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Case Nos. 2015AP001850 CRNM

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

PATRICIA A. ENRIQUEZ,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING
MOTION FOR RESENTENCING IN RACINE COUNTY CIRCUIT COURT
THE HONORABLE MICHAEL J. PIONTEK PRESIDNG
RACINE COUNTY CIRCUIT COURT CASE NO. 13-CF-1134

BRIEF OF DEFENDANT-APPELLANT
PATRICIA A. ENRIQUEZ

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STATEMENT OF THE ISSUES

- I. THE COURT CONDUCTED ITS OWN INVESTIGATION INTO MS. ENRIQUEZ BY LOOKING UP HER NURSING LICENSE STATUS IN VARIOUS STATES AND THEN WITHHELD THE INFORMATION UNTIL AFTER THE ATTORNEYS AND MS. ENRIQUEZ SPOKE AT SENTENCING. DID THIS CONDUCT RISE TO THE LEVEL OF OBJECTIVE BIAS, DENYING MS. ENRIQUEZ HER DUE PROCESS RIGHT TO BE SENTENCED BY AN IMPARTIAL COURT?

Trial court answered: No

- II. DID THE COURT'S INDEPENDENT INVESTIGATION AND CONDUCT AT SENTENCING DEPRIVE MS. ENRIQUEZ OF HER DUE PROCESS RIGHT TO REBUT THE INFORMATION RELIED UPON AT SENTENCING?

Trial court answered: No.

- III. DID THE COURT DEPRIVE MS. ENRIQUEZ OF HER DUE PROCESS RIGHT TO BE SENTENCED BASED UPON ACCURATE AND RELIABLE INFORMATION?

Trial court answered: No.

- IV. DID THE COURT ERRONEOUSLY EXERCISE ITS DISCRETION BY IMPOSING UNREASONABLE AND INAPPROPRIATE CONDITIONS OF SUPERVISION AND AN UNDULY HARSH AND EXCESSIVE SENTENCE?

Trial court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant believes that the briefs will fully present and meet the issues on appeal and will fully develop the theories and legal authority governing the issues, and therefore, oral argument would be of marginal value.

The decision in this case should be published as, pursuant to Wis. Stat. § 809.23(1)(a), this decision will clarify an existing rule of law, applying it to a factual situation significantly different from that in published opinions. This decision will clarify whether a sentencing court's actions in conducting an independent investigation into the defendant amounts to objective bias, depriving the defendant of his or her right to be sentenced by an impartial court. Therefore, the defendant-appellant respectfully requests that the Court order publication.

STATEMENT OF THE CASE/STATEMENT OF FACTS

On August 22, 2013, Patricia Enriquez was charged with two counts of Delivery of Schedule I, II, or III Non-Narcotics, contrary to Wis. Stats. §§ 961.41(1)(b) and 939.50(3)(h), and one count of Manufacture/Deliver Schedule IV Drugs, contrary to Wis. Stat. §§ 961.41(1)(i) and 939.50(3)(h), in Racine County Case 13-CF-1134. (R1:1) The Criminal Complaint alleged that on April 23, May 10 and May 13, 2013, Ms. Enriquez delivered controlled substances (dextroamphetamine sulfate and alprazolam) to a cooperating citizen who was working with the Racine Police Department. (R1:2) On each date, Ms. Enriquez was alleged to have sold ten pills for thirty dollars (\$30.00). (R1:2)

Ms. Enriquez waived her right to a preliminary hearing on October 17, 2013 and an Information was filed. (R29:1-5; R2) The Information contained the same three charges as the Criminal Complaint. (R2)

Additional charges were subsequently filed in Racine County Case 14-CF-92, and on June 13, 2014, Ms. Enriquez appeared before the Honorable Allan B. Torhorst for a plea hearing. (R35) Pursuant to a plea agreement, Ms. Enriquez, pled guilty to Counts 1 and 2 in case 13-CF-1134, and Count 3, as well as the charges in case 14-CF-92, were dismissed and read in. (R35:3-10) In exchange for Ms. Enriquez's guilty pleas, the State agreed to recommend three years in prison, as eighteen months initial confinement and eight months extended supervision, on Count 1, and five years imprisonment, stayed for three years of consecutive probation on Count 2. (R35:4) The court engaged in the plea colloquy and ultimately found Ms. Enriquez guilty of Counts 1 and 2, dismissed and read in all other charges, and ordered a presentence investigation report. (R35:9-10)

The presentence investigation report was filed on August 4, 2014. (R10) A hearing was held before the Honorable Eugene Gasiorkiewicz, at which the court acknowledged receiving Ms. Enriquez's Request for Substitution of Judge following his rotation into felony

court. (R36:2; R11) The case was then assigned to the Honorable Michael J. Piontek on August 11, 2014 and a sentencing hearing was scheduled. (R12)

The sentencing hearing was held on October 6, 2014. (R37) According to Judge Piontek's statements at the postconviction motion hearing, the court reviewed Ms. Enriquez's case for the first time on October 3, 2014. (R38:10) (A77) At that time he reviewed the various transcripts, court minutes, and the presentence investigation report. (R38:10-11) (A77-78) On October 3, 2014, Judge Piontek also went on the Internet and looked up Ms. Enriquez's nursing records. (R38:11) (A78) He printed nursing records from his search, which included records for the states of Arizona, Wisconsin, Texas, and Illinois. (R13) (A4-21) These documents were not provided to either party until the sentencing hearing on October 6, 2014, after the parties had finished presenting their arguments. (R37:9) (A48)

The court began the sentencing hearing by acknowledging that it had received the presentence investigation report. (R37:2) (A41) After noting a correction from Ms. Enriquez's trial attorney, Lori Kuehn, the court heard arguments from the parties. (R37:2-8) (A41-47) The State followed the plea agreement, recommending the agreed

upon terms of imprisonment and probation for Counts 1 and 2. (R37:3-6) (A42-45) Attorney Kuehn then made her argument, asking that the court adopt the recommendation of the presentence investigation report by withholding sentence and placing Ms. Enriquez on probation for one to two years. (R37:6) (A45) Attorney Kuehn emphasized Ms. Enriquez's substantial education and employment history as a nurse, as well as her lack of a prior criminal record and her medical conditions. (R37:6-8) (A45-447) Specifically, she advised the court that Ms. Enriquez has broken her neck several times, had cranial traction, has diabetes, multiple sclerosis, and high blood pressure. (R37:7) (A46) Ms. Enriquez then addressed the court directly, stating:

I would like to express my remorse. I did do this crime. And I know that -- that this is what brings me before your honor.

