STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2013AP557-CR

STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner,

-vs.-

COREY R. KUCHARSKI,
Defendant-Appellant.

ON REVIEW OF THE COURT OF APPEALS' DECISION REVERSING A JUDGMENT AND ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEAN A. DIMOTTO, PRESIDING, AND REMANDING FOR A NEW TRIAL ON THE MATTER OF KUCHARSKI'S MENTAL RESPONSIBILITY.

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Whereas the instant case merits this Court's review, both oral argument and publication of the Court's opinion are warranted.

STATEMENT OF THE CASE

Corey Kucharski started hearing voices sometime in 2005. (R.52:24.) He was thirty-years-old, living in Las Vegas, and embroiled in a drug habit. (*Id.* at 23.) The onset of Kucharski's mental illness—which he attributed to his methamphetamine use—caused him to return to Milwaukee and to his family home. (*Id.* at 24, 51; R.11:4.) In 2005, he took up residence with his parents in the home where he would later murder them. (R.4:3.)

The voices in Kucharski's head gradually got worse. (R.52:24, R.11:4.) By 2009, their interference in his daily life was so significant that it was "impairing his capacity for concentration." (R.11:4.) Nonetheless, in what is common behavior for persons dealing with the onset of schizophrenia, Kucharski kept quiet about the voices and their directives. (*Id.* at 9.) He believed that he could control them without help. (*Id.* at 4, 6, R.10:4.)

At that time, Kucharski had been under his parents' roof for four years. Although he originally worked upon returning to Milwaukee, Kucharski had yet been unemployed for about a year. (R.52:23.) He did not travel or visit friends. (R.11:2.) To pass the time, he did little more than load and unload ammunition cartridges. (*See* R.52:23-24.) Dr. Rawski summarized Kucharski's daily life as follows:

> His lifestyle over the last few years has become increasingly isolated with a deterioration in social and occupational functioning.

> His primary pursuits have been to spend hours on end isolated in the basement reading gun manuals or creating gun ammunition, loading shells and such. On occasion he has gone to the gun range to shoot his weapons, but even that activity has diminished over time. His drinking is primarily an isolated activity in which he purchases beer and drinks it by himself in the basement. Aside from his parents with whom he lived he had no friends, no other associates, no intimate relationships to speak of.

(*Id.*)

Kucharski's mother was a hoarder. (*See* R.11:7.) She "kept everything" and filled the family home with "things stacked and crowded all around the house." (*Id.*) It is amidst that milieu of clutter, isolation, alcohol, and guns in which Kucharski's mental health issues progressed.

In addition to hearing voices, Kucharski also began experiencing visual hallucinations. (R.52:24.) "On occasion . . . his mother['s] and father's eyes would change[;] they looked like they were possessed." (R.11:5.) Additionally, during every day conversation, Kucharski would sometimes see the person he was talking to but hear another person's voice when they spoke. (R.52:24.)

As the hallucinations became increasingly difficult to ignore, Kucharski began taking handwritten notes of what the voices would say to him. (R.10:12.) He thought that taking notes would allow him "to decipher the message or deduce some direction." (*Id.*) Some of Kucharski's notes were found in his home after his arrest. (*Id.*) When Dr. Rawski reviewed the recovered notes with Kucharski, he "reported that these writings depicted statements the voices made all the time." (*Id.* at 12-13.) The voices Kucharski heard were so omnipresent that, on one occasion, Kucharski had to note their interruption

"[a]mid [his] calculations determining the total cost of purchasing a pistol and ammunition." (*Id.* at 13.)

"Many [of the transcribed] comments are directly derogatory statements or warnings to [Kucharski]." (*Id.* at 12.) They told him, amongst other things: that "people" were "tr[ying] to control him through two tattoos on his neck;" "that when his watch was stolen that his life would be screwed up for the next five years;" that he was a failure for "running away like a big baby;" that he is "a 'fucking queer' and a 'chicken' for failing the first time he went to Las Vegas;" and that he "was going to have to die" "because he left Vegas." (*Id.* at 13.)

The voices also gave Kucharski commands. For example, he was: "to buy a watch from Utah and drink with it;" "to take a trip and get in an accident;" "to beat the Spanish;" "to stop a hostile takeover of the county by the Jews;" and to "'Kill Jeff first.'" (*Id.*) On the day of the murders, the voices clearly told him—for the first time—to kill his parents. (R.52:27.)

Kucharski's psychotic delusions also caused him to believe that his parents were inconsolably suffering. (R.52:29, 39-40.) As his illness progressed, his "thought content increasingly included delusions regarding his parents' wishes to die, the need to put them out of their misery and at times the belief he was responsible for their declining health." (R.11:9.)

Kucharski did not disclose his psychotic hallucinations during a 2009 interview for disability benefits. (R.52:24-25.) Nor did he mention them to the interviewing detectives after his arrest. (R.11:8.) He first disclosed his hallucinations upon intake to the Milwaukee County Jail, and again "during the subsequent forensic evaluations." (R.52:25.) Despite his delay in reporting his hallucinations—which "is not uncommon for individuals who begin to suffer psychotic symptoms" (R.11:9)—Kucharski repeated the same story about his mental illness to at least

three separate interviewers when he finally did disclose.[1]

To each of those doctors, Kucharski expressed his opinion that his substance abuse caused the voices to begin. (R.52:24, R.11:4; R.4:7.) When he returned to Milwaukee, the voices persisted; and yet, he never sought medical treatment. (R.52:23-25, R.11:3; R.4:5.) The voices constantly derided him and told him that he was causing trouble with his parents. (R.10:13-14, 17, R.11:5; R.4:5.) He was chastised for what the voices deemed errant behavior, and they directed him to take steps to resolve those errors. (*See, e.g.,* R.10:5, 13.) Over time, the voices convinced him that his parents were suffering and that he was a cause of their suffering. (*See, e.g.,* R.11:5, 7.) Kucharski's failure to heed the voices' commands was exacerbating his parents' turmoil and they wanted to die so as to no longer be burdened by their problems. (*See, e.g.,* R.10:19.) But, it was not until February 7, 2010—the day of the shooting—that the voices clearly told him to kill his parents. (*See, e.g.,* R.52:29.)

