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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2265-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
CARRIE E. COUNIHAN,
Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT III, AFFIRMING THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN THE DOOR COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. WEBER PRESIDING.

# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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The circuit court did not address this issue. The court of appeals concluded that Counihan forfeited her due process claim when her attorney failed to object.

II. WHETHER A DEFENDANT'S DUE PROCESS RIGHT AT SENTENCING IS VIOLATED WHEN THE COURT CONDUCTS AN INDEPENDENT INVESTIGATION INTO OTHER FILES WITHOUT ADVANCE NOTICE TO THE PARTIES AND RELIES ON THESE FILES AS THE "MOST SIGNIFICANT" INFORMATION AT SENTENCING?

The circuit court did not directly address this issue, but it did determine that its actions were proper and that the result of the proceeding would have been the same. The court of appeals did not reach this issue because it concluded that Counihan forfeited her due process claim.

III. ALTERNATIVELY, WHETHER COUNIHAN WAS DENIED HER SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT OR REQUEST A CONTINUANCE AFTER THE COURT REVEALED THAT IT CONDUCTED ITS OWN INVESTIGATION AND RELIED ON THE RESULTS OF THAT INVESTIGATION IN FORMING THE SENTENCE?

The circuit court determined that counsel was not deficient and that Counihan has not shown prejudice because it would have given the same sentence regardless. The court of appeals concluded that Counihan failed to establish the prejudice prong because she did not show that her sentence would have been different. The court of appeals did not reach the deficiency prong of her claim.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

## STATEMENT OF THE CASE

On April 2, 2015, the State filed a criminal complaint against the defendant, Carrie E. Counihan, charging her with one count of theft in a business setting greater than $10,000 and eleven counts of unauthorized use of an entity's identifying information, all felony charges. R. 1. The complaint alleged that Counihan, while acting in her role as Executive Director for the Door County Humane Society (hereinafter "DCHS") used the company credit card and funds for personal expenses estimated at around $22,000.[1] *Id.* at 8, 12, 24. Counihan admitted to carelessly using the company card, as opposed to her personal card, eighty-six times from January 2009 to January 2015, with charges totaling approximately $13,000. *Id.* at 18.

[1] The rule requiring parties to identify victims in briefs by the use of identifiers applies only to natural persons, not organizations. Wis. Stat. § 809.86(3) (2017-18).

The parties ultimately reached a plea agreement requiring Counihan to plead no contest to five misdemeanor counts of theft in a business setting, to make an advance payment of restitution and fines of $12,583.30, to pay a $500 fine on each count, and to write a letter of apology. R. 22:3. In exchange, the State would dismiss the felony charges and recommend three years probation and sixty days jail time to be stayed, provided that Counihan complied with all probation conditions. *Id.* On October 13, 2016, Counihan pled no contest to the five misdemeanor theft charges pursuant to the agreement. R. 76:8. Following Counihan's plea, a number of community members expressed outrage over the court's acceptance of Counihan's plea to only misdemeanor charges. R. 82-85.

At sentencing, the State and the defense both recommended three years probation with sixty days of stayed jail time. R. 77:4-5, 25-27; App. 110-14. The case garnered significant media attention. R. 80:16. The court made a point to note to the gallery at sentencing that it had nothing to do with the reduction of charges from felonies to misdemeanors, as that decision is solely within the purview of the prosecutor.[2] R. 77:48-49. After the State and defense made their sentencing arguments, after Counihan exercised her right to allocution, and after several community members gave statements in support of–and against–Counihan, the court advised the parties that, in addition to the items in the record, it had reviewed all of the Door County case files it could find involving theft in a business setting. *Id.* at 47; App. 115.

The court noted that these files were perhaps the *most significant* of all the items it reviewed in reaching a

[2] The court was incorrect in this regard, as it has the discretion to reject a plea agreement that it does not find to be in the public's best interests. *State v. Conger*, 2010 WI 56, ¶ 24, 325 Wis. 2d 664, 797 N.W.2d 341.

sentence. *Id.* The court focused its sentencing decision comparing and contrasting these files with Counihan's case, explaining that the amounts in those files ranged from several thousands of dollars to $300,000 and that every one of the defendants, with the exception of one, spent time in jail. *Id.* at 47, 52-54, 63; App. 115, 120-22, 131. With these files as its guide, the court rejected the joint probation recommendation, and sentenced Counihan to nine months jail. R. 77:62-63; App. 130-31. Counihan had no notice that the court had conducted this independent investigation; thus, she was unable to review or refute the accuracy or completeness of this information, and she was unable present distinguishing factors between the facts of those files and her case.

