

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2016AP001066-CR

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES J. HARTLEBEN,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and Order
Denying Postconviction Relief, Entered in the Circuit Court
for Marathon County, the Honorable LaMont Jacobson,
Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Is Mr. Hartleben entitled to resentencing based on implied bias when the sentencing court relied on a PSI report in which the author had a close work relationship with Mr. Hartleben's past victims?

The postconviction court found no implied bias.

2. Did trial counsel provide ineffective assistance for failing to object to the PSI report based on implied bias?

The postconviction court denied the ineffective claim based on lack of prejudice, without determining the deficiency of counsel's performance.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested.

STATEMENT OF CASE AND FACTS

*Trial court proceedings –
Marathon County case 14-CF-966*

This case was commenced with the filing of criminal complaints in Marathon County and Portage County. (1).¹ The Portage County charges were consolidated with the Marathon County charges, and Mr. Hartleben pled no contest in Marathon County case 14-CF-966 to one count of Resisting or Obstructing an Officer as a repeater, contrary to Wis. Stat. § 946.41(1) & 939.62(1)(a), and two counts of Vehicle Operator Flee/Elude Officer as a repeater, contrary to Wis. Stat. §§ 346.04(3) & 939.62(1)(b). (16; App. 150-52). The bases for the convictions are as follows: When officers

¹ The Portage County criminal complaint is not in the court record, but it should not be necessary for review of the issue presented in this case.

attempted to make contact with Mr. Hartleben due to a warrant, Mr. Hartleben got in his car and drove off. (1:3). An officer pursued Mr. Hartleben in his squad car with the sirens activated. (1:3-4). When Mr. Hartleben's vehicle came to a red light, the officer approached the vehicle and ordered Mr. Hartleben to open the door. (1:4). Mr. Hartleben appeared to ignore the officer and proceeded to drive his vehicle over the road's safety island. (1:4). The officer again pursued Mr. Hartleben, but stopped pursuit once Mr. Hartleben entered a residential neighborhood. (1:4-5). Later that day, officers spotted Mr. Hartleben in his vehicle. (13:3). After placing spikes on the road and doing a PIT maneuver, officers were able to stop Mr. Hartleben's vehicle. (13:3). Officers ordered Mr. Hartleben to keep his hands on the steering wheel, but Mr. Hartleben did not comply. (13:3). Mr. Hartleben was then tased and arrested. (13:3).

The court ordered a PSI report. (26:19). When Mr. Hartleben came back for sentencing, the court noted that the PSI writer neglected to include the repeaters and that the maximum available sentence was higher than the PSI writer believed. (27:2-5). The court was hesitant to proceed with an inaccurate PSI, so the sentencing hearing was rescheduled. (27:5).

At the subsequent sentencing hearing with the corrected PSI, the court considered Mr. Hartleben's character, the aggravated nature of the crimes, the read in charges, Mr. Hartleben's degree of remorse, the amount of previous custodial time, and the protection of the public. (28:23-32; App.101-114). The court also noted, "So I do consider the Presentence Investigation recommendation. It calls for what can best be described as a fairly lengthy period of imprisonment and confinement and extended supervision." (28:29; App. 109). The corrected PSI report recommended that Mr. Hartleben serve a total of 12-13 years imprisonment (7-8 in, 5 out) between the three counts. (13:5). The court sentenced Mr. Hartleben to 13 years imprisonment (8 in, 5 out). (16; 28:31; App.111).

The author of the PSI report in Marathon County case number 14-CF-966 was James Darling – a probation agent in the Shawano County probation and parole office. (13).

*Events leading up to Shawano County
Case No. 12-CM-431*

In 2012, probation agents James Darling, A.D., and E.T. all worked together in the same probation office in Shawano County. (29:21-22). That same year, Mr. Hartleben was convicted of disorderly conduct in Shawano County case number 12-CM-431. (29:12,35). According to the criminal complaint and attachments in 12-CM-431, Mr. Hartleben made threats against probation agents A.D. and E.T. (19:19-23; 29:36; App.147-49).