I did not do this crime over greater profit. I had no intention. I personally thought that I was helping a friend and neighbor because -- and maybe I was naïve and that was my -- my problem.

I know that I used poor judgment. And I no longer will be in nursing. I am retiring. And for this I am very regretful and very remorseful. Thank you for your time, sir.

(R37:8-9) (A47-48)

After hearing the sentencing arguments, the court asked the deputy to pass documents out to the parties. (R37:9) (A48) These documents consisted of the information the court printed out regarding Ms. Enriquez's nursing

license in Arizona, Wisconsin, Texas, and Illinois.

(R13) (A4-21) The following exchange then occurred between the court and Ms. Enriquez:

THE COURT: Would you like to explain your revocation of your nursing license in the State of Texas in 2000 for 17 counts of taking Morphine?

THE DEFENDANT: These counts, sir, are things that were never substantiated. I returned my license to the State of Texas because I was no longer practicing in the State of Texas.

THE COURT: Yeah.

THE DEFENDANT: These were drugs that I missed -- did not mishandle. What I did was not -- did not document correctly. And I have straightened this out. And, in fact, if you look at the State of Illinois, the State of Illinois will show you that I have straightened it out.

THE COURT: The State of Illinois is attached.

MS. KUEHN: Right.

THE COURT: And the State of Illinois shows that you have no license there.

THE DEFENDANT: What?

THE COURT: You have no license in the State of Illinois, and you never have.

THE DEFENDANT: I do, sir.

THE COURT: You see the license here, State of Illinois?

THE DEFENDANT: Yes, sir. But I know I do have a license. It might not have been -- it might not have been renewed.

THE COURT: Look, your lies are getting you in trouble. Okay?

THE DEFENDANT: No, sir, I could prove --

THE COURT: If I were you, I would close your mouth. Okay? Your license in the State of Illinois does not exist. Your license in Arizona, it says there's been disciplinary action taken against you in the past ten years.

THE DEFENDANT: Um-hmm.

THE COURT: In the State of Wisconsin you haven't had a license since March of 1992. And you're telling us all of these great things and

you were just helping out a neighbor, you know, with some medication when you have 17 counts of taking Morphine which they pulled your license for in the state of Texas in 2000.

Look, you are probably the biggest liar that ever came in front of me in terms of hiding this kind of stuff and portraying yourself as this law-abiding citizen that's just trying to help out the neighbor and what a big heart you've got.

You have a terrific drug and alcohol issue. And you're a drug dealer. And you've been a drug dealer for a long time. And I don't believe much of what you've said in terms of your own reporting. I didn't make this stuff up.

THE DEFENDANT: I didn't say that you did, sir.

THE COURT: When I saw the issue -- I don't want any comment from you anymore.

THE DEFENDANT: Yes, ma'am -- sir.

(R37:9-11) (A48-50) The court then addressed the charges before it and in rendering its sentence, placed great emphasis on the disciplinary action taken against Ms. Enriquez in Texas. (R37:12-18) (A51-57)

While imposing its sentence, the court made the following statements, among others, regarding Ms. Enriquez's nursing license:

We're going back, you know, 14 years. You're in Texas. And, you know, I'm familiar with nursing discipline in my practice. I represented nurses that were rehabilitated. I see them in recovery at times. And there are ways for them to rehabilitate themselves and get work back.

My experience with it is if they have one or two of these counts, it's unusual. Or I mean it's usual. 17 counts with -- it's always Morphine. They're always short. You know, it's not administered to the patient. Don't give me this, oh, it's just one of those administrative things

and I surrendered my license. Yes, you did. That's probably the only true thing you said.

But you were using Morphine or selling it or both back then. And I consider that as fact based on evidence from the Texas authorities on your discipline in the State of Texas.

...

The only thing you report is Dallas County Texas for an assault, a fight with your husband that gets out of hand. And that's why you have no prior record. No where in here do you tell the author of the presentence about this drug revocation of your licenses. You paint this picture like you're this nurse in good standing and the only thing you've ever done is disorderly conduct. Where is in this presentence report your statement about losing your license in the State of Texas and your explanation for why you lost it? It's because you were lying about it. You were hiding it. You were, just like all this other stuff is a bunch of baloney.

You know, your only trouble has been, you know, someone who obeys the law. And, as a nurse, tries to help people. Yeah, you helped them when you have 17 counts of taking, you know, the narcotic drug. You're helping them a lot. Not giving it to the patient is what usually happens. Taking the whole thing. Not administering. I mean they keep track of these records.

Before they go on a case like that against a nurse, they, you know, this isn't just some Mickey Mouse operation where this is some kind of mistake. You know, you're taking Morphine, either not giving it to the patients, administering it to yourself, selling it. I don't know what exactly it is. But I do know that it's true that your license was revoked because you took Morphine that was destined for patients or destined for discarding. And you used it or sold it or a combination of both.

...

I mean there's -- there are multiple offenses under the 17 charges that are contained in your, you know, revocation order from the State of Texas. So you telling me as a trained professional registered nurse that you're simply

helping someone out with pills is probably the biggest set of lies that I've heard on the bench.

(R37:13,15-16,18) (A52,A54-55,A57) The court then addressed Ms. Enriquez's character, the need to protect the public, and the nature of the offenses. (R37:18-28) (A57-67) In doing so, it made the following statements:

You stand convicted of two felonies relating to the delivery of narcotics for money, which you say was, you know, just being a good Samaritan.

And your leisurely activities are needlepoint, teaching CPR, reading, and how about selling morphine and selling pills. You know, you portray yourself as a person that's just this law-abiding, nice person. And maybe you've done some nice things in your life. But this stuff is, for a nurse, it's all totally dishonest.

...

So, you know, where it says here that your doctor has concern, your doctor up at Advanced Pain Management had concern because he thought you were selling your meds, you know, that kind of raised some of my concern. I started looking. I figured I'm going to look and see what is there.

...

So, well, you're going to be having a problem now. Because you're going to be given some time to think about your honesty. And it's the first thing you need to work on is to get honest, not with me necessarily. I'm not offended by it. I just recognize what's there. But you have to get honest with yourself. You weren't honest with your lawyer. You weren't honest with the Court. You weren't honest with the author of the presentence investigation.

