STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2007AP000400-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK H. TODY, JR.,

Defendant-Appellant-Petitioner.

ON REVIEW OF AN UNPUBLISHED OPINION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR ASHLAND COUNTY, THE HONORABLE ROBERT E. EATON PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER, MARK H. TODY, JR.

Criminal Appeals Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 265-2741

Byron C. Lichstein
State Bar No. 1048483

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ISSUES PRESENTED

The trial judge's mother was empanelled on the jury after a *voir dire* that included the following:

> THE COURT: Is there anyone among you who is a member of any police department, sheriff's department, or other law enforcement agency? Any of you have relatives employed in a law enforcement related capacity? Ms. Eaton, do you have a relative employed in the law enforcement related capacity?
>
> MS. EATON: The judge.
>
> THE COURT: I like -- I like to consider myself part of law enforcement or I may be disowned. You are related to me how?

MS. EATON: Your mother.

I. Was Tody deprived of his federal and state constitutional right to an impartial jury independent of the judge?

The Circuit Court and Court of Appeals answered: no.

II. Should the trial judge have recused himself from deciding the motion to strike his mother?

The Circuit Court and Court of Appeals answered: no.

III. Does this same series of events require a new trial in the interest of justice?

The Circuit Court did not address this issue. The Court of Appeals answered: no.

IV. Should this Court exercise its superintending authority to

prohibit a judge's immediate family members from serving on a jury in a case over which the judge is presiding?

The Circuit Court and Court of Appeals did not address this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Consistent with this Court's practice, Tody requests both oral argument and publication.

STATEMENT OF CASE

An Ashland County jury convicted nineteen-year-old Mark Tody of operating a motor vehicle without the owner's consent as party to a crime (6:1). The trial court, Hon. Robert E. Eaton presiding, sentenced Tody to three years probation and six months in jail as a condition of probation (56:208). Tody filed a post-conviction motion (38), which the trial court denied (58:45-48). Tody then appealed to the Wisconsin Court of Appeals, District III. The Court of Appeals affirmed the conviction in an unpublished opinion. ***State v. Mark H. Tody, Jr.***, 2008 WI App 83, __ Wis. 2d __, 751 N.W.2d 902 (No. 2007AP400-CR); App. A. This Court accepted Tody's Petition for Review.

STATEMENT OF FACTS

Jury Selection

The first few minutes of *voir dire* were nothing out of the ordinary (56:9-18). Judge Robert E. Eaton asked a series of routine questions, and the jurors gave unremarkable answers (56:9-18). But then the following exchange occurred:

> THE COURT: Is there anyone among you who is a member of any police department, sheriff's department, or other law enforcement agency? Any of you have relatives employed in a law enforcement related capacity? Ms. Eaton, do you have a relative employed in the law enforcement related capacity?
>
> MS. EATON: The judge.
>
> THE COURT: I like -- I like to consider myself part of law enforcement or I may be disowned. You are related to me how?
>
> MS. EATON: Your mother.

(56:19-20)(App.C:1-2). The judge asked no further questions of his mother at that point.

The prosecutor and defense attorney then questioned the judge's mother about whether she could be a fair and impartial juror (56:23-24)(App.C:5-6). She stated that she felt comfortable serving on the jury, that she had no opinion about Tody's guilt or innocence, and that she believed the jury decided guilt or innocence separately from the judge (56:23-24)(App.C:5-6).

Defense counsel, after asking questions of the judge's mother, then addressed the rest of the jury concerning the judge's comment that he might be "disowned" if he did not consider himself part of law enforcement (56:24-25)(App.C:6-7). Defense counsel stated:

> He did mention one thing that he's part of the law enforcement process and that is true and so is the prosecution and the police, but the defense has a role in the law enforcement process also, does anybody

> here feel that – is there anyone who does not feel that a finding of not guilty, if the State is not able to prove its case beyond a reasonable doubt, is there any one here who feels that a not guilty verdict is not part of law enforcement? Raise your hand.
>
> In other words, I'm asking you if you feel that law enforcement is only a conviction...
>
> I'm asking you...to open up your minds to the fact that an acquittal is just as much an upholding of the law...that's just as much law enforcement...as a conviction.

(56:24-25)(App.C:6-7).

After *voir dire*, the Court asked if the parties had motions to strike for cause (56:27)(App.C:9). The State moved to strike a juror who had gone to school with Tody's father (56:27)(App.C:9). The defense opposed the State's motion, but the Court granted it and struck the juror (56:27)(App.C:9).

Defense counsel then moved to strike the judge's mother for cause (56:28)(App.C:10). Defense counsel characterized it as a "very sensitive matter" (56:28)(App.C:10), but he stated that the judge's mother should be struck because this was a "Caesar's wife situation,"[1] in which the close relationship

[1] The Roman Emperor Julius Caesar divorced his wife, Pompeia, because of public rumors that she had helped her alleged lover sneak into a female-only ceremony. 7 Plutarch, *Parallel Lives*, pp. 463-467 (Loeb Classical Library ed., 1919)(available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Caesar*.html#9)(last visited Sept. 16, 2008). Although Caesar apparently believed his wife was innocent and agreed there was no actual evidence of an affair, he divorced her because his position as Emperor required that his "wife ought not even to be under suspicion." ***Id.*** The phrase "Caesar's wife situation" thus refers to the maxim that those in positions of power must avoid even the appearance of impropriety.

between the judge and his mother constituted a "per se prejudicial matter" (56:28)(App.C:10). Defense counsel argued that jurors might value her opinion more heavily due to her relationship with the judge (56:28)(App.C:10).

The prosecutor opposed the motion, contending that there was no evidence that the judge's mother was biased (56:28-29)(App.C:10-11). The prosecutor added:

> I would imagine she's raised an individual who looks at facts and tries to find the truth and I would suspect she would do this as a juror in this case.

(56:29)(App.C:11).

The judge then "reluctantly" denied the motion to strike his mother (56:29-31)(App.C:11-13). He stated that he had not talked to her about the case, and that he therefore believed her when she said she had no prior knowledge of the charges (56:29)(App.C:11). He stated that the *voir dire* provided no reason to believe she could not be fair and impartial (56:29)(App.C:11). He then added:

> I'm trying to go through the potential problems in my mind. Are there potential problems with juror misconduct? Might I be called into a position where I would have to rule on some type of juror misconduct involving my mother? Even if that came up I think the thing to do at that point is get a substitute judge.

(56:29-30)(App.C:11-12). Defense counsel did not move the judge to recuse himself from deciding the motion to strike. The judge's mother remained in the jury pool, and was empanelled for Tody's trial (56:33).

After a day-long trial, the jury found Tody guilty of operating

a motor vehicle without the owner's consent as party to a crime (56:188). The trial court sentenced him to three years probation and six months in jail as a condition of probation (56:208).

Post-Conviction Motion

Tody filed a post-conviction motion, claiming that trial counsel was ineffective for failing to move the trial judge to recuse himself from deciding the motion to strike his mother (38).[2] At the post-conviction hearing, asked why he did not move the judge to recuse himself, trial counsel testified that, "To tell the truth, it never occurred to me. Point well taken" (58:21).

The trial court denied the post-conviction motion. The judge stated that recusing himself would have been a "complete waste of judicial resources" (58:47)(App.D:7). He concluded:

> I just can't see that there was an appearance of bias on my part when I made the ruling. I'm absolutely positive that I could act in an impartial manner. I'm absolutely positive that I did act in an impartial manner. But I suppose it's for somebody else other than me to judge when it appears to be. And I'm sure the Court of Appeals will make that decision and let us know whether I was right or wrong.

(58:47-48)(App.D:7-8).

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[2] Tody's post-conviction motion also raised additional ineffective assistance of counsel claims, dealing with various issues relating to alleged deficiencies in counsel's presentation of Tody's trial testimony (38:2-5). Tody is not pursuing those claims in this Court, and therefore the claims will not be discussed further in this brief.

Appeal

Tody appealed to the Court of Appeals, District III. He argued that the federal and state Constitutions guarantee a jury independent of the judge. Brief and Appendix of Defendant-Appellant, Mark H. Tody, Jr., at 10-22, ***State v. Mark H. Tody, Jr.***, Appeal No. 2007AP000400-CR (hereinafter "Tody Ct. App. Brief"). He argued that the presence on the jury of a judge's immediate family member *per se* impairs the jury's independence, and therefore denies the right to an impartial jury. ***Id.*** at 15-18. He further argued that the judge's comment to the jury that, "I like -- I like to consider myself part of law enforcement or I may be disowned," also impaired the jury's impartiality because it set a pro-prosecution tone. ***Id.*** at 18-21.

Tody also argued that the judge's mother should have been struck pursuant to Wisconsin case law because she was "objectively biased." (***Id.*** at 22-26). Tody argued that the judge's comment about his family disowning him if he did not consider himself part of law enforcement revealed the pro-law enforcement views of his mother, and that this rendered her objectively biased. ***Id.***

Tody also renewed his argument that the trial judge should have recused himself from deciding the motion to strike his mother. ***Id.*** at 26-32. He argued that recusal was statutorily required under Wis. Stat. § 758.19(2)(g) because the trial judge made a subjective determination that he could not, or could not appear to be, impartial in ruling on issues involving his mother. ***Id.*** at 26-28. He argued that recusal was required under due process principles because any judge would be naturally disinclined to strike his own mother as biased, and therefore there was an appearance that the judge would be biased toward the prosecution's position opposing the motion to strike. ***Id.*** at 28-29.

Finally, Tody argued that the Court of Appeals should order a new trial in the interest of justice. ***Id.*** at 36. He argued that the real controversy was not fully tried because the trial judge's mother was on the jury, because of the trial judge's comment during *voir dire*, and because of other errors by trial counsel. ***Id.***[3]

The Court of Appeals rejected Tody's arguments. ***State v. Mark H. Tody, Jr.***, 2008 WI App 83, __ Wis. 2d __, 751 N.W.2d 902 (hereinafter "Ct. App. Opinion"); App. A. As to the Constitutional jury claims, the Court concluded that the juror bias framework in ***State v. Faucher***[4], is an all-inclusive test for such claims, and that neither ***Faucher*** nor any other case establishes that the right to an impartial jury includes the right to a jury independent of the judge. Ct. App. Opinion at ¶12, n.3; App. A at 5, n.3. The Court rejected a *per se* rule prohibiting judges' immediate family members from serving on juries because both the judge and the jurors are neutral parties, and no bias arises from a relationship to a neutral party. ***Id.*** at ¶14; App. A at 6.

The Court also rejected Tody's arguments concerning the judge's comment during *voir dire*. ***Id.*** at ¶12, n.3; App. A at 5, n.3. The Court stated that Tody failed to develop his argument that partisan judicial behavior could violate the right to an impartial jury. ***Id.*** The Court further stated that the judge's comments did not demonstrate that the judge's mother was pro-law enforcement, and therefore did not require that she be struck under ***Faucher***. ***Id.*** at ¶15-16; App. A at 6-7.

As to Tody's argument that the judge should have recused

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[3] Although Tody continues to pursue his interest of justice argument in this Court, as previously stated he has elected not to pursue his previous ineffective assistance of counsel claim, nor is he including trial counsel's errors as part of his interest of justice argument.

[4] 227 Wis. 2d 700, 596 N.W.2d 770 (1999).

himself from deciding the motion to strike his mother, the Court concluded that there was no appearance of bias, and therefore no due process right to recusal, because the mere fact that the prosecution opposed the motion to strike did not create an appearance that the judge would be biased. ***Id.*** at ¶20; App. A at 8. The Court of Appeals also concluded that the judge was not statutorily obligated to recuse himself because, contrary to Tody's argument, the judge did not make a subjective determination that he could not be, or could not appear to be, impartial. ***Id.*** at ¶21-22; App. A at 8-9.

Finally, the Court of Appeals denied Tody's request for a new trial in the interest of justice because that request relied upon other arguments the Court had already rejected. ***Id.*** at ¶26; App. A at 10-11.

ARGUMENT

I. Tody was deprived of an impartial jury independent of the judge, in violation of the federal and state constitutions.

Summary of Argument I

As set forth in detail below, the framers of the federal Constitution feared that judges were too often biased toward the State. *See* ***Duncan v. Louisiana***, 391 U.S. 145, 155-156 (1968)(describing framers' fear of the "compliant, biased, or eccentric judge"). To protect those accused of crimes from the possibility of judicial bias, the framers placed great importance on the right to trial by jury as a safeguard against the judiciary and the possibility of government oppression. ***Id.*** The framers believed that juries could fulfill their sacred purpose only if they remained *independent* of judges. ***Id.*** Thus, the constitutional right to trial by jury should be interpreted to include the right to a jury independent of the

judge.

A jury cannot be considered independent of the judge if an immediate family member of the judge is on the jury. This Court has previously recognized that close familial relationships exert uniquely powerful influence on people, thus raising unique problems when participants in the criminal justice system are closely related to each other. *See* ***State v. Gesch***, 167 Wis. 2d 660, 662, 482 N.W.2d 99 (1992)(prospective jurors related to a State's witness by blood or marriage to the third degree must be automatically struck from juries). Given the powerful influence of close familial relationships, there is too great a risk that such a relationship between a judge and juror will impair the jury's capacity for independent decision-making. This Court should thus recognize a *per se* rule prohibiting a judge's immediate family members from serving on a jury over which the judge is presiding.

Modern courts have recognized another way to protect juries' independent decision-making—by prohibiting judicial behavior that reveals bias toward one side. *See* Horwitz, *Mixed signals and subtle cues: jury independence and judicial appointment of the jury foreperson,* 54 Cath. U.L. Rev. 829 (2005)(collecting authorities). These courts have recognized that jury independence is a fragile thing, because juries seek out and defer to even subtle cues given off by judges. ***Starr v. United States***, 153 U.S. 614, 626 (1894)(judge's "lightest word or intimation is received with deference, and may prove controlling"). Courts have therefore cautioned that judges should carefully uphold the appearance of complete impartiality.

That did not occur here. Instead, the judge made a partisan comment to the jury, saying he would be disowned unless he considered himself part of law enforcement. This comment

likely biased the jury toward the prosecution. Based on these two events—the judge's partisan comment and the fact that the judge's mother was on the jury—this Court should hold that Tody was deprived of his constitutional right to an impartial jury independent of the judge.

Such a holding will protect the appearance of absolute propriety so essential to public confidence in the judiciary. An average citizen sitting in the courtroom during the *voir dire* might well have looked askance at what occurred. By refusing to condone such events, this Court will continue its efforts to protect the integrity of Wisconsin's judiciary in the eyes of the public. *See* Letter from Supreme Court of Wisconsin concerning public financing of Supreme Court campaigns, Dec. 10, 2007, available at http://www.wicourts.gov/news/archives/2007/docs/campaignfinanceletter.pdf (last visited Sept. 16, 2008) ("Judges must not only be fair, neutral, impartial and non-partisan but also should be so perceived by the public").

Sending such a message will come at little cost. Indeed, when presented with the situation that occurred in this case, most trial judges likely err on the side of caution, striking their immediate family members in order to preserve the appearance of propriety. Probably for this reason, very few appellate courts have had occasion to consider whether a judge's immediate family members should be able to serve on a jury over which the judge is presiding. There are no binding cases and very few non-binding cases addressing the issue.[5]

[5] In 1996, the Wisconsin Court of Appeals issued an unpublished opinion affirming a conviction despite the trial judge's failure to strike his mother for cause. However, in that case, the judge's mother was not empanelled because the defendant used a peremptory strike on her. ***State v. Cage***, 201 Wis. 2d 214, 549 N.W.2d 791 (Ct. App. 1996)(unpublished); *see also* ***State v. Hendricks***, 171 Mont. 7, 555 P.2d 743 (1976)(no authority requires disqualification of judge's brother-in-law); *but see* ***Ice v. Kentucky***, 1983 Ky. LEXIS 271 (1983)(trial judge's brother should not have been allowed on jury because this impaired judge's ability to

This case presents an opportunity to enunciate a clear rule for future Wisconsin cases.

A. The federal constitutional right to an impartial jury requires that the jury be independent of the judge.

The 6th Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

Trial by jury had been accepted as an essential right in England for several centuries before the drafting of the U.S. Constitution. ***Duncan***, 391 U.S. at 151. English colonists brought trial by jury with them to America, and greatly resisted the King's efforts to curtail the right. ***Id.*** at 151-53. Indeed, the Declaration of Independence explicitly objected to the King's efforts to limit trial by jury. ***Id.*** Thus, by the time the framers drafted the U.S. Constitution, there was little dispute about the critical importance of the right. Alexander Hamilton wrote: "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury." THE FEDERALIST NO. 83 at 382 (Alexander Hamilton)(Masters, Smith, and Co., 1857)(hereinafter "Federalist No. 83"). The historical importance of the right led this Court to describe trial by jury as "a fundamental maxim of our criminal jurisprudence" that "courts will carefully uphold against all violation, and see that it is enforced in all its integrity and sacredness." ***Carthaus v. State***, 78 Wis. 560, 567, 47 N.W. 629 (1891).

The right to trial by jury was rooted in the framers' distrust of

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independently and impartially assess jury's sentencing decision)(*withdrawn on other grounds by* ***Ice v. Kentucky***, 667 S.W.2d 671, 1984 Ky. LEXIS 212 (1984)).

government, specifically State-employed prosecutors and judges. *See* ***Apprendi v. New Jersey***, 530 U.S. 466, 498 (2000)(Scalia, J., concurring)("Judges, it is sometimes necessary to remind ourselves, are part of the State"). According to the U.S. Supreme Court:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies *and against judges too responsive to the voice of higher authority*. The framers of the Constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor *and against the compliant, biased, or eccentric judge.*

Duncan, 391 U.S. at 155-156 (emphasis added). One of the framers, Alexander Hamilton, wrote that trial by jury served as both "a defense against the oppressions of an hereditary monarch" and as "a barrier to the tyranny of popular magistrates in a popular government."[2] Federalist No. 83, *supra*, at 382.

Because juries were meant to be an independent safeguard against biased judges, it was essential to the framers that the judge and the jury be two separate and independent institutions. Therefore, Hamilton emphasized that providing

the right to a jury—in addition to an independent judiciary—created a "double security" against corruption:

> [T]he trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have evidently gone wrong, the court will generally grant a new trial, and it would be in most cases of little use to practice upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempt to seduce the integrity of either. The temptations to prostitution which the judges might have to surmount, must certainly be much fewer, while the co-operation of a jury is necessary, than they might be, if they had themselves the exclusive determination all causes.

Federalist No. 83, *supra*, at 384.

Thus, the framers envisioned the judge and jury as two separate institutions, each an independent safeguard.

At common law, preserving the separation of judge and jury meant prohibiting judicial influence on the jury's decision-making. In the famous ***Bushell's Case*** of 1670—a case that influenced the framers—jurors were imprisoned for refusing to follow the trial judge's directions to convict William Penn and William Mead of illegal assembly. ***Bushell's Case***, 124 Eng. Rep. 1006 (C.P. 1670). Bushell, one of the jurors, filed a writ of habeas corpus, arguing that his imprisonment was illegal because the jury had a right to reach a verdict contrary to the judge's directions. ***Id.*** The Court of Common Pleas, in an opinion authored by Chief Justice Vaughn, sided with

Bushell: the Court held that Bushell could not be punished for defying the trial judge's orders, because the jury had a right to reach its verdict independent of the judge's influence. ***Id.***

On the whole, the history of trial by jury demonstrates that juries were intended to be an independent safeguard against biased judges, and that, if juries were to exercise independent judgment, their decision-making should be shielded from judicial influence.

B. Like its federal counterpart, the state constitutional right to an impartial jury requires that the jury be independent of the judge.