First, Mr. Hartleben made threatening remarks against A.D. – his supervising agent at the time – while he was being arrested for rule violations. (29:10,17;19:19-23; App.148). Specifically, Mr. Hartleben stated, “I’m gonna get that [expletives] even if it sends me back to prison.” (19:19-23; App. 148). While Mr. Hartleben was in jail, a probation agent had to meet with him to take a statement from him and serve him with revocation papers (29:13,22). Because of the threat Mr. Hartleben had made against A.D., Julie Krause – the corrections supervisor at the time for the Shawano County probation office – did not want A.D. to meet with Mr. Hartleben. (29:22; App. 125). As a result, Ms. Krause reassigned this duty to Agent E.T. (29:11,22-23).

When E.T. met with Mr. Hartleben at the jail, Mr. Hartleben threatened him. (29:35; 19:19-23). Specifically, Mr. Hartleben slammed his fists down on the table, swore at E.T., and started coming toward him with his arms raised. (19:19-22; App. 147-49). After E.T. assumed a fighting posture and yelled at Mr. Hartleben, Mr. Hartleben physically retreated but continued to swear at E.T. until jail staff arrived to assist. (19:22; App. 148). E.T. reported the incident to supervisor Krause and to the sheriff’s department. (29:22-23; 19:21). E.T. noted that he had never been threatened like that in his career. (19:23; App. 149). Because of Mr. Hartleben’s behavior, E.T. was unable to conduct the interview, and he was unwilling to make another attempt. (19:23; App. 149).

After the threat against E.T., someone still had to obtain a statement from Mr. Hartleben at the jail and serve him with revocation papers. (29:12-13,22-24). Mr. Darling

was assigned to this duty. (29:12-13,23-24). Mr. Darling's meeting with Mr. Hartleben was uneventful. (29:16).

Postconviction motion hearing

At the postconviction motion hearing, corrections supervisor Ms. Krause testified that before Mr. Darling met with Mr. Hartleben, Ms. Krause would have briefed Mr. Darling on the situation, outlined some very specific safety concerns, and discussed how they could keep Mr. Darling safe during the meeting. (29:23-24; App. 126-27). She testified that as a result of the threats, she was concerned for the safety of the probation agents in her office. (29:24; App. 127). Ms. Krause testified that other probation agents in the office were conversing about what had happened and how it had affected them. (29:25; App. 128).

Mr. Darling testified that the Shawano County office has ten probation agents, and although he does not generally socialize with them outside of the office, he has developed "work bonds" with them. (29:6,8; App. 116,118). He testified that he generally cares about his co-workers, and that they are absolutely supportive of one other. (29:6; App.116). Mr. Darling testified that he is cover agents with A.D. and sees her at work on a daily basis. (29:7-8; App.117-18). He has known her since 2001 and has worked with her since 2007. (29:7-8; App.117-18). He testified that he would call her a friend. (29:8; App. 118).

Mr. Darling testified that he has known E.T. since about 2009. (29:8; App.118). He testified that he would call E.T. a co-worker or associate, and that he was friendly with him. (29:9; App.119). Mr. Darling noted that when E.T. returned to the office after the threatening incident at the jail, E.T. appeared to be upset about what had happened. (29:12-13; App.122-23). He testified that the incident was still in his memory when he wrote the PSI report in 2015. (29:17).

Mr. Hartleben testified that he felt uncomfortable, anxious and intimidated with Mr. Darling as the author of his PSI because he felt that a probation agent from the Shawano County office would be biased due to the threats he had made against two probation agents who worked there. (29:35;

App.134). Mr. Hartleben testified that he expressed his concerns to his trial attorney. (29:35-36; App.134-35). Specifically, Mr. Hartleben testified that he told his trial attorney about the disorderly conduct, the threats against the agents, and that he believed it would be a conflict of interest for someone from the same office as his victims to write the PSI report. (29:36; App.135).

Mr. Hartleben testified that this was not the first time he had expressed concerns about his relationship with the Shawano County office. (29:36; App.135). In 2014, Mr. Hartleben wrote a letter to the corrections supervisor asking to be transferred out of Shawano County – the most important reason being that he believed he did not have a fair chance at successfully completing supervision when two of his past victims worked in that office. (20; 29:36-37,39;).