And if you're going to lie to friends, that's up to you. If you're going to lie to the Court and present patently false information to me in order for me to fashion a sentence, and I was born but it wasn't yesterday, and I find out about it, there is a -- there is a consequence to that.

(R37:19,21,23) (A58,A60,A62)

The court sentenced Ms. Enriquez to sixty-six months, or five and a half years imprisonment, as two and half years initial confinement and three years extended supervision, on both counts, consecutive, for a total of eleven years imprisonment. (R37:25) (A64) As a condition of her supervision the court ordered that Ms. Enriquez not use any narcotic medication, whether or not it was prescribed by a physician. (R37:26) (A65)

On March 20, 2015, Ms. Enriquez, through appellate counsel, filed a Notice of Motion and Motion for Resentencing, along with supporting Brief and Affidavit. (R18;R20;R21) Ms. Enriquez requested resentencing on several grounds, alleging that the court relied upon inaccurate information, she was denied her right to rebut information relied upon at sentencing, that objective bias existed, and that the court erroneously exercised its discretion. (R19;R20) The supporting Affidavit contained documents demonstrating that, contrary to the court's assertions, Ms. Enriquez's nursing license in Texas had not been revoked, the nursing records did not contain any information alleging that Ms. Enriquez had sold drugs, and that Ms. Enriquez had been licensed as a nurse in the State

of Illinois. (R21)(A22-37) No response was filed by the State. A hearing on the motion for resentencing was held on August 24, 2015. (R38)(A68)

The motion hearing began with the court asking Ms. Enriquez if she had anything to add to her written materials. (R38:2)(A69) The court then asked Attorney Sharon Riek, appearing on behalf of the State, whether she had anything she wished to present or argue. (R38:3)(A70) Attorney Riek stated:

No, youR Honor. I -- I believe that there was no inaccurate information at the time that the defendant was sentenced and, therefore, I would ask the Court deny the motion.

(R38:3)(A70) The court then made a record regarding the facts as it saw them by recounting the procedural history of the case and the contents of the presentence investigation report. (R38:3-18)(A70-85) In relation to Ms. Enriquez's request for resentencing based upon denial of her right to an impartial court, the court stressed that it had not presided over the case, or met Ms. Enriquez until the sentencing hearing, and stated:

In this case I reviewed the presentence on October 3rd which is that Friday and which is the same day that I looked at her nursing records.

But on October 3rd of 2014 when I looked at this, especially her statement that she had her license revoked in Wisconsin, my decision at that time was to look at her nursing records for two reasons. One, if she's an addict and is selling

medication and needs treatment and she shows no recognition of those facts, she presents a great danger to our community.

And, No. 2, if she's pursuing her master's degree and she intends on returning to nursing in any capacity, if she's an addict and has access to the medication that nurses have access to, she poses a tremendous problem, not only for her, but for our community.

What about the patients that are supposed to get their medication? What about patients where she's impaired and don't get their medications? She intends on returning to nursing. According to her, this is no big deal. So I look at the nursing records. And they're dated October 3rd, 2014, which is a Friday, as I said, before the sentencing.

...

So I see this. You know, now, mind you, when I look for her records, I don't know what I'm going to see. I don't know if it's going to be good. I don't know if it's going to say Patricia was a great nurse and every place she worked loved her. I don't know if there's anything there. I'm not on a -- a quest of some kind.

The issue was raised by her in the presentence when she said my license was revoked. And all I did was access a public record. You can go on the Internet. Although I'm not that good on the Internet, I could find these things. And so I accessed them from various dates (sic).

And, you know, this idea that counsel has somehow that I sandbagged the defendant, and it goes laying in the weeds for her, I, you know, to me that is exactly what she told us all along. So counsel is right in line with what she's said which is it's everyone else's fault. This time it happens to be the judge's fault.

We should return a person like this to the nursing profession and let her work on people in our community without any treatment because she, again, has said I don't have any treatment needs. I don't -- I have never misused, you know, a drug. I've always taken them as prescribed.

So my statements in the presentence stand. You know, I gave her -- the reason I didn't give it to her timing wise until after the

presentation by the attorneys, to be honest, is she has a right of elocution (sic).

I wanted to hear her say, you know, Judge -- she said I accept responsibility when everything she says in detail says I don't accept responsibility.

...

So maybe in our job as advocates, we -- we believe the judge screwed up and, you know, somehow caused all of this, and, you know, is a bad person and shouldn't have decided, is biased.

I can tell you absolutely I was not biased. I simply wanted the truth. And that's what I got. And when I got the truth, I expected her to acknowledge it and she didn't.

...

And although the transcript doesn't indicate it after I passed out the documents, I gave time for both counsel to look at it, gave her an opportunity, another right of elocution (sic) for the defendant to explain the revocation of her license because that paints a much different picture than she paints.

And it's unfortunate that, you know, she decided to handle it that way. But I don't, you know, determine that. So, again, I did not see her until the date of sentencing. The Friday before is when I decided to look at the nursing records, before deciding whether she posed really a danger to the community as someone addicted, someone who's willing to sell drugs, accept no responsibility and serious drugs that affect this community tremendously.

(R38:10-11,20,26-27,29-30) (A77-78, A87, A93-94, A96-97) In relation to Ms. Enriquez's claim that she was sentenced based upon inaccurate information, the court stated:

I didn't. If, you know, whether she had an Illinois license or didn't have an Illinois license, that wasn't a big deal to me. And we talked about it. But there's a lot of things I talked about that aren't major factors of me deciding.

My reason for deciding are the major things I just talked about, the dishonesty, the need for help, the addict part of it, the drug-seeking behavior and the failure to recognize what a risk that poses for someone that's now in a master's program in nursing to pursue as a nurse later on.

(R38:31) (A98)

Without specifically addressing the other grounds raised in Ms. Enriquez's motion, the court denied the motion in most part, however, acknowledged it erred in imposing the costs of the buy money as restitution and ordered that an amended judgment of conviction be entered to that extent. (R38:29) (A96)

The court's Order Granting in Part and Denying in Part was filed on August 31, 2015. (R23) (A38-39) This appeal follows.

