

APPELLATE JURY TRIAL REVIEW CHECKLIST

Case Name and Number	
Appellate Litigation Counsel	
Date of Appointment	
Date for Postconviction Motion or Appeal	
Client Contact Information	
Judge	
Prosecutor	
Appellate District – District Map	
Relatives and Friends Approved to discuss case with	
Link	Appellate Practice and Procedure Handbook
Link	Checklist from Appellate Handbook
Link	CCAP
Link	Court of Appeals and Supreme Court
Link	eFiling
Link	Date Calculator
Link	DOC Offender Locator
Link	ALL WISCONSIN PRISONS LINK JAILS LINK
Link	Wisconsin Statutes

_____ Defendant Take
 _____ Trial Counsel Take

_____ Transcript Review: [Initial Appearance](#) [Preliminary Hearing](#) [Status Hearings](#)
[Motion Hearings](#) [Final Pretrial](#) [Jury Trial](#) [Sentencing](#)

_____ Issues preserved and ready for appeal

_____ Competency Issues of Defendant
 _____ Confidential Informants
 _____ Constitutional Issues
 _____ Counsels' Opening Statements and Closing Arguments
 _____ Court's Colloquy with Defendant regarding decision to waive right to testify
 _____ Defendant and Trial Attorney Agreed on Strategy
 _____ Defenses Raised or that Could have Been Raised
 _____ Drug Testing, Blood Tests, DNA Samples, Fingerprinting
 _____ Evidentiary Rulings
 _____ Exhibits
 _____ HIPPA and Open Records requests for Medical Records, DOC Records, Police Records etc.
 _____ Ineffective Assistance of Counsel
 _____ Investigator or Experts Considered and or Hired
 _____ Jury Instructions
 _____ Jury Questions
 _____ Lesser Included Offenses Discussed
 _____ Motions Denied at Trial Level
 _____ Motions Granted
 _____ New Evidence
 _____ Objections
 _____ Plea Offer Placed on Record
 _____ Preliminary Hearing Timeliness
 _____ Pro Se Motions or Letters Submitted on eFile
 _____ Questioning of Witnesses
 _____ Request for a New Judge
 _____ Request for New Counsel Granted or Denied

☐ Search Warrant
☐ Sentencing
☐ Speedy Trial Demand
☐ Sufficiency of Evidence
☐ Sufficient Meeting time and Communication with Defendant
☐ Suppression of Evidence Issues
☐ Voir Dire
☐ Witnesses

Defendant Take on Issues to Look Into	

Trial Counsel Take on Issues to Look Into		Getting Casefile from Trial Counsel Link Have Obtained Trial Counsel Casefile
		Yes No
		Dates Requested

Transcript Review

Date	Type	Details	
	Initial Appearance		
	Page Length:		
Reviewed and Initial Thoughts:			
		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			
Date	Type	Details	
	Preliminary Hearing	Preliminary Hearing Timeliness	Initial Appearance
	Page Length:		
Reviewed and Initial Thoughts:			
		Location in Record	Dates
Reviewed No Problems			

Reviewed - this could be an issue for postconviction motion or appeal			
Date	Type	Details	
	Status Hearings		
	Page Length:		
Reviewed and Initial Thoughts:			
		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			
Date	Type	Details	
	Motion Hearing		
	Page Length:		
Reviewed and Initial Thoughts:			
		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			
Date	Type	Details	
	Final Pretrial		
	Page Length:		
Reviewed and Initial Thoughts:			
		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			
Date	Type	Details	
	Jury Trial		

	Page Length:		
Reviewed and Initial Thoughts:			
		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Date	Type	Details	
	Sentencing	Sentencing Link this document	
	Page Length:		
Reviewed and Initial Thoughts:			
		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Issues Preserved and Ready for Appeal			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Competency Issues of Defendant	
Reviewed and Initial Thoughts:	