Article I, § 7 of the Wisconsin Constitution states:

> In all criminal prosecutions the accused shall enjoy the right...to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed.[6]

Like their federal counterparts, the framers of the Wisconsin Constitution were deeply distrustful of government. Brown, *The Making of the Wisconsin Constitution*, 1949 Wis. L. Rev. 648, 655. Thus, following the lead of the framers of the U.S. Constitution and several other state constitutions, the framers of the Wisconsin Constitution took for granted that certain individual liberties protected in the U.S. constitution—such as trial by jury—should be protected in the state constitution as well. ***Id.*** For that reason, records from Wisconsin's two

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[6] Article I, § 5 of the Wisconsin Constitution also protects the right to trial by jury: "The right to a jury trial shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy." However this Court has made clear that Article I, § 5 relates to civil cases, not criminal cases. ***Bennett v. State***, 57 Wis. 69, 74, 14 N.W. 912 (1883).

constitutional conventions, in 1846 and 1847-48, contain little debate concerning the right to trial by jury.[7] ***State v. Hansford***, 219 Wis. 2d 226, ¶12, 580 N.W.2d 171 (1998). The drafters of the Wisconsin Constitution apparently accepted the rationale of the framers of the U.S. Constitution with respect to trial by jury. Thus, since the framers of the U.S. Constitution intended trial by jury to be an independent safeguard against the potentially biased judiciary, one can infer that the drafters of Wisconsin's right to trial by jury shared this intent, and therefore that Wisconsin's right to trial by jury, like the federal right, includes the right to a jury independent of the judge.

Indeed, as clear as it is that the U.S. Constitution was meant to guarantee juries independent of the judge, this Court has made it clear that the Wisconsin Constitution may provide greater protection than the federal Constitution, especially concerning the right to an impartial jury. ***State v. Hansford***, 219 Wis. 2d 226, ¶¶19-21, 580 N.W.2d 171 (1998). In ***Hansford***, this Court concluded that the Wisconsin Constitution requires twelve-person juries in misdemeanor cases, even though the U.S. Supreme Court had previously concluded that a lesser number of jurors is permissible under the federal Constitution. *See* ***Williams v. Florida***, 399 U.S. 78 (1970)(holding that there was no evidence that the framers of the federal Constitution meant to incorporate all features of common law

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[7] The little debate that did occur centered on a proposed amendment that would have restricted judges from instructing juries in any manner not prescribed by statute. *Journal of the Convention to Form a Constitution for the State of Wisconsin*, 120-25 (1848). The delegate who proposed the amendment delivered a strident speech criticizing the judiciary and urging passage of the amendment. ***Id.*** at 120-24. Another delegate responded in more measured tones in opposition to the proposed amendment. ***Id.*** at 124-25. The amendment failed. ***Id.*** As one scholar put it, "whatever may have been the merits" of the proposed amendment, the delegate supporting it had "overstated his case" and lost out to the more "calming remarks" of the delegate opposing it. Brown, *The Making of the Wisconsin Constitution, Part II*, 1952 Wis. L. Rev. 23, 59.

juries, such as the norm of twelve-person juries, into the federal Constitution). Distinguishing ***Williams***, this Court concluded that the framers of the Wisconsin Constitution, unlike the framers of the federal Constitution, *had* intended to specifically adopt the common law understanding of juries into the state Constitution. ***State v. Hansford***, 219 Wis. 2d 226, ¶¶14-21, 580 N.W.2d 171 (1998)

To determine the framers' intent, the ***Hansford*** Court reviewed statements from the Constitutional conventions, as well as several Wisconsin Supreme Court cases decided shortly after the adoption of Wisconsin's Constitution (giving particular emphasis to cases decided by members of the Court who had been delegates to the Constitutional conventions). ***Id.*** This Court found ample evidence that the framers of the state Constitution had intended to specifically incorporate the common law understanding of juries into the state Constitution. ***Id.***

A similar analysis applies here. As previously explained, common law courts concluded that juries could perform their function properly only if their decision-making remained independent of judges. Because the framers of Wisconsin's Constitution meant to incorporate the common law understanding of juries, the Wisconsin Constitution provides for the jury that existed at common law—a jury whose decision-making remained independent from judicial influence—even if the federal Constitution does not.

C. Contrary to the Court of Appeals' analysis, the *Faucher* test is not a comprehensive framework for all issues arising under the constitutional right to an impartial jury.

In rejecting Tody's argument that the right to trial by jury includes the right to a jury independent of the judge, the Court of Appeals essentially concluded that all claims arising under

the right to trial by jury must fall within the framework set forth in ***State v. Faucher***, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), which established a new test for evaluating whether a potential juror is biased. The ***Faucher*** opinion replaced the previous three categories of bias ("implied," "actual," and "inferred" bias) with three new categories ("statutory," "subjective," and "objective" bias). The Court of Appeals stated that Tody's argument concerning jury independence from the judge "ignores the ***Faucher*** framework...and provides no authority for analyzing juror bias outside that framework." Ct. App. Opinion at ¶12, n.3; App. A at 5, n.3.

The Court of Appeals' analysis is incorrect for several reasons. To begin with, ***Faucher*** is most reasonably read as an interpretation not of the Constitution but of Wisconsin's statute on jury bias, Wis. Stat. § 805.08(1). The Court's opinion notes both the Constitution and the statute as sources of jury-related rights. ***Id.*** at ¶24. And although the opinion notes that the statute codified the constitutional right, the opinion then quotes the statutory requirement that the circuit court examine each potential juror to discover if he or she "has expressed or formed any opinion or is aware of any bias or prejudice in the case." ***Id.*** Much of the later discussion of juror bias deals with information gleaned from this statutorily-mandated court examination. Thus, ***Faucher*** specifically interprets the requirements imposed by the statute; it does not necessarily define the full reach of the constitutional demands.

But even if ***Faucher*** does apply to the constitutional analysis, nowhere did the ***Faucher*** Court say that its new framework was intended to be comprehensive and all-inclusive for all constitutional jury-related claims. Indeed, two of today's most high-profile constitutional issues—sentencing questions under ***Blakely v. Washington***, 542 U.S. 296 (2004), and peremptory strikes based on race under ***Batson v. Kentucky***, 476 U.S. 79 (1986)—arise in part under the constitutional right to trial by

jury, and yet such claims obviously do not fit within the ***Faucher*** framework. The ***Faucher*** framework deals only with the relatively narrow issue of analyzing the *voir dire* responses of potential jurors; nothing in the nature of the issue or the language of the opinion forecloses other kinds of constitutional jury-related claims, such as Tody's claim that the jury must be independent of the judge.

Finally, even if this Court once intended ***Faucher*** to be a comprehensive test, this Court has the authority to revisit that intention given the claim presented here. The ***Faucher*** Court cannot be blamed for failing to foresee the claim that arises here, which is based on a rather unusual fact situation. But more importantly, Tody's claim is firmly rooted in the purpose and history of the state and federal Constitutions, and therefore this Court should recognize it, regardless of ***Faucher***.

D. Tody's jury was not independent of the judge, and was therefore constitutionally inadequate, because the judge's mother was on the jury and because of the judge's pro-prosecution comment to the jury during *voir dire*.

i) The jury was not independent of the judge, and was therefore constitutionally inadequate, because the judge's mother was on the jury.

This Court should adopt a *per se* rule that the state and federal Constitutions prohibit a judge's immediate family members from serving on a jury over which the judge is presiding. A *per se* rule is necessary because of the powerful influence of close familial relationships. As this Court has stated:

> 'Blood is thicker than water;' and it is utterly impossible for any person to determine how far the

> judgment or action of a person affected by it may be swayed or controlled. It operates upon the mind and heart of the individual secretly and silently. Its operation is not disclosed by any outward manifestation other than the result. It is utterly impossible to look into a man's mind and see its operation. Its effect is not general, like many other disqualifications. It is purely personal, operating between the related parties and to the prejudice of all others.

State v. Gesch, 167 Wis. 2d 660, 662, 482 N.W.2d 99 (1992)(citations omitted).

Because of the effects of a close familial relationship, a jury cannot remain independent from the judge if one of the judge's immediate family members is on the jury. Such familial relationships impair the jury's independence in several ways. For instance, a judge's immediate family members are more likely to know the judge's predispositions and to perceive the judge's views from subtle cues, thereby making it more likely that they will decide the case based on the judge's impressions, rather than their own. Further, immediate family members are more likely to want to please the judge, thus increasing the chance that they will decide the case based on that consideration, rather than the evidence. Additionally, jurors closely connected to the judge may unduly influence other jurors, thus preventing the other jurors from exercising independent judgment. And under some circumstances, jurors immediately related to the judge may have difficulty avoiding *ex parte* conversations with the judge during the course of a trial.

Because family relationships exert such powerful influence, this Court in ***State v. Gesch*** concluded that prospective jurors related to a State's witness by blood or marriage to the third

degree must be automatically struck. 167 Wis. 2d at 662. While the Court was reluctant to make *per se* exclusions of groups of persons, the Court noted that there are still situations in which "the relationship between a prospective juror and a participant in the trial is so close that a finding of bias is mandated." ***Id.*** at 666-667. The Court noted that it is virtually impossible for any juror to consciously estimate how a family relationship will affect his or her judgment. ***Id.***

Though the excluded group of people in ***Gesch*** differs from the one in this case, the Court's holding nonetheless demonstrates that some groups—particularly those involving close familial relationships—present such fundamental constitutional concerns that a *per se* rule is necessary. To preserve the right to a jury independent of the judge, immediate family members of judges should be stricken from juries automatically.

A *per se* rule will preserve the logic of Wisconsin's test for juror bias, because it will prevent trial judges from having to evaluate the impartiality of their own immediate family members. Under Wisconsin's existing juror bias test, the trial judge is explicitly required to assess the words and demeanor of a challenged juror to determine whether the juror is subjectively or objectively biased. ***Faucher***, 227 Wis. 2d at 717-720. The Wisconsin Supreme Court adopted this policy because it reasoned that, in most cases, "the circuit court sits in a superior position to assess the demeanor and disposition of prospective jurors." ***Id.***

The Court's reasoning does not hold true for situations in which the challenged juror is an immediate family member of the judge. In such cases, because of the close personal relationship to the juror, the trial judge is not in a good position to assess the juror's impartiality. Many judges would likely find it difficult to conclude that an immediate family

member cannot be impartial. Therefore, the existing Wisconsin test for juror bias can only work if the judge is not required to rule on the impartiality of his immediate family members.

Finally, a *per se* rule would enhance the integrity of the judiciary in the eyes of the public. While it is likely true in many cases that judges' immediate family members could serve as impartial and independent jurors, Wisconsin courts have emphasized that, apart from actual bias, judges should also be concerned with the appearance of bias. ***State v. Lindell***, 2001 WI 108, ¶49, 245 Wis. 2d 689, 629 N.W.2d 223. A *per se* rule would allow Wisconsin courts to avoid any appearance that juries are not independent from judges.

ii) The jury's independence was also infringed by the judge's pro-prosecution comment during *voir dire*.

In addition to allowing his mother to serve on the jury, the judge impaired the jury's independence in another way, by telling the jury during *voir dire* that he would be disowned if he did not consider himself part of law enforcement. This comment suggested that the judge favored the prosecution, and it therefore implied that the jury should also favor the prosecution. As set forth below, courts and commentators around the country have condemned such comments and actions by judges. This Court should hold that such comments can violate the right to an impartial jury by impairing the jury's capacity to decide the case independently of the judge.

As described above, the landmark ***Bushell's Case*** of 1670 established the principle that juries' decision-making must be free of judicial coercion. ***Bushell's Case***, 124 Eng. Rep. 1006 (C.P. 1670). Consistent with this principle, modern courts have condemned judicial comments and behavior that might

prejudice the jury toward or against one of the parties. Courts have recognized that jurors are heavily influenced by even subtle and unintentional cues from the judge. This Court has stated that: "The opinions of our appellate courts are replete with precatory admonitions that trial judges must not function as partisans or advocates, or betray bias or prejudice, or engage in excessive examination, particularly in front of juries." ***State v. Carprue***, 2004 WI 111, ¶44, 274 Wis. 2d 656, 683 N.W.2d 31 (internal citations omitted). The United States Supreme Court has recognized that jurors naturally look to the judge for guidance, and are easily swayed by the judge's words and actions. The Court has stated that a judge's "lightest word or intimation is received [by the jury] with deference, and may prove controlling." ***Starr v. United States***, 153 U.S. 614, 626 (1894).

Because of the jury's profound sensitivity to the judge's views about a case, courts in other jurisdictions have concluded that a judge's pro-prosecution comments or actions can require reversal of a conviction. "Courts have stressed that trial courts must make every effort to avoid words or actions that the jury could conceivably interpret as expressing any opinion on the evidence *or any partiality to one side.*" Horwitz, *Mixed signals and subtle cues: jury independence and judicial appointment of the jury foreperson,* 54 Cath. U.L. Rev. 829, 851 (2005)(emphasis added).

In one case, for example, an appellate court reversed a conviction because the trial judge escorted the prosecution's child witness to and from the witness stand. ***People v. Rogers***, 800 P.2d 1327 (Colo. Ct. App. 1990). The Court reversed the conviction because the jury "could have perceived the trial court's action as an endorsement of the child's credibility." ***Id.*** at 1329. The Court stated that trial judges "must be free of even the appearance of bias and partiality," and should "scrupulously avoid taking actions that might give an

appearance of partiality." ***Id.*** at 1328. Despite the trial judge's explicit instruction to the jury concerning her actions, the Court nonetheless reversed, finding that no instruction could "unring the bell" of prejudice to the defendant. ***Id.*** at 1329. Other courts have reversed convictions when trial judges gave candy or treats to a child witness after his/her testimony. *See* Horwitz, *supra* at 851-852.

The cases are not limited to trial judges' conduct with child witnesses in sexual assault cases. In ***Abrams v. State***, a Florida appellate court reversed a conviction because the trial judge shook hands with and talked to a State's witness in front of the jury. 326 So. 2d 211 (Fla. Dist. Ct. App. 1976). The appellate court concluded that the trial judge's "inadvertent conduct was prejudicial to the defendant." ***Id.*** at 212. The court quoted from an earlier case:

> Great care should always be observed by the judge to avoid the use of any remark in the hearing of the jury that is capable, directly or indirectly, expressly, inferentially, or by innuendo, of conveying any intimation as to what view he takes of the case, or that intimates his opinion as to the weight, character or credibility of any evidence adduced. All matters of fact, and all testimony adduced, should be left to the deliberate, independent, voluntary, and unbiased judgment of the jury, wholly uninfluenced by any instruction, remarks or intimation, either in express terms or by innuendo from the judge, from which his view of such matters may be discerned. Any other course deprives the accused of his right to trial by jury, and is erroneous.

Lester v. State, 20 So. 232, 234 (Fla. 1896).

Similarly, the North Carolina Court of Appeals reversed a

conviction because the trial judge turned his back to the jury during the defendant's testimony. ***State v. Jenkins***, 445 S.E.2d 622, 624 (N.C. Ct. App. 1994). The appellate court acknowledged that the trial judge "may not have intended to convey such a message," but nonetheless stated that trial judges "must be careful in what they say and do because a jury looks to the court for guidance and picks up the slightest intimation of an opinion." ***Id.*** at 625; *see also* ***Veal v. State***, 268 S.W.2d 345, 346 (Tenn. 1954)(reversing conviction because trial judge shook his head during defense counsel's summation).

Courts have condemned other similar practices as well. Numerous appellate courts have reversed convictions or chided lower courts when a trial judge's persistent questioning of witnesses left the impression that the judge sided with the prosecution. ***Benedict v. State***, 190 Wis. 266, 272, 208 N.W. 934 (1926); ***Billeci v. United States***, 184 F.2d 394 (D.C. Cir. 1950); ***United States v. Bland***, 697 F.2d 262 (8th Cir. 1983) ***United States v. Beaty,*** 722 F.2d 109 (3rd Cir. 1983); ***United States v. Hill***, 332 F.2d 105 (7th Cir. 1964); ***Jackson v. United States,*** 329 F.2d 893 (D.C. Cir. 1964); ***United States v. Hickman,*** 592 F.2d 931 (6th Cir. 1979).

Similarly, the vast majority of states, as well as the American Bar Association, have rejected the practice of allowing judges to comment on the evidence. Horwitz, *supra*, at 846; *see also* Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 253 (2000). ABA standards state that judicial comment is disfavored out of "due regard for the respective roles of judge and jury in a criminal trial and the uniquely influential position of the trial judge." *Standards for Criminal Justice: Discovery and Trial by Jury*, Standard 15-4.2 cmt. (3d ed. 1996).

Other courts have recognized that a judge's non-verbal

communication to the jury can determine the outcome of a case. ***Allen v. State***, 276 So. 2d 583, 586 (Ala. 1973)("We have little doubt that facial expressions, gestures, and nonverbal communications which tended to ridicule defendant and his counsel, could, standing alone, operate so as to destroy the fairness of a trial"); *see also* Greenbaum, Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality,* 61 VA. L. REV. 1266 (1975).

Even judges' unintentional communication can heavily influence juries. Although judges are rightly considered neutral participants in a trial, they nonetheless harbor impressions about the case and expectations about how it should turn out. Horwitz, *supra* at 856. Social science research, in legal and non-legal contexts, suggests that judges likely communicate their impressions and expectations to juries in subtle and unintentional ways, and that the expectations become self-fulfilling prophecies that influence juries' decision-making. *See* Blanck & Rosenthal, NOTE: *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 Stan. L. Rev. 89, 108-109 & 137-141 (1985). In fact, researchers and commentators have argued that juries crave judges' influence on the decision-making process:

> [J]urors, like most people, respond to unfamiliar surroundings by looking for clues about how to behave and what to think. Because the judge is the authority figure and the figure with the most prestige in the courtroom, jurors tend to look to the judge for those clues. Having sought and then received those clues from the trial judge, jurors will do their best to follow them, seeking to avoid the feeling that they have not done their jobs properly or the feeling that they have somehow disappointed the judge; jurors, like most people, aim to do a good job and to please

> those in a position of authority.

Horwitz, *supra* at 859.

As one respected judge has written:

> The jury is likely to discern hints, a point of view, a suggested direction, even if none is intended and quite without regard to the judge's efforts to modulate and minimize his role . . .We should be candid, moreover, in recognizing that juries are probably correct most of the time if they glean a point of view from the judge's interpolations.

Frankel, *The Search For Truth: An Umpireal View,* 123 U. PA. L. REV. 1031, 1043 (1975).

Because of these dangers, Wisconsin trial judges routinely instruct jurors that:

> If any member of the jury has an impression of my opinion as to whether the defendant is guilty or not guilty, disregard that impression entirely and decide the issues of fact solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.

Wis. J.I.—Criminal 100 (2004). Although such instructions are widely used, they are also widely believed to be ineffective. Justice Robert Jackson once wrote: "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." ***Krulewitch v. United States***, 336 U.S. 440, 453 (1949)(Jackson, J., concurring). A respected California trial judge has written that "no matter how much we may admonish them not to, jurors do pay a great deal of

attention to the person behind the bench." Horwitz, *supra* at 860. Rather than relying on curative instructions, "the key is to avoid the potentially prejudicial conduct in the first place." ***Id.***

Applying the above principles to this case, it should be clear that the trial judge's comment to the jury likely impaired the jury's capacity to decide the case independently of the judge. In the above examples, the trial judges' actions—shaking a witness's hand, escorting a child to and from the witness stand, turning his/her back to the jury during the defendant's testimony—were relatively minor and indirect compared with what happened here. In this case, the judge made a direct comment strongly suggesting that he was aligned with the prosecution, so much so that he would be "disowned" if he were not. Because of the judge's stature in the eyes of the jury, this comment likely led the jurors to believe that they should also align themselves with the prosecution. The effect of such a comment outweighs the indirect effects of the actions that warranted reversal in other cases. Indeed, the potential biasing effect was so apparent that defense counsel felt a need to try to respond to it—an effort that, while probably necessary, was almost certainly ineffective. This Court should conclude that the judge's comment impaired the independence of the jury's decision-making, especially in combination with the presence of the judge's mother on the jury.

Responding to the above arguments concerning partisan judicial behavior, the Court of Appeals stated that Tody's arguments were "undeveloped" because "[i]t is unclear whether Tody is arguing jury bias, judicial bias, or some hybrid of the two." Ct. App. Opinion at ¶12, n.3; App. A at 5, n.3. Admittedly, Tody's brief to the Court of Appeals perhaps could have been clearer on this point. The underlying doctrine, however, should be clear for this Court: a trial

judge's pro-prosecution comments and behavior can impair a jury's impartiality under principles as old as ***Bushell's Case***, and therefore such issues can logically fall within the constitutional right to an impartial jury, regardless of whether they also fall within other doctrines of judicial bias.

