STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP197-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE L. HERRMANN,

Defendant-Appellant-Petitioner.

On Petition for Review of a Decision by the Court of Appeals, District IV, Dated February 13, 2014.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

Did the judge's statements at Mr. Herrmann's sentencing reveal that she was objectively biased in violation of Mr. Herrmann's right to due process?

Resolution of the issue in the Court of Appeals:

The Court of Appeals applied the objective test for judicial bias as stated in ***State v. Goodson***, 2009 WI App 107, 320 Wis.2d 166, 771 N.W.2d 385. That test asks whether a reasonable person could question the court's impartiality based on its statements. ***Id***., at ¶ 9. The court affirmed the judgment of the circuit court in a *per curiam* opinion. While acknowledging that this was "a close case," the court saw no distinction between the judge's statements here and remarks commonly made by judges expressing an understanding of the plight of crime victims. (App. 104).

STATEMENT OF THE CASE

Mr. Herrmann pled guilty to one count of homicide by intoxicated use of a vehicle, two counts of injury by intoxicated use of a vehicle, two counts of operating a motor vehicle while intoxicated causing injury, and one count of hit and run – resulting in death.

The circuit court sentenced Mr. Herrmann to a total of seventy-one years imprisonment (thirty-one years of initial confinement and forty years of extended supervision) followed by another 15 years of probation. (R. 26, 27).

Mr. Herrmann filed a post-conviction motion for resentencing, asserting that the circuit court erroneously exercised its discretion and violated his right to due process at sentencing because the judge was objectively biased. (R. 39). The circuit court denied the motion. (R. 43). Mr. Herrmann appealed. (R. 48).

The Court of Appeals applied the objective test for a due process violation based on judicial bias as stated in ***State v. Goodson***, 2009 WI App 107, 320 Wis.2d 166, 771 N.W.2d 385. That test asks whether a reasonable person could question the court's impartiality based on the court's statements. ***Id***., at ¶ 9. The court affirmed the judgment of the circuit court in a *per curiam* opinion. While acknowledging that this was "a close case," the court said "we find it difficult to distinguish the judge's comments from those we have seen in many other sentencing transcripts in which the judge expresses an understanding of the plight of victims of a crime." (App. 104).

Mr. Herrmann filed a Petition for Review in this Court, which was granted.

STATEMENT OF FACTS

In the summer of 1976, five young women were in a car that was struck by a vehicle in which the driver and a passenger were "drunk out of their minds." (R. 47: 4, 78; App. 117, 191). The drunk driver and his passenger were killed. Of the five young women, four were killed. One of them was the sister of Ramona Gonzalez, who would later become a circuit court judge for LaCrosse County. (R. 47: 4, 78; App. 117, 191). Even thirty-five years later, the judge said not a day went by in which she did not think about her sister's death. (R. 47: 78; App. 191).

In the summer of 2011, five young women were in a car that was struck by a vehicle driven by Jesse Herrmann, who had a blood alcohol concentration of .215. (R. 16: 2). One of the young women was killed, and the other four were injured. Mr. Herrman was also injured, but survived and was criminally charged. Ramona Gonzalez was the judge assigned to Mr. Herrmann's case.

At the beginning of his sentencing hearing on November 28, 2011, the judge told Mr. Herrmann:

> Okay, Mr. Herrmann, there is a matter that I'd like to put on the record again just before we begin. It's not a secret that I lost a sister to a drunk driver in the summer of 1976. I made this known. I don't believe that this will have any impact on my ability to set that aside and sentence you based upon the information presented on your case and not my sister's case, but I want you to understand right off the get-go that that is something that I have zealously tried to set aside, and I do believe that I am able to do that. If you have any issues or questions that you want to ask relative to that, you're certainly welcome to ask them now.

(R. 47: 4; App. 117). Mr. Hermann's attorney indicated that this information caused "no problems." (R. 47: 4; App. 117.).

Sentencing proceeded. The State recommended a "lengthy prison sentence" and asked that the court impose consecutive sentences to recognize the separate harm to each of the victims. (R. 47: 56, 61; App. 169; 174). The presentence report contained a recommendation of a total of 40 years initial confinement in prison and 20 years extended supervision. (R. 16: 15). Mr. Herrmann's attorney recommended a total of 12-15 years initial confinement in prison and 20 years extended supervision. (R. 47: 67; App. 180).

Before pronouncing sentence, the court heard from 14 witnesses describing the effects of the tragedy, including the four surviving victims, family members of the victims, a pastor, and one witness to the accident. (R. 47: App. 118-156).

