he delivered morphine to brothers Michael and Steven Wolk for a one-month period ending in mid January 2003. Michael Wolk died of "morphine toxicity" — and only "morphine toxicity" — in mid January 2003, thus more than sufficiently proving that Michael Wolk possessed morphine. Contrary to the court of appeals' completely unsupported contention that Bannister's deliveries "could have been easily concluded by mid-December," ***Bannister***, 2006 WI App 136, ¶ 11, ___ Wis. 2d ___, Pet-Ap. 108, Wolk's fatal possession occurred at a time closely proximate to a time Bannister admitted he delivered morphine to Wolk and his brother. Thus, Wolk's possession of morphine at a time Bannister acknowledged delivering it to Wolk further sufficed to corroborate the reliability of Bannister's admission to Detective Carchesi. The State did not have to do anything more, and the State did not do anything less.[16]

Contrary to the implication of the court of appeals' analysis, ***id.*** ¶¶ 10-11, Wisconsin's corroboration requirement does not demand the degree of

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[16] By contrast, if Bannister had admitted delivering heroin rather than morphine, the State's proof that Wolk died of morphine toxicity would not have corroborated Bannister's statement. Conversely, if Wolk had died of an overdose of heroin, the presence of that drug in his blood would not have corroborated Bannister's admission of delivering morphine. Under either of those scenarios (neither of them present in this case), Bannister's confession would have lacked sufficient corroboration and therefore would not have provided a sufficient basis for convicting him of delivering a controlled substance.

specificity the court of appeals appears to insist on. Much of the court's analysis denounces the "dearth of information in the charging portion of the complaint" and the lack of detail in Bannister's statement. ***Id.*** ¶ 10.[17] The complaint, however, does not play any role in a corroboration assessment; Wisconsin cases assess corroboration with reference to trial evidence. Similarly, the lack of testimony about "what time of day it occurred, what room the parties were in when the exchange occurred, or how the visit was set up," ***id.***, does not have any bearing on the corroboration assessment in this case: unless Bannister's confession included those facts, testimony about those facts would not

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[17] In light of the detail actually found in the charging portion of the complaint (2:2-3, Pet-Ap. 120-21), the State does not understand the court of appeals' lament. For instance, the complaint reports Bannister as saying he provided the morphine pills to relieve Michael Wolk's severe pain (2:3, Pet-Ap. 121). The autopsy confirmed that Michael Wolk suffered from "End Stage Lung Disease" (Pet-Ap. 125). The complaint also reports Bannister as telling Detective Carchesi that on one occasion, when Bannister delivered a morphine pill to Michael without Steve present, Michael told Bannister not to tell Steve about the transaction (2:3, Pet-Ap. 121). Moreover, the complaint recites Bannister's candid statements about the deliveries (2:3, Pet-Ap. 121). This information hardly qualifies as "a dearth of information," especially where neither an investigating officer nor a prosecutor would have any reason to include anything more in order to create a sufficient charging document.

In addition, the court's objection that "[n]o eyewitnesses to the exchange testified," ***Bannister***, 2006 WI App 136, ¶ 10, Pet-Ap. 107, slips by the point that a maximum of three people witnessed any of these exchanges: one had already died (Michael Wolk), another invoked the Fifth Amendment (Steve Wolk), and the third — Bannister — invoked his right, as the defendant, not to testify.

corroborate any fact in the statement, much less "any significant fact." The appellate record does not contain any indication that those facts appeared in Bannister's statement.

Corroboration requires only "slight" evidence, whether direct or circumstantial. *McCormick 4th*, *supra* note 7, § 145, at 559. Here, the State's corroborating evidence proved more than slight. Bannister confessed that he delivered morphine to Steven or Michael Wolk on eight to ten occasions from mid-December 2002 through mid-January 2003. Several pieces of evidence circumstantially confirmed the "significant fact[s]" of Bannister's delivery of morphine (not, say, heroin) and that Bannister made a delivery as recently as mid-January 2003:

- Michael Wolk had morphine in his blood when he died, thus corroborating that a delivery of morphine had occurred.

- Michael Wolk died on January 17, 2003, a date in "mid January 2003," thus corroborating Bannister's statement that he delivered morphine in "mid January 2003."

- The trial evidence did not suggest any source of Steve or Michael Wolk's morphine other than Bannister, thus inferentially corroborating that Bannister made the delivery.

In short, the State's evidence sufficed to demonstrate that Bannister tendered a reliable statement, ***Hauk***, 257 Wis. 2d 579, ¶ 24 — in effect, that he did not falsely confess to delivering morphine to Steven and Michael Wolk. With the con-

fession adequately corroborated, the confession provided sufficient evidence from which the jury could have concluded — and did conclude — that Bannister illegally delivered morphine. This court should therefore reverse the court of appeals' contrary decision.

4. The decision the court of appeals should have written.

Had the court of appeals applied the correct legal standards for reviewing the sufficiency of the State's corroborating evidence, the court's analysis and decision would likely have looked something like this:

> Michael Wolk died in the early morning hours of January 17, 2003, of an overdose of morphine. The autopsy of Wolk's body and a toxicology analysis of Wolk's blood disclosed only one opiate in his body: morphine. The autopsy also revealed that Wolk suffered from "[e]nd [s]tage [l]ung [d]isease." In addition, analysis of a spoon and two syringes found near Wolk's body disclosed traces of morphine on them. Although Wolk had a history of abusing heroin, the evidence does not show or allow any inference that he abused heroin (or any other controlled substance) during the relevant period (mid-December 2002 through mid-January 2003) or used any drug other than morphine during the relevant period.
>
> Bannister told Cudahy Police Detective Michael Carchesi that beginning in mid-December 2002, he delivered morphine pills to Michael Wolk or Steve Wolk on eight to ten separate occasions every three days or so. The deliveries occurred at Bannister's house. The evidence at trial did not disclose any source of morphine for Michael and Steve other than the pills delivered by Bannister.

The State charged Bannister with delivery of morphine. This charge required the State to prove that Bannister "delivered a substance"; that "the substance was morphine"; and that Bannister "knew or believed that the substance was morphine, a controlled substance."

Before trial, Bannister and the State reached an agreement that evidence of morphine in Michael Wolk's blood had probative value as to whether Bannister delivered morphine and that Bannister would not object to the evidence as unduly prejudicial.

Of the three witnesses to these deliveries, two remain alive: Steve Wolk and Bannister, the defendant. Neither of them testified at the trial. Wolk invoked his privilege against self-incrimination. Bannister elected not to testify. The sole evidence of his morphine deliveries comes via his statement to Detective Carchesi.

Because the conviction rests on Bannister's confession, the State must corroborate the confession. Corroboration serves to protect against false confessions. The corroboration does not have to establish the crime independently of the confession or even establish any element of the offense. Corroboration of "any significant fact" satisfies the State's burden. The State can satisfy its burden with "slight" evidence, and can rely on circumstantial as well as direct evidence to meet its burden.

Here, the jury knew that Michael Wolk died of a morphine overdose. Because the record does not contain any evidence permitting any inference that Wolk or anyone in his household manufactured morphine, the presence of the morphine in Wolk's blood necessarily implies that the morphine he received came from someone outside his household and, conversely, that someone from outside his household delivered morphine to him, either directly or through his brother, Steve. The morphine in Wolk's blood

thus corroborated the significant fact of a delivery of morphine.

A reasonable jury could have concluded that the morphine in Wolk's blood on January 17 came from morphine delivered as recently as a day or two before that date (*i.e.*, at the end of the period from mid-December 2002 to mid-January 2003), not from morphine delivered more than a month earlier. So, the morphine in Wolk's blood served to corroborate a delivery within the previous few days — a fact a person involved in the delivery would likely know but one that a person outside the zone of delivery activity would not likely know. In light of Detective Carchesi's open-ended question to Bannister ("I asked if he had ever given Steve or his brother [Michael] morphine") and Bannister's answer identifying a narrow window of delivery dates near in time to Wolk's death, the morphine in Wolk's blood served as sufficient corroboration of a significant fact in Bannister's statement: delivery dates that Bannister did not have any reason to choose or reveal unless he told the truth in his statement.

Finally, the trial evidence did not suggest any source of Steve or Michael Wolk's morphine other than Bannister. This evidence circumstantially corroborates a significant fact in Bannister's confession: that Bannister delivered morphine to the Wolks.

Wisconsin's corroboration rule required the evidence at trial to corroborate "any significant fact" in Bannister's confession. The evidence sufficiently corroborated at least two separate significant facts in Bannister's confession: the period during which deliveries to the Wolks occurred, including a date within a day or two of Michael Wolk's death, and Bannister as the person who made deliveries to the Wolks.

In short, a proper application of appellate standards of review of the sufficiency of the evidence corroborating Bannister's confession would have

resulted in a decision affirming Bannister's conviction, not a decision overturning it.

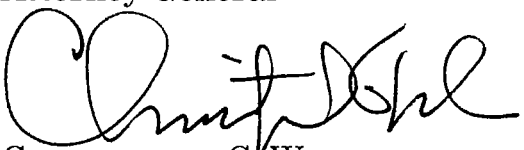
CONCLUSION

For the reasons offered in this brief, this court should reverse the decision of the court of appeals and should affirm Bannister's conviction.

Date: October 20, 2006.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General



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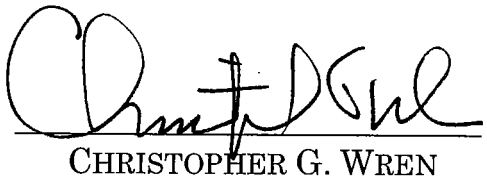
CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 10,197 words.



CHRISTOPHER G. WREN

APPENDIX

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PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN
(*State of Wisconsin v. Edward Bannister*, No. 2005AP767-CR)

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(*State of Wisconsin v. Edward Bannister*, No. 2005AP767-CR)

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No.: 2005AP767-CR

†Petition for Review Filed.

Complete Title of Case:

STATE OF WISCONSIN, †

PLAINTIFF-RESPONDENT,

V.

EDWARD BANNISTER,

DEFENDANT-APPELLANT.

Opinion Filed:	May 23, 2006
Submitted on Briefs:	
Oral Argument:	April 11, 2006

JUDGES:	Wedemeyer, P.J., Fine and Curley, JJ.
Concurred:	Fine, J.
Dissented:	

Appellant ATTORNEYS:	On behalf of the defendant-appellant, the cause was submitted on the briefs of *Kenneth P. Casey*, *Craig S. Powell* and *Jenny Yuan* of the Criminal Appeals Project – Frank J. Remington Center, University of Wisconsin Law School, Madison, with oral argument by Kenneth P. Casey.
Respondent ATTORNEYS:	On behalf of the plaintiff-respondent, the cause was submitted on the brief of *Peggy A. Lautenschlager*, attorney general, and *Christopher G. Wren*, assistant attorney general, with oral argument by Christopher G. Wren.

2006 WI App 136

COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP767-CR
Cir. Ct. No. 2003CF6219

STATE OF WISCONSIN

IN COURT OF APPEALS

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDWARD BANNISTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Edward J. Bannister appeals the judgment convicting him of one count of delivery of a controlled substance, morphine, contrary to WIS.

STAT. §§ 961.14(3) and 961.41(1)(a) (2003-04).[1] Bannister argues that there was insufficient evidence to convict him because his confession was not corroborated by a significant fact. In addition, he alleges that several improprieties at trial prohibited the real controversy from being tried, and he is entitled to a discretionary reversal pursuant to WIS. STAT. § 752.35. Because the State failed to corroborate a significant fact of Bannister's confession, we reverse.[2]

I. BACKGROUND.

¶2 On January 17, 2003, the City of Cudahy police were dispatched to the home of Michael Wolk. Upon their arrival, they discovered that Wolk, who was lying on the loveseat, was dead. Drug paraphernalia consisting of two syringes, a teaspoon, rolling papers, and a small white powdery rock substance were found on a nearby table. Later testing revealed morphine on the two syringes and teaspoon, and an autopsy of Wolk discovered that the cause of death was morphine toxicity. However, no morphine pills were found.

¶3 An investigation eventually led police to Bannister after they interviewed Wolk's brother, Steven, who told the police that both he and his brother had obtained morphine from Bannister. Steven Wolk gave the police inconsistent statements concerning the length of time this occurred. Steven also told the police he had a short-term memory deficit. Bannister was arrested and originally charged with delivering a controlled substance, morphine, to Michael Wolk, and first-degree reckless homicide. Some nine months after Wolk's death,

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Because of our disposition of this first issue, it is not necessary for us to address the remaining arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

Bannister was arrested and taken to the Cudahy police station, where he was given food after he informed the police that he suffers from sickle cell anemia. After being advised of his ***Miranda*** rights,[3] Bannister told the detective that he gave morphine tablets to Steven or Michael Wolk eight to ten times between mid-December 2002 to mid-January 2003. The detective who interrogated Bannister later testified that he took notes of what Bannister said and transcribed his notes into a report. However, Bannister never saw the notes or signed the confession, and the notes were destroyed after the report was completed.[4]

¶4 Bannister waived his preliminary hearing and demanded a jury trial. On the first day of trial, the State announced that it planned to proceed only on the delivery of morphine charge. However, after Bannister's defense attorney suggested that any discussion of Wolk's death was unduly prejudicial, and the State responded by stating that it was prepared to proceed with the homicide charge, Bannister entered into a stipulation that, in exchange for not having to face the charge of reckless homicide, he would permit the State to introduce evidence that Wolk died as a result of a morphine overdose. Prior to the calling of witnesses, the trial court conducted a ***Miranda-Goodchild***[5] hearing and ruled that Bannister's confession was admissible.

¶5 During the State's opening statement to the jury, the prosecutor told the jury that "the purpose of the testimony regarding the death is not [sic] ask someone to answer for that death, but it's an important element of evidence that I

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[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[4] The transcript notes that the report was introduced into evidence as an exhibit. However, no exhibits are in the record.

[5] ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

think that you have to listen to." He also advised the jury that they may hear from Steven Wolk, and that his testimony would be that he and his brother Michael were either given or they purchased morphine tablets from Bannister over the span of several months, and that the last time they obtained morphine from Bannister was a couple of days before Michael's death either January 14th or 15th, 2003. However, when Steven Wolk was brought to the courtroom from prison (he had recently been convicted of a traffic homicide charge), he indicated under oath and outside the presence of the jury that he would not testify even if the State offered him immunity. As a result, the jury never heard any direct testimony from Steven Wolk.

¶6 Several other witnesses were called by the State. The police officer responding to the 911 call described what he observed at the Wolk residence. A laboratory technician and the medical examiner testified that morphine had been found on the drug paraphernalia near Michael Wolk's body, and that Michael Wolk died of morphine toxicity. The Cudahy police detective also testified about Bannister's confession. After the close of testimony at the jury instruction conference, Bannister's attorney advised the court that Steven Wolk did not testify because the prosecutor in his opening statement indicated that Steven Wolk would testify that Bannister had given them morphine pills. The trial court ruled that Bannister's attorney could not mention that Steven Wolk had not testified, because to do so would require the jury to know that Steven Wolk exercised his constitutional rights not to incriminate himself.

¶7 Bannister was subsequently convicted and sentenced to five years of confinement with three years of extended supervision to follow. At sentencing,

the State asked the trial court, at the behest of Michael Wolk's widow,[6] to order Bannister to pay restitution of approximately $4000[7] for Wolk's funeral expenses. The trial court agreed, and ordered Bannister to pay the funeral expenses as restitution. A postconviction motion was filed seeking a new trial. It was denied and this appeal follows.

II. ANALYSIS.

¶8 Bannister first argues that there was insufficient evidence to sustain the conviction because his confession was not corroborated by any significant fact. The State maintains that the discovery of morphine in Wolk's body constitutes corroboration of a significant fact. We have carefully scrutinized the testimony in this case. After doing so, we must conclude that, under the unusual facts presented here, the presence of morphine in Michael Wolk's body does not constitute "corroboration of a significant fact" as is required by law.

¶9 Developed at common law, Wisconsin's corroboration rule, also known as the *corpus delicti* rule, requires that a "conviction of a crime may not be grounded on the admission or confessions of the accused alone." ***State v. Verhasselt***, 83 Wis. 2d 647, 661, 266 N.W.2d 342 (1978). Instead, there must be corroboration of a "significant fact." ***Holt v. State***, 17 Wis. 2d 468, 480, 117 N.W.2d 626 (1962). The corroboration rule ensures the reliability of the confession. *See* ***Verhasselt***, 83 Wis. 2d at 662. "[T]he main concern behind the corroboration rule is that an accused will feel 'coerced or induced' when he or she

[6] This is contrary to the State's earlier position in opening statements that the State was not suggesting that the morphine that killed Wolk was the same morphine delivered by Bannister.

[7] The judgment reflects that $4007 is owed for restitution; however, the transcript for the sentencing hearing indicates $4700. In light of the reversal, any money that Bannister has paid towards restitution should be returned to him.

'is under the pressure of a police investigation' and make a false confession as a result." ***State v. Hauk***, 2002 WI App 226, ¶25, 257 Wis. 2d 579, 652 N.W.2d 393 (footnote omitted). "Such corroboration is required in order to produce a confidence in the truth of the confession." ***Holt***, 17 Wis. 2d at 480. As noted, the corroboration must be of a "significant fact" before the conviction can stand. ***Schultz v. State***, 82 Wis. 2d 737, 753, 264 N.W.2d 245 (1978). While no case law defines exactly what a "significant fact" is, the dictionary defines "significant" as "having or likely to have influence or effect: important." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1096 (1991). We independently review whether the evidence presented meets the corroboration standard. *See* ***Barth v. State***, 26 Wis. 2d 466, 468, 132 N.W.2d 578 (1965).

¶10 We first observe that there is a dearth of information in the charging portion of the complaint concerning the charge against Bannister. It alleges only that Bannister delivered morphine at his residence "[o]n or about or between December 15, 2002 to January 17, 2003," a thirty-four-day span. No trial testimony explored or elaborated on this delivery. No eyewitnesses to the exchanges testified, and no other details fleshing out the facts of the delivery such as what time of day it occurred, what room the parties were in when the exchange occurred, or how the visit was set up was ever presented. The only evidence admitted at trial concerning these events was Bannister's rather generic confession that the deliveries occurred at his home. Like the charging portion of the complaint, Bannister's statement is also devoid of detail. Bannister told the detective little about the circumstances surrounding the delivery; he never mentioned what time of day the parties would meet, what the parties said, how they communicated, etc. We have only Bannister's barebones confession that at

his house he gave morphine pills to Michael Wolk on three or four occasions, and to Steven Wolk on three or four occasions within the span of about one month.

¶11 The detective, who knew at the time of the interrogation that Wolk had died of a morphine overdose, testified that: "He told me that he gave morphine to Steve on three to four occasions and to his brother Michael on three to four occasions. I believe he said approximately every third day or in that range."[8] In other words, Bannister confessed to giving Michael Wolk morphine pills three to four times over the span of thirty-four days. If, as the detective related, Bannister gave Michael Wolk the morphine pills three to four times approximately every third day, depending on when he started and stopped, the deliveries to Michael could have been easily concluded by mid-December. Thus, under this scenario, it would be extremely unlikely that any morphine found in Wolk's body on January 17, 2003, was obtained from Bannister unless Wolk saved some, and thus, does not corroborate the confession. Even if we assume that the deliveries occurred nearer to the time of Wolk's death, as was suggested by the prosecutor in his opening statement, when he claimed the last morphine exchange occurred two days before Wolk's death, the evidence of morphine in Wolk's body is not a significant fact corroborating Bannister's confession that he gave morphine pills to Wolk, it corroborates only that Wolk used morphine. This is so because Michael Wolk was a drug addict who regularly used illicit drugs. Consequently, the finding of morphine in his body was not a remarkable or important discovery. Just as a diabetic would have traces of insulin in the bloodstream, evidence of morphine would be expected in the bodies of morphine

[8] This is the most specific testimony that the officer gave regarding the number of visits of the two men. At other times the officer stated that Bannister told him that he delivered morphine to either Steven or Michael Wolk eight to ten times, about every third day within the thirty-four-day span.

addicts.[9] A significant fact is a meaningful and particularized fact that produces confidence in the truthfulness of the confession. Based on the evidence produced at trial, the finding of morphine in Wolk's body was not a significant fact corroborating Bannister's confession. Here, no other facts or circumstances supporting Bannister's confession were ever produced. No morphine pills or evidence of morphine pills were found next to Wolk's body, and the expert witnesses were unable to pinpoint the source of the morphine. No independent eyewitness testified to any drug exchanges between Bannister and the Wolks. Further, Bannister's confession did not yield any unusual information or circumstances that would not be widely known. Thus, under the circumstances present here, without additional evidence, the finding of morphine in Michael Wolk's morphine-addicted body is not sufficient to corroborate Bannister's confession claiming to have given morphine pills on prior uncertain dates to the deceased.

¶12 Inasmuch as the lack of corroboration of the confession presents the very situation that the corroboration rule was designed to prevent; that is, the possibility that the confession could have been false, the corroboration rule was not met. Accordingly, the evidence was insufficient to convict Bannister. Consequently, we reverse the conviction and remand this matter to the trial court for further proceedings.

By the Court.—Judgment reversed and cause remanded with directions.

[9] This is not to equate diabetes with morphine addiction. The comparison was used only to explain that people who regularly take medications can be expected to test positive for those drugs.

¶13 FINE, J. (*concurring*). I join fully in the Majority Opinion, but write separately to discuss two matters to which the Majority alludes: (1) the prosecutor's extortion of Edward Bannister's agreement to let the jury know that Michael Wolk died from an overdose of morphine, and (2) the prosecutor's basing his opening statement in part on Steven Wolk's projected testimony when on this Record there is nothing to show that the prosecutor had a good-faith basis to believe that Steven Wolk would not claim his Fifth Amendment privilege to not testify. I discuss these in turn.

(1) *Michael Wolk's death.*

¶14 As the Majority notes, although the State originally charged Edward Bannister with unlawful delivery of morphine, *see* WIS. STAT. §§ 961.14(3) & 961.41(1)(a), and first-degree reckless homicide, *see* WIS. STAT. § 940.02(2) (death resulting from the unlawful delivery of a controlled substance), on the morning of the first trial day, the prosecutor said that he would not pursue the homicide charge if Bannister agreed that the prosecutor could let the jury know that Michael Wolk died from a morphine overdose. Bannister's lawyer objected, and noted that the lead prosecutor had told him earlier that the State did not believe it had sufficient evidence to prove the reckless-homicide charge, and that the threat to file an amended information charging only first-degree reckless homicide was thus, as phrased by Bannister's lawyer, "just an end run attempt" to get the evidence of death before the jury. When the trial court said that it would permit the prosecutor to file a single-count amended information charging Bannister with first-degree reckless homicide, Bannister decided to let the prosecutor tell the jury that Michael Wolk died from a morphine overdose.

¶15 Later, in his opening statement to the jury, the prosecutor emphasized Michael Wolk's overdose death, relating how Wolk's wife found him dead in their living room:

> And the purpose of the testimony regarding the death is not [*sic*] ask someone to answer for that death, but it's an important element of evidence that I think that you have to listen to. So although it may be painful to listen to it, it may not be the nicest evidence you'll hear. It's important. It's important because his wife found him, what ends up, being dead.

The prosecutor then told the jury that the Milwaukee medical examiner and a toxicologist working in his office would testify that Michael Wolk died on January 17, 2003, from an overdose of morphine that he ingested either that day or the night before, but that the prosecutor was "not asking" the jury "to make a determination who is at fault for Michael Wolk's death. I don't know who is at fault for that death. *I know* who is at fault for giving him, several days before, some morphine and selling it to him, and that's this defendant right here." (Emphasis added.) In my view, all of this was highly improper.

¶16 First, a lawyer may *never* tell a jury what the lawyer *knows* about the contested issues in a case. Supreme Court Rule 20:3.4 is not only explicit: "A lawyer shall not: ... **(e)** in trial, ... assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, ... or the guilt ... of an accused," but, indeed, this is law-school 101. Frankly, it is shocking that this lawyer, Milwaukee County assistant district attorney Denis Stingl, apparently did not know that, or, if he did know it, ignored the proscription nevertheless. But that is not all.

> [A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in

> a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Although as contended by the State in oral argument on this appeal, Michael Wolk's death from a morphine overdose was evidence of his recent ingestion of morphine (while the traces found in his house could have been left there at almost any time), that fact was not relevant because Bannister's confession (the only "evidence" tying Bannister to morphine in Michael Wolk's house) encompassed mid-December 2002 to mid-January 2003, and the morphine that caused Michael Wolk's death could have been gotten by him at any time—even before December of 2002. In any event, the solution was to ask for an agreement that Michael Wolk possessed morphine in mid-January 2003 without telling the jury that he died as a result. Waving the "bloody shirt" of Wolk's overdose death invited—in the most blatant way—the jury to consider the evidence as proving that, beyond the delivery-charge, Bannister was also guilty of homicide.[1] Thus, the prosecutor's "warning" to the jury that "the purpose of the testimony regarding the death is not [*sic*] ask someone to answer for that death, but it's an important element of evidence that I think that you have to listen to" was disingenuous and not befitting the important role *for justice* that prosecutors have in our system. Indeed, it is a perfect example

[1] According to the Wikipedia online encyclopedia: "The term 'bloody shirt' can be traced back to the aftermath of the murder of the third Caliph, Uthman in 656 CE, when a bloody shirt and some hair alleged to be from his beard were used in what is widely regarded as a cynical ploy to gain support for revenge against opponents." Wikipedia, http://en.wikipedia.org/wiki/Bloody_shirt.

of the apophasis rhetorical device—arguing something by disclaiming an attempt to so argue. The prosecutor's opening-statement dance was, as Justice Felix Frankfurter noted in a somewhat related context, akin to "the Mark Twain story of the little boy who was told to stand in a corner and not to think of a white elephant." ***Leviton v. United States***, 343 U.S. 946, 948 (1952) (mem. of Frankfurter, J.).

(2) *Steven Wolk's non-testimony.*

¶17 As the Majority recounts, the prosecutor told the jury that Steven Wolk, Michael Wolk's brother, would testify that they both got morphine from Bannister in mid-January:

> I'm asking, for instance, *if Steven [Wolk] should testify*, you listen to him and you weigh his evidence and you weigh his credibility. It'll be out there for you. You may find he's a distasteful individual. He's a drug user. His brother was a drug user. Drugs killed his brother. You'll hear-- it'll be clear that Steven Wolk isn't the nicest person in the world but he's a witness to what happened.
>
> He'll tell you that over a span of time, that he and his brother, together with Steven, would obtain morphine from the defendant, Edward Bannister. It went on for about a year. They would go to Edward Bannister's home and obtain it. Sometimes, Edward Bannister would give it to him, according to Steven. *I don't know if that's true*-- but one thing, you have to weigh everything-- would give it to him free of charge. Sometimes, he'd give him some good faith money. That on or about the 14th or 15th of January, he can't remember the exact day, sometime in late morning or early afternoon, Steven Wolk, Michael Wolk went to the defendant's home and the defendant gave them two tablets of morphine, that they in turn gave the defendant $20.00 in exchange for that, and that Steven took one pill and Michael took another one of the pills so that they could use it at a later date or later time.