Trial counsel testified that she knew there was a disorderly conduct out of Shawano County involving a probation agent. (29:30-31; App.129-30). She could not recall whether Mr. Hartleben told her he felt uncomfortable having Mr. Darling write his PSI report, but she testified that Mr. Hartleben “may have” expressed this concern to her (29:31; App.130). On direct examination, trial counsel testified that she did not object to the PSI report being written by a Shawano County probation agent, and that she did not have a strategic reason for not objecting. (29:30-31; App.129-30). On cross-examination, trial counsel testified that she did not take action because she did not feel there was bias in the PSI. (29:32; App.131). However, she then clarified on re-direct examination that she did not specifically consider a claim of *implied* bias in the PSI writer, and that she therefore did not have a strategic reason for not objecting on that specific basis. (29:33; App.132).

The State called Nathan Nelson – the current corrections field supervisor for Shawano County – as a witness. (29:44). Mr. Nelson testified that he started as the supervisor in Shawano County in 2014 and that he has worked for the DOC for 7 years. (29:44). Mr. Nelson testified that he assigned Mr. Darling to write Mr. Hartleben’s PSI report, that he did not believe the report was biased, and that he signed off on the PSI report. (29:44-48).

Mr. Darling testified that, although conflicts between people being supervised and their probation agents are not uncommon, it is “not often at all” that criminal convictions result from that behavior. (29:20). Ms. Krause testified that over the course of her career, while there have been other circumstances where someone has been charged based on comments or threats made to staff, it does not happen all the time. (29:26). Mr. Nelson testified that he has seen it happen several times in the last five years. (29:52).

The postconviction court denied Mr. Hartleben’s motion for postconviction relief. (29:62-66; App. 140-44). The court considered both *Suchocki* and *Stafford*, ultimately concluding that a co-worker relationship does not rise to the level of husband and wife, as in *Suchocki*, or to the level of healthcare provider professional with an extensive relationship with the victim, as in *Stafford*. (29:62-65; App. 140-43). The court noted that the person who wrote the PSI report was a corrections officer who had received training in writing PSI reports. (29:64; App. 142). The court also noted that the incidents were remote in time from when the PSI was written. (29:65; App. 143). The court considered the involvement of Mr. Nelson, who reviewed and approved the PSI report. (29:65; App. 143). The court found that these factors lessened the risk of implied bias. (29:65; App. 143). The court also denied the ineffective assistance of counsel claim based on lack of prejudice, without determining the deficiency of counsel’s performance. (29:66; App. 144).

ARGUMENT

- I. Mr. Hartleben is entitled to resentencing because the sentencing court relied on a PSI report in which the author had a close work relationship with Mr. Hartleben’s past victims. Such a relationship presents a conflict of interest and demonstrates implied bias in the PSI writer and report as a matter of law.**

A. General principles of law

The importance of the PSI to the sentencing process is well established. *See State v. Suchocki*, 208 Wis. 2d 509

(abrogated in part by *State v. Tiepelman*, 2006 WI 66, ¶ 2, 291 Wis. 2d 179, 717 N.W.2d 1); *See also State v. McQuay*, 154 Wis. 2d 116, 130-31, 452 N.W.2d 377, 383 (1990). The purpose of a PSI is to assist the judge in selecting the appropriate sentence for the defendant. *State v. Washington*, 2009 WI App 148, ¶ 9, 321 Wis. 2d 508, 775 N.W.2d 535. “The integrity of the sentencing process demands that the report be accurate, reliable, and above all, objective.” *State v. Howland*, 2003 WI App 104, ¶ 36, 264 Wis. 2d 279, 663 N.W.2d 340. In preparing the PSI, the agent functions neither as an agent of the State nor the defense. *State v. Perez*, 170 Wis. 2d 130, 140-41, 487 N.W.2d 630 (Ct. App. 1992). Rather, the PSI writer functions as an agent of the court, and it is therefore of vital importance that the author of the report be a neutral and independent participant in the sentencing process. *State v. Howland*, 2003 WI App 104, ¶¶ 33, 36; *State v. Perez*, 170 Wis. 2d 130, 140.