ARGUMENT

I. STANDARD OF REVIEW

"Whether a judge was objectively not impartial is a question of law that [the Court] review[s] independently." *State v. Herrman*, 2015 WI 84, ¶23, 364 Wis. 2d 336, 867 N.W.2d 772. There is a rebuttable presumption that a judge acted fairly, impartially, and without prejudice. *Id.* at ¶24. The party alleging bias has the burden of proving bias by a preponderance of the evidence. *Id.*

Similarly, whether a defendant has been denied due

process is a constitutional issue which this Court is to decide independently of the circuit court, benefiting from its analysis. *State v. Travis*, 2013 WI 38, ¶20, 347 Wis. 2d 142, 832 N.W.2d 491. Specifically, whether a defendant was denied his or her due process right to be sentenced upon accurate information "is a constitutional issue that an appellate court reviews de novo." *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1.

Finally, on appeal, review of a circuit court's sentencing decision is "limited to determining if discretion was erroneously exercised." *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Such review is made in light of a strong policy against interference with the circuit court's decision. *Id.* at ¶18. "Appellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence." *Id.* (quoting *State v. McCleary*, 49 Wis. 2d at 281.)

II. THE CIRCUIT COURT'S INDEPENDENT INVESTIGATION OF MS. ENRIQUEZ PRIOR TO SENTENCING DENIED MS. ENRIQUEZ HER DUE PROCESS RIGHT TO BE SENTENCED BY AN IMPARTIAL COURT.

Ms. Enriquez's case should be remanded for

resentencing before a different judge as she was denied her fundamental right to be sentenced by an impartial judge in this case. "The right to an impartial judge is fundamental to our notion of due process." *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. A judge is presumed to have acted fairly, impartially, and without bias. *State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. This presumption, however, is rebuttable. *Id.* "A defendant may rebut the presumption by showing that the appearance of bias reveals a great risk of actual bias." *State v. Herrman*, 2015 WI 84, ¶3, 364 Wis. 2d 336, 867 N.W.2d 772. If the defendant makes such a showing by a preponderance of the evidence, she has established a due process violation. *Id.* at ¶¶3,23. Ms. Enriquez has shown the existence of objective bias and is, accordingly, entitled to resentencing.

The circuit court's actions in conducting an independent investigation into Ms. Enriquez gives the appearance of bias which reveals a great risk of actual bias. "The test for bias comprises two inquiries, one subjective and one objective. Either sort of bias can violate a defendant's due process right to an impartial judge." *Gudgeon*, 2006 WI App 143, ¶20. The subjective

approach is based upon the judge's own determination of his or her impartiality, while the objective approach is based upon whether impartiality can reasonably be questioned. *Herrman*, 2015 WI 84, ¶26. Ms. Enriquez does not claim that the circuit court was subjectively biased. Rather, Ms. Enriquez asserts that the test for objective bias has been satisfied in this case.

The objective test for bias "asks whether a reasonable person could question the judge's impartiality." *Gudgeon*, 2006 WI App 143, ¶21. In *State v. Goodson*, 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385, the Wisconsin Court of Appeals explained:

Objective bias can exist in two situations. The first is where there is an appearance of bias. "[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. The second form of objective bias occurs where "there are objective facts demonstrating ... the trial judge in fact treated [the defendant] unfairly."

Goodson, 2009 WI App 107, ¶9 (internal citations omitted).

"[T]he right to an impartial decisionmaker stretches beyond

the absence of actual bias to encompass the appearance of bias as well." *Herrman*, 2015 WI 84, ¶30. A reasonable person in this case, looking at the circuit court's actions and comments at sentencing, could question the court's impartiality. The record in this case also demonstrates a great risk of actual bias.

A. The circuit court's actions in this case give the appearance of bias.

The appearance of bias exists in this case; a reasonable person, seeing the circuit court's actions in conducting an independent investigation and hearing its statements at sentencing, could question the court's impartiality. The circuit court's actions and statements would lead a reasonable person to believe that the court was biased against Ms. Enriquez and had determined its sentence prior to the sentencing hearing. As the appearance of bias in this case also reveals a great risk of actual bias, Ms. Enriquez's due process right to an impartial tribunal was violated and the case must be remanded for resentencing before a new judge.

The circuit court's actions, when viewed by a reasonable person, give the appearance of bias. The court went out of its way to look into Ms. Enriquez and

independently gather information to use against her at sentencing. This gives the appearance that the Court was acting as an adversary to Ms. Enriquez, rather than as a neutral decision-maker. The Wisconsin Supreme Court has noted that appellate court decisions in this state are "replete with precatory admonitions that trial judges must not function as partisans or advocates, or betray bias or prejudice, or engage in excessive examination." *State v. Carprue*, 2004 WI 111, ¶44, 274 Wis. 2d 656, 683 N.W.2d 31 (internal citations omitted). The Wisconsin Supreme Court has further warned that the "court must not permit itself to become ... an advocate for one party"; the defendant does not receive a full and fair hearing "when the role of the prosecutor is played by the judge." *State v. Jiles*, 2003 WI 66, ¶39, 262 Wis. 2d 457, 663 N.W.2d 798. The court's independent investigation into Ms. Enriquez's background transformed its role from one of neutral decision-maker to advocate for the State. This action alone gives the appearance of bias.

The Wisconsin Code of Judicial Conduct prohibits judges from engaging in independent investigation because of the appearance of impartiality that such action portrays. Specifically, Wisconsin SCR 60.04(1)(g),

entitled, "A judge shall perform the duties of judicial office impartially and diligently," states that, with exceptions, "A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding." SCR 60.04(1)(g). The commentary under that rule clarifies that, "[a] judge must not independently investigate facts in a case and must consider only the evidence presented." SCR 60.04(1)(g). The circuit court's actions in this case are contrary to the provisions of the Code of Judicial Conduct and give the appearance of bias.

As the Wisconsin Supreme Court recognized, "there is a 'vital state interest' in safeguarding 'public confidence in the fairness and integrity in the nation's elected judges.'" *Herrman*, 2015 WI 84, ¶39. A reasonable person viewing the circuit court's action and statements in this case could question the fairness and integrity of the judicial system. This appearance of bias constitutes a violation of Ms. Enriquez's due process right to an impartial tribunal and supports her request for resentencing.

