STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP2265-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARRIE E. COUNIHAN,

Defendant-Appellant-Petitioner.

APPEAL FROM A DECISION OF
THE WISCONSIN COURT OF APPEALS
AFFIRMING THE JUDGMENT OF CONVICTION
AND ORDER DENYING POSTCONVICTION RELIEF
ENTERED IN DOOR COUNTY CIRCUIT COURT,
THE HONORABLE DAVID L. WEBER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Defendant-Appellant-Petitioner Carrie E. Counihan forfeit her due process challenge to the circuit court's consideration without advance notice of several unrelated theft cases at her sentencing when she failed to object?

The circuit court did not address this issue.

The court of appeals answered "yes."

This Court should answer "yes."

2. Is it proper for a court to consider a forfeited due process claim under the rubric of ineffective assistance of counsel or, alternatively, under plain error review?

The circuit court did not address this issue.

The court of appeals reviewed Counihan's claim under the lens of ineffective assistance and denied her relief.

This Court should answer "yes" and conclude that Counihan has not established ineffective assistance.

3. Although this Court need not reach the question, has Counihan demonstrated a due process violation?

The circuit court did not address this issue.

The court of appeals did not address this issue.

This Court should answer "no," if it decides to reach the question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case this Court has accepted for review, both argument and publication are warranted.

INTRODUCTION

The primary issue presented is whether, to avert forfeiture, Counihan was required to timely object to the sentencing court's consideration without advance notice of several unrelated theft cases. Counihan argues that case law does not support applying the forfeiture rule to her due process claim and contends that applying the rule and addressing the claim as one of ineffective assistance instead is impractical and unfair.

This Court should conclude that it is reasonable to expect defendants to object. Case law and the administration of justice support applying forfeiture[1] to sentencing errors, and Counihan overstates concerns of unfairness and delay. Moreover, applying forfeiture will not always prevent review because a court can overlook the rule or consider the forfeited claim in the context of ineffective assistance of counsel or plain error.

Because Counihan forfeited her due process claim, this Court should review it under the rubric of ineffective assistance and conclude that she is not entitled to relief. Should this Court decide to ignore forfeiture and reach the merits, it should conclude that she has not established a due process violation.

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[1] Cases often use the term "waiver" to refer to the loss of the right to appellate review resulting from the failure to properly preserve a claim. As this Court has explained, this loss is more appropriately called a "forfeiture." *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612. The State uses "forfeiture" throughout this brief, including when discussing cases that use "waiver."

STATEMENT OF THE CASE

Counihan's crimes and conviction

In February 2015, two Door County Humane Society (DCHS) board members revealed their suspicion that Counihan, the society's executive director, had been stealing from the organization. (R. 1:7.) In support, the DCHS representatives gave an investigator's spreadsheets detailing "suspicious charges" Counihan made to the society's credit card over several years. (R. 1:11–12, 17.)

The investigator confronted Counihan with the spreadsheets, and she initialed each personal credit card expense. (R. 1:18–19.) The investigator, based on this information, concluded that Counihan had used the DCHS credit card for her personal expenses 86 times. (R. 1:18, 22.) The investigator ultimately uncovered $22,803.02 in losses. (R. 1:24.)

The State charged Counihan with 12 felonies: 1 count of theft from a business setting over $10,000, in violation of Wis. Stat. §§ 943.20(1)(b) and (3)(c), and 11 counts of unauthorized use of an entity's identifying information or documents, in violation of Wis. Stat. § 943.203(2)(a). (R. 1:3–6; 6.)

The parties reached a plea agreement. (R. 20.) Counihan pled no contest to five misdemeanor charges of theft. (R. 22:3; 76:6–8.) In exchange for her pleas and her advance payment of restitution, the parties would jointly recommend that the circuit court withhold sentence, place Counihan on probation with 60 days of conditional jail time imposed and stayed, and order her to pay a $500 fine plus costs on each count and to apologize. (R. 22:3; 77:4–5.)

Counihan's sentencing

At sentencing, the State argued that the plea agreement was "a fair, just, and reasonable outcome," but acknowledged that it had received letters expressing disappointment with the deal. (R. 77:4, 11–12.) It then generally addressed the concerns raised in those letters, and emphasized that the agreement made the DCHS whole, held Counihan accountable, and required her to apologize for her conduct. (R. 77:12–20.)

Defense counsel detailed Counihan's educational and employment background and her community involvement. (R. 77:22.) Counsel acknowledged that Counihan was remorseful for breaching the community's trust and would suffer permanent damage to her personal and professional reputation. (R. 77:24–26.) Counihan, said counsel, would feel the weight of her convictions for longer "than just a short jail sentence would ever have a defendant in any other circumstance feel." (R. 77:27.)

Counihan echoed these themes in her allocution. She expressed remorse for her conduct, stating that she was "very careless with the credit card particularly," but would offset those charges with "an in-kind donation sometime later." (R. 77:28.) She also emphasized her commitment to the community and apologized for casting a shadow on the integrity of the DCHS. (R. 77:29.)

The court then invited "anybody who wishe[d] to speak" to do so. (R. 77:29.) The former DCHS president said that Counihan had done "irreputable damage" to the organization. (R. 77:30–32.) A former board member doubted whether Counihan's misdemeanor convictions would carry the same weight as felonies. (R. 77:36–37.) A prominent donor criticized the plea agreement and spoke of a potential chilling effect on donations if the punishment were to be "a

slap on the wrist." (R. 77:45–47.) An employee spoke of her difficulty facing the public after the case was publicized. (R. 77:32–35.) And one person simply expressed anger at Counihan. (R. 77:42.) The court also heard of how Counihan allegedly treated those who expressed their suspicions. (R. 77:38–40.)

Others defended Counihan for growing the DCHS and emphasized forgiveness. (R. 77:42–44.)

With the conclusion of those statements, the court began its remarks by disclosing the information it had considered. (R. 77:47.) The court stated that it had read the criminal complaint, the information, the police report, the victim impact statements, the letters in support of Counihan, some credit card entries submitted by the defense, and a letter from the DCHS insurer requesting restitution for the portion of the total loss it had paid out.[2] (R. 77:47–48.)

"Perhaps most significantly," the court continued, it had "pulled all files that [it] could find in Door County where somebody ha[d] pled to theft in a business-type setting." (R. 77:47.) The court said it had found "six or seven of them" and had "reviewed those files in detail." (R. 77:47.)

Before discussing those cases, the court addressed the "overriding" concerns it gleaned from letters it had received. (R. 77:48–50.) The court then pivoted to the theft cases, stating seven case numbers on the record. (R. 77:52.) The court generally discussed their "themes and dynamics," including why victim entities might not initially seek to make the thefts public, the range of amounts stolen, and

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[2] No presentence investigation report was prepared in this misdemeanor case. (R. 77:59.)

whether the defendants had spent time in jail and for how long. (R. 77:52–53.) The court noted that the motivation for placing defendants on probation was to ensure that they were "out in the workforce so that they could repay the money." (R. 77:53.) Moreover, observed the court, the cases had begun as felony cases, and some were later reduced to misdemeanors. (R. 77:54.)