The PSI is vulnerable to a PSI writer’s bias because the report contains discretionary determinations, such as the agent’s impressions and a sentencing recommendation to the court. *State v. Suchocki*, 208 Wis. 2d 509, 518-19. Due process entitles the defendant to a fair sentencing process, and the process is not fair if the sentencing court relied upon a PSI report from a biased writer. *Id.* at 521; *State v. Skaff*, 152 Wis. 2d 48, 55, 447 N.W.2d 84, 87.

To succeed on a claim of bias in a PSI writer, the defendant must either demonstrate: (1) actual bias in the PSI writer, or (2) implied bias as a matter of law. *State v. Suchocki*, 208 Wis. 2d 509, 561 N.W.2d 332 (Ct. App. 1997). Regarding implied bias, the existence of certain relationships suggesting a conflict of interest are sufficient in themselves to draw into question the objectivity of the PSI without a demonstration of actual bias. *See id.* Once a defendant has established implied bias, the defendant need not show that the PSI was influenced by that bias. *Id.* at 520-21.

In *State v. Suchocki*, the court of appeals held that bias in a PSI writer will be implied as a matter of law when a PSI was prepared by a DOC agent who was married to the

prosecuting attorney. *Id.* at 520.² In that case, Suchocki moved the circuit court to strike the PSI report, arguing that the marital relationship between the prosecutor and the PSI writer compromised the objectivity of the report and thereby tainted the sentencing process. *Id.* at 514. The circuit court denied the motion but permitted the defendant to file an alternative PSI report. *Id.* The court then considered both PSI reports at sentencing. *Id.*

On appeal, the state argued that the court should not strike the PSI because the defendant had failed to show any actual bias in the author or the report. *Id.* at 519, 561 N.W.2d 332. The court of appeals rejected this argument, noting that the relationship between the prosecutor and the agent could improperly influence the agent subtly and subconsciously in ways that even the agent would not realize, making it nearly impossible for a defendant to demonstrate such influence even where it was present. *Id.* at 520. As a result, the court of appeals held that the relationship demonstrated implied bias in both the author and the PSI as a matter of law:

Requiring any defendant to demonstrate that the marital relationship actually influenced the writer's impressions and recommendations would present an insurmountable hurdle to any defendant attempting to challenge a PSI. The reasons for an agent's impression may operate at a subjective level of which the report's author is unaware.

The information, attitude and impressions received from an author's spouse may influence the author's impressions at either a conscious or subconscious level. Because the author's impressions could be subconsciously influenced, the writer may not even be aware of the relationship's influence. It would be difficult, if not impossible, for a defendant to challenge a PSI when the writer is not even conscious of the influence the marital relationship had on the preparation of the PSI.

² *Suchocki* was abrogated in part by *State v. Tiepelman*, 2006 WI 66, ¶ 31, 291 Wis. 2d 179, 717 N.W.2d 1. In *Tiepelman*, the Wisconsin Supreme Court withdrew language from earlier cases that required defendants to demonstrate prejudicial reliance on inaccurate information. *Tiepelman* held that the correct standard is actual reliance.

Id. at 520. The court reasoned that the “attitudes of a prosecutor are likely to operate differently upon a PSI writer who has a marital relationship with the prosecutor than upon a PSI writer having no significant relationship with the prosecutor.” *Id.* at 519. The court of appeals concluded that bias in both the writer and in the PSI report will be implied as a matter of law by the existence of a marital relationship between a PSI writer and the prosecuting attorney, without a demonstration of actual bias. *Id.* at 520.

Citing *Suchocki*, the court of appeals in *State v. Stafford*, 2003 WI App 138, 265 Wis. 2d 886, 667 N.W.2d 370, found that a mental health professional who had contributed to the defendant’s PSI report had a conflict of interest, justifying sentence modification.³ In *Stafford*, the mental health professional who conducted the defendant’s psychological assessment, which was incorporated into the PSI, had previously treated the defendant’s victim. *Id.* The defendant argued that the mental health professional’s treatment of the victim created a conflict of interest that compromised her objectivity. *Id.* ¶6. The postconviction court denied the motion, concluding that it had not solely relied on the report in making its sentencing decision. *Id.* ¶5.

