STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case Nos. 2019AP1753-CR & 2019AP1754-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BENJAMIN J. KLAPPS,

Defendant-Appellant.

ON APPEAL FROM AN ORDER REVOKING CONDITIONAL RELEASE, ENTERED IN WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE SCOTT C. WOLDT PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## ISSUES PRESENTED

1. Did Defendant-Appellant Benjamin J. Klapps procedurally default his judicial bias claim by not presenting it in a postdisposition motion to the trial court before filing this appeal, and forfeit it by not objecting at the revocation hearing?

Klapps did not object at the revocation hearing to the trial judge's consideration of a psychologist's reports from prior proceedings that he now argues shows judicial bias against him. Klapps also did not move for postdisposition relief on this or any other ground in the trial court before filing this appeal from the revocation order.

This Court should affirm because Klapps both procedurally defaulted and forfeited his judicial bias claim.

2. Did Klapps prove that the trial judge was objectively biased against him because he considered the psychologist's reports along with the testimony at the revocation hearing as support for his decision to order revocation?

Klapps did not raise this issue in the trial court.

This Court should affirm because Klapps failed to prove the appearance of judicial bias. Klapps merely disagrees with the trial court's decision to order revocation of his conditional release based on relevant evidence that it could properly consider.

3. Is Klapps entitled to a new trial in the interest of justice?

Klapps did not raise this issue in the trial court. Klapps invokes this Court's discretionary reversal authority under Wis. Stat. § 752.35.

This Court should not grant Klapps a new trial because the real controversy was fully and fairly tried.

## POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case should be resolved based on the application of established procedural default and forfeiture principles.

## STATEMENT OF THE CASE

Klapps was committed to the Winnebago Mental Health Institute on October 24, 2000, after he was found not guilty by reason of mental disease or defect based on his guilty plea to sexual assault of a child and felony bail jumping. (R. 17.)[1] The trial court ordered that he be committed to the Department of Health and Family Services for 26 years and 8 months. (*Id*.)

In the years since that original commitment order, Klapps has been conditionally released several times, only to be revoked and recommitted. Beginning in January 2015, the court received several reports prepared by a psychologist, Dr. Allen Hauer, who assessed whether Klapps should be released and, if so, under what conditions. (R. 115; 120; 127; 165; 173.) Dr. Hauer issued his first report on January 14. 2015, and his last report on May 21, 2018.[2]

On March 4, 2019, the Department filed a petition to revoke Klapps's conditional release to a group home based on several incidents in late 2018 and early 2019 where he was

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[1] As has Klapps, the State will cite to the record in appeal number 2019AP1753-CR in these consolidated cases unless otherwise indicated. (Klapps's Br. 2 n.1.)

[2] A Dr. Kevin Miller also was appointed on several occasions to do independent psychological evaluations of Klapps and he, like Dr. Hauer, issued reports beginning in January 2016 regarding Klapps's suitability for conditional release. (R. 131; 154; 162; 168; 179; 185.)

alleged to have sexually harassed, made inappropriate comments to, and ultimately threatened harm to staff at the group home. (R. 193; 194; 195.) A revocation hearing was held on March 6, 2019, before Winnebago County Circuit Judge Scott C. Woldt as fact-finder. (R. 203.) The only witness who testified was Klapps's case manager, Patrick Woodbridge, who chronicled the alleged rules violations committed in late 2018 and early 2019 while Klapps was out on conditional release. (R. 203:4–18.) Dr. Hauer did not examine Klapps or issue a report for this proceeding.

Judge Woldt found that the State proved grounds for revocation by clear and convincing evidence in that Klapps violated the rules of his conditional release and posed a substantial risk of serious bodily harm to others. Judge Woldt ordered that his conditional release be revoked. (R. 196; 197; 203:23–24.)

Klapps did not seek postdisposition relief in the trial court under Wis. Stat. § 971.17(7m). He appealed directly from the revocation order. (R. 199.)