Statutes			
Caselaw			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Confidential Informants			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Constitutional Issues			
Reviewed and Initial Thoughts:			
Statutes	Alerting Attorney General When Challenging the Constitutionality of Statutes: Wis. Stat. §806.04(11) Uniform Declaratory Judgments Act		
	Wisconsin Attorney General Josh Kaul 17 West Main Street Madison, WI 53703 or PO Box 7857 Madison, WI 53707 T: 608 266 0682 608 266 1221 F: 608 267 2779		
Caselaw	Legislative enactments are presumed to be constitutional and the challenger must prove beyond a reasonable doubt that the statute is invalid. <i>State v Pittman</i> , 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993). A regulation is overbroad if it substantially prohibits more conduct than is necessary to accomplish its goal. <i>Virginia v Hicks</i> , 539 U.S.113(2003). A facial challenge can only be successful if it can established that under no circumstances would the charge be valid. <i>United States v. Salerno</i> , 481 U.S. 739, 745 (1987). Under the Fourteenth Amendment to the Constitution....A substantive due process challenge can allege that a statute is unconstitutional on its face or as-applied. See <i>State v P.P.</i> , 2005 WI 32, ¶15, 279 Wis. 2d 169, 694 N.W.2d 344 An as-applied challenge... is a claim that a statute is unconstitutional as it relates to the facts of a particular case or to a particular party. <i>State v. Pocian</i> , 2012 WI App 58, P1, 341 Wis. 2d 380, 382, 814 N.W.2d 894, 895 (Wis. Ct. App. 2012)		
Links	Wisconsin Statutes		
Links	Wisconsin Department of Justice Website		
	Wisconsin DOJ Criminal Appeals Unit		
Links	Wisconsin and US Constitution		
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			

Reviewed - this could be an issue for postconviction motion or appeal			

Court's Colloquy with Defendant regarding decision to waive right to testify			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Counsel's Opening Statements and Closing Arguments			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Links	Trial Presentation		
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Defendant and Trial Attorney Agreed on Strategy			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Defenses Raised or that Could have Been Raised			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
	Defenses – Criminal: Insanity Self-Defense and Defense of Others Intoxication Alibi Coercion Necessity Mistake Adequate provocation Privilege Defense of property and protection against retail theft		
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Drug Testing Blood Tests DNA Samples, Fingerprinting			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Evidentiary Rulings			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

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Exhibits			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Issue Raised / Reviewed	Location in Record	Dates	
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

HIPPA and Open Records Requests for Medical Records, DOC Records, Police Records etc.			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Issue Raised / Reviewed	Location in Record	Dates	
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Ineffective Assistance of Counsel			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Issue Raised / Reviewed	Location in Record	Dates	
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Investigator or Experts Considered and or Hired			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed	Location in Record	Dates	
Reviewed No Problems			

Reviewed - this could be an issue for postconviction motion or appeal			

Jury Instructions			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed this could be an issue for postconviction motion or appeal			

Jury Questions			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Lesser Included Offenses Discussed			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Motions Denied at Trial Level			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Motions Granted			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

New Evidence	
Reviewed and Initial Thoughts:	
Statutes	
Caselaw	<p>3. Newly discovered evidence</p> <p>[*P31] <i>HNS</i> If a judgment is to be set aside based on newly discovered evidence, the defendant must provide sufficient evidence to establish that defendant's conviction is a manifest injustice. Plude, 2008 WI 58, 310 Wis. 2d 28, ¶32, 750 N.W.2d 42. To obtain an evidentiary hearing for such an allegation, a defendant must show specific facts that are sufficient by clear and convincing proof, when considered in the context of the record as a whole, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. Avery, 345 Wis. 2d 407, ¶25; State v. Love, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citing State v. Armstrong, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98); see also State v. Machner, 92 Wis. 2d 797, 805- 06, [***87] 285 N.W.2d 905 (1979); McCallum, 208 Wis. 2d at 473.</p> <p>[*P32] If a defendant satisfies those four criteria, then "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." Avery, 345 Wis. 2d 407, ¶25 (citing McCallum, 208 Wis. 2d at 473). "A reasonable probability of a different result exists if there is a reasonable</p>