(Emphasis added.)

¶18 Steven Wolk never testified. Rather, when he was ostensibly supposed to testify, he and his lawyer told the trial court that Steven Wolk would invoke his Fifth Amendment privilege to not testify. When Bannister's lawyer asked the trial court whether he could refer in his closing argument to the fact that despite the prosecutor's assertions in his opening statement about what Steven Wolk would tell the jury, the State never produced Steven Wolk to the jury, the prosecutor complained that that would be unfair because, among other things, "I mentioned him as a *potential* witness. You will *maybe* hear from him or about him." (Emphasis added.)

¶19 The trial court ruled that not only could Bannister's lawyer not tell the jury that Steven Wolk asserted his Fifth Amendment privilege, *see* WIS. STAT. RULE 905.13(1) (In criminal cases, "[t]he claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel."), but, also, and this is the crux, forbade Bannister's lawyer from arguing that the prosecutor did not keep his promise about what Steven Wolk would testify, ruling: "I don't think you should reference him as failing to be a reference [*sic*]."[2] In my view, this was error.

¶20 A prosecutor's use of non-evidence (such as assertions in an opening statement or, under some circumstances, questions) to sway a jury, can deny a defendant his or her right to confrontation when those assertions are not backed by evidence produced at trial. ***Douglas v. Alabama***, 380 U.S. 415, 418–420 (1965) (defendant denied right to confrontation when prosecutor's statements and questions, although "not technically testimony," were the equivalent in the jury's eyes, thus triggering the right to confront). Of course, not every opening-

[2] Most likely the trial court said "witness" but this was mistranscribed as "reference."

statement promise of proof that is not validated by evidence is a prejudicial denial of the confrontation right. *See* ***Frazier v. Cupp***, 394 U.S. 731, 733–737 (1969) (*de minimis* effect on trial and prosecutor's good faith belief that evidence could be produced) ("Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given."). There is nothing in the Record here, unlike the situation in ***Frazier***, 394 U.S. at 733, that indicates that the prosecutor in this case tried to determine ahead of time that Steven Wolk would testify and that the prosecutor was misled by Steven Wolk's last-minute change of heart. Indeed, when the trial court prevented him from telling the jury that Steven Wolk did not testify, Bannister's lawyer pointed out that whether Steven Wolk would or would not testify "could have been asked of him a long time ago." The trial court, however, excused the prosecutor's failure to find out if Steven Wolk would testify by noting that Steven Wolk was in prison. The prosecutor, tacitly admitting that he did not bother to find out, replied that any assurance Steven Wolk could have given him would have been transitory because "he can change his mind up to the very moment."

¶21 Further, and working synergistically with the defendant's right to confront his or her accusers, is the rule that no party, especially a prosecutor in a criminal case, may promise to prove something that he or she knows, or reasonably should know, cannot be proven by evidence at trial. *See* ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 3-5.5 Opening Statement (3d ed. 1993) ("The prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which *the prosecutor believes in good faith will be available and admissible.* A prosecutor should not allude to any

evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.") (emphasis added).

¶22 It is no answer to say that the trial court told the jury that the lawyers' arguments were "not evidence"—the jury heard the prosecutor's version of what Steven Wolk would tell them, and that went unrebutted when the trial court refused to allow the defense lawyer to even remind the jury that it was a prosecutorial promise not kept. Indeed, as we have already seen, the prosecutor also improperly told the jury that he "knew" that Bannister had given morphine to Michael Wolk "several days before" Wolk's death on January 17, and that was the precise piece of the puzzle that the prosecutor promised the jury would be supplied by Steven Wolk.

¶23 We indulge the presumption that juries follow instructions because that advances the goals of finality. If we did not, we'd be trying the same case over and over again—the jurisprudential equivalent of a structure drawn by Maurits C. Escher. Yet, we must not let this general rule blind us to the rare situation when the trial court's instructions do not cure the prejudice. As Learned Hand repeatedly warned, the efficacy of the instructions are more assumed than real. *See* ***United States v. Delli Paoli***, 229 F.2d 319, 321 (2d Cir. 1956) ("Possibly it would be extreme to say that nobody can ever so far control his reasoning that he will not in some measure base his conclusion upon a part of the relevant evidence before him, which he has been told to disregard; but at least it is true that relatively few persons have any such power, involving as it does a violence to all our habitual ways of thinking."), *aff'd*, 352 U.S. 232; ***Nash v. United States***, 54 F.2d 1006, 1007 (2d Cir. 1932) (Instruction to jury to ignore prejudicial evidence often requires them to perform "a mental gymnastic which is beyond, not only their powers, but anybody's else."), *cert. denied*, 285 U.S. 556. Here, Steven

Wolk's projected testimony was the key link tying Bannister to the delivery of *any* morphine to Michael Wolk, no less the delivery of morphine to Michael Wolk several days or so before January 17.

(3) *Conclusion.*

¶24 If the prosecutor believed he could prove that Bannister had given Michael Wolk the morphine that caused Michael Wolk's death, he should have stayed with the first-degree-reckless-homicide charge and let the jury decide Bannister's guilt or innocence on that charge. If the prosecutor did not believe that he could prove that Bannister had given Michael Wolk the morphine that caused Michael Wolk's death, then his back-door use of the death-evidence was improper. Further, any lawyer, especially prosecutors, whose jobs are, as we have discussed, to seek *justice* and not merely convictions, should never promise in their opening statements to prove something unless they are certain that the evidence is both available and admissible. Trial judges, as impartial arbiters of justice, must ensure that this is done, and use appropriate judicial power if it is not. Additionally, institutional law offices, such as the district attorney's office, have a special responsibility to ensure that the lawyers they send into court follow the simple rules of evidence, ethics, and fairness. Sadly, none of this was done here.

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 47** **MILWAUKEE COUNTY** *For Official Use Only*

State of Wisconsin vs. Edward J Bannister

Date of Birth: 07-31-1953

Judgment of Conviction

Sentence to Wisconsin State Prisons and Extended Supervision

Case No.: 2003CF006219

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Manuf/Deliver Schedule I, II Narcotics	961.41(1)(a)	Not Guilty	Felony E	On or about 12-15-2003 to 1-17-2003	Jury	04-28-2004

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

06-23-2004 : On count 1 defendant is confined to prison for 5 years followed by a period of 3 years extended supervision for total length of sentence of 8 years.

Concurrent with/Consecutive to/Comments: Consecutive. Defendant to provide DNA sample, surcharge waived. Defendant eligible for the Challenge Incarceration program and the Earned Release program.

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	06-23-2004	Restitution		To Eileen Wolk.	
1	06-23-2004	License suspended	6 MO		

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
			4007.00				

IT IS ADJUDGED that **245** days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff execute this sentence.

John Siefert-47, Judge
Kelly Hedge, District Attorney
Jon G Spansail, Defense Attorney

BY THE COURT:

Court Official

June 24, 2004

Date

21

STATE OF WISCONSIN **CIRCUIT COURT CRIMINAL DIVISION** **MILWAUKEE COUNTY**

STATE OF WISCONSIN **Plaintiff**

vs.

CRIMINAL COMPLAINT

Bannister, Edward J.
7808 W. Bender Road, #1
Milwaukee, Wisconsin 53218
(D.O.B. : July 31, 1953)

Complaining Witness:
Detective Michael Carchesi

DA Case Number: 03XF8032

Defendant(s) **Circuit Court Case Number:** 03CF006219

THE ABOVE NAMED COMPLAINING WITNESS BEING DULY SWORN SAYS THAT THE ABOVE NAMED DEFENDANT(S) IN THE COUNTY OF MILWAUKEE, STATE OF WISCONSIN.

COUNT 01: DELIVERY OF CONTROLLED SUBSTANCE (SCHEDULE I or II NARCOTIC SUBSTANCE)
On or about or between December 15, 2002 to January 17, 2003, at 7808 West Bender Road, #1, City of Milwaukee, did knowingly deliver morphine, a controlled substance, contrary to Wisconsin Statutes sections 961.14(3) and 961.41(1)(a).

AS TO COUNT 01:
Upon conviction of this offense, a Class E felony, defendant may be fined not more than $50,000 or imprisoned for not more than 15 years or both

Upon conviction of this offense, the court shall suspend the defendant's operating privilege for not less than 6 months nor more than 5 years pursuant to section 961.50(1), Stats. If the court suspends the defendant's operating privileges the court shall impose a reinstatement assessment fee of $50.00. If the defendant's driving privileges are already revoked or suspended, any revocation imposed must be served consecutively.

Complainant is a detective with the City of Cudahy Police Department and bases this complaint upon information and belief and upon reports prepared by himself, Officer Brian Scott, and reports prepared by the Milwaukee County Medical Examiner's Office.

Said reports reflect that on or about or between December 15, 2002 to January 15, 2003, at 7808 West Bender Road, apartment #1, Milwaukee, Wisconsin, Edward Bannister (the defendant) delivered Michael T. Wolk morphine tablets.

Specifically, on January 17, 2003, Officer Scott was dispatched to 5027 South Illinois Avenue regarding a possible overdose. Upon arrival, Officer Scott spoke with Eileen Wolk who stated that she found her husband, Michael Wolk, on the love seat in the living room. Mrs. Wolk attempted to awaken Mr. Wolk, and found that he was unresponsive, and she called 911 for an ambulance.

(2)

Upon attempting to wake Mr. Wolk, Mrs. Wolk observed narcotics and paraphernalia on a small TV table located in front of Mr. Wolk. Officer Scott observed two syringes, a teaspoon, rolling papers and small white powdery rock substance on the table.

The paramedics were unable to revive Mr. Wolk and pronounced him deceased.

On February 10, 2003, Officer Scott contacted Mrs. Wolk who stated that the source of the heroin given to Mr. Wolk was from a subject who goes by the nickname of "Mouse," and has a phone number of 202-4767. Mrs. Wolk received this information from Mr. Wolk's brother, Steven Wolk. During the course of Detective Carchesi's investigation, he interviewed Steven Wolk who stated that on either Wednesday, January 14, 2003, or Thursday, January 15, 2003, between 10:00 a.m. and 1:00 p.m., he (Steven Wolk) and his brother Michael Wolk went to "Mouse's" residence on the north side of Milwaukee. While at "Mouse's" they (Michael and Steven Wolk) received two morphine pills from "Mouse." Steven Wolk stated that he and his brother (Michael Wolk) gave "Mouse" $20 for the two morphine pills. During the investigation Detective Carchesi was able to determine "Mouse" was Edward J. Bannister (the defendant).

Steven Wolk further stated that his brother Michael would take the morphine both orally and intravenously. Steven Wolk stated that "Mouse" is not a dealer and that he only gave his brother Michael the pain medication to relieve some of his brother's pain.

Steven Wolk further stated that they purchased morphine from "Mouse" on several occasions approximately one to two times per week for about the last year since January of 2002. Steven Wolk further stated that on a few occasions, "Mouse" would drop off Morphine pills at his residence but most of the time he (Steven Wolk) and his brother Michael Wolk would drive to the north side of Milwaukee to pick up the morphine pills from "Mouse's" residence.

On several occasions, Steven and Michael Wolk would receive the morphine pills anywhere form 80 to 100 milligrams and cut it up four to eight ways and they would consume a portion of the pills to take the edge off their pain.

On February 17, 2003, Detective Carchesi dialed the number 202-4767 and spoke to an individual who identified himself as Edward J. Bannister residing at 7808 West Bender Road, apartment 1, Milwaukee. During the conversation, the defendant stated that he goes by the nickname of "Mouse." The defendant explained that he has a medical problem, sickle cell anemia and high blood pressure.

On October 23, 2003, the defendant was advised of his constitutional rights and he did make a statement. The defendant stated that he has a friend, Steve, and a brother named Mike, whom he did not know very well, come to his residence on several occasions. Steve told the defendant that his brother Mike was very sick and was hurting and requested morphine pills from the defendant. The defendant felt sorry for Steve's brother and gave Steven morphine pills to give to his brother to alleviate his brother 's pain. The defendant has known Steve for a few years but did not recall where he meet him.

The defendant stated that he believed that he first started giving Steve and his brother the morphine in December of 2002 and continued for about a month until mid-January of 2003, approximately every third day. The defendant described the morphine pills as prescription morphine pills that are a grayish type pill with the number 100 written on them. The defendant takes morphine for the pain he experiences with his sickle cell anemia. The defendant's doctor is Dr. John Hanson, Jr., and he works out of St. Luke's on 27th Street.

The defendant stated that the first time Steve came over to his residence was in mid-December of 2002 stating that his brother was hurting real bad and asked for some morphine to relieve his brother's pain. The defendant gave Steven one morphine pill and Steve and his brother left the residence. The defendant did not actually see Steve or his brother consume the morphine but assumed Steve gave the morphine pills to his brother (Mike) after they had left the residence.

The defendant recalls a second time when Steve and his brother arrived over to his residence a few days after the first incident. The defendant once again gave Steve one gray morphine so that Steve could get it to his brother Mike to alleviate the pain that he was going through.

The defendant could not recall the dates or times of these transactions. The defendant stated that he never received any of the money for the transactions he was only giving the morphine to Steve and his brother to allieviate Steve's brother's pain.

The defendant stated that he would estimate that he gave Steve and his brother morphine on eight to ten occasions during the month span between the middle of December 2002 to the middle of January 2003. The defendant recalled Steve coming over to his residence on approximately three to four occasions by himself telling the defendant that he needed another morphine pill for his brother's pain. On each occasion, the defendant gave Steven one morphine pill.

The defendant also gave Mike, Steve's brother, a morphine pill on three to four occasions when Mike came to his residence alone. On each of these occasions, Michael said "don't tell my brother Steve about this." The defendant gave Michael one morphine pill of his prescribed medication.

On April 16, 2003, Detective Carchesi went to the Milwaukee County Medical Examiner's Office and picked up the autopsy protocol regarding this case. The autopsy was performed by Medical Examiner Dr. Jeffrey M. Jentzen, Medical Doctor, and Dr. Jentzen determined the cause of death to be morphine toxicity.

On October 24, 2003, Detective Carchesi contacted Dr. Hanson who stated that he is treating Edward J. Bannister and has been prescribing him MS Contin (morphine) 100 milligrams since October 11, 2002. Dr. Hanson further stated the defendant has the morphine refilled on a monthly basis. Specifically, Dr. Hanson stated that he prescribed the defendant morphine on October 11, 2002, November 8, 2002, December 12, 2002, and January 10, 2003. Dr. Hanson stated that on each of those dates he wrote a prescription for a quantity of 90 MS Contin

(morphine) 100 milligrams stating that the defendant takes three pills daily for his sickle cell anemia.

Your complainant has reviewed a CCAP printout which reflects that in Milwaukee County Circuit Court case number 1998CF882229, 1991CF911111, 1992CF920433, 1992CF920726 and 1993CF931383, the defendant was convicted of felony drug offenses. The CCAP printout also reflects the defendant was sentenced on each of those case numbers. At this time, the criminal complaints and judgment of conviction are not available, however, the State will provide copies of said documentation as soon as possible.

******End of Complaint******

Subscribed and sworn to before me and approved for filing on this 27th day of October, 2003

ASSISTANT DISTRICT ATTORNEY **Complaining Witness**

Kelly L. Hedge\MK

-- FELONY COMPLAINT --

J:\REVIEW\03XF\08000 - 08499\03XF8032\2003-10-27 COMP COMPLAINT ~BANNISTER,EDWARD~~03XF8032.DOC
TYPIST: MK

STATE OF WISCONSIN | **CIRCUIT COURT CRIMINAL DIVISION** | **MILWAUKEE COUNTY**

STATE OF WISCONSIN **Plaintiff**

vs.

Bannister, Edward J.
7808 West Bender Road, #1
Milwaukee, Wisconsin 53218
(D.O.B. : July 31, 1953)

Defendant(s)

INFORMATION

Complaining Witness:

Detective Michael Carchesi

DA Case Number 03XF8032
Circuit Court Number
03CF6219

I, E. MICHAEL MC CANN, DISTRICT ATTORNEY FOR MILWAUKEE COUNTY, WISCONSIN, HEREBY INFORM THE COURT THAT THE ABOVE NAMED DEFENDANT (S) IN THE COUNTY OF MILWAUKEE, STATE OF WISCONSIN.

COUNT 01: DELIVERY OF CONTROLLED SUBSTANCE (SCHEDULE I or II NARCOTIC SUBSTANCE)
On or about or between December 15, 2002 to January 17, 2003, at 7808 West Bender Road, #1, City of Milwaukee, did knowingly deliver morphine, a controlled substance, contrary to Wisconsin Statutes sections 961.14(3) and 961.41(1)(a).

DATED:

11-5-03

E. Michael McCann
District Attorney

ASSISTANT DISTRICT ATTORNEY

MK

J:\Review\03Xf\08000 - 08499\03XF8032\2003-10-27 COMP Complaint ~Bannister,Edward~~03XF8032.doc

FILED
CRIMINAL DIVISION
NOV - 5 2003
JOHN BARRETT
Clerk of Circuit Court

3

STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**

STATE OF WISCONSIN,

V.
EDWARD BANNISTER

Defendant.

MOTION TO SUPPRESS STATEMENT

CASE NO. 03CF006219

PLEASE TAKE NOTICE, that the defendant, by counsel, moves the Court for an order suppressing statements made by defendant to agents of the state, subsequent to the seizure and arrest of defendant by agents of the state. Said statements should be suppressed at trial because said statements were apparently the result of an unlawful arrest in that said arrest was performed by Cudahy police outside the jurisdiction of the arresting officers and without proof of compliance with Sec 175.40 (5)(a),(b) and (d). Further said statements were made involuntarily and Miranda warnings were not properly given by the agents of the state nor waived by defendant, Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), and defendant is entitled to a hearing as to exclusion of all statements made pursuant to State ex rel Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965).

Also, defendant moves for exclusion of any and all oral statements of defendant a summary or copy of which the State of Wisconsin has not provided to defendant's counsel, pursuant to Wis. Stats. Sec. 971.23.

Dated this 13th day of Feb, 2004.

Michael W. Schnake
Attorney for Defendant

Prepared by:
Michael W. Schnake, Attorney at Law
Bar #01011348
705 E. Silver Spring Drive
Milwaukee, WI 53217
414-332-5020

(6)

STATE OF WISCONSIN | CIRCUIT COURT | [COUNTY NAME] COUNTY

STATE OF WISCONSIN
Plaintiff
vs.

EDWARD J. BANNISTER
Defendant.

FILED
CRIMINAL DIVISION
47 APR 28 2004 47
JOHN BARRETT
Clerk of Circuit Court

VERDICT

Case No. 03CF006219

We, the jury, find the defendant, Edward J. Bannister, guilty of Delivery of a Narcotic (Morphine) as charged in the Information.

Robert Tuttle
Foreperson

Dated this 28th day of April, 2004

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APPENDIX B

03-00255 WOLK, MICHAEL T.

Milwaukee County Medical Examiner
933 West Highland
Milwaukee, Wisconsin 53233

AUTOPSY PROTOCOL

NAME: WOLK, MICHAEL T. SEX: MALE AGE: 50 YEARS

DOB: 03/20/1952

DATE OF DEATH: JANUARY 17, 2003 TIME: 0616 HOURS

DATE OF AUTOPSY: JANUARY 17, 2003 TIME: 0945 HOURS

PLACE OF AUTOPSY: Milwaukee County Medical Examiner's Office

PERFORMED BY: Jeffrey M. Jentzen, M.D.
Medical Examiner

WITNESSED BY: Karen Komassa
Forensic Pathology Supervisor

CAUSE OF DEATH: Morphine Toxicity

OTHER SIGNIGFICANT CONDITIONS: End Stage Lung Disease

Signed _____ 4/7/03
Jeffrey M. Jentzen, M.D. Date Signed
Medical Examiner

NOTES BY: WE TYPE/CSD, MEDICAL TRANSCRIBER

B-1

HISTORY:

The decedent is a 50-year-old caucasian male with a history of drug abuse, specifically heroin. The decedent was found dead in his residence during the early morning hours of January 17, 2003.

WITNESSES:

Personnel present for portions of the postmortem examination include Karen Komassa, Forensic Pathology Supervisor; and myself, Jeffrey M. Jentzen, M.D., Medical Examiner.

IDENTIFICATION:

The decedent was identified by his wife, Eileen Wolk, on January 17, 2003 at 6:17 a.m.

CLOTHING:

Accompanying the body is clothing consisting of the following items:

1. A blue striped, long-sleeved shirt.
2. A pair of black sweatpants.

GENERAL EXTERNAL EXAMINATION

The autopsy is commenced at 0945 hours on Friday, January 17, 2003. The body is that of a well-developed, well-nourished, somewhat thin, caucasian male who appears consistent with the reported age of 50 years. The body measures 72 inches in length and weighs 158 pounds.

Rigor mortis is presently developed within the muscles of mastication, with early rigor mortis present in the upper extremities. There is blanching lividity of the posterior neck, back and thighs. The body is somewhat warm to the touch.

HEAD: The body hair has a normal male distribution. It is dark brown in color and measures 9.0 cm in length. EYES: The irides are gray and the sclerae are clear. There are no petechiae in the palpebral or bulbar conjunctivae. NOSE: The septum is midline. There is green, mucous-like material present within the nares. There is yellow material exuding from the nares. MOUTH: The oral cavity has capped teeth in the upper jaw.

 B-2

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
Branch 47

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 03CF-6219

EDWARD J. BANNISTER,

Defendant.

ORIGINAL

JURY TRIAL

April 26, 2004

Before the Honorable
JOHN SIEFERT
Circuit Judge, Br. 47,
Presiding.

APPEARANCES:

PAUL SANDER and DENNIS STINGL, Assistant District Attorneys, appeared on behalf of the Plaintiff.

JON G. SPANSAIL, Attorney at Law, appeared on behalf of the Defendant.

DEFENDANT PRESENT IN PERSON.

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STEPHANIE OLIG - Of

TRANSCRIPT OF PROCEEDINGS

THE COURT: Now the court will call the case of State of Wisconsin versus Tim Matlock, M-A-T-L-O-C-K-- excuse me, that's not correct. Forget that.

Now the court will call the case of State of Wisconsin versus Edward Bannister, B-A-N-N-I-S-T-E-R, Case Number 03CF006219.

Appearances, please.

MR. SANDER: State appears by Paul Sander for Denis Stingl.

MR. SPANSAIL: Attorney John Spansail for Edward Bannister who is in the back not yet produced.

THE COURT: Okay.

Now, are we going forward with the trial, because we have a jury panel waiting?

MR. SANDER: There was some discussion where we discussed about the actual charge, but I believe it will still be a trial. It all depends. I'm prepared, judge, to file an amended information--

THE REPORTER: Excuse me?

MR. SANDER: Sorry.

I can inform the court that the state's

prepared to file an amended information charging reckless homicide.

There's been a lot of discussion already between the court and Mr. Stingl. I was going to suggest it might be appropriate for Mr. Bannister to be here before I present anymore.

THE COURT: I think he should be present.

Can we bring him out, please?

BAILIFF: Yes.

THE COURT: Now, the defendant, Edward Bannister is now present in court.

State should proceed.

MR. SANDER: Thank you, judge.

I was present in the courtroom for most of the morning. I just want to make that part of the record.

I know Mr. Stingl has been, for today's purposes and for this trial's purposes, is the primary DA assigned to this case, and just to make clear, I'm not sure if this was put on the record, Mr. Stingl had I believe a one fifteen doctor's appointment, either twelve thirty or one fifteen. He would not be back until two fifteen or two thirty. He asked me to handle the voir dire jury

selection. Obviously, that's what I'm prepared to do.

He took the police reports with him so he could need to prepare for the trial. I don't have those, but for jury selection, I don't that's necessary.

Mr. Stingl and the court and Mr. Spansail have discussed an evidentiary issue regarding this case.

Specifically, as the court knows from the complaint, this is a case that factually involves the defendant allegedly delivering controlled substance to an individual or individuals, and one of those individuals ultimately is deceased in relationship to controlled substance use.

Without getting into an exhaustive discussion as to the Len Bias law, the court supported that as a possible issue, inquired of the state whether or not this would be a case proceeding as a reckless homicide or not.

Mr. Stingl, both at the very beginning, the morning when he spoke with Mr. Spansail off the record, had indicated at that time and also at the time the court had asked, that our position was that we were going to proceed as a delivery

charge.

The court then, I believe, and this is my recollection, I don't have a transcript obviously from this morning, my recollection is the court inquired then as to the specific evidentiary aspects of the case relating to the homicide or the deceased person, whether or not that would be evidence that would be allowable and, obviously, I think from Mr. Stingl's perspective, it's not only allowable but it's necessary for proof of the charge that we have filed at this point, the delivery charge.

And I think there was basically a point where the case was passed and it was going to be thought, by Mr. Stingl, and that there was going to be more discussion before the jury was sworn in as to exactly how to accomplish any concerns regarding prejudice.

First, I think this is-- obviously, maybe it's a no-brainer statement, but I want to point out, and the court's very well aware of this, obviously, any relevant evidence by definition has to be prejudicial. It's a question if it's undue prejudice and, of course, our position is that any evidence regarding a person deceased, because of

having received controlled substance, that aspect of a deceased person is not unduly prejudicial.

We are prepared today, at this moment, in fact, I do have an amended information for homicide and under the Len Bias Statute 940.02(2)(a), and Mr. Stingl had instructed me, he actually phoned me while he was in transit to his appointment, and his concern was that if the court and if the defense maintain this perspective, that any reference at all to a person being deceased is unduly prejudicial, that the-- a complete dissertation of the facts would frankly be necessary for a reckless homicide charge, so that's why we're prepared to do that if, obviously, if the court or defense agree that there's a way we can present evidence in this case that would include the fact that somebody is deceased.

I think the state's prepared to agree we don't need to show photographs of a deceased person. We don't need to show photographs of the autopsy, that that would be probably unduly prejudicial of a charge of controlled substance, but the reference to a medical examiner who then examined a deceased person's body and found proof

of a controlled substance in that person's body as being corroborative of the defense confession, I don't think that aspect is unduly prejudicial, and I think that that's appropriate for it to come in.

If the defense and the court agree, we can keep going as is with the charge of delivery of controlled substance. If the defense and or the court disagree, I'm prepared to file an amended information.

