STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP1850-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PATRICIA A. ENRIQUEZ,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING MOTION FOR RESENTENCING ENTERED IN RACINE COUNTY CIRCUIT COURT, HONORABLE MICHAEL J. PIONTEK, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues in this case can be resolved by applying established legal principles to the facts; therefore, oral argument and publication are not warranted.

## SUPPLEMENTAL STATEMENT OF FACTS

The State charged Enriquez with three counts of delivery of drugs, and she pled guilty to the two counts of delivery of non-narcotic drugs and the third count of delivery of schedule IV drugs was dismissed and read in (1; 2; 8). At her sentencing hearing before the Honorable Michael J. Piontek, who had not presided over any previous proceedings involving Enriquez and the charges against her, the State recommended eighteen months initial confinement and eighteen months extended supervision on count 1 and three years of initial confinement and two years of extended supervision stayed with three years of probation on count 2 (37:3, A-Ap. 42). The State noted that, as part of the plea agreement, two counts of bail jumping and one count of obstructing an officer in a subsequent case were dismissed and read in; that it was troubling that the PSI writer commented about Enriquez's "candor"; and that it was concerning that Enriquez was in the profession of nursing when the charges against her involved providing drugs illegally (37:4, A-Ap. 43). Enriquez's counsel recommended one to two years probation and a withheld sentence, remarking that Enriquez had no prior criminal convictions and that she had accepted responsibility by pleading guilty (37:6, A-Ap. 45).

After the attorneys' presentations and Enriquez's statement to the court, the court handed out documents related to Enriquez's nursing licenses to the State and to Enriquez and then questioned Enriquez about the "revocation of your nursing license in the State of Texas in 2000 for 17 counts of taking Morphine" (37:9, A-Ap. 48). Enriquez responded by denying that her license was revoked and said the counts "were never substantiated" and that they involved drugs that she "did not document correctly" (37:9-10, A-Ap. 48-49). The court then questioned Enriquez about a document showing she had no license in the State of Illinois, and Enriquez responded that "it might not have been renewed" (37:10, A-Ap. 49). The court further commented on the PSI writer's concerns about

Enriquez's honesty and indicated that Enriquez was lying to the court because she was hiding her past issues involving her nursing licenses, stating that she has "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" (37:11-12, A-Ap. 50-51).

After reciting the maximum sentence on the charges of six years' imprisonment on both counts (37:12, A-Ap. 51), the court addressed the sentencing factors of the gravity of the offense involving delivery of drugs and protection of the public, finding that "[t]he public has a right to be protected from someone like you, especially someone who has specialized knowledge about the danger of drugs and narcotic medication" as a nurse, and also found that "aggravating circumstances are your dishonesty to the Court, to the Court's agencies including the author of the presentence report. Your rehabilitation needs are great. But you show no enthusiasm or recognition of that" (37:24, A-Ap. 63). The court found that confinement was necessary "to protect the public from further criminal activity," to provide "rehabilitative treatment" and to avoid "unduly depreciat[ing] the seriousness of the offense" (37:24-25, A-Ap. 63-64).

The court sentenced Enriquez to 66 months in prison on both count one and count two, with two and a half years of initial confinement and three years of extended supervision, to be served consecutively (37:25, A-Ap. 64). The court further ordered an AODA assessment and that during her sentence she was not to use any alcohol, drugs or narcotic medication whether or not prescribed by a physician, finding that "there are nonnarcotic medications that are available for you to be prescribed for your various conditions" (37:26, A-Ap. 65).

After entry of the judgment of conviction (15, A-Ap. 1-3), Enriquez filed a postconviction motion for resentencing,

alleging that she was sentenced based on inaccurate information; that she was denied her right to rebut that inaccurate information; that Judge Piontek was not impartial; that her sentence was harsh and excessive; and that the court erroneously ordered her to pay restitution to the Racine Police Department (19; 20; 21, A-Ap. 22-37).

At the postconviction motion hearing, the court summarized the facts of the case:

- the charges against Enriquez in this case were for two counts of delivering dextroamphetamine, which is an Adderall type drug and one count of delivering alprazolam or "Xanax," and that Enriquez pled guilty to the two counts of delivering Adderall and the count of delivering Xanax was dismissed and read in, "meaning the Court can consider the conduct when imposing its sentence" (38:4-5, A-Ap. 71-72).