Taken together, the judge's pro-prosecution comment and the presence of his immediately family member on the jury infringed Tody's right to an impartial jury independent of the judge.

E. Alternatively, the juror in this case should have been struck because the *voir dire* revealed that she was objectively biased under Wisconsin cases.

Even if this Court rejects Tody's argument that the right to an impartial jury includes the right to a jury independent of the judge, and therefore agrees with the Court of Appeals that the ***Faucher*** test is an all-inclusive test for constitutional jury-related claims, this Court should still reverse the conviction under ***Faucher***, because the challenged juror should have been struck for objective bias.

As a starting point, it is worth remembering that appellate courts have frequently urged trial judges to err on the side of caution when considering motions to strike for cause. "[W]e caution and encourage the circuit courts to strike prospective jurors for cause when the circuit courts reasonably suspect that juror bias exists." ***State v. Smith***, 2006 WI 74, ¶28, 291 Wis. 2d 569, 716 N.W.2d 482 (internal quotes and citations omitted). "This is a decades-old standard that encourages circuit courts to err on the side of striking prospective jurors who appear to be biased, even if the appellate court would not reverse their determinations of impartiality. Such action will avoid the appearance of bias, and may save judicial time and

resources in the long run." ***State v. Lindell***, 2001 WI 108, ¶49, 245 Wis. 2d 689, 629 N.W.2d 223.

The Wisconsin Supreme Court has stated that a juror should be struck if a reasonable person in the juror's position could not be impartial. ***State v. Faucher***, 227 Wis. 2d 700, 718, 596 N.W.2d 770. In this case, two factors suggest that the judge's mother could not be impartial. First, she believed that the judge—a neutral party—was a member of law enforcement. She revealed this in her answer to the question whether she had a relative in law enforcement: she answered "the judge" (56:19-20)(App.C:1-2). This by itself suggested her bias toward the prosecution. In addition, after the juror said she had a relative in law enforcement, the judge added, "I like -- I like to consider myself part of law enforcement or I may be disowned" (56:20)(App.C:2). The judge's comment revealed his mother's pro-prosecution disposition, because it showed that she and her family strongly favor law enforcement, thus further establishing the juror's bias toward the prosecution.

Wisconsin cases on juror bias support the conclusion that the judge's mother was objectively biased. Although these cases deal with a different factual situation, one in which the potential juror has close ties to a witness rather than to the judge, the overriding theme of the cases is that a juror should be struck for objective bias if he/she shows an allegiance to one of the parties.

For example, in ***Faucher***, this Court concluded that a potential juror was objectively biased because the juror stated during a mid-trial *voir dire* that he knew one of the State's witnesses and believed that the witness was a person of integrity who would not lie. 227 Wis. 2d at 705. During the initial *voir dire*, the potential juror had not even recognized the witness's name as someone he knew. ***Id.*** at 707. However, once the witness was called to testify, the juror alerted the

court that he had been acquainted with the witness and her family in the past. The juror stated that he did not socialize with the witness personally, but that the witness's parents were his next-door neighbors, and that he believed the witness would not lie. ***Id.*** at 708. When asked if he could set aside his opinion of the witness and decide the case impartially, the juror stated that he could. ***Id.*** at 707-10.

Based on these facts, this Court concluded that no reasonable person in the juror's position could be impartial. ***Id.*** at 733. The Court concluded that the witness's statements demonstrated partiality toward the State's witness, and thus toward the prosecution. ***Id.*** at 735.

The *voir dire* in this case likewise demonstrated a bias toward the prosecution. Although the nature of the bias was different—the juror in this case had a generalized pro-prosecution attitude while the juror in ***Faucher*** had a connection to a specific prosecution witness—the danger presented by the bias is similar. Furthermore, the argument for striking the juror is even stronger in this case because of the additional fact that the juror was an immediate family member of the judge, thus impairing the jury's independence. The two factors together—the juror's partiality and her lack of independence from the judge—require that she should have been struck for cause.

Typically, an appellate court gives deference to a trial court's determination that a prospective juror is not objectively biased. ***Id.*** at 731-732. This Court, however, should not give deference to the trial court in this case for two reasons. First, as explained above, the usual assumption that the trial court is well-positioned to assess objective bias does not apply in this case, because most judges would find it difficult to conclude that their own immediate family members cannot be impartial.

Second, the trial court in this case failed to assess objective bias. The ***Faucher*** court determined that the trial court has a duty to make a proper inquiry into the juror's potential bias. ***Id.*** at 732. Indeed, one of the reasons that Court found bias was because the trial court's insufficient colloquy made any other conclusion unreasonable:

> Upon concluding that [the juror in question] was sincere in his willingness to set aside his opinion, the circuit court ended its inquiry. The circuit court's decision not to dismiss [the juror in question] was based solely on [his] statement that he could set aside his opinion, and the court's erroneous belief that it had to "believe his response."

Id.

Like ***Faucher***, the trial judge in this case abruptly ended his colloquy with his mother without any meaningful inquiry into objective bias. Also like ***Faucher***, the trial judge placed too much weight on the juror's subjective assessment of her ability to be fair and impartial. For these reasons, this Court should not give deference to the trial judge's decision not to strike his mother. Instead, this Court should conclude that the trial judge erred in failing to strike his mother for cause.[8]

II. The trial judge should have recused himself from deciding the motion to strike his mother.

Having declined to strike his mother for cause on a *per se* basis, the trial judge had another option aside from trying to

[8] After losing the motion to strike the judge's mother, Tody's attorney chose not to use a peremptory strike to remove her. This decision did not waive Tody's right to appeal the judge's denial of the motion to strike. *See* ***State v. Lindell***, 2001 WI 108, ¶ 109-18, 245 Wis. 2d 689, 629 N.W.2d 223 (defendant can appeal denial of motion to strike juror for cause even if defendant does not exercise peremptory strike).

assess the impartiality of his own mother. As explained below, the judge should have recused himself from deciding the motion to strike.

A. The trial judge should have recused himself under Wis. Stat. § 758.19(2) because he made a subjective determination that he could not be, or could not appear to be, impartial in ruling on issues involving his mother.

The trial judge subjectively determined that, if issues arose requiring him to rule on his mother, he would be unable to do so and would need to recuse himself (56:29-30)(App.C:11-12). Yet when faced with one such situation—the decision whether to strike his mother for cause—he failed to follow his own subjective determination. This error requires a new trial.

Wisconsin Statute § 758.19(2) provides seven situations in which a judge must disqualify him/herself from a case. The first six are fact specific and do not fit this case. The seventh requires recusal "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." Wis. Stat. § 758.19(2)(g).[9] Under this statute, the judge is required to make a subjective determination as to whether he/she is or appears to be biased. ***State v. American TV & Appliance, Inc.***, 151 Wis. 2d 175, 183, 443 N.W.2d 662 (1989). Appellate review is then limited to whether the judge made a subjective determination requiring disqualification. ***Id.*** at 186; *see also* ***City of Edgarton v. General Cas. Co.***, 190 Wis. 2d 510, 521-22, 527

[9] This statute mirrors the ABA Standards, which state: "The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned." *ABA Standards for Criminal Justice: Special Functions of the Trial Judge,* Standard 6, Sec. 1.9 (2000).

N.W. 2d 305 (1995).

In this case, the trial judge made a subjective determination that he could not be, or could not appear to be, impartial in situations where he had to rule on his own mother. When it was discovered that the trial judge's mother was in the jury pool, defense counsel asked that she be struck for cause. The state opposed this motion. In reluctantly denying the motion, the trial judge explained:

> I'm trying to go through the potential problems in my mind. Are there potential problems with juror misconduct? Might I be called into a position where I would have to rule on some type of juror misconduct involving my mother? Even if that came up I think the thing to do at that point is get a substitute judge (56:29-30)(App.C:11-12).

Thus, the trial judge determined that the presence of his mother on the jury could cause "problems" requiring a substitute judge. Although the judge did not list all the possible problems, he did give one example—juror misconduct. But the judge then ignored the fact that he had already been placed in a nearly identical situation. If presented with an allegation of juror misconduct, the judge would have been required to evaluate testimony from the juror (his mother), listen to the arguments from the State and defense, and decide on an appropriate remedy concerning his mother. Similarly, in deciding the motion to strike, the judge had to evaluate testimony from the juror, listen to the arguments from both the defense and the state, and decide how to rule with regard to his mother. The two situations—juror misconduct and juror bias or lack of independence—both require the judge to evaluate the words and demeanor of his mother and make a ruling concerning her. The judge subjectively determined that he could not rule on his mother

with regard to juror misconduct, and this determination should have carried over to whether he could rule on her fitness as a juror.

B. The trial judge should have recused himself because failing to do so created the appearance of bias toward the prosecution.

Apart from the statutory subjective test described above, the federal and state Constitutions require that a trial judge recuse him/herself if there is even an appearance of partiality:

> [T]he appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to "hold the balance nice, clear and true" [between the State and the accused] under all the circumstances.

State v. Gudgeon, 2006 WI App 143, ¶ 24, 295 Wis. 2d 189, 720 N.W.2d 114.

In this case, there was an appearance of partiality. The defense's motion to strike required the judge to determine the impartiality of his own mother. Because of the "human psychological tendencies and weaknesses" noted in ***Gudgeon***, any judge placed in this situation would find it difficult to conclude that his/her mother could not be impartial. This created the appearance that the judge would be biased toward the prosecution, because the prosecution opposed the motion to strike and contended that the judge's mother could be impartial. To avoid the appearance of partiality, the trial judge should have recused himself from the motion to strike his mother for cause.

C. If Tody's trial counsel waived the right to have the judge recuse himself by failing to make a recusal motion, then trial counsel was ineffective for failing to make such a motion.

In his post-conviction motion, Tody contended that trial counsel was ineffective in failing to move the judge to recuse himself from the motion to strike the judge's mother (38:5-6). Tody renews this argument here.

Ineffective assistance of counsel claims are governed by the familiar two-pronged standard from ***Strickland v. Washington***, requiring proof of both deficient performance and prejudice. 466 U.S. 668, 687 (1984).

Trial counsel performed deficiently by failing to move the judge to recuse himself from deciding the motion to strike his mother. Trial counsel's objective—revealed through his motion to strike—was to have the judge's mother removed from the jury panel. Trial counsel should have recognized that, because of the judge's close familial relationship with his mother, the judge would likely have difficulty concluding that his own mother could not be impartial. Thus, to get a fair decision on the motion to strike, trial counsel should have moved the judge to recuse himself. For the reasons explained in the previous section, if trial counsel had made such a motion, the trial court would have been required to grant it.

Trial counsel conceded as much at the post-conviction hearing. When asked whether he had a strategic reason for not moving the trial judge to recuse himself, trial counsel stated: "No. To tell the truth, it never occurred to me. Point well taken" (58:21).

In a typical ineffective assistance of counsel claim, Tody would be required to prove a reasonable probability of a

different outcome in order to satisfy the prejudice prong of ***Strickland***. However, in this situation, prejudice should be presumed because the failure to file a recusal motion created a structural defect in the proceedings. Wisconsin courts have recognized that presuming prejudice makes sense when there is substantial "difficulty in measuring the harm caused by the error or the ineffective assistance." ***State v. Smith***, 207 Wis. 2d 258, 280, 558 N.W.2d 379 (1997).

In ***Smith***, the defendant agreed to plead guilty and, in exchange, the prosecutor agreed to make no sentencing recommendation. ***Id.*** at 262-63. However, at the sentencing hearing, the prosecutor recommended fifty-eight months in prison. ***Id.*** Defense counsel did not object to the prosecutor's recommendation, and, on appeal, Smith contended that defense counsel was ineffective for failing to do so. ***Id.*** at 264.

The State contended that, in order to prove prejudice for his ineffective assistance of counsel claim, Smith had to demonstrate a reasonable probability that the sentence would have been different if defense counsel had objected. ***Id.*** at 269. The Court, however, sided with Smith in concluding that the prosecutor's breach of the plea agreement required that prejudice be presumed, without regard to whether the sentence would have been different. ***Id.*** at 281. The Court reached this conclusion in part because it would have been too speculative to measure how the prosecutor's recommendation affected the judge's sentencing decision. ***Id.*** at 280.

Relying on similar reasoning, the Court reached a similar conclusion in ***State v. Behnke***, 155 Wis. 2d 796, 456 N.W.2d 610 (1990)(presuming prejudice when defense counsel absent from reading of jury verdict).

This case is similar to ***Smith*** and ***Behnke***, and therefore prejudice should be presumed. In this case, it is difficult to

know whether the outcome of the proceeding may have been affected by trial counsel's error, because it is difficult to know whether the judge's mother decided the case based on proper considerations or how she affected the jury's deliberations. Thus, like ***Smith***, determining prejudice in this situation requires insurmountable "speculation and calculation." ***Id.*** As in ***Smith*** and ***Behnke***, prejudice should be presumed here.

D. The Court of Appeals incorrectly rejected Tody's recusal arguments.

The Court of Appeals rejected Tody's argument that recusal was statutorily required because the judge made a subjective finding that he could not be or appear to be impartial. The Court of Appeals stated:

> The judge was contemplating hypothetical situations, none of which actually occurred. Because no motion for recusal was made, the judge's decision to preside over the issue indicated he believed that he could do so impartially.

App.A at ¶ 22 (citations omitted).

This conclusion elevates form over substance. In substance, the judge's statement was a recognition of the obvious—that he could not be, or could not appear to be, impartial in ruling on issues involving his mother. Rather than give effect to this recognition, the Court of Appeals disregarded it because of its form—it was phrased as a hypothetical rather than an explicit ruling. This overly mechanistic conclusion undermines the purpose of the recusal statute, which is to ensure that judges maintain impartiality and the appearance of impartiality.

Moreover, recusal requirements are almost always speculative and hypothetical. Such requirements require preventive

measures, based on the likelihood of problems, *before* anything problematic actually occurs. Contrary to the Court of Appeals' analysis, it makes no sense to conclude that recusal becomes necessary only *after* problems arise.

The Court of Appeals also rejected Tody's argument that Due Process required recusal because there was an appearance of partiality toward the prosecution. The Court of Appeals stated:

> According to Tody, this appearance of judicial bias resulted from the fact that the State opposed the motion. However, Tody offers no authority for discerning judicial bias solely from the parties' respective positions on a motion or the court's ultimate ruling on it. Instead, "judicial rulings alone almost never constitute a valid basis for a bias or partiality."

App.A at ¶ 20 (citations omitted).

But, of course, this was no normal ruling: the judge was considering a defense motion contending that the judge's own mother could not be impartial. Under these circumstances, any reasonable person would assume that the judge had a predisposition to consider his mother impartial, and therefore to favor the prosecution's position. It was this predisposition, not the ultimate ruling, that created the appearance of partiality.

Moreover, the Court of Appeals' decision ignores the untenable situation forced upon the defense by the judge's pro-prosecution comment. The defense was forced to choose between: a) leaving the judge's mother on the jury despite the strong suggestion that she was pro-law enforcement; or b) asking the judge to remove his own mother despite her assurances that she could be impartial. This is precisely the kind of situation that should have required recusal.

III. This Court should order a new trial in the interest of justice.

Wisconsin appellate courts have independent statutory authority to grant new trials in the interest of justice. Wis. Stat. §752.35; ***State v. Hicks***, 202 Wis. 2d 150, 159, 549 N.W.2d 435 (1996). This Court may grant a new trial in the interest of justice whenever the real controversy was not fully tried. ***Id.*** at 160. Under this standard, this Court need not decide that the outcome would probably be different on retrial before granting a new trial. *See* ***State v. Harp***, 161 Wis. 2d 773, 775, 469 N.W.2d 210 (Ct. App. 1991).

The issues described above—the presence of the judge's mother on the jury and the judge's comment to the jury that he would be "disowned" if he did not consider himself part of law enforcement—prevented the real controversy from being fully tried. Although jury-related issues like those in this case typically have not been dealt with under the "real controversy" standard, Wisconsin appellate courts have ordered new trials in the interest of justice in several different circumstances, many involving problems with the integrity of the fact-finding process. ***Vollmer v. Luety*** 156 Wis. 2d 1, 20-21, 456 N.W.2d 797 (1990)(collecting examples of reversals in the interest of justice). Moreover, such issues appear to fit under the plain language of the standard: a case cannot be deemed "fully tried" unless the jury that tried it was impartial. No Wisconsin case has held otherwise. Therefore, this Court should order a new trial in the interest of justice.

IV. In the alternative, this Court should exercise its superintending authority to prohibit judges' immediate family members from serving on juries.

Article VII, Section 3 of the Wisconsin Constitution grants

this Court superintending and administrative authority over all state courts. ***State v. Jennings***, 2002 WI 44, ¶13, 252 Wis. 2d 228, 647 N.W.2d 142. This provision "is a grant of power. It is unlimited in extent. It is indefinite in character." ***Id.*** (quoting ***State ex rel. Fourth Nat'l Bank of Philadelphia v. Johnson***, 103 Wis. 591, 611, 79 N.W. 1081 (1899)). This Court has exercised its superintending authority in widely varying contexts, depending on the need to ensure the administration of justice. *See* ***In re Code of Judicial Ethics***, 36 Wis. 2d 252, 153 N.W.2d 873 (1967)(superintending authority includes power to establish code of judicial ethics); *see also* ***State v. Jerrell C.J.***, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110 (superintending authority includes power to prevent admission of unrecorded custodial confessions by juvenile suspects).

Thus, even if this Court rejects the legal theories described in the previous sections, the Court should still exercise its superintending authority to ensure that judges' immediate family members do not serve on juries. Not only would this help to protect the independence of juries, it would also preserve public confidence in the integrity of the jury system.

CONCLUSION

For the foregoing reasons, Tody respectfully requests that this Court reverse his conviction and grant a new trial.

Submitted this 18 day of September, 2008.

Byron C. Lichstein

Byron C. Lichstein
State Bar No. 1048483

Criminal Appeals Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 265-2741

Attorney for Defendant-Appellant-Petitioner Mark H. Tody, Jr.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 10,966 words.

Byron C. Lichstein

Byron C. Lichstein

CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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

Dated this 18 day of September, 2008.

Signed:

Byron C. Lichstein

BYRON C. LICHSTEIN
Bar No. 1048483

TABLE OF APPENDICES

COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2008

David R. Schanker
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP400-CR **Cir. Ct. No. 2006CF37**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK H. TODY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 BRUNNER, J. Mark Tody, Jr., appeals a judgment of conviction for taking and driving a vehicle without consent, as party to the crime, contrary to

App. A-1

WIS. STAT. §§ 943.23(2) and 939.05.[1] He also appeals an order denying his motion for postconviction relief. Tody asserts multiple claims based upon the court's decision to allow the judge's mother to serve on the jury. Tody also alleges ineffective assistance of counsel. We reject Tody's arguments and affirm.

BACKGROUND

¶2 Tody's jury trial occurred on June 7, 2006, before Judge Robert Eaton. During the voir dire, the following exchange occurred between the court and a prospective juror:

> [Court]: Any of you have relatives employed in a law enforcement related capacity?
>
> Ms. Eaton do you have a relative employed in the law enforcement related capacity?
>
> [Juror] Eaton: The judge.
>
> [Court]: I like – I like to consider myself part of law enforcement or I may be disowned. You are related to me how?
>
> [Juror] Eaton: Your mother.

When the attorneys were permitted to address the prospective jurors, the district attorney had the following exchange with Eaton[2]:

> [District Attorney]: Mrs. Eaton, I know you're the judge's mother, do you feel comfortable sitting on a trial where he's the judge but he's not party in the case?
>
> [Juror] Eaton: I don't think it makes any difference.

---

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] In this opinion, we refer to Judge Eaton as "the judge," while referring to juror Eaton as "Eaton."

> [District Attorney]: Doesn't make any difference one way or the other to you? You have no opinion about the defendant's guilt or innocence?
>
> [Juror] Eaton: I know nothing about it.

