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SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2019AP548-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

Trial Court Case
No. 16-CF-1401

VS.

KEITH C. HENYARD,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED ON THE 13TH DAY OF OCTOBER, 2017 IN THE CIRCUIT COURT OF KENOSHA COUNTY, WISCONSIN, JUDGE BRUCE E, SCHROEDER PRESIDING, AND DENYING MOTION FOR POST-CONVICTION RELIEF ENTERED ON THE 4TH DAY OF MARCH, 2019 IN THE CIRCUIT COURT OF KENOSHA COUNTY,
WISCONSIN, THE HONORABLE BRUCE E. SCHROEDER PRESIDING

PETITION FOR REVIEW

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Appellant, KEITH C. HENYARD

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STATEMENT OF THE ISSUES

1. Whether the Court of Appeals erred when it failed to allow the Defendant-Appellant, Keith C. Henyard to withdraw his plea due to an actual conflict of interest which existed in his case as his trial counsel, Attorney Frank J. Parise, previously presided over Mr. Henyard's preliminary hearing as the acting court commissioner on December 28, 2016.

Answered by trial court: Defendant's motion denied.

Answered by Court of Appeals: Trial court affirmed

2. Whether the Court of Appeals erred when it held the trial court did not erroneously exercise its discretion when it denied Mr. Henyard's request for re sentencing in the above entitled matter, before a different judge, on the basis of a judicial bias it had in Mr. Henyard's case prior to a plea or sentencing, that the trial court had against heroin and/or drug delivery offenses?

Answered by trial court: Defendant's motion denied.

Answered by Court of Appeals: Trial court affirmed

CRITERIA SUPPORTING REVIEW

This court should accept the Petitioner, Keith C. Henyards Petition for Review of an adverse decision of the court of appeals in the above matter, for special and important reasons are presented herein. Further, a decision by this Court will help develop, clarify or harmonize the law, and the case calls for the application of a new doctrine, as there is not a reported case in the state of Wisconsin regarding a judge serving both as a judge in

a defendant's case, and then, in the same case, representing that defendant as defense counsel. Further, the question presented will have statewide impact as the petitioner raises serious institutional concerns regarding his attorneys' prior service as the acting court commissioner and thereafter acting as his defense attorney in the same case. Further, the court of appeals held that Petitioner could not show how his attorneys' representation was adversely affected, pursuant to the Cook v. Cook case, 208 Wis. 2d. at 156, 560 N.W.2d 246 (Wis. 1997). Because the Petitioner failed to show that his counsel had an actual conflict of interest that adversely affected his representation, pursuant to the Cook case, the Court of Appeals could not reverse, as the Supreme Court of this State had concluded in Cook, that the burden is on a Petitioner to show that the representation was adversely affected. See Cook 208 Wis. 2d at 189-90. However, if that is the law of this State, then this Court should overrule Cook, as an actual conflict of interest existed in this case given his defense counsel acted as both defense counsel and judge in the same case; thus, this conflict always adversely affects a lawyers' performance (See Henyard, Dissent at p.6). Thus, the Cook case is ripe for re-examination.

STATEMENT OF FACTS

The Petitioner, Keith C. Henyard, was charged in a criminal complaint with three counts of manufacture/deliver of cocaine on or near a park as a repeater, one count of manufacture/deliver of cocaine as a repeater, one count manufacture/deliver of heroin on or near a park as a repeater, one count manufacture/deliver of heroin as a repeater, one count of possession with intent to deliver cocaine as a repeater, and one count of possession with intent to deliver heroin as a repeater, in an 8 count criminal complaint

filed on December 21, 2016. (1:1-8). An initial appearance was held on the matter on December 21, 2016. (57:1-6). Thereafter, a preliminary hearing was held December 28, 2016. (58:1-7).

The preliminary hearing took place on December 28, 2016 in case number 16-CF-1401, State of Wisconsin v. Keith C. Henyard-Defendant. (58:1-7). At that preliminary hearing the Honorable Frank J. Parise, acting Court commissioner, presided over Mr. Henyard's case. (58:1). At that hearing, acting Court Commissioner Parise took a waiver of a right to a preliminary hearing and asked Mr. Henyard several questions about his understanding of that waiver. (58:3-4). At the conclusion of the hearing, the Court was satisfied that Mr. Henyard freely, voluntarily and intelligently waived his right to a preliminary hearing. (58:4-5).

Additionally, the Court stated as follows:

> I am satisfied further that I have reviewed
> the complaint and that there is probable cause
> to bind this matter over for trial. (58:5).