Counihan subsequently retained postconviction counsel, Attorney Brabazon, who filed a motion for postconviction relief asserting a number of issues, including that her sentencing counsel, Attorney Wimberger, was ineffective in his response–or lack thereof–to the court's conduct in independently researching other files and using those files as a guide in sentencing Counihan.[3] R. 55. Specifically, Attorney Brabazon asserted that sentencing counsel should have objected to the court's reliance on these files because this information had not been previously disclosed to Counihan, that counsel should have requested an adjournment to research these files, that counsel should have presented evidence that distinguished these files, and that counsel should have protected the record by asking the court to explain precisely what information it reviewed in these files. *Id.* at 2.

[3] Attorney Brabazon claimed additional deficiencies, which Counihan did not maintain on appeal. *See id.*

At the *Machner*[4] hearing, Wimberger noted the bizarreness of the court's conduct, but did not have any overall concern. R. 80:32-33; App. 135-36. Indeed, counsel commended the court for being "so measured" in fashioning a sentence. R. 80:32; App. 135. Initially, Wimberger explained that any benefit in reviewing the files before sentencing would have been tremendously minimal and would have shown how much more aggravating Counihan's case was as compared to the other files. R. 80:36; App. 139. However, Wimberger acknowledged that he never reviewed the files and could not identify any factors distinguishing those files from Counihan's case. R. 80:35-36, 44; App. 138-39, 147. Ultimately, Wimberger conceded that it would have been beneficial to have reviewed and explained the differences between Counihan's case and the other files. R. 80:45-46; App. 148-49. Wimberger also mentioned a tactical decision in not wanting to delay the sentencing proceedings or upset the judge. R. 80:50, 56-59, 64-66; App. 153, 159-62, 167-69.

The circuit court denied Counihan's postconviction motion. R. 61. The court explained that in sentencing a defendant, it can "conduct an inquiry broad in scope and largely unlimited as to the kind of information considered, or the source from which it comes, in terms of sentencing." R. 80:89; App. 172. The court determined that Counihan was not entitled to relief because the result would not have changed. R. 80:100; App. 177. Following the court's denial of her postconviction motion, Counihan retained undersigned counsel, and filed an appeal. R. 62-63.

On appeal, Counihan argued that her right to due process was violated when the court placed significant reliance on information at sentencing that she had no

[4] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)

opportunity to review or rebut. Alternatively, Counihan argued that her attorney was ineffective at sentencing when he failed to object. The court of appeals affirmed the judgment and order of the circuit court. *State of Wisconsin v. Carrie E. Counihan*, Appeal No. 2017AP2265-CR, filed November 6, 2018. As to Counihan's due process argument, the court of appeals declined to address the issue, concluding that Counihan had forfeited this claim when her attorney failed to object at sentencing. *Id.*, ¶ 10. The court of appeals also denied Counihan's ineffective assistance of counsel claim, concluding that she failed to establish prejudice. *Id.*, ¶ 13. The court explained that Counihan failed to establish how her sentence would have been different, that is, she failed to show that she would have received no jail time had she been aware of the information on which the court would rely. *Id.*, ¶¶ 14, 16. This Court granted review.

## ARGUMENT

### I. WHETHER THE FORFEITURE RULE APPLIES WHEN THE COURT FIRST REVEALS DURING THE COURSE OF ITS SENTENCING REMARKS THAT IT CONDUCTED ITS OWN INVESTIGATION AND RELIED ON THOSE RESULTS IN FORMING A SENTENCE BUT COUNSEL DOES NOT OBJECT?

#### A. The Forfeiture Doctrine

When a defendant fails to make a contemporaneous objection to an error, the defendant may have forfeited the right to appeal that error. *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612. The forfeiture rule is one of judicial administration and appellate courts can choose to ignore the rule to address the merits of a claim. *State v. Erickson,* 227 Wis. 2d 758, 766, 596 N.W.2d 749

(1999). The purpose of the rule is to give parties notice and opportunity to address an issue, to encourage attorneys to diligently prepare for hearings, and to prevent attorneys from "'sandbagging'" opposing counsel. *Ndina*, 315 Wis. 2d 653, ¶ 30. The forfeiture rule should not be applied when its application does not further the values the rule is intended to protect. *See id.*, ¶ 38.