The court of appeals reversed and remanded for sentence modification. Citing *Suchocki*, the court of appeals found it troublesome that the mental health professional who had previously treated the victim “could have been influenced by her extensive treatment relationship with the victim in forming her impressions regarding [the defendant] and in making her recommendations to the court...” *Id.* ¶11. The court explained that, as in *Suchocki*, the relationship could have impacted the mental health professional’s assessment at a conscious or subconscious level. *Id.* The court concluded that because the professional’s impressions and recommendations could have been subjectively influenced, the treatment relationship with the victim “calls into question

³ *Stafford* was abrogated in part by *State v. Harbor*, 2006 WI 66, ¶ 31, 291 Wis. 2d 179, 717 N.W.2d 1. In *Harbor*, the Wisconsin Supreme Court withdrew language from earlier cases that required defendants who request sentence modification to demonstrate that a new factor must frustrate the purpose of the original sentence.

her own objectivity, the accuracy of her assessment and the overall fairness of [the defendant's] sentencing process.” *Id.*

Whether the relationship between the PSI writer and another party demonstrates implied bias and tainted the sentencing process is a question of law, which this Court determines without deference to the trial court. *See Suchocki*, 208 Wis. 2d at 514-15.

B. The relationship between the PSI writer and Mr. Hartleben’s past victims presents a conflict of interest and demonstrates implied bias in the PSI writer and report as a matter of law.

The same principles in *Suchocki* and *Stafford* apply in the instant case. In order to protect the integrity of the sentencing process, the PSI report and its writer must be neutral and objective. *State v. Howland*, 2003 WI App 104, ¶¶ 33, 36. As the author of Mr. Hartleben’s PSI, Mr. Darling had the duty of serving as a neutral agent of an independent judiciary to provide the court with objective assessments and recommendations to consider at sentencing. *State v. Perez*, 170 Wis. 2d 130, 140-141. Mr. Hartleben does not claim that Mr. Darling would deliberately change his recommendation in response to his relationship with the victims. It is unavoidable, however, that he would be subtly influenced by his close work relationship with the victims of Mr. Hartleben’s threats in forming his impressions regarding Mr. Hartleben and in making his recommendations to the court.

Mr. Darling and A.D. have a long-standing work relationship. They have been working together since approximately 2007 but have known each other since approximately 2001. (29:7-8; App. 117-18). Prior to working together in the Shawano County probation office, they worked together in the Green Bay probation office. (29:7; App. 117). Mr. Darling testified that, over the years, he and A.D. have had a close work relationship, they see each other daily, and they work together as cover agents. (29:7; App. 117). Mr. Darling testified that he would characterize A.D. as a friend. (29:8; Ap. 118). Mr. Darling and E.T. met in 2009 when they both worked in Green Bay, albeit in different units.

(29:8). They then transferred to the same probation office in Shawano County.

Mr. Darling was in a unique position that afforded him a close and personal view of how Mr. Hartleben's behavior affected people he cared about and had formed "work bonds" with. (29:6; App. 116). The office consists of ten agents, and Mr. Darling testified that the agents are absolutely supportive of each other. (29:6; App. 116). The agents in Mr. Darling's office communicate with each other about their cases and about situations that come up. (29:6; App. 116). After such threats against two probation agents in a single small office, one would certainly expect discussions to take place amongst the probation agents in that office about the incidents, and Ms. Krause confirmed that this indeed occurred. (29:25; App. 128). Mr. Darling was intimately aware of the incidents shortly after they took place, and he was directly exposed to the subsequent discussions and observations; he had discussions about it in the office, and Mr. Darling's own supervisor warned him about his safety with Mr. Hartleben. (29:10-12, 23-24; App. 120-22, 126-27). Furthermore, he witnessed firsthand how upset E.T. appeared to be about what had happened. (29:11-13; App. 121-23).

Here, as in *Suchocki*, the attitudes of a PSI writer are likely to operate differently upon an author of a report who had a close work relationship with the defendant's past victims than upon an author not having such a relationship or an agent working in a different office. As in *Suchocki* and *Stafford*, Mr. Darling could have been subconsciously influenced by those relationships, observations, discussions, and warnings in a way that calls into question the objectivity of his assessments and recommendations, and the overall fairness of Mr. Hartleben's sentencing process.