Every doctor to express an opinion regarding Kucharski's responsibility for the murder of his parents concluded that he should not be held legally responsible due to the effects of his mental illness. (R.10:17-20, R.11:9-11, R.52:35-36.) No doctor believed that Kucharski was malingering; a standard testing instrument for identifying false representation of mental illness stated with 90% accuracy that Kucharski was likely not faking. (R.52:33.) And no witness—lay or expert—opined that Kucharski should be held legally responsible.

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[1] The record is silent with regard to what Kucharski told Dr. Jurek—he did not include that information in his report. However, insofar as Dr. Jurek agreed with Dr. Rawski's conclusions, it is reasonable to expect that Kucharski's detail of his mental health problems did not differ in any meaningful way from what he told Rawski.

Dr. Rawski, the court-appointed expert who testified at trial, told the trial court that Kucharski lacked a substantial capacity to appreciate the wrongfulness of his actions. (R.52:35.) It was Dr. Rawski's opinion that Kucharski had "developed a perspective that it would be altruistic to kill his parents, that it would be in their best benefit, well beyond what we would consider to be a mercy killing because this is distorted." (*Id.* at 39-40.) Kucharski's schizophrenia and the affiliated delusions allowed him to form and operate under the opinion that there was nothing wrong with killing his parents. (*Id.* at 40-42.)

Dr. Pankiewicz was retained by the defense. (R.10:1.) He met with Kucharski twice. (*Id.*) His report was admitted without objection at trial. (R.52:47.) Like Dr. Rawski, Dr. Pankiewicz concluded that Kucharski was not responsible: "I believe to a reasonable degree of medical certainty Corey Kucharski was suffering from . . . schizophrenia . . . and . . . did lack substantial capacity to appreciate the wrongfulness of his acts and conform his behavior to the requirements of the law." (*Id.* at 9.) Kucharski's "committed belief that he had honored his parents' wishes, put them out of their misery and followed the commands of persistent auditory hallucinations experienced over the course of months" rendered him unable to perceive "that what he had done was wrong." (*Id.* at 10.) Dr. Pankiewicz thus shared Dr. Rawski's opinion that Kucharski should not be held legally responsible.

Dr. Jurek was retained by the State. (R.12.) He met with Kucharski once. (*Id.*) He did not prepare a thorough report. (*See id.*) Instead, he submitted a one page letter to the State in which he expressed his opinion that "it is unlikely that [his] conclusions regarding Mr. Kucharski's criminal responsibility would differ from Dr. Rawski's findings as they were expressed in his report." (*Id.*) Jurek's letter and stated agreement with Dr. Rawski's opinion were admitted by the defense without objection at trial. (R.52:50.)

Each of those opinions was presented to the trial court, and each was rejected as mere "speculation." (R.53:7, Pet-Ap. 134.) According to the trial court, the three experts were speculating "whether in killing his parents, [Kucharski] . . . lacked substantial capacity to appreciate, the wrongfulness of his conduct." (*Id.*) Despite the overwhelming, uncontroverted evidence from all three experts that Kucharski's mental illness rendered him unable to appreciate the wrongfulness of his actions, the trial court was "not convinced" that he could prove it by a preponderance of the evidence. (R.53:7-8, Pet-Ap. 134-35.)

Kucharski filed a postconviction motion (R.36) and lost (R.42). He appealed. (R.43.) He asked the court of appeals for relief on four separate grounds: (1) the trial court did not apply the proper legal standard in the responsibility phase; (2) the trial court's decision was unsupported by the evidence; (3) his counsel was ineffective at his trial; and (4) he should have a new trial in the interests of justice. Kucharski's 1st Br. to Ct. App. at 1. The court of appeals addressed and granted relief on only one issue: the interests of justice. *See State v. Kucharski*, No. 2013AP557-CR, ¶ 1 (Wis. Ct. App. May 6, 2014) .

In forty-four paragraphs across nineteen pages, *id.* ¶¶ 1-44, the court of appeals majority detailed the facts of Kucharski's case, set forth the legal standard governing interests-of-justice reversal, and explained why there was a "substantial probability that a new trial would produce a different result," *id.* at ¶ 35. In a four-point analysis, *id.* at ¶¶ 31-44, the majority explained how "[t]he evidence showing that Kucharski lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was . . . very strong, and certainly comprised 'the greater weight of the credible evidence,'" *id.* ¶ 35 (quoting Wis. Stat. § 971.15(3)).

