Analyzing Juror Bias Exhibited During Voir Dire in Wisconsin: How to Lessen the Confusion

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I. INTRODUCTION

The voir dire process has long been recognized as essential to a jury trial. "Voir dire is the process by which lawyers and litigants obtain information about the potential jurors."1 Unfortunately, the voir dire process is imperfect. Some jurors do not disclose various biases and thus, parties may be prejudiced at trial. Additionally, jurors who exhibit honest responses that appear biased in voir dire sometimes are not struck for cause simply because a judge does not believe the juror will fail to be impartial. Hence, a very difficult and controversial question results: When should a reviewing court overturn a decision because a judge erroneously struck or did not strike a juror for cause?

Wisconsin courts have answered this question in varying manners. Part II of this Comment discusses the past standards applied by the Wisconsin Supreme Court in evaluating juror bias. Part III addresses specific Wisconsin Supreme Court cases governing the issues involved in voir dire. Part IV concludes with an approach appellate courts should apply in determining whether reversal is necessary and an approach trial courts should utilize to determine the initial signs of juror bias.

II. THE METHODOLOGY PREVIOUSLY UTILIZED BY WISCONSIN COURTS WHEN ANALYZING JUROR BIAS

The Wisconsin Supreme Court developed the juror bias standard in State v. Louis,2 State v. Gesch,3 State v. Ramos,4 and State v. Ferron.5 This

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1. Patrick E. Longan, Civil Trial Reform and the Appearance of Fairness, 79 MARQ. L. REV. 295, 302-03 (1995). Lawyers frequently conduct voir dire themselves; however, many courts (especially federal civil courts) conduct voir dire without a lawyer’s aid. Id. at 303. Parties are permitted to challenge jurors in two fashions: (1) challenges for cause and (2) peremptory challenges. Id. at 307-10. A challenge for cause, illustrated by juror bias, is difficult to attain. Peremptory challenges, on the other hand, do not require justification, but are limited by law to a certain number. Id.
2. 457 N.W.2d 484 (Wis. 1990).
3. 482 N.W.2d 99 (Wis. 1992).
4. 564 N.W.2d 328 (Wis. 1997).
5. 579 N.W.2d 654 (Wis. 1998).
part of the Comment will outline the reasoning and terminology utilized by the court in these decisions.

A. State v. Louis

In *State v. Louis*, the court held that two jurors were capable of impartiality based upon the circuit court's discretion. In *Louis*, the jury found the defendant guilty of armed robbery. On appeal, the defense argued that at trial Louis was deprived of his right to an impartial jury because the trial court refused to strike two jurors for cause. Both members of the jury in contention were Milwaukee Police officers; therefore, the Wisconsin Supreme Court had to decide if the officers were biased in a criminal trial. Both police officers were questioned individually in the circuit court in a special voir dire. The exchange involved the following conversation:

THE COURT: And you are Gilbert Adams?
[OFFICER ADAMS]: Yes, sir.
THE COURT: How do you know Mr. LaPorte?
[OFFICER ADAMS]: Milwaukee police officer.
THE COURT: Do you see him regularly?
[OFFICER ADAMS]: Periodically throughout the year.
THE COURT: Where do you work? Do you work in the Department?
[OFFICER ADAMS]: Training Bureau.
THE COURT: Would it make any difference to you if Mr. LaPorte were a witness in this case, or could you assess his testimony along with everybody else's?
[OFFICER ADAMS]: It wouldn't make any difference . . . .

6. 457 N.W.2d at 486.
7. *Id.* at 487.
8. *Id.* at 485. Defendant argued that he was forced to use two peremptory challenges to strike the members from the jury. *Id.*
10. *Id.* at 486.
11. *Id.* The above questions were directed to officer Adams and an almost identical set of questions were presented to the second officer, Detective John Wesley. *See id.* Detective Wesley also responded in the same manner. *See id.* Following these exchanges, the defense moved to have the two officers removed for cause. *See id.* The circuit judge denied the motion; however, after more Milwaukee police officers were presented as potential witnesses, the circuit court again questioned Adams and Wesley. *See id.* at 486-87. Subsequently, the circuit court denied the motions to strike for cause. *Id.* at 487.
The defense argued this exchange should have necessitated a strike for cause.\textsuperscript{12}

On review, the Wisconsin Supreme Court described the jury bias and noted that "prospective jurors are presumed impartial;" therefore, the party raising a bias issue "bears the burden of proving bias."\textsuperscript{13} The court stated that "even the appearance of bias must be avoided" and "bias may be either implied as a matter of law or actual in fact."\textsuperscript{14} The court elaborated by stating that the question of bias and dismissal for cause is purely a matter of circuit court discretion.\textsuperscript{15} The \textit{Louis} court also stated, "[a] determination by the circuit court that a prospective juror can be impartial should be overturned only where bias is 'manifest.'"\textsuperscript{16}

The court carefully analyzed the appellant's two arguments. First, the appellant argued that police officers were "implicitly" biased by the nature of their occupation.\textsuperscript{17} Second, the appellant argued that the officers were "actually" biased because they knew the witnesses.\textsuperscript{18} The court quickly disagreed with the first argument because both the United States Supreme Court and the Wisconsin Supreme Court had not, in the past, excluded groups of persons as a matter of law.\textsuperscript{19}

The \textit{Louis} court again stressed the importance of the circuit court's discretion to determine "actual" bias by deciding that the record unequivocally reflected the officers belief that they were impartial.\textsuperscript{20} The court cautioned, "[w]hile such expressions are not conclusive, evaluating the subjective sincerity of those expressions is a matter of the circuit court's discretion. The circuit court concluded that Officer Adams and Detective Wesley could decide the case fairly and impartially, without bias, based solely upon the evidence presented."\textsuperscript{21}

\begin{itemize}
  \item \textsuperscript{12} \textit{Id.}
  \item \textsuperscript{13} \textit{Id.} (citing Irvin v. Dowd, 366 U.S. 717, 723 (1961); McGeever v. State, 300 N.W. 485, 489 (Wis. 1941)).
  \item \textsuperscript{14} \textit{Id.} at 487-88 (citing United States v. Wood, 299 U.S. 123, 133 (1936); State v. Wyss, 370 N.W.2d 745 (Wis. 1985)).
  \item \textsuperscript{15} \textit{Id.} at 488 (citing Frazier v. United States, 335 U.S. 497, 511 (1948); Nyberg v. State, 249 N.W.2d 524 (Wis. 1977)).
  \item \textsuperscript{16} \textit{Id.} (citing \textit{Irvin}, 366 U.S. at 723; Hammill v. State, 278 N.W.2d 821 (Wis. 1979)).
  \item \textsuperscript{17} \textit{Id.}
  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{20} \textit{Id.} at 490.
  \item \textsuperscript{21} \textit{Id.} (citation omitted).
\end{itemize}
B. State v. Gesch