### B. The Forfeiture Rule Should not Apply to Information First Disclosed at Sentencing

Counihan is cognizant that this Court may issue a consolidated opinion with *Coffee*.[5] Although the facts are somewhat different in the two cases, the principles are cohesive. This Court should hold that the forfeiture rule does not apply when information is first disclosed at *any point* during the sentencing hearing. The timing of the disclosure of the information in Counihan's case is even more concerning than that in *Coffee*, given that it came during the court's sentencing remarks after all opportunity to present evidence, argument, and allocution was closed. Thus, Counihan submits an alternative holding that the forfeiture rule does not apply when information is first disclosed during the course of the court's explanation of the sentence.

When the forfeiture rule is applied to information first disclosed at sentencing, the values it is intended to protect are undermined, not furthered. If the State or the court is permitted to disclose new information at sentencing, a defendant has no notice of a potential issue. *See Ndina*, 315 Wis. 2d 653, ¶ 30. Similarly, permitting the State or the court to disclose new information at sentencing would encourage "sandbagging" a defendant, by thwarting any opportunity a defendant would have to investigate or

[5] *State v. Donavinn Coffee*, 2017AP2292-CR, petition for review granted.

rebut this information. *See id.* In addition, allowing such disclosure would certainly discourage diligent preparation, leaving a defendant without the opportunity to adequately prepare for sentencing.

Finally, permitting the disclosure of new information at sentencing does not promote efficient judicial administration; indeed, it would result in unnecessary delays. Consider the remedy if a defendant does contemporaneously object to information of which he has just learned and is not prepared to rebut; due process would entitle the defendant to an adjournment of the proceedings to allow her to review and rebut this information. *See State v. Damaske,* 212 Wis. 2d 169, 196, 567 N.W.2d 905 (Ct. App. 1997). The proceedings would be delayed and essentially start anew once the defendant has an opportunity to review the information and conduct any follow-up research. In effect, this is the equivalent of the remedy that Counihan seeks: a new sentencing hearing.

This entire scenario can be avoided, and a defendant's due process rights will be preserved, if the State and the court simply give advance notice of this information, a rule that is neither onerous nor unreasonable. Holding that the forfeiture rule does not apply when information is first disclosed at sentencing will put the State and courts on notice that if they want to rely on new information at sentencing, they must provide this information in advance of the hearing. This will give parties adequate notice, will allow *all* parties to diligently prepare, and will promote the efficient administration of justice without delay. *See Ndina*, 315 Wis. 2d 653, ¶ 30.

### C. The Ineffective Assistance of Counsel Rubric is not an Effective Mechanism for Redress

For counsel's conduct to be considered deficient, counsel must have had a duty to object. *See State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). Counihan submits that it is wholly unreasonable to impose a duty on counsel to object when counsel first learns of new information at the sentencing hearing, and particularly during the course of the court's sentencing explanation. When new information is first presented at sentencing, counsel is likely unprepared to know the accuracy or completeness of the information. When counsel is blindsided by new information, counsel may not know if it is even objectionable.

In addition, requiring counsel to object to new information first disclosed during the court's sentencing remarks places counsel in the precarious position of risking contempt and annoying, angering, or irritating the judge at a critical time. A court of law is a hallowed and dignified forum that demands respect and order. The State, victims, and the defendant are typically afforded an opportunity to be heard. After the court has given the parties an opportunity to present their arguments, the court commands the floor. For an attorney, who has already been given an opportunity to speak, to interrupt the court while it is pronouncing sentence would be considered disrespectful, disruptive of courtroom order, and contrary to the rules of decorum. Even if counsel was able to voice a complete objection before being admonished by the court, counsel would risk being held in contempt of court for such conduct. Contempt is defined as intentional:

> (a) Misconduct in the presence of the court which interferes with a court proceeding or with the administration of justice, or which impairs the respect due the court;
>
> (b) Disobedience, resistance or obstruction of the authority, process or order of a court. . . .

Wis. Stat. § 785.01 (2017-18). Interrupting the court at a time when it–and only it–has the floor is the type of "out-of-turn . . . comments … not permitted in the course of court proceedings." *Currie v. Schwalbach*, 139 Wis. 2d 544, 557, 407 N.W.2d 862 (1987).

