STATE OF WISCONSIN

IN SUPREME COURT

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 OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this Court's review, oral argument and publication of the Court's decision are warranted.

ISSUE PRESENTED

Although presumed impartial, a sentencing judge is objectively biased if a reasonable person under all the circumstances could question her impartiality from her statements. Here, within her lengthy and otherwise unchallenged sentencing remarks, the sentencing judge briefly acknowledged the victim's statements by touching upon her own family's experience with drunk driving. Has Herrmann shown by a preponderance of the evidence that, based on those isolated remarks, he is entitled to resentencing before a different judge because the sentencing judge was objectively biased?

The circuit court answered: No.

The court of appeals answered: No.

This Court should answer: No.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

Jesse L. Herrmann was convicted upon guilty pleas of one count of homicide by intoxicated use of a motor vehicle, contrary to Wis. Stat. § 940.09(1)(a); two counts of injury by intoxicated use of a motor vehicle, contrary to Wis. Stat. § 940.25(1); two counts of operating a motor vehicle while under the influence of an intoxicant resulting in injury, contrary to Wis. Stat. § 346.63(2)(a)1; and one count of hit and run involving death, contrary to Wis. Stat. § 346.67(1), all as a repeat offender (26; 27).

According to the criminal complaint, which Herrmann averred (*see* 45:22-23) could serve as a

factual basis for his guilty plea, the basis for Herrmann's conviction is as follows:

> On June 25, 2011, at approximately 4:10 p.m. . . . Lt. Collins observed that a truck had crashed into the rear of a compact car. Tri-State was already on the scene attending to the occupants of the compact car. Initially Lt. Collins could not immediately locate the driver of the truck. Bystanders told Lt. Collins that the driver . . . had left the scene running towards the Wild Hog Tavern . . . . The bystander told Lt. Collins that Herrmann had run down into the ditch . . . . Lt. Collins found Herrmann at the bottom of the hill with two other individuals standing by. The bystanders identified Herrmann as the driver . . . . When asked, Herrmann stated that he did not know where he was or what was happening. Herrmann emitted a strong odor of intoxicants. Lt. Collins asked Herrmann how much alcohol he had consumed that day. Herrmann replied that he had consumed too much alcohol to be driving. . . .
>
> . . . .
>
> Soon after Lt. Collins, Officer Page of the Onlaska Police Department also responded to the scene . . . Officer Page observed a large pickup attached to the back end of the black Saturn compact car. The frame of the truck was buckled so that the middle of the truck was higher than the front and rear end. Officer Page observed that the grill of the truck was where the back seat of the Saturn was supposed to be. . . . Officer Page then looked in the back seat and saw three females.
>
> Officer Page saw no movement from the females. The three were compressed into a space between the vertical part of the back seat and the rear of the front seat. Officer Page estimated that the space was approximately eight inches wide. . . .

> . . . .
>
> At the scene of the crash, Deputy Bernhardt of the La Crosse County Sheriff's Department took statements from several witnesses. . . .
>
> . . . .
>
> Deputy Bernhardt also spoke to Stephan Herold. Herold had observed Herrmann's driving for some distance before the crash. Before the crash, Herold had been driving northbound on Highway 35 and noticed in his side mirror that the truck passed the vehicle behind him. The pass took place before the vehicles had reached the intersection . . . . Herold observed that the truck had come close to having a head-on collision with a car heading southbound while making the pass. The truck was behind Herold when both stopped at the traffic light at Highway OT. After the light turned green, both vehicles continued northbound on Highway 35. . . . Herold observed the black car waiting to turn left and drove around on the right side. After passing the [black] car, Herold looked in his rearview mirror and saw the truck hit the [black] car.

(4:4-6).

Of the five female victims, one sustained severe head trauma resulting in death, while the other four suffered a variety of internal and external trauma but survived the crash (4:5).

At sentencing, the judge, the Honorable Ramona A. Gonzalez, disclosed at the beginning of the hearing that her sister had been killed by a drunk driver in 1976, and the defense raised no objection to her sitting as sentencing judge:

> 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 very 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.
>
> HERRMANN: I have none.
>
> THE COURT: No problems?
>
> [TRIAL COUNSEL]: No problems.

(47:4).