- The State had filed a motion to modify bail, alleging that Enriquez's son had been charged with delivery of the same type of drugs and that while on bail Enriquez was observed in the company of a convicted drug dealer in violation of conditions of her bail (38:5-8, A-Ap. 72-75).

- Enriquez was further charged in a separate criminal case with two felony bail jumpings and an obstructing, which were dismissed and read in for purposes of sentencing in this case (38:7-8, A-Ap. 74-75).

- After Enriquez entered her guilty pleas, the case was reassigned to another judge, who was substituted by the defense, resulting in the case being assigned to Judge Piontek for sentencing on October 6, 2014 (38:9-10, A-Ap. 76-77).

- Prior to sentencing, on October 3, the court reviewed the file, including the presentence report. The court noted its concerns about the "two competing versions" of the events surrounding the charges for delivery of drugs and the read-in charges for bail jumping and obstructing, based on the charges filed by the State and Enriquez's response, and that the PSI writer had concerns about Enriquez's honesty (38:10-13, A-Ap. 77-80).

- After reviewing the case, and in particular Enriquez's statement to the PSI writer that she had her license revoked in Wisconsin, the court decided to look at Enriquez's nursing records to determine whether she was an addict needing treatment, and whether she intended to return to the nursing profession, which could "present[] a great danger to our community" (38:20, A-Ap. 87).

- In reviewing Enriquez's nursing records, the court discovered that in 2000, Enriquez was charged with violations of The Nursing Practice Act by the Texas Board of Nursing, including at least ten counts involving Morphine and subsequently voluntarily surrendered her nursing license in Texas (38:21-25, A-Ap. 88-92).

- In its order taking the voluntary surrender, the Texas Board of Nursing found that "there exists serious risk to public health and safety as a result of impaired nursing care due to intemperate use of controlled substances or chemical dependency" and imposed the conditions that Enriquez not practice nursing and not petition for reinstatement for one year and until "she's obtained objectible, verifiable proof of 12 consecutive months of sobriety immediately preceding the petition" (38:25-26, A-Ap. 92-93).

The postconviction court commented on the nursing license information it discovered prior to 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 good on the Internet, I could find these things.

(38:26, A-Ap. 93). The court further explained that the reason it did not provide the records to the parties until after the presentation by the attorneys is because the court wanted to give Enriquez a chance to accept responsibility (38:27, A-Ap. 94). Further, "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 [allocution] for the defendant to explain the revocation of her license because that paints a much different picture than she paints" (38:30, A-Ap. 97). The court decided to look at Enriquez's nursing records so it could determine "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" (38:30, A-Ap. 97).

The court entered an order granting Enriquez's motion to remove the $90 restitution from the judgment of conviction but denied the remainder of the postconviction motion for resentencing (38:30, A-Ap. 97; 23, A-Ap. 38-39). Enriquez appeals from the judgment of conviction and the order denying her postconviction motion for resentencing (25).

## ARGUMENT

### I. ENRIQUEZ WAS NOT DENIED AN IMPARTIAL COURT BECAUSE SHE HAS NOT SHOWN THAT JUDGE PIONTEK WAS OBJECTIVELY BIASED.

#### A. Relevant law and standard of review.

"Whether a judge was objectively not impartial is a question of law that we review independently." *State v. Herrmann*, 2015 WI 84, ¶ 23, 364 Wis. 2d 336, 867 N.W.2d 772 (citations omitted). There is a rebuttable presumption that a judge has acted fairly, impartially, and without prejudice, placing the burden on the party asserting the bias to show that bias by a preponderance of the evidence. *Id*. ¶ 24, citing *State v. Goodson*, 2009 WI App 107, ¶ 8, 320 Wis. 2d 166, 771 N.W.2d 385; *State v. Gudgeon*, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114); *State v. McBride*, 187 Wis. 2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994).

As the court of appeals noted in *Goodson*:

> 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.

*Goodson*, 320 Wis. 2d 166, ¶ 8 (citations omitted). In this case, Enriquez alleges that Judge Piontek was objectively biased (Enriquez's brief at 17).