In State v. Gesch, the Wisconsin Supreme Court overturned a circuit court decision pertaining to a challenge for cause during voir dire. In Gesch, the State charged the defendant with criminal trespass to a medical facility. At Gesch's trial, Officer Wineke was a potential witness for the State. During voir dire, prospective juror Daniel Wineke indicated he and Officer Wineke were brothers. The circuit court proceeded to question juror Wineke to determine whether he could be impartial. The court concluded that the juror was not "actually" biased.

The Wisconsin Supreme Court did not agree with the lower court's holding. Basing its decision upon principles set forth previously in Louis, the Gesch court overturned the circuit court. However, the court stressed the importance of circuit court discretion regarding a juror's demeanor and sincerity. The court held that "implied" bias exists when "a prospective juror is related to a state witness by blood or marriage to the third degree." Therefore, despite the non-existence of "actual" bias, the Wisconsin Supreme Court overturned the lower court decision based upon "implied" bias. The court wrote that "special problems exist that render a circuit court's search for actual bias an inadequate protection of a defendant's right to an impartial jury. One such problem is the potential for unconscious bias."

C. State v. Ramos

In State v. Ramos, the use of a peremptory challenge to strike a juror when a challenge for cause had been inappropriately denied led to

23. Id. at 100.
24. Id.
25. Id.
26. See id. at 100-01.
27. Id. at 102. The circuit judge stated that based upon juror Wineke's demeanor and sincerity, his suspicions of Wineke's familial bias were diminished. Id.
28. Id. at 102.
29. See id. at 101-02.
30. Id. at 102; see also State v. Louis, 457 N.W.2d 484 (Wis. 1990).
31. Gesch, 482 N.W.2d at 102.
32. Id. at 102-03.
33. Id. The court held that it is impossible for a prospective juror to estimate how a familial relationship with a witness will affect judgment. See id. at 102. Regardless of sincerity, this is a situation in which a category of potential jurors, relatives, must be disqualified based upon an "unconscious bias." Id. at 102-03.
automatic reversal upon review. Ramos admitted to killing a child; however, he argued that the killing was reckless and requested a jury trial. During the defense counsel's questioning of a potential juror, that juror admitted it was possible that she could not be impartial to the defendant. She stated, "[i]fjust knowing that the child was suffocated, I guess I couldn't be fair." Ramos's counsel moved to strike that juror for cause, but the judge denied the motion as well as subsequent requests by defense counsel for a review of the record.

Defense counsel removed the juror by using its first peremptory strike; therefore, the juror did not participate in the jury that found Ramos guilty. Ramos appealed to the court of appeals, which overturned his conviction based upon a violation of his due process rights as defined by Wisconsin law. The State appealed, but the Wisconsin Supreme Court affirmed the appellate court.

The court looked at other states law and previous Wisconsin decisions, such as Gesch, to conclude that the peremptory challenge should not correct a trial court error. In essence, the Wisconsin Supreme Court held that a circuit court error in not issuing a challenge for cause which led to the waste of a peremptory challenge results in an automatic reversal. Ramos made clear that a challenge for cause must be scrutinized more heavily by appellate courts.

D. State v. Ferron

In State v. Ferron, the Wisconsin Supreme Court attempted to diminish the confusion by defining juror bias for appellate courts. Ferron and Nelson were charged with being parties to the crime of burglary. Both Ferron's and Nelson's counsel asked a potential juror a
The following exchange took place between Nelson's attorney, Fitzgerald, and two prospective jurors:

MR. FITZGERALD: . . . I'm going to argue that the State hasn't provided proof beyond a reasonable doubt that Mr. Nelson is guilty of anything. Now, keeping that in mind, I may instruct Mr. Nelson that I don't think that he has to take the witness stand. And what I wonder is would any of you think to yourself, well, you're saying the State's case is lousy, but you didn't even have your guy testify so what does that make your case? Yes, Mr. Metzler.

JUROR JAMES METZLER: Well, if your client is innocent, why wouldn't he take the stand?

MR. FITZGERALD: Because the constitution doesn't say he has to.

JUROR JAMES METZLER: Well, if he's innocent, why wouldn't he go up there and tell us he's innocent?

MR. FITZGERALD: Well, without getting into a long exchange about the constitutional rights that we all have, I can only tell you that the Court will instruct you that a defendant has the absolute right to decline to talk to the jury, to talk to the police, to talk to people investigating the crime, and that it might be my advice to him he need not take the stand. And is your questioning an indication that you would hold that against him?

JUROR JAMES METZLER: I think I may.

MR. FITZGERALD: You think you may.

THE COURT: Ladies and gentlemen, here's the instruction. A defendant in a criminal case has the absolute constitutional right not to testify. The defendant's decision not to testify must not be considered by you in any way and must not influence your verdict in any manner. Is there anyone here who cannot follow or would not follow that instruction?

JUROR M.C. CLARK: I would wonder, like he said, why, you know, if he had nothing to hide?