Thus, before hearing from the victims and the parties as to their sentencing recommendations, the sentencing judge had already alerted and secured assurances from Herrmann and his trial counsel of the issue now complained of on appeal. Neither objected or took any issue with the sentencing judge's admission.

Later, in explaining the sentence, the judge began by expressing "shock[] by the seeming blase faire [sic] attitude that this community has about alcohol use" (47:75).

> We complain and we talk about how we should challenge the students at the university not to continually drink to excess, how kids disappear, and how much harm alcohol is, but how many of us actively, actively seek to change the behaviors of those in our lives? How many of us go out for that

> Friday fish fry and then not make any arrangements for who's gonna drive the car home?

(47:76).

The judge then suggested that whatever sentence was imposed in Herrmann's case would do little to discourage drunk driving so long as the community "continues [only] to pay lip service to stopping that activity" (47:78):

> [I]t's not just about what I do with Mr. Herrmann, it's about all those other ticking time bombs out there in our community who drink and drive in a community that continues to pay lip service to stopping that activity but still we have more taverns than anyplace else. We have family fests that are surrounded and consumed by the consumption of alcohol, and then a tragedy like the Mullenbach death [in another recent drunk driving homicide] and these lovely young women [the survivors in Hermann's case present in the courtroom] and then all of a sudden we're back again concerned and worried. We must do more.

(*id.*).

Immediately following this challenge to the community, the judge highlighted her own experience of losing a sister to a drunk driver, and once again urged the public to take the problem of drunk driving more seriously:

> 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 a 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 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 in our streets, and more families will suffer the way these families suffer today.

So, Mr. Herrmann, you're going to prison today, but that's just part of the story. I want to make sure that the story is not about what a monster Jesse Herrmann was and is so that we can then wrap up this little episode in a nice neat little box and all go about our business as usual, that Mr. Herrmann the monster is off the streets, and we don't have to worry about this again, because no matter what I do to Mr. Herrmann, unless this community begins to take a different attitude about drinking and driving, and I'm talking about different attitude, not paying lip service, but actually doing, we will see this tragedy happen again and again. I challenge everyone to take care of yourself and everyone around you. If you see someone who should not be driving, do not shrink from the

> opportunity to change their life and potentially safe (sic) a life.

(47:78-79) (alteration in original).

The judge then discussed Herrmann's character issues, including his persistent alcohol problem and resistance to treatment (47:80, 84). The judge noted that prior interventions, including probation, fines, supervision, jail and alcohol treatment programs, had failed (47:81). The judge addressed mitigating factors, including that he saved the victims the pain of a trial by pleading guilty, and that Herrmann had a supportive family (47:83-84). The judge noted that the alternative Presentence Investigation Report (PSI) prepared by a defense expert had recommended a sentence of fifteen years' imprisonment, which the court determined was insufficient in light of Herrmann's criminal record, his failures at rehabilitation, and gravity of the offense (47:82). The PSI prepared by the State had recommended a total sentence of forty years' initial confinement and twenty years' extended supervision (16:15).

Based on the factors set forth on the record, the judge sentenced Herrmann to fifteen years' initial confinement and twenty years' extended supervision on the homicide charge; two terms of five years' confinement and five years' extended supervision on the charges of injury by intoxicated use of a vehicle; and two terms of three years' confinement and five years' extended supervision on the charges of operating a motor vehicle while intoxicated causing injury (47:87-88). The judge imposed the sentences consecutively, for a total sentence of thirty-one years' initial confinement and forty years' extended supervision (47:88-89). The judge also imposed a consecutive sentence of

twenty years' confinement on the hit-and-run charge, which the judge stayed and ordered fifteen years' probation (47:88-89).

Herrmann moved for postconviction relief, arguing that the judge was objectively biased based on her statements about the emotional pain she felt in losing her sister to a drunk driver, and thus the sentencing violated his right of due process (41:3-4). After briefing, the judge issued a memorandum decision and order denying the motion (43).

On appeal, Herrmann renewed his argument that the judge's remarks about her sister's death in a drunk-driving accident constituted objective bias and violated his due process rights. In support, Herrmann provided data purporting to show that his sentence was not in line with other sentences for the crime of homicide by intoxicated use of a vehicle.