At the post conviction motion hearing, the circuit court did not address the appearance of bias. Rather, the

circuit court mistakenly interpreted Ms. Enriquez's claim as one of subjective bias. (R38:29) (A96) The circuit court made a record that it had not presided over any of the earlier proceedings in the case and had first looked at the case file the Friday prior to the sentencing hearing. (R38:10) (A77) The court denied the motion for resentencing on that basis, also explaining that it did not know what it was going to find when it looked for Ms. Enriquez's records. (R38:26) (A93) The circuit court advised that it was absolutely not biased. (R38:29) (A96) Ms. Enriquez, however, did not, and does not now allege that the circuit court was subjectively biased against her. Rather, she argues that objective bias was present in this case. See *Herrman*, 2015 WI 84, ¶40 ("[T]he appearance of bias violates due process when there is a great risk of actual bias."). A finding of actual, subjective bias is not necessary.

The circuit court's actions give the appearance of bias, and under the circumstances, reveal a great risk of actual bias. A reasonable person would question the circuit court's impartiality when it conducts its own independent investigation of the defendant prior to sentencing and then uses that information as a major factor in its sentencing

decision. Here, the circuit court took on the role of the prosecutor and the manner in which the information found was presented, along with the court's statements at sentencing, reveal a great risk that Ms. Enriquez was not treated fairly.

B. The appearance of bias in this case reveals a great risk of actual bias.

The appearance of partiality in this case reveals a great risk that the circuit court actually did prejudge the sentencing hearing and Ms. Enriquez's character. Not only did the circuit court choose to conduct its own investigation of Ms. Enriquez's background, it also chose not to provide that information to the parties prior to the sentencing hearing. (R38:27) (A94)

At the postconviction motion hearing, the circuit court explained that it decided to look at Ms. Enriquez's nursing records because of its belief that if Ms. Enriquez was pursuing her master's degree and intended to return to nursing, she would pose "a tremendous problem, not only for her, but for our community." (R38:20,30) (A87,A97) The circuit court also explained that it waited to disclose its investigation because Ms. Enriquez had a right of allocution and the court wanted to hear her accept

responsibility and recognize that she had a problem. (R38:27) (A94) In denying the motion for resentencing, the circuit court also stated that it "simply wanted the truth" and that's what it got by conducting its investigation. (R38:29) (A96) These explanations, in addition to the statements made at sentencing, demonstrate that a great risk of actual bias exists in this case.

The circuit court's exchange with Ms. Enriquez, and extensive reliance on the Texas nursing records at the sentencing hearing, reveal a great risk of actual bias. After the circuit court passed out the documents it had found, it asked Ms. Enriquez to explain herself. (R37:9) (A48) When Ms. Enriquez attempted to answer the court's questions, the court accused her of lying and hiding information from it. (R37:9-11) (A48-50) Specifically, when Ms. Enriquez tried to explain that she voluntarily surrendered her Texas license and that she had a license in Illinois, the Court told her to "close [her] mouth." (R37:10) (A49) Shortly after that, the court stated that it did not want to hear any more comments from her. (R37:11) (A50) The circuit court's actions in springing accusations at Ms. Enriquez and then denying her any meaningful opportunity to respond demonstrate that it had

already made up its mind about Ms. Enriquez.

Aside from the circuit court's exchange with Ms. Enriquez, the court also made a number of comments throughout the sentencing hearing that would cause a reasonable person to question its impartiality. The circuit court repeatedly called Ms. Enriquez a liar, even implying that it knew she lied about where her daughter went to college and that she was lying about the cause of her divorces. (R37:16,22) (A55,A61) The court also accused Ms. Enriquez of presenting "patently false information" in order to be sentenced and stated that "there is a consequence to that." (R37:23) (A62)

The circuit court's actions in independently researching Ms. Enriquez, along with all of these statements and the lengthy sentence the court imposed, give the appearance of bias and reveal a great risk that the court had prejudged Ms. Enriquez and the sentence in this case. Consequently, Ms. Enriquez was denied her due process right to be sentenced by an impartial court and her case should be remanded for resentencing before a new judge.

III. MS. ENRIQUEZ IS ENTITLED TO RESENTENCING BASED UPON THE CIRCUIT COURT'S DENIAL OF HER DUE PROCESS RIGHT TO REBUT INFORMATION USED BY THE COURT AT SENTENCING.

The circuit court denied Ms. Enriquez the opportunity to review and rebut information which it relied upon in sentencing her. In doing so, it violated her due process rights and, accordingly, Ms. Enriquez is entitled to a new sentencing hearing. Every criminal defendant has the right to have an opportunity to rebut information presented at sentencing. *State v. Lynch*, 2006 WI App 231, ¶24, 297 Wis. 2d 1, 724 N.W.2d 656. "Obviously, if sentencing information is kept from the defendant, he or she cannot exercise this right." *Id.* The circuit court here, in obtaining inaccurate outside information about Ms. Enriquez and failing to notify her of it prior to sentencing, denied her an opportunity to rebut that information and to be sentenced based upon accurate information. Accordingly, Ms. Enriquez should be granted resentencing.

"To protect the integrity of the sentencing process, the court must base its decision on reliable information." *State v. Mosley*, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Wis. App. 1996). In an effort to protect a defendant's due process right to be sentenced on the basis of true and correct information, several safeguards have been

developed. *Id.* Specifically,

The defendant and defense counsel are allowed access to the presentence investigation report and are given the opportunity to refute what they allege to be inaccurate information. Second, both the defendant and defense counsel are present at the sentencing hearing and have a chance to make a statement relevant to sentencing.

Id. These safeguards were undermined by the circuit court's independent investigation of Ms. Enriquez prior to sentencing in this case. As a result, Ms. Enriquez's due process right to rebut information presented at sentencing was violated.

The circuit court, admittedly, went looking for information regarding Ms. Enriquez's nursing license prior to the sentencing hearing. (R38:20,26)(A87,A93) It was not until the sentencing hearing that the circuit court made Ms. Enriquez and Attorney Kuehn aware of the information it had found. (37:9)(A48) Even then, the court waited until after the parties had made their arguments and Ms. Enriquez had spoke before providing the information. (37:9;38:27)(A48;A94) At the postconviction motion hearing, the circuit court explained that it did not provide the information sooner because it wanted to hear what Ms. Enriquez had to say before making her aware of the information that it had found. (38:27)(A94) Without having

had the information prior to the sentencing hearing, Ms. Enriquez could not exercise her right to rebut that information which, as argued below, ultimately resulted in the court's reliance on inaccurate information. See *Lynch*, 2009 WI App 231, ¶24.