That, of course, brings up the other issue of notice and surprise. I don't believe there is a problem with notice or surprise, because this was something clearly communicated to Mr. Spansail through-- and negotiations between himself and Ms. Hedge who was originally the assigned DA on this case. This was a possibility and in fact, again, it was discussed this morning off the record as to which way the state was going to proceed.

And Mr. Spansail, my understanding, had indicated he was prepared either way, with either the delivery charge or reckless homicide charge.

But the first question is, I guess, do we proceed as a delivery charge or the homicide

charge, depends on how the defense and the court view what I've just explained as a factual issue.

MR. SPANSAIL: Your Honor, I feel that this is just an end run attempt to try to get into evidence things that they were going to get in before. You heard Mr. Stingl. I'm trying to recall if this was off record, but on record, but he did say we are not filing a charge for a homicide here because I don't believe we have enough evidence to prove that. I doubt that in the past two hours anything has changed majorly to find that-- to have that; they're going to have that evidence that pushes over that they can prove this when he obviously told you that he couldn't prove that, and now to say that they can, that smacks in the face of implausibility, that they're trying to change things to try to get us to agree, to allow this additional evidence in. This is their attempt, and then that-- that charge would go nowhere. They said so much to you this morning, judge.

THE COURT: Well, if they discussed that in an off the record, in a jury instruction conference, they may not have felt they were going to go forward with a reckless homicide, but now on

reexamination, they feel that they do have enough.

I would ask the state, first of all, are they planning to go forward on a two count amended information, one of delivery of narcotics plus reckless homicide or is it just going to be a reckless homicide?

MR. SANDER: It would be a single count of reckless homicide. My understanding of the law would be that a lesser included count would be the delivery charge, so I think when we get to the point of jury instructions, Mr. Stingl would be asking for the reckless homicide instruction with a lesser included instruction, that the jury may not find him guilty of that but find him guilty of a delivery charge.

THE COURT: Next, does the state feel that the original criminal complaint contains sufficient information that an amended information on reckless homicide could be filed on that criminal complaint file?

MR. SANDER: Before I answer, let me review this.

THE COURT: Are all the facts of the reckless homicide facts set forth in the criminal complaint?

MR. SANDER: If there's a sufficient nexus between the information and the complaint, it doesn't have to cite every fact. I'm just looking at this quickly.

I know there's reference to a deceased Michael Wolk, W-O-L-K, last paragraph of Page 1 as being found unresponsive.

There's references later on, on the second to top paragraph on Page 2, that paramedics were unable to revive him and pronounced him deceased.

There's, regarding the controlled substance, the role the controlled substance played in the status of him being deceased. Last paragraph, in reference to the County Medical Examiner's Office, there was a determination of death to be caused by morphine toxicity.

There's-- obviously, there's a four-page conversation, in a brief sense, that's sufficient at the very least to show it's causatively related to the original charge of delivery of controlled substance.

THE COURT: Finally, if you realize it goes forward on a reckless homicide, that this would have to be transferred to the homicide

sexual assault courts for trial, would not be tried here.

In addition, while I could hold-- I could hold the arraignment on the amended information and set bail on the amended information, I would not be the one trying the case.

And also, I believe, as a matter of due process, additional time for trial preparation would be granted for the defense before they would try it before a homicide judge.

MR. SANDER: That brings up two points.

I'll admit your first point, you believe this would have to be tried in front of the sexual assault slash homicide calendar judges. I don't know if that's the case or not. If the court says that's the case, obviously, I'll rely on the court knowing that.

I didn't know that until Mr. Stingl has tried on at least one other occasion-- give me one second, if you could.

MR. SPANSAIL: I believe also there may be a speedy trial demand.

THE COURT: It's not applicable because he's on a signature bond as to this case. I read for you the minutes. I point out there's a

$10,000.00 signature bond to revert to PR. It was lifted; however, it would no longer apply because there would be a new charge.

MR. SANDER: I missed that conversation.

THE COURT: The speedy trial demand would not apply because there are various exceptions. One of the exceptions would be, for example, if an amended information charging a new charge for which there would have to be additional trial preparation on behalf of the defense, it would have to be transferred to a different court so the speedy demand would not qualify.

MR. SANDER: I agree with that analysis. You're correct regarding the first the point court brought up, which court would try this case.

I asked the detective next to me, I know there was, a couple of years ago, almost an exact similar case, at least a charge we're discussing, but that case started as a homicide charge, so it was originally charged to a homicide court and stayed there.

THE COURT: If this was a two count amended information charging a drug count, then I would still keep it because there's a drug count. The idea has pendant jurisdiction; however, for

lack of a better word, it's not the same concept. However, here, it would cease to be a drug count at all, and whether or not the judge decides to give the lesser included offense, would be up to the judge after having heard the evidence at trial. It could be that he will not give the lesser included offense to the jury, perhaps at the defense's request, only on the charge in the amended information, so if you do wind up filing an amended information, I certainly can hold the arraignment on it, set bail on it; however, I believe it would have to be transferred to a homicide court for trial.

MR. SANDER: That's an administrative thing. I don't know about that. I believe, legally speaking, I don't think we can charge it as count two delivery.

THE COURT: I don't believe you can either. It could be duplicitous.

MR. SANDER: Right.

I think we're prohibited. Again, obviously, there's going to be an internal decision. Probably, the chief judge will have to say is this something that can stay in the drug court in terms of, obviously, if that's the case,

it has to be reassigned to another court. I think the first choice would be to find out if there's another court ready to do that because everything is--

THE COURT: It might be a due process requirement. If the defense demands additional time to prepare for trial because the amended information is quite different from the original information, I think it's a matter of due process that will have to be granted.

On the other hand, if they wanted to go to trial today and inform a judge from the homicide division ready to try a homicide case, it could be sent over.

MR. SANDER: That was the point, in terms of the availability of a trial judge to do this from a homicide calendar. It may be all for naught because, regarding the due process the court made, I think frankly the state's position is there's no need to adjourn the trial on that basis only because, again, as I said, this was clearly communicated on numerous occasions in writing and orally to Mr. Spansail, that this is a case that may very well end up being a homicide case. As I indicated already when Mr. Spansail

and Mr. Stingl discussed this case this morning, that was still up in the air until Mr. Stingl said we're just going to do the delivery charge.

Maybe Mr. Spansail can correct me if I'm wrong. I thought Mr. Spansail through comments of Mr. Stingl indicated that he was prepared to go today either as a reckless homicide or as a delivery charge. If I'm wrong, obviously, he can correct me. If that was the case, if he was, he obviously knew about it, adequately prepared, and I don't think due process would require a due process adjournment. It might be necessary for the calendar but--

THE COURT: Are you prepared for a homicide trial today?

MR. SPANSAIL: I believe we would be requesting for additional time.

THE COURT: Okay.

Now, the next question then becomes, does the defense wish to enter into a stipulation with the prosecution that there will be no objection to the introduction of testimony from the coroner indicating that there was a death and the death was from ingestion of morphine that would be introduced into evidence to support the state's

contention that the defendant delivered morphine, or are you going to object on other bad acts grounds at which point the state is not even going to file an amended information?

MR. SPANSAIL: Briefly, let me discuss this.

THE COURT: Sure.

MR. SPANSAIL: Your Honor, I would like to see if there's perhaps-- you gave us an A or B choice, perhaps there is a C. I think--

THE COURT: Please, proceed.

MR. SPANSAIL: One is whether or not they have the right to file the amended information. I think we still need a ruling on that.

THE COURT: My ruling would be that it is allowable for them to file that amended information at this time.

MR. SPANSAIL: Okay.

THE COURT: There are sufficient nexus between the charge in the amended information and the facts set forth in the complaint that I would allow them to file an amended information.

MR. SPANSAIL: I was not allowed to argue that.

THE COURT: Well, counsel, that's the way

I see it. At this point, you're certainly welcome for an opportunity to persuade me to the contrary.

MR. SPANSAIL: I don't believe that the actual complaint states that-- that A, that the morphine that was found in his body specifically came from Mr. Bannister. Maybe some slight inferences. I believe the criminal complaint should spell things out plainly and be clear as day on all four corners.

THE COURT: Well, if I did allow them to file an amended information, you would of course be allowed to raise objections to the sufficiency of the criminal complaint, and it may be that that other judge that would hear those motions, might find the criminal complaint is deficient. I don't know, but then again they would reissue a new criminal complaint.

MR. SPANSAIL: I believe that we can come to a resolution, Your Honor, if you give me the exact stipulation.

THE COURT: That would be worked out between the parties.

MR. SPANSAIL: Yes.

THE COURT: Basically, what the state is proposing is that if the defendant stipulates not

to object on other bad acts grounds of reference to the death of Mr. Wolk, that they will not file an amended information in this case but will proceed to trial on the lesser charge that is currently charged in the existing information.

MR. SANDER: Judge, to clarify, I'm not too sure the state is necessarily saying because of bad acts. It could be that, at least that and issues of relevance and prejudice.

THE COURT: You'll draft the stipulation. You'll negotiate it between the parties.

Is it the intention of the defense as to enter into such a stipulation?

MR. SPANSAIL: Yes.

THE COURT: I think I should take a brief recess while you do so, and I think we ought to have that in writing, preferably, off of your-- your word processor, entered into by the defendant as well as counsel. Once that's signed, we'll order up the jury and begin the jury process; the jury selection process on the existing information.

MR. SANDER: Again, hopefully, so the record is clear, it's two ten. I'm expecting Mr.

Stingl by two fifteen or two thirty.

THE COURT: We'll see if you can work out the negotiations.

MR. SANDER: Judge, I'll work on that right now.

THE COURT: Thank you.

(Whereupon, a short recess was had by the Court.)

THE COURT: Now the court will call the case of State of Wisconsin versus Edward Bannister, B-A-N-N-I-S-T-E-R, Case Number 03CF006219.

Appearances, please.

MR. SANDER: State appears by Paul Sander for Denis Stingl.

MR. SPANSAIL: Attorney Jon Spansail for Edward Bannister who also appears in person.

THE COURT: Mr. Bannister is present.

Now I understand that the defense has agreed they will not bring a motion in limine and will not seek to-- will not object to on other bad acts evidence grounds.

The state's proffered evidence in this case that there is-- that allegedly there is some proof of delivery, the fact that in Mr. Wolk's

body and around the places he died was morphine allegedly delivered to him by the defendant.

MR. SPANSAIL: No. We have a stipulation.

THE COURT: Let me take a look at the proposed stipulation.

MR. SANDER: Judge, I should let the court know I'm not too convinced a stipulation is necessary to object to. It's an appropriate concern about an evidentiary matter, and I think the court can make a ruling basically as a motion in limine to limit the state's ability to delve into the issue of a deceased person, beyond the fact that there was a deceased person, such as I've already said on the record, that we would not for instance bring in photographs of the autopsy or photographs of the body at the scene. That any reference, the only facts regarding a deceased person would be limited to the purposes of having discussions by a medical examiner and his staff developing the fact that that body was examined.

THE COURT: You might want to enter into the stipulation, regardless of whether there's objections for bad acts, because it takes the person out of the courtroom just like it would

take the photographers out of the courtroom, and it would have less impact, possibly. One could consider or the jury, if it came in by stipulation that he found morphine in the body as opposed to having him on the witness stand testifying in person, is that correct?

MR. SANDER: I missed that.

THE COURT: In other words, normally, you'd be bringing in Mr. Jentzen to testify. By this stipulation, the defense agrees he won't testify, instead, you'll simply have a stipulated fact that morphine was found in the body.

MR. SPANSAIL: No.

MR. SANDER: No.

That's the problem with the stipulation. I think we're using a tool, for lack of a better word, using the old screwdriver driving the nail. I think a tool of stipulation doesn't address the issue of undue prejudice being talked about by the death and the role the death plays in this case.

I think what we had agreed was the defense wants the charge to remain as delivery of controlled substance and they're agreeing, for that to happen, they're letting the state present evidence having the death occurred.

The state is willing to limit our presentation of evidence about that death such that we won't have unduly prejudicial facts of a dead body, but I don't think Mr. Spansail is agreeing to stipulate to anything about drugs being in a body.

THE COURT: Then you're basically entering into an agreement that you won't amend the information if he agrees to the trial, not to object to the introduction of that evidence. He certainly can probe it by cross-examination. He can challenge it with rebutting evidence of his own but not-- not object on other grounds.

MR. SANDER: It's my understanding, basically, a motion in limine, the court is saying both parties need to be clear. I think it should be clear that the state is limiting itself.

I should say, off the record, Mr. Stingl is now in court.

MR. STINGL: But the state is going to be limiting itself to discussions in evidence about there being a person deceased by the name of Michael Wolk. There will be testimony by the medical examiner and by the toxicology expert from the Medical Examiner's Office that helps the state

present its case of delivery of controlled substance. The state will not be presenting photographs. That would be perhaps unduly prejudicial for delivery of a controlled substance. That keeps the case charged as delivery of controlled substance.

THE COURT: Defense is agreeing they will not object on other bad acts evidence to that introduction of bad evidence?

MR. SPANSAIL: Of the evidence that an autopsy was done upon Michael Wolk and that Michael Wolk was dead.

THE COURT: And there was morphine found in his body.

MR. SPANSAIL: Well, that I'm not stipulating to because--

THE COURT: But you're not challenging that it's other bad acts. You may challenge whether or not it was morphine or whether or not it was in his body, how long it had been there, so on all of those things you may challenge or not challenge, but you're not at this point asking me to eliminate, prevent the state from introducing that evidence because you agree that it has probative value as to whether or not your

defendant delivered morphine, and it is not unduly prejudicial.

(Whereupon, defense attorney is conferring with his client.)

MR. SPANSAIL: Yes, Your Honor, that is our understanding and, yes, we would be agreeing. In exchange, the state would not be charging him with reckless homicide.

THE COURT: By entering into stipulation, I'll ask the state, do they believe they are then precluded from ever charging him with reckless homicide?

MR. STINGL: I think so, judge, if we try these facts.

THE COURT: You think the jeopardy would attach because you're simply trying these facts?

MR. STINGL: Yes.

THE COURT: Even if the court were not to hold to that position, I think probably would, even if it didn't, you'd be barred by doing the reckless homicide by the stipulation you're doing or agreement?

MR. STINGL: It's not a stipulation.

The evidentiary agreement and the fact that I think, again, duplicitous or

multiplicitous, we are prohibited. Once we do a trial, jeopardy attaches to this charge of doing a different charge on these facts.

MR. SPANSAIL: I just want to see in plain English if they agree, in exchange for that, that they won't charge him.

MR. STINGL: That's our agreement.

MR. SPANSAIL: Okay.

THE COURT: Thank you. There's agreement between the parties then.

And we'll bring up the jury and the state will in fact be allowed to introduce evidence of the cocaine in the body of the deceased and the defense will not challenge that other acts-- morphine is what I wanted to say.

MR. STINGL: Judge, can I withdraw whatever documents I gave you? I think I gave you a copy of the stipulation.

THE COURT: It's--

MR. STINGL: I want to keep track of all my copies. Thank you.

MR. SPANSAIL: Can we just take a brief moment, Your Honor, my client's considering--

THE COURT: I'm going to wash my cup out.

(Pause.)

MR. SPANSAIL: Your Honor, we're going forward.

THE COURT: Linda, call down and send one of the bailiffs to get the jurors.

THE CLERK: They're waiting for the jurors.

MR. SPANSAIL: Do we need to sign this stipulation?

THE COURT: No, because you did it orally on the record.

(Pause.)

BAILIFF: All rise for the jury panel.

(Whereupon, the jury panel is present in the courtroom.)

THE COURT: Potential jurors should remain standing to take an oath.

THE CLERK: Please, raise your right hands.

(Whereupon, the jury panel was sworn in by the Clerk.)

JURORS: I do.

THE CLERK: You may be seated.

THE COURT: Ladies and gentlemen, the prospective jury, first, I'd like to introduce myself. I'm Judge John Siefert and this is Branch

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
Branch 47

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 03CF-6219

EDWARD J. BANNISTER,

Defendant.

ORIGINAL

JURY TRIAL

April 26, 2004

Before the Honorable
JOHN SIEFERT
Circuit Judge, Br. 47,
Presiding.

APPEARANCES:

PAUL SANDER and DENNIS STINGL, Assistant District Attorneys, appeared on behalf of the Plaintiff.

JON G. SPANSAIL, Attorney at Law, appeared on behalf of the Defendant.

DEFENDANT PRESENT IN PERSON.

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MR. STINGL: Not from the state.

THE COURT: If either party has no objections, we will swear the jury at this time.

(Whereupon, the jury panel was sworn in by the Clerk.)

JURORS: I do.

THE COURT: You may be seated. You may be seated, and we'll have opening statements from the parties. And opening statements are not subject of notetaking, so we won't hand out your notebooks probably until tomorrow. The state presents their opening argument first.

MR. STINGL: May it please the court, counsel, the defendant, Detective Carchesi, ladies and gentlemen of the jury, this is what's known as opening statements.

As the court indicated, it's not evidence but I hope it'll be some help to you in showing you, telling you what evidence you will hear from the stand over the next several days.

The case-- the charge in this case is delivery of controlled substance. It's morphine, as indicated in voir dire. You'll hear about the morphine. Morphine is a perfectly legal drug when prescribed by a doctor, when ordered by a doctor

in a hospital, but it's illegal for other people to distribute it. It's illegal for other people to use it without a prescription. It's a dangerous, deadly drug if misused, and that's how the police became involved in this case to begin with.

On January 17th, 2003, there was a person you'll hear about named Michael Wolk, and paramedics, emergency personnel were called to his address in Cudahy at 5027 South Illinois Avenue in Cudahy. His wife, Eileen Wolk, called the paramedics because it appeared that the defendant was unresponsive. He was in the living room, ended up-- in fact, that he was dead. He had died, as you will hear, from an overdose of morphine.

And the purpose of the testimony regarding the death is not ask someone to answer for that death, but it's an important element of evidence that I think that you have to listen to. So although it may be painful to listen to it, it may not be the nicest evidence you'll hear. It's important. It's important because his wife found him, what ends up, being dead.

The police get there, the emergency

personnel are still working on him, trying to revive him, are unable to do so.

Also at the scene were two syringes and a spoon. And you will hear evidence of how the morphine that was consumed on a regular basis by this Michael Wolk was in pill form. That's not uncommon for someone to get a prescription from a doctor for morphine, that you take as a pill orally.

But you'll also hear how, number one, sometimes even morphine that is at first legally prescribed is subsequently transferred once or twice or more times in the community to drug users, abusers for money or other favors. You'll hear about, and that's illegal and that's dangerous, and in this case it was deadly.

And the morphine is used by people who are basically addicted to it. It's an opiate. It's derived from the same plant, the poppy plant as heroin is. You will hear how it can be used like heroin. The pill can be crushed up into a powder form. A device such as a spoon or some other container is taken, the powder is placed in the spoon. The liquid, normally water, is added to it. It's heated up by the drug user. It's

taken through a syringe and injected into the body.

That's what Michael Wolk did. That's how he consumed it. That's how he died. There were two syringes and two spoons on the scene.

And the Medical Examiner's Office sent-- it's a newer phrase for what used to be known as the coroner-- the Office of the Chief Medical Examiner, he's Jeffrey Jentzen. You'll hear from him. His office responded to the scene. There was a death on the arrival of the of police there. So the Medical Examiner's Office did take the body, and they did take the syringes and they did take the spoon, and that was for the purposes of testing.

Because of the nature of death, it had to be investigated by the Medical Examiner's Office. And you'll hear in this case from two people from the Medical Examiner's Office also sometimes referred to as the ME's Office.

Dr. Jentzen will tell you he performed an autopsy on the deceased Michael Wolk and that cause of death was a morphine overdose.

You'll also hear from a toxicologist, one of the directors there. Toxicology is where you

take certain substances, tissue from the body, blood from the body, urine from the body, other things, and test it for certain substances.

In this case, the blood of the deceased was taken and it was tested to determine, by Susan Gock, she is the toxicologist, Ms. Gock tried to determine what was in his system when he died, and she could determine what was in his system that contributed or caused his death. She works hand in hand with the doctor, the medical examiner, Dr. Jentzen.

She determined and she'll tell you that there was opiates in there that's consistent with morphine. Morphine is an opiate. That there was also what's known as unconjugated morphine. And she'll tell you that-- she'll say it's clear he ingested morphine prior to his death, and that with the addition of Dr. Jentzen's conclusions, will show you in fact Michael Wolk did consume morphine on January-- on or about January 17th, perhaps the night before, of 2003.

And that's important because that sets the wheels in motion. That brings the police involved. You've got a suspicious death. Now they have to determine where did he get the

morphine, who was responsible for providing him with morphine, how did he get this morphine, and it's kind of a whodunit.

In some ways, you have to work backwards from the only thing you have at first; the deceased, some drug paraphernalia, the syringes and spoon.

By the way, Susan Gock tested the syringes and spoon and they had morphine traces, so once again, it's clear Michael was using that morphine.

So you'll hear testimony regarding his brother, Steven Wolk.

And let me just tell you one thing. I'm not trying to be disrespectful. I'm just trying to be realistic here. Michael Wolk, like I said, I understand he is now deceased, he has a brother, Steven Wolk, and they know the defendant in this case, Edward Bannister.

And as in many cases, in many cases dealing with drugs, in many cases dealing with other crimes, you're going to hear from people that may to you be distasteful. I'm not asking that you like perhaps everybody that you hear from and hear about because their lifestyles are

suspect, they may not make you feel good about them, and I can't change that. I'm not asking you to befriend them.

I'm asking, for instance, if Steven should testify, you listen to him and you weigh his evidence and you weigh his credibility. It'll be out there for you. You may find he's a distasteful individual. He's a drug user. His brother was a drug user. Drugs killed his brother. You'll hear-- it'll be clear that Steven Wolk isn't the nicest person in the world but he's a witness to what happened.

He'll tell you that over a span of time, that he and his brother, together with Steven, would obtain morphine from the defendant, Edward Bannister. It went on for about a year. They would go to Edward Bannister's home and obtain it. Sometimes, Edward Bannister would give it to him, according to Steven. I don't know if that's true-- but one thing, you have to weigh everything-- would give it to him free of charge. Sometimes, he'd give him some good faith money. That on about the 14th or 15th of January, he can't remember the exact day, sometime in late morning or early afternoon, Steven Wolk, Michael

Wolk went to the defendant's home and the defendant gave them two tablets of morphine, that they in turn gave the defendant $20.00 in exchange for that, and that Steven took one pill and Michael took another one of the pills so that they could use it at a later date or later time.

Steven Wolk said they had been doing this several times a week for a while, that Michael had been doing it for approximately three months and Steven had been doing it for longer periods of time.

Apparently, the defendant did have a prescription from a doctor, did obtain the prescription, morphine drugs from a doctor but then distributed them. That's what the case is about. That's what you cannot do. You cannot deliver morphine. You cannot deliver a dangerous drug in the community, sell it or give it. You cannot deliver it at all unless it's ordered, prescribed by a physician and distributed by a licensed pharmacist of which the defendant is neither.

And I'm not asking you to make value judgments. I'm not asking you, as I indicated, to make a determination who is at fault for Michael

Wolk's death. I don't know who is at fault for that death. I know who is at fault for giving him, several days before, some morphine and selling it to him, and that's this defendant right here. I'm not asking you to make a value judgment about this defendant; whether he's a good person or bad person. I'm asking you to listen to the facts to make a determination as will be the only reasonable outcome that this defendant delivered morphine, the defendant himself.

You'll hear from Detective Michael Carchesi who is here in court, he admits it in a statement taken by Detective Carchesi, fully making sure the defendant's rights were protected. The defendant admits to it.

As with many admissions, perhaps he tries to put it in the light most favorable to himself, that he was trying to help out Michael, and Michael was in pain may be true, may be not true. It's not a defense. It's not a defense.

And I really think that's another thing, you have to weigh that statement. Detective Carchesi wrote it down as the defendant said it. He wrote down what the defendant said. He didn't sugarcoat it. He didn't make it worse or better,

but as much as the defendant wanted himself to look better in that statement, the fact is, it's a confession to the crime of delivering that morphine. And he admits that it was ongoing in nature, and that is what this case is about.

And, in the end, I'm going to ask you to find the defendant guilty of delivery of a controlled substance. That's what this is. That's what we call it when somebody sells or gives away or trades drugs under the law, that under the law, it's illegal to distribute by a person such as the defendant, such as myself, such as I think probably all of you as well. It cannot be done. It is illegal and the defendant should be held responsible, and that's what I'm going to ask you to do. I'm going to ask that you find him guilty.

Thank you.

THE COURT: From the defense, and we will go over the time for the purposes of opening statements. We have to get them in today.

MR. SPANSAIL: Hi, folks. I'm Attorney John Spansail. My defendant is Edward Bannister.

What this comes down to, Edward Bannister did not deliver controlled substance to Michael

Wolk. You'll hear that any morphine that Michael Wolk might have had indeed came from another source. Most likely, it was Steven Wolk who gave-- which is Michael's brother-- who gave him this morphine, and he's the one who should be charged. Edward Bannister did not know Michael Wolk.

You'll also hear about this statement supposedly given to the officer. Well, I'll tell you, this was not a signed statement, videotaped or anything like that. It was whatever the officer wanted to put down there. And it was also supposedly taken in October, more than nine months after the fact even though they knew who Mr. Bannister was and where he was living.

You'll also hear no police officer saw Edward Bannister give Michael Wolk any controlled substance. All we have here is that morphine was found in his system and, well, Mr. Bannister takes morphine for sick'le cell anemia.

Try to put the two together, but there are also intervening incidents here that Michael's brother, Steven Wolk, is a drug addict and does morphine himself. He's acquired morphine from other sources. He's gotten it from other places;

on the streets, and he injects it. Mr. Bannister takes pills. This was supposedly injection here. More likely that it was Steven who gave him the morphine.

Edward Bannister is a father and has sick'le cell anemia. He understands pain. He shouldn't be held for actions of another.

I believe, upon hearing all of this evidence, you will find Mr. Bannister not guilty.

THE COURT: Thank you.

Now, with that, we are going to excuse you jurors for the evening rather than calling the first witness.

I would like you to be back in your jury room by ten thirty tomorrow morning. Do not come into the courtroom separately. Go directly to your jury room. You can only be brought in together as a group.

Now, you are the jury. You are to listen to the facts and render your verdicts as instructed by the court, so do not discuss this case with anyone while the case is in progress. That includes your family, your spouse as well as all others. Do not discuss this case among yourselves until the case is submitted to you for

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 47

STATE OF WISCONSIN,

Plaintiff,

vs. CASE NO. 03-CF-6219

EDWARD J. BANNISTER,

Defendant.