In a per curiam decision and order, the Wisconsin Court of Appeals, District IV, concluded that the judge's comments at sentencing did not support a conclusion that the judge was objectively biased. *State v. Jesse L. Herrmann*, No. 2013AP197-CR (Wis. Ct. App. Feb. 13, 2014); (Pet-Ap. 101-05). The court concluded that Herrmann had failed to show objective bias based on Hermann's statistics about other sentences because this information was "too vague and general[.]" *Id.,* slip op., ¶ 7; (Pet-Ap. 104).

The closer issue, in the court's view, was whether Herrmann had demonstrated an appearance of bias sufficient to prove objective bias. Applying the test set forth in *State v. Goodson*, 2009 WI App 107, ¶ 9, 320 Wis. 2d 166,

771 N.W.2d 385, the court concluded that Herrmann had failed to demonstrate that a reasonable person could question the judge's impartiality based on the judge's statements:

> [W]e find it difficult to distinguish the judge's comments from those we have seen in many other sentencing transcripts in which a judge expresses an understanding of the plight of 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.
>
> We regard such expressions by judges as evincing an understanding of a crime's severity and its effect on victims. And, ultimately, that is what the judge did in this case. She indicated that she has a very accurate understanding of the plight of the surviving victims and families. Reviewing these comments in the context of the entire sentencing shows that the judge also spent considerable time on the defendant's character and other relevant factors. Viewing the sentencing as a whole, we conclude that a reasonable person would not conclude that the judge was biased.

Herrmann, slip op.; ¶¶ 9-10; (Pet-Ap. 104-05).

Herrmann successfully petitioned this Court for review.

ARGUMENT

THE SENTENCING JUDGE WAS NOT OBJECTIVELY BIASED WHEN SHE SENTENCED HERRMANN. THE BASIS FOR HIS SENTENCE IS READILY APPARENT FROM THE SENTENCING TRANSCRIPT AND IS IN CONFORMITY WITH ACCEPTABLE SENTENCING FACTORS.

I. APPLICABLE LEGAL PRINCIPLES AND STANDARDS OF REVIEW.

A. Regarding Circuit Court Exercise Of Sentencing Discretion.

Sentencing is committed to the circuit court's discretion. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. A defendant challenging a sentence has a burden to show an unreasonable or unjustifiable basis in the record for the sentence at issue. *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). Appellate review of a circuit court's sentencing starts with the presumption that the circuit court acted reasonably, and is not interfered with if that discretion was properly exercised. *See id.* at 418-19.

In the exercise of discretion, the circuit court is to identify the objectives of its sentence, which include but are not limited to protecting the community, punishing the defendant, rehabilitating the defendant, and deterring others. *Gallion*, 270 Wis. 2d 535, ¶ 40. In determining the sentencing objectives, the circuit court may consider a variety of factors, including the gravity of the offense, the character of the defendant, and the need to protect the public. *See, e.g., State v.*

Harris, 2010 WI 79, ¶ 28, 326 Wis. 2d 685, 786 N.W.2d 409. The weight assigned to the various factors is left to the circuit court's discretion. *Id.* The amount of necessary explanation of a sentence varies from case to case. *Gallion*, 270 Wis. 2d 535, ¶ 39.

Appellate analysis includes consideration of the postconviction hearing because a circuit court has an additional opportunity there to explain its sentence. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994).

B. Regarding Alleged Bias On The Part Of The Circuit Court.

Whether a circuit court's partiality at sentencing can be questioned is a matter of law that is reviewed *de novo*. *State v. Rochelt*, 165 Wis. 2d 373, 379, 477 N.W.2d 659 (Ct. App. 1991). To overcome the presumption of non-bias, the party asserting judicial bias must show that the judge is biased or prejudiced by a preponderance of the evidence. *State v. McBride*, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994).

As the court of appeals noted in *Goodson*, 320 Wis. 2d 166, ¶ 8 (citation omitted):

> The right to an impartial judge is fundamental to our notion of due process. We presume a judge has acted fairly, impartially, and without bias; however, this presumption is rebuttable. When evaluating whether a defendant has rebutted the presumption in favor of the court's impartiality, we generally apply two tests, one subjective and one objective.

Objective bias can exist in two situations. First, where there is the appearance of bias, which the *Goodson* Court evaluated thusly:

> "[T]he 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." Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements.