Ms. Enriquez was denied her due process right to rebut the information regarding her nursing license that the circuit court relied upon at sentencing. Unlike the defendant in *State v. Lynch*, 2006 WI App 231, 297 Wis. 2d 1, 724 N.W.2d 656, Ms. Enriquez tried to comment on, and rebut, the information presented by the circuit court but was not given any reasonable opportunity to do so. See *Lynch*, 2009 WI App 231, ¶25. When presented with the information regarding the status of her nursing license in Texas and Illinois, Ms. Enriquez attempted to explain that she voluntarily surrendered her license in 2002 and that she was licensed in Illinois. (37:9-10) (A48-49) The circuit court, however, wanted to hear nothing of it. Specifically, in response to Ms. Enriquez's attempts to clarify, the following exchange occurred:

THE DEFENDANT: These were drugs that I missed -- did not mishandle. What I did was I did not -- did not document correctly. And I have straightened this out. And, in fact, if you look at the State of Illinois, the State of Illinois

will show you that I have straightened it out.

THE COURT: The State of Illinois is attached.

MS. KUEHN: Right.

THE COURT: And the State of Illinois shows that you have no license there.

THE DEFENDANT: What?

THE COURT: You have no license in the State of Illinois, and you never have.

THE DEFENDANT: I do, sir.

THE COURT: You see the license here, State of Illinois?

THE DEFENDANT: Yes, sir. But I know I do have a license. It might not have been -- it might not have been renewed.

THE COURT: Look, your lies are getting you in trouble. Okay?

THE DEFENDANT: No, sir. I could prove --

THE COURT: If I were you, I would close your mouth. Okay? Your license in the State of Illinois does not exist. ...

(R37:10-11) (A49-50) In response to another statement from Ms. Enriquez, the circuit court stated, "I don't want any comment from you anymore." (R37:11) (A50)

At the hearing on Ms. Enriquez's postconviction motion the circuit court explained that the sentencing transcript does not reflect the fact that the parties were given an opportunity to review the material prior to this exchange. (R38:30) (A97) The circuit court also explained that Ms. Enriquez was given an opportunity to comment on these matters after the documents were passed out. (R38:30) (A97) The transcript and the exchange above, however, demonstrate that she was not given any meaningful opportunity to refute

the information the circuit court had found.

Prior to sentencing, neither Ms. Enriquez nor her trial attorney were made aware of the information that the circuit court had found and was relying upon. When they did become aware, it was too late to conduct any investigation or otherwise refute that information. Ms. Enriquez tried to explain and clarify the status of her nursing license but was not given any meaningful opportunity to do so. Had she been made aware of the information the circuit court had found prior to the hearing, Ms. Enriquez could have brought in proof that she did have a nursing license in Illinois and otherwise address the court's concerns.

The circuit court's failure to notify the parties of its independent investigation prior to sentencing denied Ms. Enriquez her due process right to rebut information presented at sentencing. As a result, she is entitled to a new sentencing hearing. The importance of this information becomes more apparent as the court's reliance upon it also deprived Ms. Enriquez of her due process right to be sentenced on the basis of true and accurate information.

IV. MS. ENRIQUEZ WAS DENIED HER DUE PROCESS RIGHT TO BE SENTENCED BASED UPON ACCURATE INFORMATION AND, CONSEQUENTLY, SHE IS ENTITLED TO RESENTENCING.

Ms. Enriquez is entitled to resentencing as the

circuit court relied upon inaccurate information regarding her nursing license in determining its sentence and that reliance was not harmless. Every criminal defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a due process violation, "a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information." *Id.* at ¶31. Once reliance on inaccurate information is shown, the burden shifts to the State to prove that the error was harmless. *Id.* The circuit court relied upon inaccurate information regarding Ms. Enriquez's nursing license in various states, and its reliance was not harmless. Accordingly, Ms. Enriquez's case should be remanded for resentencing.

As the Court relied upon the inaccurate information that it found, Ms. Enriquez is entitled to a new sentencing hearing. As the Wisconsin Supreme Court explained:

When a circuit court relies on inaccurate information, we are dealing "not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude." A criminal sentence based upon materially untrue information, whether caused by

carelessness or design, is inconsistent with due process of law and cannot stand.

State v. Travis, 2013 WI 38, ¶17, 347 Wis. 2d 142, 832 N.W.2d 491. Once a defendant has established that some information presented to the court was inaccurate, she must prove by clear and convincing evidence that the court actually relied upon that information. *Id.* a ¶22.

According to case law, whether the circuit court “actually relied” on the incorrect information at sentencing “turns on whether the circuit court gave ‘explicit attention’ or ‘specific consideration’ to the inaccurate information, so that the inaccurate information ‘formed part of the basis for the sentence.’” *Id.* at ¶28. The court need not explicitly consider the inaccurate information on the record and there are no “magic words” the court must use for it to be determined that the inaccurate information formed part of the basis for the sentence. *Id.* at ¶¶29-30. However, “a circuit court’s ‘explicit attention to the misinformation demonstrates [the circuit court’s] reliance on that misinformation in passing sentence’.” *Id.* at ¶46. Whether the sentence might have been justified by information independent of the inaccurate information is irrelevant when the inaccurate information

formed part of the basis of the sentence. *Id.* at ¶47.

In this case, the circuit court found and presented its own inaccurate information at the sentencing hearing when it determined that Ms. Enriquez never had a nursing license in the State of Illinois, that Ms. Enriquez's nursing license in Texas had been revoked, and that the Texas Board of Nurse Examiners' Order showed that Ms. Enriquez had been selling Morphine. Despite its claims to the contrary at the postconviction motion hearing, the circuit court relied upon this inaccurate information and it formed a part of the basis for the sentence it imposed. Consequently, Ms. Enriquez's due process rights were violated and she is entitled to resentencing.

A. The circuit court found and presented inaccurate information at sentencing.

The circuit court, as a result of its independent investigation, presented inaccurate information at the sentencing hearing. Specifically, the court's findings that Ms. Enriquez never had a nursing license in the State of Illinois, that her Texas nursing license had been revoked, and that she had sold drugs in Texas, were all inaccurate.