Finally, an attorney's contemporaneous objection to the court conducting an independent investigation is likely not in the client's best interests. Unlike most objections, which are typically evidentiary based with the court calling balls and strikes, an objection in this scenario would target the judge's *conduct*, not simply the court's ruling. Is it wise to interrupt the court and assert that it has violated the rules of judicial ethics, as discussed below, as the court is deciding your client's fate? A decision to forgo an objection in this circumstance would certainly be reasonable, thereby foreclosing a defendant's ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (stating that counsel's reasoned strategic decisions are "virtually unchallengeable."). This leaves defendants without a remedy for even the clearest due process violations, contrary to the guarantees of the Wisconsin constitution. Wis. Const. Art. I, § 9 (providing a right to a remedy for wrongs).

Other jurisdictions have concluded that trial counsel is not required to interrupt the court during its sentencing remarks to preserve an issue. *See e.g.*, *State v. Morgan*, 109 Idaho 1040, 712 P.2d 741, 744 (Ct. App. 1985); *Johnson v. State*, 348 Md. 337, 703 A.2d 1267, 1276 (Ct. App. 1996).

The *Morgan* case is strikingly similar to this case. In *Morgan*, the court reviewed information outside of the record, of which the defendant was unaware. *Morgan*, 712 P.2d at 743. The court disclosed this information during its sentencing remarks and the defendant did not object. *Id.* The court concluded that Morgan's due process right to rebut evidence presented at sentencing was violated and that his failure to object did not forfeit the issue. *Id.* at 744. The court explained that at the point the defendant learned of this information, all evidence had been presented, both sides advanced their arguments, and the matter had been submitted for a decision; "Had the judge desired to enlarge the record, he should have granted the parties a genuine opportunity to prepare and offer responsive information." *Id.*

As Justice Prosser—joined by Justices Ziegler and Gableman–noted in his *Ndina* concurrence, "No doubt there are situations in which the forfeiture rule does not apply because the defendant is not in a position to make a timely objection." *Ndina*, 315 Wis. 2d 653, ¶ 140. This is such a situation, where the parties' opportunity to present evidence, argument, and allocution is closed, and only the court holds the floor.

D. If the Forfeiture Rule Applies Generally to Information First Presented During the Court's Sentencing Remarks, this Court should not Invoke the Rule in this Case

At the risk of undermining Counihan's alternative ineffective assistance of counsel claim, there is currently no clear duty imposed on trial counsel to object to information first disclosed during the course of the court's sentence explanation. Deficient performance is "limited to situations where the law or duty is clear such that

reasonable counsel should know enough to raise the issue." *McMahon*, 186 Wis. 2d at 85.

The cases requiring counsel to object at sentencing all involve a failure to object to information that was disclosed *prior* to sentencing. *State v. Benson*, 2012 WI App 101, ¶¶ 5, 17, 344 Wis. 2d 126, 822 N.W.2d 484 (the defendant's counsel himself submitted the objectional information before sentencing); *State v. Leitner*, 2001 WI App 172, ¶ 41, 247 Wis. 2d 195, 633 N.W.2d 207 (objectional information contained in presentence report); *see also State v. Mosley*, 201 Wis. 2d 36, 45-46, 547 N.W.2d 806 (Ct. App. 1996) and *Handel v. State*, 74 Wis. 2d 699, 704, 247 N.W.2d 711 (1976) (court does not err in considering information in a presentence report to which the defendant did not object). Indeed, in cases where the information came during sentencing, this Court has not invoked forfeiture and has reached the merits. *State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1; *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491.

Finally, the Court should reach the merits of this case to determine whether a defendant has a sufficient opportunity to exercise her due process right to refute information relied upon in her sentence when she first learns of this information during the court's explanation of her sentence. As developed below, the court's conduct in independently investigating and relying "most significantly" on the results of that investigation, denied Counihan due process. This Court should make clear to judges that if they want to expand the record, they must first give parties advance notice and an opportunity to access and refute that information.

II. WHETHER A DEFENDANT'S DUE PROCESS RIGHT AT SENTENCING IS VIOLATED WHEN THE COURT CONDUCTS AN INDEPENDENT INVESTIGATION INTO OTHER FILES WITHOUT ADVANCE NOTICE TO THE PARTIES AND RELIES ON THESE FILES AS THE "MOST SIGNIFICANT" INFORMATION AT SENTENCING?