Id., ¶ 9 (citations omitted) (quoting *State v. Gudgeon*, 2006 WI App 143, ¶ 24, 295 Wis. 2d 189, 720 N.W.2d 114 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927))); *In re Murchison,* 349 U.S. 133, 136 (1955); *Franklin v. McCaughtry*, 398 F.3d 955, 960-61 (7th Cir. 2005)).

The second form of objective bias occurs where "'there are objective facts demonstrating . . . the trial judge in fact treated [the defendant] unfairly.'" *Goodson*, 320 Wis. 2d 166, ¶ 9 (alterations in original) (citation omitted).

Herrmann's challenge before this Court is based on the first form of objective bias. *See* Herrmann's brief at 19.

II. APPLICATION OF PRINCIPLES AND STANDARDS TO FACTS OF THIS CASE.

A. The Sentencing Judge's Sentencing Rationale Is Consistent With Existing Law And Shows Reliance On Proper Factors.

Herrmann contends that the sentencing judge was objectively biased in sentencing him because of her reference to and discussion of her own experience with drunk driving. Herrmann's brief at 19-28.

Herrmann is wrong for two reasons.

First, as set forth above, the judge's remarks regarding her own experience followed an extensive outpouring of sentencing comments from affected family and community members who were harmed by Herrmann's actions. They occurred before she began a discussion of the proper sentencing factors: gravity of the offense, character of the defendant, and the need to protect the public, in accordance with *Gallion*. The judge's comments prior to that exercise, following a dense and emotional display on behalf of the victims of the crime in La Crosse county, evince recognition, respect, and empathy for those who had been wronged. Rather, as the court of appeals concluded, the statements of the judge were, in part, an effort to show sympathy for the victims in this case. *Herrmann*, slip op., ¶ 9; (Pet-Ap. 104). After recounting the story of her sister's death to a drunk driver, the judge explained, "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" (47:79).

Contrary to the suggestion implicit in Herrmann's claims of judicial bias, the judge's remarks about her personal experience as a crime victim were in no way tied to the length of Herrmann's sentence—which was, in fact, substantially *shorter* than the sentence (forty years' initial confinement, twenty years' extended supervision) recommended by the PSI author (16:15). Indeed, taken together, the charges to which Herrmann pleaded guilty would allow for a maximum term of imprisonment of one hundred and thirty four years of exposure (*see* 45:14-21). Even starker, the total exposure Herrmann faced prior to his plea was one hundred and eighty-one years and six months (4:1-4; 43:2; *see also* Wis. Stat. §§ 346.63(2)(a)1, 346.67(1), 939.50(3), 939.62(1)(b-c), 940.09(1)(a), 940.09(1)(b), 940.25(1)(a), and 941.30(1)).

Instead, Herrmann's total term of imprisonment following sentencing is thirty-one years of initial confinement, followed by forty years of extended supervision, and fifteen years of probation (26; 27; 43:2). Thus the judge's sentence was well within applicable bounds.

The judge's full explanation of the sentence reveals that, in addition to showing sympathy for the victims, the comments at issue were made in service of the sentencing objective that was plainly most important to the judge: discouraging drunk driving (47:74-79). The judge told her personal story to draw public attention to the devastating consequences of drunk driving in a dramatic way, and to spur the community to change its behaviors around alcohol and driving. Her audience at this point was not primarily Herrmann, but the general public. Immediately before telling her story, she criticized the community for only

"pay[ing] lip service" to curbing drunk driving, and said, "We must do more" (47:78). Immediately after the remarks at issue, she challenged the community to "take a different attitude about drinking and driving" (47:79). The judge's remarks do not reasonably appear to exhibit bias toward Herrmann. In fact, the judge explained upon making the remarks at issue: "I want to make sure that the story is not about what a monster Jesse Herrmann was and is . . . because no matter what I do to Mr. Herrmann, unless this community begins to take a different attitude about drinking and driving. . . we will see this tragedy happen again and again" (47:79). Thus, the sentencing judge, confronted with a grieving community as represented in the courtroom, spoke poignantly and directly to the people before her who had just said their piece regarding a tragedy that it all too common.

At bottom, then, Herrmann's bias claim appears to be less about this judge's specific remarks than the circumstance of her passing sentence when her sister was the victim of a similar crime some thirty-five years earlier. Herrmann suggest the events are too similar to the facts of his case for her to render an impartial sentence. Herrmann's brief at 19-24.

