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Watch Gableman for Supreme Court Ad: "Prosecutor"

Watch Wisconsin Manufacturers and Commerce Ad: "Jensen"

Listen to Greater Wisconsin Committee Radio Ad: "Scandal"

Supporting Documents

Ashland_Phone_Records_April_2002.pdf (.pdf 2.4 mb)

Ashland_Phone_Records_May_2002_-_1.pdf (.pdf 4.52 mb)

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Wisconsin Judgment Day, the Sequel

March 21, 2008

White challenger launches Willie Horton-style hit, while a business group twists the "letter from the grave" case.

Summary

In this second of our "Court Watch" series, we return to what's become a racially charged campaign in Wisconsin to replace Louis Butler, the only black justice on the state Supreme Court, with a white, business-backed lower court judge, Mike Gableman. We look at two ads that attack Butler and find both to be misleading.

- An ad sponsored by Gableman's campaign features images of Butler's face next to that of a black man convicted of rape, and it's being compared to the Willie Horton ad from the 1988 presidential campaign. This ad falsely implies that Butler was responsible for freeing the rapist and allowing him to commit another sexual assault. Actually, Butler failed to win the man's release (while representing him as a public defender). The rapist served his sentence and didn't commit his next crime until he had been paroled.

- A second ad, sponsored by a business trade group, says Butler "almost jeopardized" a murder prosecution. But in fact, Butler was the sole dissenter in a 6-1 verdict. The ad also says Butler focused on "needless technicalities," when the case involves a question of constitutional rights so important that the U.S. Supreme Court will weigh in on the subject this spring.

We also lay out the facts behind a radio ad by a liberal group attacking Gableman. We leave it to our readers to judge whether or not those facts add up to a political "scandal" as the ad claims.

Analysis

The Gableman ad began airing March 14. The spot by Wisconsin Manufacturers and Commerce started running this week, as did a radio ad by the Greater Wisconsin Committee.

In Wisconsin, judges don't run with political party labels attached. They're officially nonpartisan. However, it's useful to know that Butler was appointed by a Democratic governor, while Gableman was picked by a Republican.

Loophole Louie?

Gableman's ad opens in black-and-white as a female narrator intones that "shadowy special interests supporting Louis Butler" are attacking Gableman. She doesn't tell us who they are or what they're saying, but whatever it is, "It's not true," she claims, as we're shown a grainy photo of Butler.

Flash to vivid color pictures of Gableman in his judge's robes. We're told that he put many child molesters behind bars, keeping our families safe.

Fade back to creepy black-and-white with eerie music. "Louis Butler worked to put criminals on the street," the narrator tells us. "Like Reuben Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child."

Gableman for Supreme

Some of the ad's statements are true. But the conclusion a viewer

Gableman for Supreme Court Ad: "Prosecutor"

Narrator: Unbelievable. Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman. It's not true.

Judge, District Attorney Michael Gableman has committed his life to locking up criminals to keep families safe. Putting child molesters behind bars for over a hundred years.

Louis Butler worked to put criminals on the street. Like Reuben Lee Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child.

Can Wisconsin families feel safe with Louis Butler on the Supreme Court?

would naturally draw from the construction of the ad – that Mitchell was freed as a result of Butler's legal finagling (or maybe a decision he made since he became a judge), and used that freedom to commit more crimes – is not.

Butler was a public defender for part of his career. His job as a defense lawyer was to protect the rights of the accused. His job now as a judge is different. To say he "worked to put criminals on the street" while showing him in a judge's robes hoodwinks the viewer on two counts.

In 1987, Butler was assigned to represent Mitchell in an appeal of his conviction for raping the girl.

Here's what happened: In most states, including Wisconsin, evidence of a complainant's prior sexual conduct is generally not admissible at trial. The theory is that sexual assault victims shouldn't be subjected to embarrassing and detailed examination of their prior sexual conduct unless it is relevant to a particular set of circumstances.

Sometimes, though, the rape shield law can be used to the *defendant's* advantage, and that's what happened here. At the trial, Mitchell's lawyer didn't want members of the jury to hear that the victim was a virgin, because he was afraid it would prejudice them against his client. The judge allowed it anyway. Butler then raised the same issue when he was assigned to the appeal, and the three-member appellate panel agreed with him: Not only should the jury not have heard that information, the panel said, but there was a good chance it might have affected the outcome. The judges reversed the verdict and ordered a new trial.

So Butler didn't "find a loophole" as this ad claims. He convinced the appeals court that the trial judge had allowed the jury to hear prejudicial information, which is just what appeals lawyers are supposed to do.

Furthermore, Mitchell didn't get his new trial, and he wasn't released. The state took the case to the next level, the Wisconsin Supreme Court, which reversed the appellate court. It was true, said the high court, that the trial judge shouldn't have allowed the jury to hear about the victim's virginity, *but*, said Justice Shirley Abrahamson, writing for the majority, it didn't make any difference. "[W]e can conclude that there is no reasonable possibility that the error contributed to the conviction," wrote Abrahamson.