The court analogized Counihan's circumstances to those of a case "where a woman stole approximately $30,000 from a local business [that] was not a charity . . . over many months." (R. 77:54.) That woman, the court indicated, had "spent 11 months in jail and was ordered to pay full restitution." (R. 77:54.) The court concluded its discussion of the theft cases by acknowledging "that every single case is different" and has "a nuance." (R. 77:54.) Consequently, the other theft cases "provided this Court guidance," but the court was "not relying solely on [them]." (R. 77:54.)

The court continued its remarks for approximately seven transcript pages, discussing the weight it would give to various sentencing factors and facts specific to Counihan's case. (R. 77:55–62.) It noted that the impact on the DCHS was "well documented," and that Counihan was college educated, had no addiction or mental health issues driving her behavior, and no prior criminal record. (R. 77:55–56, 59.) The court highlighted, however, that Counihan had repeatedly committed theft over many years while in a position of trust, and the publicity her case received had shaken donor confidence. (R. 77:55–57, 60–61.)

The court did not believe Counihan was a danger to society or at risk of reoffending. (R. 77:62.) However, the court emphasized that "[t]he nature and gravity of the crime . . . seem to be huge" and the effect on donors was "very, very concerning." (R. 77:59–60.) Accordingly, the court wanted to send the message that employees who steal from their

nonprofit employers would be held accountable and could not just "pay [the money] back and move on with their lives." (R. 77:62.)

The court rejected probation. (R. 77:62.) It found that Counihan, who did not suffer addiction or mental health issues, and was not at risk of reoffending, did not require "that type of supervision." (R. 77:62–63.) Probation, added the court, "would unduly depreciate the seriousness of the offenses." (R. 77:63.)

The court announced that it would impose nine months in jail "given the length and [pervasiveness] of the criminal activity." (R. 77:63.) The court again referenced the "similar" case in which a woman stole approximately $30,000 and received "11 months in jail." (R. 77:63.) The court observed that the defendants in "[a]ll other cases, except one, received jail time," and the court did not see "any reason why [Counihan] shouldn't serve jail time." (R. 77:63.) The court concluded by noting that Counihan should pay full restitution including what insurance had covered, a $500 fine plus court costs, and give the DCHS a written apology. (R. 77:63–64.)

Before pronouncing sentence, the court asked Counihan if there was "any reason why sentence should not be pronounced on [her]," to which she responded "[n]o." (R. 77:64.) The court then imposed nine months on each count, to be served concurrently, ordered Counihan to pay full restitution as well as fines and court costs per count, and granted Counihan *Huber* work release privileges and good time "if appropriate." (R. 77:64–65.) It concluded the hearing by asking the parties if either side had "anything further" to discuss, and both responded "no." (R. 77:65–66.)

Postconviction proceedings

Counihan filed a motion requesting resentencing. (R. 55.) Among the grounds asserted, she alleged seven instances of ineffective assistance of sentencing counsel. (R. 55:2–3.) Relevant here, she faulted counsel for his failure to object or to seek an adjournment to review the theft cases, or to ask the court "for what information [it] was reviewing." (R. 55:2.)

At the postconviction hearing, trial counsel indicated that he had been doing criminal defense work since 2005 and had participated in a "[f]ew hundred" Wisconsin sentencing hearings. (R. 80:10–11.) Regarding Counihan's plea agreement, counsel explained that the "main concern" was whether the newly appointed judge would accept the deal. (R. 80:13–14.)

When asked about the theft cases, counsel responded that a court referencing unrelated cases at sentencing was "notable" in that it "rarely happen[ed]." (R. 80:32.) For counsel, the court was "thoughtful" and "measured," and he explained that his only concern would have been if the court had come up with "a so-called average . . . that would [have been] much higher than what . . . might be fair." (R. 80:32–33.) Because judges frequently consider "what they think the going rate is for something," counsel could not say that the court's review of those cases "was so out-of-the-box as to be concerning." (R. 80:33.)

Counsel admitted that he had not reviewed the theft cases, but he testified that any benefit to doing so for sentencing "would have been tremendously minimal." (R. 80:36.) In counsel's view, Counihan's sentence "would have hashed out pretty much the same" because the court used the Door County cases only "to make sure that [it] wasn't overpunishing." (R. 80:43–45.) Although distinguishing the

facts of those cases may have been "helpful," trial counsel doubted "it would have really [had] a substantial effect." (R. 80:46.)

Counsel explained that he made a strategic decision at sentencing not to object or request an adjournment in order to get Counihan's case resolved before a new district attorney took office. (R. 80:57–58, 65.) Even if the court decided to deviate from the plea agreement, counsel reasoned that the district attorney with whom he had negotiated the agreement would argue for that deal in "a much more friendly atmosphere." (R. 80:58, 64.) Counsel further stated that he was unfamiliar with the presiding judge, and he did not want to risk upsetting the court by objecting too much. (R. 80:64–65.) At bottom, although counsel was "uneasy" with various aspects of the sentencing hearing, he had "to make a call," deciding that it was not in Counihan's best interests to object. (R. 80:65–66.)

The court denied Counihan relief, concluding that none of the ineffective assistance claims she raised "would have changed the result" and emphasizing that it was "absolutely 100 percent convinced that [it] would have done exactly the same thing" at sentencing. (R. 80:100.) Regarding the theft cases, the court found that trial counsel's "decision not to object or ask for a recess or to try to make distinguishing arguments" was not deficient performance and would not "have changed anything." (R. 80:93, 100.) The court explained that it lacked institutional memory at the time of Counihan's sentencing and conducted its research to "determine what the institutional memory of this Court was." (R. 80:89.) The court further remarked that judges rely at sentencing on their memory of how they resolved prior cases "all the time" and "[t]hey can't erase their memories." (R. 80:89.)

In this case, the court explained, it did not review the theft cases "in order to get a litmus test or . . . necessarily a recipe" for Counihan's sentence. (R. 80:90.) Rather, the court wanted to know whether the sentence it was considering "was consistent with what had been done in the past." (R. 80:90.) The court stated that it "came to a conclusion independently of any of" the theft cases and used them only "to make sure they supported what [it] was going to do." (R. 80:90.) Moreover, the court maintained, it had not relied on inaccurate information from them. (R. 80:91–92.) "[E]ven after all this time," the court concluded, it felt "what [it] did was appropriate." (R. 80:93.)

Counihan's appeal

Counihan appealed, arguing for the first time that the circuit court had denied her due process at sentencing by reviewing the theft cases without advance notice. *State v. Counihan*, No. 2017AP2265-CR, 2018 WL 5819594, ¶ 1 (Wis. Ct. App. Nov. 6, 2018) (unpublished). (Pet-App. A:101–02.) Alternatively, she argued that the court of appeals should ignore any forfeiture for failure to object to the circuit court's consideration of those cases and find that she had suffered ineffective assistance of counsel. *Id.* ¶¶ 1, 10. (Pet-App. A:102, 105.)

The court of appeals affirmed in an unpublished opinion. It "decline[d] to address the merits of Counihan's due process argument because she forfeited it" by failing to object. *Counihan*, 2018 WL 5819594, ¶ 10. (Pet-App. A:105.) The court of appeals then evaluated her forfeited claim through the lens of ineffective assistance and concluded that "there is no reasonable probability that the circuit court would have imposed a different sentence had it not reviewed the Door County cases." *Id.* ¶ 16. (Pet-App. A:107.)

This Court granted Counihan's petition for review.

ARGUMENT

I. Counihan forfeited her due process claim by not objecting to the sentencing court's review of several unrelated theft cases.

