

Joseph Sommers for WISCONSIN SUPREME COURT

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Judges Playing With The Record: A Grave Threat To The Integrity Of The Wisconsin Courts

This issue will cause more howls of outrage with the legal establishment than anything else I've addressed. For a long time there has been a trend in Wisconsin to place judges above public scrutiny. What if, though, some judges feel entitled to play with the record? If the true notion of the 'Rule of Law' is to protect an individual from being subjected to arbitrary and capricious actions by government officials, doesn't allowing judges to substitute alternative facts for those actually contained in the court record undermine the very heart of the 'Rule of Law'?

I have had the opportunity to appear before many good and honorable judges, and I don't mean at all to insinuate that the typical judge plays with the record. However, it is critical for the public to become aware that the examples outlined below are not isolated occurrences. From my experience, the trend in this direction is growing, and there appears to be no inclination in the judiciary to do anything about it. While many attorneys are disturbed by this trend, the common perception is that any attorney who calls attention to it will receive the 'kiss of death' professionally.

Judge Higginbotham's Revision Of The Record For The Benefit Of The Dane County District Attorney's Office¹

On June 7, 2002, in the Raisbeck case, Dane County Case No. 02 CF 2708, Judge Paul Higginbotham specifically found that Dane County Assistant District Attorney Paul Humphrey filed a false affidavit in regard to the availability of the photographic evidence. On April 7, 2003, Judge Higginbotham on the record reiterated his specific findings that ADA Humphrey's affidavit was a fabrication. At that time Judge Higginbotham made further specific findings that ADA Humphrey's argument to the court on June 7, 2002, about the veracity of his affidavit, and Humphrey's letter dated June 10, 2002, explaining the affidavit's inaccuracies, were further fabrications.

Dane County District Attorney Brian Blanchard and Deputy District Attorney Judy Schwaemle requested that Judge Higginbotham revisit the issue. Following this request, Judge Higginbotham applied and was appointed by Governor Doyle to the Wisconsin Court of Appeals; after which he obtained a special order permitting him to revisit the issue. In his order and memorandum, Judge Higginbotham revised his earlier findings. Judge Higginbotham now concluded, despite comments about ADA Humphrey routinely stretching the facts, that Humphrey's repeated factual misrepresentations "were exaggerations rather than intentional misrepresentations." Not satisfied with his revision, Judge Higginbotham went one step further and falsely asserted that he had never made specific findings that Humphrey's factual misrepresentations were intentional.

Judge Higginbotham's actions were brought to the attention of Governor Doyle, Attorney General Peg Lautenschlager, Supreme Court Chief Justice Shirley Abrahamson, and other public officials. Judge Higginbotham subsequently acknowledged that he had indeed made "the specific findings" he claimed never to have made in his memorandum and order. However, as of this date there is no indication that anyone (including the press) will ever hold Judge Higginbotham accountable for his playing with the record, or demand an answer to why he played with the record for the benefit of the Dane County District Attorney's Office.

The Court Of Appeals and Thomas Socha

In Forest County Case No. 2002 CF 16, Thomas Socha was charged with first degree intentional homicide. One would have hoped that, given the seriousness of the charge and because a conviction would result in a mandatory life sentence, Socha's constitutional right to a fair trial would have been scrupulously honored. One would have also hoped that if Socha was convicted, his constitutional right to appeal would likewise be scrupulously honored. As detailed below, regardless of whether Thomas Socha is guilty or innocent, it is easily verifiable that the Court of Appeals played with the record to cover up for Socha not receiving a fair trial due to the prosecutor inexcusably withholding evidence.

The Forest County District Attorney's Office had a critical problem to begin with in their prosecution of Thomas Socha for the murder of a Lance Leonard. All of the alleged other co-conspirators (Victor Holm, Vincent Holm, Beth Mrazik, and Dennis Drews) made no mention of Thomas Socha's involvement in the murder in their original statements, even though each implicated themselves and others. None implicated Socha until reaching plea agreements with the Forest County District Attorney's Office.

Another problem for Forest County District Attorney's Office was that a Forest County jail inmate named Roy Swanson came forward. Mr. Swanson was interviewed by law enforcement roughly four months before Socha's trial and in this interview he relayed a series of statements made to him by Victor Holm, who would be the state's primary witness against Socha. The information provided by Swanson contradicted Victor Holm's trial testimony in numerous aspects, and these inconsistencies would have been in furtherance of Socha's theory of defense.

The Swanson interview resulted in a one page summary/note, an audiotape, and a 48 page transcript of the contents of the audiotape. Despite Socha clearly being entitled to this evidence because it was both exculpatory and mandated to be turned over under the Wisconsin discovery statute, the Forest County District Attorney's Office inexcusably withheld this evidence from Socha's defense. Socha's defense would not become aware of this evidence until long after Socha's trial and sentencing.

On December 5, 2006, Socha's appeal was denied by the Wisconsin Court of Appeals' District III. There are so many factual distortions in this decision that one hardly knows where to begin. But two instances will illustrate the Court of Appeals' playing with the record. First, if one reads the decision, one finds that the Court of Appeals downplays numerous possible trial errors by repeatedly portraying the evidence against Socha as being overwhelming. But when the Court of Appeals lays out the evidence against Socha, it repeatedly obscures the fact that the alleged co-conspirators did not implicate Socha, despite implicating themselves, until they reached plea agreements.

Worse than the above, however, was how the Court of Appeals handled the withheld evidence. No mention was made of the audiotape. No mention was made of the 48 page transcript. The Court of Appeals in their decision reduced all the withheld evidence to "notes." Would anyone characterize an audiotape as a "note"? Would anyone characterize a 48 page transcript as a "note"? How could they justifiably reduce the entire extent of the withheld evidence to the summary/note?

Having arbitrarily reduced the withheld evidence, the Court of Appeals would go one step further to selectively edit the withheld evidence so that the reader of their decision would not know the extreme extent to which Holm's statements to Swanson contradicted his trial testimony. Thus, having narrowed the withheld evidence and selectively edited its contents, the Court of Appeals had little difficulty in: 1) deeming the withheld evidence as "inconsequential"; and 2) completely obscuring the degree of the prosecutor's misconduct.

Thomas Socha is under a life sentence. How can it be that in a matter as important as this the Court of Appeals feels entitled to play with the record? If the Court of Appeals can so capriciously redefine the actual

facts, can anyone be satisfied that Thomas Socha's constitutional right of appeal was protected? Can anything undermine the integrity of our courts more than this? Somebody, at some point in time, has to alert the public. And that is one of the reasons I am running for the Wisconsin Supreme Court.

Footnotes

1. **(Return)** Higginbotham is an announced supporter of Supreme Court Candidate Linda Clifford, a Madison civil attorney.

Vote for Joe Sommers on February 20th and April 3rd.

Authorized and paid for by Joseph Sommers for Supreme Court, Robert Ruth, Treasurer.