46. Id.
THE COURT: I understand.
JUROR M.C. CLARK: Why he would do that?...
THE COURT: ... The question is your opinion so strong or your belief so strong you're not willing to set those aside for the purpose of this case and follow the law that I've given you?
JUROR JAMES METZLER: Well, I would certainly try to set it aside.
THE COURT: Miss Clark?
JUROR M.C. CLARK: I would try to set it aside, but I'm not sure I could completely set that aside if that would be in the back of my mind that they didn't take the stand. That would be kind of back there knowing that, you know—
THE COURT: ... [E]vidence as it comes out in the courtroom, not things that didn't happen. That's the point. Can you do that?
JUROR M.C. CLARK: I'm not so sure I could.
THE COURT: Mr. Metzler, can you?
JUROR JAMES METZLER: Probably.47

The circuit court excused Clark from the jury; however, Ferron used one peremptory strike to remove juror Metzler.48 Ferron appealed after his conviction and the court of appeals reversed.49 The court of appeals held that:

[T]he circuit court erroneously exercised its discretion by failing to strike Metzler for cause because his answers revealed that he was not indifferent as required by Wis. Stat. § 805.08(1). The court of appeals also held that the circuit court failed to follow the directive ... that a motion to strike a juror for cause must be granted whenever the court reasonably suspects that circumstances outside the evidence will influence the juror.50

The court of appeals held that, based on Ramos, the failure to strike a juror for cause resulted in reversible error.51 Upon review, the

47. Id. at 656-57.
48. Id. at 657.
49. Id. at 658 (citing State v. Ferron, 570 N.W.2d 883 (Wis. Ct. App. 1997)).
50. Id. (citation omitted) (citing Ferron, 570 N.W.2d at 883; Nyberg v. State, 249 N.W.2d 524 (Wis. 1977)).
51. See Ferron, 579 N.W.2d at 658-59. For discussion regarding the Ramos standard and holding, see supra Part I.C.
Wisconsin Supreme Court was faced with the task of modifying the bias standard.

The Wisconsin Supreme Court first set aside the proposition that a trial court must honor challenges for cause whenever it "reasonably suspect[s]" outside evidence created bias. The court cautioned and encouraged circuit courts to strike prospective jurors when a "reasonable suspicion" of bias exists; however, appellate courts are not required to overturn circuit court decisions regarding impartiality whenever a reasonable suspicion is evidenced.

Most importantly, the court clarified the "manifest" bias standard set forth in Ramos, because that standard caused more scrutiny by a circuit court with regard to a challenge for cause. The court set out the following two-part test:

[A] prospective juror's bias is "manifest" whenever a review of the record: (1) does not support a finding that the prospective juror is a reasonable person who is sincerely willing to [set] aside an opinion or prior knowledge; or (2) does not support a finding that a reasonable person in the juror's position could set aside the opinion or prior knowledge.

The first prong allows the circuit court to determine the demeanor and sincerity of a prospective juror. The second prong tells the appellate courts how to determine if, under the circumstances, no reasonable juror could put aside the bias evident in the record.

Despite the value placed upon circuit court discretion, the Wisconsin Supreme Court applied this test and overturned the circuit court's holding. The court was not satisfied with the "probably" response that juror Metzler gave after numerous questions and explanations pertaining to the Fifth Amendment right to be free from self-incrimination. The court also wrote:

52. Ferron, 579 N.W.2d at 659. See also Nyberg, 249 N.W.2d at 524 (The Nyberg standard of "reasonable suspicion" eventually had become a command to a circuit court).
53. Ferron, 579 N.W.2d at 663 (emphasis added).
54. Id. at 661; see also supra Part I.C.
55. Ferron, 579 N.W.2d at 661.
56. Id.
57. See id. Again, the court stressed that the circuit court must be given wide latitude in their determination of bias. See id.
58. Id.
59. Id. at 662.
Indeed, that Metzler's explicit bias was hinged upon Ferron's Fifth Amendment right to be free from self-incrimination is of considerable importance in this case. Our decision in this case may have been different—given the same record—had Metzler exhibited a bias which did not conflict with such an essential constitutional right.60

Both Justice Geske and Justice Bradley dissented in the Ferron decision.61 In Part I of her dissent, Justice Bradley agreed with the majority's two-prong test because it acknowledged the importance of a circuit court's discretion.62 However, she disagreed with the majority's application of the test when she wrote, "[t]his is a case where, based on extensive questioning, legal instruction, and first-hand assessment of Metzler's comments, the circuit court determined that the juror was willing to put aside his bias."63 Justice Bradley believed the "[m]anifest" bias found by the majority in juror Metzler's responses actually violated the two-prong test because it overlooked the circuit court's discretion.64

Also, in Part I of Justice Bradley's dissent, she criticized the majority for its reliance upon the Fifth Amendment as justification for reversal.65 Bradley believed that the majority gave the Fifth Amendment special treatment; the majority ignored the importance of the fundamental Sixth Amendment right to a fair trial.66

III. HOW WISCONSIN COURTS PRESENTLY ANALYZE BIAS

During the summer of 1999, the Wisconsin Supreme Court utilized the following terms to describe juror bias: "statutory" bias, "subjective" bias, and "objective" bias.67 Specifically, this part of the Comment addresses the Wisconsin Supreme Court cases of State v. Faucher,68 State v. Mendoza,69 State v. Erickson,70 and State v. Kiernan.71

60. Id.
61. Id. at 664-68.
62. Id. at 665.
63. Id.
64. Id.
65. Id.
66. Id. at 667. Justice Geske also joined in Part I of Justice Bradley's dissent. Id. at 668.
67. State v. Faucher, 596 N.W.2d 770 (Wis. 1999).
68. Id.
69. 596 N.W.2d 736 (Wis. 1999).
70. 596 N.W.2d 749 (Wis. 1999).
MARQUETTE LAW REVIEW

A. State v. Faucher

In State v. Faucher, the Supreme Court of Wisconsin defined bias which may result in removal for cause.72 Three areas of bias exist: 1) the juror is statutorily biased; 2) the juror is subjectively biased; or 3) the juror is objectively biased.73

In Faucher, the defendant was charged with the second-degree sexual assault of a nursing home patient at a facility where the defendant was employed.74 The State presented Paulette Hayes, another nursing home employee, who testified that the defendant fondled the patient's breasts.75 Hayes became the State's key witness, and, thus, the only true issue became whether the jury found Hayes credible.76 At the close of the State's case, a juror, David Kaiser, alerted the court that he knew Hayes.77

The circuit court initiated a special voir dire that only pertained to juror Kaiser.78 Kaiser stated that Hayes had been his next door neighbor and he was her acquaintance.79 Kaiser also stated, "I know she's a person of integrity, and I know she wouldn't lie."80 The prosecutor asked Kaiser if he could put aside his knowledge of facts and details, and decide the case only based upon the trial itself.81 Kaiser responded affirmatively.82

Subsequently, the defense counsel moved to strike juror Kaiser; however, the circuit court did not have any alternate jurors.83 After consideration, the court dismissed juror Kaiser and allowed the trial to