	<p>probability that a jury, looking at both the [**705] old and the new evidence, would have a reasonable doubt as to the defendant's guilt." Id. (citing Love, 284 Wis. 2d 111, ¶44).</p> <p>[*P33] HN6 A claim of newly discovered evidence that is based on recantation [****19] also requires corroboration of the recantation with additional newly discovered evidence. McCallum, 208 Wis. 2d at 476. As we have explained, "[r]ecantations are inherently unreliable." Id. (citing Dunlavy v. Dairyland Mut. Ins. Co., 21 Wis. 2d 105, 114, 124 N.W.2d 73 (1963)). Therefore, corroboration requires newly discovered evidence that "(1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." Id. at 478; see also Zillmer, 39 Wis. 2d at 616 (concluding that "a new trial may be based upon an admission of perjury if the facts in the affidavit are corroborated by other newly discovered evidence").</p> <p><u>State v. McAlister</u>, 2018 WI 34, ¶¶30-33, 380 Wis. 2d 684, 704-05, 911 N.W.2d 77, 86-87</p>		
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Objections			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links	Wisconsin Statutes Chapter 908 Hearsay		
Links	Objections		
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Plea Offer Placed on Record			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw	<u>State v Ludwig</u> , 124 Wis. 2d 600, 369 N.W.722 (1985)		
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			

Reviewed - this could be an issue for postconviction motion or appeal			

Preliminary Hearing Timeliness			
Reviewed and Initial Thoughts:			
Statutes	Wis. Stat. Chapter 970		
	<u>Wis. Stat. 907.03(2)</u> : The preliminary examination shall be commenced within 20 days after the initial appearance of the defendant if the defendant has been released from custody or within 10 days if the defendant is in custody and bail has been fixed in excess of \$500. On stipulation of the parties or on motion and for cause, the court may extend such time.		
Caselaw			
Links	Date Calculator		
Links	Wisconsin Statutes		
Links	<u>Initial Appearance</u>		
Links	<u>Preliminary Hearing</u>		
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Pro Se Motions or Letters Submitted on eFile			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Questioning of Witnesses			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			

Reviewed - this could be an issue for postconviction motion or appeal			

Request for a New Judge			
Reviewed and Initial Thoughts:			
Statutes	<p>Wis. Stat. 971.20 Substitution of Judge</p> <p>Subsequently assigned judge (Main judge for case) (5)(b) (5) SUBSTITUTION OF TRIAL JUDGE SUBSEQUENTLY ASSIGNED. If a new judge is assigned to the trial of an action and the defendant has not exercised the right to substitute an assigned judge, a written <u>request for the substitution of the new judge may be filed with the clerk within 15 days of the clerk's giving actual notice or sending notice of the assignment to the defendant or the defendant's attorney.</u> If the notification occurs within 20 days of the date set for trial, the request shall be filed within 48 hours of the clerk's giving actual notice or sending notice of the assignment. If the notification occurs within 48 hours of the trial or if there has been no notification, the defendant may make an oral or written request for substitution prior to the commencement of the proceedings.</p> <p>SUBSTITUTION OF JUDGE IN MULTIPLE DEFENDANT ACTIONS. In actions involving more than one defendant, the <u>request for substitution shall be made jointly by all defendants.</u> If severance has been granted and the right to substitute has not been exercised prior to the granting of severance, the defendant or defendants in each action may request a substitution under this section.</p> <p>SUBSTITUTION OF JUDGE FOLLOWING APPEAL. If an appellate court orders a new trial or sentencing proceeding, a <u>request under this section may be filed within 20 days after the filing of the remittitur by the appellate court,</u> whether or not a request for substitution was made prior to the time the appeal was taken.</p>		
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Request for New Counsel Granted or Denied			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Search Warrant			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Sentencing Sentencing Transcript Link this Document			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw	<p>_____The court explained its reasoning, with reference to proper sentencing factors o Gravity of the offense: o Character of the defendant: o Protection of the public: • Harris v. State, 75 Wis. 2d 513, 519, 250 N.W.2d 7 (1977) (discussing McCleary v. State, 49 Wis. 2d 263, 274-76, 182 N.W.2d 512 (1971), and noting the factors that the court should consider when imposing sentence).</p> <p>_____ The court sought to impose the minimum period of incarceration necessary to meet its objectives, considering probation (where requested) first • State v. Gallion, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197 (stating that sentencing courts should impose the minimum amount of incarceration necessary to further its objectives and should consider probation as the first alternative).</p>		
Links	Wisconsin Statutes		
Links	From Appellate Manual		
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

	DOC or – PSI Recommendation	Prosecutor recommendation	Defense Attorney	Maximum Allowed	Judge
Sentence Recommendation					
Sentence Imposed					
Total Exposure					
Court Relied on Accurate Information					

