

**APPENDIX**

Pursuant to Rule 809.19(2) Rules of Appellate Procedure,  
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**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 20, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

Nos. 98-2420-CR  
98-2421-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

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STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JONATHAN L. FRANKLIN,

DEFENDANT-APPELLANT.

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APPEALS from judgments and orders of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

EICH, J. Jonathan L. Franklin was convicted, on his guilty plea, of felony murder and aggravated battery, as a party to the crimes. He was sentenced to sixty years in prison. He appeals from the judgments of conviction, and from the circuit court's orders denying his motions to suppress evidence and withdraw

his pleas.<sup>1</sup> He argues that the court erred in ruling that: (1) statements he made to police after invoking his right to counsel were voluntary, and therefore admissible—for impeachment purposes only<sup>2</sup>—even though they were obtained by the officers through further questioning after Franklin had invoked his right to counsel, and thus in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981); and (2) he did not establish a “fair and just reason” to withdraw his pleas. We reject the arguments and affirm the judgments and orders.

Jonathan Daniel was killed in September 1996, during a drug transaction in Madison. Franklin was identified as being the driver of the getaway car and another man, whose identity was unknown at the time, was said to have been the “shooter.” Franklin was arrested and brought to the police station for questioning. It is undisputed that police detectives, hoping to learn the shooter’s identity from Franklin, intentionally elected to continue questioning him after he had invoked his right to counsel—knowing that, because they were violating his rights under *Edwards*, they would lose the opportunity to use any self-incriminatory statements as substantive evidence. During the interrogation, Franklin identified the person who had done the shooting and accompanied the detectives to a house in Madison, which he pointed out to them as the shooter’s residence.

After he was charged as a party to the crimes of murder and robbery with a dangerous weapon, Franklin moved to suppress the statements he made to

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<sup>1</sup> While the charges are based on unrelated events and the appeal is from both convictions, the arguments Franklin advances relate only to the murder conviction.

<sup>2</sup> The circuit court granted Franklin’s motion to suppress the evidence in the State’s case-in-chief.

police. After a hearing, the trial court ruled that, while the *Edwards* violation required suppression of any evidence of Franklin's statements in the State's case-in-chief, because the statements were voluntarily made, they could be used by the State for impeachment or rebuttal purposes should Franklin elect to testify at his trial. As indicated, Franklin eventually pled guilty to the murder charge, and to an unrelated charge of aggravated battery. Prior to sentencing, Franklin moved to withdraw his pleas, and the circuit court denied the motion, concluding that he had not put forth a fair or just reason for withdrawal.

Franklin argues first that the circuit court erred in determining that the statements he made to police while in custody were admissible for impeachment purposes. The argument is two-pronged: He says first that the court erroneously failed to consider the "presumption of involuntariness"—which he says applies to all statements obtained by police after the suspect's invocation of his or her right to counsel; and, second, that the court erred in ruling that his statements were voluntary.

An accused person has an absolute right to have counsel present during custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). Once the Fifth Amendment right to counsel is invoked, all police-initiated questioning must stop until counsel is present—unless the accused initiates further communication with the police. *Edwards*, 451 U.S. at 484-85. An involuntary statement obtained in violation of these principles is inadmissible at trial for any purpose. *State v. Moats*, 156 Wis.2d 74, 93, 457 N.W.2d 299, 308 (1990). If, however, the statement is voluntary, even if it was secured by the police in violation of *Miranda* and/or *Edwards*, we are satisfied, as we explain below, that it may be used to impeach the defendant's conflicting testimony—although it is inadmissible in the prosecution's case-in-chief.

Whether a statement is voluntary or involuntary depends on whether it was compelled by coercive means or improper police practices. *State v. Clappes*, 136 Wis.2d 222, 235-36, 401 N.W.2d 759, 765 (1987). We look to the “totality of the circumstances” to resolve the question, weighing the defendant’s personal characteristics—such as his or her age, education, intelligence, physical and emotional condition, and prior experience with the police—against the coercive police conduct. *Id.* at 236, 401 N.W.2d at 766. Matters relevant to the coercive nature of the police conduct include the length of the interrogation, delay in arraignment, the general conditions under which the questioning took place, whether excessive physical or psychological pressure was brought to bear on the accused, whether the police used inducements, threats, or “strategies” to compel a response, and whether the accused was informed of his or her constitutional rights to counsel and against self-incrimination. *Id.* at 237, 401 N.W.2d at 766. In this context, “voluntariness” is a question of constitutional fact, which we review *de novo*. *State v. Owen*, 202 Wis.2d 620, 640, 551 N.W.2d 50, 59 (Ct. App. 1996). The circuit court’s findings of historical fact, however, will not be set aside unless they are clearly erroneous. *Id.*

Franklin cites *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991), for the proposition that statements taken in violation of *Miranda* and/or *Edwards* are presumed to be the involuntary product of police coercion and are therefore inadmissible at trial for all purposes. He does not elaborate, nor does he discuss the case further. While it is true that the Supreme Court stated at one point in *McNeil* that statements taken in violation of *Edwards* are “presumed involuntary,” *id.* at 177, the sentence in which that phrase appears concludes by stating that such statements are “therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary

under traditional standards.” *Id.* (emphasis added). We do not see the Court’s remark as a holding that all statements taken in violation of *Edwards* are presumed to be coerced—and thus inadmissible for any and all purposes—including impeachment. Rather, as the Court plainly stated, they are inadmissible only as “substantive” or affirmative evidence. Indeed, the case cited by the Court for its statement, *Michigan v. Harvey*, 494 U.S. 344 (1990), held that, while a post-invocation waiver of counsel obtained by police “in violation of the [Miranda rules]”<sup>3</sup> is presumed to be invalid, and that evidence obtained pursuant to such a waiver “is inadmissible in the prosecution’s case in chief,” the evidence would nonetheless be “admissible to impeach conflicting testimony by the defendant.” *Id.* at 345, 349, 350.

We are satisfied that *McNeil* does not stand for the proposition advanced by Franklin. We are equally satisfied that, under *McNeil* and related Wisconsin cases, a statement, even if obtained in violation of *Miranda* and/or *Edwards* (and thus inadmissible in the prosecution’s case-in-chief), may, if shown to have been voluntarily made, be used to impeach the defendant’s conflicting testimony. And we believe our holding in this regard—and our reading of the Supreme Court cases—is supported by the Wisconsin Supreme Court’s decisions in *State v. Harris*, 199 Wis.2d 227, 544 N.W.2d 545 (1996), and *State v. Moats*,

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<sup>3</sup> We see no difference in this respect between so-called *Miranda* violations and *Edwards* violations. In *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the Supreme Court described *Edwards* as establishing “a second layer of prophylactics for the Miranda right to counsel.” *Id.* at 176. And in *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court, citing *Harris v. New York*, 401 U.S. 222 (1971), stated: “We have already decided that although statements taken in violation of ... the prophylactic Miranda rules may not be used in the prosecution’s case in chief, they are admissible to impeach conflicting testimony by the defendant.” *Id.* at 350. And in *State v. Camacho*, 170 Wis.2d 53, 75, 487 N.W.2d 67, 76 (Ct. App. 1992) *rev’d on other grounds*, 176 Wis.2d 860, 501 N.W.2d 380 (1993), we appear to have viewed the two interchangeably, speaking in terms of *Miranda* in a context indicating that we were, in fact, considering an *Edwards* violation.