As an initial matter, it bears noting that it is Herrmann's burden to overcome the presumption that the judge was anything but impartial. It is he who must show, by a preponderance of the evidence, that the sentencing judge was not impartial. *McBride*, 187 Wis. 2d at 415 (To overcome the presumption of non-bias, the party asserting judicial bias must show that the judge is biased or prejudiced by a preponderance of the evidence.); *see also State v. O'Neill*, 2003 WI App

73, ¶ 12, 261 Wis. 2d 534, 663 N.W.2d 292 ("It is not sufficient to show that there is an appearance of bias or that the circumstance might lead one to speculate that the judge is biased.").

Though both involve drunk driving and loss of life, the two incidents are fundamentally different. First, the judge's own experience in 1976 involved the loss of four lives, whereas Herrmann's crime resulted in one (4:6; 47:78). Second, nearly forty years had passed since the judge's experience. That the judge was entirely forthright it saying that "a day does not go by that I do not think of that personal tragedy" (47:78), she did so in response to the sincere statements by the victims and their families as they search for closure and some hope for relief, noting that the passage of time and redirection of purpose can be fruitful (*see id.*). Third, while nothing in the record provides further detail for the crime in 1976, the facts of Herrmann's egregious conduct are plain from the face of the complaint: despite being on probation, despite having already been convicted of operating while intoxicated, Herrmann drove under the influence, causing severe physical damage to five people (including death to one), and then left the scene of the accident in an attempt to escape responsibility, rather than call 911 or try to help (*see* 4:4-5). The judge was plainly troubled by those actions, and remarked on the need to protect the public from the significant danger that drunk drivers pose (*see, e.g.,* 4:4-6; 47:75-79). She also discussed the gravity of the offense, and how Herrmann's decisions had caused a "ripple effect" throughout the community whose effect would be felt for years to come (47:81-83).

Though the judge said it needed to make Herrmann "pay" (47:78), she very clearly said why when determining an appropriate sentence:

> Your attitude, Mr. Herrmann, was everything, turning your back on your family as you went to that bar, responding to [a citizen witness] who was just trying to help you the way that you did, and it is probably a good thing that you don't remember because that person that--that person who drove that truck on that day who with no regard for anyone else on the highway passed those other vehicles, that person who was so inside of themselves they couldn't even be bothered to put the brakes on their vehicle, that person, Mr. Herrmann, on that particular moment, that person was a monster. (Pause).
>
> You have had the benefit of probation. You have had the benefit of alcohol and drug assessments and treatment in the community, in the institution. You've had the benefit of supervision, of jail, of none of that through that attitude. If we have finally gotten through, what a price we paid for that, Mr. Herrmann. That was a huge price.

(47:81). *Cf. State v. Pirtle*, 2011 WI App 89, ¶ 34, 334 Wis. 2d 211, 799 N.W.2d 492 (finding the absence of objective bias even though the court called the defendant a "piece of garbage").

The judge addressed Herrmann's prior convictions for OWI and other matters for which he was already on federal parole in rejecting probation and imposing a substantial period of confinement for each count, and her view that consecutive sentences were necessary to honor each victim and to rehabilitate him (47:75, 80-81, 83). She mitigated those issues with the recognition that Herrmann did not pursue a trial, that he had a family, and that he was still young

(47:83-84). Thus, the judge addressed the proper factors in meting out an appropriate sentence from Herrmann. *See* Wis. Stat. § 973.017(2).

Indeed, as she wrote in her decision denying postconviction relief:

> When the record is reviewed in its entirety, it is clear that the court pronounced an individualized sentence, not based on bias or emotion, but based on a careful and thorough consideration of the need for punishment and future deterrence to protect the community . . . .

(43:6). *Cf. Fuerst*, 181 Wis. 2d at 915 (appellate sentence review includes consideration of the postconviction hearing because a circuit court has an additional opportunity there to explain its sentence).

Thus, there is no evidence whatsoever that the judge prejudged her sentencing decision. *Accord Gudgeon*, 295 Wis. 2d 189, ¶¶ 2-5, 25-26 (judicial bias occurs when sentence prejudged or predetermined); *Goodson*, 320 Wis. 2d 166, ¶¶ 2, 13 (same). Indeed, Herrmann admits that the judge considered the proper factors in determining his sentence, which is consistent with *State v. McCleary*, 49 Wis. 2d 263 (1971), its progeny, and Wis. Stat. § 973.017(2). *See* Herrmann's brief at 5, 27.

