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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

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THE HONORABLE WILLIAM M. GABLER, SR.,  
Petitioner-Respondent,

v.

APPEAL NO. 2016AP275

CRIME VICTIMS RIGHTS BOARD,  
Respondent-Appellant,

WISCONSIN DEPARTMENT OF JUSTICE,  
Respondent.

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Appeal From the Final Order of  
Eau Claire County Circuit Court Case No. 13cv473  
The Honorable James J. Duvall Presiding

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**BRIEF OF PETITIONER-RESPONDENT  
THE HONORABLE WILLIAM M. GABLER, SR.**

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## INTRODUCTION

*The complete independence of the courts of justice is peculiarly essential in a limited Constitution . . . . It therefore belongs to [judges] to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.*

--The Federalist No. 78 (Alexander Hamilton).<sup>1</sup>

This case is about the overreach of an executive branch agency, the Crime Victim Rights Board (CVRB), which threatens to impair a fair and impartial judiciary. CVRB sanctioned Judge Gabler for waiting to sentence a criminal defendant in a multi-count case until all charges were adjudicated, concluding that this decision was “unreasonable.” CVRB issued a Final Decision and Report and Recommendation concluding that Judge Gabler violated a crime victim’s (K.L.) rights under Article I, § 9m of the Wisconsin Constitution and Wisconsin Stat. § 950.04(iv)(k) to a timely and speedy “disposition of the case.” CVRB directed Judge Gabler to promptly sentence criminal defendants in future cases. CVRB claims it has the authority to sanction judges—including issuing public reprimands and assessing forfeitures—for discre-

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<sup>1</sup> Available at Library of Congress,  
[http://thomas.loc.gov/home/histdox/fed\\_78.html](http://thomas.loc.gov/home/histdox/fed_78.html)

tionary decisions that would be upheld by an appellate court and that do not violate the Code of Judicial Conduct. (App.Br.24-27). CVRB's Final Decision and its interpretation of its statutory powers are contrary to the Crime Victim Rights Act (Wis. Stat. ch. 950), its own agency rules, Judge Gabler's right to due process, and the separation of powers doctrine.

The circuit court vacated the Final Decision and the Report and Recommendation. This court should affirm.

First, the circuit court correctly concluded that CVRB lacked jurisdiction to consider K.L.'s formal complaint under Wis. Stat. § 950.09(2) because the Department of Justice Office of Crime Victim Services (CVS)—whose powers are limited to receiving informal complaints and mediating them—had not “completed its action” on K.L.'s informal complaint under Wis. Stat. § 950.08(3), and because CVRB failed to verify CVS completed its action, as required by Wis. Admin. Code § CVRB 1.05(1). Second, the court properly concluded that CVRB violated Judge Gabler's procedural due process rights by utilizing an unauthorized investigative

report by CVS to make its probable cause determination, failing to share that report with Judge Gabler, and denying his request for a hearing.

Third, CVRB's decision was incorrect as a matter of law and not supported by substantial evidence because a crime victim has no statutory or constitutional right to have a defendant sentenced on particular *charges* before the entire matter is adjudicated. CVRB also applied an incorrect standard of review, as it refused to evaluate Judge Gabler's scheduling decision under a discretionary standard and failed to search the record for reasons to sustain it.

Fourth, the circuit court correctly concluded that the manner in which CVRB exercised its powers under Wis. Stat. ch. 950 in this case unconstitutionally infringed upon the judiciary's core, exclusive powers to review lower court legal decisions, control court dockets, and discipline judges. Simply put, CVRB cannot constitutionally sanction a judge for a discretionary scheduling decision. When reviewing complaints against judges, CVRB's re-

medial authority must be limited only to referring the matter to the Judicial Commission pursuant to Wis. Stat. § 950.09(2)(b).

### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Oral argument is requested. Publication is appropriate because the issues in this case are novel issues of first impression that have a statewide impact on all judges and because the constitutionality of the Crime Victim Rights Act is at issue.

### **STATEMENT OF THE ISSUES**

CVRB inaccurately frames the issues before this court and does not present them in the proper analytical order. The issues are as follows:

1. Did CVRB have jurisdiction to hear K.L.'s complaint?

**Answered by the circuit court:** The circuit court concluded that CVRB did not have jurisdiction under Wis. Stat. § 950.09(2) to review K.L.'s complaint against Judge Gabler because CVRB did not, in fact, verify that CVS had "completed its action" under Wis.

Stat. § 950.08(3), and because CVS had not mediated the complaint or sought consent to mediate. (R.137/App.111-114,143).<sup>2</sup>

2. Did CVRB violate Judge Gabler’s due process rights or commit other prejudicial procedural errors mandating reversal?

**Answered by the circuit court:** The circuit court concluded that CVRB violated Judge Gabler’s procedural due process rights by making a finding of probable cause using a confidential report from CVS, not sharing the report with Judge Gabler, and refusing Judge Gabler’s request for a hearing, all of which materially prejudiced him. (R.137/App.120-130, 143).

3. Was CVRB’s decision supported by substantial evidence under the correct legal standards?

**Answered by the circuit court:** The circuit court concluded that CVRB’s decision was not entitled to any deference, reasoning that the case involved novel issues of first impression that CVRB had no specialized knowledge or expertise in determining.

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<sup>2</sup> “App.” refers to CVRB’s Appendix. “S.App.” refers to Judge Gabler’s Supplemental Appendix. For ease of reading, when a document is included in the appendix or supplemental appendix, the internal record pagination is omitted.

(R.137/App.139). The circuit court further concluded that CVRB's decision was not supported by substantial evidence and wrong as a matter of law because Judge Gabler cited numerous valid reasons for his decision and was not required to sentence K.L.'s attacker until all charges in the same case had been adjudicated. (R.137/App.140-142).

4. Did the manner in which CVRB exercised its authority in this case under Wis. Stat. § 950.09(2) violate the separation of powers doctrine in that it unconstitutionally intruded upon the judiciary's core and exclusive powers to decide the law, discipline judges, and control its docket?

**Answered by the circuit court:** The court concluded that CVRB violated the judiciary's exclusive powers to manage court calendars and discipline judges by sanctioning a sitting judge for a discretionary scheduling decision involving an unsettled area of law. (R.137/App.130-139). It ruled that CVRB was limited to referring complaints against judges to the Wisconsin Judicial Commission. (R.137/App.133).



## STATEMENT OF THE CASE

### Underlying Criminal Proceedings

CVRB's summary of the underlying criminal proceedings against Leigh Beebe involving K.L. and K.H. is generally accurate, but is not complete. When Judge Gabler granted Beebe's motion to sever the charges involving K.L. and K.H., all counts remained part of the same case. (R.116/S.App.83:20-22);(R.87/S.App.38-43). Beebe was found guilty on the charges pertaining to K.L. on January 11, 2012. (R.87/App.149:¶5). Trial on the remaining charges was scheduled for August 2012. (R.87/App.149:¶6). Beebe pleaded no contest to the remaining charges on August 6, 2012 and was sentenced on all charges on October 18, 2012. (R.87/App.153:¶¶8-9).

At the January 18, 2012 scheduling conference, the prosecutor—with no prior notice or briefing—requested that Beebe be sentenced on the charges pertaining to K.L. before the remaining charges were tried. (R.87/S.App.18:1-15). Judge Gabler determined Beebe's sentencing would occur after the remaining charg-

es were adjudicated for a number of reasons: 1) the length of time needed to obtain a complete PSI and timing of the trial on the remaining charges; 2) Beebe's ability to prepare for trial and access to counsel; 3) K.L. had already testified; and 4) costs associated with dual sentencing. (R.87/S.App.6-12.)

### CVRB and CVS<sup>3</sup>

CVS is a unit of DOJ and administers state and federal crime victim programs. Wisconsin Legislative Reference Bureau, *Wisconsin Blue Book* at 432-33 (2013-2014).<sup>4</sup> Its authority is limited to receiving and mediating informal crime victim complaints. Wis. Stat. § 950.08(3).

CVRB is a 5-member board "attached to the department of justice." Wis. Stat. § 15.255(2). It is comprised of a district attorney, a local law enforcement representative, a county victim services provider, and two citizen members. *Id.* During 2012-2014,

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<sup>3</sup> The court may take judicial notice of readily ascertainable facts of public record. *Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶11, 313 Wis. 2d 411, 756 N.W.2d 667.