Recognizing that it would exercise its "discretion only in exceptional cases," the majority specifically responded to "the State's contention that a new trial is not in the interests of justice in this case because certain facts differ from those in *Kemp*[2], a case in which [this Court] granted a new trial to a man convicted of murdering his wife." *Id.* ¶¶ 33, 42 (footnote added). To the majority, the differences between the instant case and *Kemp* were "not fatal." *Id.* ¶ 43. Instead, "some differences between Kucharski's case and *Kemp* [were] in fact more favorable to Kucharski." *Id.* By comparing *Kemp* to the instant case, the majority explained how *Kemp*'s reversal in the interests of justice "support[ed] [the majority's] decision to reverse and remand Kucharski's case for a new trial." *Id.* Quoting *Kemp*, the majority explained:

> In sum, "[c]onsidering the evidence as a whole, we conclude it predominates quite heavily on the side of the defendant on the issue of his mental responsibility," and that, consequently, "justice has miscarried and . . . a new trial will probably bring a different result." *See* [*Kemp*], 61 Wis. 2d at 138. Therefore, we reverse the conviction and remand for a new trial on the issue of Kucharski's mental responsibility. See WIS. STAT. § 971.165(1)(c)3.

Id. ¶ 44.

The dissent chided the majority for "simply substitut[ing] its judgment for that of the trial court on issues that are the province of the trial court alone." *Id.* ¶ 45. Citing to *State v. Sarinske*[3], the dissent reasoned that the majority had erred by merely "second-guess[ing] the trial court," *id.*, and "*not* saying that the trial court applied the wrong law or failed to consider the evidence," *id.* ¶ 46. The dissent believed that the trial court should be affirmed because it "gave

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[2] *Kemp v. State*, 61 Wis. 2d 125, 211 N.W.2d 793 (1973).
[3] 91 Wis. 2d 14, 280 N.W.2d 725 (1979)

reasoned explanations for its findings on the second prong of mental responsibility." *Id.* ¶¶ 47, 51. The dissenting judge viewed the evidence much differently than the majority: "It is hard to see how the Majority can state that it is 'substantially probable' that another trial judge, looking at the same evidence would conclude that Kucharski met his burden. It is possible, maybe. But the standard on review is not 'possibility.'" *Id.* ¶ 51.

The State petitioned for review. It questioned, first, whether the court of appeals' discretionary reversal in the instant case impermissibly invaded the province of the factfinder and was in conflict with *Sarinske*. Second, the State asked this Court to answer whether an independent error or unfairness, separate from the substantial probability of a different result, should be a prerequisite to interests-of-justice reversal in NGI cases.

This Court granted review.

ARGUMENT

For the reasons set forth below, Kucharski contends that the court of appeals properly exercised its independent discretion when it granted him a new trial in the interests of justice. The majority's determination that there is a substantial probability of a different result on retrial was a reasonable conclusion derived from an application of the correct law to appropriate facts. The majority sufficiently explained the exceptional nature of the instant case, properly substituted its judgment for that of the factfinder, and was unimpeded by the absence of error other than a miscarriage of justice. The dissent's reliance on *Sarinske* to suggest that the majority acted contrary to controlling law is misplaced and unpersuasive. The State thus cannot prove that the majority erroneously exercised its discretion, and Kucharski asks this Court to affirm.

Additionally, Kucharski asks this Court to reject the State's call to limit the independent, discretionary power of Wisconsin's appellate courts to reverse in the interests of justice. The State's proposed change to the longstanding rule regarding reversal for a miscarriage of justice finds no support in the cases that have dealt with the interests of justice over the past century. To the contrary, precedential authority supports the position that an independent legal error is not a prerequisite to the proper exercise of the appellate court's discretion. Second, the State's rule would be an unnecessary and unreasonable constraint on the power of Wisconsin's appellate courts to do justice. Third, the State's proposed rule would lead to absurd results. For all those reasons, the State's proposed change to the discretionary power of reversal should be rejected.

Kucharski offers the following in support, including additional facts where relevant.

I. THE COURT OF APPEALS DID NOT ERRONEOUSLY EXERCISE ITS INDEPENDENT DISCRETION WHEN GRANTING KUCHARSKI A NEW TRIAL IN THE INTERESTS OF JUSTICE.

Wis. Stat. § 752.35 grants to the court of appeals the express authority to "reverse the judgment or order appealed from" "if it appears from the record that . . . it is probable that justice has for any reason miscarried." Whenever the court of appeals grants relief under Wis. Stat. § 752.35, it does so as an independent exercise of discretion. *State v. McConnohie*, 113 Wis. 2d 362, 374, 334 N.W.2d 903, 909 (1983) ("It is clear that discretionary reversals, under . . . sec. 752.35 . . . are indeed discretionary.").

A. The Decision to Reverse in the Interests of Justice Receives Deferential Review.

Given that reversal in the interests of justice is a discretionary act, this Court's review "must determine the propriety of that original decision on the basis of whether there had been an abuse of discretion."*McConnohie*, 113 Wis. 2d at 368, 334 N.W.2d at 906. "This [C]ourt does not normally review a discretionary decision of the court of appeals. However, when [it] do[es] review a discretionary act of the court of appeals, [it] review[s] the decision as [it] would any other exercise of discretion." *Raz v. Brown*, 2003 WI 29, ¶ 14, 260 Wis. 2d 614, 660 N.W.2d 647.

On review for an erroneous exercise of discretion, an appellate court "must uphold the [lower] court's discretion if its decision is made on appropriate facts and the correct law and thus is one which a court reasonably could have reached." *State v. Wyss*, 124 Wis. 2d 681, 733-34, 370 N.W.2d 745, 770 (1985).