A. Legal Principles

A defendant has a due process right to be sentenced upon accurate information. *Tiepelman*, 291 Wis. 2d 179, ¶ 9. "As part of the guarantee that he or she be sentenced on reliable information, a defendant has the right to rebut evidence that is admitted to a sentencing court." *State v. Spears,* 227 Wis. 2d 495, 508, 596 N.W.2d 375 (1999); *see also Damaske*, 212 Wis. 2d at 196; *State v. Lynch*, 2006 WI App 231, ¶ 24, 297 Wis. 2d 51, 724 N.W.2d 656 (stating a defendant is denied the due process right to the opportunity to rebut information at sentencing if the information is kept from the defendant). A defendant is denied due process when the sentence is based, even in part, on information which the defendant had no opportunity to deny or explain. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). The Court reviews this issue de novo. *Tiepelman*, 291 Wis. 2d 179, ¶ 9.

The question in this case is whether a defendant is denied the opportunity to rebut information when that information is first disclosed to her during the course of the court's sentencing decision. Counihan asks this Court to hold that if a sentencing court intends to rely on information outside the record, due process requires the court to give the parties advance notice of that information and a meaningful opportunity to review and rebut that information. While the rule Counihan advances is grounded in constitutional due process, there are also

strong policy reasons to require courts to give advance notice if it intends to rely on information outside the record. First, it will ensure that *all* parties are adequately prepared for sentencing. Second, it will prevent avoidable adjournments.

Finally, it will minimize concerns of judicial bias and ethical violations. If the court relies on information of which neither party was aware, this information would have been discovered only as a result of the court's independent investigation. Under the comments to SCR 60.04(1)(g), "[a] judge must not independently investigate facts in a case and must consider only the evidence presented." A judge's conduct in independently investigating information outside the record blurs the lines between the role of an advocate and a judge and suggests a made-up mind, thereby evidencing bias. *See e.g.*, *State v. Carprue*, 2004 WI 111, ¶ 44, 274 Wis. 2d 656, 683 N.W.2d 31; *State v. Goodson*, 2009 WI App 107, ¶ 13, 320 Wis. 2d 166, 771 N.W.2d 38.

Just days ago, this Court disciplined a judge for similar conduct, where the judge conducted his own independent investigation in a case without giving the parties notice of his intent to conduct the investigation or the nature of his investigation and its results. *In re Judicial Disciplinary Proceedings against Piontek*, 2019 WI 51, ¶¶ 16-17, 22, 39, __ Wis. 2d __, __ N.W.2d __. Requiring sentencing courts to give the parties advance notice of its intent to look beyond what is presented by parties will ensure that *all* parties are adequately and diligently prepared, will alleviate concerns of judicial bias and potential ethical violations, and will preserve a defendant's right to due process.

B. Counihan was Denied Due Process

In this case, Counihan was denied her due process right to an opportunity to refute the information relied upon by the court in passing sentence when the court conducted its own investigation and first disclosed this information to the parties at sentencing. At sentencing, the State and defense agreed on a joint sentencing recommendation of three years probation with sixty days of stayed jail time. R. 77:4-5, 25-27; App. 110-14. Counihan then exercised her right to allocution, and several witnesses subsequently spoke in support of–and against–Counihan. R. 77:27-47. After all parties had a chance to speak, the court began its sentencing discussion. *Id.* at 47; App. 115. The court outlined all of the information it had reviewed and stated, "[p]erhaps *most significantly,* I pulled all files that we could find in Door County where somebody has pled to theft in a business-type setting." *Id.* (emphasis added). The court noted six or seven files that it reviewed "in detail" and recited the case numbers to include 15-CF-90, 13-CF-76, 11-CF-128, 11-CF-104, 08-CF-072, 11-CF-066, and 93-CF-133. *Id.* at 47, 52; App. 115, 120.

The court focused the majority of its sentencing decision comparing and contrasting these files with Counihan's case, explaining that the amounts in those files ranged from several thousands of dollars to $300,000 and that every one of the defendants, with the exception of one, spent time in jail. R. 77:47, 52-54, 63; App. 115, 120-22, 131. The court further explained that the defendants in those files received from fifteen days to one year in jail, with several spending a year and several spending six months in jail. R. 77:53; App. 121. The court identified the file that it believed was most like Counihan's case, which involved the defendant (presumably an attorney) stealing $30,000 from another law firm in town and spending eleven

months in jail. R. 77:63; App. 131. The court initially termed that file "the precedential case" but then clarified that it was simply a similar case. *Id.*

With these files as its guide, the court rejected the joint probation recommendation, and sentenced Counihan to nine months jail. R. 77:62-63; App. 130-31. The court closed its sentencing decision with the following comment:

> "I feel that the maximum of nine months in jail is appropriate in this case, given the length and persuasiveness of the criminal activity. *All other cases, except one, received jail time, and I don't see any reason why you shouldn't serve jail time."*

R. 77:63; App. 131 (emphasis added). Based on this, it is clear that the sentencing court used these other files as the framework for Counihan's sentence.

