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Judgment Day in Wisconsin

March 7, 2008
Updated: March 10, 2008

First installment of our Court Watch series: Misleading voters about corruption, rape and murder in a battle to oust a Wisconsin justice.

Summary

Some of the hardest fought campaigns in 2008 will be to determine who sits on the highest courts in a number of states, courts where the stakes can be billions of dollars for corporations and insurance companies; millions in fees for trial lawyers; compensation for those who have been injured by negligence; or the liberty of individuals who have been convicted, rightly or wrongly, of crimes. In the past, some of those who would be state supreme court judges, as well as a number of outside groups that have taken an interest in these races, have shown a disregard for the facts in their campaign advertising. This year, we're making a special effort to track judicial campaigns.

We're calling this occasional series "Court Watch." Our first report deals with falsehoods, misleading statements and unproven innuendo about corruption, rape and murder in a Wisconsin race in which an incumbent justice, appointed by a Democratic governor, has been challenged by a lower-court judge who was appointed by a Republican. An independent watchdog group already has criticized one outside group and the challenger's campaign for making misleading claims. The ads have drawn fire from others, too, including the incumbent justice who might benefit from one of them.

We find that there are grounds for the outrage. Specifically:

- A fundraising letter from challenger Mike Gableman's campaign accuses incumbent Justice Louis Butler of being the "deciding vote" in a decision that resulted "in the release of [a sexual] predator into Milwaukee County." But the predator was never released.
- An ad paid for by a liberal group implies that Gableman got his lower court seat by writing checks to the then-governor's campaign. The ad provides no evidence, though, that anything unethical occurred.
- Another ad, this one from a conservative organization, implies that the incumbent overturned a murder conviction despite overwhelming evidence of his guilt. But Butler based his ruling on new DNA evidence that undercut a key part of the prosecution's case.

Election Day is April 1.

Analysis

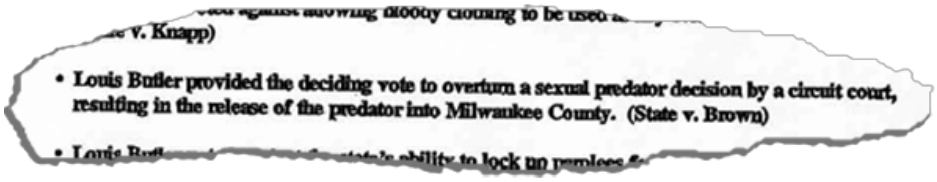
We just finished reading John Grisham's latest novel, "The Appeal," which spins the tale of a Supreme Court race in Mississippi. We couldn't help but notice a few uncanny parallels between its plot and the real-life Wisconsin race as it has unfolded so far. In both cases, a sitting justice (in the book, the only woman on the bench; in Wisconsin, the only African-American) is targeted for defeat by business interests. In both, ads accuse the incumbent of coddling criminals and being too tough on business. And in both, the election results could tip the liberal-conservative balance of the court.

In the book, a direct-mail letter accuses the incumbent of being responsible for setting a child molester free. In Wisconsin, a direct-mail letter accuses the incumbent of providing the "deciding vote to overturn a sexual predator decision … resulting in the release of the predator into Milwaukee County."

In neither case is the accusation true. In Grisham's story, the molester escaped from a local jail and died long before the court campaign. In Wisconsin, the predator remains in the same treatment facility where he was confined when his case went to the Supreme Court.

A Dubious Dispatch

A fundraising letter paid for, authorized and sent by Gableman's campaign last month asks recipients to help fund his race while slamming incumbent Butler as an "activist liberal" who's soft on crime. The letter, signed by former Lt. Gov. Margaret Farrow, a Republican, cites some cases where Butler supposedly went astray, including State of Wisconsin v. Richard A. Brown:


v. Knapp)

- Louis Butler provided the deciding vote to overturn a sexual predator decision by a circuit court, resulting in the release of the predator into Milwaukee County. (State v. Brown)

The case turned mainly on the admissibility of a psychologist's report on Brown, who had committed several acts of sexual violence over the years, and whether the state had "clear and convincing" evidence that Brown was much more likely than not to attack again if he was released from the treatment facility where he had been locked up after serving his prison sentence. The court decided the state hadn't met the "clear and convincing" standard and ordered it to prepare a supervised release plan for Brown. The 4-3 majority decision, issued March 22, 2005, was written by Chief Justice Shirley Abrahamson; Butler concurred with most of her opinion.

Ordering the state to prepare a plan and releasing Brown into the community are two different things, however. And, as it happens, Brown was not released. He remains in custody at the Sand Ridge Secure Treatment Facility in Mauston, Wis. (which is in Juneau, not Milwaukee, County), and has been there continuously since well before the case went to the Supreme Court.

Further, Farrow's claim that Butler "provided *the* deciding vote" on the case distorts the truth. The same could be said for any of the four justices who were in the majority.