C. The sentencing court relied on the PSI and its recommendation at sentencing.

It is beyond question that the court relied on the PSI and its recommendation at sentencing. Throughout the hearing, the court repeatedly referred to and directly quoted from the PSI, and it explicitly considered the PSI sentencing recommendation. (28:23,25-26,29; App. 103,105-06,109).

The court noted, “So I do consider the Presentence Investigation recommendation. It calls for what can best be described as a fairly lengthy period of imprisonment and confinement and extended supervision.” (28:29; App. 109).

Furthermore, the sentencing court was clearly interested in hearing the PSI recommendation; when the court realized that the PSI writer forgot to include the repeater and inaccurately believed the maximum penalty was lower than it actually was, the court adjourned the sentencing hearing to get an accurate recommendation. (27:2-5).

The court’s sentence also closely paralleled the PSI recommendation, which exceeded both the defense and State’s recommendations. The defense recommended that Mr. Hartleben effectively serve a total of 5 years imprisonment (2 in, 3 out) between the three counts.⁴ (28:18). The State recommended that Mr. Hartleben effectively serve a total of 9.5 years imprisonment (7 in, 2.5 out) between the three counts.⁵ (28:4-5). The PSI recommended that Mr. Hartleben serve a total of 12-13 years imprisonment (7-8 in, 5 out) between the three counts.⁶ (28:25). The court sentenced Mr. Hartleben to 13 years imprisonment (8 in, 5 out).⁷ (16; 28:31; App. 111).

⁴ The defense recommended: 5 years (2 in, 3 out) on Count 1, 2 years (1 in, 1 out) on Count 2, and 5 years (2 in, 3 out) on Count 5, all to be concurrent with each other. (28:18).

⁵ The State recommended: 7.5 years (5.5 in, 2 out) on Count 1, 2 years (18 months in, 6 months out) on Count 2, and 4 years (2 in, 2 out) on Count 5. The State recommended that Counts 1 and 2 be consecutive to each other, but Count 5 be concurrent. (28:4-5).

⁶ The PSI recommended: 5 to 5.5 years (3 to 3.5 in, 2 out) on Count 1, 2 years (1 in, 1 out) on Count 2, and 5 to 5.5 years (3 to 3.5 in, 2 out) on count 5, all consecutive to one another. (28:25; 13)

⁷ The court imposed 6 years (4 in, 2 out) on Count 1, 2 years (1 in, 1 out) on Count 2, and 5 years (3 in, 2 out) on Count 5, all consecutive to one another. (16; 28:31; App. 111).

II. Trial counsel was ineffective for failing to request a different PSI writer or object to the PSI report on the basis that bias in the PSI writer and report should be implied as a matter of law.

Both the state and federal constitutions grant the criminal defendant the right to counsel. U.S. CONST. amend. VI, XIV; WIS. CONST. art. I, § 7. The effective assistance of counsel is a well-established part of the right to counsel. *State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). A defendant seeking to establish a claim of ineffective assistance of counsel “must show that counsel’s performance was deficient and that it prejudiced the defense.” *State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (1998).

To show deficiency, a defendant must demonstrate that counsel’s performance fell below an “objective standard of reasonableness.” *Johnson*, 133 Wis. 2d at 217. The test for prejudice is “whether defense counsel’s errors undermine confidence in the reliability of the results.” *State v. Moffett*, 147 Wis. 2d 343, 433 N.W.2d 572 (1989). In determining prejudice, the Wisconsin Supreme Court has rejected a simplistic “outcome-determinative standard.” *State v. Moffett*, 147 Wis. 2d at 354; *Strickland v. Washington*, 466 U.S. 668, 693-94, 104 S.Ct. 2052, 3068, 80 L.Ed.2d 674 (1984). Rather, the focus is on the reliability of the proceedings. *State v. Moffett*, 147 Wis. 2d at 354. “The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.* at 354 (quoting *Strickland*, 466 U.S. 668, 694).