The court first alerted the parties that it had reviewed these other files in the course of pronouncing sentence, and Counihan had no notice that the court would rely on these files "most significantly" in fashioning a sentence. R. 77:47; App. 115. As a result, Counihan had no opportunity to review these files, to determine the completeness of the information, or to rebut and distinguish the information. In addition, Counihan was unable to determine the accuracy of this information–either prior to or after sentencing–because the court did not identify *what* information it reviewed within those files, whether that be the complaint, the judgment of conviction, the sentencing transcript, the PSI, or something else. Indeed, the court's assertion that only one of the defendants in the files it reviewed served no jail time appeared incorrect. R. 77:63; App. 131. The defendant in 11-CF-104 received no jail time, but in 13-CF-76, the

defendant's jail sentence was stayed, provided he was making restitution payments. R. 59:10-11, 40-41. Because Counihan does not know what information the court reviewed in those files, she is unable to determine whether the defendant in 13-CF-76 served any jail time.

If the court is going to look beyond the record in determining one's sentence, this Court should hold that due process requires that it give the parties advance notice of its intent, so the parties have a meaningful opportunity to review this information, to determine the accuracy and completeness of the information, and to prepare a rebuttal. The sentencing court's reliance "most significantly" on these other files in fashioning a sentence, with Counihan having no opportunity to review or rebut this information, violated Counihan's right to due process, and she is entitled to resentencing. R. 77:47; App. 115: *Gardner,* 430 U.S. at 362; *Tiepelman*, 291 Wis. 2d 179, ¶ 9; *Spears,* 227 Wis. 2d at 508.

The remedy that Counihan seeks, a new sentencing hearing, is not overly burdensome. Unlike the remedy for plea withdrawal or a new trial, a new sentencing hearing does not require the attendance of witnesses, protracted court proceedings, or the risk of a subsequent acquittal. "'[A] remand for resentencing, while not costless, does not invoke the same difficulties as a remand for trial does.'" *Rosales-Mirales v. United States*, __ U.S. __, 138 S.Ct. 1897, 1908 (2018)(quoting *Molina-Martinez v. United States*, 578 U.S. __, 136 S. Ct. 1338, 1348-49 (2016)). "A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *Id.* (quoting *United States v. Williams*, 399 F.3d 450, 456 (2nd Cir. 2005)).

Counihan simply requests that she be granted a new sentencing hearing where she has an opportunity to review and rebut all of the information relied upon, and particularly the "most significant" of information, in fashioning a sentence.

## III. ALTERNATIVELY, WHETHER COUNIHAN WAS DENIED HER SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT OR REQUEST A CONTINUANCE AFTER THE COURT REVEALED THAT IT CONDUCTED ITS OWN INVESTIGATION AND RELIED ON THE RESULTS OF THAT INVESTIGATION IN FORMING THE SENTENCE?

The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. U.S. Const. Amend VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To show that counsel was ineffective, a defendant must prove the following: (1) that counsel's performance was deficient and (2) that such deficiencies prejudiced the defendant. *Strickland*, 466 U.S. at 687. To prove that counsel was deficient, the defendant must show that counsel's performance fell below an objectively reasonable standard. *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305. This Court evaluates what a reasonably prudent attorney would do in these circumstances. *State v. Pitsch*, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985).

To show that counsel's deficient performance was prejudicial, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The question of whether a

defendant received ineffective assistance of counsel is a mixed question of law and fact. *State v. Smith*, 207 Wis. 2d 258, 266, 558 N.W.2d 379 (1997). This Court will give deference to the circuit court's finding of fact unless clearly erroneous; however, this Court reviews the ultimate question of whether counsel's actions violated a defendant's right to the effective assistance of counsel de novo and without deference to the circuit court. *Id.*

A. Counsel was Deficient

As developed above, Counihan was denied her due process right to an opportunity to review and rebut the information on which the sentencing court relied in sentencing her. If this Court concludes that she has forfeited her claim, such forfeiture was the result of her attorney's failure to object or request a continuance. If counsel's failure to object forfeited Counihan's claim, then counsel fell below an objectively reasonable standard when he failed to ensure that Counihan's due process rights were upheld and when he failed to review and rebut the information on which the court relied in sentencing Counihan. *See e.g.*, *State v. Littrup*, 164 Wis. 2d 120, 135-36, 472 N.W.2d 164 (Ct. App. 1992)[6] (concluding that counsel's actions were reasonable where sentencing counsel objected to a potentially improper PSI, obtained a continuance of the sentencing hearing, and presented a rebuttal PSI).

