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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2014AP2813-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

JEFFREY P. LEPSCH, Defendant-Appellant-Petitioner

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING THE LACROSSE COUNTY CIRCUIT COURT, THE HONORABLE RAMONA G. GONZALEZ PRESIDING.

DEFENDANT-APPELLANT-PETITIONER'S BRIEF

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ISSUES PRESENTED

Issue No. 1. Was Lepsch denied a trial by an impartial jury as guaranteed by Article I, Section 7 of the United States Constitution, and the 6th Amendment to the United States Constitution, where the jury consisted of jurors who expressed beliefs that Lepsch was guilty and/or that their minds were made up as to Lepsch's guilt, that police witnesses are more credible than non-police witnesses, and that the presumption of innocence should not exist in all cases?

In applying only Wisconsin law and in expressly declining to apply federal constitutional law, the court of appeals answered no.

Issue No. 2. In failing to apply or even consider **Patton v. Yount,** 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984), is the court of appeals decision in direct conflict with a controlling opinion of the United States Supreme Court?

The court of appeals did not consider this issue.

Issue No. 3. Does the standard of whether a juror is subjectively biased under Wisconsin law, is the juror a reasonable person who is sincerely willing to set aside any opinion or prior knowledge he may have, **State v. Kiernan**, 227 Wis.2d 736, 745 596 N.W.2d 2d 760 (1999) citing **State v. Faucher,** 227 Wis.2d 700, 596 N.W2d 770 (1999), sufficiently comport with the standard for juror impartiality under the 6th Amendment to the United States Constitution as set forth by the United States Supreme Court in **Patton,** supra, did the juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed?

The court of appeals did not consider this issue.

Issue No. 4. Does the standard of whether a juror is objectively biased under Wisconsin law, whether a reasonable person in the prospective juror's position could set aside the opinion or prior knowledge, **State v. Kiernan**, 227 Wis.2d 736, 719, 596 N.W.2d 2d 760 (1999) citing **State v. Faucher,** 227 Wis.2d 700, 596 N.W2d 770 (1999), sufficiently comport with the standard for juror impartiality under the 6th Amendment to the

United States Constitution as set forth by the United States Supreme Court in **Patton,** supra?

The court of appeals did not consider this issue.

Issue No. 5. Under what circumstances is a circuit court's failure to excuse a juror due to the "appearance of bias" a violation of due process, and are those circumstances present in this case?

The court of appeals concluded that the jurors at issue in this appeal did not present the "appearance of bias," but did not clarify what circumstances give rise to the "appearance of bias" such that a due process violation exists.

Issue No. 6. Does a circuit court clerk's administration of the oath to the jury venire under Wis. Stat. Sec. 805.08, outside a defendant's presence and in a jury assembly room, violate a defendant's rights to be present at a critical stage in the proceeding, to receive a public trial, and to receive a trial by a jury properly sworn to be impartial?

The court of appeals concluded that Lepsch forfeited this issue by not raising it at trial. The court of appeals also concluded that trial counsel was not ineffective in failing to raise the issue because such failure did not cause Lepsch prejudice. The court of appeals finally concluded that the error complained of was not structural in nature so as to require a finding of presumed prejudice.

Issue No. 7. Was trial counsel ineffective in failing to sufficiently examine and challenge prospective jurors for cause, in failing to properly ensure Lepsch's full of use of peremptory strikes, and in failing to ensure that the trial court properly administered the oath to the jury venire in Lepsch's presence?

The court of appeals answered no.

Issue No. 8. Did the circuit court violate Lepsch's rights to due process and to an impartial jury under the 6th and 14th Amendments to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution

by arbitrarily depriving him of 1)right to receive proper number of peremptory strikes, 2)right to full use of peremptory strikes, and 3)right to have biased jurors removed?

The court of appeals answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel understands that oral argument before this Court will be scheduled and that a decision by this Court will be published.

STATEMENT OF THE CASE

This case originates from the robbery of a LaCrosse camera shop during which the shop's owner and his son were shot and killed. 4:1-2. The State charged Lepsch with two counts of first degree intentional homicide, armed robbery, and felon in possession of a firearm. 8:1. The case received extensive pre-trial publicity. According to a database maintained by Newspaper Source Plus, media sources published no less than 64 stories

about the case prior to the time of trial. 188: 44-51. According to year-end polls taken by LaCrosse Tribune of both its staff and readers, the Lepsch case was voted the "Number One" story of the year. 188:149. Various media "streamed" live coverage of the trial on the internet. 206:7. The LaCrosse Tribune "streamed" an interactive blog. 206:77. The case proceeded to a five day jury trial wherein the jury found Lepsch guilty of all charges. 176:1-3. At sentencing, the trial court sentenced Lepsch to consecutive terms of life imprisonment without any term of extended supervision on the homicide charges, 25 years confinement/15 years extended supervision on the armed robbery charge, and 5 years confinement/5 years extended supervision on the felon in possession of a firearm charge. 176:1-3. By and through counsel, Lepsch filed a motion for new trial which asserted all issues raised in this brief. After conducting an evidentiary hearing, the trial court denied the motion. Appendix, 255-275. Lespsch appealed. In a per curiam decision, the court of appeals affirmed. Appendix, 100-112.

STATEMENT OF FACTS

Facts relevant to juror impartiality issues

The biases at issue in this appeal stem from beliefs or opinions expressed in a pre-voir dire questionnaire by 9 of the 12 Lepsch jurors, Christopher R., James T., Nathan N., John A., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F., ultimately identified in the Random Listing Report-Voire Dire, Appendix, 113-114, as juror nos. 5, 6, 12, 15, 17, 19, 20, 23 and 26. The biases encompassed four basic areas: 1)the juror's belief or opinion that Lepsch was guilty, 2)the juror's belief or opinion that his or her "mind was made up," 3) the juror's belief or opinion as to the presumption of innocence, and 4) the juror's belief or opinion that law enforcement witnesses are more credible than non-law enforcement witnesses. Prior to conducting voir dire of the entire venire, the trial court provided for an individual voir dire of certain prospective jurors based on answers that they provided in the jury questionnaire. 206:7-175.

Juror belief that law enforcement witnesses are more credible than non-law enforcement witnesses

Question no. 30 of the jury questionnaire asked in relevant part:

You will be hearing testimony from several police officers in this case. Do you think you would give police officers more credibility, less credibility or the same amount of credibility as other witnesses who were not police offers?

_____more credibility_____less credibility_____the same credibility

Of the 12 jury members, 7 jurors, Christopher R., Nathan N., John A., Pamela H., Lisa K., and Darrick M., and Roxanne F., answered that they would give police officers "more credibility." Appendix, 181, 166, 136, 198, 213, 120, 150 .

Juror beliefs that Lepsch was guilty and that juror had "made up" his or her mind

Question No. 35 of the jury questionnaire asked in relevant part the following:

Have you ever expressed the opinion that Mr. Lepsch was guilty? ____Yes____No

Do you have any feelings at this time that you have made up your mind as to Mr. Lepsch's guilt? _____Yes_____No

IF YES, would you have any difficulty putting these feelings out of your mind if you were chosen to be a juror? _____Yes_____No

Of the twelve (12) jury members, four (4) jurors answered that they had expressed the opinion that Lepsch was guilty. These included James T.,

John A., Mandy F., and Lisa K.[1] Appendix, 230, 138, 246 and 216. Three (3) of those jurors also expressed the opinion or belief that they had "made up (their) mind(s)" that Lepsch was guilty. These included James T., John A., and Mandy F. Appendix, 230, 138, and 246.

Juror disbelief in the presumption of innocence

Question 34 of the jury questionnaire asked the following:

Do you think if that state goes to the trouble of bringing someone to trial, the person is probably guilty? _____Yes No_____

Why would you say that?