Thus, Mr. Henyard's case was bound over for trial by Commissioner Parise. (58:7).

Several other hearings were held in this matter, the most important of which was the status conference wherein Mr. Henyard substituted his current counsel for Frank J. Parise. (64:1-4). This occurred at the status conference on May 30, 2017 wherein Mr. Henyard's current attorney was allowed to withdraw, and Attorney Parise was substituted in his place. (64:2). In a previous hearing on May 18, 2017, Mr. Henyard indicated to the Court that he had spoken to Frank Parise the week previous, and that a discussion ensued over money and retaining his services. (63:1-2).

The sentencing hearing was held on October 12, 2017. (68:1-23). At the sentencing hearing, on count 6, the Court sentenced Mr. Henyard to a term of 12 years initial confinement followed by a period of 5 years extended supervision. (68:20). On all other counts, the sentence was withheld and Mr. Henyard was placed on a period of probation to the Department of Corrections for a term of 6 years on each count with withheld sentences. (68:20). The probationary period was consecutive to the sentence imposed. (68:20-21). At that time Mr. Henyard had 195 days sentence credit, however, the credit was changed at the post-conviction motion hearing as Mr. Henyard actually had 204 days sentence credit, which was granted by the trial court in Mr. Henyard's post-conviction motion. (54:1).

Thereafter, Mr. Henyard filed a notice of motion and motion for post-conviction relief on December 3, 2018. (48:1-31). The basis for the motion for post-conviction relief is the basis for Mr. Henyard's appeal, as outlined in the statement of issues which preceeds the statement of facts contained herein. A motion hearing was held on this matter on February 4, 2019. (69:1-46).

At that motion hearing, the Court granted 9 days of additional sentence credit on the original judgment. (54:1). At that hearing, Mr. Henyard's trial attorney, Frank J. Parise, testified on the issue of acting as both court commissioner and trial attorney on Mr. Henyard's case. Attorney Parise testified that he did not recall acting as court commissioner on December 28, 2016. (69:14). However, Attorney Parise had the opportunity to review the pleadings in this matter, as well as the attachment for the preliminary hearing transcript as well. (69:14). In that transcript, it indicated that, indeed,

he had acted as court commissioner on December 28, 2016 over Mr. Henyard's case. (69:15). Attorney Parise could not dispute this fact. (69:15). Attorney Parise thus acted as court commissioner over Mr. Henyard's case at his preliminary examination on December 28, 2016. (69:15). Although Mr. Parise testified that he did not recognize Mr. Henyard at any point throughout the representation, he did admit that he recalled doing a conflict check in Mr. Henyard's case, but that he simply missed it. (69:16-17). At no point did Attorney Parise alert the court that he acted as court commissioner in Mr. Henyard's case. (69:19). Ultimately, it was Attorney Parise's advice to accept the plea deal that was offered to Mr. Henyard. (69:20).

A written decision was made in this matter on March 4, 2019. In that order, the Court denied Mr. Henyard's motion for plea withdrawal as well as his request for a resentencing and/or recusal for a resentencing before a different judge. (54:1-5).

A notice of appeal from the decision and order denying post-conviction relief was hereafter filed on March 8, 2019. (56:1-11).

In a decision and Order of the Court of Appeals dated July 8, 2020, the Court of Appeals affirmed the trial courts' denial of Mr. Henyards motion to both withdraw his plea, and for a resentencing. Mr. Henyard now Petitions this court for review of that decision.

ARGUMENT

I

As an actual conflict of interest existed between retained counsel, Attorney Parise, as attorney Parise also acted as court commissioner in

> Henyard's case, and a knowing and intelligent waiver of the conflict did not occur before the trial court at any time, and Henyard's plea therefore should have been allowed to have been withdrawn by the trial court at the postconviction evidentiary hearing.

In Wisconsin, pursuant to SCR 20: 1.12, a lawyer shall not represent anyone in connection with a matter in which a lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or arbitrator, mediator, or other third-party neutral. See SCR 20: 1.12 (a). The *Wisconsin Committee Comme*nt to SCR 20: 1.12 (a) states as follows:

> Paragraph (a) differs from the Model Rule in that the conflict identified is not subject to waiver by consent of the parties involved. As such paragraph [2] of ABA Comment should be read with caution. Paragraph (d) differs in that written consent of the parties is required. See Wisconsin Committee Comment SCR 20: 1.12.