ORIGINAL

JURY TRIAL DAY TWO MORNING SESSION

PROCEEDINGS HAD in the above-entitled matter before the HONORABLE JOHN SIEFERT, a Circuit Court Judge, Branch 47, on the 27th day of April, 2004.

APPEARANCES:

DENIS STINGL, Assistant District Attorney.

JON SPANSAIL, Attorney at Law, appearing on behalf of the Defendant, EDWARD BANNISTER, who is present in court.

Karen Keto, Court Reporter

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MR. STINGL: Well, it's not enough to request things. You have to put forth the legal basis by which you're entitled to it. And therein the State's opinion we have turned over anything under the discovery rules. I know that these boiler plate motions to compel are always filed in every case by Attorney Michael Schnake with absolutely no foundation whatsoever. I think that's the case here. Without more showing that there is something missing, which I have no idea what would be missing, I think that should be denied, and I'm asking that it be denied.

THE COURT: It will be denied, Counsel. There has been no showing that anything relevant to this case is discoverable, that has not already been turned over to the defense.

Then we go to the Miranda/Goodchild motion to suppress statements. The statement was filed. It's brief. I don't think we ever had any reply brief, but I don't think we ever had the evidentiary hearing on Miranda/Goodchild. I suppose it could be argued that the defense by not explicitly adopting the original request for a Miranda/Goodchild hearing by the defense has essentially waived it, but the case law looks with disfavor on, the Mockner hearings look with disfavor on waiving Miranda/Goodchild hearing rights. Does the State wish to

proceed with Miranda/Goodchild before we enter into the evidentiary portion of this trial?

MR. STINGL: Yes, the State would recall Detective Carchesi.

THE COURT: In the previous ruling the Court does find that the detective did have probable cause to arrest on a crime and believes that a crime had been committed as well as the right to arrest on the warrant. I believe that Wolk's testimony was credible to the officer, his statements to the officers provided a credible basis upon which to make a finding of probable cause and to make the arrest.

Now we'll proceed to reswear the detective.

THE CLERK: Do you solemnly swear the testimony you are about to give is the truth, the whole truth and nothing but the truth so help you God?

DETECTIVE CARCHESI: I do

THE CLERK: Please be seated. State your name and spell it for the record. Detective Michael M-I-C-H-A-E-L, Carchesi, C-A-R-C-H-E-S-I.

DIRECT EXAMINATION BY MR. STINGL:

Q. Detective Carchesi, you are a City of Cudahy Police Detective?

A. That's correct.

Q. How long have you been with the City of Cudahy

Police Department?

A. Since February 2 of 1990.

Q. Little over 14 years. Have you received training as a police officer and police detective in the area of interrogation of witnesses?

A. Yes, I have.

Q. What type of training?

A. I have had the Reeds training which is a three day training to determine individual's posture and things of that nature that they're doing when they are interviewing them. I also have FBI training. I think Sergeant Dan Kraft had a three day class as well called Interview and Interrogation.

Q. And prior to October 23, 2003, had you ever been involved in interviewing of witnesses?

A. Yes, I have several times.

Q. And did that include the interview of suspects in proceedings?

A. Yes, sir.

Q. About how many suspects in criminal investigations have you interviewed prior to October 23, of 2003?

A. I would have to say hundreds, possibly thousands, maybe up to a thousand people.

Q. And those involved statements made to people who

were in custody and subject to the Miranda Warnings?

A. That's correct.

Q. And what are the Miranda Warnings?

A. It's the rights that the individual has when they're in custody, if they want to give a statement to law enforcement.

Q. Now, on October 23, 2003, were you involved in an investigation which among other things related to the delivery of morphine by a person identified as Edward Bannister?

A. Yes, I was.

Q. And pursuant to that investigation, did you on that day, arrest Edward Bannister in the area of 7808 West Bender Road?

A. Yes, I did.

Q. And that is in the City and County of Milwaukee?

A. That is correct.

Q. And among other things, your investigation involved also a death due to morphine overdose which had occurred on January 17, 2003, in your city at 5027 South Illinois Avenue?

A. That's correct.

Q. And after arresting Mr. Bannister, did you transport him to the Cudahy Police department?

A. Yes, Officer Paczocha and I transported him to

the Cudahy Police Department.

Q. One again, we speak of Mr. Bannister, is he in court today?

A. He's seated at defense table.

Q. Wearing what?

A. Blue sweatshirt.

MR. STINGL: I ask the record reflect he's identified the defendant.

THE COURT: So ordered.

Q. Now, when you arrived at the Cudahy Police Department, did you have an opportunity to interview the defendant?

A. I did, but Mr. Bannister stated that he suffers from sickle cell anemia and high blood pressure and he was hungry so I obtained food for him prior to interviewing him.

Q. Do you recall what food you obtained for him?

A. I believe it was two McChicken sandwiches and an order of fries and Sprite from McDonald's.

Q. And you gave that to the defendant before commencing the interview?

A. I did.

Q. And how long approximately had the defendant been in custody prior to the time the interview commenced?

A. I believe we arrived back to the police

department about 1045 hours.

MR. SPANSAIL: What was that you said?

A. I said I believe we arrived back to the police department at 1045 hours. I'm sorry.

THE COURT: All of police departments in Milwaukee County with the exception of the Milwaukee Police Department operate on military time so it's 1045 hours.

A. 10:45 a.m.

THE COURT: Which is what Milwaukee would say.

A. And then we obtained food for him, and I believe the interview started right around 1200 hours or 12 o'clock noon.

Q. Noon?

A. Yes.

Q. And where did the interview occur at?

A. In the private crisis interview room at the police department.

Q. Could you describe that room?

A. It's probably about a 15 by 10 room that has two doors and a desk and some chairs and actually some stuffed animals. When we have kids in there, we interview them as well.

Q. Any windows?

A. There is a window on the door. It's similar to

the door back here. That is that you can see out a glass window.

Q. Into a hallway?

A. Yes.

Q. Is it well lit?

A. Yes.

Q. And when you interviewed the defendant, do you recall where you were seated and where the defendant was seated?

A. Yes, I was sitting behind the desk and Mr. Bannister was on the other side of the desk facing me.

Q. Was he seated as well?

A. He was.

Q. Was he handcuffed at the time?

A. He was not.

Q. Was not handcuffed?

A. No.

Q. Now, prior to the interview, did you inform the defendant of his Constitutional Rights?

A. I did.

Q. And how do you do that? Do you inform him off the Miranda cards?

A. Yes, I read right from the Department of Justice Miranda card for Constitutional Rights.

MR. SPANSAIL: Objection as to leading.

THE COURT: I'm going to overrule it.

Q. I'm showing you what's been marked as Exhibit No. 2. Can you identify that?

A. Yes, that is the Department of Justice Constitutional Rights card.

Q. And in fact, that's a photocopy of the card, correct?

A. Correct.

Q. And did you make that photocopy yourself?

A. I did.

Q. And did you utilize the original card that you used in reading rights to a defendant?

A. Yeah, I always use this card.

Q. And is that photocopy a true and accurate reflection of the card that you use?

A. Yes.

Q. When you read the rights to a suspect, do you read it directly from the card?

A. I do.

Q. Do you read it one right at a time and then ask if he understands or do you read it all the way through?

A. I read it all the way through, and then ask if he understood everything on the card.

Q. And why don't you demonstrate how you in fact read the Miranda Warnings to this defendant on October 23,

2003?

A. Okay. I stated: You have the right to remain silent and anything you say can and will be used against you in a court of law. You have the right to consult with a lawyer before questioning and have a lawyer present during questioning. If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you so wish. If you decide to answer questions now without a lawyer present, you have the right to stop questioning and remain silent any time you wish, and the right to ask for a lawyer any time you wish including during questioning. And then after I complete that I state on the back of the card it says do you understand each of the rights or each of these rights and Mr. Bannister responded that he did and stated that he wished to speak with me about this incident.

Q. And based upon your experience and based upon your observations on October 23, 2003, did the defendant appear to understand the rights that you read to him?

A. Yes, he did appear to understand.

MR. SPANSAIL: I'm going to object to the knowledge of him.

THE COURT: He can say what he appeared to do. For example, he appeared to understand because he nodded

yes back and forth or appeared not to understand because the look of bewilderment appeared across his face. Those are things of observation that the witnesses can testify to. They do not involve looking inside the other party's head. The defense objection is overruled.

MR. STINGL: Thank you.

Q. And what about your observations led you to believe that he did understand the rights?

A. Well, he stated that he did and he was nodding his head up and down.

Q. And have you observed people under the influence of alcohol or other drugs?

A. Yes, I have.

Q. Did he appear at all to be under the influence of any such substance?

A. No, not to my knowledge.

Q. And he told you he understood the rights?

A. Yes, he did.

Q. And subsequently you did have an interview with him, correct?

A. I did.

Q. And during the course of that interview, you made observations of the defendant?

A. Yes, I did.

Q. Did he make appropriate responses to your

inquiries?

A. I thought he did, yes.

Q. Did he tell you a story that made sense and was consistent in your opinion?

A. Yes.

Q. And he specifically told you about information involving your investigation regarding the distribution of morphine?

A. Correct. That's what I was interviewing him on.

Q. And Detective, I'm showing you what's been marked as Exhibit No. 1. Can you identify that?

A. Yes, that is the arrest report and interview of Mr. Bannister.

Q. I would also ask-- I note that it's not the complete report.

A. It's pages 8 through 10 of the report that I filed.

Q. And that's a report that you filed?

A. Yes, sir.

Q. And on page 8, there is a section headed "Interview with Edward Bannister", correct?

A. Correct.

Q. Is that interview that you testified to during this hearing?

A. Yes, it is.

Q. And did you prepare this particular report?
A. I did.
Q. And it does go on from the bottom of page 8, all of page 9, and almost all of page 10 to the point where it says transport to CJF, correct?
A. Correct.
Q. And this is a statement made to you by Mr. Bannister?
A. That's correct.
Q. Now, is this a verbatim statement?
A. Well, I mean, I guess, yeah. I guess I believe that, I mean that it's not word for word, but I take notes down when interviewing him, and this is a general reflection what he told me.
MR. SPANSAIL: Your Honor, I guess I need to identify what the word verbatim means, if it means something different.
THE COURT: I think it has a meaning of--ordinary meaning so I'm going to just say that I think it has it's ordinary meaning and we'll go on.
Q. So you don't write it down word for word?
A. No, because you're interviewing. You do the best you can. I guess what I'm saying the verbiage may be different but these are the exact facts that he told me.
Q. All right. And in the end, you ask Mr. Bannister

if he would like to write out a written statement and you gave him that opportunity?

A. Yes, I did.

Q. Did he agree to do that?

A. He stated he did. He refused. He did not wish to write out a written statement.

Q. And then other than the initial food you got the defendant from McDonald's, did he ask for anything else during the course of the interview?

A. No, I don't believe he did.

Q. Okay. And if he would have asked for anything else, you know, within reason, water or soda or other food, would you have obtained it for him?

A. Yes, I would have.

Q. And how long did the interview last?

A. My recollection is about an hour, maybe an hour and a half, somewhere in that area.

Q. During the course of the interview, before the interview or after the interview, did you make any threats or promises to this defendant?

A. No, I did not.

MR. STINGL: I move to introduce Exhibits 1 and 2 into evidence.

THE COURT: Any objection?

MR. SPANSAIL: No.

THE COURT: They're received.

MR. STINGL: I have no further questions.

THE COURT: Cross examination.

CROSS EXAMINATION BY MR. SPANSAIL:

Q. What did you arrest Mr. Bannister for?

A. What did I arrest him for?

Q. Yes.

A. Well, there was actually two things he could be arrested for.

Q. What did you arrest him for?

A. I arrested him on our drug case, but he also had outstanding warrants.

Q. What were the charges when you arrested him?

A. Delivery of controlled substance, and I also arrested him for first degree reckless homicide.

Q. Did you tell him about these?

A. Did I tell him about those?

Q. Yes.

A. At what point?

Q. Did you tell him what he was being arrested for?

A. He was told what he was arrested for, yes.

Q. On all charges?

A. Yes, he was booked and informed of the charge he was arrested on, yes. In fact, he made several phone calls afterwards to his family members.

MR. SPANSAIL: That last part is not relevant to the question. Ask it be stricken.

THE COURT: It will not be stricken. Please proceed.

Q. Do you know if he was-- Were you aware at the time of the arrest that he had sickle cell anemia?

A. Initially when I went to his residence I did not know that. Upon arriving there, he informed me of that, myself and Officer Paczocha that he did have sickle cell anemia.

Q. Did you know when he last took medications for that?

A. No, I really don't know.

Q. When he was in your custody, did he take any medications?

A. I honestly don't recall that.

Q. So you don't know if he was under the influence of any medication at the time of the interviewing him?

A. I don't know when he last had his medication. He wasn't under the influence of any drugs if that's what you're asking me in my opinion.

Q. Did he take medications with him when you arrested him?

A. He did have some medications with him.

Q. Did you ever ask him when he last took the

medication?

A. I believe the medications were-- I don't believe I asked him that but the medications were transported down to the county jail with him.

Q. Now, you've said he was not handcuffed when you interviewed him?

A. He was handcuffed at his residence when Officer Paczocha and I arrested him and transported to the police department, placed in the cell, given lunch. Upon interviewing him, I took him out of the cell and now he was not in handcuffs.

Q. Were there any other restraints used, leg chains or--

A. No, I didn't feel I needed those, sir.

Q. So he was not?

A. I didn't feel-- Again, if I felt intimidated, I would have. I did not feel intimidated by Mr. Bannister. But, sir, can I add to that question?

Q. No, you have answered whether or not he was restrained.

A. Okay.

Q. Did you tell him-- You said the booking room is when he learned of the arrest, right?

A. In the booking room he was informed of what the charges were, yes.

Q. Okay.
A. That's correct.
Q. Did you ever ask him if he wanted an attorney?
A. Yes, I read him the Miranda card and asked him if-- I told him he had a right to an attorney.
Q. You told him of a right. Did you ever ask him if he wanted an attorney?
A. Mr. Bannister appears to me to be very--
Q. The question is it yes or no, sir?
A. On the Miranda card?
Q. Did you ever ask him if he ever wanted an attorney?
MR. STINGL: I'm going to object that he's arguing about the Miranda card. In fact, he read the Miranda card on the record here.
THE COURT: Overruled. Please answer. Just please answer. I'm asking him to answer the question.
A. I asked him about the form of Miranda. I didn't ask him after that.
Q. You have no recording of this interview, do you?
A. Tape recording.
Q. Well tape, video?
A. I have no.
Q. Audio?
A. Correct, I have no recording.

Q. And there was not a written signed statement in this case?

A. Mr. Bannister refused. He was offered that opportunity.

Q. Did you write out a statement for him to sign?

A. No, I did not. He did not wish me to do that either.

Q. He did not. He did not get an opportunity to review and to dispute these notes, did he?

A. When I asked Mr. Bannister if he would like to write out a written statement, he said the report will suffice and this would be fine for him is what he told me.

Q. Those were his exact words?

A. Something to that, yes. I mean, it was several months ago. I don't remember it verbatim exactly what he said.

Q. Did you tell him what he's being charged with after you interviewed him?

A. I stated that I already did in the booking room he was advised.

Q. After you interviewed him?

A. Yeah, because I didn't know. I didn't know what the interview was, what he was going to state in the interview.

Q. What did you tell him after the interview?

A. I told him he was arrested for first degree reckless homicide and delivery of a controlled substance which I already answered.

Q. Did you tell him when he was arrested at his house that he was being arrested for first degree reckless homicide?

A. No, I did not.

Q. Did you-- I don't believe this was answered. Did you show him your notes after the interview?

A. I don't believe I did, no.

MR. SPANSAIL: Nothing further at this time.

THE COURT: Thank you. Anything further from the State?

MR. STINGL: No.

THE COURT: Thank you. You may step down.

MR. STINGL: State rests subject to rebuttal.

THE COURT: Okay.

MR. SPANSAIL: If I can just have one brief moment to consult with my client. Nothing more from defense, your Honor, except for argument. We'll rest.

THE COURT: Okay. Thank you. Then argument.

MR. STINGL: Yes, Judge. The purpose of Miranda is to insure that the defendant is advised of his rights under the constitution prior to being subject to questioning by the police. A voluntary waiver of those

rights allows interview by the police which can be stopped at any time by the defendant. Here it's clear and uncontradicted testimony that the defendant was arrested in the morning of October 23, 2003. He was transported to the Cudahy Police Department. He appeared to be in some distress or informed the police that he had some physical problems and needed something to eat and the officers did in fact obtain food for the defendant to eat prior to questioning him. He was then taken from a cell after his meal, transported to a private interview room which was described by Detective Carchesi. He was read his Constitutional Rights. He appeared to understand those rights and said he understood those rights and he did waive those rights and agreed to make a statement to Detective Carchesi. He did not ask for anything else during the course of the interview but any reasonable request such as a break or water or soda or additional food, bathroom break would have been provided by and given by Detective Carchesi.

Detective Carchesi abided by the rules of Miranda. He abided by the rules of Goodchild. There was no threats or promises. The defendant was not handcuffed. It was a comfortable room that was well lit. Detective Carchesi was seated by a desk. The defendant was seated in front of the desk unhandcuffed. There is no indication

whatsoever that there was any involuntariness of the statement. So based on that I am asking that the defendant's motion to suppress the statement be denied.

THE COURT: And then from the defense.

MR. SPANSAIL: Yes, your Honor. My client, I think, is well aware of he has sickle cell anemia. I think that they should have checked upon his medications at the time of having this statement. Further, I would question the accuracy of the statement which is also part of the Goodchild. There is no audio, nothing written. My client didn't have a chance to reflect upon the notes. This is all written up from the detective's memory and what he thought he wants to put down there, to show there is some sort of veracity to this statement. I don't believe that that's an accurately statement.

THE COURT: And then the State has the last word.

MR. STINGL: Well, it's uncontradicted. The defense hasn't put on any testimony that that's not what he said. That's their choice to do, but I don't know how you can argue that's not what he said. Detective Carchesi testified that he made notes and these are facts that the defendant told him. Maybe not word for word but these are the facts and when you look at the particular document and well--strike that. I mean, it's uncontradicted. The testimony is that Miranda was given. It was understood.

It was waived. The defense is now arguing something about the contents of the statement which isn't relevant really here, and there is no indication there is any Goodchild violation so I'm asking that it be denied at this time.

THE COURT: The only possible issue here was whether the defendant's medical condition made it such that he could not enter into a knowing, voluntary waiver. I don't think that is the case. The Court believes that Miranda was complied with. The Court believes that the statement was given voluntarily. It will not be suppressed. The State will be allowed to bring it in in testimony.

Anything else before we bring the jury in briefly before lunch? If not, we will then bring the jury in briefly so they know we haven't been wasting their time, and we'll hear a little testimony, beginning of the testimony and then break for lunch.

(IN THE PRESENCE OF THE JURY)

THE COURT: Now, the Court will call the case of State of Wisconsin versus Edward Bannister, Case No. 03-CF-006219. Appearances are as previously stated. We are now in the presence of the jury, and I believe we will now begin the trial of this case, is that correct?

MR. STINGL: Yes.

THE COURT: And then we should-- The jury has

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
Branch 47

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 03CF006219

EDWARD J. BANNISTER,

ORIGINAL

Defendant.

JURY TRIAL

(Afternoon Proceedings.)

April 27, 2004

Before the Honorable
JOHN SIEFERT
Circuit Judge, Br. 47,
Presiding.

APPEARANCES:

DENIS STINGL, Assistant District Attorney, appeared on behalf of the Plaintiff.

JON G. SPANSAIL, Attorney at Law, appeared on behalf of the Defendant.

DEFENDANT PRESENT IN PERSON.

(30)

STEPHANIE OLIG - Off:

Wal-Mart?

A No.

MR. SPANSAIL: Nothing further.

THE COURT: Okay.

MR. STINGL: No redirect.

THE COURT: No redirect.

Any questions for this witness from the members of the jury? If not, thank you.

Ma'am, you may step down.

MR. STINGL: May this witness be excused?

THE COURT: If there's no objection from the defense, she may be excused.

MR. SPANSAIL: I don't believe we're going to be recalling her.

THE COURT: Okay. Thank you.

MR. STINGL: I want to check to see if the next witness is in the hall.

(Pause.)

MR. STINGL: State calls Detective Michael Carchesi.

MICHAEL CARCHESI was called as a witness by the Plaintiff, and having been first duly sworn, was examined and testified as follows:

THE WITNESS: I do.

THE CLERK: Please, be seated. State your name and spell it for the record.

THE WITNESS: Detective Michael Carchesi, M-I-C-H-A-E-L, C-A-R-C-H-E-S-I.

DIRECT EXAMINATION

BY MR. STINGL.

Q Detective Carchesi, who is your employer?

A Cudahy Police Department.

Q And in what capacity are you employed?

A As a police detective.

Q How long have you been a police detective with Cudahy?

A Three years and eight months.

Q And prior to that, were you a uniformed officer?

A For ten and a half years.

Q So altogether you've been with the Cudahy Police Department how long?

A A little over fourteen years. I began employment on 2-2 of 1990.

Q Now, you worked on an investigation in this complaint involving the defendant, Edward Bannister?

A Yes, I did.

Q And when I say Edward Bannister, is that person

here in court?

A Yes, he is.

Q Would you please point him out and tell us what he's wearing?

A He's wearing the blue sweatshirt, sitting at the defendant's table.

MR. STINGL: I ask the record should reflect the defendant, Edward Bannister.

THE COURT: So ordered.

MR. STINGL:

Q And that investigation involved investigation of delivery of morphine during a period of time, correct?

A That's correct.

Q From what period of time?

A Well, the report was filed on the 17th of January of 2003, and during my investigation, depending on who you spoke to, there was the delivery of morphine to this individual a year prior to that incident.

Q Okay. When you say to this individual, what individual?

A To the victim, Michael Wolk.

Q So the investigation, is it fair to say, commenced with the death of Michael Wolk?

A That is correct.
Q And it occurred on January 17th, 2003?
A Yes, it did.
Q That was at an address in Cudahy?
A Yes, it was.
Q And where in Cudahy?
A 5027 South Illinois Avenue.
Q And that's in the City of Cudahy, County of Milwaukee?
A Yes, it is.
Q And when did you become involved in the investigation?
A I believe it was the 12th of February when it was-- when the case was assigned to me by my lieutenant.
Q And it came to you as a detective, correct?
A That's correct, when I was a detective.
Q And as part of your investigation on February 12, 2003, I take it now certain information had been gathered since the death of Mike Wolk?
A That's correct.
Q Okay. Did you have contact with the Medical Examiner's Office?
A I did. I called them back in February as well to try to determine the cause and manner of death.

Q And did you also receive information from the wife of the deceased, Eileen Wolk?
A Yes, I did.
Q And in investigations such as this, could you describe how it's often conducted, just in general, the gathering of information?
A Well, in an investigation such as this, you have to take into account everyone's statement and try to obtain as much information as you can speaking to family members of the victim, friends and anyone who may have information pertaining to the case.
Q And did you have information here that the death may have been caused by a drug overdose?
A Yes, I did.
Q And when you were assigned to the case on February 12th, were you able to obtain information as to exactly the nature of the drug overdose?
A Not at that time, no.
Q Okay. So you had to continue to investigate this incident?
A That's correct.
Q Now, as part of this investigation on February 17th, 2003, did you have an opportunity to interview a Steven Wolk?

A Yes, I did.

Q And he was determined to be the brother of the deceased?

A Yes, he was.

Q And did he give you certain information?

A Yes.

MR. SPANSAIL: I object. This path is going to be full of hearsay.

THE COURT: Okay.

Now, can we have a sidebar for a minute.

(Whereupon, a brief sidebar was had by the Court.)

MR. SPANSAIL: Your Honor, I'd just like to have a ruling on this later.

THE COURT: Sure.

MR. STINGL: Thank you, judge.

Q Now, as part of the investigation, you received information from the deceased wife, correct?

A Yes, I did.

Q You received information from the Medical Examiner's Office?

A That's correct.

Q And that was a continuing Medical Examiner's Office investigation, it hadn't yet been completed by February?

A Correct. It was an ongoing investigation.
Q And in fact, you were here when Ms. Gock just testified that her toxicology report was not completed until April 10th of 2003?
A Yes, I was.
Q And so that was; those conclusions and that information contained in that report, were not available to you till after that date?
A Till after April 10, correct.
Q And in February 17th of 2003, as part of your gathering of information in this case, did you interview a Steven Wolk?
A Yes, I did.
Q And did you interview him on more than one occasion on that day?
A I interviewed him once on that day and I believe once two days following, I believe. It was the 19th, my second interview, with him.
Q And what was your purpose in interviewing Steven Wolk?
A To obtain information relating to his brother's death.
Q Okay. And based upon all of the information that you obtained from those sources, did you receive, or did your investigator-- did you turn to a

person to investigate in addition to those you already talked to?

A Yes. I interviewed the defendant, if that's what you're asking.

Q That's Mr. Bannister?

A Yes.

Q Based upon information received by Steven Wolk on February 17th, 2003, did you attempt to make contact with the defendant on that date?

A Yes, I did, in the presence of Mr. Wolk.

Q And did you-- were you in fact able to speak with the defendant on that date?

A Yes, I was.

Q And was that in person or over the phone?

A That was over the phone.

Q Okay. And among other things, did you inform the defendant that you wanted to speak with him?

A Yes. I ordered him into the police department.

Q And for what date was that?

A That was for the following day on the 18th of February.

Q February 18th, 2003?

A Correct.

Q Okay. And I take it, if possible, you like to interview people in person as preferable as over

the phone?

A Always; always in person.

Q And so the defendant was ordered in on February 18th, 2003?

A Yes, he was.

Q Did the defendant appear at the Cudahy Police Department as ordered to do so?

A He did not.

Q Okay. Did he contact you at all?

A He called me that afternoon stating that he, I believe--

MR. SPANSAIL: Objected to as hearsay.

MR. STINGL: This is the defendant.

THE COURT: Sustained. That will be sustained.

MR. STINGL: Could we have a sidebar?

THE COURT: Sure.

(Whereupon, a brief sidebar was had by the Court.)

MR. STINGL:

Q So you spoke to the defendant on February 18th, 2003 on the phone?

A That's correct.

Q And that was the date that he was ordered into the Cudahy Police Department?