156 Wis.2d 74, 457 N.W.2d 299 (1990). In *Harris*, the court cited *McNeil* for the proposition that “following an assertion of the [Fifth Amendment] right to counsel, police-initiated interrogation renders purported waivers ineffective and thus statements so obtained are inadmissible as substantial evidence *in the prosecution’s case-in-chief* even if preceded by a purported waiver.” *Harris*, 199 Wis.2d at 251, 544 N.W.2d at 554-55 (emphasis added). In *Moats*, the court, faced with the State’s concession that the defendant’s statements were taken “in ... violation of the defendant’s rights under *Miranda* and *Edwards*,” stated that both it and the United States Supreme Court had held that, while compelled involuntary testimony is inadmissible at trial for any purpose, a “constitutionally tainted confession” that is not compelled or involuntary “may be used to impeach a defendant who chooses to testify in his own behalf at trial,”<sup>4</sup> and went on to consider the voluntariness of the defendant’s statements. *Moats*, 156 Wis.2d at 93-94, 457 N.W.2d at 308. Finally, in *State v. Camacho*, 170 Wis.2d 53, 487 N.W.2d 67 (Ct. App. 1992) *rev’d on other grounds*, 176 Wis.2d 860, 501 N.W.2d 380 (1993), we rejected the defendant’s argument that the trial court improperly allowed the prosecution to use post-invocation-of-counsel statements he made to police to impeach his trial testimony. Upholding the trial court’s determination that the statements, even though obtained in violation of *Edwards* and *Miranda*, were voluntary, we stated that “a statement is not presumed compelled simply because interrogators may have taken it in violation of *Miranda*,” and, further, that “[s]uch statements are barred from use only during direct examination.” *Id.* at 75, 487 N.W.2d at 76.

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<sup>4</sup> The cases cited by the court include: *Michigan v. Harvey*, *supra*, *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, *supra*; and *State v. Mendoza*, 96 Wis.2d 106, 291 N.W.2d 478 (1980).

We next consider whether the trial court erred when it ruled that the challenged statements were voluntary; and we conclude that it did not. The court proceeded properly by balancing Franklin's personal characteristics against any coercive police practices and, doing so, determined that his statements were voluntary, and that, while the officers concededly questioned him in violation of *Edwards*, no unjust police coercion bearing on the voluntariness of the statements was present. Specifically, the court found no indication that the officers made any promises of leniency to Franklin, or threatened him in any way, or that they questioned him beyond their intended narrow purpose of attempting to establish the identity of the shooter. The court also considered that the interrogation lasted for only an hour and a half, during which time Franklin was allowed to make phone calls (and in fact made three), smoke cigarettes, go to the restroom if he desired, and was offered refreshments. With respect to Franklin's personal characteristics, the court noted that he was coherent and aware of his surroundings and what was taking place, was not under the influence of alcohol or drugs, never indicated that he was hungry, tired,<sup>5</sup> or suffering from physical pain or discomfort. The record also indicates that Franklin has had prior police experience, having been charged with three unrelated felonies in the recent past.

Our independent consideration of the totality of the circumstances surrounding the giving of the challenged statements satisfies us that they were not coerced, but were voluntarily given by Franklin, and that the circuit court did not err in ruling that they could be used at trial for impeachment purposes, under the rules discussed earlier in this opinion.

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<sup>5</sup> Franklin did indicate at one point that he was tired—but this was at the very end of the process, after he had been questioned by the officers and had gone with them to point out the “shooter’s” house and was returning with them to the police station.

Finally, Franklin argues that the circuit court erred when it denied his motion to withdraw his pleas. Whether to allow a defendant to withdraw a guilty plea before sentencing is a discretionary determination by the trial court, which we will sustain if it is “demonstrably ... made and based upon facts appearing in the record and in reliance on the appropriate and applicable law. *State v. Garcia*, 192 Wis.2d 845, 861, 532 N.W.2d 111, 117 (1995). To prevail on such a request, the defendant must show, by a preponderance of the evidence, the existence of a “fair and just reason” for withdrawal—“some adequate reason for [his or her] change of heart,” but something more than a mere desire for a trial. *State v. Shanks*, 152 Wis.2d 284, 288, 448 N.W.2d 264, 266 (Ct. App. 1989); *State v. Canedy*, 161 Wis.2d 565, 583, 469 N.W.2d 163, 170-71 (1991).<sup>6</sup>

Franklin maintains that the court erroneously exercised its discretion in this case by failing to address three issues in its decision denying his plea-withdrawal motion: (1) his trial counsel’s failure to “investigate” certain alibi witnesses; (2) his desire to discharge his attorney before entering his pleas; and (3) the assistant district attorney’s involvement in the investigatory phase of the case. Had the court considered these factors, Franklin says, they would have established fair and just reasons for withdrawing his pleas. Franklin never raised or argued the second and third points in the circuit court, however; and he has thus

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<sup>6</sup> Franklin, pointing to language in *State v. Canedy*, 161 Wis.2d 565, 582-83, 469 N.W.2d 163, 170 (1991), that “a ‘fair and just reason’ contemplates ‘the mere showing of some adequate reason for defendant’s change of heart,’” argues that the circuit court “misstate[d] ... the law!” when it said at one point in its decision from the bench that a “fair and just reason” to withdraw a plea is “more than a mere showing of some adequate reason for change of heart.” Our review of the hearing transcript satisfies us that the court properly set forth the law and the standards for review at the beginning of the hearing, and that the misstatement to which Franklin refers was either an error in the transcription or, at best, a mistake in exposition by the court. Everything else in the court’s analysis indicates that the court did in fact use and apply the proper legal standard.

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waived any right to pursue them on appeal. *See Zeller v. Northrup King Co.*, 125 Wis.2d 31, 35, 370 N.W.2d 809, 812 (Ct. App. 1985) (we do not consider arguments raised for the first time before this court). Beyond that, it is elementary that a trial court cannot be said to have erroneously exercised its discretion in making a ruling when it was never asked to exercise that discretion in the first place. *State v. Gollon*, 115 Wis.2d 592, 604, 340 N.W.2d 912, 918 (Ct. App. 1983).

Franklin's claim that his attorney, Christopher Van Wagner, failed to properly investigate his case is based on his assertion that Van Wagner failed to interview various people who, he says, would have provided him with an alibi; and he testified at the motion hearing that Van Wagner's failure to pursue the matter contributed to his (Franklin's) decision to plead to the charges. Van Wagner also testified at the hearing. He stated that Franklin wanted him to present a defense that Franklin himself admitted was not true—that he had some people who would say he was somewhere else at the time of the shooting, even though he had already admitted to driving the shooter to and from the scene of the murder. According to Van Wagner, he informed Franklin that, ethically, he couldn't call witnesses who he knew were lying.

The trial court considered Franklin's and Van Wagner's testimony and found Van Wagner's to be more credible, stating that "much of it [wa]s corroborated" and that Franklin's testimony to the contrary was "not ... credible." The court went on to conclude that Van Wagner's performance was not deficient in any way, noting that he had spent numerous hours with Franklin, had reviewed all the evidence, and had counseled Franklin that the decision whether to plead guilty must be his own. We are satisfied that the court did not erroneously exercise its discretion in failing to give more consideration to Franklin's claim that

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his attorney's failure to interview these witnesses constituted a "fair and just reason" for withdrawing his guilty pleas.

*By the Court.*—Judgments and orders affirmed.

Recommended for publication in the official reports.