The lynchpin issue in this case is whether, to avert forfeiture, a defendant must timely object to the court's consideration of information at sentencing without advance notice. This Court should hold that a defendant risks forfeiture by failing to object at some point before the end of the sentencing hearing and that the court of appeals aptly applied the forfeiture rule in Counihan's case.

A. It is well-established that a defendant forfeits appellate review of an alleged error, even one of constitutional dimension, by not timely objecting to it.

In *United States v. Olano,* 507 U.S. 725 (1993), the United States Supreme Court declared that "[n]o procedural principal is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it." *Id.* at 731 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

Wisconsin courts have long recognized that failure to object at trial generally precludes appellate review of a claim, even constitutional ones. *See, e.g.*, *State v. Pinno*, 2014 WI 74, ¶ 56, 356 Wis. 2d 106, 850 N.W.2d 207 (the Sixth Amendment right to a public trial may be forfeited); *State v. Ndina*, 2009 WI 21, ¶¶ 30–31, 315 Wis. 2d 653, 761 N.W.2d 612 (acknowledging that "some rights are forfeited when they are not claimed at trial" and listing exceptions); *State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 26, 235 Wis. 2d 486, 611 N.W.2d 727 (defendant forfeited his right to a 12–person

jury); *State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511 (the defendant forfeited any challenge to submitting two statutorily barred counts to the jury); *State v. Davis*, 199 Wis. 2d 513, 517–19, 545 N.W.2d 244 (Ct. App. 1996) (the defendant forfeited his claim that the prosecutor violated his right to be free from unreasonable searches by eliciting testimony from a police officer that the defendant would not consent to a chemical test for intoxication); *State v. Edelburg*, 129 Wis. 2d 394, 400–01, 384 N.W.2d 724 (Ct. App. 1986) (the defendant forfeited his claim that the circuit court reversibly erred by allowing the jury to separate for the night after it began deliberating).

Defendants can also incur forfeiture by failing to object at sentencing. For example, "[a]n alleged breach of a plea agreement is [forfeited] if the issue is not raised before a defendant is sentenced." *State v. (Shomari) Robinson*, 2001 WI App 127, ¶ 13, 246 Wis. 2d 180, 629 N.W.2d 810; *see also State v. Lichty*, 2012 WI App 126, ¶ 23, 344 Wis. 2d 733, 823 N.W.2d 830 (recognizing that "[a]lleged breaches of a plea agreement are [forfeited] unless the defendant objects to them when they occur"). The same is true for a claim that the sentencing court relied on inaccurate information. *See State v. Benson*, 2012 WI App 101, ¶ 17, 344 Wis. 2d 126, 822 N.W.2d 484 (the defendant forfeited his due process claim by failing to object to allegedly incorrect information in a report he submitted to the sentencing court); *see also Handel v. State* 74 Wis. 2d 699, 704, 247 N.W.2d 711 (1976) (the court did not misuse its discretion by considering facts in the presentence report that the defendant did not challenge); *State v. Mosley*, 201 Wis. 2d 36, 45–46, 547 N.W.2d 806 (Ct. App. 1996) (the defendant did not challenge the accuracy of certain statements in a presentence report at sentencing and therefore the "court did not misuse its discretion by considering them"). A challenge to the

sentencing court's consideration of underlying expunged convictions can also be forfeited by failure to object. *See State v. Leitner*, 2001 WI App 172, ¶ 41, 247 Wis. 2d 195, 633 N.W.2d 207 (acknowledging but deciding to ignore the forfeiture), *aff'd*, 2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341. Forfeiture also applies when a defendant fails to object to a victim's sealed CHIPS records that the defendant did not know would be germane to sentencing until the circuit court began its sentencing remarks. *State v. Samuel*, 2001 WI App 25, ¶¶ 41–42, 240 Wis. 2d 756, 623 N.W.2d 565, *rev'd on other grounds*, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423.

This case law stands for the proposition that "[t]he party must object in a timely fashion with specificity to allow the court and counsel to review the objection and correct any potential error."[3] *Torkelson*, 306 Wis. 2d 673, ¶ 25.

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[3] In *State v. Grady*, this Court rejected the State's argument that the defendant had forfeited his claim that the court failed to follow its statutory obligation to consider the applicable sentencing guideline by not objecting at sentencing. 2007 WI 81, ¶ 14 n.4, 302 Wis. 2d 80, 734 N.W.2d 364. It stated in a footnote that "a postconviction motion is a timely means of raising an alleged error by the circuit court during sentencing." *Id*.

Grady arguably supports Counihan's position, though she does not rely on it. But this Court should not follow the decision. *Grady* involved a court's failure to follow a statutory duty, not its consideration of something new or improper at sentencing. As argued, case law holds that such claims can be forfeited by a defendant's failure to object, and *Grady* did not address or say it was overruling those decisions. In addition, *State v. Gallion*, 2004 WI 42, ¶ 14, 270 Wis. 2d 535, 678 N.W.2d 197, which the *Grady* court relied on when rejecting the State's forfeiture argument, does not support the court's decision. Indeed, forfeiture was not an issue in *Gallion*. Moreover, allowing defendants to timely raise

B. Applying the forfeiture rule in the sentencing context promotes better sentencing practices.

The forfeiture rule is a fundamental and well-established rule of judicial administration. *See Huebner*, 235 Wis. 2d 486, ¶ 11. It is "not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice" that goes to "the heart of the common law tradition and the adversary system." *Id*.

As in the trial phase, requiring a defendant to timely object to apparent sentencing errors promotes judicial efficiency and advances the public interest. "Contemporaneous objections give judges the opportunity to remedy an error so that it does not fester beneath the proceedings and infect the judgment of the court." *Pinno*, 356 Wis. 2d 106, ¶ 56. By allowing a circuit court "to avoid or correct any error with minimal disruption of the judicial process," a timely objection can eliminate the need for appeal. *Ndina*, 315 Wis. 2d 653, ¶ 30.

Should an appeal nonetheless result, a timely objection can ensure an adequate sentencing record by enabling the judge to remedy omissions or clarify and supplement inadequate explanations. The sentencing transcript is often the only record of the sentencing court's reasoning available postconviction. Where postconviction and appellate proceedings can occur months or years after a sentencing hearing, and before judges other than the original sentencing judge, an adequate sentencing transcript facilitates meaningful appellate review. *Cf. State v. Perry*,

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issues after sentencing does not promote the efficient use of judicial resources nor does it provide for prompt relief from error.

128 Wis. 2d 297, 300, 381 N.W.2d 609 (Ct. App. 1985) ("It goes without saying that an adequate record is necessary for review of the issues raised on appeal."). Indeed, reviewing courts rely on the parties to flag possible errors as they arise.

Requiring a sentencing error to be preserved by timely objection also advances the public interest by "encourag[ing] parties to be vigilant lest they lose a right by failing to object to its denial." *Pinno*, 356 Wis. 2d 106, ¶ 56. The parties are thus incentivized to help the court meet its obligations while exercising its broad sentencing discretion and discouraged from "sandbagging," or strategically remaining silent about their objections to the sentence only to belatedly raise alleged errors on appeal if the case does not conclude in their favor. *Id.* By encouraging timely objections before the judge best equipped to resolve the errors efficiently and effectively, and closest in time to when the errors are made, consistently applying the forfeiture doctrine promotes better sentencing practices.