<sup>4</sup> Available at [https://docs.legis.wisconsin.gov/misc/lrb/blue\\_book/2013\\_2014/600\\_executive.pdf](https://docs.legis.wisconsin.gov/misc/lrb/blue_book/2013_2014/600_executive.pdf).

none of the members of CVRB were active or former judges. *Wisconsin Blue Book* at 435. CVRB is staffed entirely by employees of the DOJ, *id.*, including Julie Braun, who acts both as Operations Director of CVRB and a “policy analyst” for CVS. (R.116/S.App.93-94);(R.87/S-App114). CVRB has the power to review crime victim complaints and sanction those whom it determines violate a crime victim’s rights. Wis. Stat. § 950.09(2). CVRB’s remedial authority includes the power to issue public or private reprimands, refer a matter to the Judicial Commission, seek equitable relief, and bring punitive forfeiture actions. Wis. Stat. § 950.09(2)(a)-(d).

#### Administrative Proceedings

K.L. filed an informal complaint with CVS on April 3, 2012, which was assigned to Victim Witness Coordinator Jennifer Rhodes. (R.87/S.App.10-11). Rhodes investigated the allegations by obtaining a copy of the scheduling conference transcript and CCAP printout for Beebe’s case. (R.87/S.App.10-43). She also contacted the victim witness coordinator for Eau Claire County (Jodi

Voegli Hollister), and the assistant district attorney who prosecuted Beebe (Meri Larson). (R.87/S.App.10-11);(R.116/S.App.81:2-19). Both made demeaning comments about Judge Gabler and reported that he had a history of treating crime victims poorly and “shutting them down like crazy.” (R.87/S.App.10-11).<sup>5</sup> Their comments were contained in a narrative report prepared by Rhodes that was later distributed to CVRB. (*Id.*)

On June 19, 2012, Rhodes wrote to Judge Gabler (*ex parte*) demanding that he change his decision and sentence Beebe on the charges relating to K.L. “as soon as possible.” (R.87/S.App.27). In doing so, Rhodes attempted to “reach a resolution on K.L.’s behalf . . . .” (R.116/S.App.85:10-16). Rhodes did not seek or obtain Judge Gabler’s consent to mediate K.L.’s complaint. (R.116/S.App.84:10 to 85:9; 87:3 to 89:14; 92:16-21).<sup>6</sup>

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<sup>5</sup> The circuit court concluded these statements were without basis. (R.137/App.124,n.5). Indeed, both Hollister and Larson had personal animosity against Judge Gabler for reasons unrelated to this case, as he had declined to hire Hollister and made previous rulings unfavorable to Larson. (R.93\_7-10:¶¶14-22.)

<sup>6</sup> CVS’s normal “protocol” is to seek consent only from the victim. (R.116/S.App.87:3-14;92:16-21).

Judge Gabler responded to Rhodes on July 3, 2012, expanding upon his rationale for not holding a partial sentencing. Judge Gabler: 1) reiterated his concern about Beebe's access to counsel; 2) noted it would take some time to complete a PSI and that a reliable PSI could not be obtained until the remaining charges were adjudicated; 3) stated he was required to consider all pertinent factors when sentencing Beebe and that the disposition of the remaining charges would affect his sentence; 4) indicated that conducting two sentencing proceedings would result in needless expense and duplication of effort; and 5) expressed concern that if Beebe appealed his sentence as to K.L., he could not be tried on the remaining charges until after the appeal. (R.87/S.App.29-35).<sup>7</sup>

K.L. then filed a formal complaint against Judge Gabler with CVRB. (R.87/S.App.6-8). Rhodes incorrectly informed Braun that CVS's case was "closed and was mediated with Justice [sic] Gabler." (R.87/S.App.45). However, Braun did not verify whether Rhodes had actually mediated the case or sought consent from

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<sup>7</sup> Judge Gabler expanded upon these reasons at the February 27, 2015 evidentiary hearing and in his submissions to CVRB. (R.87/S.App.29-35);(R.116/S.App.61-69).

Judge Gabler to mediate. (R.116/S.App.103:14 to 105:21; 107:24 to 108:3). Braun asked Rhodes for a “summary” of DOJ’s actions. (R.87/S.App.45). Rhodes provided Braun with CVS’s entire file on Judge Gabler, including a narrative of K.L.’s complaint, witness statements, the scheduling conference hearing transcript, CCAP entries, and correspondence with Judge Gabler. (R.87/S.App.9-43). Rhodes also provided a charging recommendation, stating: “It is believed that [K.L.’s] right to a speedy disposition, Wisconsin State Statute 950.04(k) [sic] has been violated.” (R.87/S.App.11). Rhodes testified that she provided this information to Braun to assist CVRB in resolving K.L.’s complaint. (R.116/S.App.86:8-12).

Braun then forwarded a copy of K.L.’s formal complaint to Judge Gabler, indicating that CVRB would issue a probable cause determination. (R.87/S.App.4-8). *Contrary to what CVRB claims, it did not provide Judge Gabler with the information it obtained from CVS until after it reached its Final Decision.* (R.116/S.App.100:18 to 101:4; 102:13-22; 71:25 to 74:10).

Judge Gabler responded (R.87\_A.R.260),<sup>8</sup> and CVRB issued a Probable Cause Determination on February 11, 2013. (R.87/S.App.1). The decision indicates CVRB relied upon “the information provided by . . . the department mediator. . . .” (R.87/S.App.3:¶5).

Judge Gabler requested a formal hearing, identifying several disputed issues of fact, and alternatively moved to dismiss the Complaint, arguing he did not violate K.L.’s rights and that CVRB’s actions against him were unconstitutional. (R.87\_A.R.127-141). CVRB denied the motions, claiming there were no “material” disputed issues of fact. (R.87/App.190,209-212).

CVRB issued its Final Decision on July 26, 2013, concluding that Judge Gabler violated K.L.’s constitutional and statutory rights to a timely and speedy disposition of her case. (R.87/App.147). Importantly, *CVRB never performed its own investigation into the substance of K.L.’s complaint.*

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<sup>8</sup> A.R. refers to the internal, stamped pagination in R.87: “Amended Adm. Rec.”

(R.116/S.App.96:23 to 97:3; 99:23 to 100:3). CVRB did not hold a hearing, interview witnesses, or subpoena any documents. (R.116/S.App.97:4-12).

CVRB determined that Judge Gabler “delayed” sentencing Beebe for a period of 6 months. (R.87/App.165:¶¶19-20). CVRB determined that this delay was unreasonable because Judge Gabler’s reasons for refusing an immediate partial sentencing “lacked a factual or legal justification” and were based on what it deemed were “erroneous” legal and constitutional interpretations. (R.87/App.166-177). CVRB refused to consider any of the reasons provided by Judge Gabler after the January 18, 2012 scheduling conference. (R.87/App.177-178:¶¶25-27). As part of its Final Decision and Order (R.87/App.182:¶1), CVRB issued a public Report and Recommendation, requiring Judge Gabler to “promptly sentence [ ] convicted defendant[s] . . . .” (R.87/S.App.207-210).

Judge Gabler petitioned for review under ch. 227, challenging the merits of CVRB’s decision and renewing his constitutional arguments that CVRB violated his right to due process and that



ch. 950 was unconstitutional as applied by CVRB to judges. (R.25). Judge Gabler also filed a declaratory judgment action against CVS, seeking a ruling that its actions and collaboration with CVRB violated its statutory and administrative powers and the separation of powers doctrine. (R.1). The circuit court ordered the cases consolidated. (R.19;R.69).

Judge Gabler then moved to supplement the record for evidence of procedural irregularities, pursuant to Wis. Stat. § 227.57(1). (R.90-R.93). The court concluded Judge Gabler made a preliminary showing of procedural irregularities. (R.94/S.App.46-47);(R.112/S.App.49:2-25;53:5-14). The court held a hearing on February 27, 2015 as to procedural irregularities, which included exhibits and testimony from Judge Gabler, Rhodes, and Braun. (R.115-116). Per agreement of all counsel, the court also allowed both parties to supplement the administrative record with evidence of past decisions of CVRB solely as it

related to the level of deference, if any, to be given to CVRB’s Final Decision. (R.112/S.App.50:22 to 52:2; 53:15-21).<sup>9</sup>

Following extensive briefing, the circuit court issued a detailed Statement of Facts and Conclusions of Law and Judgment. (R.136;R.137);(App.100-146). The circuit court concluded that CVS exceeded its statutory and regulatory powers by, *inter alia*, sharing confidential information it obtained during its investigation with CVRB and inaccurately reporting to CVRB that it had “mediated the matter” and “completed its required actions.” (R.137/App.109-117).