The Wisconsin Judicial Campaign Integrity Committee, a watchdog group set up in the wake of last year's all-out brawl over a seat on the state's high court, voiced disapproval of the Farrow letter, saying its assertion about Brown's release was "misleading" and calling on Gableman to either "provid[e] supporting evidence" or "retract the statement and correct the public record."

Gableman, whose campaign authorized and paid for the Farrow letter, did neither.

"It was just a matter of random chance that [Brown] remained incarcerated," Gableman said at an appearance with Butler on Feb. 25. It's unclear what he meant by that.

Leaps of Ethical Logic

Gableman has taken some incoming fire as well. An ad run by the liberal Greater Wisconsin Committee lists a set of events leading up to Gableman's 2002 appointment as Burnett County circuit judge by then-Acting Gov. Scott McCallum. The ad finishes off with this scolding from the narrator: "Tell Mike Gableman we need higher ethical standards for our judges." Gableman and McCallum are both portrayed as bobble-head dolls.

Greater Wisconsin Committee TV Ad: "Meet Gableman"

This ad is chock-full of facts, but they don't necessarily lead to the conclusion implied by the closing line, that Gableman's appointment was unethical.

It's true, as the ad says, that "an independent panel recommended two finalists" for the position, and Gableman wasn't one of them. Earlier that year, McCallum had established, by executive order, an Advisory Council on Judicial Selection to interview applicants for judgeships and send him the names of several finalists. It's also true that five days after the list was sent, Gableman played a

Narrator: Meet Mike Gableman.

He wanted to be a judge. But he had a few problems.
Burnett County needed a judge. But Gableman lived 290 miles away.

An independent panel recommended two finalists – but he didn't make the list. He even missed the application deadline.

But weeks before the selection, Gableman hosted a fundraiser for Gov. Scott McCallum and gave him $1,250.

Guess who McCallum picked? Gableman.

Tell Mike Gableman we need higher ethical standards for our judges.

prominent role at a fundraiser for the governor, introducing him at the event and sitting at the head table with him. He had hosted a separate fundraiser for McCallum several months earlier. And it is indeed accurate that Gableman donated $2,500 to McCallum, according to campaign finance records, half of it just after the second fundraiser.

But there's no proof that Gableman's appointment was unethical. McCallum's order creating a panel to vet applicants for judicial vacancies didn't require him to choose someone from the panel's list. McCallum recently released a statement saying he chose "the best candidate available" and that "the final decision to appoint a judge was mine alone and not an advisory committee's." The chairman of that committee, lawyer James Troupis, said he didn't recall why McCallum chose Gableman over the two finalists recommended by his panel, and one of those finalists said he was "shocked" when he learned of the choice.

We'll concede that the circumstantial evidence raises questions, and we haven't heard a convincing alternative theory for Gableman's appointment, but that's not enough to prove wrongdoing, in our judgment.

The Judicial Campaign Integrity Committee agreed with our assessment:

> **Judicial Campaign Integrity Committee statement:** [W]e believe the ad unfairly impugns Judge Gableman's integrity because it implies, without explicitly stating, that Judge Gableman somehow committed an ethical lapse in the events leading to his appointment. … The ad does not substantiate this claim.

Murder Most Foul

The most recent ad to appear on the scene in the Supreme Court contest is a brazen exploitation of fear by the Coalition for America's Families, which says its mission is "to fight to lower the tax burden and increase the decision making power of the American family."

Coalition for America's Families Ad: Armstrong

Narrator: Ralph Armstrong was a convicted rapist out on parole when he raped, beat and strangled a 19-year-old co-ed to death.

There was eyewitness testimony, fingerprints at the crime scene and blood under Armstrong's fingernails.

But Louis Butler wrote the decision to overturn this rapist's conviction.

On cases taken up by the Supreme Court, Butler sides with criminals nearly 60 percent of the time.

This 30-second spot gives a distorted, cartoon-like description of a tangled murder case that could easily be the basis for a 60-minute Law and Order episode. The real story involves recanted testimony from a colorful witness, an absurd police line-up and a conviction based in part on semen and hair that were later proved not to have come from the accused.

The spot begins with an extreme close-up of an eyeball and spins rapidly through images of a woman's body, a hand smearing blood, fingerprints, police cars at night with lights flashing, a bloody knife. The narrator reminds viewers of one of the most notorious homicide cases in Madison's history, that of 19-year-old Charisse Kamps. A friend of Kamps', Ralph Armstrong, was convicted in 1981 for her murder and rape the year before, and he was sentenced to life plus 16 years in prison. In 2005, Butler wrote the decision that overturned the conviction, based on previously unavailable DNA test results showing that hair on the victim's bathrobe belt didn't belong to the defendant, and ordered a new trial for Armstrong.