Tody's attorney also addressed Eaton:

> [Tody's Attorney]: Do you feel you could be a fair and impartial juror? Would you have to explain to His Honor Judge Eaton, let's say you voted for a verdict of not guilty, would you feel you would have to explain or justify why you voted that way?
>
> [Juror] Eaton: No.

¶3 At the end of the voir dire, Tody's attorney moved to strike Eaton for cause, contending she might unduly influence other jurors because of her relationship to the judge. The court denied the motion, concluding there was no authority for disqualifying a juror because of her relationship to a neutral party and that Eaton's answers during the voir dire indicated she would be impartial. The trial proceeded with Eaton on the jury.

¶4 The underlying facts in this case involved stealing a Jeep from the Ashland airport. The case centered on the respective roles of Tody and his two friends, Landon LaPointe and Jonathon Newago. Tody's defense was that he was merely a bystander to the crime. LaPointe testified that a couple of months before taking the Jeep, Tody raised the prospect of stealing a vehicle from the airport. Tody, LaPointe, and Newago made three separate trips to the airport. On the first trip, they looked for vehicles and found the Jeep. They decided to take the Jeep, and, on the second trip, they attempted to do so, but the battery was dead.

¶5 On their third trip, they brought a replacement battery, and Laptonte started the Jeep. Tody testified that he only opened the trunk of LaPointe's car so Newago could get the battery out. LaPointe testified that Tody actually carried the

battery from LaPointe's car to the Jeep. LaPointe and Newago drove the Jeep from the airport, while Tody drove Laptonte's car. LaPointe and Tody later discussed changing the vehicle identification number and attempting to sell the Jeep.

¶6 The jury found Tody guilty, and the court entered judgment accordingly. Afterward, Tody brought a motion for postconviction relief, asserting ineffective assistance of counsel. The court denied Tody's motion.

DISCUSSION

¶7 Tody claims he was denied his right to a fair and impartial jury because of comments during the voir dire and the court's decision not to strike Eaton. Tody also contends the judge should have recused himself from deciding whether to strike Eaton. Further, Tody claims his counsel was ineffective for failing to adequately prepare Tody for his testimony and for failing to attempt to rehabilitate adequately rehabilitate him after his testimony. Finally, Tody requests that we exercise our discretionary power of reversal.

Juror Bias

¶8 A defendant's right to a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 7 of the Wisconsin Constitution. ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). In Wisconsin, there are three categories of bias: statutory bias, subjective bias, and objective bias. ***Id.*** at 716.

¶9 Statutory bias applies to any juror who is "related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case...." WIS. STAT. § 805.08(1); ***Faucher***, 227 Wis. 2d at

717. Statutory bias is a per se category that disregards an individual's ability to act impartially. ***Faucher***, 227 Wis. 2d at 717.

¶10 Subjective bias is based on a juror's state of mind, as revealed through the juror's words and demeanor during the voir dire. ***Id.*** at 717-18. A circuit court's finding regarding subjective bias will be upheld unless clearly erroneous. ***Id.***

¶11 Objective bias does not turn upon a juror's state of mind, but instead on whether a reasonable person in the juror's position could be impartial. ***Id.*** at 718. When determining "whether a juror is objectively biased, a circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case." ***Id.***

¶12 For the most part, Tody attempts to avoid the framework for analyzing juror bias set out in ***Faucher***. He argues that a per se rule should be adopted precluding members of a judge's immediate family from serving on a jury.[3] Tody does, however, alternatively argue Eaton was objectively biased.

¶13 In support of his argument for a per se rule, Tody contends that a judge's immediate family members will more likely want to please the judge and may unduly influence other jurors. He relies on our supreme court's decision in

---

[3] Additionally, Tody asserts a broader jury bias argument, claiming he was denied his right to an impartial jury independent of the judge. The argument ignores the ***Faucher*** framework for analyzing juror bias, and Tody provides no authority for analyzing juror bias outside that framework. *See* ***State v. Faucher***, 227 Wis. 2d 700, 596 N.W.2d 770 (1999). He also cites to judicial bias cases. *See, e.g.*, ***State v. Carprue***, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31. It is unclear whether Tody is arguing jury bias, judicial bias, or some hybrid of the two. Tody's argument is undeveloped, and we decline to develop it for him. *See* ***Kristi L.M. v. Dennis E.M.***, 2007 WI 85, ¶20 n.7, 302 Wis. 2d 185, 734 N.W.2d 375 (undeveloped arguments need not be addressed).

State v. Gesch, 167 Wis. 2d 660, 482 N.W.2d 99 (1992), where the court determined that a juror related to a State's witness by blood or marriage to the third degree must be excused because of "implied bias." *Id.* at 669.

¶14 However, a juror's relationship to the judge is not, by itself, a jury bias issue. Unlike a State's witness, a judge is not associated with either party. No bias is implicit from a relationship to a neutral party.[4] We also note that *Gesch* was decided before *Faucher*, which redefined the categories of jury bias. In *Faucher*, our supreme court noted that the issue in *Gesch* would now be analyzed as objective bias. *Faucher*, 227 Wis. 2d at 723-24.

¶15 When considering objective bias, the question is whether a reasonable juror in Eaton's position could act impartially. *See id.* at 718. Eaton's position here, according to Tody, was having a favorable view of law enforcement, which Tody characterizes as a pro-law-enforcement, pro-prosecution bias. We conclude that Tody's objective bias argument fails because the premise of his argument, Eaton's favorable view of law enforcement, is not established in the record.

¶16 In *Faucher*, the court referenced previous cases that would be analyzed under objective bias. *See id.* at 721. In those cases, the juror's "membership" in a class of jurors that were arguably biased was established by the voir dire. *See id.* at 721-23. For example, in *Gesch*, the juror indicated he was related to a State's witness. *Gesch*, 167 Wis. 2d at 663. In *State v. Louis*, 156 Wis. 2d 470, 474, 457 N.W.2d 484 (1990), two jurors revealed that they were

[4] In his reply brief, Tody acknowledges that "not all immediate family members of judges will be unfair, non-independent jurors."

employed in the same police department as a State's witness. *See* ***Faucher***, 227 Wis. 2d at 722. By contrast, Tody attempts to base his objective bias argument on a number of unwarranted inferences from the voir dire. Eaton did not say she had a "favorable view of law enforcement," or that she was "pro-law-enforcement" or "pro-prosecution." From the available facts, we cannot conclude that a reasonable juror in Eaton's position could not act impartially. *See* ***id.*** at 717-18.

Judicial Bias & Recusal

¶17 Tody also claims the judge erroneously failed to recuse himself from deciding the motion to strike Eaton from the jury. He argues that recusal was constitutionally required because the court's denial of the motion created the appearance of bias and was statutorily required because the judge made a subjective determination that he could not act impartially.

¶18 "A fair trial [before] a fair tribunal is a basic requirement of due process." ***State v. Carprue***, 2004 WI 111, ¶59, 274 Wis. 2d 656, 683 N.W.2d 31 (citation omitted). Disqualification based upon allegations of bias or prejudice is only constitutionally required in the most extreme cases, such as where the judge has a direct and substantial pecuniary interest in the case. ***Id.***, ¶¶59-60. Otherwise, most matters of judicial disqualification do not rise to a constitutional level. ***Id.***, ¶60. "Matters of kinship, personal bias, state policy, and remoteness of interest are generally matters of legislative discretion." ***Id.*** (citation omitted).

¶19 The Wisconsin legislature has addressed judicial disqualification in WIS. STAT. § 757.19. As relevant here, § 757.19(2)(g) requires disqualification when "a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." This provision only requires disqualification when the judge actually makes a subjective determination that he

or she, in fact or appearance, cannot act impartially. ***State v. American TV & Appliance***, 151 Wis. 2d 175, 182-83, 443 N.W.2d 662 (1989). It does not require disqualification when a judge's partiality can be reasonably questioned by someone other than the judge. ***Id.*** Further, when a party alleges bias favoring the prosecution, such as here, and that party does not raise the issue before the circuit court, we assume the court believed it could act impartially when deciding to preside over the case. ***Carprue***, 274 Wis. 2d 656, ¶62.[5]

¶20 First, this was not an extreme case where disqualification was constitutionally required. *See* ***id.***, ¶¶59-60; *see also* ***State v. Gudgeon***, 2006 WI App 143, ¶¶23-24, 295 Wis. 2d 189, 720 N.W.2d 114. The basis of Tody's constitutional argument is that the court created an appearance of bias for the State by denying the motion to strike Eaton. According to Tody, this appearance of judicial bias resulted from the fact that the State opposed the motion. However, Tody offers no authority for discerning judicial bias solely from the parties' respective positions on a motion or the court's ultimate ruling on it. Instead, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." ***Liteky v. United States***, 510 US 540, 555 (1994).

¶21 We next address whether the judge was required to disqualify himself under WIS. STAT. § 757.19(2)(g). Even though there was no recusal motion, Tody contends the judge actually made a subjective determination that he could not act impartially when stating the following:

> I'm trying to go through potential problems in my mind. Are there potential problems with juror misconduct? Might

[5] Tody never moved for the judge's recusal. Tody's judicial bias arguments are limited to the judge's failure to unilaterally recuse himself from deciding the motion to strike Eaton.

> I be called into a position where I would have to rule on some type of juror misconduct involving my mother? Even if that came up I think the thing to do at that point is get a substitute judge. I don't think I have any legal basis for excusing her.

¶22 We reject Tody's assertion that this statement constituted a determination that the judge could not act impartially when deciding the motion before him. The judge was contemplating hypothetical situations, none of which actually occurred. Because no motion for recusal was made, the judge's decision to preside over the issue indicated he believed that he could do so impartially. *See* ***Carprue***, 274 Wis. 2d 656, ¶62.

Ineffective Assistance of Counsel

¶23 Tody's ineffective assistance claims are based on his response to the following question on cross-examination, "[I]s it fair to say that you were helping in stealing this vehicle?" Tody replied, "In a way, ya, I guess." Tody contends his attorney failed to adequately prepare him to testify at trial and deficiently failed to rehabilitate Tody on redirect examination. According to Tody, had he properly been prepared to testify, he would have answered the State's question by stating that he did not have the purpose to help steal the Jeep.

¶24 A defendant claiming ineffective assistance of counsel must establish that a defense attorney's performance was deficient, and that the deficient performance prejudiced the defense. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 587, 682 N.W.2d 433 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). Deficient performance has prejudiced the defense when there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations omitted). An

ineffective assistance claim fails if we conclude either that counsel's performance was not deficient or that the defendant was not prejudiced by the alleged deficiency, and we may begin with either inquiry. ***State v. Johnson,*** 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶25 Here, we begin and end our ineffective assistance analysis with the prejudice inquiry. In the context of the evidence presented, we cannot accept Tody's assertion that the jury's determination of intent hinged upon his answer to the State's question. Tody's intent was established by his actions. Tody's own testimony established that he was involved in the crime from the planning stage through its commission. He did not arrive at the crime scene by accident, and he was not merely a bystander while he was there. Further, LaPointe's testimony indicated that Tody's overall role was greater than Tody admitted, even while LaPointe was obviously attempting to protect Tody by minimizing Tody's role.[6] We reject Tody's characterization of the case against him, and even absent the alleged deficiencies of counsel, we are confident the result would have been the same.

Discretionary Reversal

¶26 Tody's final argument is that we should exercise our discretionary power of reversal. We may grant a new trial in the interest of justice "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." WIS. STAT. § 752.35. Tody

[6] LaPointe acknowledged that his testimony was inconsistent with a prior written statement given to police. Further, his memory conveniently lapsed multiple times and had to be refreshed by his written statement and preliminary hearing testimony.

does not address the standards for determining whether a controversy has been fully tried or whether justice has been miscarried. Instead, Tody's arguments for discretionary reversal merely restate his other arguments. We have already rejected those arguments.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 ASHLAND COUNTY *For Official Use Only*

State of Wisconsin vs. Mark H Tody Jr.

Judgment of Conviction
Sentence Withheld, Probation Ordered

Date of Birth: 04-14-1987

Case No.: 2006CF000037

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

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Take and Drive Vehicle w/o Consent [939.05 PTAC, as a Party to a Crime]	943.23(2)	Guilty	Felony H	02-19-2006 on or about 2/10/2006 and 2/28/2006	Jury	06-07-2006

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

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	06-07-2006	Probation, Sent Withheld	3 YR	Defendant to report to DOC in Ashland w/in 48 hrs.	Department of Corrections

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
136.00	20.00		800.00	8.00	85.00		250.00

Conditions:

Ct.	Condition	Agency/Program	Comments
1	Fine		
1	Restitution		Defendant is jointly/severly liable for restitution along with co actors. Attached is the restitution summary listing the name of the victim, address along with the amount owing. Defendant to pay restitution @ $100.00 bi weekly until the $350.00paid.
1	Costs		
1	Employment / School		Defendant to obtain/maintain full time employment.
1	Other		Defendant to submit to DNA speciman. Defendant to maintain absolute sobriety, obtain counseling as directed by DOC, and to have no contact with J. Newago, L. La pointe, B. Belanger.

IT IS ADJUDGED that 0 days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff execute this sentence.

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STATE OF WISCONSIN CIRC' COURT BRANCH 1 ASHLA UNTY *For Official Use Only*

State of Wisconsin vs. Mark H Tody Jr.

Judgment of Conviction
Sentence Withheld, Probation Ordered

Date of Birth: 04-14-1987

Case No.: 2006CF000037

BY THE COURT:

Robert E. Eaton, Judge
Sean P Duffy, District Attorney
Sam Filippo, Defense Attorney

Kathleen Cofgrave CC
Court Official

June 26, 2006
Date

FILED
JUN 26 2006
CLERK OF CIRCUIT COURT
ASHLAND COUNTY, WISCONSIN

App. B-2

STATE OF WISCONSIN CIRCUIT COURT ASHLAND COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 06-CF-037

MARK H. TODY

Defendant.

ORDER DENYING POST-CONVICTION MOTION

The defendant filed a post-conviction motion in the above-captioned case. This Court held a hearing on the motion on January 16, 2007. For the reasons set forth on the record, the motion is hereby denied.

Dated this 23rd day of Jan., 2007.

BY THE COURT:

Robert E. Eaton

Hon. Robert E. Eaton
Circuit Judge, Ashland County

FILED
JAN 23 2007
CLERK OF CIRCUIT COURT
ASHLAND COUNTY, WISCONSIN

App. C

Any of you know the district attorney?

Mr. Huybrecht, how do you know the district attorney?

MR. HUYBRECHT: Acquaintance through church.

THE COURT: Would you be able to set aside whatever contact you've had with him and decide this case fairly and impartially based only on the evidence presented in court?

MR. HUYBRECHT: Ya.

THE COURT: Any of you know any of the witnesses expected to testify in this case?

Do any of you have any interest in this case or its outcome other than as a juror?

Is there anyone among you who has heard or read anything about this case?

Is there anyone among you who has a feeling of bias or prejudice for or against either party to this case?

Is there anyone among you who is a member of any police department, sheriff's department, or other law enforcement agency?

Any of you have relatives employed in a law enforcement related capacity?

Ms. Eaton, do you have a relative employed in the law enforcement related capacity?

App. D-1

MS. EATON: The judge.

THE COURT: I like -- I like to consider myself part of law enforcement or I may be disowned.

You are related to me how?

MS. EATON: Your mother.

THE COURT: Is there anyone among you who has any opinion or has ever formed or expressed an opinion as to the guilt or innocence of the defendant?

Is there anyone among you who cannot or will not try this case fairly and impartially on the evidence that is given here in court and under the instructions of the court render a just and true verdict?

Mr. Duffy, you may ask questions.

MR. DUFFY: Thank you, judge. Does the court mind if I grab the podium?

THE COURT: I do not mind.

Again, good morning ladies and gentlemen. I have a few questions this morning.

Has anyone on the panel had any contact with law enforcement that may affect your ability to be fair and impartial serving as jurors?

As you know, we're going to have law enforcement testify here today. Has anybody have negative contact with law enforcement?

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Mr. Kretzschmar.

MR. KRETZSCHMAR: What do you mean by that contact there?

MR. DUFFY: Have you had -- not has anyone had contact with law enforcement but has anybody had contact such that it would affect your ability to be fair and impartial when you potentially hear testimony from an investigator.

MR. KRETZSCHMAR: No problem.

MR. DUFFY: Thank you, Mr. Kretzschmar.

Does anybody in general just have opinions about law enforcement that could affect your ability to be fair and impartial?

Mr. Otto, you indicated that you were pretty good friends with Mr. Tody's father, is that correct?

MR. OTTO: Yes.

MR. DUFFY: You guys went to school together?

MR.OTTO: Yes.

MR. DUFFY: The two of you walking down the street and maybe you saw each other, do you guys have a relationship where you would stop and have a conversation?

MR. OTTO: Yes.

MR. DUFFY: Is it a talk for five or ten

App. D-3

minutes?

MR. OTTO: Or longer.

MR. DUFFY: Do you feel comfortable sitting on his son's jury trial if it was appropriate to come back with a finding of guilty where you might feel uncomfortable seeing him at later functions as on Main Street or your house?

MR. OTTO: Yes.

MR. DUFFY: Does that affect your ability to sit on the panel and to be fair and impartial even though you want to be fair so that you're able to be fair?

MR. OTTO: Yes, it could.

MR. DUFFY: Okay. Does anyone have an opinion about prosecutors, or district attorneys, that would affect your ability to be fair and impartial as you sit on this panel?

How about me or my office, anybody have an opinion about me or the district attorney's office that would affect your ability to be fair and impartial in this case? Anyone? I appreciate that. Thank you for not raising your hand.

I have nothing further. Actually could I continue, judge?

THE COURT: Go ahead.

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MR. DUFFY: Mrs. Eaton, I know you're the judge's mother, do you feel comfortable sitting on a trial where he's the judge but he's not party in the case?

MS. EATON: I don't think it makes any difference.

MR. DUFFY: Doesn't make any difference one way or the other to you? You have no opinion about the defendant's guilt or innocence?

MRS. EATON: I know nothing about it.

MR. DUFFY: Thank you. I have nothing further.

THE COURT: Mr. Filippo.

MR. FILIPPO: Thank you.

Boy, Ms. Eaton, do I have a lot of questions for you.

Seriously. Do you feel you could be a fair and impartial juror? Would you have to explain to His Honor Judge Eaton, let's say you voted for a verdict of not guilty, would you feel you would have to explain or justify why you voted that way?

MS. EATON: No.

MR. FILIPPO: Would it be fair to say you come in here completely with an independant mind and you're without being influenced by the fact that His

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Honor Judge Eaton holds a very high office?

MS. EATON: Well, I feel like the jury makes the decision, he isn't part of the decision making. No.

MR. FILIPPO: That's right and you'll be part of the jury, if you're retained as a juror you'll be one of twelve of the jury.

MS. EATON: Right.

MR. FILIPPO: All right. He did mention one thing that he's part of the law enforcement process and that is true and so is the prosecution and the police, but the defense has a role in the law enforcement process also, does anybody here feel that -- is there anyone who does not feel that a finding of not guilty, if the State is not able to prove its case beyond a reasonable doubt, is there any one here who feels that a not guilty verdict is not part of law enforcement? Raise your hand.

In other words, I'm asking you if you feel that law enforcement is only a conviction. Does anybody believe that law enforcement only means conviction and punishment? Does anybody believe that?

I'm asking you then to open up, if you haven't already, to open up your minds to the fact that an acquittal is just as much an upholding of the

App.D-6

law, assuming the case is -- assuming the state is unable to prove its case beyond a reasonable doubt, that's just as much law enforcement, it's an enforcement of our laws as a conviction. Anybody disagrees with that proposition? Raise your hands. No hands. Good.

The prosecution has the burden of proof in this case. In other words, they're the ones that have to prove each and every part of what it takes to prove Mark Tody guilty of the crime that he's charged with, anybody have a problem with the prosecution having the burden of proof and the defense not having to prove anything? Any hands? Okay. I take it everybody understands those concepts. He doesn't have to prove his innocence. He doesn't even have to testify if he doesn't want to and that can't be held against him. Does anybody disagree with those principles? No hands. Okay.