Butler, then, had nothing to do with Mitchell's eventual release. Mitchell stayed in prison until he was paroled in 1992. In 1995, he was convicted for twice raping a 14-year-old. He was sentenced to 40 years behind bars, where he remains today.

The misleading message of this ad would be bad enough on its own, but its dominant visual image has drawn condemnation from many quarters. In that image, which remains on the screen longer than any other in this ad, a black-and-white photo of Butler is paired with Mitchell's police mug shot. Mitchell is black. Butler is the only black justice on Wisconsin's Supreme Court. The picture, at the very least, serves to remind viewers of Butler's race.

The independent Judicial Campaign Integrity Committee, which is monitoring ads in the race, called the spot "highly offensive and deliberately misleading," saying its race-baiting was reminiscent of the infamous Willlie Horton ad that attacked 1988 Democratic presidential nominee Michael Dukakis over prison furloughs granted when he was governor. The panel called for Gableman to take the ad down, as have

some Wisconsin editorial boards. But Gableman's campaign hasn't done so, and his campaign maintains the ad presents a fair comparison between the candidates.

The Letter from the Grave

Wisconsin Manufacturers and Commerce, a large business lobbying organization with a membership much like that of any Chamber of Commerce-type group, wants to see Butler unseated because, it says, he's an "activist" judge. It came after Butler this week with an ad that centers not on the civil liability issues that directly affect its members, but on a murder case that ended just last month.

The ad tells viewers that Butler's focus on "needless technicalities" in the case nearly allowed a murderer to go free. But what the ad calls "a technicality" involves an unsettled area of law tied to a fundamental constitutional right. And it's hard to argue that he "almost jeopardized the prosecution of a murderer" when the court's vote was 6-1, with Butler the only justice dissenting.

On Dec. 3, 1998, 40-year-old Julie Jensen was found dead in her home, poisoned by ethylene glycol (commonly found in antifreeze). Her then-husband, Mark Jensen, was charged with her murder in 2002.

Julie Jensen had told a neighbor and others that she thought her husband was trying to poison her. And she left a sealed letter with the neighbor, asking him to give it to the police if anything happened to her. The handwritten missive, which was delivered as instructed, described her fears about her husband and said that she was not suicidal. She wrote, in part: "I pray I'm wrong + nothing happens ... but I am suspicious of Mark's suspicious behaviors + fear for my early demise. However, I will not leave David + Douglas." (David and Douglas were her sons.)

Wisconsin Manufacturers and Commerce Ad: "Jensen"

Narrator: We count on judges to use practical common sense to keep violent criminals behind bars.

But faced with an unspeakable crime, Justice Louis Butler almost jeopardized the prosecution of a murderer because he saw a technicality.

When prosecutors needed to show critical evidence, Butler dissented. Going against six other justices. Thankfully, he didn't get his way.

Jurors said it was the most important piece of evidence they saw.

Call Louis Butler. Tell him to stand up for victims - not technicalities.

The fact that the letter was addressed to police made it, in legal terms, "testimonial evidence," or evidence similar to testimony given by a witness in court. And the confrontation clauses of the U.S. and Wisconsin constitutions guarantee the right of an accused to confront the witnesses against him or her. Things get complicated when, as in this case, the witness is unavailable – dead, for example. And not only dead, but possibly dead by the defendant's own hand. In fact, the alleged cause of the unavailability of this witness was the very crime for which Mark Jensen was being tried.

Whether such evidence can be admitted and presented to a jury is not an open-and-shut legal question. The "forfeiture by wrongdoing" doctrine – whereby a defendant is considered to have forfeited his right to confront an unfriendly witness if his own wrongdoing caused the witness to be unable to appear – is by no means settled law. In the Jensen case, the trial judge declared the letter inadmissible on the basis of a 2004 decision by the U.S. Supreme Court.

The prosecutor appealed to the state Supreme Court. And six of the justices ruled his way – but they made clear they were forging a new legal path as they did so:

> **Justice Jon P. Wilcox, for the majority:** [W]e reverse the circuit court's decision as to the applicability of the forfeiture by wrongdoing doctrine. Today, we explicitly adopt this doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to

> the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused. As such, the case must be remanded to the circuit court for a determination of whether, by a preponderance of the evidence, Jensen caused Julie's unavailability, thereby forfeiting his right to confrontation.

It was Butler, in his dissent, who took the narrower view, arguing for a stricter interpretation of the U.S. Constitution:

> **Butler:** The Sixth Amendment to the United States Constitution does not state that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [or her], except in homicide cases." While other courts may feel free to disregard the very principles upon which the Confrontation Clause rests, our decision must be limited by the Constitution and the United States Supreme Court decisions interpreting it. ...