One juror, Christopher R., juror no. 5, wrote as follows:

Probably? Yes. Definitely? Not necessarily. I would hope that the courts would not bring someone in just so they have someone to try. I would hope there would at least be a fair amount of evidence or cause before bringing someone in. Appendix, 182.

Question 32 asked:

Do you have any problem with the legal proposition that a defendant must be presumed innocent unless and until the prosecution can prove he or she is guilty?

Christopher R. responded as follows:

[1] As noted previously this brief, John A. and Lisa K. were also biased in their beliefs that law enforcement witnesses were more credible than non-law enforcement witnesses.

In general, no. But I do not believe that this should be the case 100% of the time. I believe that there are cases in which there is immediate & overwhelming evidence (I.E. physical evidence, audio/video evidence, confessions, etc.)(sic) should be presumed guilty until trial. Appendix, 182.

Facts relevant to administration of oath

LaCrosse County Clerk of Court Pam Radtke administered the oath to the jury venire in a "jury assembly room" before the prospective jurors moved into the actual courtroom. 189:14. Neither Lepsch nor trial counsel were present for the administration of the oath. 188:155. The administration of the oath in such a fashion has apparently been standard practice in LaCrosse County for "many years." 200:2-3.

ARGUMENT

Issue No. 1 - Lepsch's jury consisted of jurors who were not impartial under both the 6th Amendment to the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution.

The Fourteenth Amendment guarantees a right to a jury in all state criminal cases which, if tried in a federal court, would come within the Sixth

Amendment's guarantee of trial by jury. See **Morgan v. Illinois**, 504 U.S. 719, 727, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). The right to an impartial tribunal is one of the handful of rights of a criminal defendant that is not subject to the doctrine of harmless error. **Oswald v. Bertrand**, 374 F.3d 475, 482 (7th Cir. 2004). If even one member of the jury was not impartial, then the entire jury cannot be considered impartial. See **Parker v. Gladden**, 385 U.S. 363, 366, 87 S.Ct. 468,17 L.Ed.2d 420 (1966). Doubts regarding bias must be resolved against the juror. See **Burton v. Johnson**, 948 F.2d 1150, 1158 (10th Cir. 1991); **United States v. Gonzalez**, 214 F.3d 1109, 1114 (9th Cir. 2000). In terms of Wisconsin law, the jurors were both subjectively and objectively biased under **State v. Faucher**, supra. "Subjective bias" refers to bias that is revealed by the prospective juror on voir dire: it refers to the prospective juror's state of mind. **State v. Faucher**, 227 Wis.2d at 716. Discerning whether a juror exhibits this type of bias depends upon that juror's verbal responses to questions at voir dire, as well as that juror's demeanor in giving those responses. **State v. Lindell**, 2001 WI 108, ¶36, 245 Wis.2d 689, 629 N.W.2d 223. "Objective bias" refers to whether the reasonable person in the individual prospective juror's position could be impartial. See **State v. Faucher**, 227 Wis.2d at 718. When assessing 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**. When a prospective juror is challenged on voir dire because there was some evidence demonstrating that the prospective juror had formed an opinion or prior knowledge, the question of whether the juror should be removed for cause turns on whether a reasonable person in the prospective juror's position could set aside the opinion or knowledge. See **id.** at p.719. "Objective bias" exists where the record does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge. See **State v. Ferron**, 219 Wis.2d 481, 485, 579 N.W.2d 654 (1998). The federal constitutional standard, stated in **Patton**[2] and followed in **Oswald v. Bertrand**, 249 F.Supp.2d 1078 (E.D. Wis. 2003), affirmed 374 F.3d 475 (7th Cir. 2004), **Thompson v. Altheimer & Gray**, 248 F.3d 621 (7th Cir. 2001), **United States v. Allen**, 605 F.3d 461, 466 (7th Cir. 2010 and **Marshall v. City of Chicago**, 762 F.3d 573, 576 (7th Cir. 2014) requires the following: did the juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of impartiality have

[2] The standard stated in **Patton** traces its origins to **Irwin v. Dowd**, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), **Holt v. U.S**., 218 U.S. 245 (1910) and **Reynolds v. U.S.,** 98 U.S. 145 (1878).

been believed. See **Patton**, 467 U.S. at 1036.[3] Lepsch maintains that this Court should give **Patton** a literal and textual interpretation. As expressly stated in **Patton**, the question is one of historical fact. See **Patton**, 467 U.S. at 1036. That is to say, did each juror make the requisite swearings or not? The beliefs or opinions of the jurors which compromised each one's impartiality have been set forth earlier in this brief. In order to rehabilitate himself or herself, each juror, under **Patton**, had to 1)swear that he or she could set aside such beliefs or opinions, and 2)swear that he or she could decide the case on the evidence. The key question is, did each juror do that? With respect to each of the nine (9) jurors at issue, the answer is no.

Juror belief that law enforcement witnesses are more credible than non-law enforcement witnesses

The Eighth Circuit has stated that "[a] juror who 'would probably give [law enforcement officers] the benefit of the doubt,' is not what we would consider impartial." See **United States v. Sithithongtham**, 192 F.3d 1119, 1121 (8th

[3] In addition to the 7th Circuit, other federal circuits similarly reference the standard from **Patton** in examining a prospective juror's impartiality: **U.S. v. Angiulo**, 897 F.2d 1183, 1169-1182 (1st Cir. 1990); **Rock v. Zimmerman**, 959 F.2d 1237, 1254 (3rd Cir. 1992); **U.S. v. Turner**, 389 F.3d 111, 117 (4th Cir. 2004); **Holder v. Palmer**, 588 F.3d 328, 341 (6th Cir. 2009); **Perry v. Lockhart**, 871 F.2d 1384, 1390 (8th Cir. 1989); **Austad v. Risley**, 761 F.2d 1348, 1350 (9th Cir. 1984); **Wilcox v. Ford**, 813 F.2d 1140, 1150 (11th Cir. 1987).

Cir. 1999). "A defendant cannot receive a fair trial at the hands of jurors "who [are] inclined to give unqualified credence to [ ] law enforcement officer[s] simply because [they are] officer[s]." **U.S. v. Amerson**, 938 F.2d 116, 118 (8th Cir. 1991) citing **Chavez v. United States**, 258 F.2d 816, 819 (10th Cir. 1958); see also, **United States v. Jones**, 193 F.3d 948, 951-952 (8th Cir. 1999).

In this case, the State's evidence consisted largely of testimony from police officers or other law enforcement officials. Of the 31 witnesses called by the State, 13 fell into the category of police or law enforcement not including crime lab analysts. Beyond the basic number of law enforcement witnesses, the case also involved an issue of the police's failure to preserve potentially exculpatory evidence. As part of the State's case, it introduced surveillance video obtained from a nearby bank which showed a vehicle arriving at the crime scene area around 1:50 p.m. and then leaving around 3:00 p.m.. 208:37, 44. The footage also showed a man with a baseball-style hat with a hooded sweatshirt walking on the street toward the photo shop around 1:53 p.m., 208:24, and entering the shop. 208:38. The video then showed the man exiting the store, 208:39, and walking in the opposite direction at about 2:58 p.m. 208:23. In the 2:58 p.m. footage, the man is observed with three bags

and a backback. 208:25. Although police could not see the man's face in the video, not even a single feature or if the man was black or white, 208:48, the State used the footage to argue that the crime occurred during this time period and that the man in the video was Lepsch. 211:28-29. Lepsch however introduced evidence that police had received information that there had actually been some person in the photo shop after 4:15 p.m. 209:8. Other video obtained from a different business captured images from the front of the photo store during the time frame of 1:30 p.m. to 5:30 p.m. 209:4-5. The day after the incident, Vern Vandeberg, an investigator with the Wisconsin Department of Justice, reviewed such footage. 208:170. Vandeberg however did not download the footage or otherwise take steps to preserve it and when, days later, he went back to the business to collect the footage as evidence, only footage for the time period 1:30-3:30 was still recorded. 208:172. Contrary to the defense's position that the video would have shown an alternate suspect leaving the photo shop after 4:15 p.m., Vandeberg testified at trial that based on his review of the video, the "lost" or "destroyed" portion of the video showed no such person. 208:172. As such, a significant issue to both the State and defense turned on Vandeberg's credibility.