"The concept of discretion is a review-constraining concept." *McConnohie*, 113 Wis. 2d at 370, 334 N.W.2d at 907. This Court "cannot substitute its own judgment for that of the [lower] court," but rather "limits its review to determining whether the [lower] court erroneously exercised its discretion." *Estate of Rille v. Physicians Ins. Co.*, 2007 WI 36, 300 Wis. 2d 1, ¶ 82, 728 N.W.2d 693. As this Court "ha[s] frequently said," its agreement with the lower court's discretionary decision is not determinative: it "will uphold the discretion of a court [it is] reviewing if the decision made on appropriate facts and the correct law is one which a court reasonably could have reached." *McConnohie*, 113 Wis. 2d at 370, 334 N.W. 2d at 907 (internal citations omitted).

In fact, when a court exercises its discretion, it enjoys "a limited right to make a decision, which this [C]ourt would not have agreed with *ab initio*, without

being reversed." *Id.* at 370, 334 N.W.2d at 907. Thus, whenever the court of appeals grants relief under Wis. Stat. § 752.35, it is entitled to "a limited right to be wrong in the view of [this Court], without incurring reversal." *Id.*

As the aforementioned principles demonstrate, review of the court of appeals independent discretion is "deferential." *See State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433. This Court should uphold a Wis. Stat. § 752.35 reversal even if it would not have reversed the trial court *ab initio*, so long as the court of appeals applied the correct law to appropriate facts and reached a reasonable conclusion. *See Wyss*, 124 Wis. 2d at 733-34, 370 N.W.2d at 770. The scope of review is constrained to the discretion of the court of appeals; the propriety of the trial court's ruling is not at issue. *See McConnohie*, 113 Wis. 2d at 370, 334 N.W. 2d at 907.

B. The Court of Appeals Majority was Correct: a Substantial Probability of a Different Result is Sufficient to Warrant Reversal for a Miscarriage of Justice.

A definitive explanation of the power of discretionary reversal appears in *State v. Wyss*. The relevant question in *Wyss* was whether the "court of appeals erred as a matter of law when it granted a new trial in the interest of justice without first concluding that there was a substantial degree of probability that a different result would be produced at a new trial." 124 Wis. 2d at 733, 370 N.W.2d at 770. To decide that question, *Wyss* explained the history of and principles associated with discretionary reversal in the interests of justice. *Id.* at 734-41, 370 N.W.2d at 770-73.

After addressing the first part of Wis. Stat. § 752.35[4], *Wyss* turned to reversal for a miscarriage of justice, noting that "[t]he grounds for ordering a new trial under the second part of sec. 752.35, Stats., when it is probable that justice has miscarried, have not changed since they first appeared in sec. 2405m, Stats.1913 created by ch. 214, Laws of 1913." *Id.* at 736, 370 N.W.2d at 771.

Early cases granting reversal for a miscarriage of justice "implicitly complied with the standard that the probability of a different result had to be established before a new trial would be ordered." *Id.* However, it was not until 1966—in *Lock v. State*[5]—that this Court "articulated" a "bright line rule . . . for determining when justice had miscarried." *Id.* With *Lock*, this Court "unequivocally established the rule to be followed for determining when a miscarriage of justice, under the second part of sec. 752.35, Stats., has occurred." *Id.*

Consistent with the early cases that reversed for a miscarriage of justice, *Lock*'s rule mandates that a reviewing court must find a substantial probability of a different result before reversing. 31 Wis. 2d at 118, 142 N.W.2d at 187. The *Lock* rule reads as follows: "'In order for this court to exercise its discretion and for such a probability to exist we would at least have to be convinced that the defendant should not have been found guilty and that justice demands the defendant be given another trial.'" *Wyss*, 124 Wis. 2d at 736, 370 N.W.2d at 771 (quoting *Lock*, 31 Wis. 2d at 118, 142 N.W.2d 183).

At the time that *Wyss* was written, the *Lock* rule "ha[d] been reiterated repeatedly and ha[d] become a firm fixture in Wisconsin criminal law." *Id.* The same

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[4] Wis. Stat. § 752.35 also allows the court of appeals to reverse when "the real controversy has not been fully tried." That provision is not relevant to the instant appeal.

[5] 31 Wis. 2d 110, 142 N.W.2d 183 (1966)

remains true today: no change has been made to the *Lock* rule since its articulation in 1966, and Wisconsin's appellate courts continue to rely on it. *See State v. Henley*, 2010 WI 97, ¶ 81, 328 Wis. 2d 544, 787 N.W.2d 350 (citing *State v. Schumacher,* 144 Wis. 2d 388, 400-01, 424 N.W.2d 672 (1988), which cites to that portion of *Wyss* stating "the *Lock* rule must be followed").

The *Lock* rule sets a floor, not a ceiling; it says about what a court must "at least" be convinced to grant a new trial in the interests of justice. *Lock*, 31 Wis. 2d at 118, 142 N.W.2d at 187. While a court might find additional reasons to reverse, *Lock* requires nothing more than a finding "that the defendant should not have been found guilty and that justice demands the defendant be given another trial." *Id.*

In *Paladino v. State*, this Court reversed for a miscarriage of justice even though "there appear[ed] to be no errors sufficient to work reversal of the judgment." 187 Wis. 605, 606, 205 N.W. 320 (1925). It was the Court's "opinion that the defendant should have an opportunity of presenting the matter to another jury" even though "the errors complained of [were] not sufficient to work reversal." *Id.* A new trial was appropriate simply because the case was "very close and doubtful" and "it appear[ed] probable that justice ha[d] miscarried." *Id.*

Wyss identified *Paladino* as precursory support for the *Lock* rule, thereby endorsing its reasoning that the absence of independent error does not foreclose reversal in the interests of justice when the court finds a substantial probability of a different result. *See* 124 Wis. 2d at 736, 370 N.W.2d at 771.