As to the ch. 227 proceeding, the circuit court rejected CVRB’s argument that its decision was not reviewable and that Judge Gabler lacked standing. (R.137/App.118-120). The court concluded that CVRB lacked jurisdiction to hear K.L.’s complaint because CVS had not “completed its action” as required by Wis. Stat. § 950.08(3)—as it did not mediate or seek consent to medi-

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<sup>9</sup> Judge Gabler submitted CVRB’s responses to public records requests for past decisions. (R.92/S.App.109-206).

ate—and CVRB did nothing to verify this requirement was satisfied, as required by Wis. Stat. § 950.09(2). (R.137/App.114,143).

The court next ruled that CVRB violated Judge Gabler’s right to due process when it obtained confidential information from CVS, failed to provide Judge Gabler with all the information used to make its probable cause determination, and denied his request for a hearing when there were several disputed issues of fact. (R.137/App.120-128). The circuit court concluded that these procedural due process violations materially prejudiced Judge Gabler, warranting reversal. (R.137/App.129-130,143).

Next, the circuit court concluded that CVRB violated the separation of powers doctrine by unconstitutionally intruding upon the judiciary’s core, exclusive powers to discipline judges. (R.137/App.130-138). The court found that Wis. Stat. §§ 950.09(2)(a),(c)-(d) “intrude[s] upon the Supreme Court’s exclusive power to regulate and sanction members of the judiciary to the extent it allows an executive branch agency to reprimand, sanction, and fine a sitting judge.” (R.137/App.133).

The circuit court also concluded that under *In re Complaint Against Grady*, 118 Wis. 2d 762, 782, 348 N.W.2d 559 (1984), CVRB intruded upon the judiciary's core zone of exclusive power to manage court dockets by sanctioning Judge Gabler for a discretionary scheduling decision. (R.137/App.134-138). The court noted that Judge Gabler's decision involved unresolved questions of constitutional and statutory law as to a crime victim's and criminal defendant's rights in a multi-count criminal case and that CVRB had usurped the judiciary's power to decide such issues for itself. (R.137/App.136-137). The court noted that CVRB applied a different standard of review to Judge Gabler's decision than an appellate court, which "would potentially allow a judge to be sanctioned by CVRB while being upheld on appeal." (R.137/App.137).

The court further held that CVRB's decision was not supported by substantial evidence and was contrary to law. (R.137/App.139-142). The court applied a de novo standard of review because the case involved issues of first impression and

CVRB had no specialized knowledge as to the unsettled law concerning sentencing in a multi-count case, applying sentencing factors, or reviewing discretionary judicial scheduling decisions. (R.137/App.139).

The court concluded “[n]o authority exists expressly permitting or requiring sentencing on one count while the other count remains unresolved.” (R.137/App.140). It also found that Judge Gabler had articulated several valid reasons for waiting to sentence Beebe until the end of the entire case. (*Id.*). And, it concluded that any delay was reasonable, given that CVS first contacted Judge Gabler on June 25, 2012 (four months after the initial scheduling decision), and the PSI was ordered on August 6, 2012. (R.137/App.141-142).

For all these reasons, the circuit court reversed CVRB’s Final Decision and Order and remanded with instructions to dismiss the complaint and set aside the Report and Recommendation. (R.137/App.143-144). CVRB appealed; CVS did not.

## STANDARDS OF REVIEW

CVRB's statement of the applicable standards of review is not accurate and complete.

Issues relating to an agency's jurisdiction are decided de novo without any deference to the agency. *Miller Brewing Co. v. DILHR*, 203 Wis. 2d 380, 386, 553 N.W.2d 837 (Ct. App. 1996). Whether an agency violated a litigant's right to procedural due process is a question of law this court reviews de novo. *Bunker v. LIRC*, 2002 WI App 216, ¶18, 257 Wis. 2d 255, 650 N.W.2d 864. "Decisions which are violative of due process may be vacated under the general judicial authority." *Guthrie v. WERC*, 111 Wis. 2d 447, 457, 331 N.W.2d 331 (1983). "A finding or order made in a proceeding in which there has not been a 'full hearing' is a denial of due process and is void." *Bracegirdle v. Dep't of Regulation & Licensing, Bd. of Nursing & Div. of Enft*, 159 Wis. 2d 402, 418-19, 464 N.W.2d 111 (Ct. App. 1990) (emphasis added).

Review of the substance of agency decisions is governed by Wis. Stat. § 227.57 using the same standard as the circuit court.

*Miller Brewing Co.*, 203 Wis. 2d at 386. Because the circuit court concluded that CVRB committed procedural irregularities and took additional evidence thereof, this Court may consider such evidence in addition to the agency record. Wis. Stat. § 227.57(1). Determinations of fact, agency procedure, and questions of law should be examined separately. Wis. Stat. § 227.57(3).

An agency decision should be set aside when “the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action.” *Id.* “If the agency’s action depends on facts determined without a hearing—as is the case here—the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law . . . .” Wis. Stat. § 227.57(7). Agency action should also be reversed if it is in violation of the constitution or its own procedures. Wis. Stat. § 227.57(8).

Finally, the court reviews constitutionality of a statute de novo, *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶16, 333 Wis. 2d 273, 797 N.W.2d 854, benefitting from the analysis of the circuit court.

*Weborg v. Jenny*, 2012 WI 67, ¶41, 341 Wis. 2d 668, 816 N.W.2d 191.

## ARGUMENT

CVRB made numerous procedural, legal, and constitutional errors in the course of the proceeding against Judge Gabler. Each of the following reasons is sufficient grounds for reversal.

### **I. CVRB Lacked Jurisdiction to Consider K.L.’s Complaint Because CVS Did Not Mediate or Seek Consent to Mediate.**

Section 950.09(2) provides that “[a] party may not request the Board to review a complaint under this subsection until [CVS] has completed its action on the complaint under s. 950.08(3).” Here, CVS did not “complete its action” because it never mediated or sought Judge Gabler’s consent to mediate. CVRB argues that it had jurisdiction because CVS’s “action” is not limited to mediating complaints and instead includes information gathering and liaising, which it did in this case. (App.Br.41-42). However, CVS’s statutory powers are all expressly tied to mediation.

Section 950.08(3), entitled “Duties of Department; Mediation,” sets forth the powers of CVS:



The department may receive complaints, seek to mediate complaints and, with the consent of the involved parties, actually mediate complaints . . . .

The department may act as a liaison between crime victims or witnesses and others when seeking to mediate these complaints . . . .

All of CVS's powers are tied to mediation. There is no free-standing authority for CVS to "gather information" or demand particular action, apart from the context of mediation. As the circuit court concluded: "The liaison function is accessory to and part of the mediation function." (R.137/App.113).

CVS did not "mediate" K.L.'s complaint against Judge Gabler, as Rhodes' only contact with Judge Gabler was to demand that he do what K.L. wanted. (R.87/S.App.27);(R.137/App.113). CVS also did not seek "consent of the involved parties" to mediate, as Rhodes never sought Judge Gabler's consent to mediate. (R.116/S.App.84:10-12, 88:2 to 89:23). Indeed, CVS has "no practice or policy . . . to get consent of anyone other than the victim before engaging in mediation." (R.116/S.App.87:11-14). Because CVS never mediated K.L.'s complaint or sought consent "of the parties" to mediate, it did not "complete its action under

§ 950.08(3),” and CVRB had no jurisdiction to address K.L.’s complaint.

CVRB argues that it should not be required to verify that CVS completed its statutorily prescribed activities. (App.Br.42). However, CVRB’s own rules require it to do so. Wisconsin Admin. Code § CVRB 1.05(1) plainly states: “the board shall contact the mediator and request verification that the substance of the complaint has been presented to the department and that the department has completed its action as required by ss. 950.08 (3) and 950.09 (2), Stats.” (Emphasis added.)

Braun admitted CVRB did not verify that CVS had obtained Judge Gabler’s consent to mediate. (R.116/S.App.107:17 to 108:3). Because CVRB failed to verify CVS “completed its action,” CVRB lacked jurisdiction to consider K.L.’s complaint.

