

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

Appeal Case No. 2006AP2095-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SCOTT R. JENSEN,

Defendant-Appellant.

**On Appeal from the Judgment of Conviction
and Sentence Entered in the
Circuit Court of Dane County,
Honorable Steven D. Ebert, Presiding**

**NON-PARTY BRIEF OF
WISCONSIN ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

KATHLEEN M. QUINN
Attorney at Law
207 East Buffalo Street, Suite 514
Milwaukee, WI 53202
414-765-2373

Attorney for Nonparty, Wisconsin Association of
Criminal Defense Lawyers

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTRODUCTION 1

INTEREST OF AMICUS 3

ARGUMENT 4

 A defendant’s right to testify in his own defense
 is a constitutionally protected right, the restriction
 of which violates due process 4

CONCLUSION 13

CERTIFICATION UNDER RULE 809.19(8)(d) 15

CERTIFICATION OF MAILING 16

TABLE OF AUTHORITIES

Cases

<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	8, 9
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)	8
<i>In re Oliver</i> , 333 U.S. 257 (1948)	9
<i>McMorris v. State</i> , 58 Wis. 2d 144, 205 N.W.2d 559 (1973)	10
<i>Montana v. Egelhoff</i> , 518 U.S. 37 (1996)	7
<i>Morgan v. Krenke</i> , 232 F.3d 562 (7 th Cir. 2001)	5-7
<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39 (1987)	9
<i>Rock v. Arkansas</i> , 483 U.S. 44 (1987)	4, 8
<i>State v. Albright</i> , 96 Wis. 2d 122, 291 N.W.2d 487 (1980)	9
<i>State v. Bolstad</i> , 124 Wis. 2d 576, 370 N.W.2d 257 (1985)	12
<i>State v. Dyess</i> , 124 Wis. 2d 525, 370 N.W.2d 222 (1985)	13

<i>State v. Head</i> , 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413	10
<i>State v. Leist</i> , 141 Wis. 2d 34, 414 N.W.2d 45 (Ct. App. 1987)	13
<i>State v. Stoehr</i> , 134 Wis. 2d 66, 396 N.W.2d 177 (1986)	11
<i>State v. Wilson</i> , 179 Wis. 2d 660, 508 N.W.2d 44 (Ct. App. 1993)	4, 5
<i>United States v. Nobles</i> , 422 U.S. 225 (1975)	9
<i>United States v. Scheffer</i> , 523 U.S. 303 (1998)	7
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	8
<i>Werner v. State</i> , 66 Wis. 2d 736, 226 N.W.2d 402 (1975)	10
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971)	8-9
Constitutions, Statutes, and Rules	
U.S. Const. amend. V	4
U.S. Const. amend. VI	4
U.S. Const. amend XIV	4
§ 903.03, Stats.	13

Other Authorities

Judiciary Committee Report on the Criminal Code
(submitted 1953), Comments 11

INTRODUCTION

A defendant who braves the witness stand at his own criminal trial subjects himself to particular scrutiny. He, of course, is the most interested of all witnesses. His name, his liberty, even his life, may be in the balance. For this reason, a jury may fairly hold his testimony up to the light with special care.

Too, he is the only witness who can provide to the jury direct, non-circumstantial evidence of his own thoughts, beliefs, and intentions. For this reason, a jury has expectations that the testifying defendant will flush out for the jury his thoughts, beliefs, and intentions when his intent is at issue in a case. If the defense claim is that the defendant's intent was innocent when he engaged in specific conduct, what more important information, what more relevant evidence, could the defendant offer to the jury than what was in his mind and how it got there?

State of mind evidence should be admitted not simply in the interest of satisfying the jury's curiosity. When the defendant has something to say on the contested issue of his intent and wants to say it, he must be allowed to do just that in

the interest of facilitating the jury's search for truth and, most importantly, in the interest of guaranteeing the accused his due process right to testify on his own behalf and his right to present his defense.