The complaint or the information in this case is a means by which, as His Honor Judge Eaton said during his opening remarks, a means of bringing a dispute between the government and a private citizen. In other words, the government is accusing him of breaking the law, having committed a crime, Mark Tody as a private citizen has said, No, I am not guilty of

this crime as charged. The information or the complaint which states the charges against him is only a matter of what the dispute is about. It is not proof. Does anybody consider the fact that he's been charged evidence against him as we sit here now? Anybody? No hands? Okay.

If the prosecution, and that includes the district attorney, his witnesses, anybody who testifies for the government, is unable to satisfy each and every part of what it takes to find him guilty beyond a reasonable doubt, is there anybody who would not be able to find him not guilty? No hands.

To put it another way, is there anyone that would feel that he or she has not done the right thing if there is an acquittal? No hands. Thank you.

I have no further questions.

THE COURT: Counsel, please approach for a sidebar.

(Whereupon a discussion had off the record.)

THE COURT: Mr. Tody, please join us.

(Whereupon, court adjourned to the library.)

THE COURT: We're outside the presence of the jury with counsel of record and Mr. Tody.

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The question I had posed in the sidebar was whether the attorneys had motions to strike for cause. Each attorney indicated that they did. We'll start with the State. Mr. Duffy.

MR. DUFFY: Judge, I would move to remove Alvin Otto for cause. I would submit that he's indicated he has a very strong relationship with the defendant's father. He indicated that he would -- I think he indicated he would feel uncomfortable with coming back with a guilty verdict for his good friend's son if the evidence proves that. Therefore, I think he indicated he would have difficulty being fair and impartial. I would ask that he be removed for cause.

MR. FILIPPO: I disagree.

THE COURT: I agree. Sometimes Mr. Otto said things that were going to allow us to keep him on the panel but then he would say other things where I thought, well, we got to remove him.

Mr. Tody, I want to explain the ruling to you so you understand it. Let's say the alleged victim, a juror, said, you know, I have a relationship with the alleged victim where I know his father, I'm real good friends and I can't -- maybe it would make a difference. That juror would be out in a heart beat.

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You wouldn't let him on. I wouldn't let him on. I have to use the same test with Mr. Otto.

He's excused for cause.

The defense had a motion?

MR. FILIPPO: Yes. Juror Eaton. Very sensitive matter. I've never come across this before. I think we have a Ceaser's wife situation here where even the very fact of the close relationship I think, it's per se a prejudicial matter. Amongst other jurors they may very well value her opinion one way or the other more so with her personal relationship with the Court. So, I would ask that he be excused, with all due respect.

MR. DUFFY: There is no indication that she couldn't be fair and impartial. She appears to have a clear understanding of the Court's role in this process, very different than the role of a juror. And she indicated she has to listen to the evidence and make a decision of guilt or innocence, which isn't your role or your position as you hear this case. I think the Court's mother has the right to sit on the jury and should not be excluded just because she is your mother when there hasn't been any bias or prejudice shown. I think it's clear there was nothing there that would lead us to believe that she favors

App D-10

one side over the other and I think your mother would know that the Court finds one way in some circumstances and one way in other circumstances and I would imagine she's raised an individual who looks at facts and tries to find the truth and I would suspect she would do this as a juror in this case.

THE COURT: Accident.

I'm wondering if I can excuse her and I'll tell you, we really haven't talked about her jury duty other than the fact that I knew she was up for today. We didn't talk about the case. We don't talk about cases. So, when she says she doesn't know what its about I'm satisfied she didn't know anything about the allegations in the case beforehand.

Is she fair and impartial? What she said so far tells me, yes.

MR. FILIPPO: I don't have any reason to doubt what she said.

THE COURT: I didn't see any cases or statutes that say you disqualify a relative related to another neutral party. I'm a neutral party and so to me I'm kind of like a juror as well. I'm not for one side or the other here. I'm trying to go through potential problems in my mind. Are there potential problems with juror misconduct? Might I be called

App. D-11

into a position where I would have to rule on some type of juror misconduct involving my mother? Even if that came up I think the thing to do at that point is get a substitute judge. I don't think I have any legal basis for excusing her. I felt she wouldn't mind being excused. I don't think she would take it personally against me or anyone here in terms of, let's say, you come back and I don't excuse her but you peremptory challenge her, I don't think she's going to have any problem with that one way or the other but I don't think I have a legal basis to excuse her so I'm going to perhaps reluctantly deny your motion.

MR. FILIPPO: May I make one additional comment?

THE COURT: Sure.

MR. FILIPPO: I certainly am not in any way implying that she cannot be a fair and impartial juror, my objection was purely based on a Ceaser's wife situation where Ceaser's wife must also be above reproach or the very fact that she is related to whom she's related puts her in a special light. That's the only objection. Not that she can be fair and impartial or you benefit to be a juror, she's not -- I didn't see any indication of that either. I thought

App. D-12

she might be looked to for, as she might, be able to have an influence -- unintentionally undue influence on the rest of the jurors because of her name. That's all I wanted to say and make that clear.

THE COURT: I understand that's your point but we also have situations where if that happens, you know, because somebody is a police officer they can't automatically be excused. Or a doctor or lawyer. We've had lawyers in the panel and I assume, you know, that same argument could be made if a lawyer was on the panel but we don't automatically excuse them.

So, again, I'm not necessarily excited about having her on the panel because I can see the possibility of questions arising like you raised but I don't have any basis for kicking her off so at this point your motion is denied.

(Whereupon, the court returned to the courtroom.)

THE COURT: Mr. Otto, you're excused from serving on this panel. You're free to go. Thank you for coming.

By the way, if any other jurors step out I will note that there is a jury trial scheduled for tomorrow and as far as I know that's still on. So, if you got called for jury service both days, still call

App D-13

state; he didn't intend to help them steal a car.

Second. The thing I'd like to talk about in regard to District Attorney Duffy is talking about the State's case is overwhelming because they had all the co-conspirators there. My recollection of the trial is that some of the co-conspirators' testimony wasn't clear on what Mark allegedly did. I believe one of them -- I think Landon alleged that he carried a battery to the car. I believe Brenda said she didn't see who did what. I think Jonathan said Mark might have opened the hood. So, I think regards to that we have the jury choosing between whose story they want to believe. Do they want to believe Mark stayed in the car? Do they want to believe he carried a battery? Do they want to believe he opened the hood? I mean there is a multitude of stories the jury could have chosen. And our contention is that if Mark's story was brought out, there is a reasonable probability the jury's verdict could have been different. I do believe that Mark was sufficiently prepared to testify today. We did that to the best of our ability. That's all I have. Thank you.

THE COURT: Okay. I'm going to take a brief recess. I don't know that I'm necessarily going to come back and rule, but I might be able to do so. So we'll take a recess.

(A short recess was taken at this time.)

THE COURT: The claim of the defendant today is

App. E-1

that he received ineffective assistance of counsel. I'm sure everybody would acknowledge that Mr. Tody is not entitled to perfect representation. Adequate representation, competent representation, absolutely. But not necessarily perfect representation. So the issue today is did he receive competent, adequate, representation at trial. And in some respects are we second guessing the decisions made at trial? Or did he, in fact, receive ineffective assistance? And is it likely that, or is there a probability that the outcome of the trial would be changed if he had different representation?

There are some exculpatory facts that his counsel today suggests should have been offered at trial. The fact that the defendant owned a car. I assume that such evidence would be admissible at trial, but I don't think it was deficient performance not to inquire about the defendant's ownership of a car. As Mr. Duffy has pointed out, the fact that somebody has a hundred dollars in the bank or even in their wallet isn't very exculpatory on a charge of they stole a hundred dollars from somebody. The fact that Mr. Tody owned one car certainly doesn't eliminate the possibility that he's going to steal a car for pecuniary advantage. So I think that evidence would have come in. I just can't imagine it would have made any difference at trial.

The fact that he knew how to start a car on his own, again, I think it could have come in, but I think the attorney

App. E-2

in the case has offered a valid strategic reason for not asking the question. He really didn't want the jury to look at the defendant as being somewhat adept at stealing cars, someone knowledgeable in that area. And the fact that he could start a car on his own without keys and without the assistance of others really wouldn't have lessened the evidence against him all that much. Again, as the State points out, the fact that somebody can commit a crime on their own doesn't necessarily stop them or discourage them from joining with others to commit a crime. So, again, while the evidence would have come in, I don't view it as particularly exculpatory. I can't imagine that it would have changed the outcome of the trial.

The fact that his father owns a hangar at the airport. The defendant says he told his attorney. His attorney says, "I don't remember him saying that". In fact, the defendant said today, "I told the jurors that my father has a hangar at the airport", which doesn't appear anywhere in the trial testimony. Of the two, I find Mr. Filippo more credible. I'm satisfied that he didn't tell his attorney that his father had a hangar at the airport. So how would the attorney have known to elicit that information? Even if that information had been elicited, I can't imagine again that it would have made any possible difference in the outcome of the trial.

App. E-3

I agree with Mr. Westman, the co-defendants were not completely consistent, but they were consistent along these lines that the three male co-defendants went out to the airport at least two or three times. One to case the place. The second time they stole a computer and tried to steal the Jeep. The third time they stole the Jeep. I think in large part whether the defendant's father had a hangar at the airport wasn't going to make much difference. He said he was out at the airport other times with his father. So the hangar at the airport testimony; one, it's not ineffective assistance for the attorney not to elicit testimony he has no idea about. And, two, even if that had been elicited, it wouldn't have changed the outcome of the trial.

The second part of the ineffective assistance was the lack of re-direct on the defendant's testimony, which was essentially, "Yeah, I helped steal the car, I guess". I also think that in that case off the record discussions occurred between the defendant and his attorney. We don't have the number of times. We have some differences about the timing of those discussions. But I'm satisfied that the attorney discussed with Mr. Tody the elements of the crime; what the attorney perceived as the weaknesses in the State's case. They didn't script out the testimony. I don't know if the testimony today had been scripted out, but it certainly seems a lot more robotic than the testimony we got at trial from the

App. E-4

defendant. His mantra today is a lack of purpose. "I lacked the purpose. I didn't have any purpose". He's got that line down now. Nonetheless, having spoken with the defendant, and having heard that the defendant said he was not guilty, having been told by the defendant that he wanted a trial, I can't imagine that any attorney would have suspected the defendant was going to get on the stand and say, "Yeah, I helped -- I guess I helped steal the car". That appears to be contrary to the conversations Mr. Filippo had with the defendant prior to the trial or even at the trial. Sometimes clients do that. You think they have one story and their story changes when they get on the stand. I think that is something that happened that was unpredictable and caught the attorney by surprise. Having had that testimony of the defendant, the attorney elected not to re-direct on that point. Rather, he's going to try to argue it away at closing argument. It was for a strategic reason. And certainly having heard the jury -- Having told the jury once that the defendant guessed he had helped commit the crime, there is good reason not to subject that to the close scrutiny of the jury again. So I find that's not incompetent or ineffective representation.

Again, with trial preparation, the defendant has not met his burden in terms of a lack of adequate trial preparation. They discussed the elements. They discussed the weaknesses of the State's case in general terms. I'm

App. E-5

satisfied they discussed the defendant's testimony.

On the recusal issue, 757.19(2) says, "Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs: Subsection A: When a judge is related to any party or counsel thereto or their spouses within the third degree of kinship". Well, my mother was not a party or counsel, so that one is inapplicable. "When a judge -- " This is Subsection G. "When a judge determines that for any reason he or she cannot or it appears he or she cannot act in an impartial manner". Here was the explanation I think that I gave at the time of trial. And here's the explanation I'm giving today. I wasn't real thrilled that my mother was on the jury panel because of just this type of question. But she didn't know anything about the case. We didn't discuss the case. There was nothing in her answers that indicated a bias one way or the other that I can point to or anybody has been able to point to today. And I didn't hear Mr. Tody testify about any appearance of bias. I really think the defense is asking the Court to adopt a per se rule that if a juror is related to the judge within the third degree of kinship, that juror is to be stricken. But that's not the rule here. That's not what's in 757.19. Oh, I'm sorry. Let me go back. That's not the rule when it comes to juror disqualification. There is no statutory rule that says that. There was no subjective bias

App. E-6

mentioned by the potential juror. There was no objective bias. As I analyze the case, I'm neutral and impartial as a judge. She was neutral and impartial as a juror. That's two neutrals and impartials. That's a lack of bias as far as I'm concerned.

Now had the attorney asked the Court to recuse itself, Mr. Westman suggests well then there would have been a continuance and a new judge would be assigned. I suppose that's possible, but it seems like a complete waste of judicial resources. Having the jury come in to see if a family member of the judge comes up in the drum and then to see if there is any bias, when there is none stated, there is none in the record. I'm not exactly sure what else the Court is supposed to do. Send a jury home. Get another judge assigned to the case. Delay the trial until the judge and the attorneys can get the case set up on their calendar which may be months from then. During which you keep the same jury on even though their term might have been over. You know, I understand what the defense is saying and they might be right, but I don't think they are. I just can't see that there was an appearance of bias on my part when I made the ruling. I'm absolutely positive that I could act in an impartial manner. I'm absolutely positive I did act in an impartial manner. But I suppose it's for somebody else other than me to judge when it appears to be. And I'm sure the Court of Appeals will make

App. E-7

that decision and let us know whether I was right or wrong. But, bottom line, I don't find that there was an appearance of bias. So had Mr. Filippo made the request to recuse myself, I would have denied the request, which I think would have put us back in the same position. So, in any event, I've reviewed the defendant's motion. I've considered the evidence. For the reasons I've discussed I deny his motion. I'm satisfied that he did receive effective assistance of counsel, so I deny his motion for a new trial. That concludes the hearing.

(The foregoing motion hearing was concluded at this time.)

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STATE OF WISCONSIN

IN SUPREME COURT

No. 2007AP400-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK H. TODY, JR.,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION
OF THE WISCONSIN COURT OF APPEALS,
DISTRICT III, AFFIRMING A JUDGMENT OF
CONVICTION AND AN ORDER DENYING
POSTCONVICTION RELIEF, ENTERED IN THE
CIRCUIT COURT FOR ASHLAND COUNTY,
THE HON. ROBERT E. EATON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

J.B. VAN HOLLEN
Attorney General

WILLIAM L. GANSNER
Assistant Attorney General
State Bar #1014627

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539

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STATE OF WISCONSIN

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BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review in this case, this court has determined that the case is sufficiently important to merit both oral argument and publication.

SUPPLEMENTAL STATEMENT OF THE CASE

The "Statement of Case" and "Statement of Facts" sections of Tody's brief are significantly incomplete in their presentation of material procedural history and evidentiary facts from the circuit court proceedings in his case. The State, therefore, presents this necessarily lengthy supplemental statement.

Nature of the Case

Tody appealed (47) to the Wisconsin Court of Appeals from a judgment of conviction entered in Ashland County Circuit Court on June 26, 2006 (33; P-Ap. B) following a jury trial and return of a guilty verdict on June 7, 2006 (27), for operating a motor vehicle without owner's consent (OMVWOC), party to the crime, in violation of Wis. Stats. §§ 943.23(2) and 939.05. The circuit court withheld sentence and placed Tody on probation for three years on the OMVWOC conviction (33; P-Ap. B).[1] Tody also appealed from

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[1] Tody's brief, at 2 and 6, mistakenly states that Tody was sentenced to three years' probation **and** a six-month jail term on the OMVWOC conviction. A three-year probation term alone – with no jail time condition – was ordered on the felony OMVWOC conviction (33; A-Ap. B-1; 56:208, 211). The court did order a six-month jail term at the proceeding when the OMVWOC sentence was imposed, but as a condition of probation on a different offense, a misdemeanor theft charge in another case, 06CM68, misnumbered in the transcript as 06CM86 (56:208), one of two misdemeanors in that case to which Tody had earlier entered no-contest pleas (14). The Ashland County Circuit Court CCAP record in 06CM68 confirms this.

a circuit court order entered January 23, 2007 (44; P-Ap. C), denying his postconviction motion (38), after an evidentiary hearing and oral ruling on the motion on January 16, 2007 (58:41-48; P-Ap. E).

Charge and Preliminary Proceedings

On March 9, 2006, Tody was charged with being a party to the crime of OMVWOC, a crime that occurred between February 10 and February 28, 2006 (1:2). The complaint charged three others as parties to the OMVWOC – Landon LaPointe, Jonathan Newago, and Brenda Belanger (1:2-3).

Tody's initial appearance on the charge was held on March 13, 2006, before Ashland County Circuit Court Judge Robert E. Eaton (52).[2] Tody also appeared on two misdemeanor cases, 06CM63 and 06CM68 (52:2). Tody was bound over for trial on the OMVWOC charge at a preliminary hearing before Judge Eaton on March 21, 2006 (53).[3]

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[2] Judge Eaton is the sole circuit judge for Ashland County. *State of Wisconsin Blue Book 2005-2006,* at 586.

[3] The preliminary hearing was on Tody alone. Although not described in the present appeal record, the cases against his three co-defendants proceeded in separately numbered cases. CCAP records show that LaPointe and Newago were convicted of the OMVWOC charge on no-contest pleas and were placed on probation in cases 06CF38 and 06CF39, respectively, with LaPointe receiving jail time as a probation condition. The CCAP records show that the State dismissed Belanger's OMVWOC charge in 06CF40.

The OMVWOC charge was set for trial at a status conference before Judge Eaton on April 24, 2006 (14). Tody also renewed his not guilty plea in one of his misdemeanor cases, 06CM63, but he changed his pleas to no contest on the theft and disorderly conduct charges in 06CM68 (*id.*). Sentencing in the case was set for June 7, 2006, the date of Tody's OMVWOC trial (*id.*).

Jury Selection - Questioning of Prospective Jurors

Tody's OMVWOC charge (6) was tried on June 7, 2006 (56). Judge Eaton presided (56:1). The jury was selected immediately before the trial.

The "Voir Dire List" of prospective jurors summoned to court contained thirty-two names (19). The fourth name listed was "Mary B. Eaton" (*id.*). Ms. Eaton was one of the first twenty potential jurors whose names were randomly drawn for jury selection (56:9-10).

Judge Eaton began by explaining to the prospective jurors that the process was designed to ensure the selection of "jurors who are fair and impartial" (56:11). To that end, he explained, the panel would first be asked if they were acquainted "with the parties, attorneys, or witnesses" (*id.*).

In response to the judge's question whether they were related to or acquainted with Tody or knew any of his relatives, two panelists said they knew members of Tody's family – one worked with his cousin (56:16) and one knew Tody's father as a friend (56:17, 21). The former juror said that this knowledge would not interfere with his ability to decide the case fairly and impartially on the basis

of the trial evidence (56:16-17). The latter juror was equivocal in this regard (56:17-18, 21-22; P-Ap. D-3 to D-4).

Judge Eaton then posed additional questions to the panel aimed at discovering possible interest, bias, or prejudice. During this colloquy, the judge identified panelist Eaton as his mother. And it was during this process that the judge made a comment about his relationship to "law enforcement." The comment and the identification occurred in the context of the following questioning of the jury panel:

> THE COURT: ....
>
> Is there anyone among you who is a member of any police department, sheriff's department, or other law enforcement agency?
>
> Any of you have relatives employed in a law enforcement related capacity?
>
> Ms. Eaton, do you have a relative employed in the law enforcement related capacity?
>
> MS. EATON: The judge.
>
> THE COURT: I like – I like to consider myself part of law enforcement or I may be disowned.
>
> You are related to me how?
>
> MS. EATON: Your mother.
>
> THE COURT: Is there anyone among you who has any opinion or has ever formed or expressed an opinion as to the guilt or innocence of the defendant?

> Is there anyone among you who cannot or will not try this case fairly and impartially on the evidence that is given here in court and under the instructions of the court render a just and true verdict?

(56:19-20; P-Ap. D-1 to D-2.)