## **II. CVRB Violated Judge Gabler’s Right to Due Process and Committed Other Procedural Irregularities; Its Final Decision Was Properly Reversed.**

CVRB violated Judge Gabler’s due process rights by obtaining confidential information from CVS, using that information as

part of its probable cause determination, failing to share that information with Judge Gabler during the administrative proceeding, and denying his request for a hearing. The cumulative effect of these actions required reversal.

**A. Judge Gabler Was Entitled to Due Process Because His Property and Liberty Interests Were At Stake In The Administrative Proceeding.**

In order to obfuscate the numerous procedural irregularities in the administrative proceedings, CVRB argues that Judge Gabler possessed no right to due process because the sanction it ultimately imposed did not alter his legal status and because Judge Gabler's interest in maintaining his professional reputation is not sufficient to confer due process protections. (App.Br.29-31). Both of these arguments are wrong.

First, the United States Supreme Court has ruled that “to determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the *nature* of the interest at stake” in a particular proceeding. *Bd. of Regents v. Roth*, 408 U.S. 564, 570 (1972) (underscoring added). Thus, the appro-

appropriate inquiry is not to examine what sanction is ultimately imposed; rather, a court must make “a determination of the precise nature of the private interest that is threatened by the State.” *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) (emphasis added).

In other words, due process protections apply based upon what is at stake at the beginning of an administrative proceeding. “The fundamental requisite of due process is affording a party whose rights may be affected by government action ‘an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.’” *Neylan v. Vorwald*, 121 Wis. 2d 481, 488, 360 N.W.2d 537 (Ct. App. 1984) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962)) (emphasis added).

When a crime victim files a complaint with CVRB, the agency’s remedial powers include issuing public and private reprimands, referring alleged violations involving judges to the judicial commission, “assess[ing] a forfeiture[,]” issuing reports and recommendations, and “[s]eeking appropriate equitable relief.”

Wis. Stat. § 950.09(2). Thus, when a sitting judge is the subject of a CVRB proceeding, the interest at stake includes being deprived of property, loss of his professional status, loss of good name and professional reputation, and loss of ability to continue functioning as an objective member of the judiciary free from outside influence.

CVRB's argument means it is free to disregard the administrative, statutory, and constitutional procedural protections afforded to an individual accused of violating a crime victim's rights simply by choosing to implement a less severe sanction than it otherwise could. This is not—and should not be—the law.

Second, CVRB is wrong to argue that a public official's professional reputation is not significant enough to warrant the protections of the Due Process Clause. The United States Supreme Court has repeatedly held to the contrary. “For ‘where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.’” *Roth*, 408 U.S. at 573 (quoting *Wis-*

*consin v. Constantineau*, 400 U.S. 433, 437 (1971) & citing *Wierman v. Updegraff*, 344 U.S. 183, 191 (1952), et al.).

The Wisconsin Supreme Court has also recognized that a public employee has a constitutionally protected liberty interest in his reputation. *Nufer v. Vill. Bd. of Palmyra*, 92 Wis. 2d 289, 297, 284 N.W.2d 649 (1979) (“In a public employment context, liberty is composed of two interests—a reputation interest and an employability interest. The reputation interest has been infringed whenever charges impugn one’s good name, reputation, honor, or integrity in the community.”); *see also Bracegirdle*, 159 Wis. 2d at 417 (“Bracegirdle was entitled to fair notice of the charges against her and a full hearing to clear her good name and reputation. We conclude that she did not receive these constitutional protections.”).

CVRB cites *Weber v. City of Cedarburg*, 129 Wis. 2d 57, 384 N.W.2d 333 (1986), to the contrary, but this case is distinguishable because it involved a private citizen claiming his reputation was tarnished due to police surveillance. *Weber* does not involve

a reputational interest attendant to public employment and is therefore inapposite. Likewise, *Hinkle v. White*, 793 F.3d 764, 767 (7th Cir. 2015), which employed a “stigma-plus” standard to allegations that police spread defamatory rumors about an individual, is both factually distinguishable and inconsistent with *Roth*, *Constantineau*, *Nufer*, and *Bracegirdle*.

Even if the court concludes that a “stigma-plus” analysis is required, that standard is easily met here. CVRB’s determination that Judge Gabler violated K.L.’s constitutional rights adversely affected his professional reputation as a public official, his future “employability” (ability to run for re-election) and exposed him to monetary fines, professional discipline, public censure, and other “equitable” sanctions. What was “at stake” in CVRB’s proceeding was sufficient to trigger constitutional due process protections, the most rudimentary of which are a hearing and ability to present evidence. *See Ruhmer v. Wis. State Teachers Ret. Bd.*, 48 Wis. 2d 419, 428, 180 N.W.2d 542 (1970); *Mid-Plains Tel., Inc. v. Pub. Serv. Comm’n*, 56 Wis. 2d 780, 785, 202 N.W.2d 907 (1973).

**B. CVRB Violated Judge Gabler’s Right to Due Process and The Procedural Protections Required By Governing Statutes and Regulations.**

CVRB claims it afforded Judge Gabler “all the process he was due.” (App.Br.32). The record proves otherwise.

**1. CVRB Conducted a Prohibited Investigation Into Judge Gabler Before Making a Probable Cause Finding.**

Both Wis. Stat. § 950.09(2)<sup>10</sup> and Wis. Admin. Code § CVRB 1.06(1)<sup>11</sup> prohibit CVRB from investigating a crime victim complaint until *after* there has been a finding of probable cause. CVRB violated both provisions.

It is undisputed that before it made its probable cause determination, CVRB requested and obtained CVS’s entire file on Judge Gabler, including witness statements, the scheduling conference transcript, CCAP printouts, and confidential correspondence between CVS and Judge Gabler. (R.87/S.App.10-43). Doing so violated Wis. Stat. § 950.095(1)(a), which provides that CVS

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<sup>10</sup> “The board may not begin any investigation or take any action specified in pars. (a) to (d) until the board first determines that there is probable cause . . . .”

<sup>11</sup> “The board may conduct an investigation of any complaint which meets the probable cause standards under this chapter.”



records are confidential unless confidentiality is waived by the subject of the complaint.<sup>12</sup>

CVRB attempts to characterize CVS’s investigation as harmless “information gathering.” This is refuted by Rhodes’ admission that she was “information gathering” because “at that point, I had no reason to believe that any rights had been violated.” (R.116/S.App.91:18-20). After investigating K.L.’s complaint, Rhodes reported: “It is believed that [K.L.’s] right to a speedy disposition, Wisconsin State Statute 950.04(k) [sic] has been violated.” (R.87/S.App.11). And, Rhodes testified that she provided this information to “give the [CVRB] an understanding of what had taken place so they have a starting point . . . .” (R.116/S.App.86:8-12).

Further, contrary to CVRB’s claim that it did not rely on this information (App.Br.37), its probable cause determination states it was based, in part, on “information provided by . . . the department mediator.” (R.87/S.App.3:¶5). It is also undisputed that

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<sup>12</sup> “The records of the department relating to a complaint made under s. 950.08 (3) are confidential unless the subject of the complaint waives the right to confidentiality in writing to the department.”

CVRB did not conduct an independent investigation, did not interview any witnesses, and did not subpoena documents. (R.116/S.App.96:23 to 97:3). Thus, the information from CVRB formed the basis of CVRB's probable cause determination.

In other words, the information "gathered" by Rhodes was used by CVS to make a determination that Judge Gabler violated K.L.'s rights and this same information was then shared with CVRB and formed the basis of CVRB's determination that there was probable cause that K.L.'s rights were violated. By requesting, accepting, and acting on the information from CVS, CVRB unlawfully circumvented the limits of CVRB's investigatory authority under Wis. Stat. § 950.09(2) and Wis. Admin. Code § CVRB 1.06(1) and violated the confidentiality of Judge Gabler's CVS file, contrary to § 950.095(1)(a).

**2. CVRB Violated Judge Gabler's Due Process Rights By Withholding The CVS Documents Until He Petitioned For Judicial Review.**

Wisconsin Admin. Code § CVRB 1.06(3) provides: "Following its investigation and prior to the hearing under s. CVRB 1.07, the

board shall provide copies to the parties of any documentation obtained during its investigation.” (Emphasis added.) Here, CVRB basically adopted CVS’s investigation as its own, as CVRB did not subpoena any documents or interview witnesses. (R.116/S.App.96:23 to 97:12).