Ms. Enriquez has been licensed as a nurse in the State of Illinois. According to the Illinois Department of

Financial and Professional Regulation, Patricia A. Enriquez held license number 041235706 as a Registered Professional Nurse, first effective 05/05/1986. (R21:16) (A37) That license expired on May 31, 2014, while she was in custody. (R21:16) (A37) During the sentencing hearing, the circuit court stated multiple times that Ms. Enriquez did not have a license in the State of Illinois and had never had a license there. (R37:9-11) (A48-50) It is apparent from the circuit court's exchange with Ms. Enriquez, and the documents it entered into the record, that it believed Ms. Enriquez was not so licensed and that it relied upon this misinformation in sentencing her. It appears that during its investigation, the circuit court limited its Illinois license search to Cook County. (R13:18) (A21) As a result, the results showed that Ms. Enriquez was not licensed in the state. (R13:18) (A21) A search without that filter reveals that Ms. Enriquez was in fact licensed as a nurse in the State of Illinois. (R21:16) (A37)

In addition to the records it found regarding Ms. Enriquez's nursing license in Illinois, the circuit court found information regarding her license in Texas. (R13:3-17) (A6-20) The conclusions the circuit court derived from those records were also inaccurate. Specifically,

throughout the sentencing hearing the circuit court stated that Ms. Enriquez's license had been revoked in the State of Texas. (R37:9-24) (A48-63) The court also stated that it was accepting as fact, based upon the Order of the Board, that Ms. Enriquez had used and sold Morphine in Texas. (R37:13-14) (A52-53)

Ms. Enriquez's nursing license in Texas, however, was not revoked. As Ms. Enriquez tried to explain to the court, she voluntarily surrendered her license to the State of Texas. (R21:3) (A24) The Order of the Board of Nurse Examiners for the State of Texas shows that they accepted her voluntary surrender in 2002. (R21:4) (A25) There is nothing in that Order which suggests her license was revoked. (R21:4-15) (A25-36) There is also nothing in that Order that accuses Ms. Enriquez of selling Morphine or states that she was found to have sold Morphine or other drugs. (R21:4-15) (A25-36)

At the postconviction motion hearing, the State argued that the circuit court had not relied upon any inaccurate information. (R38:3) (A70) In denying the motion for resentencing, the circuit court did not specifically address whether the alleged inaccurate information was, in fact, inaccurate. (R38:3-32) (A70-99) Rather, the circuit

court stated that the inaccurate information was not important in its sentencing decision. (R38:31)(A98) The record, however, reflects that this inaccurate information was explicitly referenced by the court and formed a part of the basis for its sentence in this case. As a result, Ms. Enriquez's due process right to be sentenced based upon accurate information was violated and her case should be remanded for resentencing.

B. The circuit court relied upon the inaccurate information it found and presented at sentencing.

The inaccurate information regarding Ms. Enriquez's nursing license in the States of Illinois and Texas, as well as the court's erroneous conclusion that Ms. Enriquez had sold drugs in Texas, formed a part of the circuit court's sentence in this case. The circuit court gave specific consideration and explicit attention to this information throughout the sentencing hearing. In addressing this second "reliance" prong of the *Tiepelman* analysis, the Court "must examine the record to determine whether the circuit court 'actually relied' upon the inaccurate information at sentencing." *Travis*, 2013 WI 38, ¶28. "A circuit court's after-the-fact assertion of non-reliance on allegedly inaccurate information is not

dispositive of the issue of actual reliance." *Id.* at ¶48.

At the hearing on Ms. Enriquez's motion for resentencing the circuit court did not explicitly state that it did not rely on any of this inaccurate information. Rather, it stated that whether or not Ms. Enriquez had a nursing license in the State of Illinois "wasn't a big deal to [the court]." (R38:31)(A98) In regards to the other items, the circuit court stated,

I understand that we talked about some of that stuff. But I talk about a lot of things. The major factors were what I just explained for reasons I indicated.

(R38:31)(A98) Specifically, the court stated that the "major factors" in its sentencing decision were Ms. Enriquez's dishonesty, her need for rehabilitation, her drug-seeking behavior, and her failure to recognize the risk her addiction poses for someone who wants to become a nurse. (R38:31)(A98) While these factors may have been part of the basis for the circuit court's sentence, the record reveals that the court also based its sentence upon the alleged inaccurate information.

The record demonstrates that the circuit court relied upon the inaccurate information that it found when it repeatedly stated that Ms. Enriquez's nursing license in

Texas had been revoked and that she had sold Morphine in Texas. The circuit court repeatedly gave specific consideration to these factors. It is clear from the transcript that the circuit court relied heavily upon an Order of the Board of Nurse Examiners for the State of Texas in imposing its sentence in this case.

The circuit court's explicit attention to the alleged revocation of Ms. Enriquez's nursing license and history of drug dealing demonstrate that this inaccurate information formed part of the basis for the sentence in this case. Specifically, the circuit court made numerous comments about the alleged revocation of Ms. Enriquez's nursing license in Texas and repeatedly stated that she had been selling drugs since at least 2000. (R37:9,11,13-16,23-24) (A48,A50, A52-55,A62-63) These comments show that the court relied upon this inaccurate information. It is clear from the entire sentencing transcript that the circuit court relied heavily upon its belief that Ms. Enriquez's license in Texas was revoked because she was using and selling Morphine. As this information was inaccurate, Ms. Enriquez was denied her due process right to be sentenced upon accurate information.

The record also demonstrates that the court relied

upon its belief that Ms. Enriquez was not licensed as a nurse in Illinois when rendering its sentence in this case. The circuit court gave explicit attention to this fact. When Ms. Enriquez stated that she had a nursing license in Illinois, the court made it clear that it did not believe her and that her "lies" were getting her in trouble. (R37:10) (A49) The circuit court stated that it did not believe much of what she had to say and that she was "probably the biggest liar that ever came in front of [the court]." (R37:11) (A50) As noted above, the circuit court's perception of Ms. Enriquez as dishonest was a major factor in its sentencing decision.

The entire record demonstrates that, despite the circuit court's after-the-fact explanation otherwise, it relied upon the inaccurate information it found to form part of the basis for the sentence in this case. The court's reliance on that information was not harmless. The court here sentenced Ms. Enriquez based upon the erroneous view that she did not have a nursing license in Illinois and lied about it, that her license in Texas had been revoked, and that she was selling drugs in Texas. As this information was inaccurate, Ms. Enriquez's due process right to be sentenced based upon accurate information was

violated. Accordingly, the case should be remanded for a new sentencing hearing.

V. MS. ENRIQUEZ IS ENTITLED TO RESENTENCING AS THE COURT ERRONEOUSLY EXERCISED ITS DISCRETION, IMPOSING AN UNDULY HARSH SENTENCE AND UNREASONABLE CONDITIONS OF EXTENDED SUPERVISION.