71. 596 N.W.2d 760 (Wis. 1999).
72. See generally Faucher, 596 N.W. 2d 770.
73. Id. at 777-80.
74. Id. at 773.
75. Id.
76. Id. The prosecutor argued in closing argument that if Hayes could be believed, the defendant must be convicted. See id.
77. Id. at 774. Apparently, juror Kaiser did not know initially in voir dire that Hayes was a witness. See id. Nor did Kaiser recognize her name on the witness list, because she had recently been married and changed her name. See id.
78. Id. at 774.
79. Id.
80. Id.
81. Id.
82. Id. at 774-75. Defense counsel also asked Kaiser if he could set aside his opinion regarding Hayes. See id. at 775. Again, Kaiser answered in the affirmative. Id.
83. Id. Defense counsel also moved for a mistrial because the court did not have an alternate juror. Id. The court denied this motion and held another special voir dire for Kaiser. Id. The second voir dire disclosed that Kaiser had told other jurors he knew a witness, but he did not disclose who or in what manner he knew the witness. Id.
proceed with an eleven-person jury. The eleven jurors returned a guilty verdict and the defendant was convicted. The defendant filed a motion for post-conviction relief based on the circuit court's error when it neglected to strike Kaiser for cause. The court again denied the defendant's motion for a new trial.

On review, the Supreme Court of Wisconsin addressed the issue of bias in a different manner than had been done in the past. The court stated:

In addition to reviewing the issue presented, we also take the opportunity this case affords us to clarify our jury bias jurisprudence .... From these cases we have come to recognize that our past decisions in this area of law have to a degree lacked the clarity necessary to properly guide the bench and bar in the appropriate examination of prospective jurors for evidence of bias. We believe that the resulting confusion stems from our inconsistent, and at times imprecise, use of the terms "implied," "actual" and "inferred" to describe a juror's bias.

Based upon Wisconsin statutes, the Sixth and Fourteenth Amendments to the United States Constitution, the Wisconsin Constitution, and review of jury bias cases, the Wisconsin Supreme Court redefined juror bias terminology. The terms now used are "statutory," "objective" and "subjective" bias.

84. Id.
85. Id.
86. Id.
87. Id. The court of appeals reversed the circuit court's conviction and order denying post-conviction relief and remanded the case for a new trial. Id. The appellate court based its decision primarily upon Gesch. In Gesch, the Wisconsin Supreme Court held that while a prospective juror related to a State witness by blood or by marriage may not have actual bias, there still exists a great risk of an "unconscious bias." Id. The appellate court concluded that Kaiser was biased as a matter of law, because his assurance of impartiality was outweighed by an obvious bias illustrated by his responses to voir dire questions. Id. at 775-76.
88. Id. at 773.
89. Id. at 777.
90. Id. The court stated that the "new" terms are not necessarily meant to correspond to the former terminology. Id. at 777-78. However, the court stated, "we do acknowledge that subjective bias is most closely akin to what we had called actual bias, and that objective bias in some ways contemplates both our use of the terms implied and inferred bias. Id. But because the case law does not always use the former terms in a consistent manner, there is not an absolute, direct correlation between the former terms and the terms we adopt today." Id. at 778.
1. Statutory Bias

Statutory bias is based upon Wisconsin Statute Section 805.08(1).\(^{91}\) The statute lists the following categories of jurors as biased: a juror "related by blood or marriage to any party or to any attorney appearing in the case;" a juror having "any financial interest in the case;" a juror who "has expressed or formed any opinion;" or a juror who is "aware of any bias or prejudice in the case."\(^{92}\) However, the court in *Faucher* only deemed those related by blood or marriage to the defendant or an attorney in the case, or those jurors having a financial interest in the case as statutorily biased.\(^{93}\)

The court wrote:

Although § 805.08(1) also speaks of those prospective jurors who have expressed or formed any opinion or are aware of any bias or prejudice in the case, these persons are not those to whom the term "statutorily biased" applies. These persons are more accurately described as those for whom evidence of "subjective bias" exists.\(^{94}\)

The court also noted that statutory bias is the most easily described form of juror bias.\(^{95}\)

2. Subjective Bias

Subjective bias is revealed through the words and demeanor of the potential juror.\(^{96}\) Similar to "actual bias," subjective bias is based upon the record from the voir dire proceeding.\(^{97}\) Although direct proof may not prove subjective bias, a prospective juror's demeanor which indicates state of mind can illustrate subjective bias.\(^{98}\)

The court cautioned appellate courts that subjective bias turns upon

\(^{91}\) *Wis. Stat.* § 805.08(1) (1999).
\(^{92}\) *Id.*
\(^{93}\) *Faucher*, 596 N.W.2d at 778.
\(^{94}\) *Id.* (citing State v. Delgado, 588 N.W.2d 1 (Wis. 1999)).
\(^{95}\) *Id.* at 778. Although the court stated that statutory bias is easily described, it failed to further define what "financial interest in the case" by a juror means.
\(^{96}\) *Id.*
\(^{97}\) *Id.*
\(^{98}\) *Id.* The court was careful to note that it is rare for a prospective juror to simply state that they are biased. *Id.* More often the situation is not this simple; therefore, a circuit court is given great deference in determining subjective bias from demeanor. *Id.* A circuit court will not be overturned unless its ruling is found to be clearly erroneous. *Id.*
a juror's responses in voir dire and a circuit judge's findings regarding credibility, honesty, and other relevant factors. The court reasoned that because a circuit court is in a "superior position" to evaluate bias than an appellate court is, most circuit courts' decisions are sufficient to protect a defendant's Sixth Amendment right to an impartial jury.

3. Objective Bias

A judge utilizing the objective bias standard need not attempt to judge the mentality of an individual juror. Similar to other areas of the law, this analysis of objectivity is based upon the reasonable person standard: "[w]hether the reasonable person in the individual prospective juror's position could be impartial." This is a mixed question of law and fact because a circuit court must consider the "circumstances surrounding the voir dire and the facts involved" in the specific case. The analysis also remains a question of law, because the trial judge must determine whether a reasonable person in the juror's shoes could remain unbiased.

The Wisconsin Supreme Court held that the circuit court is well positioned to determine objective bias because it has a special understanding of a juror's specific subjective state of mind, which is crucial to determining objective bias.