Despite the prominent role that police officer testimony would play at trial, neither the trial court, prosecutor, nor trial counsel asked two jurors who indicated that they would give police officer witnesses more credibility than non-police officer witnesses *any* questions on the issue. These jurors were Darrick M. (appendix, 120, 127-131) and John A. (appendix, 136, 143-145). Darrick M. and John A. were not rehabilitated in any respect and their responses to the jury questionnaire stood entirely uncontradicted. The record as such demonstrates that Darrick M. and John A. did not swear that they could one, set aside their beliefs, and two, render a verdict based solely on the evidence. Of course, as discussed elsewhere in this brief, John A.'s additional belief that Lepsch was guilty and that he had "made up" his mind as to Lepsch's guilt, further eroded his status as an impartial juror. Darrick M. and John A. therefore sat upon the jury despite their express biases in favor of law enforcement. Nonetheless, despite the lack of requisite, sworn assurances from Darrick M. and John A. during voir dire, both the circuit court and the court of appeals concluded the neither juror was objectively or subjectively biased under Wisconsin law. See appendix, 259 and 105. Such conclusion fails to comply with **Patton**. Significantly, such conclusion also fails to comply with Wisconsin law. When a juror openly

admits a bias and his partiality is never questioned, the juror is subjectively biased as a matter of law. See **State v. Carter**, 2002 WI APP 55, ¶12, 250 Wis.2d 851, 641 N.W.2d 517. Both Darrick M. and John A. fell into this category. Each juror openly admitted a bias regarding the credibility of police witnesses. Neither juror was questioned regarding such bias. Either under a pure 6th Amendment analysis or under Wisconsin law regarding subjective bias, both Darrick M. and John A. were therefore not impartial. Aside from the many other issues in this case, this issue alone requires a new trial for Lepsch.

The deficiencies in the voir dire regarding the other jurors at issue are not as pronounced as they are with Darrick M. and John A. That is to say, for these particular jurors, either the trial court, prosecutor, or trial counsel conducted some examination which attempted to explore the bias exhibited by the jurors. The problem with respect to these jurors is that the questions asked of them were imprecise if not incorrect and did not elicit from the jurors the requisite assurances. In the interest of brevity, Lepsch will not summarize here the voir dire of each juror but will instead direct the Court to the transcript excerpt for each juror's voir dire. A plain reading of the voir dire of each juror reveals that each juror did not swear that 1)he or she

could set aside his or her belief and 2)decide the case solely on the evidence:

Roxanne F., appendix, 158-161;

Nathan N., 206:69-72, appendix, 173-176;

Christopher R., 206:31-36, appendix, 188-193;

Pamela H., 206:110-113, appendix, 205-208;

Lisa K., 206:113-116, appendix, 220-222.

Juror belief that Lepsch was guilty and that juror had "made up" his or her mind

Of the twelve (12) jury members, four (4) jurors answered that they had expressed the opinion that Lepsch was guilty.[4] These included James T., John A., Mandy F., and Lisa K.[5] Appendix, 230, 138, 246, 216. Three (3) of those jurors also expressed the opinion or belief that they had "made up (their) mind(s)" that Lepsch was guilty. These included James T., John A., and Mandy F. juror nos. 6, 15, 17. Appendix, 230, 138, 246. The opinion

[4] It is relevant to note that in answering Question 35 of the jury questionnaire, of the three (3) alternate jurors, Jane L. (juror no.1), Nicole M. (juror no. 2) and Jeanne C. (juror no. 25) all expressed the belief that Lepsch was guilty. Appendix, 363, 378, 393. Jeanne C. and Jane L. additionally expressed the belief that they had "made up (their) minds" as to Lepsch's guilt. Appendix, 393, 363.

[5] As discussed previously this brief, John A. and Lisa K. were also biased in their beliefs that law enforcement witnesses are more credible than non-law enforcement witnesses.

of each juror that Lepsch was guilty depicted partiality or bias. The more troubling part however of each juror's answer is the second part, that he or she had "made up" his or her mind. Perhaps depending on what else a juror may say on voir dire, a juror's mere expression of his or her opinion that a defendant is guilty, may not be fatal to the juror's impartiality. But when the juror accompanies such opinion of the defendant's guilt with the acknowledgment that he or she has "made up" his or her mind, the juror cannot, as a general proposition, reasonably be viewed as impartial. Each juror's belief that he or she had "made up" his or her mind as to Lepsch's guilt is inherently contradictory with the ability to set aside such belief. There is a difference between merely having an opinion or belief as to an issue and having one's mind "made up." One can have an opinion or belief without yet having one's mind made up on the issue. The belief or opinion may yet to be fixed or established. The belief or opinion could still be reasonably set aside. But where one's mind is "made up" the belief or opinion is fixed and established. That is the essence of having one's mind "made up." It is unreasonable to conclude that the ordinary person in the juror's position would be able to set aside his or her belief that Lepsch was guilty, and that his or her "mind was made up," and decide the case only on

the evidence presented in court. The reasonable person whose "mind is made up" has been informed by his or her emotional and intellectual sensibilities which have established a conclusion in the person's conscious and unconscious mind. It is unreasonable to think that average person can simply disregard or eliminate the information that has already been provided by his or her emotional and intellectual sensibilities as well as the conclusion such sensibilities have already rendered. Additionally, once each respective juror expressed the belief that Lepsch was guilty and that the juror's mind was "made up," such beliefs automatically compromised the presumption of innocence as well as the burden of proof. A juror whose "mind is made up" does not start the case with the presumption that the defendant is innocent. He or she starts the case with the reverse presumption, that the defendant is guilty. More troubling, since the juror's "mind is made up," it becomes the defendant's burden to "unmake" the juror's mind or persuade the juror of his innocence. Such mind-set on the part of the juror impermissibly shifts the burden of proof from the state to the defendant. For the above reasons, each juror's belief that he or she had "made up (his) or (her) mind" about Lepsch's guilt, was of such a nature and strength so as to establish a "presumption of partiality." See **Irwin v. Dowd**, 366 U.S. at 723.

Therefore, even if each juror could pass the first prong of the **Patton** test, that is, did he or she swear that he or she could set aside the belief and decide the case solely on the evidence, each juror could not pass the second part, that is, should the juror's statements be believed. See **Patton**, 467 U.S. at 1036. Such statements should not be believed because they are so objectively unreasonable. That is, the beliefs are of such a nature and strength that they establish a "presumption of partiality," and it would be unreasonable to believe that the ordinary person could simply set them aside irrespective of any statement that he or she could. But of course, we do not get to this second part of **Patton**. When we look at what each juror said during voir dire, we see that each juror failed to satisfy even the first part of the **Patton** test. Each juror did not at a minimum swear that he or she could set aside his or her beliefs and decide the case solely on the evidence.[6] Perhaps the reason for this is that each juror was not asked the proper questions by the trial court, prosecutor or trial counsel. Nonetheless, this failure to make

[6] The court of appeals, without making any detailed analysis of what each juror actually said during voir dire, summarily concluded that each juror was neither subjectively nor objectively biased:

As to the four jurors who stated in the jury questionnaire that he or she had an opinion as to Lepsch's guilt and/or that he or she had made up his or her mind as to Lepsch's guilt (James T., John A., Mandy F. and Lisa K)., each stated during voir dire that he or she had the ability to put that opinion out of his or her mind, listen to the evidence, and make a decision based on the evidence. Court of Appeals decision, ¶13, appendix, 107.