Despite CVRB’s assertions to the contrary, it is undisputed that CVRB did not share CVS’s investigative report with Judge Gabler until after it rendered its Final Decision and Judge Gabler filed his ch. 227 Petition. (R.116/S.App.100:18 to 101:4; 71:25 to 74:10). Without this information, Judge Gabler had no way to challenge the veracity of Larson’s or Hollister’s statements about him—statements that were used to find probable cause—or to identify disputed issues of fact that CVRB thought “material.”<sup>13</sup> As the circuit court stated: “Judge Gabler needed to know the facts being considered by CVRB in order to raise a material issue of fact, but . . . CVRB refused to provide Judge Gabler with the

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<sup>13</sup> Judge Gabler disputed these comments during his testimony (R.116/S.App.72-76), and in his affidavit to the circuit court. (R.93:7-9.)

facts it was considering until after it denied his request for a hearing.” (R.137/App.123).

**3. CVRB Violated Judge Gabler’s Due Process Rights By Denying His Request For a Hearing Despite Material Disputed Issues of Fact.**

Wisconsin Admin. Code § CVRB 1.07(1) provides that “[a] hearing may be requested by any party or the board.” No provision allows CVRB to refuse a hearing once one is requested. To the contrary, § CVRB 1.07(5) states that once a hearing has been requested, the parties “shall be afforded reasonable opportunity to be represented by counsel, to call witnesses, and to present evidence.” (Emphasis added.) The word “shall” in a statute is presumed to be mandatory. *Midwest Steel Co. v. DNR*, 167 Wis. 2d 160, 165, 482 N.W.2d 377 (Ct. App. 1992). Further, Wisconsin’s Administrative Procedure Act plainly provides that “[i]n a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice.” Wis. Stat. § 227.44(1). Moreover, the due process guarantee of basic “rudiments of fair play” requires an agency acting in a quasi-judicial capacity to hold a

hearing for the parties to present evidence. *Ruhmer*, 48 Wis. 2d at 428; *Mid-Plains Tel.*, 56 Wis. 2d at 785.

CVRB's argument that there were no disputed issues of fact to be decided at a hearing is not supported by the record. Among other things, there were disputed issues of fact as to: 1) whether Judge Gabler articulated all of his reasons for waiting to sentence Beebe on the record at the scheduling conference, and if not, why,<sup>14</sup> (R.116/S.App.60:3 to 62:25); 2) the veracity of the statements made by Hollister and Larson that were used as part of the probable cause determination, (R.116/S.App.72:8 to 76:5); and 3) the earliest date Judge Gabler could have sentenced Beebe on the charges relating to K.L., had he accepted Rhodes' demand to change his decision, (R.116/S.App.79:7 to 80:22), as well as the other disputed issues of fact set forth by the circuit court, including the fact that there was but a single "case" against Beebe, (R.137/App.123-124), when CVRB believed there was two. (R.87/S.App.207).

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<sup>14</sup> Judge Gabler explained that all of his reasons were not stated on the record conference because he had no notice the issue would be raised and did not have time to fully articulate his reasoning. (R.116/S.App.60-61).

**C. The Combined Effect of These Procedural Irregularities Required Reversal.**

CVRB makes an undeveloped harmless error argument. It contends that the procedural irregularities were not “material to the outcome” of the administrative proceeding, did not “materially prejudice” Judge Gabler, and the proper remedy for such errors should have been a remand. (App.Br.40-41). CVRB’s arguments are wrong both on the law and the facts.

To begin with, the circuit court was not limited simply to remanding the case to CVRB. The Wisconsin Supreme Court has held that administrative “decisions which are violative of due process may be vacated under the general judicial authority.” *Guthrie v. WERC*, 111 Wis. 2d 447, 457, 331 N.W.2d 331 (1983). Moreover, “[a] finding or order made in a proceeding in which there has not been a ‘full hearing’ is a denial of due process and is void.” *Bracegirdle*, 159 Wis. 2d at 418-19. Additionally, to the extent CVRB is arguing that the procedural errors in this case resulted from its exercise of case-handling discretion, Wis. Stat. § 227.57(8) authorizes a reviewing court to reverse when an

agency exercises its discretion in a manner that violates the constitution. Thus, the circuit court was well within its power to reverse the Final Decision regardless of a showing of prejudice.

Furthermore, there was prejudice to Judge Gabler. CVRB errs in addressing the impact of each procedural error in isolation. Individual errors that might be harmless standing alone may nonetheless warrant reversal when the combined or cumulative effect so infects the proceedings so as to deny an individual his fundamental right to a fair proceeding. *See, e.g., Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978); *State v. Harris*, 2008 WI 15, ¶110, 307 Wis. 2d 555, 745 N.W.2d 397. The circuit court properly concluded that the combined effect of the multiple procedural errors in this case undermined the fairness of the proceeding and that the errors probably caused a different result. (R.137/S.App.129,143).

CVRB circumvented its own rules and procedures by collaborating with CVS to investigate Judge Gabler and verify K.L.'s allegations before finding probable cause. It failed to share CVS's

report with him, such that Judge Gabler did not have access to all of the evidence against him and could not rebut the same. CVRB never performed its own investigation. CVRB failed to provide Judge Gabler with a hearing and failed to allow him to explain all of the reasons underlying his decision to refuse K.L.'s request for an expedited sentencing. When viewed as a whole, the conduct of this proceeding lacked "[t]he 'rudiments of fair play'" required by the constitutional guarantee to due process. *Ruhmer*, 48 Wis. 2d at 428.

As the circuit court observed, had CVRB properly determined that CVS had "completed its action," it could not have taken up K.L.'s formal complaint; had CVRB not utilized the CVS investigative report, it may not have found probable cause; had CVRB disclosed the CVS report to Judge Gabler, CVRB likely would have granted a hearing due to disputed issues of fact; had CVRB granted a hearing, the result probably would have been different. (R.137/App.129-130). Indeed, without the investigative report and material from CVS, CVRB would have had no basis to make



a probable cause determination and, at a minimum, would have been forced to hold an evidentiary hearing.

Thus, the combined effect of these procedural errors materially prejudiced Judge Gabler and warranted reversal.

### **III. CVRB's Decision is Not Supported by Substantial Evidence and is Wrong as a Matter of Law.**

Although CVRB defends the merits of its Final Decision and Order under the substantial evidence test, (App.Br.43), the issue in this case is not the *quantum* of evidence used by CVRB, but rather whether that evidence amounted to a violation of K.L.'s constitutional and statutory rights *under the correct legal standards*. As set forth below, CVRB's decision simply is not supportable as a matter of law.

#### **A. CVRB's Legal Interpretations Are Not Entitled to Any Deference.**

CVRB argues its legal interpretations should be given great weight deference. (App.Br.13-15). However, CVRB fails to meet the test for great weight deference.<sup>15</sup>

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<sup>15</sup> CVRB does not argue that it is entitled to "due weight deference" and has thus waived this argument. As such, Judge Gabler will not address it.

At the outset, no level of deference is accorded to an agency decision when it involves a legal issue of first impression. *Knight v. LIRC*, 220 Wis. 2d 137, 149, 582 N.W.2d 448 (Ct. App. 1998). This case involves a legal issue of first impression: Whether a crime victim in a multi-count, severed case has a right to have the defendant sentenced on the charges pertaining to her before the entire case is disposed. CVRB has not cited any authority to show it had previously considered this issue. It also cites no authority to show it previously considered the types of constitutional separation of powers issues raised in this case. Further, because this case calls into question the scope of CVRB's authority over judges, no deference is required. *See Rock-Koshkonong Lake District v. DNR*, 2013 WI 74, ¶61, 350 Wis. 2d 45, 833 N.W.2d 800.

Also, CVRB does not meet the test for great weight deference because: 1) it did not apply a longstanding rule or interpretation to Judge Gabler; 2) it does not have specialized knowledge or experience in addressing the matter at issue; and 3) its interpreta-

tion of Wis. Stat. § 950.04(1v)(k) does not “provide consistency and uniformity in the application of the statute.” *Knight*, 220 Wis. 2d at 148.

First, as noted above, CVRB has never addressed whether a crime victim has a right to an immediate sentencing for certain charges in a multi-count case involving multiple victims before final disposition. It likewise has no experience determining whether a judge properly applied sentencing factors in making a discretionary sentencing decision. Nor has it experience in determining whether a “delay” in sentencing violates a crime victim’s statutory rights. CVRB cites no previous decisions addressing such issues. Likewise, none of CVRB’s reports address these issues. (App.Br.15-16, n.1).