**EXCERPT FROM TRANSCRIPT OF MOTION HEARING 12/1/97 (Pages 95-101)**  
**TRIAL ATTORNEY'S TESTIMONY**

1           about any of the witnesses. We had shared some.  
2           We had exchanged things, and I was aware that he  
3           had an investigator who was attempting to contact  
4           her, photograph her, and interview those who were  
5           having contact with her. I had not received  
6           anything and, no, I had not sent an investigator  
7           out. I had lined up Investigator Diane Newby to  
8           go do so, if there were things about which I felt  
9           it would be productive prior to trial.

10        Q     Okay. Do I -- can I conclude, from your statement  
11           just now then, that you did not send an  
12           investigator out to talk to any of the potential  
13           witnesses at trial?

14        A     That's correct.

15        Q     And just so I'm clear, this agreement with Mr. --  
16           based on this agreement with Mr. Giesen, did you  
17           have reports from him of investigations of  
18           witnesses, other than Kari Hodges, prior to the  
19           plea hearing?

20        A     No, I specifically said that I hadn't received  
21           anything reflecting that she had been actually  
22           interviewed, contacted or photographed, that's  
23           correct.

24        Q     My question was, other witnesses besides Hodges,  
25           had you received things from him on other

1 witnesses besides Hodges?

2 A I have a folder that I marked as "defense and  
3 joint defense materials," and I want to quickly  
4 thumb through it to refresh my recollection.

5 Q Sure.

6 A The answer is yes, we had both exchanged  
7 information by that time about Kari Hodges.

8 Q Okay. What about any other witnesses?

9 A No, not in direct response to the question you  
10 asked me. No, I did not receive anything else  
11 from Mr. Giesen about any other witnesses.

12 Q Now, did you, after receiving this information  
13 about this Mr. Hune --

14 A About what? I'm sorry.

15 Q I think you said his name was Hune.

16 A Eric Hune, yes.

17 Q -- and your suspicions about whether or not he  
18 might be sort of a conduit for Mr. Davis, did I  
19 understand you correctly that you had those  
20 suspicions?

21 A Yes, I suspected that based on part of what Jon  
22 told me.

23 Q Then did you do any investigation to determine  
24 whether those suspicions were correct?

25 A Yes.

1 Q Okay. And what did you do?

2 A I spoke to Jonathan. I spoke to his Aunt Gloria.  
3 I spoke to his family members and I reviewed all  
4 of the correspondence each of them had received,  
5 including the letter that Ms. Bullock had received  
6 in which Mr. Hune was soliciting compensation in  
7 exchange for any further help to Jonathan.

8 Q Did you make any attempt to contact Mr. Hune  
9 himself?

10 A Absolutely not.

11 Q Mr. Van Wagner, at the evening before the plea  
12 hearing on the 19th --

13 A Yes, ma'am.

14 Q -- the meeting, that was you and Mr. Franklin and  
15 at least one police officer?

16 A There were several components of that meeting.

17 Q Okay. Was Mr. Burr present at all for part of it?

18 A For part of what?

19 Q This meeting.

20 A You're calling it a meeting; it makes it sound  
21 like a formal affair. I was there for several  
22 reasons. Do you want me to explain what happened?

23 Q No, let me back up a little. What I want to know  
24 is, first, if Mr. Burr participated in any  
25 discussions with you and Mr. Franklin?

1       A     Absolutely.  He was -- well, stop.  Let me think.  
2             I'm pretty sure he was present.  I'm pretty sure  
3             he and I had some conversations with Jonathan  
4             present, yes.

5       Q     Specifically do you recall Mr. Franklin expressing  
6             some concerns about you as a lawyer and Mr. Burr  
7             telling him that you were a good lawyer and that  
8             he should keep you?

9       A     I don't remember precisely what Mr. Burr said.  I  
10            do remember that I had a very careful and complete  
11            discussion with Mr. Franklin about the fact that  
12            he had sent two or three jail request slips to Deb  
13            Smith in the week before asking for a new lawyer  
14            and that prior to that I had received a copy of a  
15            letter, dated April 21st, from Deb Smith to  
16            Mr. Franklin reflecting that same fact.

17      Q     Okay.  Let's stop for a minute.  Just so I'm  
18            clear, so in the roughly week before this plea  
19            agreement was reached, you<sup>had</sup> information from the  
20            Public Defender that he had asked for a different  
21            attorney, is that correct?

22      A     No, I had information from him.

23      Q     Okay.  Okay.  So he indicated that he had asked  
24            and then later you got some sort of confirming  
25            letter from the Public Defender?

1 A No. Would you like me to explain the sequence?

2 Q What was the date?

3 THE COURT: I'm interested in  
4 the sequence. Go ahead and explain it.

5 THE WITNESS: Oh, I believe  
6 the day or two after I got a letter dated April  
7 21st from Deb Smith to Jonathan Franklin cc to me,  
8 with a handwritten note from Deb; it reflects that  
9 he had sent several jail slips. He, Jonathan, had  
10 sent jail slips to Deb, asking for a different  
11 lawyer. She had declined to appoint someone at  
12 that time, but said that the court would have to  
13 give permission to me to withdraw. She encouraged  
14 him to work with me and said that if the judge  
15 were to allow me to withdraw, she wasn't sure if  
16 she would be able to reappoint, and then she wrote  
17 personally a note to me, "If there is a hearing  
18 regarding this, please let me know."

19 Following that, I brought that -- when I got  
20 the letter, I brought it up with Jonathan. I had  
21 to be in Chicago the night of April 22nd, 23rd.  
22 So I believe I saw this letter when I got back.

23 MS. EVANS:

24 Q Okay. My question, though --

25 THE COURT: Well, I wanted to

1 hear the sequence. We're not done with the sequence  
2 yet. When we're done with the sequence, which I'm  
3 finding to be responsive, you can go on. Proceed.

4 THE WITNESS: I wrote a letter  
5 April 22nd, a short letter to Jonathan, prior to  
6 going to Chicago to argue in the 7th Circuit, in  
7 which I referenced the letter to Deb Smith. So  
8 actually I must have gotten it on the 22nd, and  
9 told him, when I returned, I would visit with him,  
10 go over all of that, including the fact that he  
11 had the right to ask for a new attorney, and that  
12 if he wanted me to do so, I would prepare such a  
13 written request. And then -- I'm sorry. What  
14 dates are you talking about?

15 MS. EVANS:

16 Q I thought you said in the week or so prior to.

17 A Now I realize that's later. I thought that you  
18 said April. I was confused.

19 Q I'm trying to narrow it done. That's the period I  
20 was asking about.

21 A I apologize. I was confused by the timing. In  
22 March, before the -- before the plea, at some  
23 point I got an indication from Jonathan, and  
24 possibly even Courtney Johnson, his mother's  
25 boyfriend, that he was talking about having a

1 different lawyer take my place, and so I discussed  
2 that with him. I discussed that with him in the  
3 detective bureau interview room on the evening  
4 before the plea, before he gave a statement,  
5 before I would allow anything to go forward, and I  
6 told Mr. Burr specifically, that before I could  
7 begin, I needed to meet with him to review the  
8 question of representation.

9 Q Okay.

10 A Yes, I'm sorry, and I apologize for having created  
11 so much confusion on the dates.

12 Q Okay. And during the same evening, that is the  
13 evening before the plea hearing, were there  
14 discussions with Mr. Burr, in which Mr. Burr  
15 indicated in any manner that he might ask for less  
16 than 45 years?