Additional relevant facts will be discussed in the Argument to follow.

## STANDARD OF REVIEW

1. This Court reviews de novo the issue whether a defendant adequately preserved or forfeited his right to appellate review of a particular claim. *State v. Coffee*, 2020 WI 1, ¶ 17.

2. This Court reviews de novo the issue whether the judge at the revocation hearing was impartial. *State v. Herrmann*, 2015 WI 84, ¶ 23, 364 Wis. 2d 336, 867 N.W.2d 772; *State v. Goodson*, 2009 WI App 107, ¶ 7, 320 Wis. 2d 166, 771 N.W.2d 385.

3. This Court reviews de novo the issue of statutory construction whether Wis. Stat. § 971.17(3)(e) allowed the

trial court to consider a psychologist's reports discussing Klapps's mental health history and his past performance both while institutionalized and out on conditional release when assessing his present dangerousness. *State v. Denny*, 2017 WI 17, ¶ 46, 373 Wis. 2d 390, 891 N.W.2d 144.

4. This Court's decision whether to grant a new trial in the interest of justice under Wis. Stat. § 752.35, either because the real controversy was not fully tried or there was a miscarriage of justice, is discretionary. *Vollmer v. Luety*, 156 Wis. 2d 1, 17–21, 456 N.W.2d 797 (1990). This Court independently reviews the record before making the discretionary determination whether a new trial is warranted in the interest of justice. *State v. Williams*, 2006 WI App 212, ¶ 12, 296 Wis. 2d 834, 723 N.W.2d 719.

## I. Klapps procedurally defaulted his right to appellate review of his judicial bias claim by not seeking postdisposition review in the trial court and forfeited his judicial bias claim by not objecting at the revocation hearing.

Klapps argues that he was denied due process of law because Judge Woldt was objectively biased against him. This occurred, he maintains, when Judge Woldt considered Dr. Hauer's reports discussing his mental health history and performance while institutionalized and on conditional release between 2015 and 2018, Klapps maintains that Judge Woldt was only permitted to consider the specific alleged violations that occurred during his conditional release in late 2018 and early 2019 about which Patrick Woodbridge testified at the revocation hearing. (Klapps's Br. 11–19).

Klapps openly admits, however, that he did not object to the trial court's consideration of Dr. Hauer's reports at the hearing. (Klapps's Br. 17). Klapps acknowledges that he "forfeited" the arguments that the Department failed to disclose evidence or that he was denied the right to confront

his accusers (presumably Dr. Hauer) at the revocation hearing. (Klapps's Br. 13 n.2.) Klapps also failed to object on the ground, presented for the first time here, that the trial court could not take judicial notice of Dr. Hauer's reports even though they were already in the record and their existence was presumably known to him and his attorney from the prior proceedings. (Klapps's Br. 19–20.) Finally, Klapps failed to seek post-disposition review of the revocation order in the trial court before appealing that order to this Court.

### A. Klapps procedurally defaulted his right to appellate review by not first moving for postdisposition relief in the trial court.

Although Klapps filed a notice of intent to seek postdisposition review in the trial court, (R. 198), he failed to do so. Rather, he appealed directly from the revocation order without first seeking relief in the trial court. (R. 199.)

Before appealing the revocation order to this Court, Klapps was required to first seek postdisposition review of that order in the trial court to give it the first opportunity to correct the alleged error of its ways. As provided in Wis. Stat. § 971.17(7m):

> MOTION FOR POSTDISPOSITION RELIEF AND APPEAL. (a) A motion for postdisposition relief from a final order or judgment by a person subject to this section shall be made in the time and manner provided in ss. 809.30 to 809.32. An appeal by a person subject to this section from a final order or judgment under this section or from an order denying a motion for postdisposition relief shall be taken in the time and manner provided in ss. 808.04(3) and 809.30 to 809.32. *The person shall file a motion for postdisposition relief in the circuit court before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised.*

Wis. Stat. § 971.17(7m).