Prior to pronouncing sentence, the judge decried the community's inadequate response to the problem of drunk driving. (R. 47: 74-78). Then the judge said this:

> In 1976 five young women got into a vehicle, and only one of them survived. The two gentlemen in the other vehicle were 17, drunk out of their minds, and they did not survive. That was my personal story, and I will tell you that the day does not go by that I do not think of that personal tragedy, and I wish that I could tell these victims that that pain will one day disappear, but it doesn't. Time makes it less. We redirect ourselves to other things, and a day does go by when we don't think of our loved ones and then we feel guilty at night because that happened, but life does go on and I am very grateful today that I'm looking at four lovely young ladies and that only one family has had to go through the pain that my family and the other three young ladies' families had to endure in 1976.
>
> And so perhaps it is again destiny or a higher power or, Pastor, probably the prayers of many others that bring me to be the judge on this particular case because I probably more than anyone else who would be able to sit on this bench in this county understand the pain that these victims are feeling, but I have had the benefit of all those years since 1976 to understand that I have to make Mr. Herrmann pay, but that nothing I do to him will lessen that pain, and that if I don't do more than just incarcerate Mr. Herrmann, if I don't speak out on behalf of my community today, then this tragedy will continue to happen on our streets, and more families will suffer that way these families suffer today.

(R. 47: 78-79; App. 191-92).

The judge then urged the community not to focus on "what a monster Jesse Herrmann was and is," which would allow the community to go back to a state of complacency about drinking and driving. She urged members of the community to change their attitudes about the problem and not to "shrink from the opportunity" to intervene when they see someone who should not be driving. (R. 47: 79; App. 192). The court also discussed another recent fatal drunk driving case. (R. 47: 76, 80; app. 189, 193).

The judge discussed Mr. Herrmann's character, including his alcohol use despite his having had the benefit of supervision, assessment and treatment. (R. 47: 81, 84-85; app. 194, 197-98).[1] The judge considered the gravity of the offense and its effects on the victims and on Mr. Herrmann's own family. (R. 47: 81-82; App. 194-95). The judge considered the need to protect the public. (R. 47: 82-83; App. 195-96).

The court then imposed consecutive sentences on the various counts totaling 31 years initial confinement and 40 years extended supervision followed by 15 more years of consecutive probation. (R. 47: 87-89; App. 190-92).

[1] The court did not list Mr Herrmann's criminal convictions, but they were before the court by way of the presentence report. They included a first offense OWI in 2005; a citation for Possession of Open Intoxicant in a Vehicle on the same date in 2005; convictions for Carrying a Concealed Weapon, Bail Jumping, Disorderly Conduct, and Battery in 2006; and a 2007 federal conviction for Conspiracy to Possess with Intent to Distribute Methamphetamine. (R. 16: 8).

The father of the victim who was killed indicated displeasure over an apology letter that some of the victims had received from Mr. Herrmann. (R. 47:17; App. 119). Immediately after imposing sentence, the judge said:

> You will have no contact with these victims or their families, and on that score I feel compelled to make a statement about your letter. I don't know what the motivation would have been for you to write such a letter to these victims, but you are never, ever to communicate, not just with them, but with any member of their families or write any letter to any other member of the community without first having that sent to the district attorney's office for review.

(R. 47: 90; App. 203). Mr. Herrmann explained that he had provided the letter to the district attorney's office as he had been directed to do, with the understanding that it would be provided only to those victims who wished to read it. (R. 47: 90; App. 203). The judge reiterated:

> Well, I'm not sure how that got lost in the translation, Mr. Herrmann, but let me just say from the bench as a condition of your extended supervision other than your own family members any letter that you would write to any member of the community rendering any excuses, opinions, or concerns about your sentence or about this crime need to be run through the district attorney's office first.

(R. 47: 90; App. 203).

It became clear that when the court imposed the sentence, the judge believed that the terms of extended supervision would run concurrent to each other by operation of law. She said that was the reason she had structured the terms of extended supervision as she did. (R. 47: 92; App. 205). The prosecutor attempted to correct this impression,

saying "Well, I'm pretty sure all the time you have ordered on extended supervision he's got to serve." The judge said "Well, if he has to serve it all, then I'm gonna keep him on supervision until he's a hundred then." The prosecutor said "Well, that's what I'm getting at is he'd be a hundred before he even started his probation term that you ordered." The prosecutor opined "That's not – I assume – that's not your intent or is it?" The judge responded:

> That is my intent. If something – if somebody changes – you know, if somebody changes the way we incarcerate people in the future here, I want to make sure that he's under supervision until he dies.

(R. 47: 93; App. 206).

ARGUMENT

I. At Mr. Herrmann's Sentencing, the Judge's Comments Revealed that She Was Not the Impartial Judge Due Process Requires.