A Yes, it was.
Q Did the defendant appear at the Cudahy Police Department on that day?
A He did not.
Q Did he ever voluntarily, after that date, appear at the Cudahy Police Department?
A No, he did not.
Q And your investigation continued?
A Yes, it did.
Q And that included a contact with the Medical Examiner's Office when the toxicology report was completed?
A Yes. I believe it was on the 16th of April of that year I contacted the Medical Examiner's Office.
Q That would be April 16th or about there?
A Of 2003, correct.
Q And that's when you-- did you receive a copy of the toxicology report?
A Yes, I did.
Q And on that day, did you also have cause to be recovered from the Medical Examiner's Office a copy of the autopsy report?
A Yes, I did.
Q And based upon that information contained therein,

specifically, the toxicology report regarding any drugs in the defendant's blood as well as the determination by Dr. Jentzen as to the cause of death--

MR. SPANSAIL: I'm going to object because the autopsy is not yet in evidence.

MR. STINGL: I'm not asking him what the cause was but based upon his review of that.

THE COURT: Repeat the question.

MR. STINGL:

Q Based upon the toxicology reports as testified to by Ms. Gock, as well as your review of the autopsy report and including among other things the cause of death listed by Dr. Jentzen, did you continue your investigation?

A Yes, I did.

THE COURT: That objection is overruled. He can say he continued his investigation.

MR. STINGL:

Q Now, did there come a time when you went to arrest the defendant?

A Yes. That was on October 23rd of '03.

Q Okay. October 23rd of 2003 you went to the defendant's address?

A Yes, I did, with Officer Paczocha.

Q He's a City of Cudahy police officer?
A Third shift officer he is.
Q What address did you go to?
A 7808 West Bender Road, Apartment 1.
Q Okay. And was the defendant arrested at that location?
A He was.
Q Now, is it fair to say that this took place in your investigation from April 16th till October 23rd of 2003?
A That's a fair statement.
Q Okay. And is there any reason for the fact that six month period passed?
A The reason that, what I would tell you, we were very busy. With only three detectives, there was a severity of crimes happening and I guess I did it as quickly as I could.
Q What types of crimes were you investigating over the summer of 2003 in Cudahy?
A There was a homicide at the Speedway Gas Station, several sexual assaults, armed robberies, things of that nature.
Q And did these involve incidents where people were already in custody?
A Yes, they were.

Q And I take it, when people are in custody or if there's a homicide involved, that takes quite a bit of your attention?

MR. SPANSAIL: I'm going to object as leading.

THE COURT: Sustained.

MR. STINGL:

Q Does that take quite a bit of your attention?

MR. SPANSAIL: Same; it's the same question, Your Honor.

THE COURT: I'm going to sustain it.

THE WITNESS: Yes.

MR. STINGL:

Q All right. There's three detectives in the City of Cudahy?

A Yes, three detectives; two besides myself.

Q In October of 2003, you were able to once again work on the investigation involving this offense?

A Yes, I was.

Q And after the defendant was arrested on October 23rd, 2003, was he transported anywhere?

A He was transported to the Cudahy Police Department and placed in a cell.

Q Now, about what time was he arrested?

A It was-- we arrived at his residence probably

about nine forty-five in the morning. He had to use the rest room, obtain some personal items and so I would say we were there till around ten fifteen, and it's a good drive back to Cudahy, so we didn't arrive back to Cudahy until ten forty, ten forty-five that morning.

Q So you allowed the defendant to use the rest room and get some personal items?

A Yes, we did.

Q And then transported him to Cudahy?

A Yes, sir.

Q Arriving at approximately ten forty-five in the morning?

A About ten forty-five, yes.

Q Okay. And what was your purpose in transporting him to the Cudahy Police Department?

A To interview him pertaining to this investigation that was ongoing.

Q And once you got to the police department of Cudahy at 10:45 AM, did you immediately begin interviewing the defendant?

A No, I didn't. He told me that he had sick'le cell.

MR. SPANSAIL: Objection as to hearsay.

THE COURT: Sustained.

MR. STINGL:

Q Did you get the defendant anything based upon information he provided to you?

A I got him some lunch because he stated that--

MR. SPANSAIL: Okay.

THE COURT: Officer, you are not to testify as to what the defendant stated. Go on to the next question.

MR. STINGL: Okay.

Q What did you get him?

THE WITNESS: Do you want me to answer that, judge?

THE COURT: Yes.

THE WITNESS: I got him two chicken sandwiches and a Sprite and order of fries from McDonald's.

MR. STINGL:

Q And after that, was he allowed to eat those items in the cell?

A Yes, he was.

Q And is there-- at some point, did you take a statement from the defendant?

A Yes. At approximately twelve noon, I took him out of the cell and transported him into, or escorted him into an interview room within the police

department.

Q And could you describe that interview room?

A We call that our crisis room. It's probably about a fifteen by ten room that has two doors one having a glass door such as in the back of the courtroom here, several stuffed animals, and a couch and a desk in the room.

Q What is the purpose of stuffed animals in the interview room?

A If you have a child with sensitive needs you would then let the child have the stuffed animal while you're interviewing them.

Q This interview room is used for suspects; to interview suspects?

A Suspects and victims, yes.

Q Victim witnesses as well?

A Yes, sir.

Q And about what size is the room?

A It's approximately ten by fifteen.

Q Does it contain any furniture?

A There's a couch seated behind the desk, and then there is a desk and a couple of chairs.

Q Is it well lit?

A It's, yes, well lit.

Q And where were you placed during the interview

process?

A I was sitting behind the desk.

Q And where was the defendant, Mr. Bannister?

A He was on the other side of the desk.

Q And was he standing or seated?

A He was seated.

Q Was he handcuffed?

A No, he was not.

Q Was he restrained in any manner?

A Not at all, no.

Q You could have done that if you wanted to?

A I could have but I didn't feel I needed to.

Q Now, prior to interviewing the defendant, did you advise him of his constitutional rights?

A Yes, I did.

Q Those rights are referred to sometimes as the Miranda warnings?

A Yes, the Miranda warnings, right; constitutional rights.

Q I'm showing you what's marked as Exhibit 7. Can you identify this?

A Yes. That is the Miranda warning, constitutional rights card from the Department of Justice.

Q Even though I'm here, you have to keep your voice up.

A Yes. That is the Miranda rights, constitutional rights card from the Department of Justice.

Q All right. And is that what you use to read a person their Miranda rights?

A Yes, sir.

Q And you made this copy from your card?

A That's correct.

Q And it's a true and accurate reflection?

A Yes, it is.

Q And that's provided by the Department of Justice?

A Yes.

Q And when you informed the defendant of his rights, did you do it-- did you read the rights directly from the card?

A Yes, I did.

Q And, if you could, show us how those rights-- how you read those rights to the defendant in this case?

A Sure. You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to consult with a lawyer before questioning and to have a lawyer present during questioning.

If you cannot afford to hire a lawyer,

one will be appointed to represent you at public expense before or during questioning, if you so wish.

If you decide to answer a question now without a lawyer present, you have a right to stop the questioning and remain silent and the right to ask for and have a lawyer at any time you wish including during questioning.

And upon completion of that, I ask the defendant right from the card stated, do you understand each of these rights and he stated that he did.

Q Okay. So you read the rights to him from the card, correct?

A Yes, correct.

Q And then you asked him if he understood those rights?

A Yes, I did.

Q And he told you he understood those?

A Yes, he did.

Q Did he appear to understand the rights?

A He appeared to understand them, yes.

Q And did he have any questions regarding the rights?

A He had no questions, no.

Q Did he agree to talk to you then?

A He did agree to speak to me, to give me a statement, yes.

Q Okay.

MR. SPANSAIL: I imagine now would be a good time for my hearsay objection.

THE COURT: Now, sidebar, please.

(Whereupon, a brief side bar was had by the Court.)

THE COURT: Let's ask the jury to leave briefly for five minutes. Just file out and just leave your notebooks.

(Whereupon, the jury is not present in the courtroom.)

THE COURT: Okay. We are outside the presence of the jury.

Now, we'll have the defense raise their objection outside the presence of the jury.

MR. SPANSAIL: Yes. I believe that the next question is probably going to involve what Mr. Bannister said which is hearsay.

THE COURT: From the state, would it involve an answer involving hearsay or is there a hearsay exception?

MR. STINGL: If, number one, if the

defense is right, there never could be an exception brought in a case, that's why we had the Miranda-Goodchild.

THE COURT: -- a Mirandized confession is admissible.

MR. STINGL: It's not hearsay, judge.

THE COURT: Well--

MR. STINGL: Under 908.01(4), statements which are not hearsay; a statement is not hearsay if, and there are certain exceptions, and this is (b), admission by party opponent, the statement is offered against a party and is the party's own statement.

THE COURT: Right. Okay. So it's explicitly ruled out, considered to be hearsay.

MR. STINGL: It's not even hearsay.

THE COURT: So why wouldn't his answer-- he said as follows, according to his Miranda, why wouldn't the Mirandized confession be admissible at this point?

MR. SPANSAIL: No further argument, Your Honor.

THE COURT: I didn't think so.

So we'll have the jury come back in and the state will be allowed to proceed with its line

of questioning.

Remember, for reasons previously stated, we need not rise because that might show the defendant being in custody.

MR. STINGL: Thank you.

(Whereupon, the jury is present in the courtroom.)

THE COURT: Okay. The state will go on with its next question.

MR. STINGL: Thank you.

Q So after advising the defendant of his rights and after his waiver of those rights, did you talk to him regarding your investigation?

A Yes, I did.

Q And did you explain to him what you were investigating?

A Yes. I stated I was investigating the death of Michael Wolk.

Q And did you talk to Mr. Bannister about his-- any particular health problems that Mr. Bannister himself had?

A Yes. I asked him if he had any health problems and he stated that he had sick'le cell anemia and high blood pressure.

Q And did you specifically talk to him involving any

medication regarding those ailments?

A Yes, I did, and he stated he was taking morphine prescribed by Dr. Hanson.

Q Did you ask him about his relationship with Steven Wolk?

A I did.

Q And what did he say?

A He said that he knew an individual, wasn't sure of his last name, but stated his last name was Steve, that he's known him for several years, telling me he had a brother by the name of possibly Michael.

Q Meaning that Steve had a brother?

A Correct.

Q Did you ever talk to the defendant regarding Steve and his brother and anything regarding morphine?

A Yes, I did.

Q What did he say?

A I asked if he had ever given Steve and or his brother morphine and he told me that he had on eight to ten occasions given Steve or his brother morphine at his residence on Bender Avenue.

Q So this would occur at the defendant's residence?

A Yes. He stated it occurred from mid December of '02 to mid January of '03.

Q And did he state what the frequency of this was

where he would give them more pills to Steve or his brother?

A He told me that he gave morphine to Steve on three to four occasions and to his brother Michael on three to four occasions. I believe he said approximately every third day or in that range.

Q And once again, the time frame that he said this occurred?

A That was mid December of 2002 to mid January of 2003.

Q Okay.

MR. STINGL: I don't have any further questions.

THE COURT: Okay.

Cross-examination.

CROSS EXAMINATION

BY MR. SPANSAIL:

Q This statement-- this statement, it's not written, is it?

A Written statement on my police report?

Q It's-- it's not a signed statement? It's not signed by Mr. Bannister?

A No, it is not.

Q He was not shown a write-up after questioning, was

he?

A The report was probably done the day that he went into custody so, no, he wasn't shown the report. I always transcribe my notes after I do an interview.

Q Transcribe as word-for-word transcription like the court reporter is taking it down?

A I mean, as I take information, facts and put them on a police report like I did in this case, and then I check through my notes to make sure there are no missed information on there or mistakes, and then I sign off on the report.

Q You said you checked through your notes. Was Mr. Bannister given an opportunity to view those notes?

A I think I told you he was in custody when I dictated the notes. He was already transported down to the Criminal Justice Facility.

Q Well, you took the notes when you were-- when you were speaking with him, right?

A Yes, I did.

Q Was he given an opportunity at the end of the questioning to view those notes that you took down?

A No, he was not, nor is anyone else.

Q That's not the question, sir.
A Okay.
Q You can answer the question that's asked of you.
And this interview is not recorded in any way such as audio or videotaped?
A No, sir.
Q I believe you went to his house, Mr. Bannister's house on October 23rd, 2003?
A That is correct.
Q Okay. Did you know what Mr. Bannister's address was in February?
A Did I know what his address was in February?
Q Yes, of 2003?
A He gave it to me over the telephone. I didn't know it was-- if it was correct.
Q Was-- was that indeed the address?
A It turned out to be the same address, yes.
Q Now you said you spoke with him on February 18th, 2000-- well, you ordered him in on February 18th of 2003?
A Yeah, talked to him on the phone the 17th and ordered him in on the 18th the following day.
Q Did you call Mr. Bannister in April of 2003?
A Did I call him in April of 2003?
Q Yes.

A No, I did not.
Q Did you call him in any time between May and September of 2003?
A No, I did not.
Q Did you go to that address between May, 2003 and September, 2003? Did you go to Mr. Bannister's address?
A No.
Q Do you have that notebook with you right now?
A Do I have my notebook with me?
Q Yes.
A Referencing those notes?
Q Yes.
A No.
Q Why not?
A It's our policy that we shred the notes after we check information, make sure it's correct.
Q So, after it's shredded, nobody can get access to it?
A You have the police report. That's a general reflection of the notes.
Q Would that be a no?
A I was answering your question, I thought.
Q It really could have been a yes or no question. So nobody would have access to those

notes?

A No one would have access to those notes, no, sir.

MR. SPANSAIL: Nothing further at this time.

THE COURT: Okay. From the state.

REDIRECT EXAMINATION

BY MR. STINGL:

Q On February 17th, 2003, you talked to the defendant, correct?

A Yes, sir.

Q And you told him to come into the Cudahy Police Department on February 18th, 2003?

A Yes, sir.

Q And he never did come in, did he?

A No, he did not.

MR. STINGL: I don't have any further questions.

THE COURT: Any further cross?

MR. SPANSAIL: No.

THE COURT: I ask the members of the jury, do you have any questions for this witness in writing? Anyone? Seeing not, thank you.

Detective, you may step down.

THE WITNESS: Thank you.

THE COURT: He wasn't here. He was at the state prison at the time of opening arguments.

MR. STINGL: And he can change his mind up to the very moment.

THE COURT: So, I'm going to get a glass of water and we'll bring the jury in.

(Whereupon, the jury is present in the courtroom.)

THE COURT: Thank you. We are now in the presence of the jury. Appearances are as previously stated.

Does the state have any other witnesses that they wish to call?

MR. STINGL: Just one moment. I just want to recall Detective Carchesi for one matter.

THE COURT: Okay.

You remain previously sworn.

THE WITNESS: Yes.

MR. STINGL: Thank you.

DIRECT EXAMINATION

BY MR. STINGL:

Q Detective Carchesi, you testified regarding the statement that the defendant made to you involving distribution of morphine to Steve Wolk and his

brother, Michael Wolk, correct?

A That's correct.

Q And when you talked to the defendant, Edward Bannister, did you talk to him about a specific period of time?

A Yes. I asked him when he distributed the morphine to both Michael and Steven Wolk.

Q And what was that period of time?

MR. SPANSAIL: I have a continuing objection.

THE COURT: That will be overruled. Please, proceed and answer.

THE WITNESS: I'm sorry. I didn't hear the end of Mr. Stingl's question.

MR. STINGL:

Q What was the period of time that the defendant stated that he delivered morphine to Steve Wolk and his brother, Michael Wolk?

A He told me mid December of 2002 and mid January of 2003.

Q And I believe he indicated there was-- what was the frequency of that?

A He had stated it was eight to ten times total, approximately, every third day is what he told me.

Q When you say he, the defendant?

A Mr. Bannister had told me that.

MR. STINGL: Thank you. That's all I have.

THE COURT: Cross-examination?

CROSS EXAMINATION

BY MR. SPANSAIL:

Q Are you saying that this is-- this was during the unrecorded, unsigned, supposed confession when he was in your custody?

A At the police department he gave me that statement, yes, sir.

Q All right.

MR. SPANSAIL: Nothing further.

THE COURT: Okay. Thank you.

Any questions? Any redirect?

MR. STINGL: No redirect.

THE COURT: Any questions further of this witness from the jury?

JUROR: I do.

THE COURT: That's fine. Please, write it up.

Both sides can come over and we will review the question.

(Whereupon, a brief sidebar was had by

the Court.)

THE COURT: Now, is it the police policy in Cudahy to either tape-record or videotape statements as given?

THE WITNESS: Never has been.

THE COURT: Okay.

Now is it the-- is it your policy as an interviewer to ask the subject to both review and or sign the statement?

THE WITNESS: Yes. After I'm done, if I take a written statement, I ask the individual if you would like to review it. I let them review it, sign it in my presence, and we both are witnessing to it and, in this case, I offered Mr. Bannister to write a written statement and he refused.

THE COURT: Okay.

Did you read back your statement as you wrote it? Did you read back the statement that you wrote down to the defendant? Did you read it to him?

THE WITNESS: No, I didn't. It was transcribed after Mr. Bannister was already in custody.

THE COURT: It was transcribed from

what?

THE WITNESS: What happens when we do a report, we dictate it on a transcribing machine. The clerical staff types up the reports and I look at it for any corrections, additions, any changes that may need to be made to the report.

THE COURT: Okay.

So the transcribed statement was not presented to him for his signature?

THE WITNESS: No, it was not.

THE COURT: Okay.

And were your notes, upon which the transcribed statement was dictated, presented to him for his signature?

THE WITNESS: No, they were not.

THE COURT: Okay.

Did you offer him an opportunity to review the statement when it was transcribed?

THE WITNESS: As I was interviewing him, I was just taking down notes so I didn't. They were just my notes. He didn't look at them.

THE COURT: What did you say to the defendant at the conclusion of his giving that statement?

THE WITNESS: I asked him, I said, Mr.

Bannister, would you like to write out a written statement in regards to what we spoke about. He refused and told me the police report would be sufficient in this matter.

THE COURT: Okay.

So you offered him an opportunity to write out his statements in longhand?

THE WITNESS: Exactly. I also said I would type it out for him and have him read through the statement. He didn't want to do that either.

THE COURT: Is it your policy to present a transcribed statement to the defendant for signature or for refusal of signature?

THE WITNESS: Always, when I type something out, I guess what I'm saying, I would take a statement from this individual, type it out and let him look at it for corrections, additions, changes, because it's his words, and then if there is corrections, we would change it and then have him sign only if everything in there is truthful to his word.

THE COURT: Okay.

Now, any follow-up questions on that from the jury, if there are? Fine.

BAILIFF: No other questions.

THE COURT: If there are no others, we will ask the state if they have any follow-up questions, we'll ask the defense if they have follow-up questions, and the state, if they have follow-up questions-- wait a second. It would be the state and the defense.

Then, the state, okay?

MR. STINGL: Thank you, judge.

REDIRECT EXAMINATION

BY MR. STINGL:

Q Just to make it clear, Detective Carchesi, how many statements in your career have you taken from suspects?

A I'd have to say several hundred to possibly over a thousand.

Q And in how many of those cases do the defendants want to write out their own statement in addition to your report?

A A small-- a small minority. I would say, a very small minority.

Q But when that's requested, you allow them to do so?

A I always ask if they would like to write out a

written statement.

Q Is it your testimony that you in this case offered to type it out right there so the defendant could review it?

A I always do that as well.

Q Okay. And in this case, did Mr. Bannister want to write out his own written statement?

A He did not.

Q Did he want you to type it up right there?

A No.

Q You gave him the opportunity?

A I did.

MR. STINGL: I have no further questions.

THE COURT: Cross-examination?

MR. SPANSAIL: Yes

RECROSS EXAMINATION

BY MR. SPANSAIL:

Q You didn't say that before that you offered. Your statement now is that you offered to have it typed up right away and have him review it and sign that, is that your testimony?

A That's my testimony. You didn't ask that before.

Q You're also saying that Mr. Bannister said the words, is this; the police report will be

sufficient?

A Words to that effect, yes.

Q Perhaps not those exact words?

A Perhaps not those exact words.

Q Can you remember his exact words?

A No, I can't.

Q And this interview with him happened October-- in October of 2003, right?

A October 23rd at 12 o'clock.

Q Oh.

MR. SPANSAIL: Nothing further.

MR. STINGL: Just a couple.

RE-REDIRECT EXAMINATION

BY MR. STINGL:

Q When did you prepare the report regarding the defendant's statement?

A I believe it was the same night that he was taken into custody by uniformed officers. I usually dictate my reports right after I do my interviews so, everything, all my notes are fresh and everything is accurate.

Q Okay. And that report was prepared back in October?

A Yes. It would have been the 23rd of October,

2003.

Q And you had an opportunity to review your reports for today?

A I always do, yes.

Q That's the reason you make reports, correct?

A That is correct.

Q Because things happen in October or earlier or, why do you do a report?

A So that you get the specific events that occurred in an incident and have them transformed on paper.

Q Right when they occurred?

A Right when they occurred, yes.

MR. SPANSAIL: Objection, leading.

THE COURT: That's sustained.

MR. STINGL: I don't have any further questions.

THE COURT: Are there any recross questions?

MR. SPANSAIL: No, Your Honor.

THE COURT: Okay.

Thank you.

Any further questions from the jury? If not, at this point, you may step down.

The state rests again?

MR. STINGL: State rests.

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
Branch 47

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 03CF006219

EDWARD J. BANNISTER,

ORIGINAL

Defendant.

JURY TRIAL

(Afternoon Proceedings.)

April 27, 2004

Before the Honorable
JOHN SIEFERT
Circuit Judge, Br. 47,
Presiding.

APPEARANCES:

DENIS STINGL, Assistant District Attorney, appeared on behalf of the Plaintiff.

JON G. SPANSAIL, Attorney at Law, appeared on behalf of the Defendant.

DEFENDANT PRESENT IN PERSON.

(30)

STEPHANIE OLIG - Off

here.

Now, we will hear the closing arguments of the attorneys. Okay.

The state goes first.

MR. STINGL: Ladies and gentlemen of the jury, I know that you've been attentive. I know there's been breaks.

As I indicated, the evidence is clear in this case. It was brief, and I will attempt to be brief. I just want to highlight certain points.

First of all, Edward Bannister delivered morphine to Steven Wolk and Michael Wolk between the time period in the information which is December 15th, 2002 to the date of death of Michael Wolk on January 17th, 2003.

I will never know the exact dates or times and, as the court indicated-- you can look at the instruction-- that's not necessary. It's not always possible to prove the exact times when you have a situation here where the defendant is delivering morphine to people one of whom is now dead.

In this particular case, it starts with an investigation of that death. Michael Wolk died on January 17th, 2003 in Cudahy at 5027 South

Illinois Avenue, his home, a home he shared with his wife, Eileen Wolk, at his side.

When the paramedics got there, there were two syringes and spoon. Those were confiscated by the medical examiner. Paramedics and EMT's tried to make him survive, tried to revive him to no avail. He died at the scene and, therefore, the Medical Examiner's Office was called in, as they are called in at such deaths, and the body was recovered, syringes were recovered, the spoon was recovered, and that is evidence and corroboration that you have. And as the tests later show, that Michael Wolk was a morhine user. He didn't use heroin on that day, didn't use oxycodone or oxycoton or any other drug on that day. He used morphine. He was a morphine user.

And you heard first of all from Officer Brian Scott who responded to the scene as to what the scene was and what was recovered.

You saw testimony and-- you heard testimony from Susan Gock. She is a very experienced toxicologist. She is one of the backbones of the Medical Examiner's Office here, and she told you the tests she performed, and a lot of them I can't even pronounce, but in lay

persons term, she's very good at doing them. She told you the scientific tests but she told you what they showed. They showed, after all the tests were done, that the defendant had one drug in his system, a fatal dose of morphine, not heroin, not another opiate, not another drug, not alcohol, but morphine.

Dr. Jentzen used this information as well as the evidence from the scene, as well as his autopsy, and there's no need to go deeply into the autopsy. They're not pretty. Dr. Jentzen does them because that's what he does. He's a great forensic pathologist, medical examiner and doctor, and he's done well for our community as Susan Gock is a good toxicologist at the Medical Examiner's Office. He told you what caused the death of Michael Wolk; morphine overdose, not heroin overdose, no other type of overdose, not a mixed overdose, morphine, morphine, morphine.

Why is that important?

That's important because Detective Carchesi and other members of the Cudahy Police Department, their investigation began when Michael Wolk died. Detective Carchesi became involved in February, and a lot of times it's difficult to

look at what you have when you get to the scene of the death. You have Michael Wolk who is deceased. You got a couple syringes. You got a spoon. That's the evidence you have, and of course Michael Wolk is not around to tell us what happened, not-- not in the conventional sense, but his body and the syringes and spoon and the residue tell us the story about how he died. And that's all the Cudahy Police Department had on January 17th, 2003 and in the subsequent months he died.

Subsequently, it took till April to get the toxicology reports. It was morphine. The medical examiner reported morphine caused the death.

So where does Detective Carchesi go?

He's investigating as early as February. In fact, he calls the defendant after speaking with Steven Wolk, tells him to come down on the 18th, says I want to talk to you.

Does the defendant come down?

No.

Does he ever voluntarily come down?

No, he does not come down when requested and appear as required by Detective Carchesi,

doesn't come down to the police department.

Now, the defense is going to say, well, from April after the toxicology reports until October they didn't go out and get him.

Well, ladies and gentlemen, there's no requirement in the law. Detective Carchesi wanted to get him sooner. I'm sure he would have. There's no requirement of the law it's sooner. Cudahy is a smaller police department. It's a suburb. That in the past year, as Detective Carchesi stated, in the summer of 2003, they had a homicide and sexual assaults and other things where people were in custody to investigate. Three detectives handle all that twenty-four hours a day, seven days a week in Cudahy. You can't hold that against him.

Detective Carchesi, when he finally got an opportunity, he took an officer, went out and arrested the defendant, and the defendant made a Miranda statement, and you heard about the statement. You heard how he was advised of his constitutional rights and admitted that he in fact gave morphine, morphine, not heroin, not oxycodone, morphine, morphine to Steven Wolk and his brother Michael Wolk during that period of

time that's set forth in the information, December 15th, 2002 to mid January.

And I understand what the defense will say here that, well, why didn't-- why wasn't that statement written out, why didn't Detective Carchesi write it out, why didn't he have the defendant write it out, why didn't he type it out?

The fact is the defendant was offered that and he said he didn't want to. He relied on the police reports.

And I can tell you, I'm going to save it for rebuttal, but that statement is totally corroborated by the death of Michael Wolk and the death of Michael Wolk fits the time frame admitted to, the delivery admitted to by this defendant. He delivered this morphine to the Wolk brothers and that is why he should be found responsible for it. He should be found guilty for it and that's what I'm asking for.

Thank you.

MR. SPANSAIL: Hi, folks. I'd like to thank you for being jurors here. It's been an okay experience.

Edward Bannister did not deliver morphine

to Michael Wolk.

The state says Michael Wolk died from a morphine overdose but, what they don't show is really a strong connection to what the source of this morphine was.