The Wisconsin Association of Criminal Defense Lawyers concurs in Scott Jensen's position that the trial court violated his due process right to present his complete defense when it prohibited him from testifying and calling witnesses to corroborate his testimony about the facts and circumstances that bore on his intent during the time he engaged in the activities attributed to him at trial. The evidence he sought to admit was relevant and exculpatory, tending to negate the element of specific intent to obtain a dishonest advantage.

If the Court affirms Jensen's conviction and, specifically, the trial court's extreme limitation of even Jensen's own testimony regarding state of mind evidence, the due process rights of all defendants facing trial accused of specific intent crimes in Wisconsin courts will be imperiled.

INTEREST OF AMICUS

The Wisconsin Association of Criminal Defense Lawyers is an organization composed of criminal defense attorneys practicing in the State of Wisconsin, with a membership totaling approximately 400 private and public defender attorneys who appear regularly before all courts of this State. WACDL, by its charter, is organized to foster and maintain the integrity of the criminal defense bar, to promote the proper administration of criminal justice, and to uphold the protection of individual rights and due process of law. WACDL and its members, consequently, have an abiding professional and ethical commitment to ensure that defendants in criminal cases receive the due process of the laws to which they are entitled.

ARGUMENT

A defendant's right to testify in his own defense is a constitutionally protected right, the restriction of which violates due process.

The right of a defendant to testify in his own defense is a fundamental constitutional right, grounded in the due process clause of the Fourteenth Amendment; the compulsory process clause of the Sixth Amendment; and as a corollary to the Fifth Amendment's guarantee against compelled testimony. *State v. Wilson*, 179 Wis. 2d 660, 508 N.W.2d 44 (Ct. App. 1993) (citing *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987)).

Prior to or in the midst of just about every criminal trial, the judge makes evidentiary rulings regarding the admissibility or inadmissibility of evidence. At times, those rulings have a significant impact on a defendant's decision whether or not to testify on his own behalf. This happens, for instance, when evidence that tends to bolster the defendant's rendition of events is excluded. It happens when the testimony of witnesses who would corroborate the defendant is prohibited.

Under these circumstances, a defendant is faced with singing his song solo, knowing that his version of things may

suffer for lack of accompaniment. However, in most cases, he is afforded the opportunity to be heard – if only solo. It is that right, at a minimum, that has been recognized to be guaranteed by the due process clause of the United States Constitution.

If the defendant feels compelled to opt out of testifying because he is prohibited from introducing the bolstering or corroborating evidence, it may not amount to a violation of his due process right to testify on his own behalf. As unappealing as testifying without bolstering evidence may be, and as strategically unsound as proceeding without corroboration of one's testimony may seem, the defendant in these circumstances is still able to climb into the witness chair and testify about his understanding of the facts and circumstances of the case. If he chooses not to testify at all, that is often, on review, deemed to have been his own difficult decision with which he must live.

An illustrative case is that of *Morgan v. Krenke*, 232 F.3d 562 (7th Cir. 2001). During the guilt phase of the bifurcated jury trial of Morgan on several charges, including first degree intentional homicide while armed, the trial court excluded lay and expert opinion testimony regarding Morgan's mental

condition. *Morgan v. Krenke*, 232 F.3d 562, 563 (7th Cir. 2001). Morgan sought to admit evidence through the testimony of others that she suffered from post-traumatic stress disorder and that, prior to shooting and killing the victim, events triggered for her a trance-like state that was consistent with PTSD. *Id.* She wanted to offer the evidence to negate the inference that she had the specific intent to shoot the victim. *Id.*

While excluding the testimony of other witnesses regarding what Morgan was going through at the time of the shooting, the trial court determined that Morgan's *own* testimony about what she was doing at the moment of the killing was relevant and admissible. *Id.* at 568. She was permitted to testify for herself about why she closed her eyes at the time of the shooting and it was possible, too, that she would have been permitted to testify about traumatic incidents throughout her life that contributed to her PTSD. *Id.* Morgan's claim that she was effectively precluded from testifying was rejected because Morgan was afforded the opportunity to testify for herself but chose not to because she preferred not to present her own testimony without the bolstering testimony of others regarding

both her PTSD symptoms and the traumatic experiences of her youth. *Id.* at 570.