A. Introduction.

In addition to the statutory requirement of recusal based on purely subjective bias[2], the United States Supreme Court has said that the Due Process Clause "has been implemented by objective standards that do not require proof

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[2] By statute, a judge must recuse herself if she "determines that for any reason . . .she cannot, or it appears. . .she cannot, act in an impartial manner." Wis. Stat. §757.19(20(g). This Court has said that the inquiry required by this statute is a purely subjective one on the part of the judge. Recusal is required only where the judge believes she cannot act impartially or where the judge believes there is an appearance of partiality. ***State v. American TV & Appliance,*** 151 Wis.2d 175, 183, 443 N.W.2d 662 (1989). Mr. Herrmann has never argued that Judge Gonzalez was required by statute to recuse herself. Her statement at the beginning of the sentencing hearing that she believed she could be fair would seem to satisfy the statute as it has been interpreted. (R. 47: 4; App. 107).

of actual bias." ***Caperton v. A.T. Massey Coal Co***., 556 U.S. 868, 883, 129 S. Ct. 2252, 2263 (2009). Due process is violated by an appearance of bias if there is "a serious risk of actual bias—based on objective and reasonable perceptions." ***Id.***, at 884, 129 S. Ct. 2252 at 2263.

Since ***Caperton*** was decided, this Court has not spoken on the precise nature of the standard that applies to due process claims based on an objective appearance of judicial bias except to acknowledge that due process does require an "objective inquiry." ***State v. Pinno*****,** 2014 WI 74, ¶94, 356 Wis. 2d 106, 158, 850 N.W.2d 207, 233 (*citing* ***Caperton***). Precisely which formulation of the test should be used to evaluate due process claims based on judicial bias is a question this case calls upon this Court to decide.

The Court of Appeals said it was applying the standard it had articulated in ***State v. Goodson***, 2009 WI App 107, 320 wis.2d 166, 771 N.W.2d 385. That test asks whether a "reasonable person could question the court's impartiality based on the court's statements." ***Id***., at ¶ 9. Mr. Herrmann has no quarrel with the test the Court of Appeals applied. The court in ***Goodson*** was relying on the standard it had stated in ***State v. Gudgeon.*** WI App 143, 295 Wis. 2d 189, 720 N.W.2d 114, in which the court said due process was violated:

> whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to "hold the balance nice, clear and true" under all the circumstances.

Id., at ¶ 23- 24, 295 Wis. 2d at 205-06, 720 N.W.2d at 122. This language is consistent with ***Caperton***. The various formulations of the test can be encapsulated this way: Due

process is denied whenever there is an appearance of bias on the part of the judge that reveals a substantial risk of actual bias from the standpoint of a reasonable observer. It is this standard that Mr. Herrmann asks the Court to adopt.

As discussed below, while the Court of Appeals stated essentially the correct standard, that court applied it incorrectly to the facts of this case. Wherever this Court may draw the line, the statements by the judge in this case crossed it.

It is important to note at the outset what Mr. Herrmann is not arguing. He is not arguing that any time a judge is a crime victim, that judge will necessarily be impermissibly biased in a case involving the same crime. A case by case inquiry is required. In this case, it is not the bare fact that the judge lost a sister to a drunk driver in 1976 that disqualified her. Whether Mr. Herrmann would prevail on a due process claim based on that fact alone is questionable and not at issue here.

What disqualified the judge in this case was: 1) her admission that although the tragedy happened 35 years ago, she still thinks about it every day; 2) the striking similarity between the two accidents and the kind of harm they caused to the families; 3) her complete identification with the victims; 4) her belief that she was the judge in this case as a result of divine intervention because her personal tragedy made her the best judge for the job; and 5) her sense of mission to make Mr. Herrmann "pay." Mr. Herrmann seeks no bright line rule that would automatically prevent a burglary victim from sentencing a defendant in a burglary case.

B. Standard of review.

When analyzing a judicial bias claim, the reviewing Court presumes that the judge was fair, impartial, and capable of ignoring any biasing influences. That presumption, however, is rebuttable. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 203, 720 N.W.2d 114, 121. Whether the judge is objectively biased is a question of law that this Court reviews *de novo*. ***State v. Rochelt***, 165 Wis. 2d 373, 379, 477 N.W.2d 659, 661 (Ct. App. 1991).

C. Due process is denied when there is an appearance of bias on the part of the judge that indicates a substantial risk of actual bias from the standpoint of a reasonable observer.

A fair trial in a fair tribunal is a basic requirement of due process. ***In re Murchison***, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955). It has long been recognized that proof of actual bias on the part of the judge is not always necessary to establish a due process violation. In an early judicial bias case, the United States Supreme Court was called upon to determine whether a mayor who was paid from the fines collected from prohibition violators, but who also acted as the judge in the cases against the violators was impermissibly biased in violation of due process. ***Tumey v. Ohio*****,** 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927).

In ***Tumey***, the Court said that "[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." ***Id.*** The Court acknowledged that the judge might not be biased and that there were doubtless judges who could act impartially under those circumstances. However, the Court said "Every procedure which would offer a possible temptation to the average man as a judge . . . not to

hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." ***Tumey*****,** 273 U.S. at 532, 47 S.Ct. at 444.