The problem with this characterization of what the jurors said during voir dire is that it is factually incorrect according to the transcript.

the proper inquires of the jurors resulted in their failure to make the requisite assurances. In the interest of brevity, Lepsch will not summarize here each juror's voir dire but will instead direct the Court to the voir dire transcript for each juror:

John A., 206:85-87, appendix, 143-145;

James T., 206:37-40, appendix, 236-239;

Mandy F., 206:102-105, appendix, 251-254.

Juror disbelief in the presumption of innocence

Christopher R.'s beliefs, as set forth earlier in this brief, are deeply troubling in that they go to the very heart of the criminal process, the presumption of innocence. Given the nature and strength of such beliefs, Lepsch maintains that they established a "presumption of partiality." At the very least, such beliefs fatally compromised the juror's ability to be impartial. Such beliefs manifested a bias, an inherent rejection by Christopher R. of a fundamental right enjoyed by all citizens. To meet the minimum threshold of impartiality, Christopher R. had to swear that he could set aside his beliefs and decide the case solely on the evidence.

Christopher R. failed to do so.[7] Curiously, the trial court did not ask Christopher R. any questions regarding his beliefs as to the presumption of innocence. Appendix, 188-193. Not surprisingly, trial counsel was the only one to examine Christopher R. regarding such beliefs. Appendix, 190-193. Nevertheless, trial counsel only asked a few questions and none of them squarely elicited assurances from Christopher R. that he could set aside his beliefs. Appendix, 188-193. Trial counsel only asked Christoper R. if he was "okay, with the principle (of the presumption of innocence)" and Christopher R. responded, "[y]eah." Appendix, 193. The inquiry made by trial counsel and Christopher R.'s response to it failed to establish an assurance that Christopher R. could set aside his beliefs that the presumption of innocence should not apply in all cases, that in some cases there should be a presumption of guilt, and that if the state goes to the trouble of bringing somebody to trial, they are "probably" guilty. Trial counsel's inquiry similarly failed to establish that Christopher R. could return a verdict based solely on the evidence introduced at trial. Finally, as

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[7] With respect to Christopher R., the court of appeals stated as follows:

…that juror was reminded in voir dire that, under the presumption of innocence, jurors had to start out looking at Lepsch as innocent, and that Lepsch was innocent as he sat there that day. That juror was asked if he "was okay with" that principal, and the juror responded in the affirmative. Court of appeals decision, ¶14, appendix, 107.

discussed earlier in this brief, Christopher R.'s impartiality was additionally compromised by his belief that police officer witnesses are more credible than non-police officer witnesses.

James T., John A., Mandy F., and Lisa K. all believed Lepsch was guilty before hearing even one piece of evidence. James T., John A., and Mandy F. also believed that their minds were "made up." John A. and Lisa K., along with Christopher R., Nathan N., Pamela H., Darrick M., and Roxanne F., additionally believed that police officer witnesses are more credible than other witnesses. Finally, with respect to Christopher R., on top of his bias regarding the credibility of police officers, Christopher R. believed that those defendants proceeding to trial were "probably" guilty, that the presumption of innocence should not apply in all cases, and that a presumption of guilt should exist in some cases. Under **Patton**, these jurors failed to meet the test for impartiality because they did not swear that they could 1)set aside their beliefs or opinions, and 2)decide the case solely on the evidence. Under Wisconsin law, each juror was subjectively biased based on the mind set expressed by each one. Each juror was objectively biased because the record, namely the voir dire of each juror, failed to support a finding that a reasonable person in

the juror's position could set aside the opinion or prior knowledge. In order to receive a new trial, Lepsch must show only that one (1) juror was not impartial. See **Parker v. Gladden**, 385 U.S. at 366. Lepsch has done so and is entitled to a new trial under both Article I, Section 7 of the Wisconsin Constitution, and the 6th Amendment.

Issues No. 2, 3 and 4 - In order for a juror to be considered impartial under the 6th Amendment to the United States Constitution, *Patton* requires that the juror swear that he or she can set aside any opinion that he or she may hold and decide the case on the evidence; to the extent that the court of appeals decision and Wisconsin law regarding juror impartiality allow for less, the decision and law it is based upon do not sufficiently comport with *Patton*.

One federal court, in applying **Patton**, has stated that the standard it sets forth "is a federal constitutional requirement and Wisconsin courts are not free to disregard or dilute it." See **Oswald v. Bertrand**, 249 F.Supp.2d at 1105. Yet that is what both the circuit court and the court of appeals did. Indeed, both the circuit court and the court of appeals expressly declined to apply any federal law, notably, **Patton**, and its progeny, **Oswald v. Bertrand**, 249 F.Supp.2d 1078, affirmed 374 F.3d 475, **Thompson v. Altheimer & Gray**, 248 F.3d 621, and **Marshall v. City of Chicago**, 762 F.3d 573, to Lepsch's

claims regarding the partiality of his jurors. See court of appeals decision, appendix, 105, and circuit court decision, appendix, 259. Instead, both the circuit court and the court of appeals evaluated the juror impartiality issues according only to Wisconsin law, specifically, **State v. Lindell**, supra, **State v. Faucher**, supra, **State v. Mendoza**, 227 Wis.2d 838, 596 N.W.2d 736 (1999), and **State v. Erickson**, 227 Wis.2d 758, 776, 596 N.W.2d 749 (1999). The problem is that the Wisconsin cases seemingly do not require an affirmative swearing by the juror that he or she can set aside his opinion and decide the case on the evidence.[8] In terms of subjective bias, a juror is determined to be impartial if he or she is a reasonable person who is sincerely willing to set aside any opinion or prior knowledge he or she may have. See **State v. Kiernan**, 227 Wis.2d at 745. In terms of objective bias, the standard is whether a reasonable person in the prospective juror's position could set aside the opinion or prior knowledge. See **id**. Under both

[8] At earlier points in the development of Wisconsin jurisprudence, the standard for impartiality appears to have more closely aligned with that stated in **Irwin v. Dowd** and **Patton**, supra: "The important thing is whether the opinion can be set aside and the defendant tried only on the evidence offered at trial." **Beavers v. State**, 63 Wis.2d 597, 217 N.W.2d 307 (1974) citing **Irwin v. Dowd** at 615. See also, **Mainville v. State**, 173 Wis.12, 17-18 (1920): " In **Baker v. State**, 88 Wis. 140, 59 N.W. 570; **Niezorawski v. State**, 131 Wis.166, 111 N.W. 250; and in **Burns v. State**, 145 Wis. 373, 128 N.W. 987, this court has had occasion to discuss the question of what constitutes an impartial juror. The rule deducible from these and other cases is that a juror who says he can and will give the defendant the benefit of the presumption of innocence; who can and will disregard any opinion he may have formed or expressed as to his guilt or innocence, and who can and will try him impartially upon the evidence given in court and upon that alone, is competent."

the subjective and objective bias standards, a trial court can determine that a juror is not subjectively or objectively biased, and is therefore impartial, based on statements made by the juror as well as the juror's demeanor, which fall short of express, affirmative assurances by the juror himself or herself that he or she can set aside his or her opinion and decide the case on the evidence. A finding by a court that a juror is "sincerely willing" to set aside an opinion is different from an express affirmation from the juror himself or herself that he or she *can* set aside the opinion, and decide the case on the evidence. A finding by a court that a reasonable person in the juror's position could set aside the opinion or prior knowledge is also different from an express affirmation from the juror himself or herself that he or she *can* set aside the opinion, and decide the case on the evidence. As this case illustrates, Wisconsin law regarding subjective and objective bias allows a circuit and/or appellate court in evaluating the impartiality of a juror to conclude that the juror is not subjectively or objectively biased even if the juror himself or herself does not make the requisite assurances under **Patton.** In this regard, a juror who may be considered by a circuit and/or appellate court to be "impartial" under Article I, Section Seven of the Wisconsin Constitution, may nonetheless not be "impartial" under the