Thus, Court Commissioner Frank Parise was barred from representing Mr. Henyard in his case, as he presided over Mr. Henyard's case as Court Commissioner, making a probable cause finding. See SCR 20: 1.12(a). Additionally, the conflict was not at any time waivable. See W*isconsin Committee Comment* SCR 20: 1.12. Thus, even if the matter had been discussed by Attorney Parise, with Mr. Henyard, and even if Attorney Parise knew, or should have known, that he had presided as Court Commissioner over Mr. Henyard's case, the same case which he was retained on, this would not be a waivable conflict of interest. In other words, if this was ever brought to the trial court's attention, Attorney Parise would have had to have been discharged

pursuant to Wisconsin law, as Mr. Henyard's attorney of record. See SCR 20: 1.12 (a); *Wisconsin Committee Comment* SCR 20: 1.12.

The Sixth Amendment guarantees defendants effective, albeit not perfect, representation by counsel, Strickland v. Washington, 466 U.S. 668, 691-96, 104 S. Ct. 2052, 2066-69, 80 L. Ed. 2d 674 (1984); United States v. Bradshaw, 719 F.2d 907, 911 (7th Cir. 1983). See generally Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). An "actual" conflict of interest means "that the defense attorney was required to make a choice advancing

his own interests to the detriment of his client's interests," United States v. Horton, 845 F.2d 1414, 1419 (7th Cir. 1988) (citing United States v. Marrera, 768 F.2d 201, 207 (7th Cir. 1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1209, 89 L. Ed. 2d 321 (1986)), and "which, by its nature, is so threatening [as] to justify a presumption that the adequacy of representation was affected." United States v. Cancilla, 725 F.2d 867, 870(2d Cir. 1984).

Generally speaking, ineffective assistance of counsel claims are governed by the standard set forth in Strickland, i.e., that "counsel's performance fell below minimum professional standards, [and] also that his counsel's failure was so prejudicial that it probably changes the outcome of his trial." Horton, 845 F.2d at 1418 (citing Strickland, 466 U.S. at 691-96, 104 S. Ct. at 2066-69). But where a conflict of interest is the basis for the Sixth Amendment claim, then prejudice may or may not be presumed. "If the defendant or his attorney give the trial court notice of an alleged conflict, and the trial court fails to inquire into the conflict, a reviewing court will presume prejudice upon a showing of possible prejudice." Horton, 845 F.2d at 1418 (citing Holloway v. Arkansas,

435 U.S. 475, 487-88, 98 S. Ct. 1173, 1180-81, 55 L. Ed. 2d 426 (1978); Walberg, 766 F.2d at 1075; Marrera, 768 F.2d at 205-06)}. The Seventh Circuit has determined that possible prejudice was shown where the judge was in conflict with the defendant's attorney, even though the defendant, in addition to overwhelming evidence of guilt, was not necessarily prejudiced at trial or at sentencing because the judge did nothing during the trial to indicate prejudice against the defendant, Walberg, 766 F.2d at 1075.

The Seventh Circuit Court of Appeals has spoken on this issue in U.S. v, Ziegenhagen, 890 F.2d 937 (7th Cir. 1989). In that case, the defendant Ziegenhagen was represented by one Attorney Martin Hanson. U.S. v. Ziegenhagen, 898 F.2d at 938. Unbeknownst to anyone, Hanson appeared 20 years earlier at the sentencing hearing on behalf of the Racine County District Attorney's office to recommend the length of sentence to be imposed on Ziegenhagen, on two of the convictions that the government had relied upon to enhance his present sentence in U.S. v. Ziegenhagen. Id. Without being aware of the role in Ziegenhagen's prior convictions, Attorney Hanson filed a motion to bar application of the sentencing enhancing statute, on the ground that one of the earlier convictions, a 20-year old burglary conviction in Wisconsin, did not qualify as a predicate offense. See Ziegenhagen at 939. Prior to sentencing, Attorney Hanson discovered his involvement in Ziegenhagen's earlier convictions and sentences 20 years earlier. Id. He discussed the possible conflict with the prosecutor in the case, and informed the client. Id. Ziegenhagen did not say anything after the disclosure, and no one informed the district judge of those facts. Id.

The case proceeded to the Seventh Circuit Court of Appeals. Ziegenhagen's motion requested a change of counsel from Attorney Martin Hanson to Attorney Deutsch because of the alleged conflict of interest stemming from Hanson's appearance against Ziegenhagen at Ziegenhagen's sentencing hearing in Racine, 20 years earlier. See Ziegenhagen at 939.