Second, CVRB has no special “expertise” or “specialized knowledge” in addressing such issues. Indeed, CVRB has minimal experience dealing with crime victim complaints and even less experience dealing with such complaints against judges. From 1999 to 2012, CVRB handled only 51 crime victim com-

plaints. (R.92/S.App.118). Out of those 51 cases, only 11 involved judges, and only 5 involved findings of probable cause, including Judge Gabler. (R.92/S.App.110:¶¶6-7;116;133). Of the other 4 probable cause findings against judges, only 1 involved an issue of speedy disposition. (R.92/S.App.180-191). Moreover, none of the members of CVRB who adjudicated this case were active or former judges, and only one was an attorney.<sup>16</sup> As stated in *Wisconsin Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶¶64-65, 311 Wis. 2d 579, 754 N.W.2d 95, “[c]ourts give deference to an agency . . . because the agency is in a better position to interpret the rule than the court.” Such is not the case here.

Third, the standard CVRB used in this case is inherently subjective and does not provide “uniformity and consistency.” In analyzing speedy disposition complaints, CVRB employs a four-part test and determines if there was a delay, the length of the delay, if the delay was reasonable, and if it was attributable to the sub-

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<sup>16</sup> Wis. Stat. § 15.255(2); Wisconsin Legislative Reference Bureau, *Wisconsin Bluebook* at 435.

ject of the complaint. (R.87/App.162:¶13).<sup>17</sup> Yet, CVRB has promulgated absolutely no standards for determining what is “reasonable” or what factors should be considered in determining whether a delay is “reasonable.” In this case, CVRB dismissed each of the reasons Judge Gabler provided for not immediately sentencing K.L.’s attacker. (R.87/App.165-178). CVRB’s determination that Judge Gabler’s decision was “unreasonable” was left entirely to the subjective opinions of the Board members—none of whom had any judicial experience. Moreover, CVRB’s reasonableness standard involves “greater scrutiny” (App.Br.24), than an appellate standard of review for the same decision. Thus, CVRB’s subjective rule does not provide uniformity and, in fact, invites inconsistent rulings.

For all of these reasons, the test for great weight deference is not met and the *de novo* standard is appropriate.

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<sup>17</sup> See also <http://www.doj.state.wi.us/sites/default/files/ocvs/not-victim/special-report-speedy-disposition-cvrb201001.pdf>.

**B. CVRB Incorrectly Determined That a Crime Victim in a Multi-Count Case Has a Right to Have The Defendant Sentenced Before All Counts Are Adjudicated.**

Wisconsin Const., art. I, § 9m provides that a crime victim has a right to a “timely disposition of the case[.]” (Emphasis added.) Likewise, Wis. Stat. § 950.04(iv)(k) grants a crime victim the right to a “speedy disposition of the case in which they are involved as a victim in order to minimize the length of time they must endure the stress of their responsibilities in connection with the matter.” (Emphasis added). Neither provision grants a crime victim the right to have a defendant in a multi-count criminal case sentenced *on particular counts* before the entire case is disposed. CVRB has not cited *any* legal authority recognizing such a right. CVRB cannot create one sua sponte by agency fiat.

In fact, CVRB’s determination that a crime victim in a multi-count case has a right to immediate sentencing on the counts relating to her is not only inconsistent with the text of § 950.04(iv)(k), it is contrary to established case law governing sentencing factors. *State v. Gallion*, 2004 WI 42, ¶11, n.11 & 12,

270 Wis. 2d 535, 678 N.W.2d 197, requires a court to consider all pertinent information concerning a defendant's character and culpability in fashioning a sentence, including aggravating factors and related criminal offenses. *See also State v. Frey*, 2012 WI 99, ¶45, 343 Wis. 2d 358, 817 N.W.2d 436 (“a sentencing court needs the fullest amount of relevant information concerning a defendant's life and characteristics”). Whether a defendant is ultimately found guilty of related charges in the same case certainly is a “relevant factor” for a court to properly consider during sentencing.

In short, CVRB's underlying premise that K.L. had a right to have her attacker sentenced on the charges relating to her before disposition of the entire criminal case lacks any legal support and, in fact, is contrary to law. On this basis alone, CVRB's decision should be reversed as a matter of law. Wis. Stat. § 227.57(5)&(7).

**C. CVRB Applied The Wrong Standard In Reviewing Judge Gabler's Discretionary Decision and Improperly Refused to Consider Reasons Supporting His Decision.**

Even if K.L. had a right to have Beebe sentenced before the entire case was disposed, CVRB's decision should be vacated under Wis. Stat. § 227.57(5)&(7) because it applied an incorrect standard of review and the facts compel a particular result as a matter of law. First, CVRB, without basis, refused to consider any reason not set forth on the record by Judge Gabler at the January 18, 2012 scheduling conference. (R.87/App.178:¶27). Under *Hefty v. Strickhouser*, 2008 WI 96, ¶¶15, 49-50, 312 Wis. 2d 530, 752 N.W.2d 820, a circuit court is not required to state on the record every reason it considered in making a discretionary scheduling decision. CVRB asserts that it is not bound by *Hefty* because "it is proper to require the court to place the reasons for its decision on the record" when crime victim rights are involved. (App.Br.44). It cites no authority for this proposition. While *Hefty* does require a court to provide "an explanation" for a contested scheduling decision, *id.*, ¶53, it does not require the court to state



all the reasons supporting its decision on the record or prevent a reviewing court from considering other reasons that support the decision.

The reasons provided by Judge Gabler (on the record, in his correspondence with CVS, and in his testimony)<sup>18</sup> for not immediately sentencing Beebe provide ample support for his decision to wait until all charges were disposed of before sentencing Beebe. These reasons included concerns about having all pertinent information to sentence the defendant, the defendant's ability to prepare for trial, the need for a complete PSI, the timing of the PSI, expenditure of judicial resources, judicial economy, and the ability to proceed with the remaining charges if Beebe appealed.<sup>19</sup> The circuit court properly found that these were "valid reasons," (R.137/App.140-142), that supported Judge Gabler's discretionary decision. K.L.'s subjective desire for a partial sentencing does not outweigh these concerns.

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<sup>18</sup> (R.87/S.App.18-24,29-35);(R.116/S.App.63-69).

<sup>19</sup> (*Id.*)

Second, when a court’s discretionary actions are under review, the reviewing body must “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). Discretionary decisions must be upheld so long as they are the product of a rational consideration of the applicable law and facts—even if the reviewing court would have decided differently if exercising discretion in the first instance. *Franke v. Franke*, 2004 WI 8, ¶¶54-55, 268 Wis. 2d 360, 674 N.W.2d 832. In other words, “[b]ecause the exercise of discretion is so essential to the trial court’s functioning, [a reviewing body] generally look[s] for reasons to sustain discretionary decisions.” *Schneller v. St. Mary’s Hosp. Med. Ctr.*, 155 Wis. 2d 365, 374, 455 N.W.2d 250 (Ct. App. 1990), *aff’d* 162 Wis. 2d 296, 470 N.W.2d 873 (1991).

CVRB did not do that here. Indeed, its Final Decision is remarkable as to the extent to which CVRB went to “disprove” and undercut all of the reasons supporting Judge Gabler’s decision. According to CVRB’s Final Decision, there was only one legally

permissible course of conduct available to Judge Gabler—agreeing with the prosecutor’s request for an immediate sentencing on K.L.’s charges. Any reason, fact, or principle of law supporting Judge Gabler’s decision was derided as “erroneous” and “without basis.”

CVRB’s conclusory statement that it is allowed to subject Judge Gabler’s discretionary scheduling decision to “greater scrutiny” (App.Br.24) because it involved a crime victim’s rights is without any legal basis. Likewise, its argument that applying the deferential standard of review would violate a crime victim’s right to be treated with “fairness, dignity, and respect” (App.Br.44), is bereft of any legal support.<sup>20</sup>

#### **D. CVRB’s Calculation of the Length of The Alleged “Delay” Is Not Supported by Substantial Evidence.**

Additionally, CVRB erred in determining the length of the “delay” in sentencing Beebe. CVRB measured the supposed delay from April to October 18, 2012, based on when Beebe was ulti-

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<sup>20</sup> CVRB’s reliance on Wis. Stat. § 950.04(1v)(ag) throughout this case is troublesome, as it raises constitutional vagueness and overbreadth issues when CVRB uses its subjective determination of “fairness” to find rights violations and buttress otherwise unsupportable legal conclusions.

mately sentenced on all charges, compared to the first opportunity Judge Gabler had to sentence him after the January 18, 2012 scheduling conference. (R.87/App.165:¶19). It cites no authority for this decision. (App.Br.46).