C. Counihan's arguments that the forfeiture rule should not apply to her claim are not persuasive.

Against these benefits of the forfeiture doctrine, Counihan overstates concerns of unfairness and delay. (Counihan's Br. 7–11.)

As for delay, Counihan argues that timely objecting to previously undisclosed information will require an adjournment and delay proceedings. (Counihan's Br. 8.) Yet the burden of sitting through an objection or an adjournment at sentencing "pales in comparison to the time and resources required to correct errors through a lengthy appeal and resentencing." *United States v. Flores-Mejia*, 759 F.3d 253, 258 (3d Cir. 2014) (en banc). That is all the more reason for

this Court to make clear that an objection is required to preserve sentencing claims like Counihan's for appeal. Giving circuit courts the opportunity to correct any potential errors immediately, or avoid them altogether, instead of months or even years later will do far more to preserve judicial resources and promote orderly justice than categorically exempting such claims from the forfeiture rule.

Moreover, we trust courts to decide whether or for how long to adjourn a proceeding, and to properly manage their dockets. *See State v. Jackson*, 69 Wis. 2d 266, 279, 230 N.W.2d 832 (1975) (finding "no abuse of discretion in the trial court's refusal to adjourn the sentencing" despite the parties' stipulation); *State ex rel. Collins v. American Family Mut. Ins. Co.*, 153 Wis. 2d 477, 483, 451 N.W.2d 429 (1990) (noting that "[c]ircuit courts possess inherent discretionary authority to control their dockets with economy of time and effort"). Had Counihan objected, the parties could have reviewed the theft cases. It is unclear how long that would have taken, but presumably not the nearly 9 months between Counihan's sentencing and her assertion of an ineffective assistance claim in her amended postconviction motion. (R. 55; 77.)

Counihan further contends that applying forfeiture would deny her constitutional right to notice and an opportunity to fully prepare for sentencing. (Counihan's Br. 7–8.) In support, Counihan references several cases in which the defendant was faulted for failing to object to information that was disclosed before sentencing. (Counihan's Br. 12.) She cites *State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, and *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491, for the proposition that where the disclosure occurred at sentencing, this Court ignored forfeiture and reached the claim's merits. (Counihan's Br. 12.) But it appears that the parties never addressed

forfeiture in either of those two cases, so the courts did not discuss or apply the rule. *See Waushara County v. Graf*, 166 Wis. 2d 442, 453, 480 N.W.2d 16 (1992) (Appellate courts have no obligation to consider issues that the parties do not raise.). These two decisions are best viewed as having nothing to say about forfeiture.

In any event, by clarifying that there will be consequences for a failure to object at sentencing to plainly new and potentially objectionable information, this Court will incentivize parties to diligently prepare for, and pay close attention during, the proceeding to be able to recognize possible error. While parties cannot be expected to prepare for what cannot be anticipated, they can and generally should be expected to object to and ask for the opportunity to review any unanticipated material information that comes to light during the hearing. A timely objection will efficiently and effectively prevent the court from relying on any improper or incorrect information in crafting the defendant's sentence.

Moreover, although Counihan argued in postconviction proceedings that trial counsel was ineffective for not objecting or requesting an adjournment at sentencing, she now maintains that imposing such a duty on counsel is "wholly unreasonable." (Counihan's Br. 9.) This is because, she explains, counsel cannot be expected to know whether previously undisclosed information is objectionable and interrupting the sentencing court's remarks risks frustrating the court and even incurring a contempt charge. (Counihan's Br. 9–11.)

Neither reason is persuasive. If a party is unsure whether certain information he or she hears for the first time during sentencing is objectionable, the remedy is to object and request an adjournment, and thus help preclude error. Judges are generally accustomed to objections and

should not be presumed "so thin-skinned and vindictive that counsel should be allowed to bypass the most immediate way of dealing with their grievances." *United States v. Kwiat*, 817 F.2d 440, 448 (7th Cir. 1987). Indeed, parties commonly challenge judges while cases are pending. They object to circuit court rulings, bring interlocutory appeals, and file recusal motions pursuant to Wis. Stat. § 757.19(2)(g). These circumstances can be awkward and even contentious, but parties are generally shielded by their lawyers, who must advocate for their clients, and judges are presumed to be able to set aside disagreements and rule fairly and impartially.

Given that Wis. Stat. § 972.14(2) obliges a circuit court to ask a defendant before pronouncing sentence "why sentence should not be pronounced upon him or her," and to afford defense counsel and the State the opportunity to address the court, it is not unreasonable to expect the parties to take advantage of those opportunities and speak up. That said, the court did not reveal to Counihan that it had reviewed the theft cases until after it had begun its sentencing remarks. (R. 77:47.) It is also reasonable for defense counsel to be reluctant to interrupt the court under those unique circumstances. [4]

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[4] Objecting during the court's explanation of its sentence is not impossible, however. In *State v. Samuel,* the court of appeals rejected a defendant's argument that he could not have objected because he did not know the circuit court was going to rely on certain sealed CHIPS records concerning the victim until it began its sentencing remarks. 2001 WI App 25, ¶ 41, 240 Wis. 2d 756, 623 N.W.2d 565, *rev'd on other grounds*, 2002 WI 34, 252 Wis. 2d 26, 643 N.W.2d 423. The court of appeals explained that the defendant "had as much right to object then as at any other time during the proceeding." *Id.* ¶ 42. While it may not be necessary to

Accordingly, the State proposes that an objection to the court's consideration of information during its sentencing remarks could still be timely made, and the claim preserved, once the court concludes its remarks, or before the hearing is adjourned. Even if the defense objects after the court has announced its sentence, the court can still act to correct any error and change its sentence. A defendant would not have a legitimate expectation of finality in the sentence just announced and that she objected to. *See, e.g.*, *State v. (Jacqueline) Robinson*, 2014 WI 35, ¶¶ 19–50, 354 Wis. 2d 351, 847 N.W.2d 352 (holding that the court's increasing defendant's sentence the day after sentencing based on court's realization that it was mistaken about defendant's prior record did not violate double jeopardy). To facilitate appellate review, this Court can encourage circuit courts to afford the parties a reasonable opportunity to object after its sentencing remarks or just before the sentencing hearing concludes. *See, e.g.*, *State v. Howell*, 2007 WI 75, ¶ 51, 301 Wis. 2d 350, 734 N.W.2d 48 (encouraging circuit courts to use the suggested methods of ascertaining a defendant's understanding of a charge).

In sum, Counihan's concerns about applying the forfeiture rule under the circumstances of her case pale in comparison to the benefits the rule confers. And the court of appeals made a straightforward application of the forfeiture rule here. Whether a defendant has adequately preserved claims for appeal is a question of law this Court reviews de novo. *State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998). Counihan had two clear opportunities to object at sentencing to the circuit court's review of the theft cases

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object during the court's explanation of its sentence to preserve a claim, *Samuel* demonstrates that doing so is possible.

without interrupting the proceedings. She could have spoken after the court concluded its sentencing remarks when it asked her whether sentence should be pronounced, or at the conclusion of sentencing when the court asked the parties if there was anything further to discuss. (R. 77:64, 66.) Counihan did neither and thus forfeited her due process claim.