In concluding that an actual conflict of interest existed in Ziegenhagen, the Court determined that it must remand the matter to the District Court for an evidentiary hearing to determine whether or not Ziegenhagen waived the conflict. See U.S. v. Ziegenhagen, at 941. The Court reasoned that ineffective assistance of counsel claims are governed by the standards set forth in Strickland, that counsel's performance fell below minimum professional standards, [and] also that his counsel's failure was so prejudicial that it probably changed the outcome of his trial." See Ziegenhagen, quoting Horton, 845 F.2d at 1418 (citing Strickland, 466 U.S. at 691-696, 104 S. Ct. at 2066-69). The Court further found that, where a conflict of interest is the basis for a Sixth Amendment claim, prejudice may or may not be presumed. "If the defendant or his attorney give the trial court notice of an alleged conflict, and the trial court fails to inquire into the conflict, a reviewing court will presume prejudice upon a showing of possible prejudice." Id quoting Horton at 1418 (citing Holloway v. Arkansas, 435 US 475, 487–88. This all presumed that the trial court was given notice. Id. However, nothing in the affidavit's of either counsel or Ziegenhagen, or the motion itself, indicated that the trial court was appraised of the potential conflict of interest prior to trial or sentencing. See U.S. v. Ziegenhagen, at 940, The Seventh Circuit did note, however, that it was given notice of the conflicting

interest. It also noted that not every conflict of interest is "so egregious" as to constitute a violation of the Sixth Amendment," but government employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not proper. See Ziegenhagen, at 940, citing Westbrook v. Zant, 575 F.2d 186, 189 (M. D.Ga. 1983). United States v. Kitchin, 592 F.2d 900 (5th Cir.), cert. denied, 444 U.S. 843, 100 S. Ct. 86, 62 L. Ed. 2d 56 (1979); *Model Code of Professional Responsibility* DR 9 101 (B) (1987) (an attorney "shall not accept private employment in a matter in which he has substantial responsibility while he was a public employee). Thus, in Ziegenhagen's case, the prosecutorial role that Ziegenhegen's counsel took in the earlier convictions was substantial enough to represent an actual conflict of interest. Although not the prosecuting attorney of record, Attorney Hanson appeared at the sentencing hearing to recommend the length of sentence in the convictions for the burglary and robbery, convictions used to enhance Ziegenhagen's present sentence. See U.S. V. Ziegenhagen, at 941.

Thus, this former representation amounted to an actual conflict of interest, and the Seventh Circuit had been given notice of it. Id. Despite the fact that Ziegenhagen had been convicted by a jury of the present offense, this did not mean that Attorney Hanson could not decide his defense strategy, either at sentencing, or on appeal on the basis of the conflict. Id. Needless to say, according to the Seventh Circuit, there are *countless* ways that a conflict could have hindered a fair trial, the sentencing hearing, even the appeal. Id. The Court could not say that there was nothing another attorney could have argued based upon the record, to more zealously advocate on this defendant's behalf and thus, it

presumed Ziegenhagen was prejudiced by Hanson's representation. Id. See also Horton, 845 F.2d at 1418-20; U.S. V. Rossbach, 701 F.2d 713, 717 (8th Cir. 1983).

The Seventh Circuit was also disturbed by the fact that Hanson learned of the conflict, could have informed the trial court of the facts, but did not do so. Id at 941. An actual conflict of interest between retained counsel and a represented party requires an evidentiary hearing to determine whether or not the represented party made a knowing and intelligent waiver of the conflict. Id. Thus, an actual conflict of interest existed requiring an evidentiary hearing according to the Seventh Circuit in Ziegenhagen. Id.

On December 28, 2016, Keith C. Henyard appeared at a preliminary hearing before the Kenosha County Circuit Court. The Honorable Frank J. Parise was presiding as Court Commissioner at that time. (58:1). Mr. Henyard, at the time of the preliminary hearing was represented by Jonathan Carver Smith. (58:1). The State of Wisconsin was represented by Special Prosecutor K. Richard Wells. (58:1-7). At that hearing, Mr. Henyard waived his right to a preliminary hearing. (58:3-4). The Court questioned Mr. Henyard regarding his waiver. At the conclusion of the hearing the Court stated as follows:

> The Court: Okay. Then I am satisfied that Mr. Henyard has freely, voluntarily, and intelligently waived his right to a preliminary hearing. I am satisfied further that I have reviewed the complaint and that there is probable cause to bind this matter over for trial. (58:4-5).