The circuit court erroneously exercised its discretion while imposing the sentence in this case. Accordingly, Ms. Enriquez is entitled to a new sentencing hearing. "It is a well-settled principle of law that a circuit court exercises discretion at sentencing." *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. Moreover,

[d]iscretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.

McCleary v. State, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (Wis. 1971). A court erroneously exercises its discretion in sentencing when it imposes a sentence which is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (Wis. 1975). Under the circumstances, the circuit court imposed an unduly harsh and excessive sentence with an unreasonable

condition of extended supervision. Consequently, Ms. Enriquez is entitled to a new sentencing hearing.

A. The circuit court erroneously exercised its discretion in imposing an unduly harsh and excessive sentence.

The circuit court sentenced Ms. Enriquez to a total of eleven years of imprisonment, as five years initial confinement and six years of extended supervision. (R15:1) (A1) Under the circumstances, this sentence of one year less than the maximum penalty was unduly harsh and excessive so as to shock the public sentiment. The trial court has great latitude in passing sentence, however, "[t]he exercise of sentencing discretion must be set forth on the record." *Gallion*, 2004 WI 42 at ¶ 4. Specifically,

[c]ircuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.

Id. at ¶ 40. With these factors in mind, the sentence imposed by the court must call for the minimum amount of custody or confinement necessary to protect the public and address the gravity of the offense and rehabilitative needs of the defendant. *Id.* at ¶ 44.

The circuit court addressed the necessary factors when

it sentenced Ms. Enriquez, nonetheless, it erroneously exercised its discretion by sentencing her to nearly the maximum time available. The circuit court has the discretion to impose a sentence of any length within the range set by statute. *Ocanas*, 70 Wis. 2d 179 at 185. An erroneous exercise of that discretion is found,

only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.

Id. The sentence imposed by the circuit court, in light of Ms. Enriquez's character, rehabilitative needs, and the need to protect the public, is unduly harsh and so disproportionate to the offense as to violate the judgment of reasonable people concerning what is right and just.

A reasonable person would not find that a sentence to five years initial confinement was the minimum amount necessary under the circumstances of this case. Rather, such a sentence is so excessive as to shock public sentiment. Ms. Enriquez was 52 years old at the time of sentencing. She had a history of employment and was pursuing her master's degree in nursing. (R37:6) (A45) Additionally, she had no prior criminal record and the

offenses for which she was being sentenced consisted of selling thirty prescription pills to her neighbor for three dollars a pill. (R37:6; R1:1-2)(A45) Ms. Enriquez also suffered from a number of medical conditions, volunteered in the community, and accepted responsibility by pleading guilty. (R37:6-8)(A45-47)

The sentence imposed by the circuit court, eleven years imprisonment, is so disproportionate to the offenses for which Ms. Enriquez was sentenced as to shock public sentiment and violate the judgment of reasonable people as to what was right and proper. The presentence investigation report recommended that the circuit court sentence Ms. Enriquez to one to two years of probation. (R10;R37:6)(A45) The State, similarly did not believe such a lengthy sentence was necessary. It recommended three years imprisonment on one count, followed by three years of probation on the other. (R37:6)(A45) Looking at Ms. Enriquez's character, and the nature of these offenses, the circuit court erroneously exercised its discretion by imposing a sentence which was disproportionate and excessive. Ms. Enriquez, therefore, is entitled to resentencing.

B. The circuit court erroneously exercised its discretion when it imposed an unreasonable condition of extended supervision.

The circuit court's imposition of a condition of extended supervision that Ms. Enriquez not consume prescribed narcotic medications is unreasonable and excessive. Such a condition is unreasonable in light of Ms. Enriquez's medical conditions, and consequently, constitutes an erroneous exercise of the circuit court's discretion.

"Trial courts are granted broad discretion in determining conditions necessary for extended supervision; such discretion is subject only to a standard of reasonableness and appropriateness." *State v. Miller*, 2005 WI App 114, ¶11, 283 Wis. 2d 465, 701 N.W.2d 47. Whether the condition is reasonable and appropriate is determined by how well it serves the goals of rehabilitation and the protection of the public interest. *Id.* In light of Ms. Enriquez's medical conditions and needs, it was unreasonable to impose a condition of extended supervision that she not take prescribed narcotic medication.

At the time of the sentencing hearing, the circuit court was made aware of Ms. Enriquez's mental and physical health conditions, including her diagnoses of: Major

Depression, Attention Deficit Disorder, Diabetes, High Blood Pressure, Multiple Sclerosis, and Restless Leg Syndrome. (R37:7;R10) (A46) Because of all of these conditions, Ms. Enriquez was on a number of medications, including some narcotics. (R6:2) As some of these conditions cannot be cured and are likely to progress, it is reasonable to conclude that Ms. Enriquez will continue to need her prescriptions. When rendering its sentence the circuit court noted that there should be non-narcotic medication regimes out there that Ms. Enriquez can use instead of her current prescriptions. (R37:26) (A65) The court, however, provided no basis for this conclusion.

The circuit court's conclusion that there will be non-narcotics available to meet Ms. Enriquez's needs, and imposition of a condition that she not consume prescribed narcotic medications, was unreasonable and unduly harsh. It is also inappropriate as it is not related to Ms. Enriquez's rehabilitation. Depriving her of necessary medication will not further her rehabilitation or protect the public. As the circuit court erroneously exercised its discretion in imposing an unreasonable and inappropriate condition of extended supervision, Ms. Enriquez's case should be remanded for resentencing.

CONCLUSION

A convicted offender does not have a constitutional right to a particular sentence available within a range of alternatives, but the offender does have a right to a fair sentencing process -- one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information.

Tiepelman, 2006 WI 66, ¶26 (quoting *Welch v. Lane*, 738 F.2d 863, 864-65 (7th Cir. 1984)). For the reasons stated above, Ms. Enriquez asserts that she was denied her right to a fair sentencing process in this case, and respectfully requests that the Court reverse the circuit court's denial of her motion for resentencing, vacate the sentence, and remand this matter back to the circuit court for resentencing before a new judge.

Dated this 25th day of November, 2015.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 45 pages.

Dated this 25th day of November, 2015.

**SEYMOUR, KREMER, KOCH,
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CERTIFICATION 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 s. 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 25th day of November, 2015.

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