Like *Paladino*, *Kemp v. State*—which was decided after *Lock*—demonstrates that error other than a substantial probability of a different result is not required to reverse in the interests of justice. The defendant in *Kemp* asserted a variety of errors, and

the court rejected each argument: "We have reviewed them and find no error." 61 Wis. 2d at128, 136, 211 N.W.2d at 793, 798. Nonetheless, *Kemp* reversed in the interests of justice for the following reason:

> Considering the evidence as a whole, we conclude it predominates quite heavily on the side of the defendant on the issue of his mental responsibility that justice has miscarried and believe that a new trial will probably bring a different result. Therefore, in our discretion, a new trial is ordered in the interest of justice on the single issue of the defendant's special plea of not guilty by reason of insanity or lack of mental responsibility at the time of the act.

Id. at 138, 211 N.W.2d at 799.

Controlling authority of this Court, which the State does not dispute or distinguish, therefore demonstrates that a substantial probability of a different result is all that is required to grant a new trial for a miscarriage of justice. *See* St.'s 1st Sup. Ct. Br. at 29 ("[U]nder existing case law, such a finding is itself sufficient to justify a discretionary reversal under § 752.35."). That has been the rule since creation of the interests of justice statute in 1913; and it has been clearly articulated as such since 1966.

In the instant case, the court of appeals cited to and quoted from the discretionary reversal statute. *Kucharski*, 2013AP557, ¶ 33. Consistent with the *Lock* rule, the majority properly stated that it could "conclude that justice has miscarried if [it] determine[d] that there is a substantial probability that a new trial would produce a different result." *Id.* (citing to case that cites to *Wyss*'s discussion of miscarriage of justice standard). The majority's reversal in the absence of error other than a

substantial probability of a different result thus applied the correct law.[6]

C. The Court of Appeals Majority was Correct: This Court's Prior Cases Show That Finding a Substantial Probability of a Different Result Includes Substituting the Reviewing Court's Judgment for that of the Factfinder.

This Court has before reversed for a miscarriage of justice despite recognizing the sufficiency of the evidence to support the verdict and the factfinder's special role in our justice system for resolving credibility and deciding the burden of proof. Two cases are particularly relevant: *State v. Hintz*, 200 Wis. 636, 642, 229 N.W. 54, 57 (1930), and *Kemp*.

In *Hintz*, the defendant argued that the evidence was insufficient to justify his conviction, but this Court rejected that argument. 200 Wis. at 639-642, 229 N.W. at 56-57. "No rule is more thoroughly established by the decisions of this court than that where conflicting inferences may be drawn from the facts proved the question is one for the jury." *Id.* at 642, 229 N.W. at 56-57. Given the deference owed to the factfinder under sufficiency of the evidence challenges, this Court could not grant the defendant a new trial on that

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[6] As the State rightly points out, the court of appeals did not decide the other errors that Kucharski alleged. At this point, we cannot know whether the court of appeals believed that those alleged errors warranted reversal. It very well may be the case that the majority would have reversed on one or more of those errors, but found it unnecessary to address them because the interests of justice were dispositive.

If this Court adopts the State's position that an independent error is necessary to reversal for a miscarriage of justice, Kucharski asks that his case be remanded to the court of appeals with instructions that it should determine whether such an error existed.

ground. *Id.* Nonetheless, *Hintz* reversed in the interests of justice. The Court explained:

> Viewing the case from any angle, and in the light of all established principles, the question of defendant's intent presented a plain jury question. Whatever doubts we may entertain concerning the justice of this verdict, our power to disturb it is limited by established rules of jurisprudence designed to protect the sanctity of findings of fact, a function which constituted society has committed to the jury.
>
> As we contemplate this conclusion, we cannot escape the reflection that at times one's liberties are shielded by a curtain of the merest gauze. This evidence leaves the question of defendant's intent to defraud in the greatest doubt. While it is the function of the jury to resolve this doubt, it seems probable to us that justice has miscarried by the verdict rendered. Under such circumstances it is within our power to order a new trial. Sec. 251.09, Stats.; *Paladino v. State*, 187 Wis. 605, 205 N.W. 320. Because we think the question of defendant's guilt should be passed upon by another jury, the mandate is . . . reversed.

Id. at 642, 229 N.W. at 57. Thus, despite recognizing that the evidence was sufficient to sustain the jury's verdict, *Hintz* reversed because it thought that the jury likely got it wrong. *See id.* To reverse in the interests of justice, the *Hintz* court thus substituted its judgment for that of the jury; it gave no deference to the jury's findings. *See id.*

Kemp engaged in similar reasoning:

> The defendant contends that he should be granted a new trial in the interest of justice under sec. 251.09, Stats. While admittedly a close question, the majority of this court concludes that it appears from the record it is probable that justice has miscarried and that in our discretion a new trial should be granted to the defendant in the interest of justice.

> The reason we say it is a close question is because the burden of proving by the greater weight of the credible evidence that he lacked mental responsibility at the time of the act is upon the defendant, and for the further reason that the credibility of the witnesses and whether the defendant has met his burden of proof are to be resolved by the jury.
>
> We believe the weight of the testimony is such that justice has probably miscarried and that it is probable a new trial will result in a contrary finding.