If sentencing after revocation and different judge, court demonstrated familiarity with original sentencing hearing					
Defendant had assistance of counsel					
Jail Credit					
ERP Wis. Stat §302.045(2)(c)					
Substance Abuse Program Wis. Stat. §302.05					
Challenge Incarceration Program Wis. Stat. §302.045					
Jail – Custody Credit					
Prior Record					
Prosecutor agrees with PSI					
Defense agrees with PSI					
	Other Issues				
Victim Witness					
Character Witnesses					
Submissions to hearing for sentencing consideration					
Defendant given opportunity to Speak					
Mitigating Factors					
Judge’s Sentencing Discussion					
3 Sentencing Factors					
Character of Defendant					
Gravity of Offense					
Need to Protect the Public					
Harsh or Excessive					
If re-sentencing, vindictive					
Restitution Fines and Fees					
No Contact Orders					
State Complied with Victim Notification					
Basis for sentence modification					
Any other concerns apparent					

from the record or raised by the defendant					
Timely Notice of Right and Notice of Intent to Seek Postconviction Relief					
Sex Offender Registry	Wis Stat §§ 973.048 301.45				
Stay of Sentence Pending Appeal Wis. Stat. §809.31	<i>State v Gudenschwager</i> , 191 Wis. 2d 431, 529 N.w.2d 225 (1995)				

Speedy Trial Demand			
Reviewed and Initial Thoughts:			
Statutes	<p>Stat. §971.10 Speedy Trial (1) In misdemeanor actions trial shall commence within 60 days from the date of the defendant's initial appearance in court.</p> <p>(2)</p> <p>(a) The trial of a defendant charged with a felony shall commence within <u>90 days from the date trial is demanded by any party in writing or on the record.</u> If the demand is made in writing, a copy shall be served upon the opposing party. The demand may not be made until after the filing of the information or indictment.</p> <p>(b) If the court is unable to schedule a trial pursuant to par. <u>(a)</u>, the court shall request assignment of another judge pursuant to s. 751.03.</p> <p><u>971.10(3)(3)</u></p> <p>(a) A court may grant a continuance in a case, upon its own motion or the motion of any party, if the ends of justice served by taking action outweigh the best interest of the public and the defendant in a speedy trial. A continuance shall not be granted under this paragraph unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial.....</p>		
Caselaw			
Links	Wisconsin Statutes		
Links	Date Calculator		
Issue Raised / Reviewed	Location in Record		Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Sufficiency of Evidence	
Reviewed and Initial Thoughts:	
Statutes	Wis. Stat. §805.14(1)
Caselaw	<i>State v Pankov</i> , 144 Wis. 2d 23, 422 N.W.2d 913 (1988) review denied 145 Wis. 2d 916, 430 N.W.2d 351 (1988)
Links	Wisconsin Statutes
Links	

Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Sufficient Meeting time and Communication with Defendant			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Suppression of Evidence Issues			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Voir Dire	
Reviewed and Initial Thoughts:	
Statutes	Wis. R. Civ. P., Wis. Stat. § 805.18(2) provides that no judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of drawing, selection or misdirection of jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it appears that the error complained of affects the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