II. An appellate court may review forfeited claims under ineffective assistance of counsel or plain error.

Because Counihan forfeited her due process claim, she is not entitled to direct review of that claim's merits. Rather, she should have to show, as she attempted to show before the circuit court and argues in the alternative here, that her trial counsel was ineffective for not objecting to the court's consideration without advance notice of other Door County theft cases. (R. 55; Counihan's Br. 19–25.)

Here, defense counsel made the strategic decision not to object. (R. 80:57–58, 65.) His decision should be reviewed under the familiar rubric of ineffective assistance, the "normal procedure in criminal cases" for addressing forfeited errors. *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31. The same should be true for claims that the court considered information at sentencing without adequate notice, as those claims arise because counsel failed to object to something either the State or the circuit court did. *See Benson*, 344 Wis. 2d 126, ¶¶ 16–17 (finding a claim forfeited because it was not raised at sentencing).

True, requiring defendants to present forfeited claims in the ineffective-assistance context will cause delay and inefficiency because of the need to hold *Machner* hearings. But most of that inefficiency and delay will have been the result of the defendant's failure to object at sentencing,

which would have allowed the court or the parties the opportunity to immediately correct any error. And regardless of whether a forfeited claim is reviewed in the context of ineffective assistance, the defendant will need to make the claim in a postconviction motion, which is much less efficient than a timely objection.

Counihan's claim fits the ineffective-assistance mold, and two courts have correctly concluded that it fails under that analytic lens. Where, as here, the court's consideration of previously undisclosed information is plain, the decision not to object, whether strategic or the result of incompetence, is best scrutinized through the familiar rubric of ineffective assistance of counsel.

That said, there may be unusual cases, such as where a defendant is pro se, where an ineffective assistance claim is unavailable or where the rubric of ineffective assistance does not allow for review of a meritorious but forfeited claim of sentencing error, such as where counsel had no way of knowing certain sentencing information was inaccurate. As the State argues in *State v. Donavinn D. Coffee*, No. 2017AP2292-CR, a case to be argued in conjunction with this matter, this Court should conclude that such claims are reviewable under the plain-error doctrine.

While both legal theories place higher burdens of proof on a defendant than direct review would, either standard is an appropriate consequence for the failure to preserve a claim when corrective action could easily have been taken at sentencing. *See United States v. Williams*, 258 F.3d 669, 672 (7th Cir. 2001) (noting that "[f]orfeiture has the serious consequence of changing the standard of appellate review . . . but it does not render the issue completely unreviewable").

A. To obtain relief under *Strickland*, a defendant must show deficient performance and that this performance had an adverse effect.

To prove ineffective assistance of counsel, Counihan must establish both that her "counsel's performance was deficient" and that this performance prejudiced her defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689–90. When reviewing an ineffective-assistance claim, this Court upholds the circuit court's findings of fact unless they are clearly erroneous, but it independently determines whether counsel was effective. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695.

A defendant proves deficient performance by showing "that counsel's representation fell below an objective standard of reasonableness" considering all the circumstances. *Strickland*, 466 U.S. at 688. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305. Counsel's decisions based on a reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable" and do not constitute ineffective assistance. *Strickland*, 466 U.S. at 690–91.

To prove prejudice, defendants should not be held to a strict outcome-determinative test. *See Strickland*, 466 U.S. at 693–94 (rejecting an outcome-determinative test); *State v. Sholar*, 2018 WI 53, ¶ 44, 381 Wis. 2d 560, 912 N.W.2d 89 (same). Rather, they must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *State v. Reinwand*, 2019 WI 25,

¶ 42, 385 Wis. 2d 700, 924 N.W.2d 184. As this Court recently reiterated, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Reinwand*, 385 Wis. 2d 700, ¶ 42.

B. The court of appeals correctly concluded that Counihan had not proven ineffective assistance of counsel.

1. Sentencing counsel's strategic decision not to object was reasonable under the circumstances.

Counihan has established neither deficient performance nor prejudice.

As for deficient performance, counsel explained that although he grew "uneasy" at sentencing, he did not object or request a continuance because he did not want to risk delaying the proceeding until after the new district attorney took office and because he was unfamiliar with the judge. (R. 80:57–58, 60, 66.) That was a reasonable, "virtually unchallengeable" strategic decision under the circumstances. *Strickland*, 466 U.S. at 690–91.

Counsel went into the hearing aware that the parties might not convince the judge to adopt the plea agreement, and that there had been publicity surrounding the case. (R. 80:13, 15–16.) Indeed, many DCHS board members and volunteers were present at sentencing and spoke against the agreement and the defendant. (R. 77:29–42.) Even though the plea agreement had received a negative community response, both counsel and the district attorney lobbied for it. (R. 77:4–20, 25–27.) True, the court did not accept the deal, but it did not impose the maximum sentence either; rather, it ordered Counihan's five nine-month sentences to run concurrently and granted *Huber* privileges without also imposing probation. (R. 77:55, 64–65.)

In light of these considerations, it was reasonable for counsel to conclude that it was of greater benefit to Counihan to stick with the district attorney who negotiated the deal and was thus incentivized to support it in face of community opposition rather than potentially having to return to court with the new district attorney who might not be as supportive and risk an even less favorable outcome. And while distinguishing the theft cases in some way may have been "helpful," at some point that strategy would have risked further undermining Counihan's acceptance of responsibility and expression of remorse. (R. 77:28–29; 80:46.) Under the totality of those circumstances, the real-time "call" that counsel made not to object before the pronouncement of sentence or afterward "did not fall below the objective standard of reasonableness." *State v. Breitzman*, 2017 WI 100, ¶ 61, 378 Wis. 2d 431, 904 N.W.2d 93.

2. Counihan has not shown prejudice.

Counihan also fails to show that had counsel objected to the court's review of the theft cases and tried to distinguish them, a different result was reasonably probable to occur.

Counihan's sentencing judge confirmed as much at the *Machner* hearing by stating that there was no probability, let alone a reasonable probability, that the sentence he imposed would have been any different absent any of the alleged attorney errors. (R. 80:100.) The court was, in fact, "absolutely 100 percent convinced that [it] would have done exactly the same thing" at sentencing. (R. 80:100.) And "even after all this time," it felt "what [it] did was appropriate." (R. 80:93.)

Counihan asks this Court to disregard these compelling statements. (Counihan's Br. 22–23.) But this

Court, and appellate courts, have done the opposite. *See, e.g.*, *Reinwand*, 385 Wis. 2d 700, ¶ 51 (noting that the circuit court made clear that the defendant would have received the same sentence "regardless of counsel's performance at sentencing"); *State v. Harbor*, 2011 WI 28, ¶ 75, 333 Wis. 2d 53, 797 N.W.2d 828 (holding that counsel's alleged error was non-prejudicial because the circuit court "concluded that the new factors asserted by Harbor would not have made any difference in its sentencing decision"); *State v. Voss*, 205 Wis. 2d 586, 598, 556 N.W.2d 433 (Ct. App. 1996) (holding that counsel's alleged errors did not prejudice the defense because the circuit court said "that none of the things Voss complains about would have affected the sentence"); *State v. Giebel*, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995) (giving weight to the circuit court's conclusion that "even if trial counsel had performed at sentencing in the manner suggested by Giebel, the sentence would have been the same").