Where did he get this morphine from?

State put on the two expert lab people. They said that he died of a morphine overdose.

Well, that alone does not show where he got the morphine from. They said they couldn't tell if it was from, even if I asked them, if they could get it from Wal-Mart or Walgreen's. They couldn't tell where he got it from, if he got if from the street or anything else.

There were syringes. So you just don't get-- oh, you can get rolling paper I believe at some places, but syringes, you just don't go to Wal-Mart to pick up a pack of syringes. They had to come from some source.

And there's also no testimony to say that who gave him that. Where did he get that?

We would contend it's the same source where he got the morphine, and nobody is saying they got syringes from Mr. Bannister. Even this statement that the state would like to hinge their

case upon, nowhere in there is anything said about the syringes. They're talking about morphine tablets.

And there is something else that happened in between here. The state's case reverts on this unrecorded, unsigned, alleged statement.

Notice also how combative the officer was on this issue. They shred these notes. These notes would not be important, that you would maybe like to refer to them or in case somebody says something that contradicts this, I wrote it down, and this is right at the same time that I was taking the statement? That would be an important thing.

I also can't understand why they didn't audiotape the conversations. It costs fifty bucks for a boom box at Best Buy with a microphone and $20.00 for an audiocassette. It's also a waste of two days of your time, the fees of officers coming in for fifty bucks and $20.00, so they'd make a heck of a stronger case. Why?

They don't want you to hear what goes on there in that room with them, because if the person says something else, they can just say, well, and they will fit what the case says.

I don't know if the officer's lying or mistaken, or what he's hearing. It's not a word-for-word transcript of what he dictates later. I don't know if Mr. Bannister was still in custody. They could have maybe said, I'll dictate it back to you, maybe now you would like to see this at another opportunity and see what he's exactly going to say. As a lawyer, I wouldn't sign anything unless I get a chance to read it.

I also think it's significant that-- the time it took. They really-- why wait to arrest him? This is Cudahy. It isn't Mayberry, all right? It's still a part of Milwaukee County. If they can't handle it, call the sheriff, call somebody else, get something, if they think this guy's doing this.

Why wait from April till October to go and arrest him, if they thought they had a solid case this guy is selling?

If they've got the evidence, why wait if they think they've got somebody poisoning people out there?

It just doesn't make sense.

And for a felony case, how long did it take him to arrest him?

They go over his house, knocked on the door, same address that he was at, same phone number. It's not like they had to do a lot of looking to find the guy.

The state of this this is, there's just something kincky here. Something is just not adding totally up as to why they finally bring in my client and they're saying that he said these things.

Well, folks, I hate to question the credibility of a police officer, but they've got a job to do and to put-- and they want to clear their case, to clear this case. We believe somebody else gave him this heroin (sic). I believe, as I said, I believe in the opening statement--

MR. STINGL: I will object. He stated heroin.

MR. SPANSAIL: Sorry.

THE COURT: That objection will be sustained.

MR. SPANSAIL: Yes. Yes.

THE COURT: So you can have a chance to correct yourself.

MR. SPANSAIL: Sorry. I correct myself.

you have. That's the only drug that's involved, and that is the drug that this defendant delivered to Steven Wolk and Michael Wolk and that is wrong. That is illegal. And it is illegal and it's wrong for a reason.

People scream sometimes and say, well, maybe we should legalize all drugs. Well, morphine is a legal drug but it's still a deadly drug when its misused by people like this defendant. To make it legal, to make it a legal delivery has to be a doctor prescribing it. The defendant is not a doctor. The defendant has no right to distribute a deadly opiate in our community. If you think it's no big deal, if you think it's no big deal then, fine. I understand why it's illegal to do so and so do people like Eileen Wolk. It is a big deal. It is illegal. It is wrong. It cannot be justified.

And, as I said in the beginning, I'm not asking you to make value judgments.

Is Michael Wolk responsible for his death in part?

Certainly, he is, and that is a shame.

Is this defendant responsible for distributing morphine in our community?

Yes, he is. And that's a shame.

I'm not asking you find he's a bad person or an evil person. I'm asking you to do what you promised me you would do at the beginning of this case and, that is, you would look at the facts and you would apply the facts to the law and that you would reach a just conclusion, and that is all I'm asking you to do.

From the time we are young, from the time we are children, we are held responsible for our actions and that is what I'm asking you to do.

Edward Bannister must be held responsible and finding him guilty holds him responsible and that is what I'm asking you to do.

Thank you.

THE COURT: Now, members of the jury, the duties of counsel and the court have been performed. The case has been argued by counsel. The court has instructed you regarding the rules of law which should govern you in your deliberations. The time has now come when the great burden of reaching a just, fair, and conscientious decision of this case is to be thrown wholly upon you, the jurors, selected for this important duty. You will not be swayed by

CERTIFICATION FOR APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

(*State of Wisconsin v. Edward Bannister,* No. 2005AP767-CR)

CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.19(2)(b), I certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § (Rule) 809.19(2)(a) except as to a document (Pet-Ap. 125-126) that appeared in the appendix to Bannister's brief in the court of appeals and on which the court of appeals relied in making its decision. Otherwise, the appendix contains:

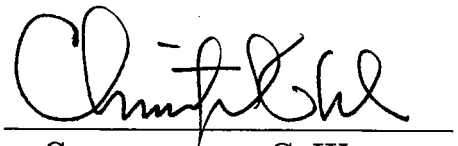
(1) a table of contents;

(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.



CHRISTOPHER G. WREN

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2005AP767-CR

STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner,

v.

EDWARD BANNISTER,
Defendant-Appellant-[redacted]

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS, REVERSING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HON. JOHN SIEFERT PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-RESPONDENT EDWARD J. BANNISTER

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STATE OF WISCONSIN

IN SUPREME COURT

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STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Fifty-year-old Michael Wolk was found dead in his living room in the early morning hours of January 17, 2003. (35: 45, 47.) His wife had called 9-1-1 after finding him unconscious in the living room; beside him on the table were two syringes, a spoon, and a "white powdery rock substance." (35: 48, 52.) He had a history of heroin abuse and was suffering from lung disease at the time of his death. (Pet. App. 125-26.)

Detective Carchesi interviewed Steven Wolk about his brother's death on February 17 and 19, 2003. (36: 25.) Steven told Carchesi that he and his brother got morphine from Bannister, but he provided inconsistent statements to Carchesi regarding when they got it. (35:16-17.) At first he told Carchesi that he and Michael had been getting it from Bannister for over a year; he later said it was only for 2-3 months. (35: 17.) He also told Carchesi he had a short-term memory deficit. (35: 18.) Based on this information, Carchesi contacted Bannister on February 17, 2003 and asked him to come to the station the following day. (35: 15.) Bannister phoned Carchesi on February 18 and explained that he could not make it that day. (35: 15.) In April, Carchesi learned that the Milwaukee County Medical Examiner had determined that Wolk had died of a morphine overdose. (35: 14). Carchesi's next attempt at contact with Bannister was on the date of his arrest and interrogation, some nine months after Michael's death. (35: 6-8, 16-18.)

On October 23, 2003, Carchesi went to Bannister's residence to arrest him. (35: 8.) He was taken to the Cudahy Police Department to be questioned. (35: 26-28.) According to Carchesi's trial testimony, Bannister told him during this interview that he had given morphine to Steve or his brother 8-10 times between mid-December 2002 and mid-January 2003, and that he had given it to each one of them three or four times about every third

day. (36: 41-42.) On November 5, 2003, the State filed an information charging Bannister with Delivery of a Controlled Substance. (28: 2.) Bannister pled not guilty. (28: 3.)

At trial, Carchesi detailed how he "always" takes notes during interviews and later uses them to check the produced report for errors, and how he "always" presents a transcribed statement to the defendant for signature or refusal of signature. (36: 43, 79.) In this case, Carchesi's questioning of Bannister produced no signed statement; Carchesi did not show Bannister a copy of a report or transcribed statement so he could check it for errors; and Bannister was not given the chance to look at the notes from which Carchesi dictated his report. (36: 42-43.)

On the morning of the first day of trial, in an off-the-record conversation, the State told both Bannister's attorney and the court that it would be proceeding only as a delivery charge. (34: 4-5.) The prosecutor didn't believe he had enough evidence to prove a homicide charge. (34: 8.) The State's case relied heavily on Bannister's alleged statement, and Steven Wolk, the only person mentioned in Bannister's statement who could testify to its degree of accuracy, was serving a three-year prison term for hit-and-run causing death. (38: 13-14.)

Though Wolk had been ordered produced from Racine Correctional Institution as a State's witness, the State took steps to secure other evidence for purposes of corroboration. (34: 6-7.) Off-the-record discussions that morning between the parties and the court left the prosecutor with the impression that the court believed evidence about the death of Michael Wolk would be unduly prejudicial to Bannister on a delivery charge. (34: 5-6.) The prosecutor argued that he needed to be able to introduce evidence of Michael Wolk's death in order to corroborate Bannister's confession and prove the charge of delivery. (34: 5.) That afternoon, while the jury panel was awaiting voir dire, the prosecutor notified the court

that it was prepared to file an amended information charging First Degree Reckless Homicide. (34: 2-3.) The prosecutor offered to keep the charge as delivery if Bannister agreed not to object to evidence of Michael Wolk's death as unduly prejudicial; if he refused, the prosecutor would file the amended information. (34: 6-7.) After conferring with his attorney, Bannister agreed not to object. (34: 17-25.) The resulting evidentiary agreement was created orally, on the record, by the judge and the parties. (34: 15, 18-25.)

In its opening statement, the prosecutor detailed evidence that the jury would hear, including a summary of the expected testimony of Steven Wolk: that Steven and his brother Michael would get morphine from Bannister and had been doing so for a year; that sometimes Bannister would just give it to them and sometimes they would give him money; that "on the 14th or 15th of January," Steven and Michael got morphine from Bannister; and that Michael had been getting it from Bannister for three months, while Steven had been getting it longer. (34: 86-87.) The prosecutor went on to say he did not know who was at fault for Michael Wolk's death, but that "I know who is at fault for giving him, several days before, some morphine and selling it to him, and that's this defendant right here." (34: 88.)

The State put on four witnesses; Steven Wolk asserted his Fifth Amendment privilege against self-incrimination and, hence, was not one of them. (36: 64-67.) Officer Brian Scott was called first and testified about the scene of Michael Wolk's death. (35: 45-52.) Toxicologist Susan Gock testified that there was morphine present in Michael Wolk's blood, but that she could not tell where it came from. (36:16-17.) Detective Carchesi took the stand to talk about his investigation and recount the statement he took from Bannister. (36: 20-46.) And finally, over a defense objection, Dr. Jeffrey Jentzen, a Milwaukee County Medical Examiner, described the autopsy and testified that Michael Wolk died from

morphine toxicity, although he couldn't say where Wolk acquired the morphine. (36: 53-61.) Just before resting, the district attorney recalled Carchesi to repeat his assertion that Bannister had admitted giving Steven and Michael Wolk morphine on 8-10 occasions between mid-December 2002 and mid-January 2003. (36: 74, 76.) Defense counsel rested after the conclusion of the State's case and moved for a directed verdict, which was denied. (36: 86-87.) The court also denied a defense motion requesting that they be allowed to mention the fact that Wolk did not testify. (36: 73-74.) The jury returned a guilty verdict in 50 minutes. (1:5.)

The District I Court of Appeals reversed Bannister's conviction because the State failed to corroborate a significant fact of Bannister's confession. *State v. Bannister*, 2006 WI App 136, ¶1; (Pet. App. 102-03.) The court of appeals did not address Bannister's second claim, that discretionary reversal was warranted because the real controversy had not been fully tried. *Id.* This Court granted the State's Petition for Review on September 12, 2006.

ARGUMENT

I. This Court should reject the State's invitation to eliminate the corroboration requirement.

Though buried in a footnote, the State's invitation to this Court to eliminate a centuries-old procedural safeguard against convictions based on false confessions is a bold request; one that should be rejected.

A. Recent DNA exonerations reveal that false confessions are a leading cause of wrongful convictions.

Although the State repeatedly acknowledges that the purpose of the corroboration rule is to prevent convictions based on false confessions, the State

nonetheless suggests that the corroboration rule has "outlived its usefulness" and should be eliminated. (Pet. Br. 12-13, n. 6, and 23-24, n. 11).

The State has it exactly backwards: now is the time to strengthen, not weaken, safeguards against false confessions. With the advent of post-conviction DNA testing, it has become increasingly clear that false confessions—counter-intuitive though they are—happen with surprising frequency. In at least 35 of the first 130 post-conviction DNA exonerations, the innocent person confessed to the crime. *See* Innocence Project, Causes and Remedies of Wrongful Convictions, *available at*: http://www.innocenceproject.org/causes/ (last visited June 22, 2006). Another recent study surveyed 125 proven false confessions. *See* Drizin & Leo, *The Problem Of False Confessions In The Post-DNA World*, 82 N.C.L.REV. 891 (2004). And these numbers are almost certainly the tip of the iceberg, because few cases contain the DNA evidence necessary to prove a confession false.

Moreover, social scientists studying false confessions have suggested that, rather than being exceptionally rare events, false confessions are a predictable result of routine practice in our criminal justice system. Saul M. Kassin, *On the Psychology of Confessions*, 60 AM. PSYCHOL. 215, 220 (2005). For instance, social scientists have suggested that psychological interrogation techniques—which are now the bread and butter of modern-day police interrogation—are sufficiently powerful to elicit false confessions from innocent suspects. (Id at 221-222.)

Social scientists have further suggested that certain populations that come into frequent contact with the criminal justice system, such as the mentally ill, juveniles, and those with drug and alcohol problems, are particularly susceptible to psychological interrogation techniques, and therefore particularly likely to falsely confess. (Id at 222.)

Several short examples illustrate the problem of false confessions, and the extent to which it prevents our criminal justice system from apprehending the guilty, and not the innocent.

i. The five false confessions in the Central Park Jogger case.

In April, 1989, a female jogger was brutally raped in New York City's Central Park. Police quickly focused on a group of five teenagers who were suspected of committing other crimes in the park that night. Police interrogated the teenagers and eventually elicited confessions from all five. In the confessions, the suspects provided not only detailed accounts of the supposed facts of the crime, but also detailed expressions of motivation and apologies for having committed the crime. Saul M. Kassin & Gisli H. Gudjonsson, *True Crimes, False Confessions*, SCIENTIFIC AMERICAN MIND, June 2006, *at* www.sciammind.com/article. cfm?articleID=000635C8-590A-128A-982D83414B7F0000.

Although all five suspects eventually recanted the confessions, and even though the confessions did not match each other in important respects and did not match many of the known facts of the crime, juries convicted all five. *Id.*

In 2002, a convicted serial murderer and rapist named Mattias Reyes confessed that he alone had raped the Central Park jogger. In an attempt to corroborate the confession, authorities conducted DNA testing on sperm taken from the victim's rape kit, and on a hair that had been microscopically matched to one of the teenagers. DNA proved that Reyes's sperm was in the rape kit and that the hair did not match the teenage suspect. On the recommendation of the District Attorney, all five of the convictions were overturned. Richard A. Leo *et al., Bringing Reliability Back In: False Confessions and*

Legal Safeguards in the Twenty-First Century, 2006 WIS. L. REV. 479, 482-484.

ii. The false confession and false guilty plea of Christopher Ochoa

In 1988, Nancy DePriest was raped and murdered as she prepared to open the Pizza Hut restaurant she managed in Austin, Texas. There were no eyewitnesses and the early investigation produced few leads. Christopher Ochoa, a man with no prior criminal record, became a suspect after he and his friend, Richard Danziger, went to the restaurant several weeks after the crime. Employees thought Ochoa and Danziger were overly interested in the DePriest murder, so they called the police. *See* Keith A. Findley and Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS.L.REV. 291, 332.

Ochoa was then interrogated by police and ultimately signed a confession that contained details of the crime that only the perpetrator and police would have known. After his confession, Ochoa not only pleaded guilty to DePriest's murder, but he went so far as to testify against Danziger. Both men were sentenced to life in prison. *Id.*

Years later, an inmate named Achim Marino had a religious conversion and began sending letters to various authorities, saying that he alone had killed DePriest. Eventually, Ochoa's attorneys at the Wisconsin Innocence Project obtained DNA testing of sperm found on DePriest's body. The testing confirmed that Marino had killed DePriest, and Ochoa and Danziger were released. Although Ochoa went on to graduate from the University of Wisconsin Law School, Danziger was injured in a fight in prison and suffered permanent brain damage. Tom Kertscher, *Law school freed him, taught him*, MILW. JOURN. SENT., May 10, 2006.

iii. The videotaped false confession of Michael Crowe

In 1998, the family of 12 year-old Stephanie Crowe found her murdered in her bedroom. Police soon focused attention on Stephanie's 14 year-old brother, Michael. In a videotaped interrogation spanning several days, Michael confessed to murdering his sister. Police also interrogated two of Michael's friends, obtaining a confession from one and allegedly incriminating statements from the other. All three were charged with Stephanie's murder. *See* Michael Crowe's Forced Confession, Crime Library Minds and Methods, *available at*: http://www.crimelibrary.com/notorious_murders/not_guilty/coerced_confessions/6.html.

Before the trial commenced, defense attorneys convinced the prosecutor to conduct DNA testing on a bloody shirt seized from a drifter named Richard Tuite on the day of the murder. Tuite had been detained for questioning about Stephanie's murder, but released. When DNA testing identified Stephanie's blood on Tuite's shirt, prosecutors agreed to drop the case against Michael Crowe and his friends, despite their videotaped confessions. *Id.*

B. Courts—both old and new—have recognized the problem of false confessions.

Even before DNA began providing proof of false confessions,[1] the United States Supreme Court regarded custodial interrogations and extrajudicial confessions with hesitancy and caution. In *Haley v. Ohio,* the Court issued an admonishment to lower courts to use "special care" in scrutinizing the statements made by a child in police custody. 332 U.S., 596 (1948). The stress of an

[1] As of May 2006, the number of DNA exonerations was 177, and 23% of these wrongful convictions were caused by, or related to, false confessions. Richard A. Leo, et. al, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century,* 2006 Wis. L. Rev. 479, 516.

interrogation, combined with the child's immature and impressionable nature, could elicit a confession founded in little more than fear and panic. *Id.* In the landmark decision of *In re Gault,* the Court again recognized the vulnerability of juveniles, and the risk that their statements to law enforcement officers could be "the product of ignorance of rights or of adolescent fantasy, fright or despair." 387 U.S. 1, 55 (1967).

The Court's concern about confessions has not been limited to juvenile suspects. In *Smith v. United States,* 348 U.S. 147 (1954), the Court acknowledged the potential for false confessions: "[T]he experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made." *Smith* at 153 (citation omitted). The statements of the accused "may reflect the strain and confusion attending his predicament rather than a clear reflection of his past." *Id.*

Wisconsin courts have echoed these concerns. The Court of Appeals has noted the risk that "an accused will feel 'coerced or induced' when he or she 'is under the pressure of a police investigation' and make a false confession as a result." ***State v. Hauk***, 2002 WI App 226, ¶25, 257 Wis. 2d 579, 652 N.W.2d 393 (footnote omitted). In addition, both the Wisconsin Court of Appeals and this Court recently agreed that "[I]t is time for Wisconsin to tackle the false confession issue." *Id.* at ¶ 32; *State v. Jerrell C.J.*, 2005 WI 105, ¶ 57.

Against the established wisdom of the United States Supreme Court and this Court, and against the cautionary tales of proven false confessions, the State labels the corroboration rule an anachronism and asks this Court to eliminate it. The State's request—which itself comes at precisely the wrong moment in the history of false confessions—should be soundly rejected.

C. Safeguards such as *Miranda* warnings, the voluntariness test, and electronic recording do not obviate the need for the corroboration rule.

The State's request to eliminate the corroboration rule is premised in part on the notion that other safeguards such as *Miranda* warnings, the restriction on the use of involuntary confessions, and the new requirements for electronic recording of custodial interrogations, render the corroboration rule unnecessary. (Pet. Br. 12-13, n. 6) The State's reasoning is unpersuasive.

i. *Miranda* and the voluntariness doctrine do little to prevent false confessions

For proof that *Miranda* and the voluntariness doctrine do not prevent false confessions, this Court need look no further than the proven false confession cases, many of which were characterized by confessions that were admitted in spite of *Miranda* and voluntariness challenges. Leo, 2006 at 499-501 (all five defendants in the Central Park Jogger case filed motions to suppress their confessions, but the judge ruled that their claims of coercion were not credible). Moreover, as commentators have pointed out, it is no surprise that these doctrines do not prevent false confessions because they—unlike the corroboration rule—are not explicitly targeted at ensuring the reliability of confession evidence. *Id.* at 501. *See also Smith* at 147 ("though a statement may not be 'involuntary' within the meaning of the exclusionary rule, still its reliability may be suspect…").

Furthermore, studies show that roughly four out of five suspects waive their *Miranda* rights and submit to questioning. Kassin, 2005 at 218. Innocent suspects, in particular, may waive their *Miranda* rights because they believe they have nothing to hide. *Id.*

ii. Electronic recording will improve, but not solve, the problem of false confessions

As the State points out, this Court and the Wisconsin State Legislature have recently implemented new policies encouraging, to varying degrees, the electronic recording of custodial interrogations.[2] Relying on these new policies, the State asserts that "The impending growth in audio and video recording of . . . suspects' statements buttresses the view [that] the corroboration rule has outlived its usefulness and that other mechanisms afford equal or better protection." (Pet. Br. 12, n. 6).

While these new recording policies are an important step forward for the truth-seeking function of courts, they do not guarantee that all confessions presented in court will be electronically recorded. Because there a variety of exceptions to the new recording policies, many unrecorded confessions will fall outside their reach.[3] Furthermore, even for those confessions that are recorded, there is no guarantee that juries will recognize false confessions and acquit the innocent. While electronic recording will make it easier for the State to meet the burden of corroboration (because there will be more known details of the confession against which to compare corroboration), electronic recording is not an adequate substitute for the corroboration rule. Recording of confessions merely ensures a faithful

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[2] *See In re Jerrell C.J.*, 2005 WI 105, ¶ 59, 283 Wis.2d 145, 699 N.W.2d 100 (court exercised superintending authority "to require that all custodial interrogation of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention."); Wis. Stat. § 938.195, 938.31(3)(recording custodial interrogations of juveniles); § 968.073 (recording custodial interrogations of adults); § 972.115 (admissibility of defendant's statements).

[3] Wis. Stat. § 938.31(3)(c) (exceptions to the recording of custodial interrogations of juveniles); Wis. Stat. § 972.115 (2)(a) (exceptions to the recording of custodial interrogations in felony cases).

reproduction of the words spoken by the accused, it does not ensure the truthfulness thereof.

a. The new recording policies will not necessarily prevent false confessions from occurring, nor will they prevent jurors from believing false confessions.

Even when police electronically record interrogations, false confessions will still occur, and juries will still sometimes believe them. The proven instances of false confessions demonstrate the inadequacy of electronic recording to prevent false confessions. Prosecutors videotaped the confessions of four of the five suspects in the Central Park Jogger case. Leo at 480-481. Electronic recording will not always deter the kinds of interrogation techniques that can cause false confessions.

Furthermore, electronic recording will not always lead jurors to recognize and reject false confessions. As the United States Supreme Court has noted, confessions have an overwhelming impact on juries. "[A] confession is like no other evidence. . . . [and] may tempt the jury to rely upon that evidence alone in reaching its decision." *Arizona v. Fulminante,* 499 U.S. 279, 296 (1991). Because false confessions are so counter-intuitive, it is difficult for the average juror to believe that an innocent person could falsely admit to a serious crime. *See Smith* at 153.[4] This is true even when a confession contains contradictions and inconsistencies indicating that the confession may be false,[5] and it is true even if the confession is recorded because false confessions

[4] In describing the inordinately stressful circumstances of a criminal investigation and interrogation, the Court noted that "These are the considerations which justify a restriction on the power of the jury to convict, for this experience with confessions is not shared by the average juror."

[5] In the Central Park Jogger case, "when prosecutors compared the boys' confessions with each other, they found that the defendants' accounts differed on nearly 'every major aspect of the crime...'" Leo at 483.

sometimes contain exceedingly persuasive narratives containing apologies and justifications. Kassin, 2005 at 215.

b. Electronic recording should be seen as a supplement, not substitute, for the corroboration rule

The State overlooks the fact that electronic recordings may be used to help satisfy the corroboration rule. The State cites to a recent law review article (Leo, 2006) to support its argument that electronic recording has rendered the corroboration rule obsolete. (Pet. Br. 13, note 6). Bannister agrees with the State that "[r]ecording creates an objective, comprehensive, and reviewable record of the interrogation process" that could be incredibly helpful to a judge in determining the reliability of a confession. Leo, 2006 at 530. However, the State misrepresents the argument set forth in this article by claiming that it supports the State's contention that the corroboration rule has outlived its usefulness. Although the article argues for recording as a means to insure reliability, the authors do not advocate that a recording on its own may be proof of reliability. Moreover, the authors certainly do not advance the argument that recording is a substitute for corroboration. Rather, they believe it should be a safeguard in addition to "meaningful corroboration rules." *Id.* at 515.

II. The Corroboration Rule Should Remain as a Rule of Evidentiary Sufficiency

It is an American jurisprudential maxim that a conviction cannot stand on the unsupported confession of the accused alone. *See Wong Sun v. United States*, 371 U.S. 471, 488-89 (1963), *State v. Verhasselt*, 83 Wis. 2d 647, 661, 266 N.W.2d 342 (1978). The logical implication is that this is a subject of post-conviction review; however, the State asserts that, if this Court

chooses to maintain the corroboration rule, it should change the rule to one of pre-trial admissibility. (Pet. Br. 23-26).

To support this claim, the State argues that the rationale for the rule "implies that the corroboration requirement operates as a rule of admissibility (or exclusion)" (Pet. Br. 13); and that a pre-trial procedure would be more efficient. (Pet. Br. 25, note 12). Because the State's erroneously equates truthfulness with admissibility, and because considerations of practicality and efficiency are better served by post-conviction review, the State's argument should be rejected.

A. The state's reasoning is grounded in neither logic nor precedent

There is little reason to think that the rule's purpose, protecting against convictions based upon false confessions, is any better served by a pre-trial admissibility analysis under Wis. Stat. § 904.04(1). While the State points to *McCormick on Evidence* in support of its argument that the rule is one of admissibility, (Pet. Br. 10-11, 13-14), the State conveniently omits the fact that idea of treating the rule as one of admissibility was essentially dismissed by the same commentator: "On balance, there is no reason for the rule to be framed or discussed as one of admissibility. The courts should stop pretending that it is a rule of this sort." KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE, §146 at 600 (6th ed. 2006).