The Court called this a "stringent rule" and has acknowledged that it may sometimes disqualify judges who "have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties*." **Murchison,*** 349 U.S. at 136, 75 S. Ct. at 625. This is necessary because "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" ***Id.,*** *quoting* ***Offutt v. United States*****,** 348 U.S. 11, 14, 75 S.Ct. 11, 13. (1954). In ***Murchison,*** the claim of bias was based on a procedure whereby the judge in a proceeding in which contempt occurred then also presided over the ensuing contempt proceeding.

The Due Process Clause prohibits a judge from presiding over a case when he or she has "an interest in the outcome." ***Id***. But what kind or degree of interest would trigger due process concerns was for decades far less than crystal clear. The Supreme Court acknowledged as much when it said "That interest cannot be defined with precision. Circumstances and relationships must be considered." ***Id.***

The Court in ***Withrow v. Larkin***, 421 U.S. 35, 95 S. Ct. 1456 (1975), reiterated that there is some point at which "the probability of bias on the part of the decision-maker is too high to be constitutionally tolerable." ***Id***. at 47, 95 S. Ct. at 1464. The Court explained that to show an "unconstitutional risk of bias," it is necessary to employ "a realistic appraisal of psychological tendencies and human weaknesses." ***Id.***

None of this language defined with great precision the degree of risk or probability of judicial bias that would offend

due process. For decades there was disagreement about the application of these Supreme Court precedents to claims of judicial bias. In many cases, courts decided these claims without any reference to the Supreme Court precedents, concluding that due process was offended only if *actual* bias could be shown. *See, e.g.* ***State v. Hollingsworth***, 160 Wis. 2d 883, 894, 467 N.W.2d 555, 560, 1 (Ct. App. 1991) ("A litigant is denied due process only if the judge, in fact, treats him or her unfairly. A litigant is not deprived of fundamental fairness guaranteed by the constitution either by the appearance of a judge's partiality or by circumstances which might lead one to speculate as to his or her partiality.")

In some cases, courts considered the Supreme Court precedents, but sought to limit them to their facts despite their broad language. In those cases, courts held that the objective test for judicial bias required a showing of actual bias except under the few very specific circumstances that had been found by the Supreme Court to create an impermissible risk of bias, such as where a judge stood to gain a pecuniary advantage based on the outcome of a case or where the judge who was the object of contempt then presided over the ensuing contempt proceeding. *See, e.g.*, ***Margoles v. Johns*****,** 660 F.2d 291, 296 (7th Cir. 1981).

In other cases, the courts rejected the notion that only actual bias offends due process, interpreting the Supreme Court precedents as requiring an examination of the appearance of bias. *See, e.g.,* ***Franklin v. McCaughtry*****,** 398 F.3d 955, 960-61 (7th Cir. 2005) (citing ***Tumey*** and ***Murchison*** for the proposition that "the Supreme Court has decided that both actual bias and the appearance of bias violate due process principles"); ***Jones v. Luebbers***, 359 F.3d

1005, 1013 (8th Cir. 2004) (disqualification required when the potential for bias is sufficient to tempt an "average man serving as a judge" to stray from impartiality.).

This Court, in the wake of the United States Supreme Court's decision in ***Withrow***, relied upon it to conclude that the judicial bias inquiry *did* involve an objective test that *did not* require that actual bias be shown. ***State ex rel. DeLuca v. Common Council of City of Franklin*****,** 72 Wis. 2d 672, 242 N.W.2d 689 (1976). ("We conclude that, in respect to this latter test, the trial judge appeared to base his ruling on whether there was actual bias revealed by the record. We believe this test to be incorrect and that actual bias need not be shown.") And the Court again suggested that under some circumstances the appearance of bias might offend due process without a showing of actual bias in ***In Interest of Kywanda F.*****,** 200 Wis. 2d 26, 546 N.W.2d 440 (1996). The Court did not elaborate because it found that not even an appearance of bias had been shown in that case. The parameters of the objective test that should be employed, therefore, remained unclear.

The Wisconsin Court of Appeals waded into these waters more recently in ***State v. Gudgeon*****,** 2006 WI App 143, 295 Wis. 2d 189, 720 N.W.2d 114. There, the court noted the tension among the cases discussing the objective test for judicial bias. The court concluded that the seemingly divergent case law could be harmonized because the cases recognizing the appearance of bias as sufficient to violate due process were limited to those circumstances where "the appearance of bias revealed a great risk of actual bias." ***Id.*** at ¶ 23- 24, 295 Wis. 2d at 205-06, 720 N.W.2d at 122. The Court of Appeals stated the objective test for judicial bias as follows:

> In short, the appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to "hold the balance nice, clear and true" under all the circumstances.

Id. The court stressed that the test was what a reasonable person — as opposed to a reasonable judge or legal practitioner — would conclude. ***Id.*** at ¶ 26, 295 Wis. 2d at 207-08, 720 N.W. 2d at 123.

