STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

State of Wisconsin,

Plaintiff-Respondent,

v.

Bradley A. Brandsma

Defendant-Appellant.

Appeal No.
2010AP001429 CR

Circuit Court Case No.
2008CM000838

DEFENDANT-APPELLANT'S REPLY BRIEF

Appeal from the Circuit Court of Sauk County,
The Honorable James Evenson, Presiding

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ARGUMENT

The State in its Respondent's Brief correctly notes that the 7th Circuit cases[1] cited for persuasive value in the Appellant's Brief have been directly overruled. (Respondent's Brief at 9-10.) Undersigned counsel apologizes for this embarrassing error, and obviously this Court should not afford those cases any persuasive value.

The fact remains that the principle articulated in *Halmo*, based on the constitutional reasoning in *Halmo*, is today in Wisconsin an even more important principle than it was at the time *Halmo* was decided. The State in its Respondent's Brief fails to address the practical implications raised by Brandsma, or even address the consequences of the new rule the State itself proposes. This Court should make a common sense finding supported by constitutional reasoning that a jury in Wisconsin may not be allowed to separate during deliberations.

The State contends that we have no legal authority for our position. (Respondent's Brief at 3; 9.) That is incorrect. There is no more foundational legal authority than the federal and state constitutions. Because Wisconsin is one of the few states that have CCAP, it may be necessary to apply constitutional rights differently in Wisconsin than they would be applied in other states. A right to a fair trial by an impartial jury may not necessitate keeping a jury together

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[1] *United States v. Panczko,* 353 F.2d 676 (7th Cir.1965), *cert. denied*; *United States v. D'Antonio,* 342 F.2d 667 (7th Cir.1965), both overruled by *United States v. Arciniega*, 574 F.2d 931 (7th Cir. 1978).

during deliberations in states that do not provide such vast and easy access to their citizen's legal records. In Wisconsin, it must.

The court in *Halmo* advised in a footnote that it was for the legislature to make distinctions regarding jury separation. The State contends that the legislature has done that, and that the statute as revised is unambiguous. (Respondent's Brief at 5.) The State conceded and we agree that the statute no longer distinguishes between juries sworn and juries deliberating.[2] Regardless of what the judicial counsel intended in its recommendation or what the legislature intended with its revisions or why either intended those things, the unambiguous statue is silent on this issue.

This Court can therefore no longer avoid the constitutional issue presented. The constitutional issue must be decided with reference to reality. CCAP sometimes receives more hits daily than the number of Wisconsinites that have internet access. (Appellant's Brief at 4.) The vast majority of Wisconsin jurors go home to internet access. (*Id.*) A defendant's constitutional right to a fair and impartial jury is compromised by that jury's exposure to outside influences. This is not a reality that will entertain an extension of the legal fiction that jurors will follow a court's instructions.

The very case in which that legal fiction was first applied to criminal law defeats the notion that the presumption encompasses juror conduct. *State v.*

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[2] "However, as Wis. Stat. § 972.12 no longer makes a distinction between juries deliberating and simply 'sworn', would this then also require a trial court to make a *voir dire* any time a jury is allowed to separate during a multiple day trial?" Respondent's Brief at 9.

Deer, 125 Wis. 2d 357, 372 N.W.2d 176 (Ct. App. 1985). In that case, a juror violated the court's order not to discuss the case with other jurors or with their family until they had heard all the evidence. *Id.* at 364-65. *State v. Hagen*, referenced by Brandsma as the outer limit of the presumption, concerned a *de facto* jury instruction to disregard improper attorney comments. *State v. Hagen,* 181 Wis.2d 934, 948, 512 N.W.2d 180 (1994). *Hagen* does not, as the State argues on page 8 of its brief, extend the scope of that presumption to juror conduct. The State points to no case that does. This Court should provide clear guidance to the State's trial courts on the matter by finding that it does not.

The new rule the State proposes is that a jury be allowed to separate during deliberations as an exercise of judicial discretion. The State supposes that this discretion is afforded by the statute, but as noted above, it is in fact not. The statute is now silent on the distinction and does not contain the word "discretion." The State ignores, in addition to the practical implications of that Brandsma raises, the consequences of its own expansive interpretation of the statute: That a trial court would never be required to admonish a jury not to perform outside research at all.

If the silent statue is the only device setting parameters on trial court practice, there will be a gaping distance between trial court practice and the preservation of constitutional rights. The application of a constitutional parameter is therefore required.

CONCLUSION

This Court should make the common sense finding that the constitutional right to a fair trial by an impartial jury in Wisconsin entails having the jury kept together during deliberations. *Halmo* created a presumption of prejudice and burdened the State with overcoming it when a trial court failed in that duty based in statute. Since it would be silly to afford a right based in the Constitution less of a presumption than a right based in statute, this Court should either adopt a *per se* rule or at least maintain the presumption and burdens articulated in *Halmo*. This Court should in any event find that reversible error occurred in this case and afford Bradley Brandsma a new trial.

FORM AND LENGTH CERTIFICATION

I hereby certify that:

This brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief, including the statement of the case, the argument, and the conclusion and excluding other content, is 830 words.

The text of the electronic copy of this brief is identical to the text of the paper copy.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of November, 2010.

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