Additionally, the State cites no authority to support its contention that post-conviction application of the corroboration rule undermines the rule's rationale. To the contrary, the State's collection of Wisconsin cases in its brief unequivocally demonstrates that Wisconsin courts treat corroboration as an inquiry into the sufficiency of the evidence. (Pet. Br. 15-22). This indicates that

corroboration is an issue that is assessed only after the jury has returned a verdict.

The State's suggestion to change the corroboration rule appears grounded on the view that, because the voluntariness doctrine relates to reliability and is a rule of pre-trial admissibility, the corroboration rule should also be considered pre-trial as a rule of admissibility. The corroboration and voluntariness doctrines, however, serve different ends; the former seeks to produce confidence in the truth of the confession, while the latter serves to deter official misconduct. The two are not interchangeable, as has been recognized by the United States Supreme Court:

> Our decisions under [the fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system-a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration.

Rogers v. Richmond, 365 U.S. 534, 540-41 (1961). This Court has agreed that questions of truthfulness have no place in the voluntariness calculus. *State v. Agnello*, 226 Wis. 2d 164, 174, 593 N.W.2d 427 (1999) ("It is well settled constitutional law that the truthfulness of a confession can play no role in determining if that confession was voluntarily given.") Thus, the State's analogy to the voluntariness doctrine is inapposite.

B. For efficiency reasons, the corroboration rule works best on post-conviction review.

The State contends that efficiency is better served by a pre-trial analysis. (Pet. Br. 25, n. 12). According to the State, if there is insufficient evidence to corroborate a confession, it would be most logical and efficient to make the determination to exclude the confession prior to trial. *Id.* Although the State's reasoning sounds correct on its face, it offers no details or procedures for how the determination would be made. Furthermore, efficiency would actually be sacrificed in most cases.

In order for the State to demonstrate that a confession is corroborated by a "significant fact," the court must have the opportunity to meaningfully assess all the evidence concerning corroboration. Since the evidence of corroboration unfolds throughout the course of the trial, it would be highly cumbersome to transform the corroboration rule into a rule of admissibility. This would require the State to present virtually all of its evidence in a pre-trial hearing in order to establish that it has sufficient corroboration—essentially a trial before the trial.

Moreover, given the dynamic nature of evidence, there is no guarantee that evidence proffered at such a pre-trial hearing would continue to be available or be similarly probative come time for trial. The present case provides a perfect example. If the pre-trial admissibility hearing proposed by the State would have taken place in Bannister's case, the prosecution surely would have proffered the testimony of Steven Wolk, much as it did in its opening statement. (34: 86-87.) Assuming that the trial judge would have found this proffered evidence sufficiently corroborative to admit Bannister's alleged confession, things would have changed dramatically at trial. When the State called Steven Wolk to the stand, he refused to testify. (36: 64-67.) The State's corroborative

evidence would have vanished *after* Bannister's statement had been presented to the jury through Detective Carchesi's testimony. Thus, post-conviction review would have been necessary notwithstanding the fact that a pre-trial hearing ostensibly designed to avoid this very problem had already been held.

C. Changing the corroboration rule to a pre-trial rule of admissibility would not affect the outcome of Bannister's case

Even if this Court adopts the State's proposed change to the corroboration rule, that change would have no bearing on this case. As discussed in the next section, the court of appeals properly concluded that Bannister's confession lacked adequate corroboration. Under the State's proposal, Bannister's confession would be deemed inadmissible, and the State would have no evidence linking Bannister to a delivery of morphine. Clearly, the evidence would be insufficient to convict him of that charge.

III. The Court of Appeals Correctly Interpreted and Applied Wisconsin's Corroboration Rule When it Concluded that the State Failed to Adequately Corroborate Bannister's Confession.

A. The doctrine of judicial estoppel does not apply to Bannister's claim that his confession was not sufficiently corroborated to sustain a conviction.

The State argues that, since Bannister "stipulated" that the presence of morphine in Michael Wolk's blood "had probative value" as to the crime of delivery, he is estopped from arguing that this same evidence fails to adequately corroborate his confession. (Pet. Br. 35).

This argument misconstrues the doctrine of judicial estoppel as well as the Wisconsin rules of evidence.

The "stipulation" referred to by the State was no such thing; rather, it was an evidentiary concession effectively coerced out of Bannister by the prosecutor. (See sec. IV, supra; 34: 2-7, 17-25)

In *State v. Mendez*, 157 Wis. 2d 289, 291, 459 N.W.2d 578 (Ct. App. 1990), the defendant pleaded guilty to one misdemeanor and four felony charges. At the plea hearing, Mendez conceded that a factual basis existed for his pleas. *Id.* at 294. Mendez argued on appeal that a factual basis did not exist. *Id.* The State argued that Mendez was judicially estopped from making this argument. *Id.* The court of appeals rejected the State's argument, noting that such an application would create a scenario in which a defendant could plead guilty to an offense that was not committed, and given that the doctrine of judicial estoppel is grounded in basic principles of justice, such a result would be untenable. *Id.*

The court of appeals' reasoning in *Mendez* applies to the present case. The record is clear that the evidentiary agreement between Bannister and the State was only reached after the State threatened Bannister with a homicide charge, a charge it had previously said it did not think it could prove. (34: 2-8.) At least one judge of the court of appeals saw fit to describe this exchange as "extortion." *Bannister* at ¶ 13. (Fine, J., *concurring*). It would undoubtedly offend basic principles of justice to hold Bannister to a position on appeal that the State effectively coerced him into assuming at the trial court level.

Moreover, judicial estoppel would not apply in this case. Judicial estoppel "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." *State v. Petty,* 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). The

boundaries of judicial estoppel are as follows: "[T]he later position must be clearly inconsistent with the earlier position; second, the facts at issue should be the same in both cases; and finally, the party to be estopped must have convinced the first court to adopt its position . . .." *Id.* at 348 (citing *Harrison v. LIRC,* 187 Wis.2d 491, 497 (Ct. App. 1994).

Bannister's position at trial was not "clearly inconsistent" with his contention on appeal that the evidence failed to corroborate his confession. As previously discussed, Bannister agreed not to object to evidence of Michael Wolk's death in order to avoid being charged with homicide. In so doing, Bannister's counsel acquiesced to the court's statement that "you agree that it has probative value as to whether or not your defendant delivered morphine." (34: 23-24.) Conceding that evidence may have some probative value is not the same as conceding that the evidence satisfies the legal requirement of corroboration. Judicial estoppel simply does not bar Bannister's claim.

B. The State has mischaracterized and misapplied Wisconsin's corroboration rule.

i. The State has mischaracterized Wisconsin's corroboration rule

The State points to an innocuous misnomer in the court of appeals' opinion as the first of "repeated" errors in that court's application of the corroboration rule. (Pet. Br. 29) ("The court of appeals' errors begin with its characterization of Wisconsin's corroboration requirement 'as the *corpus delicti* rule'"). In so doing the State erroneously suggests that the court of appeals applied this "stricter" version of the corroboration rule "long ago rejected" by Wisconsin courts in favor of a "trustworthiness" version. (*Id.* at 29-30.) This assertion is belied by the text of the opinion.

Initially, the State's assertion that the *corpus delicti* rule is "stricter" than the trustworthiness standard is questionable. The traditional *corpus delicti* rule merely requires corroborating evidence "that a harm or injury occurred by criminal act." Richard A. Leo et. al, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century,* 505. In contrast, the trustworthiness standard used by Wisconsin and the federal courts requires corroboration of the *confession*, rather than the criminal act itself. *See Holt v. State,* 17 Wis. 2d 468, 480 (1962) (Wisconsin requires corroboration of a "significant fact" of the confession.). Accordingly, the traditional rule, not the Wisconsin rule, is easier for the prosecution to satisfy because the State must only establish that an injury was caused by a criminal act; it can use the defendant's statement to fill in the identity of the perpetrator (confessor) and elements of the crime such as intent or malice even if unsupported by other evidence. Leo, 11-12. The State's implication that the traditional rule requires more is simply incorrect.

In addition, the text of the opinion immediately surrounding the five words lifted by the State clearly demonstrates that the court of appeals knew and applied the appropriate version of the rule in Wisconsin:

> Developed at common law, Wisconsin's corroboration rule, also known as the *corpus delicti* rule, requires that a "conviction of a crime may not be grounded on the admission or confessions of the accused alone." Instead, there must be corroboration of a "significant fact." ... "Such corroboration is required in order to produce a confidence in the truth of the confession." As noted, the corroboration must be of a "significant fact."

State v. Bannister, 2006 WI App 136, ¶9 (Internal citations omitted.) Perhaps the court of appeals invoked the generic label of *corpus delicti* simply to acknowledge the common law origin of Wisconsin's corroboration rule. Whatever the reason for it, the court's use of the common law terminology is entirely insignificant. The court of

appeals applied Wisconsin's trustworthiness standard in its decision and reversed Bannister's conviction due to the lack of corroboration of his confession,[6] not because the State failed to corroborate the crime itself.[7] Thus, whether the court of appeals called the rule "*corpus delicti*" or something else is of no consequence. What matters is that the court of appeals applied the proper standard under Wisconsin law.

ii. The State incorrectly argues that the court of appeals must adopt every inference most favorable to the verdict in evaluating corroboration.

The State asserts that a review of the evidence with an eye towards determining whether the corroboration rule was satisfied requires that the evidence be viewed in the light that best supports corroboration. (Pet. Br. 30-31). In crafting this standard, the State relies on *State v. Poellinger,* 153 Wis. 2d 493, 451 N.W.2d 752 (1990) which states that "an appellate court must view the trial evidence in the light most favorable to the verdict." *Id.* at 30. Although this is the appropriate standard for reviewing the sufficiency of the evidence to uphold a conviction, the corroboration rule is properly construed as a question of law entitled to a *de novo* determination by the court of appeals. *See Bannister* at ¶ 9 ("We independently review whether the evidence presented meets the corroboration requirement.") (citing *State v. Barth*, 26 Wis. 2d 466, 468, 132 N.W.2d 578 (1965)); *and see State v. Turner*, 136 Wis. 2d 333, 344, 401

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6 "Thus, under the circumstances present here, without additional evidence, the finding of morphine in Michael Wolk's morphine-addicted body is not sufficient to corroborate Bannister's confession claiming to have given morphine pills on prior uncertain dates to the deceased." *State v. Bannister,* 2006 WI App 136, ¶11.

7 It is interesting to note, however, that the State would have failed under this formulation of the test as well. The State provided no evidence aside from Bannister alleged confession that Michael Wolk received the morphine illegally; e.g., there was no testimony that Wolk did not have a prescription for the drug.

N.W.2d 827 (1987) ("Questions of law require independent appellate review.") The State's argument erroneously conflates the legal standard of corroboration with that for review of a jury verdict. The court of appeals must be allowed to draw its own inferences in determining whether there is adequate corroboration.

a. *Poellinger* is applicable only to inferences previously "drawn by the trier of fact."

Jurors in Wisconsin are never asked to determine whether a confession is adequately corroborated, and the jury is never instructed on the standard of corroboration. In the present case, the jury was instructed on assessing the credibility of witnesses, and was charged with determining how much weight to give to the testimony presented at trial. The jury was even given specific instructions on assessing Bannister's confession. (36: 101-05.) However, the jury was never instructed on the standard of corroboration.

By its terms, *Poellinger's* command to draw every inference most favorable to the verdict applies only to those inferences previously "drawn by the trier of fact." *Id.* at 507. Because the jury does not determine adequate corroboration, *Poellinger* does not require the court of appeals to give deference to the verdict in determining the issue of corroboration.

In addition, the State's attempt to give deference to the jury verdict under *Poellinger* conflicts with the nature of the corroboration rule. As the U.S. Supreme Court has noted, the corroboration rule "infringe[s] upon the province of the primary finder of facts" and acts as "a restriction on the power of the jury to convict." *Smith* at 153. Moreover, considering the much-discussed rationale for the corroboration rule—producing confidence in the truth of the confession—a failure to produce sufficient evidence to corroborate the confession effectively makes

the confession incredible as a matter of law. In such a case, any inferences drawn from the confession are entitled to no deference. *See Poellinger* at 507 ("...an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law.")

b. Whether corroboration is sufficient is a question of law, entitled to *de novo review.*

The State's assertion that "viewing the evidence in the light most favorable to a verdict means viewing the evidence in the light that best supports corroboration," (Pet. Br. 31) is contrary to established precedent on the proper standard of review of a question of law. In Wisconsin, an appellate court has specific authority to engage in *de novo* review of the application of a legal standard, such as corroboration, to undisputed facts. *See State v. Miller*, 2004 WI App 117, ¶ 20, 274 Wis. 2d 471, 683 N.W.2d 485 ("We review the question of identify of issues as a question of law because it involves the application of a legal standard to undisputed facts.")

The evidence presented in this case, apart from the testimony concerning Bannister's alleged confession, is undisputed. On January 17, 2003, Officer Scott was called to a residence where Michael Wolk was found dead; two syringes, a powdery substance, rolling papers, and a spoon were found on the table next to him. (35: 47-49.) There were no pills found. *Id.* at 52. Dr. Susan Gock determined that the syringes, spoon, and Wolk's blood all contained morphine. (36: 11, 15.) Dr. Gock could not say where the morphine came from. *Id.* at 18. Dr. Jeffrey Jentzen determined that Wolk died from morphine toxicity. *Id.* at 60. Dr. Jentzen could not testify as to where the morphine came from. *Id.* at 61. The purely legal inquiry, then, is whether this evidence corroborated a significant fact of Bannister's alleged

confession. The court of appeals correctly determined that it did not.

iii. The court of appeals did not engage in improper appellate fact-finding

The State takes issue with a number of statements in the court of appeals' opinion. First, the State asserts that the court's statement that "the deliveries to Michael could have been easily concluded by mid-December" is pure conjecture and lacks "*any*" support in the record. (Pet. Br. 31) (emphasis in original). This is not so. According to Detective Carchesi's trial testimony, Bannister said he gave morphine to Steve on three to four occasions and to his brother Michael on three to four occasions, every third day or in that range, between mid-December of 2002 and mid-January of 2003. (36: 41-42.) The statement attributed to Bannister is devoid of further detail, thereby supporting a variety of equally plausible delivery scenarios including the one raised by the court of appeals in which Bannister delivers morphine to Michael three times in nine days starting in mid-December 2002 and ending in mid-December 2002. *Bannister* at ¶ 11. The State complains that there is no evidence to support such an inference because Bannister told the detective that the deliveries ended in January of 2003. (Pet. Br. 31.) The State, however, ignores the fact that Bannister's alleged statement was that he was giving morphine to both Michael and Steve in that time period and there are *no specifics* as to who received what and when. The record supports the observation of the court of appeals, which shows the weak probative force of the alleged confession.

Second, the State asserts that the court of appeals' characterization of Michael Wolk as "a drug addict who regularly used illicit drugs" constituted improper appellate fact-finding based on speculation and inference unsupported by the record. (Pet. Br. 32.) The State

misses the mark again. The undisputed facts are that Wolk died of a drug overdose and was found in close proximity to two syringes, a spoon, and a powdery substance. (35: 48, 52.) These facts clearly allow the inference, if not unequivocally demonstrate, that he was an intravenous drug user. Moreover, Wolk's autopsy protocol, which reported his history of heroin abuse, was received into evidence and was therefore a proper basis for an inference that he was a drug addict. *See State ex rel Sieloff v. Golz*, 80 Wis. 2d 225, 241, 258 N.W.2d 700 (1977) (inferences based on documentary evidence entitled to no deference); and WIS JI-Criminal 155, EXHIBITS (2000) (An exhibit received is evidence, whether or not it goes to the jury room.)

Lastly, the State inexplicably charges the court of appeals with "fundamentally misunderstanding" the charges against Bannister. (Pet. Br. 33.) The State complains that the court of appeals focused only on deliveries to Michael rather than deliveries to both Steven and Michael. *Id.* The State continues that it only had to prove a delivery to *either* Steven or Michael, not just Michael, and that the court of appeals' focus on Michael somehow held the State to an erroneous legal standard, though it fails to explain what that exactly means. *Id.* The only independent evidence produced at trial related to Michael Wolk and the conditions of his death. Simply put, it would have been impossible for the court to focus on anything else. The fundamental misunderstanding appears to lie with the State.

C. The evidence did not corroborate the confession

Lastly, the State argues that the trial evidence was sufficient to corroborate Bannister's confession. The court of appeals found otherwise and the State is simply asking the Court will step in and correct what it perceives to be an error by the court of appeals. This Court should resist.

The State first contends that the court of appeals demanded more than is required by the significant fact doctrine. (Pet. Br. 34.) None of the Wisconsin cases dealing with the corroboration rule defines "significant" in the context of the rule. The court of appeals recognized this fact and turned to the dictionary, which it was entitled to do. *Bannister* at ¶ 9 ("having or likely to have influence or effect: important."); *See State v. Grady*, 175 Wis. 2d 553, 558, 499 N.W.2d 285 (Ct. App. 1993) ("All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.")

The court of appeals later stated: "A significant fact is a meaningful and particularized fact that produces confidence in the truthfulness of the confession." *Id.* at ¶ 11. This only makes sense. Producing confidence in the truth of the confession is the stated rationale for the rule. *Holt* at 480. Further, a "meaningful or particularized" fact suggests something more than a generic admission or a restatement of ultimate facts within the knowledge of the questioning officer at the time of the interrogation. Such a definition is consistent with the accepted rationale for the rule, and is proper. "If a person only provides information already known by the police or the public...a confession may be untrustworthy." *State v. Mauchley*, 67 P.3d 477, 489 (Utah 2003) (internal citation omitted.)

Because the court of appeals applied the correct standard in reviewing whether there was sufficient corroboration of Bannister's confession, there is no reason for this court to undertake an independent review of the trial evidence to determine if it met that standard. *See State v. Peotter*, 108 Wis. 2d 359, 371-72, 321 N.W.2d 265 (1982) (Abrahamson, J. *dissenting.*)

Regardless, the State's challenge to the ultimate conclusion of the court of appeals, that the confession was

not sufficiently corroborated, is unconvincing. The State makes much of the court of appeals' "lament" regarding the "dearth" of information in the criminal complaint, noting that the complaint plays no part in the corroboration analysis. (Pet. Br. 37, n. 17.) The State failed to recognize, perhaps, that the court of appeals was referring only to the "charging section" of the complaint, which strictly alleges the commission of the crime, not the facts within the probable cause narrative which the State detailed in a footnote. *Id.* (citing *Bannister*, ¶ 10.)

In addition, the State's position that the lack of details of any delivery in Bannister's alleged confession has no bearing on the corroboration assessment is wrong and misses the point entirely. (Pet. Br. 37-38.) The court of appeals highlighted the absence of those details to illustrate the "barebones" nature of the confession. *Bannister* at ¶ 10. Had any of those details been part of Bannister's statement and corroborated, the conviction might have been sustainable. As the State recognizes, however, those facts do not appear in Bannister's statement. (Pet. Br. 38.) Their absence is relevant to the ultimate corroboration determination, because the fewer details a confession contains, the more likely it is that the confession is untrustworthy. This is especially true when the corroborating evidence is already within the possession of the police at the time the confession is allegedly made, as was true in the present case.

Bannister was interrogated about Michael Wolk some 9-10 months after the alleged delivery of morphine occurred. (35: 6-8, 16-18.) By the time of the interrogation, the Detective knew the critical details of the case, including the time and cause of Wolk's death. (35: 14.) The statement ultimately produced by the Detective did nothing to add to his pre-existing knowledge of the case. For example, the Detective knew that Wolk died of morphine toxicity on January 17, 2003. The Detective claims that Bannister told him he gave morphine to Wolk and/or his brother Steven on several occasions between

mid-December and mid-January at Bannister's home. (36: 41-42.) That, alone, is the essence of the statement. The court of appeals recognized its shortcomings:

> Bannister's statement is also devoid of detail. Bannister told the detective little about the circumstances surrounding the delivery; he never mentioned what time of day the parties would meet, what the parties said, how they communicated, etc. We have only Bannister's barebones confession that at his house he gave morphine pills to Michael Wolk on three to four occasions, and to Steven Wolk on three to four occasions within the span of about one month. ... Bannister's confession did not yield any unusual information or circumstances that would not be widely known.

Bannister at ¶ 11. In so doing, the court of appeals considered the generic nature of Bannister's confession as well as the absence of a significant corroborating fact, and correctly held that there was insufficient evidence to corroborate Bannister's confession.

IV. This Court Should Exercise Its Power of Discretionary Reversal Because the Sole Issue of Delivery of Morphine Was so Clouded by Evidence of Michael Wolk's Death and by Prejudicial Statements Made by the Prosecutor that the Real Controversy in this Case Was Not Fully Tried[8]

This Court should exercise its power of discretionary reversal. The sole issue in this case—whether Bannister delivered morphine—was so clouded by the improper emphasis on Michael Wolk's death that the true controversy in this case was not fully tried. Additionally, the cumulative effect of other evidence and commentary put before the jury—including the prosecutor's assertion of personal knowledge of Bannister guilt; the prosecutor's opening summary of Steven

[8] Bannister recognizes review was not granted on this issue; however, he includes it pursuant to *State v. Johnson*, 153 Wis. 2d 121 (1990) to avoid a potential claim of waiver.

Wolk's expected testimony, which never materialized; and the prosecutor's misrepresentation of Bannister's failure to appear at the Cudahy police station—confused the issue. For this reason, the real controversy in Bannister's case was not fully tried and Bannister should be granted a new trial in the interest of justice pursuant to Wis. Stat. 751.06.[9]

The Wisconsin Supreme Court in *State v. Wyss* delineated the two grounds for when the court of appeals may reverse a judgment and order a new trial under its power of discretionary reversal. 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). The court of appeals may exercise its power of discretionary reversal: (1) whenever the real controversy has not been fully tried or (2) whenever it is probable that justice has for any reason miscarried. *Id.* Under the first category, when the real controversy has not been fully tried, an appellate court may use its power of discretionary reversal without first finding a probability of a different result on retrial. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The circumstances surrounding Bannister's trial prevented the real controversy from being fully tried; accordingly, he is entitled to reversal without showing the probability of a different result on retrial.

In *Vollmer v. Luety*, the Wisconsin Supreme Court listed several evidentiary circumstances under which courts have found that the true controversy has not been fully tried and thus exercised its power of discretionary

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[9] Discretionary reversal. In an appeal to the Supreme Court, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendment in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules as are necessary to accomplish the ends of justice. Wis. Stat. 751.06 (2004). *See also, Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990); *State v. Wyss*, 124 Wis. 2d 681, 734-35, 370 N.W.2d 745 (1985).

reversal.[10] *Id.* at 19-21. Courts have concluded the real controversy has not been fully tried when the jury had before it evidence that prevented the jury from fairly considering a crucial issue, *Lorenz v. Wolff*, 45 Wis. 2d 407, 173 N.W.2d 129 (1970), or when the jury had before it evidence not properly admitted that so clouded a crucial issue. *Wyss*, 124 Wis. 2d at 735. Both situations apply to this case; therefore, this Court should exercise its power of discretionary reversal under Wis. Stat. § 751.06 in the interest of justice.

A. The jury was repeatedly presented with irrelevant and prejudicial evidence and statements highlighting Michael Wolk's death

The sole issue in Bannister's case was delivery of morphine. This issue, however, was not fully tried because the jury was repeatedly presented with evidence and statements that clouded and confused the issue of delivery. *See Vollmer*, 156 Wis. 2d at 20; *Wyss*, 124 Wis. 2d at 735; *Lorenz*, 45 Wis. 2d at 406. Throughout the course of trial, the prosecutor repeatedly focused the jury's attention on Michael Wolk's death. The jury could not weigh the evidence of delivery without contemplating Wolk's death because it was the only evidence the State produced independent of Bannister's confession. By inextricably linking the death with the delivery, the State prevented the jury from objectively considering the sole issue in the case, delivery.

[10] Although the *Vollmer* court listed several different situations when courts have found that the true controversy has not been fully tried, the court acknowledged that its list was not an exhaustive list of every situation when courts have exercised its power of discretionary reversal. *Vollmer*, 156 Wis. 2d at 21.

i. The prosecutor repeatedly focused the jury's attention on the death of Michael Wolk

The State's case improperly focused the jury's attention on Wolk's death by morphine toxicity when the only issue in the case was delivery of morphine.

In *Vollmer v. Luety*, the Wisconsin Supreme Court found that the court of appeals correctly reversed the judgment in that case because the court concluded that "the erroneous special verdict question led the jurors to focus their attention on the defendant's negligence in maintaining the premises, when the crux of the case was that the defendant was negligent in his operation of the power mower." 156 Wis. 2d at 22.

In this case there is much more than an erroneous verdict question to show that the jury was likely confused about the issue. *See Id.* The continual presentation of prejudicial evidence and statements regarding Wolk's death undoubtedly focused the jury's attention on holding someone accountable for that death. This shift in focus prevented the true controversy from being fully tried.

The State framed the case in light of Wolk's death and went out of its way to appeal to the jury's sympathies. In his opening statement, the prosecutor told the jury that Eileen Wolk found her husband dead from an overdose of morphine. (34: 81.) "[T]he purpose of the testimony regarding the death is not [to] ask someone to answer for that death, but it's an important element of evidence that I think that you have to listen . . . . It's important because his wife found him, what ends up, being dead."[11] (34: 81.)

Throughout the rest of trial the jury's attention was drawn back again and again to Wolk's death. Every one

[11] The court of appeals noted that this was a perfect example of the apophasis rhetorical device-arguing something by disclaiming an attempt to so argue. *Bannister* at ¶ 16, (Fine. J, *concurring*)

of the State's witnesses either focused entirely on Michael Wolk's death or spent time describing his death and the circumstances surrounding it. The entirety of Susan Gock's testimony, the toxicologist, was framed within the context of testing the presence of drugs in Wolk's dead body. (36: 4.) Additionally, during the testimony of two of the State's four witnesses, Officer Scott and Detective Carchesi, Wolk was consistently referred to as "the victim." (35: 47; 36: 21, 23.) The jury was unable to separate evidence of delivery of morphine from the death, because all of the State's evidence of delivery was intermingled with evidence of his death and status as a "victim."

In addition, the prosecutor's entire closing argument reminded the jury of Wolk's death again and again. (36: 106.) For example, in addressing the State's inability to prove the exact time of the morphine delivery, the prosecutor stated "[i]t's not always possible to prove the exact times when you have a situation here where the defendant is delivering morphine to people one of whom is now dead." (36: 106.) The prosecutor then spent some time describing how Wolk was found after he overdosed. "Paramedics and EMT's tried to make him survive, tried to revive him to no avail. He died at the scene . . . ." (36: 107.)