The circuit court's resoluteness in this case should carry the same weight. Indeed, Counihan fails to articulate how counsel, had he objected, could have materially distinguished her circumstances from those of the other theft cases. Although she maintains that she has never had the opportunity to review and rebut those cases, the court twice invited Counihan to express any concerns after it concluded its remarks. (R. 77:64–66.) At that point, Counihan had heard the court's discussion of certain information from those cases and been notified of the case numbers. (R. 77:52–54.) She contends that she does not know what documents from the case files that the judge reviewed, but she knew what information the court considered relevant and circuit court records are open for public inspection. Wis. Stat. § 59.20(3)(a). Moreover, CCAP gives charging and sentencing details. Nearly three years on,

however, Counihan has yet to articulate how counsel could have materially distinguished the other theft cases. (Counihan's Br. 24–25.) That omission is telling and fatal to her prejudice claim.

And, in any event, the circuit court grounded its sentence in the facts of Counihan's case. (R. 77:55–63.) The court began its approximately seven-transcript-page discussion of those facts with Counihan's background, noting that she had held a position of trust and had repeatedly committed theft over many years, and her behavior was not driven by mental illness or addiction. (R. 77:55–56.) The court also acknowledged the remarks it had heard that day, giving less weight to allegations that certain people did not get raises, that the shelter's animals suffered, or that Counihan maintained her innocence. (R. 77:55, 57–58.) These facts, along with her lack of a criminal record, were relevant to her character and rehabilitative needs. (R. 77:58–59.)

As for the need to protect the public and deterrence, the court reasoned that people who steal are put "in jail all the time," so it should be no different for those who can afford restitution. (R. 77:61–62.) Although Counihan was not in danger of reoffending, the court felt strongly that it had to send a message: those who stole would not avoid otherwise appropriate punishment simply because they could quickly pay back the loss. (R. 77:62.)

The court reserved its strongest words for the nature and gravity of the offense. It acknowledged that the publicity surrounding the case had impacted donations to the DCHS and other non-profits. (R. 77:56–57.) The court found this potential chilling effect on donors to be "very, very concerning." (R. 77:59–60.) Returning to the fact that Counihan was intelligent and had stolen money over many years despite early warnings to take care with the credit

card, the court refused to accept that her conduct had been careless. (R. 77:28, 60–61.) The court concluded that Counihan "[didn't] need supervision," she needed punishment by incarceration to avoid "unduly depreciat[ing] the seriousness of [her] offenses." (R. 77:63.)

In documenting what it considered at sentencing, the court was candid about its reasoning, which sentencing courts are required to be. *See State v. Gallion*, 2004 WI 42, ¶¶ 3–4, 270 Wis. 2d 535, 678 N.W.2d 197. The "majority of [the court's] sentencing" remarks, however, were not focused on "comparing and contrasting these files with Counihan's case." (Counihan's Br. 15.) Its review of the theft cases was therefore significant in that it showed the court's unusual diligence, not in that the information in those cases represented the keystone of Counihan's sentence.

Because Counihan does not articulate how counsel could have materially distinguished her circumstances as discussed by the court from the information the court found relevant in the other theft cases, she has not shown that counsel prejudiced her defense at sentencing.

3. Counihan's arguments to the contrary lack merit.

Counihan's arguments to the contrary do not compel a different conclusion. At bottom, Counihan maintains that her sentence was unfair and unreliable. She presses that the court of appeals inappropriately focused on whether the outcome of her sentencing would have been different at the expense of the proceeding's fundamental fairness. (Counihan's Br. 24.) *Strickland* did not hold, however, that a defendant may establish prejudice by showing that her attorney's errors rendered the proceeding fundamentally unfair. *See Strickland*, 466 U.S. at 694.

Rather, prejudice turns on the reasonable probability of a different result—a probability sufficient to undermine confidence in the outcome. *See Reinwand*, 385 Wis. 2d 700, ¶ 42 (prejudice requires a reasonable probability of a different result); *Sholar*, 381 Wis. 2d 560, ¶ 46 ("If there is no reasonable probability that the jury would have reached a different verdict, then a defendant has not proven prejudice"); *Breitzman*, 378 Wis. 2d 431, ¶ 39 (defining prejudice as a reasonable probability of a different result).

In the sentencing context, prejudice means a reasonable probability of a different sentence. *See, e.g.*, *Reinwand*, 384 Wis. 2d 700, ¶¶ 47–51 (rejecting defendant's claim of ineffective assistance of sentencing counsel because there was "no reasonable probability" of "a different sentence"); *State v. Pote*, 2003 WI App 31, ¶ 41, 260 Wis. 2d 426, 659 N.W.2d 82 (finding ineffective assistance where it was reasonably probable that the defendant would have received a lesser sentence and thus the court's confidence in the outcome was undermined); *Benson*, 344 Wis. 2d 126, ¶¶ 18–19 (proving ineffective assistance requires showing that but for counsel's failure to object or correct allegedly inaccurate information, there is a reasonable probability the result of the resentencing would have been different).

The court of appeals properly conducted the standard *Strickland* inquiry here. *See Counihan*, 2018 WL 5819594, ¶¶ 13–14. (Pet-App. A:106.) Although prejudice is presumed in cases where a defendant has been effectively denied the right to counsel altogether, Counihan makes no such allegation. *See Strickland*, 466 U.S. at 692; *United States v. Cronic*, 466 U.S. 648, 658 (1984).

Nor is this case one "in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice' . . . because defendants would receive a windfall as a result of the application of an incorrect legal

principle or a defense strategy outside the law." *Lafler v. Cooper*, 566 U.S. 156, 166–67 (2012). "For example . . . when a state court relies on overruled law . . . or the defendant's lawyer refuses to let him commit perjury." *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006) (discussing *Nix v. Whiteside*, 475 U.S. 157, 171 (1986), and *Lockhart v. Fretwell*, 506 U.S. 364, 384 (1993)). Under such "circumstances a mere difference in outcome will not suffice to establish prejudice." *Glover v. United States*, 531 U.S. 198, 202 (2001).

Such exceptional cases stand for the proposition that an overriding interest in fundamental fairness precludes a prejudice finding where such a finding would be a fortuitous windfall for the defendant. They "do not justify a departure from a straightforward application of *Strickland*" where, as here, the question is whether counsel's allegedly deficient performance "*does* deprive the defendant of a substantive or procedural right to which the law entitles" her. *Williams v. Taylor*, 529 U.S. 362, 393 (2000); *see also Lafler*, 566 U.S. at 166–67 (emphasizing that *Lockhart* did not modify or supplant the *Strickland* analysis); *Glover*, 531 U.S. at 202–03 (same); *Goodman*, 467 F.3d at 1028 (*Lockhart*'s "heightened prejudice analysis" applies only "where the defendant challenges his conviction based upon unusual circumstances"); *cf. Lockhart*, 506 U.S. at 373 (O'Connor, J., concurring) (observing that "in the vast majority of cases . . . [t]he determinative question—whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' . . . remains unchanged.").

As relevant here, a defendant has a right to be sentenced based on accurate information and thus "has the right to rebut evidence that is admitted by a sentencing court." *State v. Spears*, 227 Wis. 2d 495, 508, 596 N.W.2d

375 (1999). Because Counihan is challenging her attorney's alleged "failure to meet a valid legal standard," the normal *Strickland* prejudice test applies. *Lafler*, 566 U.S. at 167.