It is when a court wrenches from the defendant the decision whether or not to testify on a material issue that the defendant's due process rights are violated. And that is precisely what happened in Scott Jensen's case. The trial court did not "merely" prohibit Jensen from introducing testimony of witnesses who would have corroborated and bolstered his testimony about circumstances that bore on his intent. (The exclusion of this relevant exculpatory evidence further exacerbated the violation of Jensen's right to testify and to present his defense.) The trial court went to the extreme of prohibiting *Jensen* himself from testifying fully about the matters that bore on his state of mind and intent. (R.220: 109-110).

A state may limit the introduction of relevant evidence for a "valid" reason. *See Montana v. Egelhoff*, 518 U.S. 37, 54 (1996). However, where the exclusion "infringes on the weighty interest of the accused," the exclusion of evidence has been found to be unconstitutional. *United States v. Scheffer*,

523 U.S. 303, 308 (1998), citing *Rock v. Arkansas*, 483 U.S. 44, 58 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); and *Washington v. Texas*, 388 U.S. 14, 22-23 (1967). State authority to exclude competent, reliable, exculpatory evidence is not absolute. *Rock v. Arkansas*, 483 U.S. 44 (1987) (striking down state rule preventing defendant from testifying on issues previously the subject of hypnosis); *Crane v. Kentucky*, 476 U.S. 683 (1986) (reversing Kentucky conviction for excluding evidence of circumstances surrounding confession); *Chambers v. Mississippi*, 410 U.S. 284, 299-302 (1973) (ordering new Mississippi trial because, inter alia, court excluded adverse witness's confession); *Washington v. Texas*, 388 U.S. 14, 22 (1967) (striking down Texas statute prohibiting testimony of defendant's alleged accomplice).

Of course, no interest could be more weighty to a defendant than exercising his right to present his own testimony regarding facts and circumstances that bore on his state of mind at the time of the conduct attributed to him. "A fundamental requisite of due process is the opportunity to be heard." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). A

primary element of the defendant's opportunity to be heard is the right to offer testimony, including the defendant's own story. *In re Oliver*, 333 U.S. 257, 273 (1948); *Chambers v. Mississippi*, 410 U.S. 284,294 (1973). *State v. Albright*, 96 Wis. 2d 122, 291 N.W.2d 487 (1980). Here, Jensen was prohibited from telling his complete story and the prohibition was for no valid reason.

“The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.” *United States v. Nobles*, 422 U.S. 225, 230-231 (1975). That is why due process guarantees a defendant's “right to put before a jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). Because the state of Jensen's mind – his intent – was formed and informed by his awareness of the circumstances in which he operated – including the actions of others in the legislature – he should have been permitted to put before the jury the evidence of his knowledge and beliefs concerning these circumstances. (R.138; R.143; R.168).

The purpose for admission of the evidence can be analogized to evidence regarding an alleged victim's actions offered by a defendant when a defendant sufficiently raises the issue of self-defense in a trial for homicide or assault. *McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 [1973]. The evidence may not be used to support an inference about the victim's actual conduct. *State v. Head*, 2002 WI 99, ¶128, 255 Wis. 2d 194, 253, 648 N.W.2d 413 (citing *Werner v. State*, 66 Wis. 2d 736, 743, 226 N.W.2d 402 (1975)). However, the evidence "relates to the defendant's state of mind, showing what [the defendant's] beliefs were . . ." and "such evidence helps the jury to determine whether the defendant acted as a reasonably prudent person would under similar beliefs and circumstances" in the exercise of the privilege of self-defense. *Head* at ¶128, quoting *McMorris*, 58 Wis. 2d at 149.