Objective bias can exist in two situations. Traditionally, courts have considered whether "'there are objective facts demonstrating . . . the trial judge in fact treated [the defendant] unfairly.'" *Hermann*, 364 Wis. 2d 336, ¶ 27 (citing *Goodson*, 320 Wis. 2d 166, ¶ 9; *McBride*, 187 Wis. 2d at 416). More recently,

courts have "recognized that the right to an impartial decisionmaker stretches beyond the absence of actual bias to encompass the appearance of bias as well." *Hermann*, 364 Wis. 2d 336, ¶ 30. "When the appearance of bias reveals a great risk of actual bias, the presumption of impartiality is rebutted, and a due process violation occurs" *Id.* ¶ 46 (citations omitted).

In *Hermann*, the Wisconsin Supreme Court held that where the judge made personal statements about her sister being killed by a drunk driver while sentencing the defendant for homicide by intoxicated use of a vehicle, the statements were made "to illustrate the seriousness of the crime and the need to deter drunk driving in our society" and were not "an expression of bias against Hermann." *Id.* at ¶ 60. Therefore, the defendant had failed to rebut the presumption that the judge was impartial because the court's statements, viewed in context, did not reveal a great risk of actual bias. *Id.* at ¶ 68.

In this case, Enriquez alleges that by demonstrating that the sentencing court obtained Enriquez's nursing records from another state prior to sentencing, and then produced them at the sentencing hearing and questioned Enriquez about them, she has rebutted the presumption of Judge Piontek's impartiality because "[t]he 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" (Enriquez's brief at 16). Enriquez's claim of judicial bias fails for two reasons: first, she forfeited this claim by failing to object at the sentencing hearing; and second, even if her attorney had objected, Enriquez has not rebutted the presumption that Judge Piontek impartially sentenced her.

### B. Enriquez forfeited her judicial bias claim by not objecting at the sentencing hearing.

Enriquez did not object to the circuit court's comment or seek recusal of Judge Piontek at the sentencing hearing;

consequently, she forfeited her judicial bias claim. *See, e.g., State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992) ("A challenge to a judge's right to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to the judge's decision on a contested matter").

By failing to make a contemporaneous objection to Judge Piontek's impartiality at the sentence hearing after he produced Enriquez's nursing records, provided them to the State and to Enriquez and then questioned Enriquez about them, Enriquez deprived the circuit court of the opportunity to address her concerns regarding the court's questions to her about her nursing records. *See, e.g., State v. Davis*, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996) (Policies behind the contemporaneous objection rule include reducing trial-error, promoting finality in litigation, and the development of an accurate factual record). Therefore, Enriquez has forfeited her judicial bias claim and it cannot be the basis for this court to order resentencing.

### C. Enriquez has failed to show that Judge Piontek was objectively biased by a preponderance of the evidence.

If Enriquez's judicial bias claim has not been forfeited, it fails on the merits because she has not rebutted the presumption that Judge Piontek was impartial by a preponderance of the evidence. Enriquez has not shown an appearance of bias that reveals a great risk of actual bias, because there is no evidence whatsoever that the circuit court prejudged its sentencing decision. *See Gudgeon*, 295 Wis. 2d 189, ¶¶ 2-5, 25-26 (judicial bias occurs when sentence prejudged or predetermined).

Further, as the supreme court recognized in *Hermann*, in making its sentencing decision, the circuit court is "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." *State v. Gallion*, 2004 WI 42, ¶ 40, 270 Wis. 2d 535, 678 N.W.2d 197; accord Wis. Stat. § 973.017(2).[1] Enriquez has not shown that, when viewed in context of the circuit court's proper consideration of these sentencing factors, the circuit court's action of obtaining Enriquez's nursing records and questioning Enriquez about them at the sentencing hearing proves that there was a great risk that the circuit court was actually biased. *See Hermann*, 364 Wis. 2d 336, ¶ 66 (circuit court's statements about personal experience with sister's death by a drunk driver were properly made in the context of consideration of sentencing factors and did not reveal a great risk of actual bias sufficient to rebut presumption of impartiality).