17 A He specifically said that he had not taken a  
18 position on anything, other than the cap, and that  
19 he would wait until after the presentence was in  
20 to decide what a specific request was going to be.  
21 It was a cap, not a recommendation.

22 Q I just wanted to make sure.

23 MS. EVANS: Nothing further.

24 REDIRECT EXAMINATION BY MR. BURR:

25 Q With respect to the final draft --

**EXCERPT FROM TRANSCRIPT OF MOTION HEARING 12/10/97 (Pages 163-194)**  
**TRIAL COURT'S DECISION**

1           much. Proceed.

2                           MS. EVANS: And I would just  
3 point out that all the cases, whether you talk  
4 about a motion to withdraw a plea before  
5 sentencing or after, they talked about the  
6 defendant's fear and ignorance being relevant  
7 factors for the Court to consider. So the  
8 suggestion by the State, that just because he was  
9 scared, that that isn't really a factor, just  
10 isn't what the cases say. Those are factors for  
11 the Court to consider. Whether or not the Court  
12 thinks that those, combined with the other  
13 situations, is enough, that's a different  
14 question, but they certainly are legitimate  
15 factors that have been recognized by the courts.

16                   THE COURT: Thank you. The  
17 standard has been cited repeatedly, I think by  
18 counsel and the Court, but for purposes of the  
19 record, I again want to quote from two of the  
20 leading cases.

21           Garcia, at Page 861, "A circuit court should  
22 freely allow a defendant to withdraw his plea  
23 prior to sentencing if it finds any fair and just  
24 reason for withdrawal unless the prosecution has  
25 been substantially prejudiced by reliance on the

1 defendant's plea. 'Freely' does not mean  
2 automatically. A fair and just reason is some  
3 adequate reason for the defendant's change of  
4 heart, other than the desire to have a trial. The  
5 burden is on the defendant to prove a fair and  
6 just reason for withdrawal of the plea by a  
7 preponderance of the evidence."

8 Garcia correctly states the confusion is a  
9 fair and just reason for withdrawal.

10 They cite back to the Canedy case in Garcia,  
11 Page 863. "This court held in Canedy, that if the  
12 circuit court does not believe the defendant's  
13 asserted reasons for withdrawal of the plea, there  
14 is no fair and just reason to allow withdrawal of  
15 the plea."

16 As it relates to Canedy, they first note this  
17 ruling, in Canedy, Page 579, is a matter of the  
18 discretion of the circuit court.

19 "We will sustain the circuit court's ruling  
20 denying Canedy's motion to withdraw his guilty  
21 plea as long as the circuit court did not abuse its  
22 discretion. 'A discretionary determination, to be  
23 sustained, must demonstrably be made and based  
24 upon the facts appearing in the record and in  
25 reliance on the appropriate and applicable law.'

1       'Additionally, and most importantly, a  
2       discretionary determination must be the product of  
3       a rational mental process by which the facts of  
4       record and law relied upon are stated and are  
5       considered together for the purpose of achieving a  
6       reasoned and reasonable determination.'"

7               Page 581, "ABA Standards for Criminal Justice  
8       -- Pleas of Guilty, Standard 14-2.1 (1979). The  
9       history of the standard notes that 'this change in  
10      emphasis from may to should reflects the belief  
11      that prior to sentencing, when there is a basis  
12      for the defendant's motion and the absence of  
13      compelling prosecutorial reason for its denial,  
14      withdrawal of a plea of guilty or nolo contendere  
15      normally should be allowed.' This change is  
16      consistent with the view expressed by this court  
17      in Libke, that withdrawal motions made before  
18      sentencing are to be freely allowed. But 'freely'  
19      doesn't mean automatically.

20              The appropriate and applicable law in the  
21      case before the court, is that a defendant should  
22      be allowed to withdraw a guilty plea for any fair  
23      and just reason, unless the prosecution would be  
24      substantially prejudiced."

25              Canedy, Page 583, " ...this court has held

1       that withdrawal of a guilty plea before sentencing  
2       is not an absolute right and that a 'fair and just  
3       reason' contemplates 'the mere showing of some  
4       adequate reason for defendant's change of heart.'  
5       The reason must be something other than the desire  
6       to have a trial," and they indicate again the  
7       burden is upon the defendant; the standard being a  
8       preponderance of the evidence.

9               Canedy notes, at Page 585, "The case before  
10       us is similar to Dudrey where the court did not  
11       believe the defendant's assertions."

12              "The court conceded that a misunderstanding  
13       of the consequences of a guilty plea is grounds  
14       for withdrawal, but the misunderstanding must  
15       actually exist."

16              Canedy, at Page 586, "In the case before us  
17       it is obvious from the record that the circuit  
18       judge did not believe that Canedy did not  
19       understand the charge to which he pled guilty."

20              Considering the testimony first of  
21       Mr. Franklin, I will note, that at the plea  
22       hearing on March 20th, 1997, he was 18 years of  
23       age. The transcript, which has been received as  
24       Exhibit 1, obviously speaks for itself.

25              He testified, that after the suppression

1       hearing, in which I denied -- I believe what I  
2       ruled on, that the statements made by Mr. Franklin  
3       were inadmissible in the State's case in chief,  
4       but could be used for purposes of impeachment if  
5       the defendant testified. Mr. Franklin testified  
6       -- indicated, after that hearing sometime, he did  
7       some research, and that my ruling on that was a  
8       factor in his entering a plea.

9               Testified he asked Mr. Van Wagner to  
10       interview people. Indicated Mr. Van Wagner said  
11       that he would, but that he did not. The people he  
12       wanted interviewed would have apparently said  
13       where Mr. Franklin was at the time in question or  
14       would have served as a basis for impeachment, I'm  
15       taking it, of some of the State's witnesses.

16              Said Mr. Van Wagner pressured him into a plea  
17       bargain. Three weeks before trial, there was a  
18       discussion with Mr. Van Wagner. Again, or at  
19       least at that time, Mr. Franklin discussed with  
20       Mr. Van Wagner about talking to witnesses. Mr.  
21       Van Wagner indicated it was his belief that the  
22       witnesses would be perceived as being untruthful  
23       by the jury.

24              Indicated at some point Mr. Van Wagner  
25       discussed the proposed plea bargain before the

1       plea. Mr. Franklin testified he told  
2       Mr. Van Wagner he wanted nothing to do with it.  
3       That he wanted to go to trial. Mr. Franklin  
4       testified that Mr. Van Wagner's response was that  
5       a trial would be a waste of time.

6               Indicated that Mr. Van Wagner asked him about  
7       entering into the plea bargain on more than one  
8       occasion. Again, Mr. Franklin testified he wanted  
9       nothing to do with the plea. Mr. Van Wagner  
10      allegedly said, that in his opinion, the case had  
11      no hope. Mr. Franklin testified he felt he did  
12      not have a choice because, in his opinion, a lack  
13      of investigation.

14             As it relates to reasons given for any  
15      coercion on the part of Mr. Van Wagner or problems  
16      which Mr. Franklin had with Mr. Van Wagner,  
17      Mr. Franklin testified that it just seemed that  
18      Mr. Van Wagner was banking on a plea. That he did  
19      not feel Mr. Van Wagner was prepared to go to  
20      trial. That he was deprived of information about  
21      his case. And that legal material was allegedly  
22      taken from him by the jail. Mr. Van Wagner told  
23      him he would -- that he didn't need any more  
24      trouble with the police.