6th Amendment. In this case, for each of the nine (9) jurors which Lepsch claims were not impartial, the proper 6th Amendment inquiry required that a court examine what each juror said during voir dire and determine if the juror specifically swore that he or she could 1)set aside his or her opinion and 2)decide the case on the evidence. Both the circuit court and the court of appeals failed to do this and instead simply analyzed whether the jurors were objectively or subjectively biased under Wisconsin law. Both courts came to the wrong conclusion and both courts rendered decisions which are in direct conflict with **Patton**. This same circumstance also played out in **State v. Theodore Oswald**, 2000 WI App 2, 232 Wis.2d 62, 606 N.W.2d 207, where the court of appeals concluded that certain jurors were not subjectively or objectively biased, only to have the United States District Court for the Eastern District of Wisconsin, affirmed by the Seventh Circuit Court of Appeals, grant habeas corpus relief, in part because the challenged jurors did not provide the requisite assurances under **Patton** and the 6th Amendment**.** See **State v. Theodore Oswald**, 2000 WI App 2, at ¶¶19-36; **Oswald v. Bertrand**, 249 F.Supp.2d at 1105, affirmed 374 F.3d 475. The situation will no doubt continue to arise as long as circuit courts analyze a prospective juror's impartiality based solely on whether the juror is

subjectively or objectively biased as defined by Wisconsin law without regard for whether the juror has himself or herself specifically sworn that he or she can 1)set aside his or her beliefs and opinions, and 2)decide the case solely on the evidence as required by **Patton**.

Further, there is a contradiction between certain federal law which requires a juror's assurances to be "unequivocal," see **Thompson v. Altheimer & Gray**, 248 F.3d at 626, **State v. Allen**, 605 F.3d at 466, and **Marshall v. City of Chicago**, 762 F.3d at 576, and Wisconsin law which rejects the need for "unequivocal" assurances, see **State v. Erickson**, 227 Wis.2d at 776 citing **State v. Ferron**, 219 Wis.2d at 507, n.9., **State v. Faucher**, 227 Wis.2d at 731, note 8, **State v Lindell**, 2001 WI 108, ¶100, 245 Wis.2d 689, 629 N.W.2d 223 and **State v. Kiernan**, 227 Wis.2d at 750 at note 10.[9, 10]

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[9] In addition to the 7th Circuit, other federal appellate courts require "unequivocal assurances" in evaluating a juror's impartiality. See **United States v. Gonzalez**, 214 F.3d 1109, 1113-1114, (9th Cir. 2000), **United States v. Evans**, 272 F.3d 1069, 1079 (8th Cir. 2001), and **Wolfe v. Brigano**, 232 F.3d 499, 502 (6th Cir. 2000).

[10] Former Justice Geske, in the dissent in **Ferron** stated as follows: "In almost every serious felony case, honest prospective jurors express concerns about the heinous factual allegations, the presumption of innocence, a prior record, other acts testimony, a defendant's option not to testify, evaluating a police officer's testimony in the same manner as other witnesses, or the victimization of a child, elderly or disabled person. We encourage trial judges to explore those fears, biases, and natural reactions with members of the prospective jury panel. Few people can honestly tell the court that they are bothered by some of these factors in the case and then absolutely, *without equivocation*, reassure the judge that they are certain they can disregard their concerns. *Most honest people can only commit that they will do their best to be fair.* The trial judge must then, based upon his or her own assessment of that person's sincerity and ability to be fair, decide whether that person is qualified to sit on that particular case." **State v. Ferron**, 219 Wis.2d at 507. Italics added.

To be sure, even **Patton** and 7th Circuit authority recognize that during voir dire a juror may give ambiguous and contradictory statements. See **Patton**, 467 U.S. at 1039 and **United States** v. **Allen**, 605 F.3d at 466, "[p]rior equivocating or wavering is hardly dispositive in assessing credibility…". But at some point before a juror may be deemed to be impartial, that juror must give a *final, unequivocal statement* that he or she can 1)set aside his or her belief and 2)decide the case soley on the evidence. See **State v. Allen**, 605 F.3d at 466; **Thompson v. Altheimer & Gray**, 248 F.3d at 626. In short, yes, prior equivocating is expected and acceptable. But in the end, before the juror can be deemed to be impartial he or she must make a commitment and give the requisite unequivocal assurance. A commitment "that they will do their best to be fair," **State v. Ferron**, 219 Wis.2d at 507, is simply not enough. In **Thompson**, although the juror in question stated that "she would *try* to be fair," she expressed no confidence in being able to succeed in that attempt. See **Thompson v. Altheimer & Gray**, 248 F.3d at 626. Italics added. The 7th Circuit therefore concluded that the juror could not be deemed impartial because she did not provide "unequivocal assurances" or "unwavering affirmations of impartiality." **Id.** at 626-627. A

prospective juror's statement that he or she would "try" to set aside a belief or opinion, or "try" to decide the case on the evidence presented at trial has similarly been expressly rejected by other federal circuit courts. See **Wolf v. Brigano**, 232 F.3d at 503, (6th Cir. 2001), "[t]he Sixth Amendment guarantees Wolfe the right to a jury that will hear his case impartially, not one that tentatively promises to try…"; **United States v. Sithithongtham**, 192 F.3d at 1121, (8th Cir. 1999), "'[p]robably' is not good enough" assurance; **United States v. Gonzalez**, 214 F.3d 1109, 1114 (9th Cir. 2000), "I'll try" is insufficient assurance. Of course, jurors' statements that they would "try" were also specifically rejected in **Oswald v. Bertrand**, 249 F.Supp.2d at 1106-1107. For the above reasons, to the extent that Wisconsin case law, specifically **Erickson**, **Ferron**, **Kiernan**, **Faucher** and **Lindell**, allows for a finding of impartiality where the juror has not given a final, unequivocal assurance that he or she can set aside his or her belief, and decide the case solely on the evidence, such case law, as Judge Adelman writes in **Oswald v. Bertrand**, 249 F.Supp.2d at 1105, "disregard(s) or dilute(s)" a federal constitutional requirement.

Issue No. 5 - Even in absence of actual bias, Lepsch's due process rights were denied by circumstances which created the "likelihood or appearance of bias," and the trial court's failure to conduct a sufficient inquiry regarding such circumstances.

It is clear under United States Supreme Court precedent that even if there is no showing of actual bias, due process is denied by circumstances that create the "likelihood or the appearance of bias." See **Peters v. Kiff**, 407 U.S. 493, 502, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972). With respect to even the "appearance of bias," this Court has repeatedly stated, "[w]e caution and encourage the circuit courts to strike prospective jurors for cause when the circuit courts 'reasonably suspect' that juror bias exists." See **State v. Lindell**, 245 Wis.2d at 716, **State v. Louis,** 156 Wis.2d 470, 478, 457 N.W.2d 484 (1990), **State v. Ferron**, 219 Wis.2d at 499, and **State v. Faucher**, 227 Wis.2d at 715. 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. **State v. Lindell**, 245 Wis.2d at 716. Such action will avoid the appearance of bias, and may save judicial time and resources in the long run. **Id.**