The Wisconsin Supreme Court explained three specific challenges that must be analyzed through juror bias: (1) "strike for cause;" (2) "lack of juror candor;" and 3) "extraneous information." In Faucher, the court addressed the issue of strike for cause. When it applied the "new" analysis and terminology, the court determined that juror Kaiser

99. Id.
100. Id. Despite the court's new analysis and terminology pertaining to juror bias, the court's view that a circuit court has "superior discretion" is consistent with previous holdings pertaining to juror bias. See generally State v. Gesch, 482 N.W.2d 99 (Wis. 1992).
101. Faucher, 596 N.W.2d at 779.
102. Id.
103. Id.
104. Id. The court noted that objective bias has been reviewed by various standards. Id. The court concluded that because of the mixed law and fact issues involved, the higher court may still defer to the circuit court. Id. Reversal will only occur if, as a matter of law, a reasonable judge could not have reached the same conclusion. Id. at 780.
105. Id. at 779 (citing State v. Delgado, 588 N.W.2d 1 (Wis. 1999)).
106. Id. at 780-83. See also State v. Broomfield, 589 N.W.2d 225 (Wis. 1999); State v. Gesch, 482 N.W.2d 99 (Wis. 1999); State v. Ferron, 579 N.W.2d 654 (Wis. 1998); Delgado, 588 N.W.2d at 1; State v. Messelt, 518 N.W.2d 232 (Wis. 1994); State v. Louis 457 N.W.2d 484 (Wis. 1990); State v. Wyss, 370 N.W.2d 745 (Wis. 1985).
107. Faucher, 596 N.W.2d at 780.
was "objectively" biased. The court determined this by first analyzing "subjective bias." The Wisconsin Supreme Court indicated that the circuit court correctly assessed that Kaiser was willing to set aside his views about the key witness in determining the outcome of the case and was, therefore, not subjectively biased. However, the court held that despite its deference to a circuit court's bias determination, the trial court failed to consider if Kaiser was "objectively" biased. The court reviewed the record and noted that Kaiser had explained that witness Hayes was his next door neighbor and "a girl of integrity." Kaiser had made it clear that based upon his opinion of Hayes he was sure she would not lie. Therefore, based upon the "strength" of Kaiser's opinion and the fact that Hayes' testimony was pivotal in the case, the court held juror Kaiser to be objectively biased.

B. State v. Mendoza

In State v. Mendoza, the Wisconsin Supreme Court held that although the circuit court erred in dismissing a juror, such error need not result in an automatic reversal of the circuit court's decision. Mendoza was charged with possession of cocaine and intent to deliver. After the initial jury examination, five jurors were examined more carefully in chambers. Four of the prospective jurors had been convicted of crimes, and one had a family member who had committed a drug offense. The four jurors were struck for cause because of their criminal connections. Mendoza argued that the effect of striking the four

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108. Id. at 785.
109. Id.
110. Id. at 784. The court noted that this was consistent with Ferron, where a juror was not sincerely willing to set aside bias. Id. Instead, Faucher demonstrated a situation where a juror unequivocally stated that he would abide by the law. Id. It appears that the court intertwined the Ferron standard with the new "objective" and "subjective" terminology. See id. at 784-85.
111. Id.
112. Id. at 785.
113. Id. at 786.
114. Id. at 785-86.
115. 596 N.W.2d 736, 749 (Wis. 1999).
116. Id. at 738-39.
117. Id. at 739.
118. Id.
119. Id.
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The Wisconsin Supreme Court disagreed and held that the circuit court's erroneous dismissal of one of the four jurors was not enough to reverse the conviction. The error was deemed harmless and not similar to the situation in *Ramos*. Therefore, automatic reversal was not warranted.

C. State v. Erickson

In *State v. Erickson*, the Wisconsin Supreme Court did not reverse the defendant's conviction, holding that the lower court properly refused to strike a juror for cause. The defendant was convicted of child enticement and sentenced to life imprisonment without the possibility of parole. Erickson sought post-conviction relief because he had not received all his peremptory strikes. The circuit court held that, according to *Ramos*, prejudice was assumed and Erickson was entitled to a new trial. The State appealed this automatic reversal, and Erickson cross-appealed the circuit court's refusal to strike for cause one juror who had been sexually assaulted.

The Wisconsin Supreme Court held that *Ramos* only compels automatic reversal when "a circuit court, after the defendant has challenged a juror for cause, incorrectly concludes that the juror does not need to be removed for cause... [and] the defendant uses peremptory strikes to correct a circuit court error...." Accordingly, the Wisconsin Supreme Court stated that bias must be left to the circuit court's discretion because the circuit court is in the best position to

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120. *Id.* at 746. Mendoza argued that the group of four jurors should not have been categorically struck for cause, and that this resulted in four "free" challenges for the benefit of the state. *See id.* This was the opposite situation from *Ramos*, where jurors should have been struck for cause but were not. *See id.*

121. *Id.* at 749. One of the four jurors had such remote ties to the criminal world that the Wisconsin Supreme Court felt he should not have been struck. *Id.* at 745.

122. *Id.* at 749.

123. *Id.*

124. *See generally* 596 N.W.2d 749 (Wis. 1999).

125. *Id.* at 752-53.

126. *Id.* at 753-54. Erickson also argued that he was subjected to ineffective assistance of counsel because the circuit court error was not preserved for appeal. *Id.* at 754.

127. *Id.*

128. *Id.*

129. *Id.* at 757. The court explained, "*Ramos* stands for nothing more and we decline to expand its reach beyond those facts." *Id.*
observe a juror's true behavior.\textsuperscript{130}

The court further held that automatic reversal was not proper because the circuit court did not err by refusing to strike a sexual assault victim.\textsuperscript{131} The assault was far removed and the demeanor of the juror could only be properly assessed by a circuit court.\textsuperscript{132}

\textbf{D. State v. Kiernan}

In \textit{State v. Kiernan}, the circuit court was reversed when the Wisconsin Supreme Court affirmed the Wisconsin Court of Appeals which held that the challenged jurors were objectively biased.\textsuperscript{133} The defendant was arrested and charged with operating a motor vehicle while under the influence of an intoxicant, violating a permissible breath concentration.\textsuperscript{134} When the prospective jurors entered the courtroom, Kiernan's attorney realized that five members had served two days earlier in almost exactly the same type of case.\textsuperscript{135} In both cases defense counsel argued that objects "placed in the mouth, such as denture adhesive," that absorb alcohol result in inaccurate readings.\textsuperscript{136}