Of course, Scott Jensen was not laboring to establish an affirmative defense of privilege to a crime of violence. He was, instead, offering evidence to negate the element of specific intent to obtain a dishonest advantage. The evidence he sought to admit regarding the activity of others within the legislature

was relevant to his state of mind, and was not offered or usable to support inferences about the actual conduct of others. It was offered and should have been admitted as it shed light on the circumstances that affected Jensen's own beliefs about whether his activities were prohibited as well as his own beliefs about whether a dishonest advantage could have been obtained through his activities.

As the Wisconsin Supreme Court recognized in *State v. Stoehr*, 134 Wis. 2d 66, 78, 396 N.W.2d 177 (1986), "The Comments in the Judiciary Committee Report on the Criminal Code (submitted 1953), p. 176, explain that an actor who is guilty under sec. 946.12 must have the requisite criminal intent, *i.e.*, 'the public officer must know that what he does under color of his office . . . is either prohibited or not authorized by law.'" The fact that Jensen was aware that others engaged in comparable activities – whether the activities were actually legal or not – made it less likely that Jensen had the knowledge that his acts were prohibited or not authorized by law. His awareness that those over whom it was suggested he could gain an dishonest advantage were engaged in the same activities

made less likely an intention to obtain an advantage through the same activities.

Finally, the exclusion of a defendant's testimony offered to rebut a permissible inculpatory inference created by the evidence has been held to constitute error affecting the substantial rights of the defendant. *State v. Bolstad*, 124 Wis. 2d 576, 370 N.W.2d 257 (1985) (exclusion of defendant's testimony regarding his reason for refusing to submit to a blood alcohol test, offered to rebut and diminish the force of permissible inference of his consciousness of guilt created by evidence that he had refused the test, was error affecting his substantial rights).

Of course, Jensen was up against more than just a permissible inference regarding his state of mind; he was combating what amounted to a presumption – a mandatory presumption – that his actions were for the purpose of obtaining a dishonest advantage for himself or others within his political party. This mandatory presumption was created by operation of the non-standard jury instruction which included the instruction, “[t]he use of a state resource to promote a candidate in a

political campaign or to raise money for a candidate, provides to that candidate a dishonest advantage.” The presumption was manifestly improper. See §903.03, Stats.; *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985); *State v. Leist*, 141 Wis. 2d 34, 37-38, 414 N.W.2d 45 (Ct. App. 1987). [See Defendant-Appellant’s brief-in-chief at pages 13-18]. The problem created by the improper jury instruction was compounded by the fact that Jensen was not permitted to give a full account of his knowledge and understanding of circumstances that formed his intent.

CONCLUSION

For these reasons, as well as for those stated in Mr. Jensen’s briefs, WACDL asks the Court to vacate the judgment of conviction and the sentence in this case and to grant Jensen a new trial.

Dated this 15th day of March, 2007.

Respectfully submitted:

Kathleen M. Quinn, Attorney at Law
SBN: 1025117

Mailing Address:

Kathleen M. Quinn, Attorney at Law
207 East Buffalo Street, Suite 514
Milwaukee, WI 53202
414-765-2373; Fax: 414-765-0828

CERTIFICATION UNDER RULE 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in Rule809.19(8)(b) and (c) for a nonparty brief produced with proportional serif font. The length of this brief is 2,338 words according to the word processing system used to prepare the brief.

Kathleen M. Quinn

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that on the 15th day of March, 2007, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to:

Wisconsin Court of Appeals
P.O. Box 1688
Madison, WI 53703-1688.

Further, I caused 3 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to each of the parties, to wit:

Brian W. Blanchard
District Attorney
215 S. Hamilton, Room 3000
Madison, WI 53703

Robert H. Friebert
Matthew W. O'Neill
Friebert, Finerty & St. John, S.C.
330 E. Kilbourn Ave. Ste. 1250
Milwaukee, WI 53202

R. Ryan Stoll
Skadden, Arps, Slate, Meagher & Flom, LLP
333 West Wacker Drive, 22nd Floor
Chicago, IL 60606

and

Sally L. Wellman, Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857.

Kathleen M. Quinn