On appeal, Enriquez contends that the circuit court impermissibly conducted its own investigation by obtaining online public records related to Enriquez nursing license in Texas and Illinois, and that this action is sufficient to create an appearance of bias that reveals a great risk of actual bias (Enriquez's brief at 24). Enriquez is wrong. As the court explained, when it decided to look up Enriquez's nursing records, it did not know what it would find, whether the information would be positive or negative or whether there

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[1] Wis. Stat. § 973.017(2) provides:

> When a court makes a sentencing decision concerning a person convicted of a criminal offense committed on or after February 1, 2003, the court shall consider all of the following:
> (ad) The protection of the public.
> (ag) The gravity of the offense.
> (ak) The rehabilitative needs of the defendant.
> (b) Any applicable mitigating factors and any applicable aggravating factors[.]

was anything there: the court was not on a "quest of some kind" to find negative information about Enriquez, especially given that Judge Piontek had no experience with Enriquez and had not presided over her case prior to the sentencing hearing (38:26-27, A-Ap. 93-94). Enriquez's allegations that the sentencing court was "gather[ing] information to use against her at sentencing" and "was acting as an adversary to Ms. Enriquez, rather than as a neutral decision-maker" are simply untrue and are not supported by her allegations (Enriquez's brief at 19). There is no evidence that the court had prejudged its sentencing decision when it obtained the nursing records and a reasonable person would not think that the court's decision to get more background information about Enriquez's professional status negated the presumption of the court's impartiality.

By looking up Enriquez's nursing records, the court sought out already-existing information that was obviously known by Enriquez and that the court believed was necessary for it to make an appropriate sentencing decision. As the court explained at the postconviction hearing, the court was concerned about Enriquez's statement in the PSI that her Wisconsin license had been revoked because of the danger to the community posed by someone in the nursing profession having issues with drug abuse and addiction (38:20, A-Ap. 87). Because "[t]he issue was raised by her in the presentence when she said my license was revoked," the court decided to access the public records regarding Enriquez's nursing licensure on the internet and found the information about the circumstances surrounding the surrender of her license in Texas (38:26, A-Ap. 93). The court explained that the reason it did not produce the nursing records to either party until after the attorneys' sentencing arguments was that the court wanted Enriquez to accept responsibility and recognize that she had an addiction problem (38:27-28, A-Ap. 94-95).

Enriquez's argument that the circuit court violated SCR 60.04(1)(g), which states that a judge "may not initiate, permit, engage in or consider ex parte communication concerning a pending or impending action or proceeding" fails because the circuit court did not engage in ex parte communication with the State or create new evidence to use in the case. Rather, the circuit court sought out information from a third-party source that was already in existence, was readily available on the internet and, most importantly, was obviously well known to Enriquez herself and that the court felt was necessary to appropriately sentence Enriquez.

This case is fundamentally different from *State v. Vanmanivong*, 2003 WI 41, 261 Wis. 2d 202, 661 N.W.2d 76, in which the circuit court contacted law enforcement without informing either party and caused two unsworn memoranda to be used in determining whether the identities of unknown informants should be disclosed. *Id*. ¶¶ 8-12, 33-34. Under these specific circumstances, the Wisconsin Supreme Court held that the:

> [c]ircuit court erred by independently requesting additional information from law enforcement, a request that led to receipt of the unsworn memo from Detective Bloedorn. The circuit court relied upon that independently gathered information to make a ruling on disclosure…. Judges are generally prohibited from independently gathering evidence by the rules of judicial ethics. Supreme Court Rule 60.04(1)(g) prohibits a judge from engaging in ex parte communications concerning a pending action . . . .

*Vanmanivong*, 261 Wis. 2d 202, ¶ 34. Here, however, the circuit court did not create or gather new evidence from law enforcement; it obtained information from public records that already existed, was readily available and was known to Enriquez.

Further, Enriquez wrongly asserts that the circuit court's actions are contrary to the Code of Judicial Conduct and thus

give the appearance of bias (Enriquez's brief at 20). Because the circuit court was not investigating "facts in a case" as prohibited by the Rules of Judicial Conduct, but was merely obtaining background information about Enriquez to determine her character, the danger she posed to the public and the gravity of the offenses for which she was being sentenced, the court did not violate the judicial conduct code. The circuit court obtained information that it is allowed to obtain under SCR 60.04(1)(g)(3) and as warranted to help it make an appropriate sentencing decision. Therefore, Enriquez wholly fails to overcome the presumption of non-bias because "the party asserting judicial bias must show that the judge is biased or prejudiced by a preponderance of the evidence." *McBride*, 187 Wis. 2d at 415.