The matter was then bound over for trial before Judge Bastianelli, Circuit Court Branch 1. Thus, Commissioner Frank Parise, Mr. Henyard's later trial counsel, made a probable

cause finding at the conclusion of the preliminary hearing as court commissioner, and bound the entire matter over for trial. (58:7).

Thereafter, Mr. Henyard met with Attorney Frank Parise, when he discharged his former lawyer. (69:15). He retained Attorney Frank Parise in this case on or about May 18, 2017, prior to a hearing on May 30, 2017. (63:1-2; 64:2). At that meeting, and at no time thereafter, did Attorney Parise ever inform Mr. Henyard that he presided over the preliminary hearing in Mr. Henyard's case, prior to being retained. (69:16–17). However, it is clear that Attorney Frank Parise acted as the Court Commissioner at Mr. Henyard's probable cause hearing. (69:15). Mr. Henyard's post-conviction motion, alleged that Attorney Frank Parise presiding as court commissioner at his preliminary hearing and as his counsel in the same case, prevented Mr. Parise from effectively representing Mr. Henyard, as Attorney Parise had pre-judged his case as commissioner when *Commissioner* Parise determined that there was enough evidence for the case to proceed to trial and made a probable cause finding. (58:4-5). Additionally, this finding manifested itself during the representation, when Attorney Parise advised Mr. Henyard that he should take a plea. (69:20). Further, Mr. Henyard's motion alleged additional concerns about the lack of meetings with Attorney Parise. Attorney Parise did not know how many meetings they had. (69:23). Additionally, concerns were raised about and lack of discussion about any possible defenses or mitigating factors in Henyard's case. (69:24-25).

It is clear that there is an actual conflict of interest in Wisconsin in this case. See SCR 20: 1.12(a). Additionally, it is also clear pursuant to Ziegenhagen, a case from Wisconsin as attorney Hanson was a prosecutor in Racine County, that performing a

prosecutorial or governmental role, and then representing that defendant in that same case later on, is an actual conflict of interest. See Ziegenhagen at 941. The only question therefore is not is there an actual conflict of interest, but whether or not there is a waiver of that conflict. The difference, however, is that under Wisconsin law, this is not a waivable conflict. *Wisconsin Committee Com*ment SCR 20: 1.12. In other words, Mr. Henyard could not even have waived this conflict. Attorney Parise cannot represent Mr. Henyard in both the capacity as his attorney of record, and as court commissioner in the same case that he presided over as court commissioner during Mr. Henyard's preliminary hearing. See W*isconsin Committee Comm*ent to SCR 20: 1.12.

In addition, at the motion hearing the State took issue with the Ziegenhagen case's conclusion that the former representation amounted to an actual conflict of interest. See United States of America v. Armin Ziegenhagen, at 941. It is Mr. Henyard's position that given the ethics rules in the case, specifically SCR 20: 1.12, that an actual conflict of interest existed as Attorney Parise represented Mr. Henyard in the same case, and acted as court commissioner in Henyard's case, making a finding of probable cause and binding Mr. Henyard over for trial. However, the issue as cited by the State, in terms of whether a violation of SCR 20: 1.12 constitutes an actual conflict of interest that causes counsel to *automatically* be deemed ineffective, has not yet been decided in Wisconsin State courts. It has, however, been decided by the U.S. Court of Appeals.

It is Mr. Henyard's position, however, that an actual conflict of interest existed in this case, which required Attorney Parise to withdraw from the representation. If the trial court had gotten notice of this actual conflict, it would have certainly discharged Attorney

Parise from any further representation. (64:32).

In People v. Miller, 771 N.E. 2d 386, 389 (Ill. 2002) (Finding a per *se* conflict where former defense counsel represented state and defense at the later stages of the same case: and in People v. Kester, 361 N.E. 2d 569 (Ill. 1977), the Illinois Supreme Court explained why a per *se* rule was required:

> [T]here is also the possibility that the attorney might be subject to subtle influences which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner. It might be contended, for example, that the advice and performance of court appointed counsel in such a situation was affected by a subliminal reluctance to attack pleadings or other actions and decisions by the prosecution which he may have been personally involved with or responsible for. A defendant who has entered a plea of guilty might later suspect that his attorney's advice thereon had been influenced to some degree by a subconscious desire to avoid an adversary confrontation with the prosecution as a consequence of his previous participation in the case as a prosecuting attorney...it would be extremely difficult for an accused to show the extent to which this may have occurred. At the same time, a lawyer who may have provided an able and vigorous defense with complete loyalty to the defendant is placed in a difficult and unfortunate position of being subject to unfounded charges of unfaithful representation. The untenable situation which results for both the accused and his court appointed attorney in such instances is one which can and should be avoided in the interest of the sound administration of criminal justice. People v. Kester, 361 N.E. 2d 569.