Jensen, after a seven-week trial that was followed by the national media (which dubbed it the "letter from the grave" case), was convicted and sentenced to life without parole. But he could get a chance for a new trial. The U.S. Supreme Court, still grappling with the issue of forfeiture by wrongdoing, will hear a case next month in which the accused, charged with murdering his ex-girlfriend, claims that the use of evidence of a police conversation with the victim before her death violates his Sixth Amendment confrontation clause right. The court's ruling in Giles v. California is expected by the end of June.

Perhaps ironically, the prosecutor of the Jensen case, Robert Jambois, is a Butler supporter. Wisconsin Manufacturers and Commerce "is being completely hypocritical here," he said, "going after Justice Butler as being too liberal, when he did in this case what they say they want all justices to do, which is follow the Constitution."

"Shadowy Group" Reemerges!

Remember the "shadowy groups" condemned by the Gableman ad earlier in this article? This is most likely a reference to the Greater Wisconsin Committee, which is out with a new radio ad once again questioning Gableman's ethics. (We've already reviewed one of its earlier TV offerings.)

First, we should say that this group is no more shadowy than the outside groups, like Coalition for America's Families, that have supported Gableman. They don't disclose their donors, but they're not required to. For that matter, Wisconsin Manufacturers and Commerce doesn't either. The only real difference we can see is that GWC doesn't maintain a Web site. But finding the group isn't difficult. Wispolitics.com, a popular political Web site in the land of the cheeseheads, has a page on it and carries its press releases.

Greater Wisconsin Committee Radio Ad: "Scandal"

Wisconsin scandal update: New troubling revelations about Judge Mike Gableman.

First: An investigation uncovered evidence that Gableman was selected as a judge by Gov. McCallum just weeks after he hosted a fundraiser and contributed $1,250 to McCallum's campaign.

Next, media reports disclosed that Gableman actually charged taxpayers for working while he traveled over 500 miles to host the fundraiser.

But now, the most disturbing of all:

GWC's latest ad alleges, first, that then-Gov. Scott McCallum appointed Gableman to his judgeship just weeks after Gableman hosted a fundraiser for him and gave his campaign a check. That's true, as we've written previously.

Next, the ad claims that Gableman "charged taxpayers for working" while he traveled to the June 12, 2002, fundraiser. It's true that it would have been impossible for Gableman to get from his office to the evening fundraiser, several hundred miles away, without using part of what are normally considered working hours. Gableman's campaign responded to our questions about this in an e-mail:

Gableman campaign: Judge Gableman asked for and received permission to attend the event. And was required to use comp time so

Newly released records show that Gableman's district attorney's office was a virtual political campaign headquarters.

In just two months, before the fundraiser, more than 50 long-distance telephone calls were made from his office to campaign fundraising staff, other big campaign contributors, and political campaigns. All at taxpayers' expense. All while taxpayers were paying Gableman to fight crime.

Call Mike Gableman at xxx-xxx-xxxx and tell him we need higher ethical standards for our judges.

Paid for by Greater Wisconsin Committee.

was required to use comp time so he did NOT travel on state time. He was back at work the next day. Their spin is misleading and the allegations are false.

According to the campaign, Gableman received permission from Sandra Schultz, who it identifies as "his supervisor."

The ad's final charge is that during two months leading up to the fundraiser, more than 50 calls were placed from Gableman's office to persons who, it appears, were likely being contacted about the upcoming event. GWC received the telephone records using state open records laws, and we have posted the records as supporting documents to this article. We have also posted GWC's analysis of them.

The Gableman campaign has not clarified this matter, although it did release to Madison's *Wisconsin State Journal* two pages of documents showing that Gableman reimbursed Ashland County for some personal calls in the months before and after the fundraiser. But the campaign wouldn't say whether the calls were connected to fundraising, nor would it explain how the reimbursements matched up with the calls cited by GWC, which wasn't at all clear from the records themselves.

Even if the reimbursements do match the outgoing calls, the calls could raise questions for Gableman. As the *Wisconsin State Journal* notes, under Wisconsin Ethics Board rules, "it is improper and illegal for a state public official to charge the State of Wisconsin for a telephone call if the call is not primarily related to the person's official responsibility – even if the official later reimburses the State for its costs."

We'll leave it to readers to decide if these facts, to the degree we've been able to ascertain them, add up to an ethical "scandal," as the ad charges.

This week the Brennan Center for Justice at NYU School of Law calculated that Wisconsin voters were subjected to 4,789 televised Supreme Court campaign ads between Feb. 20 and March 16. The vast majority have come from third-party groups.

We'd chime in that a large number of them have been misleading.

The Gableman-Butler face-off is April 1.

– by Viveca Novak

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Judgment Day in Wisconsin

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