In addition, as the court of appeals correctly observed, it is not uncommon for judges (or their family members) to have been victims of the types of crimes for which they pass sentence, *Herrmann*, slip op., ¶ 9; (Pet-Ap. 104), and a rule mandating recusal in such a circumstance, no matter the judge's on-the-record remarks, disregards the strong presumption that judges are impartial,

McBride, 187 Wis. 2d at 414, and is contrary to the approach taken in the case law. *See Goodson*, 320 Wis. 2d 166, ¶ 9 (determination of objective bias is based on the court's statements).

Although Herrmann concedes that the court of appeals applied "essentially the correct test," he argues that it applied it incorrectly. Herrmann's brief at 18.

As shown above, the court of appeals' decision is consistent with its own prior precedent (*Gudgeon* and *Goodson*), as well as precedent of the United States Supreme Court (upon which *Gudgeon* and *Goodson* are based) and precedent of this Court. *See, e.g., State v. Pinno*, 2014 WI 74, ¶¶ 92, 94, 356 Wis. 2d 106, 850 N.W.2d 207 (citing *Gudgeon*, 295 Wis. 2d 189, ¶ 20; *Caperton v. A. T. Massey Coal Co., Inc.*, 556 U.S. 868, 886-89 (2009)). Because the court of appeals properly applied precedent following those decisions, it did not misapply the standard to Herrmann.

Herrmann's brief accurately sets forth the development of the law regarding judicial bias before the United States Supreme Court, this Court, and the Wisconsin Court of Appeals. Herrmann's brief at 10-16.

However, Herrmann neglects to note that the court of appeals' formulation of the objective bias tested is derived directly from longstanding United States Supreme Court precedent. Indeed, the language "every procedure which would offer a possible temptation to the average man [or woman] 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" in *Gudgeon* and later restated in *Goodson* is taken verbatim

from *Tumey*, as solidified by *Murchison*. *See Gudgeon*, 295 Wis. 2d 189, ¶ 21; *Tumey*, 273 U.S. at 510; *Murchison*, 349 U.S. at 136. As the court of appeals wrote in its decision here:

> The other component of objective bias is whether there was an appearance of bias. The test we apply is whether a reasonable person could question the court's impartiality based on the court's statements. *Goodson,* 320 Wis.2d 166, ¶9. This is a legal question that we review independently. *Id.,* ¶7.
>
> We acknowledge that this is a close case. However, ultimately we find it difficult to distinguish the judge's comments from those we have seen in many other sentencing transcripts in which a judge expresses an understanding of the plight of 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.
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> *We regard such expressions by judges as evincing an understanding of a crime's severity and its effect on victims. And, ultimately, that is what the judge did in this case. She indicated that she has a very accurate understanding of the plight of the surviving victims and families. Reviewing these comments in the context of the entire sentencing shows that the judge also spent considerable time on the defendant's character and other relevant factors. Viewing the sentencing as a whole, we conclude that a reasonable person would not conclude that the judge was biased.*

Herrmann, slip op., ¶¶ 8-10 (emphasis added); (Pet-Ap. 104-05).

Still, Herrmann contends that this Court has yet to definitively address *Caperton*, noting the number of various formulations that the United States Supreme Court has adopted or applied with respect to judicial bias. Herrmann's brief at 8, 17-18.

Herrmann is entitled to no relief for two reasons.

First, as set forth above, in *Pinno* and other cases this Court has already addressed *Caperton*. And while there are a variety of possible formulations for objective bias, such an all-encompassing, fact-driven approach is not only appropriate but entirely necessary given the litany of judicially created protections and statutorily-mandated recusal options. As this Court observed in *Pinno*:

> 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. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884, 886-87, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (contribution of roughly $3 million to judge's campaign from a person with a personal stake in the case created "serious risk of actual bias" that rose to an unconstitutional level). However, "The Due Process Clause demarks only the outer boundaries of judicial disqualifications." *Id.* at 889, 129 S.Ct. 2252 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986)). "[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *Id.* at 876, 129 S.Ct. 2252 (brackets in original) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702, 68 S.Ct. 793, 92 L.Ed. 1010 (1948)). "Because the codes of judicial conduct provide more protection than

> due process requires, most disputes over disqualification will be resolved without resort to the Constitution." *Id.* at 890, 129 S.Ct. 2252.