While Lepsch maintains that he has already demonstrated actual bias, at the very least he has demonstrated "circumstances that created the likelihood or

the appearance of bias." The jurors at issue in this appeal presented multiple layers and combinations of bias. Of the twelve jurors, four jurors (James T., John A., Mandy F., and Lisa K.) believed Lepsch was guilty before hearing even one piece of evidence. On top of that, three of the four (James T., John A., and Mandy F.) believed that their minds were "made up." On top of that, two (John A. and Lisa K.), along with Christopher R., Nathan N., Pamela H., Darrick M., and Roxanne F., believed that police officer witnesses are more credible than other witnesses. With respect to Christopher R., on top of his bias regarding the credibility of police officers, he held the belief that those defendants proceeding to trial were "probably" guilty, that the presumption of innocence should not apply in all cases, and that a presumption of guilt should exist in some cases. Of the three (3) alternate jurors, Jane L., juror no.1, Nicole M., juror no. 2, and Jeanne C, juror no. 25, all expressed the belief that Lepsch was guilty. Appendix, 363, 378, 393. Jane L. and Jeanne C. additionally expressed the belief that they had "made up (their) minds" as to Lepsch's guilt. Appendix, 363, 393. If the beliefs and opinions of these jurors did not constitute "bias," they presented at a minimum the "appearance of bias." Adding to the "appearance of bias" or "likelihood of bias," was the extensive pre-trial publicity that surrounded the case. Given

the significant risks of bias and prejudice, the trial court had an obligation to take certain measures to avoid or at least minimize such risks. The United States Supreme Court imposes a duty of vigilance on trial judges to ensure that defendants are tried by impartial juries. Due process requires that the "trial judge [be] ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." **Smith v. Phillips**, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). The Supreme Court has described the trial judge's duty to be vigilant in a number of ways. See **Chandler v. Florida**, 449 U.S. 560, 574, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) (stating that trial courts "must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law"); **Sheppard v. Maxwell**, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.E.2d 600 (1966) (stating that courts must take such remedial measures as are necessary to prevent prejudicial outside interference at its inception); **Remmer v. United States**, 347 U.S. 227, 230, 74 S.Ct. 450, 98 L.Ed. 654 (1954) (indicating that when a trial court becomes aware of an occurrence that may have biased a juror, the court must "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial"); **Dennis v. United States**, 339 U.S. 162,168, 70

S.Ct. 519, 94 L.Ed. 734 (1950) (stating that when empanelling a jury, a trial court must be zealous in protecting the rights of the accused); and finally, **Frazier v. United States**, 335 U.S. 497, 511, 69 S.Ct. 201, 93 L.Ed. 187 (1948), stating that the trial court has the ultimate duty to ensure the seating of an impartial jury. As such, irrespective of trial counsel's performance and obligations, the trial court had an independent obligation to ensure that the voir dire in the case was conducted according to 6th Amendment principles, and in particular, to ensure that any and all jurors selected were "impartial" as that term is defined by federal constitutional law. The trial court in this case did not satisfy those obligations. First, in assessing the trial court's actions, it is noteworthy to consider the availability of extra prospective jurors. See **State v. Lindell**, 245 Wis.2d at 717, footnote 6. In this case, the trial court had 65 prospective jurors from which to select the jury. Appendix, 113-114. Therefore, at the time the jurors were individually questioned regarding their answers to the jury questionnaire, there were 56 other prospective jurors who were "blank slates," who had not, based on their own answers to the jury questionnaire, demonstrated the biases exhibited by Christopher R., James T., John A., Nathan N., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F. To avoid the appearance of bias, the trial court should have simply

excused Christopher R., James T., John A., Nathan N., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F, and replaced them with 9 of the other 56 prospective jurors. Second, given that the trial court kept Christopher R., James T., John A., Nathan N., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F. on the venire, the trial court should have examined each of them more fully regarding their beliefs and opinions, and their exposure to pre-trial publicity. Jury selection started on the morning of July 23, 2013 at 8:00 a.m. and by 2:00 p.m. the jury had been selected. Appendix, 113-114. As such, the jury selection process was fast and short especially considering the gravity of the charges and the extent of the pre-trial publicity. Perhaps both a reason for and a consequence of such an abbreviated process is that the trial court did not provide for a comprehensive examination of each prospective juror, especially those who presented beliefs or opinions which made them ripe for dismissal. With respect to James T., John A., and Mandy F., the trial court did not ask any questions which sufficiently probed the circumstances and impact of pre-trial publicity on their beliefs that Lepsch was guilty and that they had "made up" their minds. The trial court similarly did not ask any questions that probed the inherent conflict of having one's mind "made up" and having the ability to lay aside such belief and decide the case solely on

the evidence. The trial court never asked James T., John A., and Mandy F. if they themselves believed they could be fair and impartial. With respect to Christopher R., the trial court never asked Christopher R. any questions which probed his belief that defendants proceeding to trial were "probably" guilty, that the presumption of innocence should not apply in all cases, and that a presumption of guilt should exist in some cases. Finally, as discussed throughout this brief, the trial court made no mention of, or applied, the requirement that a juror provide "unequivocal assurances." In ignoring or dismissing this standard, the trial court could not conduct a legally sufficient inquiry into those circumstances which created, at the very least, the "appearance or likelihood" of bias. The trial court's obligation to conduct a sufficient inquiry to avoid the "appearance or likelihood" of bias under the 6th Amendment required it to apply the proper legal standard. It did not. Given the severity of the charges against Lepsch, the extent of the pre-trial publicity, and the nature of the biases expressed by the prospective jurors, a reviewing court cannot fairly look at the voir dire of James T., John A., Mandy F., and Christopher R., and conclude that such voir dire satisfied the trial court's independent obligation to safeguard Lepsch's right to an impartial jury and to due process. Irrespective of the issue of whether any one juror was actually

biased, the factual circumstances pertaining to the jury selection on a whole, at a minimum, gave rise to the "likelihood or appearance of bias." If this case does not present circumstances which create the "likelihood or appearance of bias," this Court should clarify just what circumstances do rise to such level.

Issue No. 6 - Circuit clerk's administration of the oath to the jury venire outside Lepsch's presence violated Lepsch's rights to be present at a critical stage in the proceeding, to receive a public trial, and to receive a trial by a jury properly sworn to be impartial.

Both federal and state law require that prospective jurors take an oath as part of the jury selection process. See **Patton,** at 467 U.S. at 1036; Wis. Stat. Sec. 805.08. Wis. Stat. Sec. 805.08 provides in relevant part:

> The court *shall examine on oath* each person who is called as a juror to discover whether the juror…has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused. Italics added.

In recognition of this duty, the Wisconsin Judicial Bench Book, Criminal and Traffic, 2013, advises trial court judges to "Give panel oath before voir dire examination," and recommends the following:

> "Do you and each of you solemnly swear (or affirm) that you will true answers make to such questions as shall be put to you touching on your qualifications to act as jurors in the pending case, so help you God?" CR 23-4 (2013).

Although it may be a standard local practice for the clerk to administer the oath outside the presence of the court and the parties, such practice is problematic and actually unlawful for a number of reasons.[11] As an initial matter, Section 805.08 does not authorize the clerk to administer the oath. Section 805.08 uses mandatory language in specifying that "The *court shall* examine on oath…" the prospective jurors. See Wis. Stat. Sec. 805.08. Italics added. The Judicial Bench Book, as referenced above, similarly contemplates that it is the court that must administer the oath. The requirement that the court rather than the clerk administer the oath makes sense when we consider the various constitutional problems that materialize when, as in this case, the court does not administer the oath to the prospective jurors in the courtroom in the presence of the defendant. First, because the voir dire process is a "critical stage" in the criminal proceeding, Lepsch, like all defendants, had a right under both the United States and Wisconsin Constitutions to be present with counsel. See **State v. Tulley**, 2001 WI App

[11] It should be noted that the clerk's administration of the oath in such fashion also violated SCR 71.01 which requires in relevant part as follows:
(2) All proceedings in the circuit court shall be reported, except for the following:

(a) A proceeding before a court commissioner that may be reviewed de novo;
(b) Settlement conferences, pretrial conferences, and matters related to scheduling;
(c) In a criminal proceeding, a matter preceding the filing of a criminal complaint.