The Court of Appeals' approach in ***Gudgeon*** was shown to be essentially correct when the United States Supreme Court decided ***Caperton v. A.T. Massey Coal Co.***, 556 U.S. 868, 129 S. Ct. 2252 (2009). In that case the Court held that due process demanded that a West Virginia appellate court judge recuse himself when the CEO of one of the corporate parties appearing before him had contributed roughly three million dollars to the judge's election campaign.

The facts of ***Caperton*** were unique, but the Court took the opportunity to provide some clarification on the objective standard to be used to evaluate due process/judicial bias claims. The Court said "Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" ***Id.*** at 872, 129 S. Ct. at 2257 (quoting ***Withrow,*** 421 U.S. at 47, 95 S.Ct.1456).

The Court acknowledged that in ***Tumey,*** it had stated that the Due Process Clause had incorporated common law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. ***Caperton***, 556 U.S. at 877, 129 S. Ct. at 2259 (quoting ***Tumey,*** 273 U.S.

at 523, 47 S. Ct. at 441). Under the common law rule, disqualification for personal bias or prejudice was not permitted, but was left to statutes and judicial codes. ***Id.*** However, the ***Caperton*** Court rejected the notion that a pecuniary interest was a prerequisite to a due process violation, explaining:

> As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." ***Withrow,*** 421 U.S., at 47, 95 S.Ct. 1456.

Caperton, 556 U.S. at 877, 129 S. Ct. at 2259. The Court noted that in ***Tumey***, the concern was not limited to the judge's pecuniary interest in the case. Rather, the Court was "also concerned with a more general concept of interests that tempt adjudicators to disregard neutrality." ***Caperton***, 556 U.S. at 878, 129 S. Ct. at 2260. The Court explained the need for an objective standard to assess the dangers posed by those interests:

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. See

> ***Tumey,*** 273 U.S., at 532, 47 S.Ct. 437; ***Mayberry,*** 400 U.S., at 465–466, 91 S.Ct. 499; ***Lavoie,*** 475 U. S., at 825, 106 S.Ct. 1580. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." ***Withrow,*** 421 U.S., at 47, 95 S.Ct. 1456.

Caperton**,** 556 U.S. at 883, 129 S. Ct. at 2263. The Court stated the test this way:

> The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."

Id. at 881, 129 S. Ct. at 2262. Stated another way, the question is whether there is "a serious risk of actual bias—based on objective and reasonable perceptions."***Id.****, at*, 884, 129 S. Ct. 2252 at 2263.

After ***Caperton,*** it is clear that a due process violation can be shown without a showing of actual subjective bias. This Court has said as much. *See* ***State v. Pinno*****,** 2014 WI 74, ¶94, 356 Wis. 2d 106, 158, 850 N.W.2d 207, 233. (In addition to the requirement that a judge must reach a subjective determination that he is not biased under Wis. Stat. § 757.19(2)(g), "the Due Process Clause requires an objective inquiry."*citing* ***Caperton***). However, this Court has not addressed the question precisely what objective inquiry is required by ***Caperton.*** Unfortunately, the ***Caperton*** decision is not distinguished by precision of language. The Supreme Court cited with approval language from its previous cases

and added new formulations. As a result, the objective test is stated these several different ways:

1) whether "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." ***Caperton,*** 556 U.S. at 872, 129 S. Ct. at 2257 (*quoting* ***Withrow,*** 421 U.S. at 47, 95 S. Ct. 1456);

2) whether "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" ***Id.*** at 881, 129 S. Ct. at 2262;

3) whether the circumstances "would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true between the State and the accused" ***Id.*** at 878, 129 S. Ct. at 2260. (*quoting* ***Tumey,*** 273 U.S. at 532, 47 S. Ct. at 437);

4) whether "'under a realistic appraisal of psychological tendencies and human weakness,'" the interest "'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" ***Id.*** at 883, 129 S.Ct. at 2263 (*quoting* ***Withrow,*** 421 U.S. at 47, 95 S. Ct. 1456); and

5) whether there is "a serious risk of actual bias—based on objective and reasonable perceptions." ***Id***., *at* 884, 129 S. Ct. at 2263.

There is nothing truly inconsistent about these various formulations, and they are all essentially equivalent to the conclusion arrived at by the Court of Appeals in ***Gudgeon*** — that the appearance of bias violates due process when "the appearance of bias reveal[s] a great risk of actual bias." 295 Wis. 2d at ¶ 23- 24, 295 Wis. 2d at 205-06, 720 N.W. 2d at

122. Put yet another way, "the appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***Id.***

The various formulations can be encapsulated thus: Due process is denied when there is an appearance of bias on the part of the judge that indicates a substantial risk of actual bias from the standpoint of a reasonable observer. It is this test that should be applied to the facts of this case.