The trial continued over the defense counsel's objections to the jurors in question.\textsuperscript{137} The jury convicted Kiernan on two counts.\textsuperscript{138} Based upon \textit{Ferron}, the court of appeals held that reasonable jurors in the five jurors' positions could not set aside their views or prior knowledge about the breathalyzer.\textsuperscript{139} The Wisconsin Supreme Court began its review of the \textit{Kiernan} case by summarizing precedent beginning with \textit{Ramos}, noting that deprivation of peremptory strikes

\begin{itemize}
  \item \textsuperscript{130} \textit{Id.} at 758 (citing State v. Gesch, 482 N.W.2d 99 (Wis. 1999); State v. Ferron, 579 N.W.2d 654 (Wis. 1998) (Geske, J., dissenting)).
  \item \textsuperscript{131} \textit{Id.} at 760.
  \item \textsuperscript{132} \textit{Id.} at 759.
  \item \textsuperscript{133} 596 N.W.2d 760, 761-62 (Wis. 1999).
  \item \textsuperscript{134} \textit{Id.} at 762.
  \item \textsuperscript{135} \textit{Id.} The court noted the following:

  In both cases the State prosecuted a person for driving an automobile while intoxicated with a breath alcohol content of 0.11. In both cases the State's strongest evidence was a reading from a breathalyzer machine, the Intoxilyzer 5000, showing that the defendants' breath alcohol was in excess of the permitted legal limit.

  \textit{Id.}

  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id.} at 763.
  \item \textsuperscript{139} \textit{Id.} For further explanation regarding the \textit{Ferron} rationale see also supra Part II.D.
warranted reversal.\textsuperscript{140}

The majority stressed that since the \textit{Ramos} decision, the Wisconsin Supreme Court had faced many bias cases where the issue was whether court errors in jury selection warranted a new trial, regardless of the existence of an impartial jury.\textsuperscript{141} Again, the court summarized the three types of bias outlined in \textit{Faucher}, and focused upon subjective and objective bias in its analysis.\textsuperscript{142}

Basing its analysis of subjective bias upon \textit{Ferron}, the court held that subjective bias was not present because it was too difficult for an appellate court to discern a juror's beliefs, demeanor, and sincerity, where no transcript of voir dire exists.\textsuperscript{143} Instead, the court overturned the circuit court's decision based upon objective bias.\textsuperscript{144} The five veteran jurors did not need to be removed categorically, but the five were found to be individually, objectively biased.\textsuperscript{145}

Again, having stated the importance of circuit court discretion, the Wisconsin Supreme Court held:

While we normally defer to the conclusions of the circuit court in objective bias instances, we cannot do so here. On this record, as a matter of law, the circuit court could not reasonably reach the conclusion that it reached in this case. The circuit court was obligated to remove those jurors for cause.\textsuperscript{146}

\subsection*{E. Subsequent Decisions by the Wisconsin Court of Appeals}

In \textit{State v. Oswald}, the Wisconsin Court of Appeals took note of the four Wisconsin Supreme Court decisions defining juror bias.\textsuperscript{147} Defendant Oswald and his son robbed a bank, took a woman hostage, and shot at police.\textsuperscript{148} The media broadcast the incident and upon trial a

\begin{footnotesize}
\begin{enumerate}
\item[140.] \textit{Id.} at 764 (citing \textit{State v. Ramos}, 564 N.W.2d 328, 328 (Wis. 1997)).
\item[141.] \textit{Id.} (citing \textit{State v. Mendoza}, 596 N.W.2d 736 (Wis. 1999); \textit{State v. Erickson}, 596 N.W.2d 749 (Wis. 1999); \textit{State v. Ferron}, 579 N.W.2d 654 (Wis. 1998)).
\item[142.] \textit{Id.} (citing \textit{State v. Faucher}, 596 N.W.2d 770 (Wis. 1999)).
\item[143.] \textit{Id.} at 765 (citing \textit{Ferron}, 579 N.W.2d 654 (Bradley, J., dissenting)).
\item[144.] \textit{Id.} at 766.
\item[145.] \textit{Id.}
\item[146.] \textit{See id.} at 767.
\item[148.] \textit{Oswald}, 606 N.W.2d at 242.
\end{enumerate}
\end{footnotesize}
jury convicted Oswald of twenty felony counts.\textsuperscript{149} On appeal, Oswald raised several claims, one of which was juror bias.\textsuperscript{150}

The court summarized the recent Wisconsin Supreme Court holdings regarding juror bias and noted that two different levels of deference must be given to the trial court when determining subjective or objective bias.\textsuperscript{151} The clearly erroneous standard must be applied when a trial court is deciding the issue of subjective bias because the trial court is in the special position to judge a juror's tone and demeanor.\textsuperscript{152} Additionally, the trial court's determination of objective bias is only reversible when, "as a matter of law, a reasonable judge could not have reached the same conclusion."\textsuperscript{153} A higher standard of review must be used regarding objective bias because "the trial court's conclusion on the question of law of whether the facts add up to objective bias is so intertwined with the factual findings supporting that conclusion."\textsuperscript{154}

The court addressed subjective bias initially and noted that, according to Ferron, "questions as to a prospective juror's sincere willingness to set aside bias should be largely left to the circuit court's discretion."\textsuperscript{155} After Ferron and the subsequent juror bias cases a juror does not need to respond to voir dire questions with "unequivocal impartiality."\textsuperscript{156}

In determining objective bias, the recent cases illustrate that objective bias is evident when "direct, critical, personal connections" are maintained between the juror and critical evidence or issues in the case, or when the juror has a strong negative attitude toward the criminal justice system.\textsuperscript{157}

\begin{itemize}
\item 149. Id.
\item 150. Id. at 242-43.
\item 151. Id. at 243.
\item 152. Id. (citing State v. Kiernan, 596 N.W.2d 760, 764 (Wis. 1999)). The court stated that such deference is only logical because the "cold record" was not sufficient to assess the trial court's decision. Id.
\item 153. Id. (citing Kiernan, 596 N.W.2d at 764; State v. Faucher, 596 N.W.2d 770, 780 (Wis. 1999)).
\item 154. Id. (citing Faucher, 596 N.W.2d at 779).
\item 155. Id. (quoting State v. Ferron, 579 N.W.2d 654, 662 (Wis. 1998)).
\item 156. Id. at 244 (citing State v. Erickson, 596 N.W.2d 749, 759 (Wis. 1999); Faucher, 596 N.W.2d at 784). The Wisconsin Court of Appeals clarified that the court in Ferron had overturned the trial court's determination because the facts were unique. See id. They involved the constitutional right not to testify upon one's behalf. See id. Therefore, the case did not demand that prospective jurors give unequivocal assertions during voir dire. See id.
\item 157. Id. In Faucher, the juror was acquainted with the State's key witness and trusted her fully. Id. (citing Faucher, 596 N.W.2d at 774). This is an example of a juror having a
\end{itemize}
The court in *Oswald* held that none of the jurors were biased; therefore, the court upheld the trial court's determination. Defendant Oswald had argued that five jurors were either subjectively or objectively biased.