Enriquez has not met her burden to show that by obtaining these public records, questioning Enriquez about them at sentencing, and hoping that Enriquez would take some responsibility for her previous conduct, there arose an appearance of bias that gave rise to a great risk of actual bias. As such, Enriquez has failed to rebut the presumption that the circuit court acted impartially when it sentenced her for two counts of delivery of drugs.

## II. ENRIQUEZ WAS NOT DEPRIVED OF HER RIGHT TO REBUT INFORMATION ABOUT THE STATUS OF HER NURSING LICENSES IN OTHER STATES.

On appeal, Enriquez asserts that she was deprived of her due process right to rebut the information about her previous nursing license status, citing *State v. Lynch*, 2006 WI App 231, ¶ 24, 297 Wis. 2d 51, 724 N.W.2d 656 (Enriquez's brief at 25). *Lynch* does not support Enriquez's argument, however. In *Lynch*, this court held that because the defendant was aware of the information contained in a television interview that Lynch himself had given, he was not deprived of his due process rights by the court not giving him prior notice that it would

consider the television interview at his sentencing. *Lynch*, 297 Wis. 2d 51, ¶ 25 ("In this case, the contents of the interview were not kept secret from Lynch. Since Lynch gave the interview, he knew its contents and when it occurred"). Similarly, Enriquez's nursing records were not secret from her: they were her own records so she obviously knew about them and they were readily available to her and to her counsel.

In this case, the court provided the nursing records to both parties at the same time at the sentencing hearing, after both counsel had made their presentations and Enriquez had addressed the court, and gave them time to review the records before questioning Enriquez about them (37:9, A-Ap. 48; 38:30, A-Ap. 97). The court wanted to give Enriquez an opportunity at sentencing "to explain the revocation of her license because that paints a much different picture than she paints" (38:30, A-Ap. 97). Additionally, Enriquez did not object contemporaneously at the sentencing hearing to the court's questions about her nursing records, and the record reflects that she did respond to the court's questions (37:9-11, A-Ap. 48-50). Based on Enriquez's responses to the court's questions about her nursing license records, the court determined that she was not taking responsibility, not admitting that she had been involved with drugs in the past, and was refusing to "accept responsibility" and "recognize [she had] something to change" (38:13, A-Ap. 52).

The record demonstrates that Enriquez had the opportunity to respond to the court's questions about her nursing records, which were known to her and which therefore did not contain new "secret" information. Therefore, this court should affirm the circuit court's order denying resentencing.

## III. ENRIQUEZ IS NOT ENTITLED TO SENTENCE MODIFICATION BASED ON HER ALLEGATIONS THAT THE COURT RELIED ON INACCURATE INFORMATION DURING SENTENCING.

### A. Relevant law and standard of review.

A defendant has a constitutionally protected due process right to be sentenced upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1. In *Tiepelman*, the Wisconsin Supreme Court clarified the law in this area, and held that a defendant who requests resentencing due to the circuit court's use of inaccurate information must show *both* that the information was inaccurate, *and* that the court actually relied on the inaccurate information in the sentencing. *Id.* ¶¶ 2, 26. The defendant's burden of proof, on both prongs, is by clear and convincing evidence. *State v. Harris*, 2010 WI 79, ¶ 34, 326 Wis. 2d 685, 786 N.W.2d 409; *State v. Payette*, 2008 WI App 106, ¶ 46, 313 Wis. 2d 39, 756 N.W.2d 423. Once actual reliance on inaccurate information is shown, the burden then shifts to the State to prove that the error was harmless. *Tiepelman*, 291 Wis. 2d 179, ¶¶ 3, 26, 31. An error is harmless if there is no reasonable probability that it contributed to the outcome. *Payette*, 313 Wis. 2d 39, ¶ 46.