The test the Court of Appeals said it applied was essentially the correct test (Opinion at 3-4; App.103-104), but Mr. Herrmann will argue below that the court applied the standard incorrectly. Whatever formulation of the objective test this Court may approve, the judge's remarks in this case will be found to have revealed an unconstitutional potential for bias.

D. At Mr. Herrmann's sentencing, the judge was objectively biased.

Maintaining neutrality — "that calm detachment necessary for fair adjudication"[3] — in a case like this one poses a serious challenge for any judge. Hearing the facts of the case and the outpouring of grief from family members and friends of a young person tragically killed should arouse feelings of sadness and compassion in any judge. But there is a vast difference between feeling sympathy for the victims

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[3] ***Mayberry v. Pennsylvania,*** 400 U.S. 455, 465, 91 S. Ct. 499 (1971) (explaining why Due Process is offended when the judge who is the object of contempt presides over the contempt proceeding, "No one so cruelly slandered is likely to maintain that *calm detachment necessary for fair adjudication*.").

and wholly identifying with them. That difference is at the heart of this case.

At the very start of the sentencing hearing, Judge Gonzalez said that she did not believe her personal tragedy would have any impact on her ability to be fair. There is no reason to doubt that she sincerely believed that. The judge said that the loss of her sister to a drunk driver was something she had "zealously tried to set aside." (R. 47: 4; App. 117). But she was plainly unable to do that. Under the circumstances of this case, which mirrored so closely the circumstances of her sister's death, the judge could not set aside her feelings. They featured prominently in her comments as she sentenced Mr. Herrmann. She said:

> In 1976 five young women got into a vehicle, and only one of them survived. The two gentlemen in the other vehicle were 17, drunk out of their minds, and they did not survive. That was my personal story, and I will tell you that the day does not go by that I do not think of that personal tragedy, and I wish that I could tell these victims that that pain will one day disappear, but it doesn't. Time makes it less. We redirect ourselves to other things, and a day does go by when we don't think of our loved ones and then we feel guilty at night because that happened, but life does go on and I am very grateful today that I'm looking at four lovely young ladies and that only one family has had to go through the pain that my family and the other three young ladies' families had to endure in 1976.

(R. 47: 78; App. 191). The judge did not set her personal tragedy aside while sentencing Mr. Herrmann. She told the story and talked about her pain. Her comments would have indicated to any reasonable observer that the circumstances of her sister's death were very much on her mind.

A reasonable observer might have been willing to accept the judge's assertion at the outset of the hearing that she could put this tragedy aside. After all, it happened 35 years ago. But the judge's comments later on indicated that didn't much matter. The judge described a pain that never went away and indicated that *not a day had gone by* since her sister's death in which she did not think about it. She described feeling guilt at night when she had managed to get through a day without thinking about it.

Furthermore, a reasonable observer would have been struck by the similarity between the accident that took the life of the judge's sister and the one in this case – each of them a summertime accident in which five young women were traveling in a car that was struck by a drunk driver with horrific results.

The judge heard from 14 people who had been affected by the tragedy. In addition to details about the awful scene, she heard poignant details that would surely have struck a familiar chord to her. She heard parents of the victims describe the terrible moment when they received the phone call that notified them of the accident. (R. 47: 22, 24, 27; App. 135, 137, 140). She heard the father of the deceased victim describing having to choose a casket, plan a funeral, and see his daughter buried. (R. 47: 16; App. 129). She heard the mother of one of the injured victims describing how happy the five girls had been to see each other and how they had "their whole lives still ahead of them." (R. 47: 21; App. 134). She heard one parent describing how the deceased victim would not be there for important dates like Christmases, weddings, and the birth of her friends' first babies. (R. 47: 23; App. 136).

These details are terribly sad, but to this judge they must have been excruciating. It would have taken super-human emotional control for a judge who still felt the pain of her sister's death every day to remain impartial as she listened to all of this.

The judge said that one of the families had to go through the same pain that her family "endured in 1976." (R. 47: 78; App. 191). The judge's identification with the victims was total, as evidenced by her use of "we" – "*We* direct ourselves to other things, and a day does go by when *we* don't think of our loved ones and then *we* feel guilty at night because that happened." (R. 47: 78; App. 191).

Then the judge said:

> And so perhaps it is again destiny or a higher power or, Pastor, probably the prayers of many others that bring me to be the judge on this particular case because I probably more than anyone else who would be able to sit on this bench in this county understand the pain that these victims are feeling, but I have had the benefit of all those years since 1976 to understand that I have to make Mr. Herrmann pay, but that nothing I do to him will lessen that pain, and that if I don't do more than just incarcerate Mr. Herrmann, if I don't speak out on behalf of my community today, then this tragedy will continue to happen on our streets, and more families will suffer that way these families suffer today.

(R. 47: 78-79; App. 191-82).