CVRB's determination fails to recognize that Judge Gabler did not receive any request to reconsider his scheduling decision until June 19, 2012—more than four months after his initial decision. Counting these four months against Judge Gabler is patently unreasonable, as he had no way of knowing that K.L. considered her rights to have been violated before this time. And it also fails to account for the time it takes to complete a PSI. The circuit court got it right: at most the “delay” was under two months, which is not unreasonable as a matter of law. (R.137/App.141-142).

For all of these reasons, CVRB's decision on the merits should be reversed and vacated.

#### **IV. CVRB Violated The Separation of Powers Doctrine, As It Interfered With The Judiciary's Core Exclusive Powers of Judicial Review, Docket Control, and Disciplining Judges.**

The fundamental issue in this case is whether an executive branch agency can assume the power of judicial review, interfere with a court's discretionary scheduling decision, and sanction a judge because it disagrees with his legal determinations and duty to ensure he has complete information before pronouncing sentence. The answer is no.

##### **A.This is an "As Applied" Challenge Involving Exclusive Judicial Powers.**

CVRB's separation of powers argument misstates the nature of Judge Gabler's constitutional challenge and mischaracterizes the arguments raised before the circuit court. CVRB incorrectly states that Judge Gabler must demonstrate "beyond a reasonable doubt" that ch. 950 "unduly burdens are substantially interferes" with the judiciary's powers. (App.Br.18).

However, Judge Gabler has not made a facial challenge to the constitutionality of Wis. Stat. ch. 950. He is arguing that ch. 950 is unconstitutional as applied by the CVRB in this case to a

judge. In an “as-applied” constitutional challenge, the court does “not presume that the State applies statutes in a constitutional manner.” *Tammy W-G. v. Jacob T.*, 2011 WI 30, ¶48, 333 Wis. 2d 273, 797 N.W.2d 854 (quoting *Society Ins. v. LIRC*, 2010 WI 68, ¶27, 326 Wis. 2d 444, 786 N.W.2d 385.) Thus, “neither party faces a presumption that the statute was constitutionally applied.” *Id.*

Also, CVRB’s entire separation of powers argument is flawed from the start because this case does not involve a “shared powers” analysis or the “substantial interference” test. (App.Br.18-25). Contrary to what CVRB states, Judge Gabler has not argued that the judiciary has the exclusive power to remedy a violation of crime victim rights. Rather, he has consistently argued that the manner in which CVRB exercised its powers under ch. 950 in this case unconstitutionally intruded upon the judiciary’s core, exclusive powers to review legal determinations made by courts, to manage court dockets, and discipline judges. (R.121\_23,48; R.131\_7).

The law is clear that all three of these are core constitutional powers that are exclusive to the judiciary. The judiciary's core constitutional powers include those inherent powers which are "essential to the expedition and proper conducting of judicial business." *Barland v. Eau Claire Cty.*, 216 Wis. 2d 560, 575 N.W.2d 691 (1998) (quoting *In re Janitor of the Supreme Court*, 35 Wis. 410, 419 (1874)).

First, the Wisconsin Constitution enshrines the power of judicial review solely within the judicial branch. Wis. Const., art. VII, § 2. *See also* SCR 60.02 ("Legal decisions made in the course of judicial duty on the record are subject solely to judicial review") (emphasis added); *Grady*, 118 Wis. 2d at 782 (it is a "well-established policy that the judicial branch of government must be independent in the fulfillment of its constitutional responsibilities").

Second, the Wisconsin Supreme Court has clearly and unambiguously held that "[t]he setting and enforcement of time periods for judges to decide cases lies within an area of authority exclu-

sively reposed in the judicial branch of government.” *Id.* at 783. *See also Hefty*, 2008 WI 96, ¶31 (“Wisconsin circuit courts have discretion to control their dockets. This power is inherent to their function. It is also granted by statute.”)

Third, the Wisconsin Constitution grants the Supreme Court “general superintending control over all inferior courts.” Wis. Const., art. VII, § 3. This power “unlimited in extent . . . undefined in character . . . .” *In re Kading*, 70 Wis. 2d 508, 519, 235 N.W.2d 409 (1975) (quoted source omitted).

Next, CVRB is wrong to assert that the Crime Victim Rights Amendment to the Wisconsin Constitution granted the legislature power to intrude upon the above-referenced core zones of judicial powers. (App.Br.18-23.) While it is true that the constitutional amendment provides that “[t]he legislature shall provide remedies for the violation of this section,” Wis. Const., art. I, § 9m, nothing in that amendment grants the legislative branch any powers belonging to the judiciary. Nor does Article I, § 9m grant the executive branch any powers belonging to the judiciary.



The fact that the legislature granted CVRB general *statutory* authority to enforce the Crime Victim Rights Act does not give CVRB *constitutional* authority to engage in judicial review and fine a judge for adopting a legal interpretation with which CVRB disagrees. And, CVRB has cited no authority for the proposition that the legislature can use its own grant of authority to expand the scope of the executive’s constitutional authority at the expense of the judiciary.

CVRB also notes the fact that the legislature rejected a prior version of the Crime Victim Right Act that would have limited the scope of CVRB’s remedial authority over judges to certain circumstances, Sen. Amend. 1 to 1997 A.B. 342.<sup>21</sup> But, this says nothing about the *constitutionality* of CVRB exercising its powers in a manner that interferes with the power of judicial review, scheduling discretion, and disciplining judges.

The Wisconsin Supreme Court has been clear that when dealing with core areas of inherent and exclusive judicial authority,

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<sup>21</sup> Contrary to what CVRB states, this amendment would not have “prevented” CVRB from reviewing a complaint against a judge. (App.Br.22).

“*any* exercise of authority by another branch of government is unconstitutional.” *Grady*, 118 Wis. 2d at 776 (emphasis in original). Such powers are “jealously guarded,” *Barland*, 216 Wis. 2d at 573, and the Wisconsin Supreme Court has struck down several attempts by the legislature to infringe upon the judiciary’s core powers. *See, e.g., In re Janitor*, 35 Wis. 410 (1874) (attempt to remove and appoint court employee); *In re Court Room*, 148 Wis. 109, 134 N.W. 490 (1912) (attempt to dictate court facilities); *Thoe v. Chicago, Milwaukee & St. Paul Ry. Co.*, 181 Wis. 456, 195 N.W. 407 (1923) (attempt to define sufficiency of the evidence standard); *Grady*, 118 Wis. 2d 762 (setting timelines for judges to decide cases).

Moreover, CVRB incorrectly implies that Judge Gabler is claiming that judges are not subject to either Article I, § 9m or ch. 950. (App.Br.20.) This is not so. Judge Gabler agrees that the history of the constitutional amendment indicates judges must respect a crime victim’s rights. However, as explained below, the only *constitutional* method of enforcing ch. 950 against judges is

for the CVRB to refer complaints to the Judicial Commission—as the legislature expressly authorized in § 950.09(2)(b).

**B. CVRB Unconstitutionally Interfered With The Judiciary’s Exclusive Power to Review Judicial Determinations.**

One of the most basic principles underlying our system of government is that the power of judicial review—the power to say what the law is—is a power reserved exclusively to the judiciary. Wis. Const. art. VII, § 2 (“The judicial power of this state shall be vested in a unified court system. . . .”). “Legal decisions made in the course of judicial duty on the record are subject solely to judicial review.” SCR 60.02 (emphasis added); *see also Grady*, 118 Wis. 2d at 782 (it is a “well-established policy that the judicial branch of government must be independent in the fulfillment of its constitutional responsibilities.”).

CVRB is comprised of a district attorney, law enforcement personnel, a crime victim rights advocate, and citizen representatives. It determined that Judge Gabler not only violated the Crime Victim Rights Act, but that he erroneously interpreted the law, (R.87/App.166:¶21), violated Wis. Stat. § 971.105,

(R.87/App.169-171), adopted an “erroneous legal position,” (R.87/App.170), and that his constitutional and practical reasons for waiting to sentence Beebe “lacked a factual or legal justification”/“lacked a factual basis, a legal basis, or both.” (R.87/App.177,179). CVRB’s decision afforded no deference to Judge Gabler’s factual determinations, overruled his legal and constitutional determinations, and second-guessed every discretionary determination made by Judge Gabler.