One juror testified that she had formed the opinion that Oswald was guilty; she had seen the shootout twice on television. Another juror stated that she could "probably" listen to the evidence with an open mind. Oswald claimed that these were both evidence of subjective bias.

Oswald claimed that a second juror was both subjectively and objectively biased. Oswald argued that the juror's statement that after viewing the television reports she knew either he or his son had done the crime was an indication of subjective bias. Additionally, Oswald claimed that the fact that the juror's husband was a police officer resulted in objective bias.

A third juror stated that he would try his best to listen to evidence and not determine the outcome based upon the media coverage. Oswald argued this was subjective bias. Also, the juror was an immigration officer, which Oswald argued resulted in objective bias. Finally, the last two jurors were challenged based upon familial ties to a police officer and responses to questions indicating subjective bias, respectively.

The court held that Oswald had not demonstrated that the trial court's determination regarding subjective bias was erroneous. The

direct connection with crucial evidence at trial. Id. Conversely, a juror's connection to evidence is not indicative of bias if the connection is remote. Id. at 244-45 (citing *Erickson*, 596 N.W.2d at 753). Objective bias also occurs when a juror has a direct connection to the main issue in a case (e.g., the defense theory). Id. at 245 (citing *Kiernan*, 596 N.W.2d at 766-67). Finally, general dislike of the system will render a juror objectively biased (e.g., jurors convicted of past crimes). Id. (citing State v. *Mendoza*, 596 N.W.2d 736, 739 (Wis. 1999)).

158. Id. at 248.
159. Id. at 246.
160. Id.
161. Id.
162. Id.
163. Id. at 246.
164. Id.
165. Id.
166. See id. at 246.
167. Id. at 246-47.
168. Id. at 247.
169. Id.
170. Id.
court also concluded that certain jurors' ties to the police community were not sufficient to render them incapable of impartiality. The court, therefore, concluded that these jurors were not objectively biased.

The court also took the opportunity to distinguish the case from Faucher. The court stated that the Faucher juror had known the State's sole key witness and that the issue at trial was one of credibility regarding this particular witness. Conversely, in Oswald, the juror that stated she thought police were "more truthful" than others did not have a personal relationship with any of the officers who testified in the case; therefore, objective bias was not present.

In State v. Jimmie, the defendant was convicted of three counts of first-degree sexual assault and three counts of incest with a child. The jurors had been asked if anyone had a family member or friend that had been a victim of a sexual assault. One juror stated that his wife had been a victim of sexual assault as a child. The juror told the judge that he thought he could set aside his wife's experience in the interest of fairness during trial. Jimmie's counsel asked the juror further questions that demonstrated "some hesitancy" in his impartiality, yet, the trial judge denied dismissal for cause.

The court summarized the previous holdings and concluded that objective bias was a mixed question of fact and law. The court held that the juror did not exhibit subjective bias, based on the trial court's superior position in determining a juror's honesty and credibility. Finally, the court upheld the trial court's ruling regarding objective bias comparing the case to Erickson and finding no evidence of objective bias.

171. Id.
172. Id. at 247-48. The court stated this case was not similar to Mendoza because familial relationships with police officers are not the same as ingrained negative attitudes towards the criminal justice system. Id. at 248.
173. Id. (citing State v. Faucher, 596 N.W.2d 770, 785 (Wis. 1999)).
174. Id.
175. 606 N.W.2d 196, 198 (Wis. Ct. App. 1999).
176. See id. at 199.
177. Id.
178. Id.
179. Id. at 200-01.
180. Id. at 201 (citing State v. Faucher, 596 N.W.2d 770, 779 (Wis. 1999)).
181. Id. at 203. The court stated that "magical words" are not necessary to assess a juror's impartiality. Id.
182. Id. at 204. The case was not similar to Faucher because the juror, unlike the one in
IV. A Solution to the Confusion Regarding Standards to Review Juror Bias

Over the past decade, juror bias has become quite controversial in Wisconsin. *Ramos* made a challenge for cause enough of a right to result in automatic reversal. Subsequently, the *Ferron* decision attempted to make sense of cases leading up to and including *Ramos*.

The most important decision in this line of cases is the *Ferron* decision. *Ferron* finally developed a two-pronged test that answered how appellate courts should review juror bias cases as well as how circuit courts should decide cases initially. Prong one speaks to the "willingness" of prospective jurors to set aside their beliefs (as judged by a circuit court), while prong two only allows for reversal by an appellate court if it finds that no reasonable juror in such circumstances could be impartial. The only problem with *Ferron* is the holding itself.

The court in *Ferron* failed to apply the two-part test it proscribed. It held that the circuit court should have been reversed because the Fifth Amendment right to be free from self-incrimination was not given enough weight by the judge. As Justice Bradley questioned in her dissent, why is the Fifth Amendment right given more credence than the Sixth Amendment right to a fair trial? The Wisconsin Supreme Court should not have reversed the circuit court's decision because the discretion of the circuit court was key to that juror bias situation. This was a case where, under the two-pronged analysis, a juror could have been impartial.

After the *Ferron* decision, in the summer of 1999, the Wisconsin Supreme Court decided four important cases. It appears as though the *Ferron* two-prong standard somewhat diminished with the evolution of

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*Faucher*, did not know any person in the case. *Id.* at 203. Neither was the case similar to *Kiernan*, as the juror in *Jimmie* did not demonstrate any prejudice towards any aspect of the case. *Id.*

183. *See generally* State v. Ramos, 564 N.W.2d 328 (Wis. 1997).