A defendant waives or forfeits an inaccurate information claim by failing to object to the information presented at sentencing. *See State v. Leitner*, 2001 WI App 172, ¶ 41, 247 Wis. 2d 195, 633 N.W.2d 207, *aff'd*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341 (counsel's failure to object to prosecutor's argument about behavior underlying expunged convictions constituted waiver of inaccurate information claim). Once a defendant is given the opportunity to review and contest the information, such as information contained in the PSI that he believes is improper, it is within the trial court's discretion to rely upon the information and determine the weight, if any, to

be given the information. *State v. Peters*, 192 Wis. 2d 674, 697, 534 N.W.2d 867 (Ct. App. 1995).

### B. Enriquez waived her inaccurate information claim and the court did not rely on inaccurate information when sentencing Enriquez.

Because Enriquez failed to object to the alleged inaccurate information in her nursing records at the sentencing hearing, Enriquez has waived this claim. *See Leitner*, 247 Wis. 2d 195, ¶ 41. Further, Enriquez fails to meet her burden of proof, by clear and convincing evidence, *both* that the information contained in the nursing records was inaccurate, *and* that the information was actually relied upon by the sentencing court. *Tiepelman*, 291 Wis. 2d 179, ¶¶ 2, 26; *Harris*, 326 Wis. 2d 685, ¶ 34; *Payette*, 313 Wis. 2d 39, ¶ 46. Because Enriquez has failed to meet this burden on either prong, this Court should reject her inaccurate information claim.

Enriquez has not met her burden of proof to show that the information the court obtained about her nursing licenses in Texas and Illinois was *actually* inaccurate, as she claims. Enriquez submits her counsel's affidavit, attaching documentation showing that her Texas nursing license was subject to disciplinary action and was voluntarily surrendered in 2002 and attaching the order of the Texas Board of Nursing that the court also had at the hearing (21:1-15, A-Ap. 22-36). Enriquez argues on appeal that the information the court had about her Texas nursing license was inaccurate because "the circuit court stated the Ms. Enriquez's license had been revoked in the State of Texas" and "that Ms. Enriquez had used and sold Morphine in Texas," where instead of being revoked, Enriquez's license was "voluntarily surrendered" and there was "nothing in that order that accuses Ms. Enriquez of selling Morphine or states that she was found to have sold Morphine or other drugs" (Enriquez's brief at 34).

However, the fact that Enriquez's license was not revoked but instead was "voluntarily surrendered" as a result of the disciplinary action against her is semantic. The documents obtained by the sentencing court from her nursing records in Texas contained the seventeen enumerated formal charges against Enriquez, all involving misuse of Morphine (13, A-Ap. 25-36). Just because the order did not adjudicate her "guilty" of selling Morphine does not negate the fact that the Texas Board of Nursing brought these numerous formal charges against her that resulted in her voluntary surrender of her license in Texas in 2002. This is what the court focused on in its sentencing decision: its concern about the duration of Enriquez's conduct allegedly involving misuse of drugs, "going back … 14 years" based on the Texas charges filed in 2000 and her 2014 Wisconsin conviction for charges involving drugs (37:13, A-Ap. 52). None of this information is altered by the distinction of whether Enriquez voluntarily surrendered her license or whether it was revoked.

Enriquez also attempts to prove that the information about her Illinois nursing license was actually inaccurate by attaching to her counsel's affidavit a printout showing that her license was "not renewed" in 2012 and expired in 2014. The same print out also shows that she had a disciplinary action on her license in 2010 "due to sister state disciplines and a misdemeanor conviction" (21:16, A-Ap. 37). Again, the difference between whether she never had a license in the state of Illinois and whether her license was not renewed and expired is not significant. The court's statement that Enriquez never had a license in Illinois was not a materially inaccurate statement because, as shown by the document submitted by Enriquez, her license there expired and was also subject to disciplinary action. Enriquez does not prove that the information the court had about her Illinois license was *actually* inaccurate, as the law requires for her to prevail on an inaccurate information claim. Accordingly, this Court should find that Enriquez did not meet his burden of proof in proving

that the information was actually inaccurate. *See, e.g., Tiepelman*, 291 Wis. 2d 179, ¶¶ 2, 26; *Harris*, 326 Wis. 2d 685, ¶ 34; *Payette*, 313 Wis. 2d 39, ¶ 46.