61 Wis. 2d at 136-37, 211 N.W.2d at 798. Like *Hintz*, the *Kemp* majority thus did not defer to the factfinder, instead substituting its opinion of the defendant's responsibility for that of the jury. *Compare id. with Hintz*, 200 Wis. at 642, 229 N.W. at 57. The *Kemp* dissent took issue with the majority's disregard for the province of the factfinder:

> Given such conflict in expert testimony as to the credibility of defendant's account of what transpired, it was for the jury as trier of the facts to determine the credibility of defendant's statements. As this court said in an ALI test insanity case, '. . . The issue as to sanity remained for resolution by the trier of fact. The issue of credibility of witnesses and of whether the defendant had met his burden of proof in establishing the defense of insanity was for the jury to determine. . . .' (*State v. Bergenthal* (1970), 47 Wis. 2d 668, 685, 178 N.W.2d 16, 26.) . . . In the case before us, given the testimony of [one expert] as to the inconsistencies and lack of reliability of defendant's statements concerning his shooting and killing his wife, the jury here had a far stronger basis than in *Bergenthal* for finding defendant sane at the time of the commission of the crime of murder, second degree. So the writer would affirm.

61 Wis. 2d at 142, 211 N.W.2d at 800-01 (Hansen, J., dissenting) (emphasis added). And yet, that reasoning was obviously not persuasive to the majority, which granted a new trial while recognizing that issues of

credibility and whether the defendant satisfied his burden of proof were for the jury to determine. *Id.* at 136-37, 211 N.W.2d at 798. The *Kemp* majority therefore did not defer to the factfinder when exercising its discretionary reversal power, as the dissent's argued that it should have. *See id.*

The State—like the court of appeals' dissent in the instant case—relies on language in cases analyzing legal concepts other than the interests of justice to assert that it is error for an appellate court not to defer to the factfinder. *See* St.'s 1st Sup. Ct. Br. at 17-18, 22-26 (citing, e.g., *Sarinske*). However, a close read of the cases on which the State relies shows that the cited language does not support the proposition for which it is adduced.

While it is true that interests of justice reversal was part of *Sarinske* and *Pautz v. State*[7], the State relies on language not from the interests of justice portion of either opinion, but rather from those parts of the opinions deciding whether "the trial court erred in denying [the defendant's] motion to set aside the jury's verdict that he was not suffering from mental disease." *Sarinske*, 91 Wis. 2d at 47, 280 N.W.2d at 740, *Pautz*, 64 Wis. 2d at 475, 219 N.W.2d at 330. The State's discussion of the deference owed to a factfinder's conclusions thus derives not from prior law addressing reversal in the interests of justice, but rather from law reviewing the propriety of an order denying a motion for relief notwithstanding the verdict. The cited portions of *Sarinske* and *Pautz* are thus inapt.

Likewise, the discussion in *Schultz v. State*[8] on which the State relies is not persuasive. In the cited part of *Schultz*, the court was actually considering a challenge to the sufficiency of the evidence, not whether justice miscarried. 87 Wis. 2d at 172-74, 274

[7] 64 Wis. 2d 469, 479, 219 N.W.2d 327, 332 (1974).
[8] 87 Wis. 2d 167, 219 N.W.2d 327 (1974)

N.W.2d at 617. But, as was discussed above, reversal in the interests of justice can be had even where the evidence may be deemed sufficient. *See Hintz*, 200 Wis. at 642, 229 N.W. at 57. Certainly, it is true that "the trier of fact is not obliged to believe defense experts, at least where other evidence undercuts their opinions." *Schultz*, 87 Wis. 2d at 173, 274 N.W.2d at 617. However, when considering the sufficiency of the evidence an appellate court must defer to the factfinder. *See State v. Poellinger*, 153 Wis. 2d 493, 501, 503-04, 451 N.W.2d 752, 755, 756 (1990) (reviewing court must view the evidence "most favorably to the state and the conviction" and resolve any inferences in favor of the verdict). To the contrary, when an appellate court acts in the interests of justice, it is not so constrained; what evidence the factfinder may have accepted or rejected does not limit the court's independent discretion. *See Hintz*, 200 Wis. at 642, 229 N.W. at 57. *Schultz* is not controlling.

The very nature of the test for a miscarriage of justice necessitates substitution of the appellate court's judgment for that of the factfinder. It requires the reviewing court to decide—as an exercise of independent discretion—whether there is a substantial probability of a different result. Answering that question demands unfettered discretion to review the record without deference to the factfinder's conclusions. Requiring an appellate court to defer to the factfinder when deciding whether justice miscarried will convert the interests of justice test into a test for the sufficiency of the evidence.

However, the test for reversal in the interests of justice is not a test for the sufficiency of the evidence; it is not a test for whether the defendant was entitled to a directed verdict. Reviewing for a miscarriage of justice requires no deference to the factfinder, unlike when reviewing for error on those other issues. When deciding whether a miscarriage of justice has occurred, it is proper for the appellate court to reevaluate the

evidence and, as an act of independent discretion, substitute its judgment for that of the factfinder whenever there is a substantial probability of a different result.

Insofar as that is what the court of appeals did in the instant case, it applied the correct law.