Neither party objected at this time to the presence of the judge's mother on the jury panel. Instead, the prosecutor and defense counsel proceeded with questions to the panel (56:20-26; P-Ap. D-2 to D-8), including questions to Ms. Eaton specifically. The attorneys' questions to Ms. Eaton, and her answers, were as follows:

> MR. DUFFY: Mrs. Eaton, I know you're the judge's mother, do you feel comfortable sitting on a trial where he's the judge but he's not party in the case?
>
> MS. EATON: I don't think it makes any difference.
>
> MR. DUFFY: Doesn't make any difference one way or the other to you? You have no opinion about the defendant's guilt or innocence?
>
> MS. EATON: I know nothing about it.
>
> MR. DUFFY: Thank you. I have nothing further.
>
> THE COURT: Mr. Filippo.
>
> MR. FILIPPO: Thank you.
>
> Boy, Ms. Eaton, do I have a lot of questions for you.

> Seriously. Do you feel you could be a fair and impartial juror? Would you have to explain to His Honor Judge Eaton, let's say you voted for a verdict of not guilty, would you feel you would have to explain or justify why you voted that way?
>
> MS. EATON: No.
>
> MR. FILIPPO: Would it be fair to say you come in here completely with an independent mind and you're without being influenced by the fact that His Honor Judge Eaton holds a very high office?
>
> MS. EATON: Well, I feel like the jury makes the decision, he isn't part of the decision making. No.
>
> MR. FILIPPO: That's right and you'll be part of the jury, if you're retained as a juror you'll be one of twelve of the jury.
>
> MS. EATON: Right.

(56:23-24; P-Ap. D-5 to D-6.)

Defense counsel then posed questions to the entire panel relating to the judge's comment about considering himself "part of law enforcement" (56:24-26; P-Ap. D-6 to D-8):

> All right. He did mention one thing that he's part of the law enforcement process and that is true and so is the prosecution and the police, but the defense has a role in the law enforcement process also, does anybody here feel that – is there anyone who does not feel that a finding of not guilty, if the State is not able to prove its case beyond a reasonable doubt, is there any one here who feels that a not guilty verdict is not part of law enforcement? Raise your hand.

> In other words, I'm asking you if you feel that law enforcement is only a conviction. Does anybody believe that law enforcement only means conviction and punishment? Does anybody believe that?
>
> I'm asking you then to open up, if you haven't already, to open up your minds to the fact that an acquittal is just as much an upholding of the law, assuming the case is – assuming the state is unable to prove its case beyond a reasonable doubt, that's just as much law enforcement, it's an enforcement of our laws as a conviction. Anybody disagrees with that proposition? Raise your hands. No hands. Good.

(56:24-25; P-Ap. D-6 to D-7.)

Jury Selection - Motions to Strike Prospective Jurors for Cause

With the panel's *voir dire* completed, the court entertained the parties' motions to strike prospective jurors for cause (56:27-31; P-Ap. D-9 to D-13).

The court granted the State's motion to strike Mr. Otto, the juror who was acquainted with Tody's father, because of the juror's equivocal answers on whether the relationship would make his impartiality difficult (56:17-18, 21-22; P-Ap. D-3 to D-4; 56:27-28, 31; P-Ap. D-9 to D-10, D-13).

The defense then moved to strike Ms. Eaton, the judge's mother (56:28; P-Ap. D-10), who had revealed no impartiality concerns in her answers to questions from court and counsel (56:19-20, 23-24; P-Ap. D-1 to D-2, D-5 to D-6). Attorney Filippo

stated that he was "not in any way implying that she cannot be a fair and impartial juror" (56:30; P-Ap. D-12) and had no reason to doubt her promise of fairness and impartiality (56:29; P-Ap. D-11). Nonetheless, he sought to strike Ms. Eaton because he believed that she might have an undue influence on other jurors because of her relationship to the judge (56:28, 30-31; P-Ap. D-10, 12-13).

The key portions of the record are as follows:

> MR. FILIPPO: Yes. Juror Eaton. Very sensitive matter. I've never come across this before. I think we have a Ceaser's [sic] wife situation here where even the very fact of the close relationship I think, it's per se a prejudicial matter. Amongst other jurors they may very well value her opinion one way or the other more so with her personal relationship with the Court. So, I would ask that he [sic] be excused, with all due respect.
>
> . . . .
>
> THE COURT: . . . .
>
> I'm wondering if I can excuse her and I'll tell you, we really haven't talked about her jury duty other than the fact that I knew she was up for today. We didn't talk about the case. We don't talk about cases. So, when she says she doesn't know what its [sic] about I'm satisfied she didn't know anything about the allegations in the case beforehand.
>
> Is she fair and impartial? What she said so far tells me, yes.
>
> MR. FILIPPO: I don't have any reason to doubt what she said.

THE COURT: I didn't see any cases or statutes that say you disqualify a relative related to another neutral party. I'm a neutral party and so to me I'm kind of like a juror as well. I'm not for one side or the other here. . . .

MR. FILIPPO: May I make one additional comment?

THE COURT: Sure.

MR. FILIPPO: I certainly am not in any way implying that she cannot be a fair and impartial juror, my objection was purely based on a Ceaser's [sic] wife situation where Ceaser's [sic] wife must also be above reproach or the very fact that she is related to whom she's related puts her in a special light. That's the only objection. Not that she can be fair and impartial or you benefit to be a juror, she's not – I didn't see any indication of that either. I thought she might be looked to for, as she might, be able to have an influence – unintentionally undue influence on the rest of the jurors because of her name. That's all I wanted to say and make that clear.

THE COURT: I understand that's your point but we also have situations where if that happens, you know, because somebody is a police officer they can't automatically be excused. Or a doctor or lawyer. We've had lawyers in the panel and I assume, you know, that same argument could be made if a lawyer was on the panel but we don't automatically excuse them.

So, again, I'm not necessarily excited about having her on the panel because I can see the possibility of questions arising like you raised but I don't have any basis for

> kicking her off so at this point your motion is denied.

(56:28-31; P-Ap. D-10 to D-13.)

At no time during these proceedings did either counsel request or suggest to Judge Eaton that he recuse himself from ruling on the defense motion to strike.

The parties exercised their peremptory challenges (56:33), each striking four prospective jurors (21). Neither side chose to peremptorily strike Ms. Eaton (*id.*) and she was thereby selected as one of the twelve trial jurors (56:33).

Opening Arguments

The prosecutor told the jury in his opening argument that the three other persons involved in taking the Jeep from the Ashland airport without its owner's consent – LaPointe, Newago, and Belanger – would testify to Tody's participating with them in the planning, execution, and attempted concealment of the crime (56:37-40). The evidence, he said, would be "straight forward" (56:40).

Defense counsel Filippo was candid in his opening argument. He conceded that the Jeep had been stolen – its window smashed, the ignition broken and the car started without a key, and the car driven from the airport parking lot – and that Tody had been present for it all (56:41). But while admitting that "Mark Tody has a problem" (*id.*), he argued that Tody did not aid, abet, or conspire with the others in the car theft; that is, that he was present at the crime but not criminally involved:

> He was with bad guys and he was around a bad incident and bad things happened that night and he should not had [sic] been there. He didn't do anything to stop it but he's not required to but that does not make him a party to the crime. He should [not] have been there in the first place and he was around the fringes but he didn't damage the car and he didn't drive it away. He did follow in another car with Brenda Belanger but that is the extent of his involvement.

(56:41.)

Trial Evidence

The testimony at Tody's trial was short and the evidence uncomplicated. The State called five witnesses: the car's owner, Tody's three co-defendants in the complaint, and an Ashland police investigator. Tody was the sole defense witness. All six witnesses, including Tody himself, implicated him as a party to the OMVWOC crime.

State witness Daniel MacDonald. MacDonald, the car's owner, testified that he did not know Tody, LaPointe, or Newago and never gave them permission to take the car (56:43). When the police returned it to him, the car had suffered the following damage: "the right-hand side front window was broken out[,] [t]he steering column lock area [was] severely damaged and the hood [was] bent as though somebody was trying to force it open" (56:45).

State witness LaPointe. LaPointe testified that he and Tody had discussed assisting each other in two acts of theft at the Ashland airport: Tody taking a computer for LaPointe from the airport terminal and LaPointe – who knew how to

start a vehicle without a key – taking a Jeep Cherokee from the airport parking lot that Tody wanted (56:52-53). The idea of stealing a car from the airport originated in a jailhouse conversation between Tody and LaPointe some months earlier (56:69, 77).

LaPointe stated that he, Tody, and Newago made three trips to the airport. On the first trip, they looked around (56:68-69). On the second trip, he and Tody discussed taking the Jeep and decided to do so (56:78). The trio took an ax from the airport terminal and Newago used it to break a side window to get into the car; the ax was used again to break open the car's ignition column (56:67-68). But the Jeep's battery was dead and the car would not start (56:58, 60). They succeeded in taking the car on their third trip. Joined by Brenda Belanger (56:59), they drove to the airport in LaPointe's Honda and brought a replacement battery (56:65). LaPointe testified that Tody carried the battery to the Jeep and that LaPointe and Newago installed it (56:59-60, 70). The Jeep started, and LaPointe and Newago drove it from the airport, while Tody drove LaPointe's Honda with Belanger as his passenger (56:61). The stolen car was stored behind LaPointe's house in a snow bank (*id.*). Afterwards, LaPointe and Tody talked about changing its VIN and then eventually selling it (56:75).

State witness Newago. Newago testified that he, Tody, and LaPointe "stole a computer and a Jeep" at the airport (56:80), both on the same night, the Jeep for Tody and the computer for LaPointe (56:87). Six months before their first trip to the airport, he said the three men decided that it would be an easy place to steal a car

(56:84). Their first visit was a scouting trip (56:80). On the second trip, Newago and LaPointe broke into the Jeep and searched for keys while Tody stood nearby (56:81-82). On the third trip – when they were accompanied by Belanger – Newago said they broke the ignition with a hatchet, opened the hood, put the new battery in, and took the car (56:82). Tody "helped" open the hood (56:83-84), but Newago said he, not Tody, got the new battery out of LaPointe's car (56:84). Like LaPointe, Newago said that Tody drove LaPointe's car while he and LaPointe left in the Jeep (56:87).

State witness Belanger. Belanger testified after a grant of immunity (56:89-90). She accompanied Tody, LaPointe, and Newago on the trip to the airport when the Jeep was stolen (56:90-91). She remained in LaPointe's car while the three men got out (56:92). When they left the airport, she rode in LaPointe's car with Tody, while LaPointe and Newago drove the Jeep (56:94). They drove into Ashland where Belanger retrieved her car (*id.*). A caravan of LaPointe and Newago in the stolen Jeep, Tody driving LaPointe's car, and Belanger in her car then drove to Red Cliff (56:94-95).

State witness Gerald Katchka. Katchka, an investigator with the Ashland Police Department (56:96), testified to a statement he took from LaPointe. LaPointe told Katchka that he and Tody had agreed that Tody would take a computer from the airport for him and LaPointe would take the Jeep that Tody wanted from the airport parking lot, since LaPointe knew how to start a car without a key (56:98).

Defense witness Mark Tody. Tody testified in his own defense after the judge advised him that it was his right and decision to testify or not and after Tody told the judge that he understood the advisement (56:123-24). Tody denied all of the following: riding in the stolen Jeep; smashing a window to gain entry to the vehicle; stealing or helping anyone steal a computer from the airport (56:125); agreeing with LaPointe to help him steal a computer if he helped steal the Jeep for Tody; using an ax to smash the Jeep ignition; trying to open the hood of the Jeep; helping with the dead battery removed from the Jeep; lifting the replacement battery out of the trunk of LaPointe's car; or helping Newago install the new battery in the Jeep (56:126-27).[4]

But Tody also admitted a great deal in his testimony. He admitted:

- LaPointe, Newago, and Belanger were friends of his (56:134);
- he had previously spoken to Newago and LaPointe about stealing vehicles and told them the airport was a possible place to do it (56:134-35);
- he made three trips to the airport with Newago and LaPointe (56:131);
- on the first trip they drove around the parking lot looking at cars (*id.*);

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[4] Tody acknowledged that he had been convicted of a crime or adjudicated delinquent on five previous occasions (56:136).

- he made a second trip to the airport and was present when the Jeep was broken into (56:132);

- he knew the purpose of going back to the airport was to take the Jeep (56:132-33);

- he drove to the airport with LaPointe, Newago, and Belanger in LaPointe's Honda on the night that Newago and LaPointe took the Jeep (56:127);

- Newago told him to open the trunk of the Honda where the replacement battery for the Jeep was located (*id.*);

- he did not know who owned the Jeep and had no permission or consent to take it, and that, "[a]fter we took it," he and LaPointe had a plan to remove the car's VIN and to sell the vehicle (56:135);

- he told LaPointe that he did not want to drive the Jeep because "it had expired tags on it and I figured it would be most likely to be pulled over and I didn't have my license so I didn't want to get pulled over, especially in a stolen vehicle" (56:128);

- he knew the Jeep was stolen before he left the airport (56:129);

- Belanger was supposed to drive LaPointe's Honda but "we were trying to get away quick so I jumped in the car and drove" (*id.*);

- he drove LaPointe's car from the airport as LaPointe drove the stolen Jeep, all the while knowing the Jeep was stolen (56:130); and

- he drove LaPointe's car all the way to Red Cliff, where LaPointe had driven the Jeep (*id.*).

Finally, when the prosecutor asked "[s]o, is it fair to say that you were helping in stealing this vehicle[,]" Tody responded, "[i]n a way, ya, I guess" (*id.*), because he chose to drive LaPointe's car from the airport for him (56:130-31).[5] There was no re-direct examination (56:136-37).

Jury Instructions

The court's instructions emphasized the separate responsibilities of court and jury and the duty to decide the case only on the basis of the trial evidence. In this respect, the judge instructed the jury:

> It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is or ought to be, you must base your verdict on the law I give you in these instructions. Apply the law to the facts in the case which have been properly proven by the evidence. Consider only the evidence received during this trial and the law as given to you by these instructions and from these alone, guided by your soundest reason and best judgment reach your verdict.

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[5] Defense counsel's objection to the prosecutor's question was overruled (56:130).

> If any member of the jury has an impression of my opinion as to whether the defendant is guilty or not guilty, disregard that impression entirely and decide the issues of fact solely as you view the evidence. You, the jury, are the sole judges of the facts and the court is the judge of the law only.

(56:145-46.)

Closing Statements

District Attorney Duffy described the case as "simple" and "straight forward" (56:158), because it was undisputed that LaPointe drove the car from the airport and he did not have the owner's permission to operate the car (*id.*), and because – while there was varying testimony of Tody's opening the Jeep's hood, bringing the replacement battery from LaPointe's car to the Jeep, and smashing the Jeep's steering column – LaPointe, Newago, and Belanger all agreed that Tody had driven LaPointe's car from the airport while LaPointe drove the stolen vehicle (56:160). The prosecutor further noted that Newago and LaPointe had both described prior discussions with Tody about stealing a car and the airport being a good place to do it (56:162). And finally, the prosecutor emphasized that by his own testimony, Tody had admitted going to the airport parking lot to locate a car to steal; being present when the Jeep was broken into; going a third time to the airport while knowing that the objective was to steal the Jeep; driving LaPointe's car from the airport to Red Cliff, where the car was hidden; and then planning with LaPointe to eliminate the Jeep's VIN and sell the car (56:162-63). On this "overwhelming" evidence (56:164), the prosecutor argued that the jury should conclude that Tody

was a party to the OMVWOC either as a co-conspirator to the crime or as an active aider and abetter of it (56:180-82).

Defense counsel Filippo agreed that the Jeep was stolen (56:164), that Tody was "around the criminals" when the car was broken into and taken (56:165), and that Tody drove LaPointe's car from the airport as LaPointe drove the stolen Jeep (56:166). But he argued that Tody's mere presence while others committed the crime was insufficient for conviction, and that his driving of LaPointe's car was "not enough to assist in the crime of stealing" (56:167). He argued that there was reasonable doubt as to whether Tody assisted or intended to assist the taking of the Jeep (56:168, 177-78). In arguing reasonable doubt, Filippo emphasized that the State had introduced no evidence of Tody's fingerprints on the Jeep or the ax that was used to break the car's ignition (56:176-77).

Jury Verdict, Conviction, and Sentence

The jury returned a unanimous verdict finding Tody guilty of OMVWOC, party to the crime (27; 56:187-88).

Judge Eaton found that the verdict was supported by the evidence and adjudged Tody convicted (56:189).

The court proceeded to sentence Tody on the OMVWOC conviction and on the two misdemeanor charges, theft and disorderly conduct, to which he had entered no-contest pleas on April 24, 2006 (14). The court withheld sentence and ordered a three-year probation term with no jail condition on

the OMVWOC conviction (33; P-Ap. B-1; 56:208, 211). The court imposed three years of probation on the misdemeanor theft as well, but with a six-month jail condition (56:208). CCAP record shows that the court ordered a three-year probation term with no jail time on the misdemeanor disorderly conduct.

Postconviction Motion Proceedings

On November 30, 2006, with the assistance of postconviction and appellate counsel, Tody filed a motion for new trial (38) accompanied by affidavits from Tody (39) and his postconviction counsel (40).

Motion claims. The motion asserted that Tody's trial counsel had rendered constitutionally ineffective assistance in four respects:

1. failing to present testimony and argument that Tody did not have the purpose of helping to steal the Jeep (38:2-3);

2. failing to prepare Tody for his trial testimony (38:3-4);

3. failing to elicit exculpatory testimony from Tody during his direct examination (38:4-5); and

4. failing to move for the trial judge's recusal from deciding the defense motion to strike the judge's mother from the jury panel (38:5-6).[6]

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[6] Tody pursued all four of these ineffectiveness claims in the court of appeals. He states in his brief to this court,

Judge Eaton presided over an evidentiary hearing on the postconviction motion on January 16, 2007 (58). The defense called two witnesses: Tody and his trial counsel, Attorney Filippo.

Tody's testimony. Tody testified that he and his counsel "met a few times" before trial to discuss the case (58:2). He stated that he told Filippo that he owned a car – "so there was no reason I would need to help somebody steal one" (*id.*) – and that he had experience working on cars with his father and knew how to start one without a key – "so I wouldn't need anybody's help to do it" (58:2-3) – and that his father had a hangar at the Ashland airport – "[s]o I hang around the airport" (58:3). Regarding his activities on the night the Jeep was stolen, Tody said that he told Filippo he went to the airport with LaPointe and Newago (58:3-4) "to go to my dad's hangar" (58:4), but that "I stayed in the car and didn't get out" (58:3). Tody also said that he did not think before trial that he was guilty and never told Filippo that he thought he was, that Filippo never told him that he thought he was guilty, and that they had never discussed facts that might be used to prove his guilt (58:4).

As for the trial, Tody testified that he first knew he was going to testify only a few minutes before he took the stand, and that he and Filippo had not discussed his testifying before that point (58:5). He described the decision as follows: "The

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at 6 n.2, that he has abandoned the first three claims and now pursues only the fourth claim. In order to provide a complete description of the context in which the arguments now before this court arose, however, the state here describes the testimony and court ruling on all four claims.

State called their witnesses. Then they asked if I wanted to testify or if my attorney had any witnesses. And he said that I could testify. It might help me. It might not help me. It was up to me" (*id.*). Tody said that when he was cross-examined by the prosecutor, he "didn't really understand his questions" (*id.*). When he responded to the prosecutor's question by saying that he had assisted LaPointe's stealing of the Jeep "[i]n a way," Tody said that he had not meant to admit that he had the purpose to steal the Jeep (*id.*), that he had not understood the answer could make him appear guilty, and that Filippo had never prepared him to answer such a question (58:6). He said that he told Filippo that "I didn't have a purpose to help" steal the Jeep when he went to the airport on the night it was stolen (58:7, 14), and that he simply sat in the car while the others were stealing it (58:14).

Tody said he could not remember whether LaPointe had smashed the window of a vehicle on one of the visits to the airport (58:8). After his trial testimony on the subject was reviewed – his testimony that he had been present at the airport when the Jeep window was broken (56:132) – Tody recalled having been there at the time (58:8) and said he had recounted this fact to Filippo (58:8-9). After Tody was reminded of his trial testimony that he made a return trip to the airport with LaPointe and Newago to get the Jeep and start it, the parties stipulated that Tody had never told the jury at trial that he had merely gone to the airport to go to his father's hanger (58:10-11).