If the court were to find waiver on Argument I,⁸ then Mr. Hartleben argues that his trial attorney provided ineffective assistance for failing to bring the conflict of interest to the court’s attention. Mr. Hartleben testified that he told his trial attorney he believed it would be a conflict of

⁸ Waiver is a rule of judicial administration which a court may, in the proper exercise of discretion, choose not to employ. *Wisconsin Dep’t of Revenue v. Mark*, 168 Wis. 2d 288, 293 n. 3, 483 N.W.2d 302 (Ct. App. 1992); *State v. Matson*, 2003 WI App 253, ¶ 32 n. 1, 268 Wis. 2d 725, 674 N.W.2d 51.

interest to have Mr. Darling – or any probation agent working in the same office as his victims – write his PSI report. (29:35-36; App. 134-35). Mr. Hartleben’s relationship with the Shawano County office was an issue he had been concerned about for quite some time. In 2014, Mr. Hartleben wrote a letter to the Shawano County corrections supervisor asking for his supervision to be transferred out of Shawano County, and he explicitly cited the conflict of interest as the most important reason (20).

Trial counsel testified that Mr. Hartleben told her about the disorderly conduct out of Shawano. (29:31; App. 130). She testified that Mr. Hartleben “may have” also told her that he was uncomfortable having a Shawano County probation agent as his PSI writer, although she could not recall specifically. (29:31; App. 130). Counsel did not bring this matter to the attention of the court. (29:30; App. 129). Trial counsel testified that she did not specifically consider a claim of implied bias and that she did not have a strategic reason for not objecting. (29:33; App. 132).

Aside from Mr. Hartleben bringing his concerns to trial counsel, information about the disorderly conduct conviction was available in the record. Specifically, the PSI report notes that Mr. Hartleben threatened physical violence against two agents, followed by revocation of his extended supervision in Shawano County case 05-CF-17 and a disorderly conduct conviction in Shawano County case 12-CM-431. (13:7-8). The *Suchocki* and *Stafford* cases both existed at the time of Mr. Hartleben’s sentencing and should have alerted counsel to object based on implied bias. Furthermore, the PSI report recommended a lengthy sentence. (28:29; App. 109). It was deficient performance to not request that Mr. Hartleben’s PSI be assigned to an agent outside of Shawano County.

This deficiency prejudiced Mr. Hartleben. As explained in detail above, it is beyond question that the court relied on the PSI at sentencing. Furthermore, unlike in *Suchocki*, the sentencing court in the instant case was not aware of the potential lack of objectivity in the PSI. In *Suchocki*, the sentencing court was made aware of the potential bias in the PSI report before sentencing. 208 Wis. 2d

509, 522. As a result – even though the court erroneously refused to strike the PSI report – it did take measures that effectively reduced the report’s influence in the sentencing process. *Id.* at 521-22. The court delayed sentencing proceedings for a sufficient period of time to permit the defense to prepare an alternative PSI, which the court considered at sentencing. *Id.*

Furthermore, because the court was mindful of the potential lack of objectivity in the original PSI, it treated the two PSIs received as submissions from each of the parties, rather as from a neutral and independent agent of the court. *Id.* at 522. In the instant case, because the implied bias was not brought to the court’s attention, the safeguards that reduced prejudice and softened the blow of the impliedly biased report in *Suchocki* were not present in the instant case, including court awareness and a defense sentencing memorandum.

As indicated by all these factors – the court’s express reliance on the report and recommendations, the parallel between the PSI recommendation and the sentence imposed by the court, and the lack of safeguards present in *Suchocki* – confidence in the sentencing proceeding is undermined. Because trial counsel was ineffective for failing to raise these issues with the trial court, Mr. Hartleben is entitled to a resentencing hearing with a new PSI report prepared by an agent outside of Shawano County who has not had a close work relationship with Mr. Hartleben’s past victims and personal, intimate knowledge and observations regarding the crime against those victims.

CONCLUSION

WHEREFORE, for all the reasons stated above, Charles Hartleben respectfully requests that this Court grant a new sentencing hearing before a different judge.

Dated this 14th day of July, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief in proportional serif font. The length of the brief is 4,921 words.

**CERTIFICATION OF COMPLIANCE
WITH RULE 809.19(12)**

I hereby certify that:

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

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

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

Dated this 14th day of July, 2016.

Signed:

Christina C. Starnier
Attorney for Defendant-Appellant

APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of person, specifically including juveniles and parents of

juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of July, 2016.

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