The constitutional infirmity in CVRB’s actions is evident by its claim to have the power to:

- determine whether an exercise of scheduling discretion “is consistent with the constitutional limitations” imposed by art. I, § 9m of the Wisconsin Constitution, (App.Br.24.);
- apply “greater scrutiny” to a judge’s decision making than a reviewing court would, (*id.*); and
- sanction a judge for a discretionary decision, even if such decision would be upheld on appeal and even if it comports with SCR 60.04(1)(h). (App.Br.24-27).

In short, CVRB has assumed the function of judicial review and set itself up as the sole arbiter of crime victim rights.

This creates the prospect that a judge could have his legal determinations and discretionary acts challenged on appeal, affirmed, and yet have CVRB sanction him based on its own legal interpretations and review of those same discretionary decisions. And, it opens the door for a dissatisfied prosecutor to encourage a crime victim to file a complaint in a pending case in order to pressure the court to change an adverse decision.

Simply put, a circuit court cannot fulfill its constitutional role as an independent arbiter of the law if it is subject to sanction by the executive branch for the manner in which it exercises its inherent authority and exclusive powers. The powers claimed by CVRB “constitute an attempt . . . to coerce judges in their exercise of the essential case-deciding function of the judiciary,” are “an intrusion . . . into the exclusively judicial area of judicial decision-making and, as such, [are] unconstitutional.” *Grady*, 118 Wis. 2d 782.

**C. CVRB Unconstitutionally Interfered With The Judiciary's Exclusive Power of Scheduling Discretion.**

CVRB's decision in this case also contravenes the judiciary's inherent and exclusive power to control its docket. As noted, the power of Wisconsin circuit courts to control their dockets is "inherent to their function." *Hefty*, 2008 WI 96, ¶31.

In *Grady*, 118 Wis. 2d at 782, the court struck down a law that attempted to dictate that circuit judges must decide cases within 90 days or forfeit their salary. The court held that "the setting of time limits for judicial decision-making concerns the efficient and effective functioning of the court system," which is an area of the judiciary's exclusive constitutional authority. *Id.* The court ruled that **"a reasonable time period for judicial decision-making can be established only by the supreme court** as a rule of judicial administration adopted pursuant to its administrative authority over all courts . . . ." *Id.* at 783 (emphasis added).

CVRB wholly fails to mention *Grady* in its brief, yet this decision is dispositive. CVRB's decision to sanction Judge Gabler over a disagreement as to what is a "reasonable" time for sentencing a

defendant in a multi-count criminal case is entirely inconsistent with *Grady*. CVRB has not provided any authority showing that in enacting Wis. Const., art. I, § 9m, the people of the state intended to overrule or displace *Grady*.

**D. CVRB Unconstitutionally Interfered With The Judiciary's Exclusive Power of Judicial Discipline.**

The Wisconsin Supreme Court possesses the inherent and exclusive power to regulate courts and sanction members of the judiciary. Wis. Const., art. VII, § 3. This power is “unlimited in extent . . . undefined in character . . . [and] unsupplied with means and instrumentalities.” *In re Kading*, 70 Wis. 2d 508, 519, 235 N.W.2d 409 (1975) (quoted source omitted).

The exclusivity of the supreme court's power to discipline judges is also reflected in Article VII, Section 11 of the Wisconsin Constitution, which provides: “Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law.” (Emphasis added). These are the only four “disciplinary alternatives for judicial miscon-

duct . . . .” *In re Judicial Disciplinary Proceedings against Aulik*, 146 Wis. 2d 57, 77, 429 N.W.2d 759 (1988).

Acting pursuant to this power, the Wisconsin Supreme Court has promulgated the Code of Judicial Conduct, SCR ch. 60. *In re Kading*, 70 Wis. 2d at 519. Charges of judicial misconduct are investigated by the Wisconsin Judicial Commission, which was created as an “agency of the judicial branch of our state government[.]” *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 289, 238 N.W.2d 81 (1976).

As applied by CVRB in this case, the Crime Victim’s Rights Act intrudes upon and usurps the Wisconsin Supreme Court’s exclusive power to regulate and sanction members of the judiciary to the extent that it allows an executive branch agency to reprimand, sanction, and fine a sitting judge for actions taken while performing judicial functions. Put simply, the legislature cannot give the executive branch the power to regulate the conduct of members of the judiciary—period. That power belongs solely to the Wisconsin Supreme Court and its agency, the Judicial Com-



mission. To hold otherwise would destroy the independence and impartiality of the judiciary. Judges cannot function as independent arbiters of disputes if they are subject to sanctions, fines, and reprimand by another branch of government when carrying out their duties.

**E. CVRB's Remedial Power Over Judges Must Be Limited to Referring Complaints to The Judicial Commission, as is Authorized in Ch. 950.**

It is a cardinal rule of statutory construction that when there are two possible interpretations of a statute—one that is constitutional and one unconstitutional—the court will chose a “saving construction.” *Lynch v. Conta*, 71 Wis. 2d 662, 689, 239 N.W.2d 313 (1976); *State v. Vonesh*, 135 Wis. 2d 477, 487, 401 N.W.2d 170 (Ct. App. 1986). Here, the circuit court properly concluded that the only manner of interpreting § 950.09(2) such that it does not violate the separation of powers doctrine is to limit CVRB's power over judges to referring crime victim complaints to the Judicial Commission. (R.137/App.132-133).

Article I, § 9m of the Wisconsin Constitution states that “[t]he legislature shall provide remedies for the violation of this section.” And, as it pertains to members of the judiciary, the legislature provided that CVRB may “[r]efer to the judicial commission a violation or alleged violation by a judge of the rights of crime victims provided under this chapter, ch. 938 and article I, section 9m, of the Wisconsin constitution.” Wis. Stat. § 950.09(2)(b). Like the Code of Judicial Ethics, the Crime Victim Rights Act must “be construed so as not to impinge on the essential independence of judges in making judicial decisions.” SCR, ch. 60, preamble.

CVRB argues that such an interpretation frustrates the purpose of ch. 950 because it leaves crime victims without a remedy as to judges. (App.Br.25-28.) According to CVRB, the Judicial Commission would not have jurisdiction to consider a complaint that a judge violated a victim’s rights to a timely or speedy disposition of her case. (App.Br.27). This argument is refuted by the text of SCR 60.04(1)(h), which requires a judge to “dispose of all judicial matters promptly and efficiently.” Certainly, this com-

mand encompasses protecting a victim's constitutional or statutory rights to a timely and speedy disposition of her case. Moreover, CVRB's argument that some crime victim rights violations would not warrant discipline by the Judicial Commission ignores that the Code of Judicial Ethics "should be applied consistent with constitutional requirements, statutes, and other court rules and decisional law." SCR, ch 60, preamble.

Finally, CVRB's argument that there is no separation of powers violation because its decisions are subject to judicial review, (App.Br.24), is without basis given that CVRB argued below that its decision was not subject to review and Judge Gabler lacked standing to challenge it. (R.137/App.118-119). And, the argument rings hollow in light of CVRB's assertion that it is not constrained by the "usual standard of review for discretionary decisions" (App.Br.24), and its claim that its legal determinations should be accorded great weight deference. (App.Br.14.)

## CONCLUSION

For these reasons, this Court should affirm the circuit court's decision in all respects and vacate CVRB'S Final Decision and Order.

Dated this 15th day of July, 2016.

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## **FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) & (c) as to form and certification for a response brief and appendix produced with a proportional serif font (Century 13 pt. for body text and 11 pt. for quotes and footnotes). The length of this brief is 10,970 words.

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**ELECTRONIC FILING CERTIFICATION**

I further certify, pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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### **SUPPLEMENTAL APPENDIX CERTIFICATION**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with § 809.19(3)(b) that contains a table of contents, a copy of any unpublished opinion cited under § 809.23(3)(a) or (b), and a signed certification that the appendix complies with the confidentiality requirements under § 809.19 (2) (a) in a form substantially similar to the confidentiality provision under sub. (2) (b).

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

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I further certify, pursuant to Wis. Stat. § 809.19(13)(f) that the text of the electronic copy of the Supplemental Appendix is identical to the text of the paper copy of the same.

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