The ad correctly states that there was eyewitness testimony at the trial. The main

Tell Louis Butler victims, not criminals, deserve justice.

eyewitness, a transvestite prostitute who was living as a female at the time, said she'd seen the defendant coming and going from Kamps' apartment on the night in question. At one point, she was interviewed by law enforcement under hypnosis, after already having been exposed to some of the characteristics of Armstrong and his car. The lineup from which she singled him out consisted of Armstrong, who called attention to himself by going limp to protest the process, and four police officers, at least two of whom wore what were obviously wigs. Even the witness said the lineup was fixed. She recanted her statements, then recanted her recantation.

The ad also mentions "fingerprints" at the crime scene. But only one of them, which was found on a water bong, was Armstrong's. And the fingerprint didn't bear on whether he murdered Kamps, since he had stated that he visited the victim on the night in question.

As for blood under Armstrong's fingernails, as the ad says, there were traces of human blood found under his thumbnails and the nails of two of his toes. But there wasn't enough of it for the crime lab to be able to identify who it was from or how old it was. Armstrong presented two credible, corroborated alternative explanations for how the blood got there, including the fact that he'd fallen and had a bloody knee.

The forensics experts analyzing semen found on the victim's bathrobe could only conclude that it came from a person with Type A blood, which is the second-most common type in the U.S. The experts also concluded that several hairs found at the scene were "similar" to or "consistent" with the defendant's by comparing its characteristics with those of Armstrong's hair, the usual method for hair analysis at the time.

Armstrong long ago had been turned down for a new trial after DNA tests eliminated him as the source of the semen. But in 2001, he filed a fresh motion based on the fact that new DNA testing also excluded him as the source of two hairs on Kamps' bathrobe belt. Those hairs had played a significant role in the case because the belt was found draped across Kamps' body. One of Armstrong's lawyers at the argument before the high court was Barry Scheck of the Innocence Project, which helps defendants whose guilt may be in doubt due to post-conviction DNA testing.

Butler, in his opinion, said the DNA test results were too important to ignore, given that the state had played up the physical evidence to the jury:

> **Butler:** [T]he State presented the physical evidence as affirmative proof of guilt, an assertion that was inconsistent with what the later DNA analysis revealed. ...
>
> The DNA evidence discredits one of the pivotal pieces of proof forming the very foundation of the state's case.

Three justices agreed with Butler. Three others dissented, saying the new evidence didn't meet the standard of creating "a reasonable probability that a different result would be reached at a new trial," in the words of Justice Patience Drake Roggensack.

Armstrong is easy to villainize. He was convicted of three rapes in New Mexico before coming to Wisconsin. And he may be found guilty in this case again; his new trial is pending. But some Madison residents have long held doubts about the conviction. "This has been one of the great unresolved, much-debated cases here," said David Callendar, who knew the victim and is now a reporter at the local Capital Times, in an interview with FactCheck.org. And by not mentioning the new DNA evidence, the ad leads viewers to think that Butler's decision was ill-considered.

The ad claims also that Butler "has sided with criminals nearly 60 percent of the time," but that's in dispute. The Butler camp says he has voted to uphold criminal convictions in 97 percent of cases brought before the court, and the campaign sent us a link to a Wisconsin Law Journal piece showing that in the 2006-2007 term, Butler voted with the majority on criminal cases 89 percent of the time, the second highest percentage of the seven justices. We tried to reach the Coalition for America's Families several times over two days, but our calls were not returned. We still don't know exactly how it derived its 60 percent figure.

Despite the fact that we can't conclusively reconcile the numbers from the coalition and the Butler campaign, it's clear to us that the "Armstrong" ad's presentation of facts about the murder case is meant to lead viewers to believe that Butler disregarded overwhelming evidence against Armstrong in setting him free. It

doesn't mention the new DNA results, which have led to reversals of convictions in numerous cases nationwide in recent years. It dupes voters by bypassing one of the most important aspects of the case, and the reason for Butler's decision.

Stand Down? Not Likely.

When the Greater Wisconsin Committee ran its first ad attacking Gableman, Butler called for the group to stop running it, asking third party groups to "stand down" in the Supreme Court campaign. He has repeated his appeal more than once.

Good luck with that. Political cognoscenti in Wisconsin expect millions of dollars to be spent on ads in the Butler-Gableman contest. Two other groups with deep pockets, the Club for Growth and Wisconsin Manufacturers & Commerce (WMC), already have begun airing television and radio ads supporting Gableman. (A Madison television station did a "Reality Check" today finding fault with a Club for Growth ad touting the challenger.)

All we can say is, John Grisham's story line isn't exactly far-fetched. It's playing out for real in Wisconsin.

– by Viveca Novak

Update, March 10: We originally wrote above that Type A blood is the kind most people have. Thanks to a reader who was still awake when she got to that part of the story, we have corrected it to say that Type A is the second-most common in the U.S. (Type O is the most common).

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