The same is true in Henyard's case. This is an untenable situation which resulted when Attorney Parise as retained counsel, even if not overtly so, might be subject to those same subtle influences which could be viewed adversely, affecting his ability to defend his client in an independent and vigorous manner. Thus, an actual conflict of interest existed here, which is not waivable in Wisconsin, and looking at the cases from the U.S. Court of Appeals, specifically the Seventh Circuit Court of Appeals, and independently looking at this record, including Henyard's motion, it is clear that Mr. Henyard should be allowed to withdraw his plea. Ziegenhagen at 941; Kester, 361 N.E. 2d 569.

Upon learning that Attorney Parise had actually presided as court commissioner over this case, it should give this Court GREAT concern as Attorney Parise's legal advice was that Henyard should take a plea, based upon the evidence that was presented. (69:20). Of course, an attorney always gives legal advice in a case. The problem here, however, is that the advice was predicated on his appearance as court commissioner where, as court commissioner, Attorney Parise made a specific finding of probable cause in the exact same case he was now representing Henyard on. (58:4-5). This, of course, should give anyone great pause as it is certainly understandable why a defendant in Mr. Henyard's position would then be very skeptical, and, in fact, disagreeable with Attorney Parise's legal opinion, based upon the fact that Commissioner Parise made a probable cause finding in his case, and then as Attorney in the same case, indicated that the evidence was overwhelming against Henyard.

A hearing was held as to the issue of Mr. Henyard's concerns about the representation of Attorney Parise. The trial court denied the motion to withdraw the plea. (54:1-5). In the dissenting opinion of Henyard, the dissent concluded that the majority erred in concluding that an actual conflict of interest did not exist. See Henyard 19 AP 548-CR, ¶44. However, as the dissent made clear and as Henyard argues here, a Judge whom makes a substantial ruling, then sells his services as a defense lawyer to a defendant that he just presided over, has created an actual conflict. Id. The violation of SCR 20:1.12(a) is not waivable, and as the dissent asserted, it adversely affected Henyard, the judiciary, and the independence, impartiality, and integrity of the judicial system. Id. It is this violation, the integrity of the judicial system, which "adversely affected" Mr. Henyard's representation in this matter. Id.

Further, it is time for this Court to take up the issue when an actual conflict of interest that is not waivable exists, a court should presume not only that the lawyers' performance was prejudicial, but also that it adversely affected the defendants' representation. See Henyard at ¶46. An actual conflict of interest always adversely affects the lawyers' performance. Id. If Cook v. Cook 208 Wis. 2d. 156 (1997), "controls this answer," and if the Court of Appeals is correct that the Cook case does control, then it is time for this Court to overrule Cook as it applies to Henyards particular case.

> Mr. Henyard could not feel that this was a conflict free representation, when his attorney gave him advice to take a plea on the one hand and at the same time binding his case over for trial as acting Court Commissioner. Thus, Mr. Henyard's plea should have been allowed to be withdrawn. See Ziegenhagen, *supra.* (See also, State v. Jennings, 2019 WI App. 14, 386 Wis. 2d 336, ¶11. To withdraw a guilty plea

> after sentencing, a defendant must show by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in a manifest injustice. A defendant can establish manifest injustice by proving ineffective assistance of counsel).

Mr. Henyard has proven both a manifest injustice due to an actual conflict of interest and ineffective assistance as the conflict was per se prejudicial. SCR 20:1:12; Ziegenhagen, s*upra;* Kester, *supra.*

ARGUMENT

II

> In the alternative, the Defendant-Appellant requested a resentencing due to a judicial bias that the circuit court had against those who are convicted of delivering heroin and other drugs, and the Court noted this prior to any plea or sentencing in Mr. Henyard's case; thus, the circuit court erred in refusing to both recuse itself in this matter, and further, to set the matter on for a resentencing before a different trial judge.