Caselaw	<p>Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias. <i>State v. Louis</i>, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990) (citing <i>Irvin v. Dowd</i>, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43 (1961); <i>McGeever v. State</i>, 239 Wis. 87, 96, 300 N.W. 485 (1941)). Whether a juror is biased and should be dismissed for cause is a discretionary matter to be determined by the trial court. <i>Louis</i>, 156 Wis. 2d at 478 (citations omitted). This is because the trial court is "intimately familiar with the voir dire proceeding, and is best situated to reflect upon the prospective juror's subjective state of mind which is relevant as well to the determination of objective bias." <i>State v. Faucher</i>, 227 Wis. 2d 700, 720, 596 N.W.2d 770 (1999)(citing <i>State v. Delgado</i>, 223 Wis. 2d 270, 285, 588 N.W.2d 1 (1999)).</p> <p>In a postconviction hearing ordered by the Court of Appeals after a no merit report was filed and rejected – the circuit court found: although "Attorney Keane may have been inarticulate at times" her failure to move to strike the panel did not constitute deficient performance. (106:4-14; App. 169-69) page 9 of Appellant's Appeal brief. They also declined to grant a new trial in the interest of justice noting that they were not persuaded the jury was tainted by the comments. <i>Id.</i></p> <p><i>Hammill v State</i>, 89 Wis. 2d 404, 278 N.W.2d 821 (1979)</p> <p><i>Oswald v Bertrand</i>, 374 F.2d 475 (7th Cir. 2004)</p> <p>In <i>Lorenz v. Wolff</i>, 45 Wis. 2d 407, 173 N.W.2d 129 (1970), the court did determine that discretionary reversal was warranted because conduct during the course of the trial prevented the jury from fairly considering a crucial issue before the court. See <i>Vollmer</i>, 156 Wis. 2d at 17, 36 456 N.W.2d at 804 (finding that the Supreme Court's power of discretionary reversal under Wis. Stat. § 751.06 is identical to Court of Appeals power of discretionary reversal under Wis. Stat. § 752.35). In <i>Lorenz</i>, defense counsel's questioning of the plaintiff became defense counsel's own testimony regarding something he purportedly witnessed. <i>Id.</i> at 416-18, 173 N.W.2d at 133-34. The trial court advised the jury that they were to disregard defense counsel's "testimony." <i>Id.</i> A short while later, defense counsel requested to be sworn in as a witness but then withdrew the request because he wanted to remain an attorney on the case. <i>Id.</i> at 417, 173 N.W.2d at 133. During closing arguments, defense counsel vouched for the truthfulness of the testimony of a witness, who happened to be his son. <i>Id.</i> at 418-19, 173 N.W.2d at 134. <u>On review, the Wisconsin Supreme Court reversed the verdict finding that there was a miscarriage of justice because the jury had before it evidence that was not properly admitted at the trial. <i>Id.</i> at 426, 173 N.W.2d at 138-39.</u></p> <p>Furthermore, unlike defense counsel's "testimony" in <i>Lorenz</i>, which was evidence not properly before the court, the prejudicial statements Attorney Keane elicited from prospective jurors resulted from voir dire proceedings that properly functioned to screen out biased jurors. As such, this is not the kind of case or set of circumstances that warrant the extraordinary remedy of discretionary reversal under Wis. Stat. § 752.35.</p> <p>State:</p> <p>In order to establish that the defendant was prejudiced by Attorney Keane's failure to strike the jury panel and Attorney Keane's own statements during voir dire, the defendant must show that Attorney Keane's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." <i>State v. Koller</i>, 2001 WI App 253, ¶ 9, 248 Wis. 2d 259, 635 N.W.2d 838 (quoting <i>Strickland</i>, 466 U.S. at 686, 104 S.Ct. at 2064). This burden cannot be met by showing that an error had some conceivable effect on the outcome. <i>Id.</i> (citation omitted). Instead, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding</p>
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would have been different.” Id. (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068). To show prejudice for trial counsel’s deficient performance during the selection of a jury, a defendant must show that counsel’s performance resulted in a biased juror member hearing her case, and not whether a differently composed jury would have acquitted the defendant. See Koller, 2001 WI App at ¶ 14. See also State v. Traylor, 170 Wis. 2d 393, 400-01, 489 N.W.2d 626 (Ct. App. 1992) and State v. Lindell, 2001 WI 108, ¶81, 245 Wis. 2d 689, 629 N.W.2d 223. When determining whether there were 22 any biased jurors, mere speculation is insufficient to satisfy the prejudice prong of Strickland. State v. Erickson, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999). Whether trial counsel’s actions constituted ineffective assistance presents a mixed question of fact and law. State v. Pitsch, 124 Wis.2d 628, 633-34, 369 N.W.2d 711 (1985). This court should not reverse the trial court’s factual findings regarding counsel’s actions unless those findings are clearly erroneous. Id. at 634, 369 N.W.2d 711. Whether trial counsel’s performance was deficient, and whether that behavior prejudiced the defense, are questions of law this court should review de novo. Id. In Koller, the defendant claimed that he was denied effective assistance of counsel because his trial attorney failed to sufficiently question several prospective jurors about their personal experiences with sexual assault and sexual assault victims. 2001 WI App at ¶ 11, 248 Wis. 2d at 271. There was no indication from the record that any of the jurors that heard the case were biased. Id. However, Koller argued that because trial counsel failed to question jurors in depth regarding whether any had an experience with sexual assault or its victims, this failure “might have resulted in a biased juror escaping detection.” Id. The Court of Appeals with sexual assault or its victims, this failure “might have resulted in a biased juror escaping detection.” Id. The Court of Appeals 23 found that Koller failed to establish prejudice because he failed to show that counsel’s failure to question jurors regarding sexual assault resulted in a biased juror deciding his case. Id. at ¶¶ 15-16, 248 Wis. 2d at 271. The Court determined that because Koller failed to make that showing, it did not have to consider whether counsel’s performance was deficient. Id. at ¶ 12, 16, 248 Wis. 2d at 271.