Counihan cites *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), to suggest that the determinative inquiry when analyzing prejudice in a mine-run case is whether attorney error led to a fundamentally unfair proceeding. (Counihan's Br. 22.) *Weaver* does not extend that far. *Weaver*, which considered whether prejudice had to be shown when an attorney's error led to a structural error, explained that "[i]n the ordinary *Strickland* case, prejudice means 'a reasonable probability'" of a different result. 137 S. Ct. at 1911. The *Weaver* Court did "not decide" whether a defendant could prove prejudice by simply showing that counsel's failure to object to a structural error rendered a trial fundamentally unfair. *Id.* Further, unlike the defendant in *Weaver*, Counihan is not asserting that counsel failed to object to a structural error, i.e. an error not reviewable for harmlessness.

All this is not to say that general fairness concerns are due no consideration in ineffective assistance cases. *Strickland* itself took the purpose of effective assistance, "to ensure a fair trial," as its "guide" in "giving meaning to the requirement." *Strickland*, 466 U.S. at 686. But *Strickland*'s edict that an attorney's error "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment" remains primary. *Id.* at 691; *see, e.g.*, *Williams*, 529 U.S. at 398–99 (noting that a state trial judge's conclusion that there was a reasonable probability of a different outcome at sentencing reflected "the established legal standard for determining counsel's effectiveness"); *Floyd v. Hanks*, 364 F.3d 847, 852–53 (7th Cir. 2004) (*Williams* "removed the discussion of reliability from" the prejudice determination; despite an improper reference to

"reliability," the state court's prejudice analysis properly focused on the potential effect of counsel's actions on outcome of trial).

This is because the prejudice requirement arises from the right to "*effective* (not mistake free) representation," so "[c]ounsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have)." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). In other words, a reasonable probability of a different outcome remains the starting point under *Strickland*, and Counihan does not make that showing.

Rather, Counihan maintains that this Court should disregard certain remarks of the circuit court at the *Machner* hearing because they evidence judicial bias. (Counihan's Br. 23.) Prejudging or predetermining a sentence can be an example of judicial bias. *See State v. Gudgeon*, 2006 WI App 143, ¶¶ 25–26, 295 Wis. 2d 189, 720 N.W.2d 114. But because Counihan did not raise a judicial bias claim until now, she has forfeited it. *State v. Marhal*, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992).

In any event, Counihan has not shown an appearance of bias that reveals a great risk of actual bias, and therefore has not rebutted the presumption that the court impartially sentenced her. *State v. Herrmann*, 2015 WI 84, ¶¶ 24, 46, 364 Wis. 2d 336, 867 N.W.2d 772 (lead opinion).

At the *Machner* hearing, the court explained that it reviewed the other theft cases to supplement the "institutional memory" it lacked, and "wanted to use the cases to make sure they supported what [it] was going to do." (R. 80:89–90.) But the court did not think of those cases as "a recipe," and acknowledged at sentencing that every case was different. (R. 77:54; 80:91.) That the court may have

considered whether the plea agreement was appropriate in preparation for the hearing does not also mean that the court had decided "what [it] was going to do" with any certainty until after the parties and the community had their say. (R. 80:90.) The court made no remarks at sentencing to that effect, or to the effect that it always imposes a certain sentence for misdemeanor theft. In many cases, the parties, through a plea agreement or a presentence investigation, will offer a recommended sentence for the court's consideration before the hearing. A diligent court will consider whether to adopt that recommendation, but such forethought is no indication of a closed mind. *See State v. Varnell*, 153 Wis. 2d 334, 338, 450 N.W.2d 524 (Ct. App. 1989) (holding that a court's tentative decision before sentencing to impose the maximum sentence, and its failure to communicate that inclination to the petitioner did not deprive the petitioner of due process during the sentencing hearing).

Nor has she substantiated any concern of an ethical violation. (Counihan's Br. 14.) Under the Code of Judicial Conduct, SCR 60.04(1)(g), "[a] judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding" except under certain circumstances. The comments to SCR 60.04 state that "[a] judge must not independently investigate facts in a case and must consider only the evidence presented." Comment, SCR 60.04. As this Court has said, "[a] judge must not go out and gather evidence in a pending case. To do so is error." *State v. Vanmanivong*, 2003 WI 41, ¶ 34, 261 Wis. 2d 202, 661 N.W.2d 76.

The circuit court's review of certain information in the unrelated theft cases is not akin to investigating facts or gathering evidence in Counihan's case. The court did not, for example, visit the DCHS, speak with board members or

volunteers, research Counihan on the Internet, discuss the merits of Counihan's case with the prosecution ex parte, or independently verify Counihan's bank account information. *Cf. American Family Mut. Ins. Co. v. Shannon*, 120 Wis. 2d 560, 564, 356 N.W.2d 175 (1984) (The court erred "in making an unrequested, unannounced, unaccompanied and unrecorded view of the scene" and "gather[ing] evidence used to determine the credibility of witnesses that is not part of the record."). Rather, as the court explained, it wanted to supplement the institutional knowledge it lacked and confirm that the sentence it was considering for Counihan was not unreasonable. (R. 89:89–91.)

Those circumstances are entirely unlike what this Court addressed in *In re Judicial Disciplinary Proceedings against Piontek*, 2019 WI 51, ¶ 18, 386 Wis. 2d 703, 927 N.W.2d 552, which Counihan references. (Counihan's Br. 14.) In that case, this Court faulted a circuit court for conducting online research of a defendant's "nursing licenses and related matters in several states" and then confronting her with the inaccurate results at sentencing. *Piontek*, 386 Wis. 2d 703, ¶ 16. When the defendant confronted the court, the court responded that her "lies are getting [her] in trouble." *Id.* ¶ 18. This Court concluded that it was "clearly improper for a judge to both conduct an independent investigation and to fail to give a party a chance to respond to the judge's misinformed allegations based on that investigation." *Id.* ¶ 37. Here, the court did not independently investigate Counihan or her case and gave her two clear opportunities after its sentencing remarks to express any concerns. (R. 77:64–66.)

III. Should this Court decide to overlook forfeiture and reach the merits of Counihan's claim, she has not demonstrated a due process violation.

At bottom, Counihan does not expressly fault the circuit court for reviewing the unrelated case files or develop an inaccurate information claim; rather, she claims a due process violation because the court failed to inform her at some point before the hearing of its theft-cases survey. (Counihan's Br. 15–16.) Forfeiture is a rule of judicial administration that a court can choose not to apply.[5] *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). If this Court overlooks Counihan's forfeiture and addresses her claim directly under de novo review, it should conclude that she has not demonstrated a due process violation. *See Teague v. Schimel*, 2017 WI 56, ¶ 19, 375 Wis. 2d 458, 896 N.W.2d 286 (stating that appellate courts review procedural due process challenges de novo).

"The Fourteenth Amendment to the United States Constitution and art. I, § 1 of the Wisconsin Constitution prohibit government actions that deprive any person of life, liberty, or property without due process of law." *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 80, 237 Wis. 2d 99, 613 N.W.2d 849. "A defendant has three due process rights at sentencing: (1) to be present at the hearing

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[5] It may make sense to reach the merits of a forfeited claim where the question presented would be likely to recur with any frequency and "is of sufficient public interest." *See Olmsted v. Circuit Court for Dane Co.*, 2000 WI App 261, ¶ 12, 240 Wis. 2d 197, 622 N.W.2d 29. But that is not the case here. As trial counsel remarked at the *Machner* hearing, the circuit court's reference to other cases was "notable" only in that "[i]t rarely happens," and he could not recall it happening since he had started practicing in Northeastern Wisconsin. (R. 80:32, 35.)

and to be afforded the right to allocution, (2) to be represented by counsel, and (3) to be sentenced on the basis of true and correct information." *State v. Borrell*, 167 Wis. 2d 749, 772, 482 N.W.2d 883 (1992).