At the *Machner* hearing, Wimberger noted the bizarreness of the court's conduct, but did not have any overall concern. R. 80:32-33; App. 135-36. Indeed, counsel commended the court for being "so measured" in fashioning a sentence. R. 80:32; App. 135. Initially, Wimberger explained that any benefit in reviewing the files before

[6] Overruled on other grounds by *Tiepelman*, 291 Wis. 2d 179, ¶ 2.

sentencing would have been tremendously minimal and would have shown how much more aggravating Counihan's case was as compared to the other files. R. 80:36; App. 139. However, Wimberger acknowledged that he never reviewed the files and could not identify any factors distinguishing those files from Counihan's case. R. 80:35- 36, 44; App. 138-39, 147. Ultimately, Wimberger conceded that it would have been beneficial to have reviewed and explained the differences between Counihan's case and the other files. R. 80:45-46; App. 148-49. Wimberger also mentioned a tactical decision in not wanting to delay the sentencing proceedings or upset the judge. R. 80:50, 56-59, 64-66; App. 153, 159-62, 167-69.

Reasonably prudent counsel would have ensured that he reviewed all information relied upon by the sentencing court and would have presented a rebuttal argument, highlighting and distinguishing the positive and negative similarities and distinctions. In short, reasonably prudent counsel would have ensured that his client's due process right to be sentenced upon accurate information and to rebut information presented at sentencing is preserved. Counsel's failure to do so fell below this objectively reasonable standard and was thus deficient.

B. The Prejudice Standard

In *Strickland*, the Court held "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Court explained that an "outcome-determinative standard . . . . is not quite appropriate." *Id.* at 693-94. Instead, the Court focused on the *process* to reach that outcome explaining,

"[t]he 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 694. This Court too looks at the process to reach the result and not the result itself. *Thiel*, 264 Wis. 2d 571, ¶ 20.[7]

In its response to Counihan's petition for review, the State suggests that the reliability and fundamental fairness of the proceedings are not part of the analysis in this case. State's Resp. at 12-13. Following *Strickland*, the Supreme Court emphasized the need to look beyond just the outcome but also to the fundamental fairness of the proceeding. *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). In *Lockhart*, the Court required the defendant to show more than that the result would be different; the defendant had to show that the proceeding was fundamentally unfair. *Id.* at 369-371. The Court subsequently clarified that the heightened standard announced in *Lockhart* applies only in unusual cases where the defendant would receive a windfall, such as where counsel did not take advantage of authority before it was overturned or where counsel refuses to present perjured testimony. *Williams v. Taylor*, 529 U.S. 362, 363 (2000); *Lafler v. Cooper*, 566 U.S. 156, 167 (2012). This clarification did not remove the *Strickland* consideration of fundamental fairness and reliability in the majority of cases (not involving those unusual circumstances), as the State suggests; it simply means that only in those unusual cases does a defendant need to establish more than that the result would have been different. *See id.; Strickland*, 466 U.S. at 694.

[7] Stating, "[t]he focus of this inquiry is not on the outcome of the trial but on the 'reliability of the proceedings.'" (quoting *Pitsch*, 124 Wis. 2d at 642).

Just recently, the Supreme Court reaffirmed that "the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Weaver v. Massachusetts*, __ U.S. __, 137 S. Ct. 1899, 1911 (2016)(quoting *Strickland*, 466 U.S. at 696). In *Weaver*, the Court assumed without deciding that a defendant can establish prejudice where counsel's error rendered the proceeding fundamentally unfair, even if there is no showing of a reasonable probability of a different outcome. *Id.* And last year, this Court reaffirmed that the principal concern is whether the error rendered the proceedings "unfair and unreliable." *State v. Sholar*, 2018 WI 53, ¶ 33, 381 Wis. 2d 560, 912 N.W.2d 89; *see also State v. Pico*, 2018 WI 66, ¶ 20, 382 Wis. 2d 273, 914 N.W.2d 95. Thus, the reliability and fundamental fairness of the proceedings, not just the end result, remain critical components of the analysis.