25             Franklin again testified he did research on

1 my rulings and this was a factor.\*

2 When asked if he felt intimidated or  
3 confused, the response to a question from  
4 Ms. Evans, he said, "I was scared." That when the  
5 judge asked him during the plea hearing if he  
6 understood and if his plea was voluntary,  
7 Mr. Franklin said that he stated yes, but that was  
8 not the case because he was scared. That he was  
9 doing it for someone else other than himself. .

10 After the hearing, he said he started  
11 reviewing things in his own head. And my notes --  
12 these are my words -- indicate that further  
13 reflection upon this was a factor.

14 He stated at the point of acquittal of the  
15 co-defendant, that was not a factor.

16 We then went through lengthy questioning  
17 related to establishing Mr. Franklin's  
18 understanding. That if he was successful on this  
19 motion, all charges are reinstated, with all  
20 attendant potential penalties.

21 On cross-examination, he testified he was  
22 truthful in the Daniel Davis case. Testified that  
23 he had gone over a transcript, the transcript from  
24 the March 20th, '97 plea hearing --

25 MR. BURR: Your Honor, pardon

1 me. I believe, when I asked him if he was  
2 truthful in his testimony in the Davis case, he  
3 refused to answer.

4 THE COURT: Well, my notes  
5 indicate telling the truth to the best of his  
6 ability and knowledge; he didn't say this, but he  
7 took the Fifth Amendment. Am I allowed to  
8 consider that?

9 MR. BURR: Not in a criminal  
10 case, I don't believe, but in a civil case you  
11 could draw the inference. I thought you said he  
12 just testified --

13 THE COURT: My notes indicate,  
14 at one point you asked him, "Did you testify  
15 truthfully in the Daniel Davis case?"

16 MR. BURR: There was an  
17 objection as to relevance then, I reasked it, and  
18 I think he took the Fifth, and I don't think it  
19 was ever answered.

20 THE COURT: I will strike that  
21 then that --

22 MS. EVANS: I think it was  
23 answered and then you asked him further --

24 MR. BURR: I could be wrong.

25 THE COURT: My recollection

1 is, you received a positive response to your  
2 inquiry as to whether or not he testified  
3 truthfully in the Daniel Davis case. You then  
4 asked, "Did you tell the truth to the best of your  
5 ability and knowledge," and at that point he took  
6 the Fifth.

7 MR. BURR: Yes, thank you.

8 MS. EVANS: Yes.

9 THE COURT: He was asked  
10 whether his responses to my questions at the plea  
11 hearing were truthful and honest and he said "no."

12 He said he's being truthful and honest today.

13 That on March 20th he didn't understand. The  
14 reasons, his attorney was not able to assist him.  
15 It got to the point where nothing really mattered  
16 to him, that being Mr. Franklin. Things just kept  
17 going on without him. That was his feeling.  
18 Again indicated Mr. Van Wagner wouldn't talk to  
19 the witnesses that he requested. That the result  
20 of the Davis trial had nothing to do with this  
21 motion. Again, after the plea, he thought about  
22 it.

23 When asked by Mr. Burr, "Why did you wait  
24 three months," he indicated Mr. Van Wagner was no  
25 longer acting in his interest; seemed to be upset

1       about the Davis acquittal. Mr. Franklin first  
2       testified that the acquittal did not upset him at  
3       all. Later testified it was upsetting, but that  
4       it had no influence on his decision to withdraw  
5       his plea.

6               Redirect, Ms. Evans asked him about the  
7       three-month period. He said he did some further  
8       legal research, sought input from others, more  
9       familiar with the law.

10              And, finally, at the plea hearing, he did not  
11       understand all the questions. That it did not  
12       matter to him and that he gave answers that,  
13       quote, they wanted, end quote.

14              On recross, again asked about the hearing,  
15       the plea colloquy. He said he understood, but he  
16       was scared to answer. He did not tell  
17       Mr. Van Wagner he was scared. As to the plea  
18       agreement, didn't understand that the evidence  
19       wouldn't be used against him. And he was advised  
20       as to perjury.

21              Mr. Van Wagner testified that he's practiced  
22       law since 1981, both in Wisconsin and the State of  
23       Illinois and New Jersey, and the last six years of  
24       his practice has been mainly criminal. In the  
25       last three years, 80 percent of his practice has

1        been criminal defense. Three years prior to that,  
2        he was a federal prosecutor. In his career, as a  
3        practicing lawyer, he estimates that 65 to 70  
4        percent of his cases, which he's handled, have  
5        been criminal. As a prosecutor, has handled  
6        approximately a thousand cases. Fifty-five to 60  
7        went to jury in Mercer County, New Jersey; 10 in  
8        federal court. As a defense attorney, he's  
9        handled 150 to 250 cases, five to seven of which  
10       went to trial.

11       He was appointed by the Public Defender to  
12       represent Mr. Franklin. That appointment occurred  
13       as of November 6, '96. Between November 6, '96  
14       and March 20th, 1997, he spent between 25 and 40  
15       hours in conference with the defendant. Obviously  
16       was present at the March 20th hearing.

17       Asked specifically, "Between November 6, '96  
18       and March 20th, 1997, did you at any time coerce  
19       Mr. Franklin?" He said "no."

20       Asked specifically, "At the hearing on March  
21       20th, any reason to believe that Mr. Franklin was  
22       confused?" Said "no."

23       "Was he scared during the hearing?" "Yes."  
24       My notes indicate that's not unusual. There was a  
25       discussion in that regard relating to it not being

1 unusual for someone in that position to have some  
2 fear to be scared because of what they are facing,  
3 no matter what they do.

4 Mr. Van Wagner testified that they had many  
5 discussions regarding the plea hearing. Those  
6 discussions occurred between the suppression  
7 ruling and the plea hearing itself. In his  
8 opinion, at the time of the hearing, Mr. Franklin  
9 had a fear of the future. My notes indicate, "But  
10 not a disabling fear." I read from that, in  
11 Mr. Van Wagner's opinion, the fear did not disable  
12 Mr. Franklin at the time of the plea hearing so as  
13 to raise a question as to his competence to  
14 proceed. Asked, "At the hearing, did the  
15 defendant appear to you to fail to understand  
16 anything?" Mr. Van Wagner indicated, "Not in my  
17 mind." That the decision was absolutely free and  
18 voluntary. That in his view, the defendant  
19 understood exactly what he was doing.

20 He noticed what I termed a change in  
21 emotional state shortly before the defendant gave  
22 the statement to Detective Draeger -- that would  
23 have occurred the evening of March 19th -- up  
24 until the point when Davis was acquitted.  
25 Established the statement to Draeger was taken

1 before the plea.

2 Asked, "When did you first become aware of  
3 any indication Mr. Franklin wished to withdraw his  
4 plea?" Mr. Van Wagner indicated, "After March  
5 20th, there were discussions in that regard." He  
6 referred to his letter written to the defendant  
7 dated April 16th. That refreshed his  
8 recollection. Indicated that at least as of that  
9 date, and probably earlier that week, the  
10 defendant had raised the possible issue of taking  
11 back his plea of guilty. But shortly after --  
12 I've got moments after -- but, again, it's shortly  
13 after the Davis acquittal, the defendant called  
14 Mr. Van Wagner and raised the possibility of  
15 withdrawing the plea. That he spoke with the  
16 defendant. The defendant asked, "What are we  
17 going to do now?" Mr. Van Wagner was unaware of  
18 the acquittal, so Mr. Franklin told him about  
19 that.