D. The Court of Appeals Majority Complied with its Obligation to Explain the Exceptional Nature of Kucharski's Case.

When granting relief under Wis. Stat. § 752.35, the court of appeals "ha[s] an obligation to analyze why a case is so exceptional to warrant a new trial in the interest of justice." *State v. Avery*, 2013 WI 13, ¶ 55 n.19, 345 Wis. 2d 407, 826 N.W.2d 60. The failure to do so constitutes an erroneous exercise of discretion. *Id.* The court of appeals cannot satisfy its discretionary obligation by "simply restat[ing] the interest of justice test." *Id.* Instead, it must analyze how the facts of a particular case demonstrate that relief should be granted in the interests of justice. *Id.*

The majority in the instant case properly explained the exceptional nature of Kucharski's case. Unlike in *Avery*, the majority did more than merely repeat the test for discretionary reversal. Instead, it set forth a painstakingly detailed explanation of the uncontested facts. The majority separated its factual recitation into three relevant sections: (1) "Kucharski develops symptoms consistent with schizophrenia;" (2) "Kucharski shoots his parents at the direction of the voices;" (3) "Experts diagnose Kucharski with schizophrenia and opine that he lacked substantial capacity to appreciate the wrongfulness of his actions and/or to conform his behavior to the requirements of law." In each section, the majority wrote several paragraphs elucidating the supporting facts.

After detailing the facts, the majority engaged in an analysis of why Kucharski's case was the exceptional one warranting reversal in the interests of justice. The majority carefully explained how the facts in the instant case satisfied the defendant's burden of proof under the NGI statute. The majority noted the lack of any dispute regarding Kucharski's mental illness. It further explained that the experts' "uncontroverted" opinions regarding Kucharski's lack of responsibility were "well-supported, well-reasoned, and uncontradicted." Additionally, the majority noted "a complete lack of alternative explanations for Kucharski's behavior." Instead, said the majority, there was strong evidence in the record that Kucharski "was acting upon the delusional belief that killing his parents was in their best interests," and thus was unable "to control his behavior or appreciate its wrongfulness at the time of the shooting." Lastly, the majority compared and contrasted Kucharski's case to *Kemp*, and decided that relief was warranted in Kucharski's case just as it was in *Kemp*: there was a substantial probability of a different result on retrial. For all those reasons, said the majority, Kucharski's case was exceptional and reversal in the interests of justice was appropriate.

By carefully analyzing the facts of the instant case under the proper standard for miscarriage-of-justice reversal, the court of appeals satisfied its obligation to explain the exceptional nature of the instant case. *See Avery*, 2013 WI 13, ¶ 55 n.19.

E. The Court of Appeals Majority Applied the Correct law to Appropriate Facts and Reached a Conclusion that a Reasonable Judge Could Reach; its Holding Should Thus be Affirmed.

As detailed above, the court of appeals applied the correct law in the instant case. The only remaining

question is whether the majority applied that law to appropriate facts and reached a conclusion that a reasonable judge could have reached. That question must be answered affirmatively.

First, not even the State contests the appropriateness of the facts on which the court of appeals relied. Second, it is not tenable to suggest that the majority's conclusion is not one that a reasonable judge could have reached, and the State does not make that argument.

Instead, the State challenges the majority's exercise of its discretion on the ground that it applied the wrong legal standard. However, as detailed above, that argument fails. Thus, under the deferential standard of review to be applied to the majority's independent exercise of discretion, its ruling must be upheld because it constitutes a reasonable conclusion derived from application of the correct legal standard to appropriate facts. *See Wyss*, 124 Wis. 2d at 733-34, 370 N.W.2d at 770.

II. THIS COURT SHOULD DECLINE THE STATE'S INVITATION TO CONSTRAIN THE STATUTORY POWER OF DISCRETIONARY REVERSAL.

The power to reverse in the interests of justice is granted to the court of appeals—and to this Court—by the legislature. Wis. Stat. §§ 752.35, 751.06. Wisconsin's appellate courts have enjoyed the statutory authority to reverse in the interests of justice for over 100 years. *See id.* The legislature first granted this Court that power in 1913. *See* Wis. Stat. § 2405m (1913). Sixty-five years later, upon creation of the court of appeals, "a substantially similar power of discretionary reversal was extended to that court under sec. 752.35, Stats." *Schumacher*, 144 Wis. 2d at 399-400, 424 N.W.2d at 676.

When litigants later asked this Court to delimit the court of appeals' power under Wis. Stat. § 752.35,

it concluded "that, with respect to the discretionary power to reverse under secs. 751.06 and 752.35, the powers of the supreme court and the court of appeals are coterminous." *Vollmer v. Luety*, 156 Wis. 2d 1, 18, 456 N.W.2d 797, 805 (1990). Cases interpreting this Court's discretionary reversal power are "equally applicable as interpretations of the court of appeals' power to reverse judgments under sec. 752.35." *Id.* at 19, 456 N.W.2d at 805. Any constraint placed on the court of appeals' discretionary reversal power would similarly constrain this Court; "the power of reversal under these statutes is identical." *Id.*

As was described above, precedential cases of this Court have reversed for a miscarriage of justice in the absence of any other identifiable error. *See, e.g., Paladino*,187 Wis. at 606, 205 N.W. 320. And yet, the State now asks this Court for a rule that is contrary to the holdings of those opinions. The State proposes that a substantial probability of a different result should be a necessary but not sufficient condition to warrant reversal for a miscarriage of justice. Instead, a substantial probability of a different result must be "coupled" with a finding of some other error. St.'s 1st Sup. Ct. Br. at 32.