These comments are cause for concern because they indicate that the judge believed that it was "destiny," or "a higher power," or "prayers" that called her to be the judge on this case due to her unique ability to understand the victims' pain. At this point it was clear that she did not view her pain

at her sister's death as something she needed to "set aside" when sentencing Mr. Herrmann — far from it. She believed that it was her pain that made her uniquely qualified to be the judge in this case. This indicates a complete loss of judicial perspective. A reasonable person listening to these words would be forced to conclude that there was a great risk that the judge's ability to be neutral was gravely compromised. There was "an unconstitutional potential for bias" because the average judge in the position of Judge Gonzalez would not be likely to remain neutral. *See* ***Caperton,*** 556 U.S. at 881, 129 S. Ct. at 2262.

The judge's sense of mission to "speak out on behalf of her community" as well as to "make Mr. Herrmann pay," is also problematic. A judge at sentencing must in an impartial way consider the need for punishment. Rarely does a judge speak of "making him pay." This language bespeaks a more personal kind of retribution.

It is true that after the judge discussed her personal story, she went on to consider the required sentencing factors. (R. 47:81-86; App. 194-99). But there is no reason to think that her personal pain had left her mind, and she had returned to a state of neutrality. In fact, even after she pronounced sentence, it was apparent that the judge continued to identify with the victims to such an extent that she was not thinking like a judge.

Presumably because some of the victims were displeased at having received Mr. Herrmann's apology letter, the judge addressed the matter, saying:

> You will have no contact with these victims or their families, and on that score I feel compelled to make a statement about your letter. I don't know what the motivation would have been for you to write such a

> letter to these victims, but you are never, ever to communicate, not just with them, but with any member of their families or write any letter to any other member of the community without first having that sent to the district attorney's office for review.

(R. 47: 90; App. 203). Even after Mr. Herrmann explained that he had provided the letter to the district attorney's office as he had been directed to do, with the understanding that it would be provided only to those victims who wished to read it, the judge reiterated:

> Well, I'm not sure how that got lost in the translation, Mr. Herrmann, but let me just say from the bench as a condition of your extended supervision other than your own family members any letter that you would write to any member of the community rendering any excuses, opinions, or concerns about your sentence or about this crime need to be run through the district attorney's office first.

(R. 47: 90; App. 203). The judge was so personally invested in protecting these victims from even incidental unpleasantness that she committed an obvious First Amendment violation.[4] While the judge was permitted to set reasonable conditions of supervision, surely an order that a probationer get pre-screening by the D.A.'s office of *any* letter to *anyone* in the community expressing *any* opinion about his crime or sentence is substantially overbroad (even laying aside the fact that it facially prohibits written communication about his case with his attorney).

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[4] Mr. Herrmann did not raise the First Amendment violation below and does not attempt to assert it as a separate claim here.

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The Court of Appeals, while calling this a "close case," said:

> However, ultimately, we find it difficult to distinguish the judge's comments from those we have seen in many other transcripts in which a judge expresses an understanding of the plight of the victims of a crime. It is not uncommon for circuit court judges to have themselves been victimized by the types of crimes that are before them, or to express understanding of what it might be like to be a victim of those crimes, whether that be a robbery, financial crime, or sexual assault.

(App.104).

But there *is* a difference. While judges commonly express compassion and understanding, judges do not normally expressly identify with victims based on their shared pain while sentencing the defendant. And, assuming for the moment that it really is commonplace for judges to also be crime victims, it certainly is not commonplace for them to discuss the pain their victimization has caused them while sentencing a defendant for a similar crime.

Mr. Herrmann is not seeking a bright line rule that would disqualify a judge from presiding over a case whenever he has been the victim of a similar crime. What disqualified the judge in this case was not the bare fact that she lost her sister to a drunk driver in 1976. What disqualified her was that she felt compelled to talk about her personal tragedy while sentencing Mr. Herrmann, breaking the promise she made at the start of the hearing to set it aside. Indeed, the Court of Appeals noted "the apparent inconsistency between the judge's initial statement that she would not consider her own history, and the extent to which she then discussed that history at sentencing." (App. 104). It was her decision to talk

about it and what her statements revealed about her state of mind that created a constitutionally intolerable risk of bias.

It is well understood that a trier of fact who puts himself in the shoes of a party compromises his own impartiality. It is for this reason that it is improper for an attorney to make the "Golden Rule" argument — "asking the individual juror to put himself in another's place and decide what he would want for a particular injury to himself or his child." ***Rodriguez v. Sattery***, 54 Wis.2d 165, 170, 194 N.W.2d 817, 819 (1972). A reasonable observer would conclude that when this judge crossed the line between sympathizing with the victims and identifying with them, there was a serious risk that her impartiality was compromised in the same way.