Counihan grounds her due process claim in the third right, arguing that a court should "give advance notice if it intends to rely on information outside the record" to ensure untainted sentences. (Counihan's Br. 14.) As Counihan notes, "[a] defendant has the right to an opportunity to rebut information presented at sentencing" and cannot exercise that right where "sentencing information is kept" from him or her. *State v. Lynch*, 2006 WI App 231, ¶ 24, 297 Wis. 2d 51, 724 N.W.2d 656.

Counihan received due process at sentencing. A defendant receives adequate notice when a circuit court explains the basis for its sentence. *See Bruneau v. State*, 77 Wis. 2d 166, 175, 252 N.W.2d 347 (1977). And a circuit court may rely on information presented at sentencing if the defendant does not exercise his or her opportunity to rebut it. *See Spears*, 227 Wis. 2d at 508–09 (collecting cases). Counihan had two opportunities to remedy any inadequate notice by objecting, and no sentencing information was kept from her. Further, Counihan could have sought an adjournment to investigate and rebut the other theft cases. *See, e.g.*, *State v. Damaske*, 212 Wis. 2d 169, 196–97, 567 N.W.2d 905 (Ct. App. 1997); *State v. Hubert*, 181 Wis. 2d 333, 346, 510 N.W.2d 799 (Ct. App. 1993). This Court should hold that Counihan received adequate notice and opportunity to respond at sentencing.

Further, this Court gave notice over 15 years ago in a seminal sentencing decision that courts can "consider information about the distribution of sentences in cases similar to the case before it." *Gallion*, 270 Wis. 2d 535, ¶ 47. The circuit court here made no secret that it had done so. It

stated on the record the case numbers and facts it considered from other theft cases. (R. 77:52–54.) Other than Counihan's suggestion that two of the unrelated defendants, rather than one as stated by the court, may have avoided jail time, she has never developed a claim that the information referenced by the circuit court was inaccurate and thus never showed that she was sentenced on inaccurate information. (Counihan's Br. 16–17.)

Counihan contends that she cannot be expected to have done so because she does not know what documentation the court reviewed from the case files and thus cannot verify the accuracy of what the court discussed. (Counihan's Br. 16.) But, again, the court indicated the case numbers nearly three years ago. (R. 77:52–54.) It is telling that Counihan has never developed any inaccurate-information claim or linked any possible inaccuracies in the other theft cases to her sentence.

Counihan's case does not raise the concerns addressed in *Gardner v. Florida*, 430 U.S. 349 (1977). (Counihan's Br. 13.) There, the trial court sentenced the defendant to death without stating on the record the substance of information from a presentence report upon which it relied but that had not been disclosed to the parties. *Id.* at 353. Accordingly, defense counsel had no opportunity to challenge its materiality or accuracy. *Id.* at 356; *compare Williams v. New York*, 337 U.S. 241, 244 (1949) (noting that the trial judge described the material facts concerning the defendant's background in open court without objection or a request to refute the information). That was not the case here, and in any event the United States Supreme Court has suggested that due process does not require the disclosure of sentencing information in advance of sentencing, even in capital cases. *See Gray v. Netherland*, 518 U.S. 152, 168 (1996) (finding no constitutional violation during the penalty

phase of a capital case where the defendant had "the opportunity to hear the [surprise] testimony of [the witnesses] in open court, and to cross-examine them"). In sum, Counihan has not established a violation of due process.

Admittedly, Counihan's proposed advance notice requirement has intuitive appeal where, as here, the court presumably reviewed the other theft cases ahead of sentencing. Moreover, advance notice could avert the consideration of suspect information, as Counihan suggests. (Counihan's Br. 13–14.)

But this Court should not adopt a procedure described at such a high level of generality. Indeed, Counihan does not define the notice procedure the court should have followed. She does not suggest, for example, what kind of information could fall "outside the record" and require advance notice or indicate what form such notice should take. Counihan does not specify how far in advance a court should provide notice of its intent to reference such information at sentencing or discuss whether the court should provide notice sua sponte and whether this disclosure requirement should apply with equal force to the defendant and the State. Nor does she submit an analytic framework for assessing what due process requires in this context, such as, for example, the three-prong approach of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), or the traditional fundamental fairness standard of *Medina v. California*, 505 U.S. 437, 445 (1992), both used to assess the validity of state procedural rules. *See Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (differentiating *Mathews* from *Medina*).

Theory aside, in broader practice, compliance with Counihan's advance notice requirement would rarely be straightforward and could have a chilling effect. Here, the circuit court accessed paper case files to supplement the

"institutional memory" it lacked. (R. 80:89.) For a judge with a longer memory and more experience, it would be cumbersome or practically impossible to provide advance disclosure of all the cases or other "outside the record" information he or she might think of while preparing for or during sentencing.

This Court encourages every judge, in an effort to craft an appropriately individualized sentence, to "conduct an inquiry broad in scope and largely unlimited either as to the kind of information considered or the source from which it comes." *Handel*, 74 Wis. 2d at 703. This mandate, entrusted to those presumed fair and impartial, should not be circumscribed by a requirement limiting the court's inquiry and reasoning to only the information that is documented and fully disclosed before sentencing. Indeed, courts are expected to consider what victims, the defendant, or any other person might say or recommend at sentencing, so long as the information is relevant, statements which need not be disclosed ahead of time and which no party can dictate. *See* Wis. Const. art. I, § 9m; Wis. Stat. §§ 950.04(1v)(m), 972.14(2), (3)(a); *State v. Bokenyi*, 2014 WI 61, ¶¶ 59, 63, 355 Wis. 2d 28, 848 N.W.2d 759 (victims have the right to speak at sentencing and the court was required to consider the effect of the offense on the victim); *State v. Frey*, 2012 WI 99, ¶ 106, 343 Wis. 2d 358, 817 N.W.2d 436 (noting that the defendant has a right to speak at sentencing and to refute any allegedly inaccurate information). The court did so here. (R. 77:55, 57–58.)

Under Counihan's proposed requirement, judges may decide that it is safer to rely on appellate courts to fill in gaps in their analysis than to risk disclosing something that occurred to them only during sentencing and could later be used to support resentencing. *See McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971) (holding that

appellate courts are "obliged to search the record" if a sentencing judge's analysis or explanation is lacking and have a "duty to affirm [a] sentence on appeal if from the facts of record it is sustainable as a proper discretionary act"). Rather than create a prophylactic procedure to prevent rare instances of judicial bias or ethical violations, this Court should hold that disclosure on the record at sentencing was sufficient notice in this case and that Counihan had a reasonable opportunity to be heard. In so holding, this Court would reaffirm a sentencing court's broad discretion upon which individualized sentencing depends.

CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 31st day of July 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,936 words.

Dated this 31st day of July 2019.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 31st day of July 2019.

_____
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