C. Counihan was Prejudiced

The sentencing proceeding in this case was fundamentally unfair and unreliable where the court relied on information it discovered as a result of its independent investigation, which Counihan had no opportunity to review or rebut. In addition, confidence that Counihan would have received the same sentence had the court not relied on these files or had Counihan had an opportunity to review and rebut this information is undermined.

While the court stated at the postconviction hearing that it would have given the same sentence even if counsel had performed differently, this Court is not bound by the sentencing court's retrospective review. R. 80:93, 100; *Travis*, 347 Wis. 2d 142, ¶ 77. Indeed, this Court emphasizes that in determining the effect of an error, the focus is on the court's explanation at sentencing, not the court's assertions at a postconviction hearing. *Id.*, ¶ 73.

As an initial matter, this Court should reject the sentencing court's attempt to sanitize the error, as its explanation reveals a potentially more serious error: bias. The court explained that "I came to a conclusion independently of any of these cases, but I wanted to use the cases to make sure they supported *what I was going to do*." R.80:90; App. 173 (emphasis added). This explanation makes it appear as though the court decided on a sentence, reviewed these files to confirm its decision, and arrived at the hearing with a made-up mind. In addition, the court explained that it used these files to supplement the "institutional memory" it lacked, as a result of being on the bench for only three or four months. R. 80:89; App. 172. Arriving at a sentencing hearing with a made-up mind or a preconceived sentencing policy that "fits the crime, but not the criminal" constitutes bias. *State v. Ogden*, 199 Wis. 2d 566, 571, 544 N.W.2d 574*; Goodson*, 320 Wis. 2d 166, ¶ 13. Instead, it appears from the sentencing transcript that the court used the information it gained from the parties at and before the hearing, along with the information it gained from its own investigation, to fashion a sentence. *See* R. 77:47-65; App. 115-133. This Court presumes that the sentencing court acted impartially and without bias. *Goodson*, 320 Wis. 2d 166, ¶ 8.

In addition, the record plainly contradicts confidence that the court would have issued the same sentence regardless of its consideration of the other files. Based on all the information presented by the parties, they agreed that a joint recommendation of probation and no jail time was appropriate. R. 77:4-5, 25-27; App. 110-14. The court used these other files as the basis for rejecting the joint recommendation explaining, "All other cases, except one, received jail time, and I don't see any reason why you shouldn't serve jail time." R. 77:63; App. 131. We cannot be confident that the court would have imposed the same

sentence had it not relied on these files or had counsel rebutted those files.

The court of appeals' analysis focused only on the ultimate result of the proceeding–the sentence itself–without considering the process to reach that result when it concluded that "Counihan has not shown how her sentence would have been different–i.e., no jail time–had she known about the cases ahead of time." *State of Wisconsin v. Carrie E. Counihan*, Appeal No. 2017AP2265-CR, ¶ 16, filed November 6, 2018. This distinction is critical in this case. Given the wide discretion afforded to sentencing judges and the general lack of sentencing guidelines in Wisconsin, it is impossible for a defendant to quantify the impact of an error on a sentence, that is, to show by how much a sentence would have been reduced absent the error.

Counihan has shown prejudice where her sentence was based most significantly on information that she had no opportunity to review, of which she had no knowledge of the contents or accuracy, and that she had no opportunity to rebut. Counihan was thus "deprived of a fair proceeding whose result is reliable[,]" a sufficient showing to establish prejudice. *Smith*, 207 Wis. 2d at 275. While Counihan cannot show *how* the final result would have been different, she has shown that the "outcome is suspect," and has thus satisfied the *Strickland* standard. *Id.* (citing to *Strickland*, 466 U.S. at 694).

The basic tenets of our criminal justice system include notice, disclosure, and the opportunity to refute. This Court cannot approve of a sentencing court's independent investigation and reliance on information unknown to the parties in fashioning a sentence, particularly when the court considers this information as the most significant factor in arriving at a sentence. *See* R.

77:47; App. 115. Counihan is entitled to a new sentencing hearing where she has notice of the information relied upon by the court and where she has an opportunity to refute this information.

## CONCLUSION

Based on the above reasons, this Court should remand for a new sentencing hearing.

Dated this 14th day of June, 2019

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief for review conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) for a brief produced using the following font:

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Dated this 14th day of June, 2019

Signed:

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## CERTIFICATE AS TO APPENDICES

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:(1) a table of contents; (2) the findings or opinion of the circuit 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 circuit 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.

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Dated this 14th day of June, 2019

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# APPENDIX

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