Finally, another indication that the jury was likely confused about the issue in the case is that the Court appeared to be as well. At sentencing the trial court ordered Bannister to pay restitution to Wolk's widow for funeral expenses. (38: 26-27.) In imposing sentence the court told Bannister he should have known distributing morphine could kill people and "this particular distribution of Schedule 1 narcotics resulted in a death." (38: 25.) The court then ordered Bannister to pay $4700.00 of restitution to Eileen Wolk, Michael Wolk's widow, stating "it is 'causally related' to your conduct." (38: 26-27.)

ii. The prosecutor exceeded the scope of the agreement by presenting the medical examiner's testimony regarding the cause of Michael Wolk's death

Although Bannister was charged and tried for delivery of morphine, the prosecutor threatened him with a charge of reckless homicide moments before trial was set to begin, and thus got Bannister to agree not to object to evidence of Wolk's death. (34: 6-8, 24; Pet. App. 132-34, 150.) The prosecutor asserted that the reason he wanted to present evidence of the death was so the State could establish that a delivery of a controlled substance took place. (34: 22-23; Pet App. 148-49.)

The circumstances surrounding the agreement between the defense and the State indicate that it was vague at best; the court, the State and defense counsel all appeared to have a different understanding of what it entailed.[12] (34: 17-26; Pet. App. 143-52.) Both the prosecution and the defense corrected the court several times when the court attempted to state the agreement on the record. (34: 17-23; Pet. App. 143-49.) After several attempts by the court, the prosecution and the defense to orally state what the agreement entailed, the defense acquiesced in exchange for the State not charging reckless homicide. (34: 24; Pet. App. 50.)

The prosecutor satisfied this agreement by calling the toxicologist, Susan Gock, to testify. Gock tested Michael Wolk's blood for various drugs or poisons. (36: 4.), and testified to finding unconjugated morphine in Wolk's blood, thus establishing that he used morphine shortly before his death. (36: 10.) Her testimony satisfied the purpose of the agreement which was to show that Wolk used morphine in January 2003.

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[12] Because of the confusion surrounding the agreement, all of the relevant transcript pages were reproduced in Appellant's court of appeals brief; they also appear in the Petitioner's appendix.

After Gock's testimony the State called Jeffery Jentzen the medical examiner for Milwaukee County. Jentzen's testimony exceeded the scope of Bannister's agreement with the State. The State's purpose for entering into this agreement was to help prove delivery of morphine by showing that Wolk had used it. (34: 22-23; Pet. App. 148-49.) Cause of death testimony was not needed to show that Wolk used morphine on January 17, 2003 because Gock's testimony already established that he used morphine shortly before his death. Jentzen's testimony regarding cause of death, therefore, had no probative value and was highly prejudicial and irrelevant. This fact inextricably links the death of Wolk with delivery of morphine to Wolk.

B. The prosecutor knowingly mischaracterized Bannister's failure to appear at the police station

The prosecutor intentionally elicited misleading testimony in an effort to show consciousness of guilt on Bannister's part.

Bannister was asked by Detective Carchesi to come to the police station on February 18, 2003 and Bannister agreed. (35: 15.) However, he was unable to make it down to the police station that day and so he called Carchesi to inform him of that fact. (35: 15.) Carchesi did not put out a warrant for Bannister's arrest. (35: 15.) He did not go out and immediately pick Bannister up. (35: 15.) In fact, Carchesi did not find it necessary to make any sort of contact with Bannister again until October 23, 2003, eight months after he initially called Bannister. (35: 11.) When Carchesi was asked why he did not make contact with Bannister sooner after speaking with him on the phone on February 18, 2003, he responded by stating "our case load is such that I got to this case when I got to it." (35: 15; 36: 27.) This information was elicited outside the presence of the jury

during motion hearings prior to the evidentiary portion of the trial. (35: 3.)

The prosecutor, however, misrepresented these facts to the jury through witness testimony and argument. (35: 15; 36: 27-28, 46, 109.) In his direct examination of Carchesi during trial, the prosecutor elicited the following testimony:

> Q: So you spoke to the defendant on February 18, 2003 on the phone?
> A: That's correct.
> Q: And that was the date that he was ordered into the Cudahy Police Department?
> A: Yes, it was.
> Q: Did the defendant appear at the Cudahy Police Department on that day?
> A: He did not.
> Q: Did he ever voluntarily, after that date, appear at the Cudahy Police Department?
> A: No, he did not.

(36: 27-28.) The prosecutor made a point to highlight Bannister's failure to "voluntarily" appear at the police station. The prosecutor portrayed Bannister to the jury as one who evaded police and refused to follow a police order. After cross-examination, the prosecutor chose to re-direct Carchesi about only one point, Bannister's failure to appear at the police station:

> Q: On February 17, 2003, you talked to the defendant correct?
> A: Yes sir.
> Q: And you told him to come into the Cudahy Police Department on February 18, 2003?
> A: Yes sir.
> Q: And he never did come in, did he?
> A: No, he did not.
>
> MR. STINGL: I don't have any further questions.

(36: 46.) The prosecutor's only purpose in conducting a redirect examination of Carchesi was to emphasize to the jury Bannister's failure to appear as requested by the

police. It was also a subject of argument at closing. (36: 109). Because the prosecutor knew, based on motion testimony he heard that same day, that Bannister had notified Carchesi he could not appear as requested, this was highly improper.

In light of the fact that the sole issue of delivery was already clouded with evidence of, and statements regarding, Michael Wolk's death, this misrepresentation of Bannister's character and actions is further proof that the real controversy in this case was not fully tried and that this Court should exercise is power of discretionary reversal pursuant to Wis. Stat. § 751.06.

C. The prosecutor improperly discussed Steven Wolk's anticipated testimony during opening statement when the record indicates that he was uncertain as to whether Steven Wolk would testify

The prosecutor detailed Steven Wolk's anticipated testimony in his opening statement, but Steven asserted his Fifth Amendment rights and did not testify. (36: 65-67.) In *State v. Wyss*, the court stated that "when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." 124 Wis. 2d at 735. While we concede that statements of the attorneys are not evidence, the totality of the circumstances surrounding Bannister's trial render the prosecutor's recital of Steven Wolk's anticipated testimony especially critical to the sole issue of delivery in this case.

The prosecutor detailed Steven Wolk's testimony for the jury. (34: 85-87; Pet. App. 159-61). He prefaced his description of Steven's testimony with "if Steven should testify . . . ." (34: 86; Pet. App. 160.) Yet, despite this indication that the prosecutor even then suspected that Steven may not testify, he still offered a summary of what Steven would say if he did. "He'll tell you that over a

span of time, that he and his brother . . . would obtain morphine from the defendant, Edward Bannister. It went on for a year." *Id.* He went on, "Steven Wolk said they had been doing this several times a week for a while, that Michael had been doing it for approximately three months and Steven had been doing it for longer periods of time." *Id.* at 87; 161. Wolk, of course, did not testify.

When defense counsel made a motion in limine asking if he would be able to mention the fact that Steven Wolk was not called as a witness, the court compounded the problem by prohibiting comment on the fact that Wolk did not testify. (36: 73.) In denying the motion, the trial court first erroneously stated that Wolk was not mentioned as a witness in "opening arguments." The prosecutor admitted he mentioned him as a "potential witness. You will maybe hear from him or about him." (36:73.) The trial court then ruled, stating "You cannot argue that he pled the Fifth. That's absolutely forbidden... It's taking unfair advantage of a constitutional right that the state could not have known he could have exercised at the time they made mention of him in opening arguments."[13] (36: 73.)

Steven Wolk's testimony was absolutely critical to the State's case. He was the only witness that the State contended could testify to Bannister's delivery of morphine to Michael Wolk. The State's case rested entirely on its ability to sufficiently corroborate Bannister's confession; accordingly; putting Wolk's testimony before the jury was a vital element of the State's case.

While the limiting instruction, that statements of the attorneys are not evidence, was given to the jury, the clear importance of the prosecutor's version of Wolk's

[13] As the Court of Appeals noted, trial counsel pointed out that the State could have asked Wolk if he was going to testify, something the prosecutor tacitly admitted he didn't bother doing. *Bannister* at ¶ 20 (Fine. J, *concurring*).

anticipated testimony was not likely lost on the jury. In an opening statement filled with details regarding the death of Michael Wolk and intravenous drug use, the prosecutor's only evidentiary foreshadowing concerning a *delivery* was the testimony of Steven Wolk. In addition, the prosecutor signaled the importance of this expected evidence by going out of his way to tell the jury that he wasn't asking them to hold anyone accountable for the death of Michael Wolk, just for the act of delivery.

Lastly, though the good faith of the prosecutor isn't controlling, it should be considered. The prosecutor's good faith in the present case is questionable in two ways. First, he gave some indication in his opening that he was not certain if Wolk would testify, yet he dove immediately into what Wolk would say if he did. The second point is the content of the prosecutor's summary. The prosecutor was well aware, or should have been, that Steven Wolk gave conflicting statements to the police regarding his contacts with Bannister, specifically the time period involved, yet the prosecutor chose only one of those versions to share with the jury. (35: 17).

Taken together, the fact that the jury was repeatedly presented with irrelevant and prejudicial evidence and statements regarding Michael Wolk's death, that Bannister's character was misrepresented to the jury, and that the jury essentially heard the prosecutor's damaging recital of Steven Wolk's anticipated testimony, it is clear that the jury was presented with evidence and statements that clouded the issue of delivery. For these reasons the true controversy in this case was not fully tried and this Court should exercise its power of discretionary reversal under § 751.06, Stats. and *Vollmer v. Luety*, 156 Wis. 2d 1, 456 N.W.2d 797 (1990).

CONCLUSION

Because the court of appeals applied the correct standard in determining whether Bannister's alleged confession was sufficiently corroborated, and because

Bannister's alleged confession presents the situation the rule was designed to avoid, this Court should affirm the court of appeals' reversal of Bannister's conviction. Furthermore, due to the practical difficulties attendant to treating the corroboration rule as a rule of admissibility, the Court should continue to recognize the rule as one of evidentiary sufficiency. Furthermore, in a time in which convictions based on false convictions are coming to light with increasing frequency, the need for safeguards against such results could not be more clear; the Court should soundly reject the State's invitation to abrogate the corroboration rule in Wisconsin. Lastly, should it deem addressing the issue appropriate, the Court should order discretionary reversal of Bannister's conviction.

Respectfully submitted this 16th Day of November, 2006

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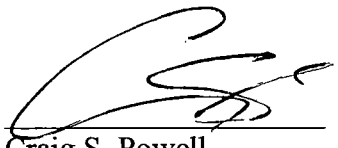
CERTIFICATION

Pursuant to Wis. Stat. (Rule) § 809.19(8)(d), I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,900 words.



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STATE OF WISCONSIN

IN SUPREME COURT

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STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

EDWARD BANNISTER,

Defendant-Appellant.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

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ARGUMENT

The State reaffirms the arguments it presented in its principal brief and does not concede that Bannister has refuted them. Because a reply to Sections I through III in Bannister's brief would mostly repeat, in truncated form, the State's previous arguments, this reply focuses mainly on Section IV of Bannister's brief: whether this court should exercise its discretion under Wis. Stat. § 751.06 and grant a new trial in the interest of justice. This reply also addresses to two other

points raised in Bannister's brief that merit specific responses.[1]

I. BANNISTER FALSELY ASSERTS THE STATE "CONVENIENTLY OMIT[TED]" AN OPPOSING VIEW.

Bannister accuses the State of "conveniently omit[ting]" a *McCormick on Evidence* editor's opposition to treating the corroboration rule as one of admissibility. Bannister's Brief at 14 (quoting editor as declaring "'there is no reason for the rule to be framed or discussed as one of admissibility'").

Bannister seriously misleads. At a later point in its brief, the State quoted (and responded to) similar language in *McCormick* when offering a good reason — from the State's viewpoint — for treating the rule as one of admissibility: avoiding a double-jeopardy bar. *See* State's Brief at 25 n.12.

II. BANNISTER MISUNDERSTANDS THE *DE NOVO* STANDARD OF REVIEW FOR ASSESSING WHETHER THE STATE SUFFICIENTLY CORROBORATED HIS CONFESSION.

Bannister misunderstands the nature of *de novo* review in this case. Bannister's Brief at 21-24. The court of appeals wrote that it "independ-

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[1] In addition, while preparing this reply brief, State's counsel located another Wisconsin corroboration case. *See* State's Brief at 9 n.3, 15-22. In ***State v. Bronston***, 7 Wis. 2d 627, 98 N.W.2d 468 (1959), this court held that the State adequately corroborated Bronston's confession. ***Id.*** at 640.

ently review[s] whether the evidence presented meets the corroboration standard." ***State v. Bannister***, 2006 WI App 136, ¶ 9, ___ Wis. 2d ___, 720 N.W.2d 498, Pet-Ap. 107. This statement leaves unaddressed the matter of *which* evidence the court can rely on.

Bannister's erroneous understanding shows when he declares (through a misreading of ***Poellinger***)[2] that "a failure to produce sufficient evidence to corroborate the confession effectively makes the confession incredible as a matter of law." Bannister's Brief at 22-23.

No.

Lack of corroboration does not convert a truthful (if insufficiently corroborated) confession into a confession "incredible as a matter of law." Insufficient corroboration either precludes admission of the confession or means that the jury should not have considered the confession; to the extent a conviction requires support from a confession, insufficient corroboration would only mean the State failed to produce sufficient evidence to support the conviction.

When assessing whether the State sufficiently corroborated a confession, a reviewing court must do three things:

- First, it must view the nonconfession evidence most favorably to the verdict. ***State v.***

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[2] ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

- Second, the court must take the confession "as is." Because corroboration-rule review requires the court to compare the proffered corroborating evidence against the "as is" contents of the confession, the court cannot rewrite the confession and cannot presume the unreliability or inaccuracy of the confession.

- Third, the court determines whether any of the proffered nonconfession evidence corroborates, directly or inferentially, "any significant fact" in the confession. ***Holt v. State***, 17 Wis. 2d 468, 480, 117 N.W.2d 626 (1963). If the evidence does, the State has satisfied its obligation.

Here, the court of appeals did *not* take the confession "as is." The court made up a fact: "the deliveries to Michael could have been easily concluded by mid-December." ***Bannister***, 2006 WI App 136, ¶ 11, ___ Wis. 2d ___, Pet-Ap. 108-09. The court relied heavily on this "fact" to find a lack of corroboration: "Thus, under this scenario, it would be extremely unlikely that any morphine found in Wolk's body on January 17, 2003, was obtained from Bannister unless Wolk saved some, and thus, does not corroborate the confession." ***Id.*** Bannister's statement, however, made clear that deliveries occurred through mid-January (36:42, Pet-Ap. 186; *see also* 36:41, 75, Pet-Ap. 212, 219). A mid-January death from "morphine toxicity" (36:60) corroborates the mid-January delivery of morphine reflected in Bannister's statement.

Similarly, without any supporting evidence, the court of appeals declared Michael Wolk a morphine addict. ***Id.*** From this "fact," the court concluded that morphine in Wolk's blood did not corroborate anything because "the finding of morphine in his body was not a remarkable or important discovery. Just as a diabetic would have traces of insulin in the bloodstream, evidence of morphine would be expected in the bodies of morphine addicts." ***Id.*** The presence of morphine in the body of someone not addicted to morphine, however, would qualify as "a remarkable or important discovery" of corroborative value. Here, the court engaged in improper appellate fact-finding to declare the existence of a significant fact — Michael Wolk's morphine addiction — lacking any support in the record.

In short, the court of appeals misinterpreted and misapplied the corroboration rule and engaged in improper fact-finding.

III. THIS CASE DOES NOT MERIT DISCRETIONARY REVERSAL IN THE INTEREST OF JUSTICE UNDER WIS. STAT. § 751.06.

Bannister urges this court to grant a new trial because "the real controversy in [his] case was not fully tried and [he] should be granted a new trial in the interest of justice pursuant to Wis. Stat. 751.06." Bannister's Brief at 29.

This court should decline Bannister's invitation.

> [A] new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has

> for any reason miscarried. Separate criteria exists for determining each of these two distinct situations. *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985).

State v. Hicks, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996). A Wisconsin appellate court

> may exercise its power of discretionary reversal . . . without finding the probability of a different result on retrial when it concludes that the real controversy has not been fully tried. The case law reveals that situations in which the controversy may not have been fully tried have arisen in two factually distinct ways: (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case, and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

State v. Wyss, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985) (citations omitted), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

An appellate court should exercise its discretionary authority to grant a new trial in the interest of justice "infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992).

This court should not invoke its discretionary power to grant a new trial in the interest of justice in this case. If this court agrees with Bannister's claim that the State did not adequately corroborate his confession, then this court will presumably reverse the conviction anyway. On the other hand, if this court disagrees with Bannister's claim, then the court will not have any reason to

remand for a new trial: the jury will have returned a verdict based on a voluntary confession that clearly established Bannister's guilt.

In addition, Bannister's claims do not fit either of the two "situations in which the controversy may not have been fully tried." First, the only "important testimony . . . [bearing] on an important issue of the case" the jury did not hear — the testimony of Steven Wolk — would have buttressed the State's case for delivery and thus would harmed rather than helped Bannister. ***Wyss***, 124 Wis. 2d at 735. Second, the jury did not have before it any improperly admitted evidence, much less any improperly admitted evidence "which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***Id.***

Bannister identifies four alleged defects he believes justify a new trial under Wis. Stat. § 751.06:

1. the prosecutor prejudicially focused on Michael Wolk's death, *see* Bannister's Brief at 31-32

2. the State's presentation of a medical expert exceeded the scope of a stipulation, *id.* at 33-34

3. the prosecutor mischaracterized Bannister's failure to appear at the police station, *id.* at 34-35

4. during opening statements, the prosecutor prejudicially discussed Steven Wolk's anticipated testimony, *id.* at 36-38

Whether viewed individually or collectively, these alleged errors do not merit a new trial pursuant to section 751.06.

In terms of the allegedly prejudicial focus on Michael Wolk's death (Alleged Error No. 1), Bannister's counsel stipulated, after consulting with Bannister, that the State could introduce the evidence about morphine in Michael Wolk's body (34:22-24). Bannister's counsel also agreed not to object to "the evidence that an autopsy was done on Michael Wolk and that Michael Wolk was dead" (34:23).

Thus, not only did Bannister not raise his current evidentiary objection at trial, he stipulated to the use of this evidence. This court should, therefore, apply judicial estoppel to this alleged error. ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). *See also* ***State v. Edmunds***, 229 Wis. 2d 67, 85 n.3, 598 N.W.2d 290 (Ct. App. 1999) (explaining judicial estoppel). Alternatively, because Bannister did not make an objection at trial, this court should treat this claim as waived. *Cf.* ***State v. Keith***, 216 Wis. 2d 61, 80, 573 N.W.2d 888 (Ct. App. 1997) ("[a]rguments which are not raised at the trial level are deemed waived").

In any event, the prosecutor referred to Wolk's death because it provided an unavoidable context for proving two elements of the crime: delivery of a controlled substance (here, morphine). Bannister's counsel had stipulated to the presence of morphine in Wolk's body as probative of delivery (34:23-24). The toxicologist testified that Wolk's blood contained morphine (36:10, 15-17). Both the toxicologist and the medical examiner confirmed the presence of morphine in Wolk and excluded the pres-

ence of any other opiate (36:17, 60), thus excluding a possible claim that Wolk had received a controlled substance different from the one Bannister admitted delivering. And, as the prosecutor noted, the death itself and its timing corroborated Bannister's statement about delivery of morphine (36:111) — an argument bearing on the jury's evaluation of the trustworthiness of Bannister's statement and on the core issue in this appeal. None of this would have distracted the jury from its obligation to decide whether Bannister delivered morphine: even with fewer references to Michael Wolk's death, the evidence pointed directly and unavoidably to a verdict of "guilty." References to Wolk's death therefore did not cause Bannister any harm. ***State v. Hunt***, 2003 WI 81, ¶ 77, 263 Wis. 2d 1, 666 N.W.2d 771 ("The test for harmless error is 'if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."' *State v. Harvey*, 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189; *see also* Wis. Stat. § 805.18(2).").

As to Alleged Error No. 2, the medical examiner's testimony did not exceed the scope of the stipulation. During the discussion on the stipulation, the prosecutor made clear that "[t]here will be testimony by the medical examiner . . . that helps the state present its case of delivery of controlled substance" (34:22-23). The medical examiner's brief testimony (36:52-62) fit well within the terms of the stipulation. Judicial estoppel should apply to this claim as well. ***Petty***, 201 Wis. 2d at 347; ***Edmunds***, 229 Wis. 2d at 85 n.3

Moreover, Bannister's lawyer clearly remained alert to the content of the expert's testimony. During the testimony of the medical expert (a Mil-

waukee County medical examiner), Bannister's counsel objected twice: once on the ground of lack of foundation for a question (36:59-60), and once to the admission of the written autopsy protocol (36:60-61). In the first instance, the court held a sidebar conference, after which the prosecutor asked a different question. In the second instance, the court admitted the document "in a redacted form" (36:61). Neither of these objections asserted that the testimony exceeded the scope of the stipulation. In light of the objections made by defense counsel, the lack of an objection that the medical examiner's testimony exceeded the scope of the stipulation indicates that defense counsel did not regard the testimony as beyond the stipulation's scope. Bannister's complaint amounts to second-guessing, not a reason for a discretionary reversal.

As for the questioning (36:27-28, 46) Bannister now contends amounted to mischaracterization of his failure to appear at the police station (Alleged Error No. 3), defense counsel had more than ample opportunity on cross-examination (36:42-46) to correct any misimpression. He did not do so. Instead, skirting the alleged mischaracterization, he sought to create the impression that Detective Carchesi had acted in dereliction of his obligations when he did not contact Bannister for about nine months after Bannister did not come to the police station (36:44-45). Despite a second opportunity to correct the alleged mischaracterization after the prosecutor's redirect examination (36:46), defense counsel did not exercise his right to recross-examination on that issue. Bannister also did not object when, during closing argument, the prosecutor argued this lack of cooperation to the jury (36:109-10). Instead, defense counsel sought to use the delay to reinforce the impression he attempted

to create during the trial that Detective Carchesi had acted unprofessionally (36:114-15). Again, Bannister's complaint amounts to second-guessing, not a reason for a discretionary reversal.

Moreover, Bannister himself subtly mischaracterizes what the prosecutor knew about Bannister's lack of cooperation. Bannister's Brief at 34. Bannister characterizes his call to Detective Carchesi as a voluntary call to tell Detective Carchesi that "he [Bannister] was unable to make it down to the police station that day." *Id.* But the testimony by Detective Carchesi described Bannister's call in a different (and, for Bannister's claim, important) way:

> Well, I called him, I believe it was on the 17th of February [2003] and ordered him into the police department. He stated he would come in the following day. Then he called and said he wasn't going to come in that day and again, because of the high case load, I got to this case when I did, and you can see back in October there was already a warrant for him.

(35:15.) The record known to both the prosecutor and Bannister's lawyer showed that Bannister told Detective Carchesi that he would not come to the police station, not that he "could not" come in. The prosecutor's characterization of Bannister's action more closely matches the record than does Bannister's.

As for Alleged Error No. 4, Bannister once again did not object to the prosecutor's references to Steven Wolk's testimony. Even so, "the jury in this case was instructed that the remarks of the attorneys were not evidence, and that if such remarks implied the existence of certain facts not in evidence, such implication was to be disre-

garded.[3] *See* Wis. JI-Criminal 157." ***State v. Fawcett***, 145 Wis. 2d 244, 257, 426 N.W.2d 91 (Ct. App. 1988) (footnote added).

Bannister contends that "the circumstances surrounding Bannister's trial render the prosecutor's recital of Steven Wolk's anticipated testimony[4] especially critical to the solo issue of delivery in this case." Bannister's Brief at 36 (footnote added). This contention, however, ignores not only Bannister's own reliance on anticipated testimony by Steven Wolk (34:90-91), but the most damaging evidence of all: Bannister's own confession to delivering morphine.[5] The confession establishes be-

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[3] 36:101-02 (during post-evidence jury instructions, circuit court instructs jurors that "[r]emarks of the attorneys are not evidence. If the remarks suggest certain facts not in evidence, disregard the suggestion."). *See also* 34:67-68 (before trial begins, circuit court defines "evidence" for prospective jurors and admonishes that "[y]ou are to decide the case solely on the evidence offered and received during trial"); 34:80 (during opening statement, prosecutor reminding jurors not to treat opening statements as evidence); 36:100 (after close of evidence, circuit court instructs jurors on the definition of "evidence").

[4] Steven Wolk later invoked his Fifth Amendment privilege and did not testify (36:63-67). Wolk said he would not testify even if granted immunity (36:66).

[5] The State's reliance on Bannister's confession in response to this claim rests on an assumption that the court concludes the State adequately corroborated the confession or that the court decides either to abolish the corroboration rule or to modify in a way that would not have precluded use of Bannister's confession at the trial. If this court agrees with the court of appeals' decision, however, the court will, presumably, not reach the issue of a discretionary reversal in the interest of justice.

yond any doubt Bannister's delivery of morphine to the Wolks. Consequently, beyond the lack of any objection, any reference to Wolk's testimony, especially in light of the circuit court's cautionary instructions and Bannister's confession, did not cause Bannister any harm. ***Hunt***, 263 Wis. 2d 1, ¶ 77 (test for harmless error).

In short, the reasons Bannister offers for discretionary reversal under Wis. Stat. § 751.06, whether considered individually or collectively, do not merit reversal in the interest of justice or reversal because of a failure to try the real controversy.

CONCLUSION

For the reasons offered in this brief and in the State's principal brief, this court should reverse the decision of the court of appeals and should reinstate the judgment of conviction.

Date: December 1, 2006.

Respectfully submitted,

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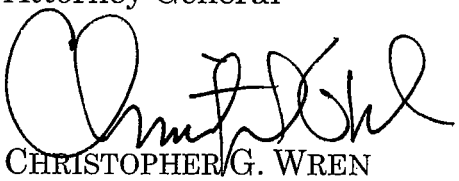

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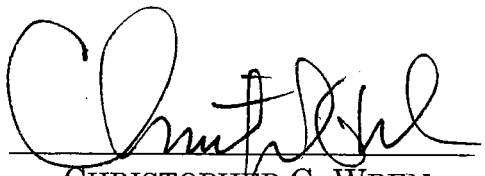
CERTIFICATION

In accord with Wis. Stat. § (Rule) 809.19(8), I certify that this brief satisfies the form and length requirements for a reply brief and appendix prepared using a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per line, and a length of 2,913 words.



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