236, ¶6, 248 Wis.2d 505, 635 N.W.2d 807; **State v. Harris**, 229 Wis.2d 832, 839, 601 N.W.2d 682 (Ct. App. 1999); Wis. Stat. Sec. 971.04(c). Lepsch specifically had a right to be present "at *all* proceedings when the jury is being selected." See **State v. Harris**, supra at 839. As noted above, Wis. Stat. Sec. 805.08 mandates that a trial court "examine on oath" each prospective juror to discover whether the juror has expressed or formed any opinion, or is aware of any bias or prejudice in the case. Under **State v. Harris**, "all proceedings when the jury is being selected" logically includes the administration of the oath to the prospective jurors. After all, the juror's oath is an integral element of a defendant's fundamental right to have his guilt decided by an impartial jury. See **State v. Block,** 170 Wis.2d 676, 680, 489 N.W.715 (Ct. App. 1992). Lepsch, like all defendants, therefore had a constitutional interest in ensuring that the trial court properly administered the oath to the prospective jurors and that all prospective jurors did in fact swear or affirm as required by Section 805.08 and federal law. In order to protect such interest, Lepsch had to be present for the oath given to and taken by the prospective jurors; he was not. Second, the administration of the oath in the "jury assembly room" violated Lepsch's right to a public trial. The Sixth Amendment provides an accused the right to a public trial. **State v.**

Pino/State v. Seaton, 2014 WI 74, ¶40, 356 Wis.2d 106, 850 N.W.2d 207, citing **Presley v. Georgia**, 558 U. S. 209, 212, 1305 S.Ct. 721, 175 L.Ed.2d 675 (2010).[12] The right to a public trial includes voir dire. **Id**. at ¶43 citing **Presley** 558 U.S. at 213. The United States Supreme Court has repeatedly recognized that a violation of the public trial right is a defect that is structural in nature. See **Waller v. Georgia**, 467 U.S. 39, 49-50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), subsequently cited in **Arizona v. Fulminante**, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), **Neder v. U. S**. 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), and **U.S. v. Gonzalez-Lopez**, 548 U.S. 140, 148-49, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). A structural error taints the entire framework of the trial, is not subject to harmless error analysis and requires automatic reversal. See **Arizona v**. **Fulminante**, 499 U.S. at 309-310, and **Neder v. U.S**., 527 U.S. at 8. Similarly, it is the settled rule of the federal courts that a showing of prejudice is not necessary for a reversal of a conviction not had in a public proceeding. See **Douglas v. Wainwright**, 714 F.2d 1532, 1542 (11th Cir. 1983) citing **Levine v. United States**, 362 U.S 610, 627, n.1, 80 S.Ct. 1038, 4 L.Ed.2d 789 (1960). In this case, a crucial part of the voir dire proceeding, the administration of the oath,

[12] Wisconsin Constitution Article I, Section 7 also provides a defendant the right to public trial as does Wis. Stat. Sec. 757.14, "Sittings, Public."

was not made part of Lepsch's public trial. To satisfy Lepsch's right to a public trial, the entire voir dire process, including the administration of the oath, should have occurred in the courtroom in the presence of Lepsch, trial counsel and the public at large. As discussed above, it did not. Under **Waller**, **Wainwright**, and **Levine,** prejudice must be presumed. Nonetheless, the court of appeals decided the issue by concluding that since Lepsch did not object at trial, under **State v. Pino/State v. Seaton**, 2014 WI 74 at ¶63, he forfeited his right to a public trial. In further reliance on **Pino**, the court of appeals also declined to presume prejudice and concluded that Lepsch could not show actual prejudice. Appendix, 104. **Pino** however applies to a different factual situation, one where the defendant is aware that the judge has excluded the public from the courtroom and the defendant fails to object to the judge's decision to do so. See **State v. Pinno/ State v. Seaton**, 2014 WI 74 at ¶7. Such is not the case here. At no time during the proceedings did the trial court inform Lepsch that the oath to the prospective jurors would be administered in the "jury assembly room" by the clerk rather than the judge in open court. Unlike the defendants in **Pinno/Seaton**, Lepsch never received notice of a possible infringement on his public trial right. For this reason, the forfeiture exception carved out in **State v. Pinno/Seaton** does

not apply. Also, unlike the defendants in **Pinno/Seaton**, Lepsch can show actual prejudice. To the extent that the administration of the oath was defective, which Lepsch maintains it was, it precluded him from receiving a trial by an impartial jury. The oath taken by a jury is not ceremonial or symbolic. Rather, a juror's oath is an integral element of a defendant's fundamental right to have his guilt decided by an impartial jury. See **State v. Block**, 170 Wis.2d at 680. If a juror is not sworn or not sworn properly, then that juror cannot be deemed to be an "impartial" juror for purposes of the 6th Amendment or Article I, Section 7. In essence, the improper administration of the oath created two different structural errors. The first directly pertained to Lepsch's right to a public trial and the second pertained to Lepsch's right to an impartial jury. Under **Hughes v. United States**, 258 F.3d 453, 463 (6th Cir. 2001) citing **Johnson v. Armontrout**, 961 F.2d 748, 756 (8th Cir. 1992) trial by a jury other than an impartial one is plainly a structural error not subject to harmless error analysis. Finally, in addition to the prejudice caused immediately to Lepsch by the public trial violation, prejudice also existed as to the public at large and the media, both of which had an obvious and compelling interest in maintaining an open court. See **State v. Pinno/ State v. Seaton**, 2014 WI 74 at ¶106.

Issue No. 8.[13] **The circuit court violated Lepsch's rights to due process and to an impartial jury under the 6th and 14th Amendments to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution by arbitrarily depriving him of 1)right to receive proper number of peremptory strikes, 2)right to full use of peremptory strikes, and 3)right to have biased jurors removed.**

When a state grants criminal defendants certain statutory rights, it may create a "substantial and legitimate expectation" on their part that they will not be deprived of their liberty in violation of such rights. **Oswald v. Bertrand**, 249 F. Supp.2d at 1101 citing **Hicks v. Oklahoma**, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). If the state arbitrarily disregards the rights it has created, it may be found to have violated due process of law. **Id**.

Trial court failed to provide Lepsch with proper number of peremptory strikes

Under Wis. Stat. Sec. 972.03, because Lepsch faced a charge made punishable by life imprisonment, he was entitled to six (6) peremptory strikes. Because the trial court also selected an alternate juror, actually three (3) alternate jurors, Lepsch was entitled, also under Section 972.03, to one

[13] Lepsch has purposely addressed Issue No. 8 before Issue No. 7 in the interest of a logical presentation of facts and arguments.

additional peremptory strike which would have properly given him seven (7) peremptory strikes. The trial court gave Lepsch only 6 peremptory strikes. Appendix, 113.

Trial court's failure to remove biased jurors for cause deprived Lepsch of full use of his peremptory strikes

Wisconsin statute provides that "[i]f a juror is not indifferent in the case, the juror shall be excused." See Wis. Stat. Sec. 805.08(1). The presiding trial judge has the authority and responsibility, either *sua sponte* or upon counsel's motion, to dismiss prospective jurors for cause. **United States v. Torres**, 128 F.3d 38, 43, (2nd Cir. 1997), relying on **Frazier v. United States**, 335 U.S. 497 at 511. Where a defendant is forced to use most or all of his peremptory strikes to strike jurors who should have been properly excused by the trial court for cause, the error is harmful. See **State v. Sellhausen**, 2012 WI 5, ¶17, 338 Wis.2d 286, 809 N.W.2d 14 citing **State v. Lindell**, supra at ¶113. Similarly, the **Sellhausen** Court cited **Pool v. Milwaukee Mechanics' Ins. Co.,** 94 Wis. 447, 453, 69 N.W.65 (1986) for the proposition that "[t]he true rule, we hold, is…that it is not prejudicial error to overrule a challenge for cause, unless it is shown that an objectionable juror was forced upon the

party, and sat upon the case after such party had exhausted his peremptory challenges. **Id**. at ¶17. In this case, Lepsch was forced to utilize all of his peremptory strikes to exclude certain jurors who should have been excused by the trial court for cause. These jurors included Robert B., Mary S., Beverly R., Mary Sw. and Stephen H., juror nos. 8, 10, 16, 22 and 27. Because Lepsch was required to exhaust his peremptory strikes on these jurors, he did not have sufficient strikes left to exclude other objectionable jurors, specifically, Christopher R., James T., John A., Nathan N., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F., and such objectionable jurors therefore sat upon the case much to Lepsch's prejudice. This problem was exacerbated by the fact that the trial court improperly gave Lepsch six (6) peremptory strikes as opposed to the seven (7) required by statute. Significantly, had the trial court properly excused Robert B., Mary S., Beverly R., Mary Sw. and Stephen H., for cause, and given Lepsch the one additional peremptory strike to which he was entitled, Lepsch could have used 4 of those 7 peremptory strikes to exclude James T., John A., Mandy F., and Lisa K., the jurors who had expressed the belief that Lepsch was "guilty" and the belief that they had "made up (their) minds" about Lepsch's guilt. Lepsch additionally could have excluded Christopher R., the juror who did

not believe in the presumption of innocence "100%" of the time and instead thought that in some cases there should be a presumption of guilt.