184. *See generally* State v. Ferron, 579 N.W.2d 654 (Wis. 1998); *see also* State v. Gesch, 482 N.W.2d 99 (Wis. 1992); State v. Louis, 457 N.W.2d 484 (Wis. 1990).

185. *See Ferron*, 579 N.W.2d at 654; *see also supra* Part II.D.

186. *Id.* at 661.

187. *Id.*

188. *Id.* at 662-64.

189. *Ferron*, 579 N.W.2d at 667 (Bradley J., dissenting).

190. *See id.*

191. *See generally* State v. Faucher, 596 N.W.2d 770 (Wis. 1999); State v. Erickson, 596 N.W.2d 749 (Wis. 1999); State v. Mendoza, 596 N.W.2d 736 (Wis. 1999); State v. Kiernan, 596 N.W.2d 760 (Wis. 1999).
the terms "statutory," "objective," and "subjective" bias.\textsuperscript{192} However, these terms confuse appellate and circuit courts. As applied in \textit{Faucher}, "objective" and "subjective" bias have no clear differentiation.\textsuperscript{193} According to the \textit{Faucher} court, a juror was biased because \textit{his} answers and demeanor evidenced that he was objectively biased.\textsuperscript{194} It does not make sense that an "objective" standard is utilized to judge the specifics of an individual's thought process.

Common principles of law dictate that an "objective" standard is based upon a reasonable man's beliefs, not a certain individual's beliefs.\textsuperscript{195} According to \textit{Black's Law Dictionary}, an objective standard is "[a] legal standard that is based on conduct and perceptions external to a particular person."\textsuperscript{196} Yet, the \textit{Faucher} court attempted to probe the mind of a juror with only a "cold" record to rely upon.\textsuperscript{197} This only takes away circuit court discretion and offers appellate courts confusing terminology.

\textit{Ferron} is still alive in the recent case law.\textsuperscript{198} The cases themselves refer to the two-prong \textit{Ferron} test because it is the best way to make sense of appellate review pertaining to juror bias. But if the new terms "statutory," "objective," and "subjective" bias are effective, why are courts still relying upon \textit{Ferron}?\textsuperscript{199}

Although the Wisconsin Supreme Court has truly attempted to clarify standards to review juror bias, the recent modifications only confuse everyone in the legal profession. "Objective" and "subjective" bias are better defined by the Wisconsin Supreme Court than applied. Most importantly, the appellate and lower courts may be left confused.

It appears that in recent decisions the Wisconsin Court of Appeals has dealt with the new terminology quite properly, thus resulting in just

\begin{itemize}
  \item \textsuperscript{192} \textit{See generally Faucher,} 596 N.W.2d at 770.
  \item \textsuperscript{193} \textit{Id.}
  \item \textsuperscript{194} \textit{Id.}
  \item \textsuperscript{195} \textit{BLACK'S LAW DICTIONARY} 1413 (7th ed. 1999).
  \item \textsuperscript{196} \textit{Id.}
  \item \textsuperscript{197} \textit{See Faucher,} 596 N.W.2d at 770. The court in \textit{Faucher} also stressed the importance of a circuit court's discretion of a prospective juror's bias when discussing "subjective" bias; however, the court failed to apply the same rationale with the "objective" bias (which still looks at a subjective level of thought). \textit{See id.}
  \item \textsuperscript{198} \textit{See generally Faucher,} 596 N.W.2d at 770; \textit{State v. Erickson,} 596 N.W.2d 749 (Wis. 1999); \textit{State v. Mendoza,} 596 N.W.2d 736 (Wis. 1999); \textit{State v. Kiernan,} 596 N.W.2d 760 (Wis. 1999).
  \item \textsuperscript{199} \textit{See Faucher,} 596 N.W.2d at 775 (citing \textit{State v. Ferron,} 579 N.W.2d 654 (Wis. 1998); \textit{Kiernan,} 596 N.W.2d at 764 (citing \textit{Ferron,} 579 N.W.2d at 654); \textit{Erickson,} 596 N.W.2d at 758 (citing \textit{Ferron,} 579 N.W.2d 654 (Geske J., dissenting)).
\end{itemize}
holdings affirming trial court discretion when warranted. However, why change the standard of review regarding objective and subjective bias when even objective bias deals with specific facts in a case that only the trial judge can truly judge effectively? Although the cases indicate that objective bias fits in a category and subjective bias fits in another category, it is probable that the two overlap, because even objective bias determinations may be steered by juror demeanor and tone. For example, a "firmly held negative predisposition by the juror regarding the justice system" is a type of objective bias, but such predisposition is more often than not exhibited by specific, subjective-type responses during voir dire as applied to an objective, reasonable man standard.

The two-prong Ferron test is the best solution to this confusing-but critical-problem of juror bias. Ferron clearly described to the trial judge what to do in determining bias and additionally provided appellate courts that same methodology in checking the trial court's determination. As Justice Bradley stated in her dissent (which Justice Geske joined in pertinent part), "We should reserve imposing our own view of the record to those cases where the circuit court's interpretation has no support in the record or where the circuit court ignores its duties." If we use the Ferron test, but apply it carefully as Justice Bradley suggested in her dissent, this area of law would be clarified greatly in Wisconsin. The terms "statutory," "subjective," and "objective" bias may be beneficial, but probably not as beneficial as compared to the Ferron test employed alone.

V. CONCLUSION

Voir dire is a fundamental aspect of the jury trial. The Sixth Amendment guarantees the right to an impartial jury, and this is only possible if courts have proper guidance in determining bias. The Wisconsin Supreme Court has struggled over the past decade to define bias and determine when to properly overturn circuit court decisions judging juror bias. The resolution in the cases decided in the summer of 1999 appeared to be a great alternative, and subsequent courts have embraced the new terminology. However, the terminology as applied


201. Jimmie, 606 N.W.2d at 201.

202. See Ferron, 579 N.W.2d at 667 (Bradley, J., dissenting). Justice Bradley agreed with the application of the test, but found the application of it to the specific facts inoperable. See id.
only results in more confusion and analysis than necessary. Alternatively, however, the *Ferron* standard should be utilized to lessen confusion regarding voir dire in Wisconsin.

*SARVENAZ J. RAISSI*