Second, and perhaps more importantly, this Court should also find that Enriquez has not met her burden of proving, by clear and convincing evidence, that the circuit court actually *relied* on any allegedly inaccurate information about Enriquez's Texas and Illinois nursing records when sentencing her. *Tiepelman*, 291 Wis. 2d 179, ¶¶ 2, 26; *Harris*, 326 Wis. 2d 685, ¶ 34; *Payette*, 313 Wis. 2d 39, ¶ 46. Rather, the record is clear that the sentencing court relied on a whole host of proper factors in imposing sentence and gave sound reasoning for the exercise of its sentencing discretion.

The alleged inaccurate information about Enriquez's nursing licenses, even if it was materially inaccurate, did not form the basis for her sentence and therefore, Enriquez has failed to show that the court relied on the information about her Texas and Illinois nursing license status in sentencing her. In sentencing Enriquez, the court did not rely on the status of her nursing license in other states, but instead focused on how her failure to address these issues for over a decade demonstrated her dishonest and addictive behavior and the risk she posed to the public as a nurse with these behaviors, finding that:

> drug dealing ... [is] a serious problem in our community. Deterrence and protection of the public, this has been going on now since 2000 at least in some form. And these are the times you've been approached by the authorities. I don't know what went on in the interim. But to assume that the only times in your life this ever happened you were caught would be naïve of me.
>
> The gravity of the offense I've talked about already. Considerations of protection of the public. The public has a right to be protected from someone like you, especially someone who has specialized knowledge about the danger

> of drugs and narcotic medication and the fact that you do not exchange narcotic medication even if I were to buy the baloney that you've thrown out and have me slice up concerning your, you know, just being a good Samaritan type of thing.
>
> Your character is, I would classify as miserable concerning honesty. In other respects it's fine. The aggravating circumstances are your dishonesty to the Court, to the Court's agencies including the author of the presentence report. Your rehabilitation needs are great. But you show no enthusiasm or recognition of that.
>
> And the mitigating circumstances I've already talked about are your, you know, your education and your work. Although a good portion of it, the last 14 years has apparently involved illegal activity.

(37:24-25, A-Ap. 63-64). The sentencing court further found that confinement was necessary to protect the public and to address Enriquez's rehabilitation needs (37:25, A-Ap. 64).

Considering all of these proper sentencing factors, the court sentenced Enriquez to less than the maximum sentence of six years' imprisonment with three years of initial confinement and three years of extended supervision on each count (37:12, A-Ap. 51), imposing 66 months in prison on both count one and count two, with two and a half years of initial confinement and three years of extended supervision, to be served consecutively (37:25, A-Ap. 64).

In its oral ruling denying Enriquez's postconviction motion alleging that the court relied on inaccurate information in imposing sentence, the court indicated that "whether she had an Illinois license or didn't have an Illinois license, that wasn't a big deal" and, with respect to the order accepting her surrender of her Texas nursing license, the court found that its sentencing decision was supported by Enriquez's "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" (38:31, A-Ap. 98). The court determined that it "couldn't in good conscience, let someone like that stay in our community without, you know, trying to affect her somehow in recognizing" her need for drug treatment (38:31, A-Ap. 98).

Because the sentencing transcript demonstrates that the court relied on proper sentencing factors and Enriquez has failed to show that the court's sentence was improperly based on the status of her out of state nursing licenses, the court should affirm the judgment of conviction.

## IV. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN SENTENCING ENRIQUEZ.

Enriquez final argument on appeal is that she is entitled to resentencing because her sentence was unduly harsh and contained unreasonable conditions of extended supervision (Enriquez's brief at 39).

As this Court is well aware, sentencing is reviewed only for an erroneous exercise of circuit court discretion. *State v. Spears*, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). There is a "'strong public policy against interference with the sentencing discretion of the trial court[,] and sentences are afforded the presumption that the trial court acted reasonably.'" *Id.* at 506 (citation omitted).

This court must therefore begin with the presumption that the circuit court acted reasonably in imposing sentence, and the challenger has the burden to show that the sentencing court relied on some unreasonable or unjustifiable basis in imposing sentence. *State v. Lechner*, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). The appellate court cannot interfere with the circuit court's sentencing decision unless the appellant

proves the circuit court erroneously exercised its discretion. *Id.* at 418-19.