20 Discussion on May 9th. Mr. Franklin voiced  
21 his belief that the State couldn't prove that  
22 Davis was the shooter and the State would not be  
23 allowed to prove him guilty because of the  
24 acquittal. The reasons expressed by the defendant  
25 after the Davis verdict to withdraw the plea had

1 to do with the verdict and the defendant indicated  
2 he was going to claim that Mr. Van Wagner coerced  
3 him or forced him --

4 MS. EVANS: Your Honor, I  
5 don't want to interrupt, but my notes show that he  
6 said they didn't just have to do with the verdict.  
7 There were other things too.

8 THE COURT: All right. So  
9 noted. A few days before the plea, the defendant  
10 asked Mr. Van Wagner, "What should I do," related  
11 to whether he should go ahead with a trial, should  
12 he accept the agreement. Mr. Van Wagner testified  
13 that he made it very clear, "It's up to you. It's  
14 your decision."

15 That he had conversations with the  
16 defendant's mother and with an individual by the  
17 name of Courtney. Cautioned them as well in this  
18 regard.

19 Mr. Van Wagner testified he told the  
20 defendant several times that the decision was with  
21 the defendant.

22 From approximately April 16th, sometime  
23 around there, to approximately May 9th, the  
24 defendant told Mr. Van Wagner about mail received  
25 from inmate Eric Hune advising him to vacate the

1 plea, have the case go to jury trial after the  
2 Davis trial. Apparently a letter was also sent  
3 to, I believe, the defendant's aunt.

4 Mr. Van Wagner indicated it was his impression  
5 that inmate Hune knew Davis, was acting on Davis'  
6 behalf. That Hune had told Mr. Franklin, that if  
7 Davis got off, that the Davis verdict would be  
8 brought out at the Franklin trial.

9 Now, my notes indicate that Mr. Van Wagner  
10 indicated he could not suborn perjury. What he  
11 meant by that, the defendant had requested  
12 Mr. Van Wagner to go out, attempt to change  
13 testimony of witnesses, at a minimum, Kari Hodges.  
14 Mr. Van Wagner indicated ethically he could not do  
15 that.

16 Mr. Van Wagner again had the distinct  
17 impression that Hune knew Davis and the belief  
18 that there was a possibility that Davis was acting  
19 through Hune to attempt to get Mr. Franklin to  
20 change his mind. That Hune advised the defendant  
21 that he should raise attorney coercion,  
22 ineffective assistance, and the unfairness of a  
23 trial related to a black defendant and white  
24 victim. And that if Davis got off, the Davis  
25 verdict could be brought to the attention of the

1 defendant's jury.

2 Mr. Van Wagner indicated he reviewed what he  
3 believed to be erroneous legal positions. Told  
4 the defendant he couldn't present a defense that  
5 was not there. Didn't want to call witnesses that  
6 he felt would not be believed. The defendant had  
7 already admitted it to him. That he could not  
8 attempt to get Kari to change her story. Asked  
9 the defendant not to do anything rash. Asked the  
10 defendant not to file a motion on his own. He  
11 did. And stated in a direct response to a  
12 specific question that had the defendant's case  
13 not been settled by plea, he was ready for trial  
14 the week of April 7th.

15 Discussion on cross-examination that  
16 apparently there were two drafts prior to the  
17 final draft of the plea agreement. Those coming  
18 on March 17, March 19th, and then the final on  
19 March 20th. It's been established the final  
20 discussion about entering the plea agreement took  
21 place between Mr. Van Wagner, Mr. Franklin, the  
22 evening hours of March 19th.

23 Subsequently the plea hearing was the  
24 following morning. Mr. Van Wagner testified the  
25 defendant was undecided until about 5:30, six

1 o'clock on March 19th. Spoke to Mr. Van Wagner  
2 privately. The defendant had been going back and  
3 forth, but by March 19th, the evening hours, the  
4 defendant had made up his mind and did not waver.

5 As to Mr. Van Wagner recalling proceedings  
6 when the defendant was uncertain, he said he does  
7 not recall. Did not review the transcript, but he  
8 does recall proceedings when the defendant asked  
9 for advice and it was given to him.

10 Went through the testimony about the failure  
11 of Mr. Van Wagner's investigator to do anything  
12 prior to the plea or get any information to him.  
13 Indicated what investigation he did in the area as  
14 related to Eric Hune. He made no attempt to  
15 contact Hune. Answered that rather vehemently.

16 Mentioned the letter from Deb Smith to the  
17 defendant, which was dated April 21st, a copy sent  
18 to Mr. Van Wagner, related to jail slips the  
19 defendant was sending to her asking for a new  
20 lawyer.

21 On April 22nd, Mr. Van Wagner wrote the  
22 defendant a letter regarding the Deb Smith letter  
23 and said he would visit with him soon and discuss  
24 it.

25 Indicated that before the plea in March, he

1 got an invitation from the defendant that he was  
2 thinking of getting a different lawyer. That this  
3 was discussed with the defendant prior to the  
4 March 19th meeting with Mr. Burr and with the  
5 police. The discussions with Mr. Burr were such,  
6 that by the time of the plea, Mr. Burr had  
7 indicated he would take no position on what an  
8 appropriate sentence recommendation was, other  
9 than he would cap his recommendation; that any  
10 recommendation would have to wait until he  
11 reviewed the PSI.

12 And then, finally, on redirect, indicated,  
13 "To the best of my knowledge, the defendant  
14 understood the plea agreement."

15 Now, I have had the opportunity to hear  
16 Mr. Franklin testify on a couple of occasions,  
17 including today, and assess his credibility.  
18 Suffice it to say, that it is suspect in my mind.

19 I'm finding the testimony of Mr. Van Wagner  
20 to be very credible, to be very consistent with  
21 how a competent criminal defense attorney would  
22 conduct him or herself in representing an accused  
23 on a case or cases of this magnitude. I don't  
24 find it, for instance, unusual, that in plea  
25 discussions, a prosecutor would set a deadline by

1       which a response of yes or no must be received,  
2       because the prosecution likewise has an interest  
3       in finding out sooner rather than later if a case  
4       is going to be resolved by way of plea agreement  
5       or if it's going to go to trial. Both sides have  
6       to be prepared for a trial. Mr. Van Wagner  
7       indicated that he received a couple extensions  
8       from Mr. Burr. That those were done at the  
9       request of Mr. Franklin because Mr. Franklin was  
10      undecided as far as what he wished to do.

11           I am well satisfied -- and I referred to this  
12      earlier -- that Exhibit 1, the transcript of the  
13      March 20th plea hearing, establishes, that at the  
14      time Mr. Franklin entered these pleas, that he did  
15      so knowingly, voluntarily, and intelligently.  
16      There was certainly no coercion on the part of the  
17      Court at that time. I think I went to great  
18      length to explain the law to him, to make sure  
19      that he understood, to make sure that he  
20      understood, that no matter what the plea agreement  
21      is or what the recommendations are of anybody,  
22      that the Court is not bound by those at the time  
23      of sentencing, and is free to give whatever  
24      penalty it feels is appropriate, up to and  
25      including the maximum penalties.

1 I don't find Exhibit 11 to in any way give me  
2 pause for concern as to whether or not the plea,  
3 on March 20th, was entered knowingly, voluntarily,  
4 and intelligently.