Testimony at the motion hearing also revealed that some of Tody's trial testimony had been false, or at least less than totally candid.

The prosecutor asked Tody at the hearing about his misdemeanor case, 06CM68, and Tody admitted that it involved the theft of a computer from the airport and that he had pled no contest to the charge (58:12). The record shows that Tody entered that plea on April 24, 2006 (14). But during direct examination by Attorney Filippo at his OMVWOC trial less than two months later on June 7, 2006, Tody had denied stealing or helping to steal a computer from the airport (56:125). Confronted with his trial testimony at the motion hearing (58:12-13), Tody admitted that the truth was that he actually pled to the charge of helping steal a computer from the airport and that Filippo had represented him in the misdemeanor case where he had entered the no-contest plea (58:13).

Attorney Filippo's testimony. Filippo testified that he had practiced law for twenty-nine years (58:15). He did not recall Tody telling him that his father had a hanger at the Ashland airport, and he said he did not elicit such information at Tody's trial because he wasn't aware of it (58:15-16). Tody did tell him before trial that he knew a lot about cars and knew how to start one without a key, but Filippo chose not to introduce that fact at trial:

> I felt that the more information that came out . . . of . . . Mark's mechanical expertise with cars, and his ability to start a car without a key, that that would be prejudicial to his interest at trial. In other words, the jury is going to hear about how good he is at being able to take a car or start up a car without the owner's permission. And I just wanted to stay away from that.

(58:16.)

Tody also told him before trial that he owned an automobile, but Filippo said he could recall no strategic reason for not introducing that fact at trial (58:16-17).

As for Tody's trial preparation, Filippo said he reviewed the elements of the OMVWOC charge with Tody and told him what elements he believed the State would not be able to prove beyond a reasonable doubt (*id.*). While in this general way he had reviewed the questions he would ask Tody if he testified, they did not practice specific questions and answers (58:17-18) and did not go over questions the State was likely to ask (58:18).

Filippo acknowledged that he had not sought any re-direct examination of Tody after Tody had said on cross-examination that he guessed he had helped in the stealing of the Jeep (58:19). While he considered Tody's statement damaging – he said he thought Tody might have hanged himself by the answer (58:27) – he explained why he did not attempt rehabilitation on re-direct. He explained that he had objected to the prosecutor's use of the term "stealing" but the court had overruled his objection (*id.*).

> I felt that the D.A.'s question was misleading. That was the basis of my objection. The Court overruled my objection. And Mark answered, "Yeah, I guess so" or words to that effect, is my recollection of the transcript. The strategic reason for not re-visiting that on re-direct examination was not to exacerbate the damage he had already done to himself. In other words, I didn't want to ring the bell twice. I was leading it up to closing argument that he did not – that the State did not meet its burden of proof as to the elements of the crime with which he was

> charged. Which was operating without owner's consent, as opposed to theft. And if that argument failed and there was a conviction, then the acts that he would be guilty of would be left to the appellate court if it got that far.

(58:20.)

On the subject of the presence of Ms. Eaton in the jury pool, Filippo offered no strategic reason why he had not asked the judge to recuse himself from ruling on his motion to strike him from the panel (*id.*). He said: "No. To tell the truth, it never occurred to me. Point well taken" (58:21).

But Filippo also testified that he had not used any of his four peremptory challenges against Ms. Eaton because he believed there were better candidates for peremptory challenge on the panel than Ms. Eaton (*id.*). There were "four others that I thought were – would be less appropriate jurors" than Ms. Eaton, he explained (58:22).

The parties argued the motion (58:28-34, 40-41), and the court questioned the defense on their theory of why the judge should have recused himself from ruling on the motion to strike Ms. Eaton from the jury panel (58:35-40).[7]

Judge's ruling on motion. Judge Eaton then orally denied Tody's postconviction motion (58:41-48; P-Ap. E).

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[7] Tody's postconviction counsel could not say whether Ms. Eaton or the judge was biased and, if so, which way (58:35-36). Therefore, counsel could not answer the questions whether Ms. Eaton should have been struck for cause and whether Judge Eaton erred in denying the motion (*id.*).

The judge rejected the defense argument that trial counsel was ineffective in not eliciting allegedly exculpatory testimony from Tody. The judge concluded that counsel's performance in this regard had not been deficient, and that the absence of the testimony was not prejudicial because it would have had no impact upon the outcome of the case (58:42-44; P-Ap. E-2 to E-4).

Judge Eaton ruled that trial counsel was not ineffective in deciding not to attempt to rehabilitate Tody on re-direct after he had admitted on cross-examination that he had assisted the stealing of the Jeep. He concluded that counsel had a good strategic reason for not revisiting the damaging subject (58:44-45; P-Ap. E-4 to E-5).

The judge also ruled that the defense had failed to sustain its burden of establishing counsel's ineffectiveness in preparing Tody for trial, in light of the evidence that Filippo and Tody had discussed the elements of the charge and the weaknesses of the State's case (58:45-46; P-Ap. E-5 to E-6).

On the recusal issue, the judge concluded that there was no statutory requirement for his recusal from the motion to strike Ms. Eaton because his mother was neither an attorney or a party in Tody's prosecution (58:46; P-Ap. E-6). Furthermore, the judge found that there was nothing in her *voir dire* answers that provided any basis for striking her from the jury panel (*id.*). And the judge rejected – as having no statutory or other legal basis – the defense argument for a *per se* rule requiring the disqualification of any juror that is related to the judge (*id.*). In the absence of any evidence of subjective or objective bias on the

part of the judge or his mother, Judge Eaton concluded that "I'm neutral and impartial as a judge. She was neutral and impartial as a juror. That's two neutrals and impartials" (58:47; P-Ap. E-7). Since the judge was certain that he was neither objectively or subjectively biased on the matter of the motion to strike, he was equally certain that he was capable of acting, and had acted, in an impartial manner in ruling on the motion. As a practical matter, he concluded that his recusal and the appointment of a substitute judge to rule on the motion would have produced a "complete waste of judicial resources," an unjustified waste of the jurors' time, and an unwarranted delay in the defendant's trial (*id.*).

Decision on Appeal

Tody's brief, at 7-9, presents a fair summary of the unpublished decision of the Wisconsin Court of Appeals affirming his conviction and the order denying his postconviction motion (P-Ap. A).

Petition for Review

Tody's petition for review to this court raised the four issues described in his brief, at 1-2. On July 28, 2008, this court granted the petition for review and directed that "the defendant-appellant-petitioner may not raise or argue issues not set forth in the petition for review unless otherwise ordered by the court . . . ."

ARGUMENT

I. TODY WAS NOT DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

Overwhelming evidence – including his own inculpatory admissions – led an Ashland County jury to conclude that Mark Tody was guilty beyond any reasonable doubt of being a party to the crime of taking and operating a motor vehicle without the owner's consent. Tody does not dispute the admissibility of the evidence or the strength of its support for the guilty verdict. Instead, he contends that he was deprived of his right to an impartial jury because the trial judge's mother was a member of the jury, because the judge made an off-hand comment during jury selection that he considered himself "part of law enforcement," and because he contends the judge's mother was biased. Tody's arguments are not persuasive, alone or in the aggregate, as the circuit court and the court of appeals both concluded. Deferring to the trial judge's determination on some matters and exercising its independent review authority on others, this court should reject Tody's jury impartiality challenge.

A. The presence of the trial judge's mother on the jury did not violate Tody's right to a fair and impartial jury, independent of the judge.

Tody argues that the presence of Ms. Eaton, the judge's mother, on the jury at his trial was a *per se* violation of his state and federal constitutional right to a fair and impartial jury at a

criminal trial. He contends that the right should be interpreted to mean a jury that is independent of the judge, and he asserts that "[a] jury cannot be considered independent of the judge if an immediate family member of the judge is on the jury." *Brief and Appendix of Defendant-Appellant-Petitioner*, at 10. Thus, he asks this court to "adopt a *per se* rule that the state and federal Constitutions prohibit a judge's immediate family members from serving on a jury over which the judge is presiding." *Id.*, at 19.

The court of appeals rejected Tody's broad argument for a *per se* rule and concluded that he was not deprived of his right to an impartial jury (P-Ap. A-4 to A-7). The court based its decision on the application of the analysis provided in *State v. Faucher*, 227 Wis. 2d 700, 596 N.W.2d 770 (1999), for protecting a criminal defendant's unquestioned right to a jury of impartial jurors as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 7 of the Wisconsin Constitution. *Faucher*, 227 Wis. 2d at 715. This court should proceed in the same fashion, rejecting Tody's call to use this case as the platform to pronounce a broad *per se* rule and opting, instead, for the good sense of applying existing law to the particulars of this novel case. There was no error, *per se* or otherwise, in Ms. Eaton remaining on the jury.

Tody conceded in the court of appeals that neither the United States Supreme Court nor a Wisconsin appellate court has ever held that it is a *per se* violation of a defendant's right to an impartial jury for an immediate family member of the trial judge to sit on a jury. And he has cited no

persuasive on-point authority from other jurisdictions to that effect.

In the absence of such authority, this court should uphold the court of appeals' determination that this court's decision in *Faucher* provides the proper means for deciding Tody's claim that he was deprived of his right to an impartial jury.

Faucher outlined three categories of juror bias: statutory, objective, and subjective. *Faucher,* 227 Wis. 2d at 716-21.

Statutory bias describes those disqualified from jury duty under Wis. Stat. § 805.08(1):

> With *Wis. Stat. § 805.08(1)*, the legislature deemed biased those who were related by "blood or marriage to any party or to any attorney appearing in [the] case" and those who "[have] any financial interest in the case." *Wis. Stat. § 805.08(1).* Therefore, a person meeting one of these descriptions is statutorily biased and may not serve on a jury regardless of his or her ability to be impartial.

Faucher, 227 Wis. 2d at 717 (emphasis added). Whether a prospective juror falls within the statutory disqualification is obviously a question of law for independent appellate determination.

Subjective bias is "bias that is revealed through the words and the demeanor of the prospective juror. . . . [I]t refers to the prospective juror's state of mind." *Id.* A determination of a juror's subjective bias "turns on his or her responses on *voir dire* and a circuit court's assessment of the individual's honesty and credibility[.]" *Faucher*, 227 Wis. 2d at 718. Because the circuit

court has a "superior position to so assess the demeanor and disposition of prospective jurors," *id.*, great deference is shown to the circuit judge's assessment. *See id.* "On review, we will uphold the circuit court's factual finding that a prospective juror is or is not subjectively biased unless it is clearly erroneous." *Id.*

Objective bias focuses "upon whether the reasonable person in the individual prospective juror's position could be impartial." *Id.* A deferential standard of review is applied. *Faucher*, 227 Wis. 2d at 719. Objective bias presents a mixed factual and legal question. *Faucher*, 227 Wis. 2d at 720. But because "a circuit court's conclusion on objective bias is intertwined with factual findings supporting that conclusion[,] it is appropriate that this court give weight to the circuit court's conclusion on that question." *Id.*

This case involves no statutory bias for the obvious reason that Ms. Eaton was not related to "any party or any attorney" in the case or anyone with "any financial interest" in it. Wis. Stat. § 805.08(1). She was not related to anyone with an adversarial interest in the case or a stake in its outcome. Like the judge, she was a neutral in the case, as Judge Eaton observed (58:47; P-Ap. E-7). While the statute is inapplicable here, Tody effectively argues that this court should amend it when he asks at page 21 of his brief for a holding that "immediate family members of judges should be stricken from juries automatically." The request should be rejected as outside this court's purview AND as contrary to the evident purpose of the statute. It disqualifies as jurors persons closely related to those directly involved in the

case as party or party advocate. Ms. Eaton was a neutral, not a partisan.

And Ms. Eaton was not related to any witness in the case. As a result, Tody's reliance upon *State v. Gesch*, 167 Wis. 2d 660, 662, 666-67, 482 N.W.2d 99 (1992) (holding that prospective jurors closely related to a state witness should be disqualified from juror service in the case), is misplaced. Parties, attorneys for parties, and witnesses in a case closely related or connected to a party can all be said to be trial participants with a stake in its outcome. Ms. Eaton, as mother of the judge, cannot be so described.

Paradoxically, Tody conceded in his brief in the court of appeals, at 18, that "it is likely true in many cases that judges' immediate family members could serve as impartial and independent jurors[.]" The concession thoroughly undercuts his call for a *per se* rule banning such a family member from a jury. And the absence of any evidence of Ms. Eaton's subjective bias supports the conclusion that this was such a case. Neither her answers nor her demeanor during *voir dire* revealed any bias. She said the fact that the judge was her son made no difference to her (56:23; P-Ap. D-5). All of the jurors in this case, of course, were instructed on the independent roles of judge and jury and that as jurors they were to decide the case only on the basis of the trial evidence, without prejudice or bias, and were to disregard any impression they may have gained of the judge's view of Tody's guilt or innocence (56:34-35, 145-46).

Appellate courts "presume that the jury followed the instructions given to them by the trial court." *State v. Smith*, 170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992) (citation omitted). Criticism of this maxim invites anarchy at trial and on appeal. And Tody's trial counsel apparently had no such doubt about Ms. Eaton's ability and willingness to follow the court's instructions. While he unsuccessfully sought to have her removed from the pool for cause, he conceded that *voir dire* had revealed no indication that she could not serve as a fair and impartial juror (56:30; P-Ap. D-12). And instead of using a peremptory challenge against her, he used the challenge on four other jurors whose jury fitness he had greater reason to question (58:21-22).

Judge Eaton fairly determined that *voir dire* had revealed no legal basis – no subjective bias – for striking juror Eaton from the jury panel (56:29-30; P-Ap. D-11 to D-12). His finding of no subjective bias was not clearly erroneous and cannot be set aside. *See Faucher*, 227 Wis. 2d at 718.

Thus, in the absence of any evidence of subjective bias, Tody has asked for an automatic exclusion rule that presumes that any close relative of a trial judge cannot serve fairly and impartially. His request – based on speculation, unsupported by persuasive authority or experience, and contradicted by his own concession that such family members could certainly be impartial – should be rejected.

B. The judge's off-hand "law enforcement" comment did not jeopardize Tody's right to an impartial and independent jury.

Tody contends that his right to an impartial and independent jury was violated by the judge's remark that he considered himself "part of law enforcement" (56:20; P-Ap. D-2). This comment appeared during the judge's routine quizzing of the prospective jurors on whether they had a relative "employed in a law enforcement related capacity" (56:19; P-Ap. D-1). When Ms. Eaton, the judge's mother, identified the judge as such a relative, Judge Eaton acknowledged that he considered himself "part of law enforcement" (56:20; P-Ap. D-2). Tody labels the comment as a "pro-prosecution comment." *Brief and Appendix of Defendant-Appellant-Petitioner*, at 22. This second aspect of Tody's challenge to the impartiality of his jury raises a single off-hand remark of the judge during jury selection from mole hill to Himalayan status.

Tody's brief, at 24-26, reviews several cases from other jurisdictions in which a significant show of partiality by a judge in front of a jury was deemed prejudicial to a defendant's fair trial rights. The acts involved in those cases are markedly distinguishable from Judge Eaton's brief and seemingly jocular comment in this case. The judge's remark did not signal any opinion by him on the merits of the case that was yet to be tried in his court or any favor toward the prosecution.

Defense counsel clearly did not interpret it as a threat to his client's fair trial rights. He not only did not object to the comment, he agreed with it – telling the jurors that the judge was indeed

"part of the law enforcement process [as were] the prosecution and the police" (56:24; P-Ap. D-6). He then seized upon the judge's comment as an advocacy opportunity for the defense, using it to tell the jury that "the defense has a role in the law enforcement process also" and that an acquittal in Tody's case would be "just as much law enforcement, it's an enforcement of our laws[,] as a conviction" (56:24-25; P-Ap. D-6 to D-7). No prospective juror disagreed with this sentiment (*id.*).

Tody's right to a fair, impartial, and independent jury was not prejudiced by the judge's "law enforcement" comment. It is a gross exaggeration to describe the comment as evincing a pro-State disposition in Tody's case.

C. The combined effect of the judge's law enforcement comment and the presence of the judge's mother on the jury did not violate Tody's right to an impartial and independent jury.

The third aspect of Tody's jury impartiality challenge combines his first aspect with his second aspect and argues that they have greater weight in combination than considered separately. Two unconvincing arguments, serially presented, attain no weightier status when combined.

D. Ms. Eaton should not have been struck for objective bias.

Finally, and alternatively, Tody contends that juror Eaton should have been struck from the jury panel for cause because of objective bias. His argument appears to stray between objective and

subjective bias as described in *Faucher*. The State has already shown that the circuit court properly determined that Ms. Eaton was not subjectively biased. This court should also conclude that objective bias on the part of juror Eaton was not shown.

The parties agree that an assessment of objective bias looks to "whether the reasonable person in the individual prospective juror's position could be impartial." *Faucher*, 227 Wis. 2d at 718. Because facts and law are intertwined in the assessment, a reviewing court should give weight to the circuit court's conclusion on the question. *Faucher*, 227 Wis. 2d at 720.

In addition to finding that his mother was not subjectively biased – Judge Eaton determined that she should not be removed from the panel for objective bias. The judge's conclusion that as a juror, his mother would play a neutral and nonpartisan role in the trial, just as he would (56:29-30; P-Ap. D-11 to D-12), was an apparent conclusion that a reasonable person in Ms. Eaton's position – as a close relative of the trial judge – could be impartial. There are no elements in this case that render this an unreasonable determination. Tody himself has acknowledged that an immediate family member of a judge could serve impartially as a juror in a trial presided over by the judge. And contrary to Tody's exaggerated argument on the judge's "law enforcement" comment, there was no evidence of a pro-prosecution tilt in this case. Tody's argument principally relies upon Judge Eaton's comment that he considered himself part of law enforcement and upon his mother's *voir dire* answer that her son, the judge, was in law enforcement (56:19-20; P-Ap.

D-1 to D-2). But strong objective evidence for rejecting the view that the judge's comment and his mother's answer reflected the juror's pro-prosecution bias came from defense counsel – who not only agreed that the judge was part of law enforcement but stated that defense counsel was also part of the law enforcement system.

Judge Eaton fairly determined that a categorical disqualification of a trial judge's close relative was unjustified. This was a fair determination that juror Eaton – a member of such a category – was not objectively biased, because such persons are capable of serving as impartial jurors. His conclusion was properly upheld by the court of appeals. This court should affirm that conclusion.

II. THE JUDGE NEED NOT HAVE RECUSED HIMSELF FROM DECIDING THE MOTION TO STRIKE HIS MOTHER FROM THE JURY PANEL.

The court of appeals properly determined that there was no constitutional or statutory requirement for Judge Easton to have recused himself from deciding the defense motion to strike Ms. Eaton from the jury panel for cause (P-Ap. A-7 to A-9). This court should affirm that conclusion.

Tody's position in this regard rests on two fallacious contentions.

First, he contends that Judge Eaton was required to disqualify himself from ruling on the motion to strike under Wis. Stat. § 757.19(2)(g), because the judge actually made a subjective determination that he would be unable to act

impartially if issues arose requiring him to make a ruling involving his mother. But as the court of appeals sensibly determined, this argument was based upon a comment by Judge Eaton "contemplating hypothetical situations, none of which actually occurred" (P-Ap. A-9). And when a real situation arose requiring the judge's ruling on his mother, Judge Eaton plainly manifested the belief that he could rule impartially on the motion to strike her for cause from the jury panel (*id.*). Judge Eaton was perfectly capable of acting impartially in ruling on a motion to strike Ms. Eaton. He did so. He made the required assessment of his subjective bias and found none.

Second, Tody asserts that the judge was constitutionally required to disqualify himself from ruling on the strike motion because the circumstances created an appearance of partiality. As the court of appeals noted, Tody rested his argument on the claim that denying the motion to strike Ms. Eaton created an appearance of bias for the State because the State had opposed the motion (P-Ap. A-8). The court of appeals correctly held, however that a court's ruling on a contested issue was an inadequate basis for a claim of bias or the appearance of bias because "'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.' ***Liteky v. United States***, 510 US 540, 555 (1994)" (P-Ap. A-8).