In a discussion of the appearance of bias on the part of a sentencing judge, it is worth noting the nature and importance of the proceeding. In the great majority of criminal cases, the sentencing hearing is the most important proceeding in the case. Although the cases often refer to the importance of "a fair trial in a fair tribunal," in most cases, there will never be a trial. Ninety-five percent of state criminal cases are resolved by plea or settlement. 2 Mary Prosser, Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities, 2006 Wis. L. Rev. 541, n. 2 at 554. *See* ***Missouri v. Frye***, 132 S. Ct. 1399, 1407 (2012) ("[O]urs is for the most a system of pleas, not a system of trials.").

The sentencing proceeding is unique in the degree of discretion accorded to the judge — and the power the judge wields. "In any instance where the exercise of discretion has been demonstrated, [the reviewing court] follows a consistent and strong policy against interference with the discretion of

the trial court in passing sentence." ***McCleary v. State***, 49 Wis.2d 281, 182 N.W.2d 512 (1971). A judge's sentencing decision is afforded a strong presumption of reasonableness because the circuit court "has a great advantage in considering the relevant factors and demeanor of the defendant." ***State v. Harris,*** 119 Wis.2d 612, 622, 350 N.W.2d 633 (1984).

Since the advent of truth-in-sentencing, "the judiciary's responsibility for assuring a fair and just sentence has significantly increased." ***State v. Gallion***, 2004 WI 42, ¶ 28, 270 Wis. 2d 535, 551, 678 N.W.2d 197, 205. Sentencing discretion was previously shared by all three branches of government, but truth-in-sentencing legislation and the elimination of parole diminished the roles of the executive and legislative branches. ***Id.*** Now the judge decides the fate of the convicted defendant with very little check or review.

The danger that a judge's bias will affect the outcome is perhaps greater at a sentencing hearing than at any other proceeding. The sentencing decision occurs entirely in the mind of the judge. Unlike evidentiary rulings on pretrial motions or rulings during the course of a trial, the sentencing decision is not readily subject to review for fairness based on objective standards. Whether the sentence was right or wrong, fair or unfair often depends on who is asked.

Take the sentencing decision in this case: Mr. Herrmann has pointed out that the sentence he received was arguably disproportionately high based on Court Tracker data regarding sentences received by similarly situated defendants.[5] The State, on the other hand, has pointed out

[5] Prior to sentencing, Mr. Herrmann's trial attorney provided Court Tracker data to the court regarding sentences imposed for violations of Wis. Stat. § 940.09(1)(a). (R. 22). That analysis reflects

that the presentence report recommended a longer term of initial confinement than the judge imposed. Neither observation goes any distance toward answering the due process question, which is whether there is a serious risk that bias based on her personal tragedy was at work in this judge's mind influencing her sentencing decision. The risk must be measured based on the perceptions of "a reasonable person taking into consideration human psychological tendencies and weaknesses," ***Gudgeon,*** 2006 WI App at ¶ 23- 24, 295 Wis. 2d at 205-06, 720 N.W.2d at 122.

Judge Gonzalez considered Mr. Herrmann's character, the gravity of the offense and the need for protection of the public as required by law. She said a number of things that were true, insightful, and even enlightened during the course of her sentencing remarks. But given Judge Gonzalez's personal history, what she said about it, and what it revealed about her state of mind, "a reasonable person — taking into consideration human psychological tendencies and weaknesses — [would] conclude[ ] that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." ***Id.*** In this case, "the probability of actual bias on the part of the judge . . .is too high to be constitutionally tolerable." ***Caperton,*** 556 U.S.at 872, 129 S. Ct. at 2257 (*quoting* ***Withrow,*** 421 U.S. at 47, 95 S.Ct. 1456.)

The error is structural. The unconstitutional risk of bias permeated the entire sentencing proceeding and was, therefore, structural error. *See* ***Neder v. United States,*** 527 U.S. 1, 8, 119 S.Ct. 1827 (1999). *See also*, ***State v. Nelson***,

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that of 1,039 homicide by intoxicated use of a vehicle cases in Wisconsin, only 39.85% of the cases resulted in a prison sentence. Of the prison sentences, 36% were for sentences of 5 to 10 years. About 27% of the sentences were for less than 5 years and about 36% (about 140) were for more than 10 years.

2014 WI 70, ¶ 34, 355 Wis. 2d 722, 738, 849 N.W.2d 317, 324 (stating that a biased judge is structural error, *citing* ***Tumey,*** 273 U.S. at 534, 47 S. Ct. 437); ***Franklin v. McCaughtry***, 398 F.3d 955, 960-61 (7th Cir. 2005) ("[W]here there is a structural error, such as judicial bias, harmless error analysis is irrelevant."); ***State v. Carprue,*** 2004 WI 111, ¶ 59, 274 Wis.2d 656, 683 N.W.2d 31.

A new sentencing is required.

CONCLUSION

Mr. Herrmann asks that this Court reverse the decision of the Court of Appeals and remand the case to the circuit court for sentencing by a different judge.

Dated this_____ day of November, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,046 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this day of November, 2014

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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A P P E N D I X

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