5 The history of this case is well-known to  
6 both sides and to Mr. Franklin. By my count,  
7 Ms. Evans is Mr. Franklin's third attorney. At  
8 the hearing on August 19th, I made separate and  
9 specific findings -- and I recall this -- that  
10 while Mr. Franklin is competent to proceed, as  
11 that term is legally defined, he was not competent  
12 to represent himself, and so the case was going to  
13 go forward, but it was going to go forward with  
14 Mr. Franklin being represented by an attorney  
15 licensed to practice in this state and not by  
16 himself.

17 I recall Mr. Franklin's demeanor on March  
18 20th. And the circuit court, of course, is in the  
19 best position to observe it because people who  
20 speak or testify do so in front of it, and I can  
21 observe body language, facial expressions,  
22 etcetera, not simply referring back to the spoken  
23 words contained in the transcript.

24 I was well satisfied then that there was no  
25 indication to me whatsoever that the plea

1 agreement was anything but knowing, voluntary, and  
2 intelligent.

3 August 19th, I was satisfied, likewise, that  
4 Mr. Franklin was competent to proceed. That some  
5 of the changing of his answers on certain  
6 questions in the colloquy was for -- was not  
7 reflective of the fact that he did not understand  
8 as it relates to the findings I made of competency  
9 to proceed, but only, in my mind, that he was  
10 exercising his choice of being selectively  
11 responsive to certain of my questions. In other  
12 words, I was satisfied he knew what he was doing  
13 as it relates to being competent to proceed. I  
14 was satisfied he was not competent to represent  
15 himself, and I'm further satisfied he knew what  
16 was going on, but that he was attempting to  
17 potentially muck up the record, and I believe  
18 unsuccessfully so.

19 So nothing that's been referred to me in  
20 Exhibit 11, or for that matter, anything else  
21 again gives me pause to hesitate as to my findings  
22 on March 20th.

23 I think Mr. Franklin would be for any  
24 attorney a difficult client. I'm satisfied, based  
25 upon his testimony today and his handling of the

1 case up through the plea hearing, that Christopher  
2 Van Wagner is a very competent criminal defense  
3 attorney. That he's experienced in serious cases.  
4 This is not part of the record, but my impression  
5 has been, the four years I've been on the bench,  
6 that he has the ability to handle what I consider  
7 to be major cases, the ability to handle them  
8 either by way of plea or by way of trial, and the  
9 one major case I had with him, a sexual assault of  
10 minors, although he was not successful, I thought  
11 he did as good a job as anybody could have done in  
12 that situation. That's State v. Christopher  
13 Ashmore, and I say that only because, what I have  
14 seen of Mr. Van Wagner in court, is consistent  
15 with the testimony of what I have heard from him  
16 today.

17 Likewise, I've had the occasion to have  
18 Ms. Evans in front of me, and I am satisfied that  
19 she is very competent to handle cases of this  
20 magnitude. I am of the opinion that there may be  
21 difficulties at times for Ms. Evans in  
22 representing Mr. Franklin, based upon  
23 Mr. Sukowaty's experience with Mr. Franklin, but  
24 that Ms. Evans has conducted herself in a most  
25 professional and lawyer-like manner and has put

1       forth this position at the request of her client  
2       citing appropriate grounds and appropriate legal  
3       authority.

4               I've always termed these types of motions to  
5       withdraw a plea prior to sentencing, you don't  
6       really need much, to put it in lay person's terms,  
7       in order to withdraw your plea, but you need  
8       something. I can't find any case law that sets it  
9       out better for me than Canedy and Garcia, and I  
10      think both of those cases set it out very well.

11              I'm going to find, based upon the record for  
12      all the reasons I've stated as follows:

13              I've already indicated I find  
14      Mr. Van Wagner's testimony to be credible. I  
15      believe everything he said and much of it is  
16      corroborated.

17              I'm going to find Mr. Franklin's testimony,  
18      as it is divergent in any way from that of  
19      Mr. Van Wagner's, not to be credible. I think  
20      Mr. Franklin has in the past, certainly in this  
21      case, not hesitated to set forth under oath any  
22      assertion that he feels will benefit him at the  
23      time with little, if any, regard to the  
24      truthfulness of such assertions. It's difficult  
25      for a finder of fact, in this case the Court, to

1 determine when someone is telling the truth when  
2 they are selective about when they will tell the  
3 truth, and I think that has been the case here.

4 I'm going to further find, that while I'm not  
5 unsympathetic for Mr. Burr, there has been no  
6 showing by the State that it would be  
7 substantially prejudiced. There's the obvious  
8 prejudice. The older a case gets, I think anybody  
9 who practices criminal law for any extended time  
10 would agree the more difficult it becomes for the  
11 prosecution. Witnesses die. They move away.  
12 Their memories fade, etcetera. There's a lot of  
13 reasons why, as a case gets older, there's  
14 prejudice. I don't see this as being  
15 substantially prejudicial if I grant it because I  
16 think the State is still in a position -- and  
17 they've given me no reason otherwise -- to gather  
18 the evidence up and again go to trial.

19 But the defendant still has to show a fair  
20 and just reason. And I know, from Canedy and  
21 Garcia, that a fair and just reason is more than  
22 the mere showing of some adequate reason for  
23 change of heart, and it's got to be something  
24 other than a desire to have a trial.

25 The reasons set forth on the record and by

1 Ms. Evans in her closing argument indicate, first  
2 of all, the constitutional right to effective  
3 assistance of counsel. All of us agree that an  
4 accused always has that. I can find nothing on  
5 this record in any way to indicate that that has  
6 been denied to Mr. Franklin. I've already  
7 commented on my findings as to the job that  
8 Mr. Van Wagner did for him. I'm not finding that  
9 the -- in any way finding that the amount of  
10 preparation done by Mr. Van Wagner in any form was  
11 in any way deficient. He testified spending 25 to  
12 40 hours with the defendant from the time of the  
13 appointment up to the time of plea. His client  
14 was charged with some very serious offenses, and  
15 really what we're talking about is the homicide  
16 obviously being the most serious.

17 And at the time Mr. Van Wagner cut this deal  
18 with the State, he did so on behalf of his client,  
19 who authorized him to do so. It was after review  
20 of all of the discovery, after many discussions  
21 with his client, including asking his client if he  
22 wanted another lawyer and repeatedly emphasizing,  
23 "It's not my choice. It's yours. I'm your  
24 attorney. If you want to go trial, we'll do that.  
25 If you want to take the plea, we'll do that."

1           As it relates to the next potential ground,  
2           the defendant interested in getting another  
3           attorney, I think I've already stated the reasons  
4           for that today. At the time Mr. Franklin  
5           authorized Mr. Van Wagner to enter the agreement  
6           on his behalf, the evening of March 19th, 1997,  
7           that was explored by Mr. Van Wagner, and  
8           Mr. Franklin gave Mr. Van Wagner the go-ahead.

9           The Court's adverse ruling on the suppression  
10          motion, I've already stated my feelings in that  
11          regard. I don't pretend to be perfect and that's  
12          why we have a Court of Appeals and the Supreme  
13          Court. And that's why we have Section 971.31(10).  
14          Your recourse, if you think I'm wrong on a ruling  
15          on a suppression motion, is to go to the Court of  
16          Appeals. I suppose you could bring a motion to  
17          reconsider. Suffice it to say, I believe I've  
18          made the correct ruling in that regard and all my  
19          reasons are a matter of record.