Pinno, 356 Wis. 2d 106, ¶ 94.

Second, as it relates to Herrmann's claim that the judge was impartial because of her comments, *Caperton* broke absolutely no new ground or announced any new rules with which this Court must grapple. Rather, the *Caperton* Court reiterated that which it had said in *Tumey*, *Murchison*, and *Withrow v. Larkin*, 421 U.S. 35 (1975):

> 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* [*v. Pennsylvania*], 400 U.S. [455, 465-466 (1971)]; *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 883-84.

Beyond that basic framework, the *Caperton* decision was remarkably fact specific and tailored to the individual issues present in the case. *See,*

e.g., id. at 884 ("We conclude that there is a serious risk of actual bias--based upon objective and reasonable perceptions--when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.").

Indeed, the only arguable new ground broken in *Caperton* was the clear declaration that proof of actual bias was not necessary for a finding of objective bias. *See id.* at 883-84. But that is already the law in Wisconsin. *See, e.g.*, *State ex rel. DeLucca v. City of Franklin*, 72 Wis. 2d 672, 681, 242 N.W.2d 689 (1976) (citing *Withrow*, 421 U.S. 35); *State v. Allen*, 2010 WI 10, ¶ 88, 322 Wis. 2d 372, 778 N.W.2d 863 (recognizing *Caperton* holding that proof of actual bias not required).

Finally, Herrmann notes the importance of sentencing in a criminal system that relies predominately on plea bargaining. Herrmann's brief at 25.

Indeed, sentencing is a critically important part of the criminal process for all involved. Indeed, as this Court is well aware, Chapter 950 details extensive rights to victims of crimes. *See, e.g.,* Wis. Stat. § 950.04(1v) (Rights of Victims). Those rights include the right to "provide statements concerning sentencing." Wis. Stat. § 950.04(1v)(m).

Perhaps at no time more than at sentencing is a circuit court a representative of its community. It is tasked with identifying a specific violation of the criminal code against its people. It is guided by the statutory factors set forth in Wis.

Stat. § 973.017(2) and those outlined in *McCleary*: the gravity of the offense, the character and rehabilitative needs of the offender, and the need for protection of the public. *McCleary,* 49 Wis. 2d at 276. But it is speaking on behalf of the community in holding accountable a defendant who has inflicted harm on the community. In a very real way, the circuit court is a representative of the community which it serves. As this Court made plain in *Gallion*:

> "This shift of more complete--and informationally accurate--sentencing decisionmaking to the judiciary places upon judges the task to more carefully fashion a sentence based upon the severity of the crime, the character of the offender, the interests of the community, and the need to protect the public. *Judges are on the front lines of the criminal justice system every day, listening to victims and their families, defendants and their families, law enforcement, prosecutors, defense attorneys, and the public.*"

Gallion, 270 Wis. 2d 535, ¶ 29 (citation omitted).

No more poignantly and directly is that sacred obligation carried out than in sentencing a criminal defendant who did violence to the community and its families. That the judge acknowledged and affirmatively responded to the community's comments at Herrmann's sentencing, before independently determining his sentence in full accordance with the law, does not entitle him to relief. And as a result, the judge's comments prior to that exercise do not offend due process because a reasonable person could not question the judge's impartiality based on her statements which simply reiterated statements already made by others regarding Herrmann's crime. *See*

Goodson, 320 Wis. 2d 166, ¶ 9 ("Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based on the court's statements."); *Hermann,* slip op., ¶ 10; (Pet-Ap. 105).

Because the sentencing judge properly exercised her sentencing discretion on the basis of acceptable and apparent factors, yielding an appropriate sentence which serves the sentencing objectives as outlined by statute and case law, Herrmann has not shown the existence of any judicial bias, and his sentence was not the product of same.

CONCLUSION

For the foregoing reasons, this Court should affirm Herrmann's judgment of conviction and the opinion of the Wisconsin Court of Appeals.

Dated this 2nd day of December, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,387 words.

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Robert G. Probst
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 2nd day of December, 2014.

_____
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