The right to an impartial judge is fundamental to our notion of due process. State v. Goodson, 2009 WI APP 107, 320 Wis. 2d 166, 173, ¶8. We presume a judge has acted fairly, impartially and without bias; however, this presumption is rebuttable. Id citing State v. Gudgeon, 2006 WI APP 143, 120. When evaluating whether a defendant has rebutted the presumption in favor of the Court's impartiality, a court generally applies two tests; one subjective and one objective. See Goodson at ¶8. Objective bias exists in two situations. The first is where there is the appearance of bias, Gudgeon, 295 Wis. 2d, ¶123-24. "[T]he appearance of bias offends constitutional due process principals whether a reasonable

person - taking into consideration human psychological tendencies and weaknesses - concludes that the average judge could not be trusted to hold the balance nice, clear and true under all of the circumstances." Goodson at ¶9, citing Gudgeon at ¶24. Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the court's impartiality based upon the Court's statements. Id; Id, ¶26. The second form of objective bias occurs where "there are objective facts demonstrating the trial judge in fact treated (the defendant) unfairly." Goodson at 99, citing State v. McBride, 187 Wis. 2d 409, 416 (1994).

In Goodson, the Court of Appeals agreed with the defendant that a reasonable person could interpret the Court's statements to mean it made up its mind before the re-confinement hearing. The court cited to the Gudgeon case, 295 Wis. 2d 189, where a probation agent proposed that instead of extending Gudgeon's probation, the Court convert the restitution obligation to a civil judgment. The judge replied, "No - I want his probation extended..." See Goodson at ¶10, quoting Gudgeon at ¶2-3. At a subsequent hearing, the judge extended Gudgeon's probation.

On appeal, Gudgeon argued the Court had pre-judged the outcome. Goodson at ¶11. The Appellate Court concluded that the trial court was objectively biased because the judge's note created an appearance of impartiality. The Court ruled that "a reasonable person familiar with human nature knows that average individuals sitting as judges would probably follow their inclination to rule consistently with their personal desires. Gudgeon at 126 as cited in Goodson at ¶11.

The same analysis applied in Goodson's case. See Goodson at ¶12. In Goodson, the trial court unequivocally promised to sentence Goodson to the maximum period of time if he violated his supervision rules. Thus, a reasonable person "would conclude that a judge would intend to keep such a promise - that the judge had made up his mind about Goodson's sentence before the re-confinement hearing. This appearance constitutes objective bias." Id at ¶13. In State v. Herrmann, the Supreme Court summed it up as follows:

> In sum, when determining whether a defendant's right to an objectively impartial decision maker has been violated we consider the appearance of bias in addition to actual bias. When the appearance of bias reveals a great risk of actual bias, the presumption of impartiality is rebutted, a due process violation occurs. See State V. Herrmann at ¶46, citing Caperton, 556 US at 885; Goodson, 320 Wis. 2d 166, ¶9; Gudgeon, 295 Wis. 2d 189 121, 24.

In the alternative, Mr. Henyard would request a resentencing in the above matter due to a judicial bias that the court has against those who are convicted of delivering heroin. At a hearing on August 7, 2017, Mr. Henyard appeared before the Court on the charges. During the hearing the Court stated as follows:

> I think breaking a couple of bones, and so I'm very uncomfortable with that, given the severity of the charges, and there has been some recent publicity about my thoughts about dealing heroin, too, so that-that would give the defendant an additional incentive to fail to appear so give them a new date for the pre-trial. (65:8).

The Court's recent thoughts on heroin have been publicized in the news and, as the court noted at Mr. Henyard's hearing, the Court believes that it is only long prison sentences that can deter others from selling heroin. Attached to the post-conviction motion was an article in the Kenosha News dated March 18, 2018, the title of which is "Judge Hopes Stiff Sentence Can Deter Opioid Abuse." (48:26). In that case the court sentenced Harold Wilcher, 52, to 18 years in prison for his role in the death of Anthony Nicolai. (48:26). Wilcher was convicted by a jury February 1, 2018 for 1st Degree Reckless Homicide - Delivery of Drugs and Delivery of Heroin. Wilcher was one of three people charged in Nicolai's death. The Court stated as follows: "People who commit this grave crime have to suffer severe loss." Additionally, the Court indicated that it believed that long prison sentences 'deter others from selling heroin. Finally, that "I pray to God that it will and that lives will be saved." (48:26-28). That, in addition to the Court's recent publicized thoughts about dealing heroin, as noted at Mr. Henyard's sentencing hearing, which is that the Court's opinion is that long prison sentences should be given to those who deal heroin, and further, that this would give Mr. Henyard an additional incentive to not appear, all indicate a bias on behalf of the Court to pre-judge any case wherein someone has been charged and convicted of delivery of heroin or drugs, and that they should get long prison sentences, (65:8). In a second case, attached to the motion, the Court sentenced Langston to 12 years in prison for sharing heroin with a friend who later died. The Court indicated as follows:

> Schroeder said Friday in sentencing Langston that he thinks the key to addressing the growing opiate problem - and drug problems in general -

is to put more people in prison.