20          As relates to timing, confusion, the haste  
21          argument, again, I don't find it unusual, based  
22          upon my experience as an attorney, who was both a  
23          prosecutor and criminal defense lawyer, that once  
24          a deal is made, a plea hearing is set in the very  
25          near future, in this case the next morning. I

1 find nothing unusual about that. And that it's  
2 typically in the interest of both sides.  
3 Particularly where a witness has indicated they're  
4 going to testify against a co-defendant, to make  
5 that agreement final. It protects not only the  
6 interest of the State, but also the defendant, and  
7 having it a matter of public record because, like  
8 the defendant, the State is bound to any  
9 agreements which it enters into. And I don't see  
10 haste and confusion here.

11 As it relates to information received from  
12 jailhouse lawyers, I disagree, as I've already  
13 indicated with Ms. Evans, that if we were to have  
14 a subsequent jury trial in this case, that it  
15 would be admissible evidence that Daniel Davis was  
16 acquitted. I have thought that over, since it was  
17 first raised, and I am unaware of any valid legal  
18 or evidentiary basis that would in any way make  
19 the admission of that evidence relevant. It's  
20 extremely prejudicial and I don't think it has a  
21 scintilla of evidence to what a subsequent jury in  
22 this case would be asked to decide.

23 I, frankly, am not surprised at testimony  
24 that Mr. Franklin was getting advice from  
25 jailhouse lawyers. I'll now say publicly that

1       that has been my impression for some time, given  
2       the type and quality, or lack thereof, of the  
3       motions that he's been filing with me, the  
4       correspondence he's been sending me. The fact  
5       that on more than one occasion I've had to  
6       admonish him, that when you have an attorney of  
7       record, that's how you proceed. We don't have a  
8       situation where the trial court has to allow both  
9       you and your attorney to file motions and argue.  
10      It's one or the other. In this case, since I  
11      found him competent not to represent himself, that  
12      means it's through competent counsel, which he has  
13      had through every stage of the proceedings, both  
14      with Mr. Van Wagner, Mr. Sukowaty, and now with  
15      Ms. Evans.

16           As it relates to a consistent set of actions  
17      on the part of the defendant that he wanted to  
18      withdraw his plea, again, I don't find it unusual  
19      that somebody at a plea hearing, making the most  
20      important, what is probably the most important  
21      decision of their life, is scared. And, again,  
22      all I would have to do is put myself in the shoes  
23      of Mr. Franklin or any other defendant charged  
24      with first degree intentional homicide, ending up  
25      pleading to a felony murder, knowing that the

1 Court's got a lot of discretion, knowing that the  
2 Court can do whatever it feels is appropriate, no  
3 matter what Mr. Burr says or anybody else and,  
4 frankly, I would be scared too, but it goes back  
5 to earlier remarks of, was this state of being  
6 scared, the state of being scared, the state of  
7 fear, such that it incapacitated Mr. Franklin's  
8 ability to be competent to proceed or  
9 incapacitated him in entering a plea knowingly,  
10 voluntarily, and intelligently. And nothing I  
11 have heard today convinces me that that is the  
12 case. We have the unequivocal testimony of  
13 Mr. Van Wagner. We have the equivocal testimony  
14 of Mr. Franklin indicating coercion, where he  
15 understood, but he just wanted to go ahead with it  
16 because that's what everybody wanted him to do,  
17 and the answers that he gave to the Court, which  
18 are clear in the transcript, were simply because  
19 that's what they wanted him to give, and I simply  
20 cannot assign any weight and credibility to those  
21 assertions whatsoever.

22 As it relates to Ms. Evans' opinion that this  
23 is a triable case, I will accept that at face  
24 value. One of the points Ms. Evans made during  
25 this hearing in objecting to the transcript, which

1 is Exhibit 11, is that it's not for this Court to  
2 determine in this motion whether or not  
3 Mr. Franklin is guilty, and that's absolutely the  
4 case. If I do allow the motion, Mr. Franklin has  
5 got a constitutional right to a jury. They will  
6 decide and they must decide unanimously whether or  
7 not, as to each individual charge, the State has  
8 met its burden of proof. But the only potential  
9 ground I could see that falling under is the  
10 reason being a desire to have a trial, and what  
11 has come through today, by this record, loud and  
12 clear, is that, in light of everything that has  
13 transpired, the plea in March, the acquittal of  
14 Mr. Davis in May, the subsequent go-arounds that  
15 Mr. Franklin had with Mr. Sukowaty, which led to  
16 his being allowed to withdraw and the appointment  
17 of Ms. Evans, that Mr. Franklin very much now  
18 wants to have a trial. His right to that was  
19 known to him at the time we did the plea hearing.

20 I'm satisfied that the record reflects that I  
21 assiduously discussed all his rights with him on  
22 March 20th and every response which I received was  
23 indicative of someone who knew what they were  
24 doing, was doing so voluntarily and intelligently.  
25 Nothing today has convinced me otherwise in that

1        regard. I am satisfied that Mr. Franklin, on  
2        March 20th, was acting of his own free will. That  
3        it was his desire to take this agreement. That he  
4        did so knowingly, voluntarily, and intelligently,  
5        and that anything that may have changed his mind  
6        related to advice from inmate Hune or other  
7        potential jailhouse lawyers and/or from the Davis  
8        acquittal, and just as any statements Mr. Franklin  
9        may have made during the Davis trial, which are  
10       indicative of his guilt in this offense, are  
11       irrelevant for today's purposes, so I do believe  
12       the fact that Daniel Davis was acquitted is  
13       likewise irrelevant. And so while Mr. Franklin  
14       has established today, I think loudly and clearly,  
15       that he now wants a trial, that is not a basis for  
16       granting the motion to withdraw the plea.

17       And I am well satisfied that -- or then that  
18       being established, there has been no showing which  
19       arises to the level of a fair and just reason  
20       which would provide a basis for me granting this  
21       motion.

22       Accordingly, for all the foregoing reasons,  
23       any pending motions which I have -- by my count,  
24       there are two filed by the defendant or on his  
25       behalf moving to withdraw his pleas of guilty as

1 to all counts for which I found him guilty and  
2 convicted him on March 20th, 1997 -- are denied in  
3 all respects.

4 Counsel, the next thing we have to do is  
5 proceed to sentencing. I have lost track of where  
6 we were with Mr. Franklin as it relates to the  
7 presentence report. I recall there's some  
8 correspondence in the file.

9 MR. BURR: I believe, Your  
10 Honor, the agent was asked to put the presentence  
11 on hold pending the resolution of this motion.

12 THE COURT: What I will do is  
13 instruct my clerk to contact the Department of  
14 Corrections, indicate that they are to prepare a  
15 presentence report within 45 days, copies given to  
16 respective counsel, and then upon receipt, we will  
17 send out notice of the sentencing hearing.

18 Mr. Burr, is there anything further I should  
19 take up today or anything which I've overlooked?

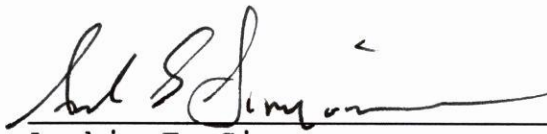
20 MR. BURR: I would ask -- I  
21 don't know how long it's going to take the agent.  
22 I have a homicide case in Rock County I have to  
23 try the week of March 23rd.

24 THE COURT: We'll note it  
25 should not be scheduled that week.

**CERTIFICATION**

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Courier 12, 10 spaces per inch, monospaced font, double-spaced, 1-1/2 inches margin on left and 1 inch on other three sides. The length of this brief is 13 pages.

Dated this 5<sup>th</sup> day of June, 1999.



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