This Court should reject the State's proposed rule because it is inconsistent with well-established precedent. The test for miscarriage-of-justice reversal has been in existence for more than a century and clearly articulated for decades. It has been recognized by this Court and the court of appeals alike to require nothing more than a substantial probability of a different result. *Henley*, 2010 WI 97, ¶ 81 ("A miscarriage of justice occurs if a defendant can show a substantial probability of a different outcome."), *State v. Murdock*, 2000 WI App 170, ¶ 31, 238 Wis. 2d 301, 617 N.W.2d 175 ("We may conclude that justice has miscarried if we determine that there is a substantial probability that a new trial would produce a different result."). More than once, this Court has reversed in

the absence of any other error simply because there was a substantial probability of a different result. *See, e.g., Hintz*, 200 Wis. at 642, 229 N.W. at 56-57. The court of appeals has done the same. *See, e.g., Murdock*, 2000 WI App 170, ¶ 40. Adopting the State's test would necessitate a holding that those prior cases were wrongly decided and that those courts erroneously exercised their discretion in reversing absent some error other than a substantial probability of a different result. The State offers insufficient reasons to overturn those prior cases, and this Court should decline the invitation.

This Court should also reject the State's proposed rule because it would significantly limit the court of appeals' discretion and impede its ability to do justice in the individual case. "[T]he court of appeals is charged primarily with error correcting in the individual case," *State ex rel. Swan v. Elections Board*, 133 Wis. 2d 87, 94, 394 N.W.2d 732, 735 (1986), and "consistent[ly]" has a "broad discretion [that] enables it to achieve justice in individual cases," *Vollmer*, 156 Wis. 2d at 21, 456 N.W.2d at 806. As this Court has explained, "the question of whether justice has been done in an individual case is primarily and initially the concern of the court of appeals." *McConnohie*, 113 Wis. 2d at 368, 334 N.W.2d at 906. The court of appeals' ability to reverse for a miscarriage of justice is one of the powers that allows it do justice between the parties.

However, if this Court conditions miscarriage-of-justice reversal on some error in addition to a substantial probability of a different result, it will constrain the court of appeals' ability to do justice. Even in a case where the record clearly shows that the factfinder got it wrong, the court of appeals would be unable to reverse absent some error. The State suggests nothing unique about NGI cases such that its proposed limitation to miscarriage-of-justice reversal will apply only in those cases. Instead, the State's rule

could be equally applied to all cases, including civil. Adopting the State's rule would be inconsistent with the court of appeals' broad discretion under Wis. Stat. § 752.35 to achieve justice in the individual case, and thus should not be done.

This Court should also reject the State's proposed rule because it leads to absurd results. In its brief, the State does not describe the significance of the error that it believes is necessary to sustain a miscarriage-of-justice reversal. However, the State's position must be that any error, regardless of how insignificant or harmless, can sustain a Wis. Stat. § 752.35 reversal. Otherwise, the State would be asking this Court to predicate reversal for a miscarriage of justice on a finding of some otherwise reversible error. But, so limiting Wis. Stat. § 752.35 would render it a nullity, and thus cannot possibly be the State's position.

That is to say, if the State were asking for a rule limiting reversal in the interests of justice to those cases with otherwise reversible error, in every case where the appellate court could reverse under Wis. Stat. § 752.35 it would simultaneously be able to reverse regardless of Wis. Stat. § 752.35. There would thus be no need for the independent discretionary power to reverse if that power was itself conditioned on the existence of an otherwise reversible error. Such an interpretation of Wis. Stat. § 752.35 would eliminate any need for it and thereby render the statute superfluous. The State thus cannot be advocating for such a rule.

The State's proposed rule must therefore be that an appellate court cannot reverse for a miscarriage of justice unless it can find both a substantial probability of a new result and some error that may or may not alone constitute reversible error. But, if an appellate court can predicate reversal on any error—regardless of its significance—then what is the point in requiring

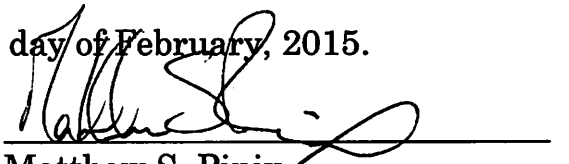
the identification of independent error in the first place? Harmless error, deficient-but-not-prejudicial attorney performance, or even an immaterial defect in the pleadings could all serve as the basis for interests of justice reversal. Such a loosely framed rule will certainly not lead to the "consistent" application of Wis. Stat. § 752.35 that the State seeks. *See* St.'s 1st Sup. Ct. Br. at 32. It will, instead, open the door to reliance on the most minor of mistakes as justification for reversal when a substantial probability of a different result exists. Such reliance would be an absurd fiction unaccepted by and unnecessary in light of prior precedent. This Court should reject the request to create it.

For all those reasons, this Court should reiterate that a substantial probability of a different result is alone sufficient to justify reversal for a miscarriage of justice under Wis. Stat. § 752.35.

CONCLUSION

In the instant case, the court of appeals majority correctly exercised its independent discretionary power to reverse for a miscarriage of justice. The State's proposed change to existing law is unsupported by prior precedent, an unreasonable limitation to the court of appeals' broad discretionary power, and poorly formulated. Kucharski therefore asks this Court to affirm the court of appeals.

Dated this 3rd day of February, 2015.



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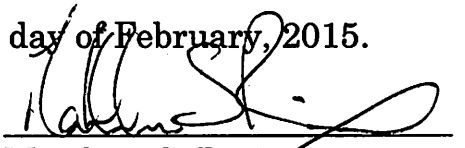
CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 7,906 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. 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 3rd day of February, 2015.



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CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Defendant-Appellant's Brief will be deposited in the United States mail for delivery to the Diane Fremgen, Clerk, Wisconsin Supreme Court, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on February 3, 2015. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

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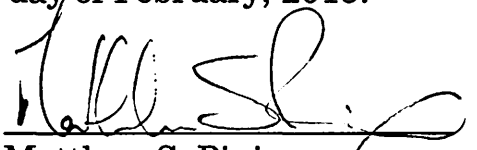

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