> "I have been convinced from the get-go that the war on drugs was never fought because of the indulgent attitude of some of my colleagues," he said. "Some people do buy into this treatment needs concept - I do think the war on drugs needs to be fought more aggressively."
>
> Perhaps, he indicated, with the death penalty, which was abolished in Wisconsin in 1853, at least in part because of outrage over a public execution in Kenosha. "I guess we are at the point where we need to look at Singapore's approach."
>
> "Do you know where Singapore is?" Schroeder asked Langston. "It's on the other side of the world. Thirty or 40 years ago it was one of the most dangerous places on earth."
>
> "Drug trafficking will be punished by death," he said. "They mean it and they do it, and today they have one (of the) lowest rates of drug abuse in the world." (48:29-31).

Thus, it is eminently clear on the court's position on every drug delivery case.

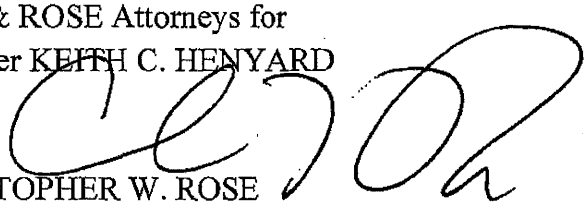
The Court's comments in Mr. Henyard's case, which specifically came out at the hearing held on August 7, 2017, indicated that given recent publicity about the Court's thoughts about heroin dealing, that it would give the defendant an additional incentive to fail to appear, gives the appearance of bias, in addition to actual bias. See Herrmann at ¶46. The publicity that the Court was talking about, which was referenced earlier at the motion hearing, was giving stiff prison sentences to those who deal in heroin/drugs. Thus, the Court was pre-judging cases, like Mr. Henyard's, and which the court specifically commented on in Henyard's case, which would give Mr. Henyard a reason to flee; namely, a lengthy prison sentence, not unlike those which are publicized. The Court's

comments give not only the appearance of bias, but actual bias. As the Court in Goodson stated, a "reasonable person familiar with human nature knows that average individuals sitting as judges would probably follow their inclination *to rule consistently with their personal desires."* (Emphasis added). See Goodson at ¶11. The same is true in Henyard, as it is clear from the Court's comments during Mr. Henyard's hearing, that pre-trial publicity regarding handing out stiff prison sentences, for those who deal in heroin, that the Court would act consistently with its personal desire to sentence drug offenders to lengthy prison sentences, especially those who are dealing with heroin like Henyard. (65:8). Thus, Mr. Henyard has shown both the appearance of, and actual bias pursuant to the cases cited herein, and pursuant to the trial court's comments. State v. Goodson, 320 Wis. 2d 166; State v. Herrmann, 364 Wis. 2d 336. Thus, Mr. Henyard requests a resentencing. Additionally, given the Court's appearance of and actual bias, recusal is necessary. Id.

CONCLUSION

For the reasons cited herein, the Petitioner, Keith C. Henyard requests the Court accept this Petition for Review.

Respectfully submitted,
ROSE & ROSE Attorneys for
Petitioner KEITH C. HENYARD



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CERTIFICATION

I certify that this brief of appellant meets the form and length requirements of Rule 809.19(8) (b) and (c) in that it is:

Typewritten (a proportional serif font, 200 dots per inch, 13 point body text). The length of the Brief is 6599 words.

Dated this 4 day of August, 2020.

Signed,

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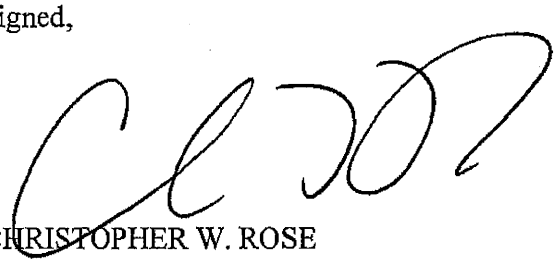
CERTIFICATE OF COMPLIANCE WITH WIS. STATS. S (RULE) 809.19 (12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. States. S (RULE) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of this 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.

Signed,



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CERTIFICATION RE APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains as a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this 4 day of August, 2019.

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