See State v. Mayo, 2007 WI 78, ¶ 63, 301 Wis. 2d 642, 734 N.W.2d 115. In Mayo, the prosecutor made several inappropriate comments during the trial. Id. at ¶¶ 14-17, 301 Wis. 2d at 121. In her closing argument, the prosecutor commented on the defendant’s decision to invoke his right to silence. Id. at ¶ 15, 301 Wis. 2d at 121. She also expressed her personal opinion regarding the defendant’s guilt and the role of defense counsel, which was to “get his client off the hook.” Id. at ¶¶ 15-17, 301 Wis. 2d at 121. The defendant claimed that his trial counsel was ineffective because counsel did not object to the prosecutor’s remarks. Id. at ¶ 20, 301 Wis. 2d at 122. **The Wisconsin Supreme Court found that while trial counsel may have been deficient for failing to fully investigate the case, counsel was not deficient for failing to 24 object to the prosecutor’s improper remarks. Id. at ¶ 63, 301 Wis. 2d at 131.** This determination was based, in part, on the circuit court’s finding that counsel’s failure to object involved defense strategy, and the court refused to “second guess” this decision. Id. (citing Strickland, 466 U.S. at 689, 104 S.Ct. 2052. Like the defendant in Koller, the defendant n A. The only evidence the defendant produced at the Machner hearing was Attorney Keane’s testimony. (See R.105 at 3-14) In response to appellate counsel’s question of whether she thought about striking the jury panel, Attorney Keane stated, “It didn’t occur to me.” (R.105 at 8) Attorney Keane was asked if she had concerns about the impact Whitehouse’s statements might have had on the jury, and Attorney Keane responded that at the time, she was more focused on the jurors who expressed opinions about her ques Prospective jurors are presumed impartial, and the challenger to that presumption bears the burden of proving bias. State v. Louis, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990) (citing Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43 (1961); McGeever v. State, 239 Wis. 87, 96, 300 N.W. 485 (1941). Whether a juror is biased and should be dismissed for cause is a discretionary matter to be determined by the trial court. Louis, 156 Wis. 2d at 478 (citations omitted). This is because the trial court is “intimately familiar with the voir dire proceeding, and is

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Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Witnesses			
Reviewed and Initial Thoughts:			
Statutes			
Caselaw			
Links	Wisconsin Statutes		
Links			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
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[TOP](#)

Statutes			
Caselaw			
Issue Raised / Reviewed		Location in Record	Dates
Reviewed No Problems			
Reviewed - this could be an issue for postconviction motion or appeal			

Statutes			
Caselaw			
Issue Raised / Reviewed		Location in Record	Dates
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Anders v California, 386 US 738, 87 S. Ct 1396, 1967 U.S. Lexis 1569;

Court of Appeals District III: When counsel files a no-merit report, the question presented to this court is whether, upon review of the entire proceedings, any argument would be wholly frivolous. See ***Anders v California***, 386 U.S. 738, 744 (1967). The test is not whether the attorney expects he argument to prevail. See SCR 20:3.1, cmt (action is not frivolous even though lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for counsel to prosecute the appeal. See ***McCoy v Court of Appeals***, 486 U.S. 429, 436 (1988).

Two-part test of effective assistance of defense counsel held (1) reasonably effective assistance and (2) reasonable probability of different result with effective assistance. *Strickland v. Washington*, 466 U.S. 668, 671, 104 S. Ct. 2052, 2056, 80 L. Ed. 2d 674, 683, 1984 U.S. LEXIS 79, *1, 52 U.S.L.W. 4565