Because his trial counsel never moved for Judge Eaton's recusal on the defense motion to strike Ms. Eaton from the jury panel, Tody's final argument on the recusal issue is that his trial counsel was constitutionally ineffective in failing to move for the judge's recusal. Attorney Filippo acknowledged at the postconviction motion hear-

ing that the thought of a recusal motion simply never occurred to him when he moved to strike Ms. Eaton from the jury panel (58:20-21). This does not mean he was constitutionally ineffective in failing to make the motion. To establish counsel ineffectiveness, *Strickland v. Washington,* 466 U.S. 668, 687 (1984), requires a showing of both deficient performance and prejudice. Tody sustained no prejudice from his counsel's failure to move for Judge Eaton's recusal from decision on the strike motion, since – for reasons already argued in this brief – there was no substantial basis for the granting of the underlying motion to strike Ms. Eaton, on grounds of statutory, subjective, or objective bias *and* no substantial basis for the granting of the recusal motion. Attorney Filippo's performance was not deficient under *Strickland*, for counsel should not be dunned for failing to pursue a motion for which there is no reasonable probability of success.

Lastly, the State notes the incongruity of Tody's apparent positions that the judge should have recused himself from acting on the motion to strike his mother from the jury panel because he was supposedly partial, or alternatively, that he simply should have granted the motion to strike her from the panel. Tody cannot have it both ways. The judge cannot be too biased to rule on the motion to strike, thereby requiring his recusal, but then be sufficiently capable of ruling on the motion, so long as he granted it.

III. TODY IS NOT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE.

The State has shown that Tody's arguments individually provided no basis for the reversal of his conviction and the granting of a new trial. In his penultimate argument, Tody contends that the combination of the individual errors warrant this court's ordering a new trial in the interest of justice under either of the two alternative grounds for discretionary reversal set forth in Wis. Stat. § 752.35.

Under § 752.35, there are two situations where an appellate court may exercise its power to independently review a record and grant a discretionary reversal: when the real controversy has not been fully tried, or when it is probable that justice has for any reason miscarried. *See Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The principal difference between these two standards is that in the "real controversy" situation, unlike the "miscarriage of justice" situation, "it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial." *Vollmer*, 156 Wis. 2d at 19. Tody has met neither test.

The court of appeals rejected Tody's discretionary reversal argument because the claimed individual errors were rejected and their combination merely restated them (P-Ap. A-10 to A-11). This court should do the same. Combining individually unpersuasive claims does not make them more persuasive. "Zero plus zero equals zero." *Mentek v. State,* 71 Wis. 2d 799, 809, 238

N.W.2d 752 (1976).[8] The real controversy in this case – Tody's guilt of the charged offense – was fully tried, and there was no miscarriage of justice in the proceedings.

This court's discretionary reversal power should be used "sparingly and with great caution." *State v. Williams*, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. "An appellate court will exercise its discretion to grant a new trial in the interest of justice 'only in exceptional cases.'" *State v. Chu*, 2002 WI App 98, ¶55, 253 Wis. 2d 666, 643 N.W.2d 878 (quoted source omitted). This is not such a case.

IV. THIS COURT SHOULD NOT EXERCISE ITS SUPERINTENDING AUTHORITY TO PROHIBIT MEMBERS OF A JUDGE'S IMMEDIATE FAMILY FROM SERVING ON A JURY AT A TRIAL PRESIDED OVER BY THE JUDGE.

Tody's last argument is that this court should exercise its superintending and administrative authority over Wisconsin courts under Article VII, § 3, subsec. 1 of the Wisconsin Constitution, to create a *per se* rule prohibiting the immediate family of a judge from serving on a jury at a trial presided over by the judge. The State submits it should not.

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[8] Or, as Billy Preston sang in the 1970's, "nothin' from nothin' leaves nothin'." Billy Preston, *"Nothin' From Nothin'"* on *The Kids and Me* (A&M Records 1974).

This court's superintending and administrative authority is "unquestionably broad and flexible," but "will not be invoked lightly." *State v. Jerrell C.J.*, 2005 WI 105, ¶41, 283 Wis. 2d 145, 699 N.W.2d 110. "Whether we choose to exercise our supervisory authority in a given situation is thus a matter of "'judicial policy rather than one relating to the power of this court.'"" *Id.* (citations omitted). The power is "as broad as necessary to meet the needs of changing circumstances, and that power is to be exercised judiciously." *Jerrell C.J.*, 283 Wis. 2d 145, ¶70 (Abrahamson, C.J., concurring). This court's restraint in the use of that power recognizes that "[t]his court will not exercise its superintending power where there is another adequate remedy, by appeal or otherwise, for the conduct of the trial court, or where the conduct of the trial court does not threaten seriously to impose a significant hardship upon a citizen." *McEwen v. Pierce County*, 90 Wis. 2d 256, 269-70, 279 N.W.2d 469 (1979) (citations omitted).

Neither policy nor necessity compels the exercise of this court's superintending authority to create the *per se* rule requested by Tody. Wisconsin law provides an adequate analytical framework in *Faucher* for treatment of the rare case – represented by the novel situation that arose here – where a member of a judge's immediate family appears in the jury pool for a trial presided over by the judge. Trial judges are entirely capable of assessing the ability of a family member to give impartial service as a juror on a case-by-case basis in the extraordinarily small number of cases where the issue might ever arise.

CONCLUSION

For the reasons argued in this brief, the State of Wisconsin respectfully requests that this court affirm the decision of the court of appeals affirming Tody's judgment of conviction and the order denying his postconviction motion.

Dated at Madison, Wisconsin, this 29th day of October, 2008.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

WILLIAM L. GANSNER
Assistant Attorney General
State Bar #1014627

Attorneys for
Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539

CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 10,357 words.

WILLIAM L. GANSNER

STATE OF WISCONSIN

SUPREME COURT

Appeal No. 2007AP000400-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

MARK H. TODY, JR.,

Defendant-Appellant-Petitioner

ON REVIEW OF AN UNPUBLISHED OPINION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING A JUDGMENT OF CONVICTION AND ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR ASHLAND COUNTY, THE HONORABLE ROBERT E. EATON PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER, MARK H. TODY, JR.

Criminal Appeals Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 265-2741

Byron C. Lichstein
State Bar No. 1048483

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ARGUMENT

I. Tody was deprived of an impartial jury independent of the judge, in violation of the federal and state constitutions.

The State's brief begins with a lengthy "Supplemental Statement of the Case," which the State claims is necessary because Tody's brief-in-chief was "significantly incomplete" as to "material procedural history and evidentiary facts" (State's brief at 2). But much of the State's lengthy supplement is *immaterial*, because it focuses on the trial evidence and claims not before this Court. The State's exhaustive description of the trial evidence, and the accompanying claim that Tody was "[c]onvicted by overwhelming evidence" (State's brief at 28), are a mere sideshow: the trial evidence obviously has no relevance to jury selection, and harmless error does not apply to impartial jury issues. ***Gray v. Mississippi***, 481 U.S. 648, 668 (1987)("[B]ecause the impartiality of the adjudicator goes to the very integrity of the legal system, the ***Chapman*** harmless-error analysis cannot apply"). This Court should ignore the State's *sub silentio* harmless error argument, which is nothing more than an end-run around Tody's constitutional rights.

The same is true of the State's nearly eight page description of facts from the post-conviction hearing that concern ineffective assistance of counsel claims not raised in Tody's petition for review or brief-in-chief to this Court (State's brief at 20-27). This description, like the State's repeated emphasis on the trial evidence, is nothing more than a distraction from the actual issues before this Court.[1]

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[1] The State points out in a footnote that Tody's six-month jail sentence was imposed not in this case but in a separate misdemeanor case for which Tody was

Once the State finally addresses the relevant issues, its analysis is incomplete and unconvincing. Tody's argument began with the premise that the framers of the federal and state constitutions intended for juries to be *independent* of judges, but the State hardly bothers to analyze or interpret the constitutional impartial jury provisions. One can only assume from this silence that the State agrees with Tody that the framers of both constitutions intended for juries to be independent of judges. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct.App. 1979)("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute").

Having implicitly conceded the first premise of Tody's argument—that a jury can pass constitutional muster only if its decision-making remains independent of the judge—the State can only argue that Tody's jury was somehow independent, despite the presence of the judge's mother on the jury and despite the judge's partisan comment during *voir dire*. The State makes several points in support of this contention. These points are addressed in turn.

A. No precedent either way, including the *Faucher* test, deals with the specific issue in this case.

The State emphasizes the lack of binding authority holding that a trial judge's mother may not serve on a jury over which the judge is presiding (State's brief at 29-30). But the State also cites no authority holding that a trial judge's mother *may*

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sentenced at the same time as this case (State's brief at 2, n.1). The State appears to be correct, but the issue has no bearing on this appeal. If Tody's appeal is successful, this Court will presumably vacate his conviction and sentence in this case. Any jail sentence in the separate misdemeanor case has long since been completed.

serve on such a jury. The issue simply has not been addressed, a fact that does not aid the State's position.

In the absence of binding authority either way, the State argues that the ***Faucher*** test applies, and that under ***Faucher*** Tody's claim fails (State's brief at 29-31). The State appears to believe that ***Faucher*** is a comprehensive test for all juror-related claims, and that ***Faucher*** therefore applies to the issue of juror independence from the judge. But the State fails to point to any language in the ***Faucher*** opinion suggesting that it was meant to be a comprehensive test for juror-related claims. In addition, the State fails to explain how the structure of the ***Faucher*** test (which assesses three categories of juror "bias") fits the concept of juror independence from the judge. The simple fact is that ***Faucher*** has nothing to say about this issue. If (as the State seems to concede) the constitutional right to trial by jury includes the right to a jury independent of the judge, and if the ***Faucher*** test does not speak to this issue, then it stands to reason that ***Faucher*** is not a comprehensive test for juror-related claims and does not apply to the issue in this case.

And if ***Faucher*** does not apply, then the State's discussion of statutory, subjective, and objective bias is largely irrelevant. Tody has never contended that juror Eaton was statutorily or subjectively biased. He did argue that she was objectively biased, but only as an alternative argument. Tody's primary contention is that none of the "juror bias" categories in ***Faucher*** applies to the issue of juror independence from the judge. This Court should reach the objective bias argument only if it rejects Tody's primary arguments.

As part of its discussion of ***Faucher***, the State argues that Tody is asking this Court to inappropriately "amend" Wis. Stat. § 805.08(1), which lists specific categories of people who are disqualified from serving on juries, including people

who are related to "any party or any attorney" or anyone with "any financial interest" in the case (State's brief at 31). The State argues that Tody is asking to add another category, immediate family members of the judge, to this list. The State's analysis misses the mark. Tody is asking this Court not to amend the statute but to recognize a constitutional imperative, which is precisely what this Court did in ***Gesch*** when it created a *per se* rule prohibiting relatives of State's witnesses to the third degree from serving on juries. ***State v. Gesch***, 167 Wis. 2d 660, 482 N.W.2d 99. That category also was not listed in Wis. Stat. § 805.08(1), but this Court nonetheless recognized a *per se* exclusion prohibiting members of the category from serving on juries.

B. A *per se* rule concerning judges' immediate family members is appropriate regardless of whether some such immediate family members could be fair, impartial, and independent jurors.

The State appears to believe that a *per se* rule concerning judges' immediate family members would be appropriate only if Tody could establish that *all* immediate family members of judges would be unfair jurors. Both the State and the Court of Appeals made much of a "concession" in Tody's briefs that some such jurors could be fair, impartial, and independent (State's brief at 32 & 33; Court of Appeals' opinion at n.4). But this is no concession at all. A *per se* rule would protect against the *likelihood*, not the certainty, that judges' immediate family members will not be independent jurors. That likelihood is so great, and the cost to a *per se* rule is so low, that there is simply no reason to take the risk of assessing independence on a case-by-case basis.

That is exactly the analysis this Court followed in ***Gesch***, in which this Court created a *per se* rule prohibiting family members of State's witnesses from serving on juries. This Court created such a *per se* rule even though there are likely

some family members of State's witnesses who could overcome the familial relationship and serve as impartial jurors. The *per se* rule was appropriate because of the obvious risk that a substantial proportion of such family members would be biased toward the State. ***Id.*** at 669 ("Whether Daniel Wineke or any other relative by blood or marriage to the third degree of a state witness will be actually biased we may never know, but what is important is the existence of the very high potential that they will be. Whether Daniel Wineke's presence in the jury room actually hindered significant credibility determinations we will never know, but what is important is the fact that it could have"). The risk is no less great here that a substantial proportion of immediate family members of the judge will not be independent jurors. Just as a *per se* rule was appropriate in ***Gesch***, a *per se* rule is appropriate here.

The State also entirely ignores the problem created by a case-by-case assessment of juror independence—specifically, such a process would institutionalize the rather bizarre spectacle of trial judges assessing the fairness, impartiality, and independence of their own immediate family members. The State does not deny that "blood is thicker than water" and that a close familial relationship powerfully and unconsciously affects judgment, but the State nonetheless purports to see no problem with judges evaluating their own immediate family members' answers during *voir dire*. The State's position is naïve and contrary to common sense: imagine if the issue here was not jury selection, but rather evaluating the credibility of a witness—the judge's immediate family member—at a suppression hearing or bench trial. No reasonable person would contend that it would be fair or appropriate for the judge to assess his own immediate family member's credibility for purposes of deciding the admissibility of evidence or a defendant's guilt or innocence. There is little difference between that scenario and the scenario presented here.

The State also highlights various evidence purportedly establishing that juror Eaton was a fair, impartial, and independent juror (State's brief at 32-33). The State points out that juror Eaton said she could be fair and that she was instructed about the independent roles of the judge and jury. But these points do not establish that juror Eaton was in fact fair and independent. As Tody pointed out in his Brief-in-chief, *whether they know it or not* jurors seek out and follow judicial influence, even when instructed to do otherwise (Brief-in-chief at 23-28). Juror Eaton's subjective assessment of her own fairness is not determinative, because, as this Court said in ***Gesch***, "[a]lthough no intentional actual bias may exist, the risk of unconscious bias in these situations is manifest." 167 Wis. 2d at 667.

The State also makes much of statements by Tody's defense counsel—statements made in court while addressing Judge Eaton—that juror Eaton appeared to be fair and impartial (State's brief at 32-33). The State points out that trial counsel told Judge Eaton that he was "not in any way implying" that juror Eaton could not be fair impartial, and that defense counsel chose not to exercise a peremptory challenge on her. But these points say much less about the fairness and impartiality of the juror than they do about the awkwardness of having to address a sitting judge about the fairness and impartiality of the judge's own mother. In the case of trial counsel, who was faced with conducting not only a possible sentencing in Tody's case but also future court appearances before this same judge, it is hardly surprising that counsel would take the most deferential stance toward the judge's mother, seeking to stay in the judge's good graces for the rest of Tody's case and for future court appearances. Indeed, it speaks volumes about counsel's concerns (and fortitude) that he moved to strike for cause at all.

Finally, it is worth remembering that a *per se* rule would protect not only the *actual* impartiality and independence of juries, but also the *appearance* that juries are independent, thereby safeguarding the public's perception of our system's integrity.

C. The trial judge's pro-prosecution comment during *voir dire* infringed Tody's right to an impartial jury independent of the judge.

The State repeatedly minimizes the significance of the judge's comment during *voir dire*, in which the judge said, "I like – I like to consider myself part of law enforcement or I may be disowned" (56:20). The State characterizes the comment as "off-hand," "jocular," and essentially harmless (State's brief at 34-35). But the fact that the comment may have been "off-hand" and "jocular" does not mean it was insignificant. Every joke contains at least a grain of truth. And the fact that the comment was funny likely made it more noticeable and memorable, not less. Further, the State's insinuation that such judicial behavior is harmless stands in stark contrast to the numerous authorities cited in Tody's brief-in-chief at 22-28. No less an authority than the U.S. Supreme Court has stated that a judge's "lightest word or intimation is received [by the jury] with deference, and may prove controlling." ***Starr v. United States***, 153 U.S. 614, 626 (1894). Regardless of whether the judge's remark may have been "off-hand" and "jocular," it likely had a significant effect on the jury's attitude toward the case.

The State dismisses Tody's reliance on various cases which reversed convictions based on partisan judicial behavior (State's brief at 34). The State claims—without explanation or elaboration—that these cases are "markedly different" than what occurred here. The State is wrong. The partisan judicial behavior condemned in those cases was similar to and in

some cases less severe than what occurred here. In one case, for instance, an appellate court reversed because the judge shook hands with a State's witness, conduct which is much less direct than telling the jury that the judge considers himself part of law enforcement. ***Abrams v. State***, 326 So. 2d 211 (Fla. Dist. Ct. App. 1976). In another case, the trial judge escorted the State's child witness to and from the witness stand, conduct which, again, constitutes much more indirect alignment with the State than what the trial judge did here. ***People v. Rogers***, 800 P.2d 1327 (Colo. Ct. App. 1990).

Finally, the State argues that trial counsel must not have viewed the comment as harmful because he responded to it by agreeing that the judge was part of law enforcement and by reminding the jury that the defense was also part of law enforcement (State's brief at 35-36). But in reality, trial counsel was merely making the best of a bad situation, one forced upon him by the judge's gratuitous comment. If counsel had not been worried about the effect of the comment, he would have simply ignored it. Counsel's reaction, while probably necessary under the circumstances, was likely not sufficient to erase the effect of the comment.

D. Alternatively, the juror in this case should have been struck because the *voir dire* revealed that she was objectively biased.

Apparently seeing no problem with a judge exercising discretion about his own mother, the State argues that this Court should give deference to the trial court's determination concerning objective bias (State's brief at 31-33). While deference on such issues is normally appropriate, in this situation it is not because of the powerful, and unconscious, effect that the familial relationship likely had on the judge's assessment of his mother. This Court should not defer to the trial judge's determination about whether his mother could be

an impartial and independent juror. Instead, this Court should reject the trial judge's decision and conclude that the juror was objectively biased.

II. The trial judge should have recused himself from deciding the motion to strike his mother.

The State's brief in this section adds almost nothing to the points made by the Court of Appeals, all of which Tody responded to in his brief-in-chief (Tody's brief-in-chief at 32-35). Those responses will not be repeated here. However, several points warrants further note.

The State claims to find "incongruity" between Tody's argument that, on one hand, the judge should have granted the motion to strike in order to protect Tody's constitutional rights, while on the other hand the judge should have recused himself from deciding the motion to strike (State's brief at 39). There is nothing incongruous in these arguments. Tody believes that, as a *per se* matter, the federal and state constitutions prohibit a judge's immediate family members from serving on a jury over which the judge is presiding. But if there is no such *per se* rule, then such potential jurors will have to be evaluated under the ***Faucher*** standard, and Tody believes a judge should not be allowed to evaluate his/her own family members. Thus, Tody's recusal argument comes into play only if this Court rejects the argument for a *per se* rule.

As a final point, it is telling that the State's brief offers hardly a word about the appearance of impropriety—about how the trial court's actions in this case would have appeared to the average citizen. Even the trial judge acknowledged the potentially questionable appearance that might arise from what occurred with his mother: "I'm not necessarily excited about having her on the panel because I can see the possibility

of questions arising...but I don't have any basis for kicking her off" (56:28-31). The State disregards language in prior cases to the effect that the appearance of bias offends Due Process just as much as actual bias. ***State v. Gudgeon***, 2006 WI App 143, ¶ 24, 295 Wis. 2d 189, 720 N.W.2d 114.

The State's silence on this subject speaks volumes. Lacking any legitimate retort to the obvious fact that what occurred here would not instill confidence in the justice system, the State simply ignores the point.

CONCLUSION

For the foregoing reasons, Mark Tody respectfully requests that this Court reverse his conviction and grant a new trial.

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Byron C. Lichstein
State Bar No. 1048483

Criminal Appeals Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 265-2741

Attorneys for Defendant-Appellant-Petitioner Mark H. Tody, Jr.

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2,892 words.

Byron C. Lichstein

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