Like James. T., John A., Mandy F. and Lisa K., prospective jurors Robert B., Beverly R., and Mary Sw., in answering the jury questionnaire, expressed the belief that Lepsch was guilty. Appendix, 278, 309, 329. Robert B. and Mary Sw. also expressed that each had "made up (his or her) mind" that Lepsch was guilty.[14] Appendix, 278, 329. Robert B., along with other prospective jurors Mary S., and Stephen H., expressed the belief that witnesses who were police officers are more credible than non-police officer witnesses. Appendix, 280, 288, 345. Mary Sw. additionally knew and personally interacted with A.J.P. and P.P. at their store. Appendix, 337-339. Beverly R. additionally had a daughter who was attacked by a parolee. Appendix, 318-319. Mary S. additionally knew P.P.'s sister. Appendix, 296-300. Lepsch maintains that all of these prospective jurors were not impartial as required by federal and state law and that the trial court should have excluded them for cause. Because the trial court failed to do so, Lepsch was required to exhaust all of his peremptory challenges to

[14] Robert B.'s questionnaire is not included in the appendix.

exclude them, thereby preventing him from using such strikes to exclude other objectionable jurors. As a result, the other objectionable jurors sat upon the case. The circumstances were therefore harmful and prejudicial under the principles of **Pool, Sellhausen** and **Lindell**.

Issue No. 7 – Lepsch received ineffective assistance of counsel.

Due to trial counsel's failure to preserve the issues at trial, all of the issues litigated in this appeal have been raised via a claim of ineffective assistance of counsel under **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .

Trial counsel's failure to ensure that the trial court properly administered the oath to the jury venire in Lepsch's presence constituted ineffective assistance of counsel

Under **Strickland v. Washington**, supra, a defendant claiming ineffective assistance of counsel must show that counsel's performance was both deficient and prejudicial. **Strickland**, 466 U.S. at 687. To meet the deficiency prong, the defendant must show that counsel's conduct fell below an objective standard of reasonableness. **State v. Thiel**, 2003 WI

111, ¶19, 264 Wis.2d 571, 665 N.W.2d 305. Prejudice exists when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." **State v. Johnson**, 133 Wis.2d 207, 222, 395 N.W.2d 176 (1986) (quoting **Strickland**, 466 U.S. at 687). Trial counsel was deficient in failing to ensure that prospective jurors were properly sworn as part of the voir dire process. In support of this allegation, Lepsch would incorporate herein by reference the specific arguments set forth above on pages 38 to 43 of this brief. In general, trial counsel failed to take steps to safeguard Lepsch's rights to be present at a "critical stage" of the proceeding and to receive a public trial. In terms of prejudice, Lepsch suffered actual prejudice in that an improperly sworn jury did not and could not constitute an impartial jury. In the alternative, this Court should presume prejudice given that the failure to properly administer the oath to prospective jurors amounted to structural error.

Trial counsel was ineffective in failing to sufficiently examine and challenge prospective jurors for cause

When a venireperson expressly admits bias on voir dire, without a court response or follow-up, for counsel not to respond in turn is simply a failure

"to exercise the customary skill and diligence that a reasonably competent attorney would provide." **Hughes v. United States**, 258 F.3d at 462. Additionally, the failure to attempt to bar the seating of obviously biased jurors constitutes ineffective assistance of counsel of a fundamental degree. See **Johnson v. Armontrout**, 961 F.2d at 756. Similarly, under Wisconsin case law, a lawyer's failure to act to remove a biased juror who ultimately sat on the jury constitutes deficient performance resulting in prejudice to his or her client. See **State v. Carter**, 2002 WI App 55 at ¶15. As discussed on pages 10-25 of this brief, James T., John A., Mandy F., Lisa K., Christopher R., Nathan N., Pamela H., Darrick M. and Roxanne F. openly expressed beliefs which precluded them from being considered impartial under both the 6th Amendment and Article I, Section 7 At a minimum, trial counsel therefore should have examined each prospective juror thoroughly with respect to the beliefs each expressed, and made sure that each prospective juror provided the requisite assurances under **Patton** and its progeny. Trial counsel failed to do so. Trial counsel also failed to challenge such jurors for cause. These omissions by trial counsel constituted deficient performance. Given that trial counsel's omissions resulted in the seating of biased jurors, prejudice is presumed. See **Hughes v. United States**, 258 F.3d at 463. The

seating of a biased juror who should have been dismissed for cause requires reversal of the conviction. **United States v. Martinez-Salazar**, 528 U.S. 304, 316, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). Failure to remove biased jurors taints the entire trial, and therefore...[the resulting] conviction must be overturned." **Hughes v. United States**, 258 F.3d at 463.

Trial counsel was ineffective in utilizing Lepsch's peremptory strikes

As discussed earlier in this brief, Lepsch should have received seven (7) rather than six (6) peremptory strikes. Trial counsel failed to note this problem and take proper steps to correct it. As a result, trial counsel had one less peremptory strike to work with when he could have used all the strikes that he could get. Making matters worse, trial counsel used five (5) of Lepsch's six (6) peremptory strikes to exclude prospective jurors which should have been challenged for cause. As discussed earlier in this brief, trial counsel had an obligation to challenge for cause any biased venire person and to attempt to bar the seating of obviously biased jurors. Trial counsel failed to do so. Trial counsel did not challenge Robert B., Mary Sw., Beverly R., Stephen H. and Mary S. for cause due to their various biases, but instead chose to exclude them through use of Lepsch's peremptory strikes. Such

conduct by trial counsel was deficient and prejudicial. Because trial counsel exhausted his peremptory strikes on these prospective jurors, prospective jurors who should have been excluded for cause, he did not have sufficient strikes left to apply to other objectionable jurors, specifically, Christopher R., James T., John A., Nathan N., Mandy F., Pamela H., Lisa K., Darrick M., and Roxanne F., and such objectionable jurors therefore sat upon the case. Given that trial counsel's omissions resulted in the seating of biased jurors, prejudice is presumed. See **Hughes v. United States**, 258 F.3d at 463, and **State v. Carter**, 2002 WI App 55, at ¶15.

Conclusion

For all reasons stated in this brief, this Court should reverse and remand the case for a new trial.

Respectfully submitted,

BY:_____/s/_____ _____day of June 2016.

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CERTIFICATION

I hereby certify that this petition meets the form and length requirements of Wis. Stat. Rules 909.62(4) and 809.19(8)(b) and (d) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 10,985 words.

Dated this _____day of June 2016

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

This electronic petition 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 upon all opposing parties.

Dated this ____day of June 2016.

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CERTIFICATION

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 s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) 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 this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the final decision of the administrative agency.

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 been so reproduced to preserve confidentiality and with appropriate references to the record.

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