In other words, a circuit court properly exercises its discretion if, using a logical rationale, it applies the proper legal standards to the facts of record or to facts that can be reasonably inferred from the record. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). This Court presumes that the circuit court acted reasonably, because the circuit court is in the best position to assess the relevant factors and the defendant's demeanor. *Gallion*, 270 Wis. 2d 535, ¶ 18.

The primary factors the circuit court must consider at sentencing are the gravity of the offense, the character of the offender, and the need for protection of the public. *State v. Smith*, 207 Wis. 2d 258, 281-82 & n.14, 558 N.W.2d 379 (1997). The circuit court can base a sentence on any of the three primary factors after considering all relevant factors. *Spears*, 227 Wis. 2d at 507-08. Moreover, the circuit court has wide discretion to attach varying weight to each of the relevant factors. *State v. Larsen*, 141 Wis. 2d 412, 428, 415 N.W.2d 535 (Ct. App. 1987).

A circuit court properly exercises its discretion if, using a logical rationale, it applies the proper legal standards to the facts in the record or to facts that can be reasonably inferred from the record. *Ocanas*, 70 Wis. 2d at 185. If, however, the sentencing court fails to set forth the reasons for the sentence imposed, this Court is obliged to search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained. *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971). *See also Gallion*, 270 Wis. 2d 535, ¶ 18 (reaffirming the sentencing standards established in *McCleary*).

Enriquez's argument that the court erroneously exercised its discretion in sentencing her has no merit and must fail. The

circuit court considered the relevant sentencing factors and the record fully supports the sentence imposed. Further, as set forth in part III, above, the record is abundantly clear that the circuit court discussed—and relied upon—all three relevant sentencing factors when sentencing Enriquez. *See Smith*, 207 Wis. 2d at 281-82 & n.14 (relevant factors).

Enriquez's sentence was not unduly harsh, as it was not so excessive as to "shock the public conscience." *State v. Wegner*, 2000 WI App 231, ¶ 12, 239 Wis. 2d 96, 619 N.W.2d 289. In fact, it is a lesser sentence than the maximum that the court could have imposed. Further, the court clearly explained its reasoning for imposing the condition of extended supervision prohibiting her from taking narcotic drugs; in fact, the crux of the court's analysis of the sentencing factors, as set forth above, was that Enriquez clearly had a drug problem that had been ongoing for at least a decade. Therefore, the condition of her sentence prohibiting her from taking narcotic drugs was completely warranted. Accordingly, the circuit court properly exercised its discretion because Enriquez's sentence was not unduly harsh, as it was not so excessive as to "shock the public conscience" and because the circuit court considered all of the relevant factors. *Wegner*, 239 Wis. 2d 96, ¶ 12.

Society would not think that five years of initial confinement and six years of extended supervision on two counts of delivery of drugs, an AODA assessment and prohibition of the use of any alcohol, drugs or any narcotic medication whether or not prescribed by a physician (37:25-26, A-Ap. 64-65) was excessive based on the sentencing court's rationale of Enriquez's long-standing addictive and dishonest behavior and the need to protect the public from a nurse demonstrating this type of behavior. Further, consecutive sentences were warranted and justified for separate counts of delivery of narcotics. *See State v. LaTender*, 86 Wis. 2d 410, 434, 273 N.W.2d 260 (1979) (consecutive sentences appropriate when each crime was distinct instance of criminal behavior).

Indeed, no explanation is even necessary for making sentences for separate offenses consecutive. *See State v. Ramuta*, 2003 WI App 80, ¶ 24, 261 Wis. 2d 784, 661 N.W.2d 483 (legislature has specifically permitted trial courts to "stack" sentences by imposing as many sentences as there are convictions).

The circuit court fully explained its sentencing rationale, and this Court should not disturb the circuit court's proper exercise of its discretion in imposing its sentence.

## CONCLUSION

For the foregoing reasons, this court should affirm the order denying postconviction relief and the judgment of conviction.

Dated this 27th day of January, 2016.

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 6,502 words.

Dated this 27th day of January, 2016.

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Anne C. Murphy
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 27th day of January, 2016.

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Assistant Attorney General