This subsection was created by 2009 Wis. Act 26. It mirrors Wis. Stat. § 974.02(2) and Wis. Stat. § (Rule) 809.30(2)(h). "The person shall file a motion for postconviction or postdisposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised." Wis. Stat. § (Rule) 809.30(2)(h).

Like its criminal law counterparts, this subsection unequivocally required Klapps to file a motion for post-disposition relief in the trial court before he could appeal the revocation order. *See State v. Monje*, 109 Wis. 2d 138, 151, 325 N.W.2d 695 ("This court has adopted a policy of encouraging the trial court to correct errors before appeal is taken."), *reconsideration denied,* 327 N.W.2d 641 (Wis. 1982); *State ex rel. Rothering v. McCaughtry,* 205 Wis. 2d 675, 678 n.3, 556 N.W.2d 136 (Ct. App. 1996); *see also Coffee*, 2020 WI 1, ¶¶ 31, 41 ("[W]hile an objection may be the best practice, a postconviction motion is also a timely manner in which to assert that claim. . . . We note that the postconviction court had the opportunity to address this issue.").

Klapps's judicial bias challenge, raised for the first time here, was not "previously raised" and is not a challenge to the sufficiency of the evidence. Had Klapps filed a post-disposition motion, the trial court could have directly addressed the judicial bias claim, reopened the hearing and ordered Dr. Hauer to testify, allowed Klapps to supplement the record with additional evidence, ordered an independent evaluation, or provided a justifiable basis for its reliance on Dr. Hauer's reports. Klapps deprived the trial court of that opportunity before coming into this Court. By so proceeding, Klapps has procedurally defaulted his right to appellate review of his judicial bias claim. *See Martinez v. Ryan*, 926 F.3d 1215, 1223–26 (9th Cir. 2019); *Greer v. Minnesota*, 493 F.3d 952, 957–58 (8th Cir. 2007) (upholding on federal habeas corpus review state court rulings that the petitioners procedurally defaulted judicial bias claims by not properly

seeking state postconviction review); *see also Pinno v. Wachtendorf*, 845 F.3d 328, 330–31 (7th Cir. 2017) (upholding on federal habeas corpus review the Wisconsin Supreme Court's determination that the petitioner forfeited his public trial challenge by not objecting).

### B. Klapps forfeited his constitutional challenge by not objecting at the revocation hearing.

Klapps did not object when the trial court referenced Dr. Hauer's reports at the revocation hearing. Failure to object at trial generally precludes appellate review of a claim, even a claim of a structural constitutional violation. *State v. Pinno*, 2014 WI 74, ¶¶ 55–66, 356 Wis. 2d 106, 850 N.W.2d 207 (claimed denial of the structural public trial right at voir dire was forfeited by failure to timely object), *cert. denied, Pinno v. Wisconsin,* 574 U.S. 1062 (2014); *State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis. 2d 486, 611 N.W.2d 727. Double jeopardy challenges also may be waived or forfeited. *United States v. Broce*, 488 U.S. 563, 570–74 (1989); *see State v. Kelty*, 2006 WI 101, ¶¶ 2, 19–26, 28–30, 34, 38–42, 52, 294 Wis. 2d 62, 716 N.W.2d 886 (a guilty plea waives any double jeopardy challenge in a case where further fact-finding is needed). A multiplicity challenge is also waived by the failure to timely object. *State v. Koller*, 2001 WI App 253, ¶¶ 41–44, 248 Wis. 2d 259, 635 N.W.2d 838.

"The forfeiture rule fosters the fair, efficient, and orderly administration of justice." *Coffee*, 2020 WI 1, ¶ 19. To properly preserve an objection for review, the litigant must "articulate the specific grounds for the objection unless its basis is obvious from its context. . . . so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." *State v. Agnello*, 226 Wis. 2d 164, 172–73, 593 N.W.2d 427 (1999) (citations omitted).

Application of the forfeiture rule encourages timely objections which will give the trial court notice of the error and the opportunity to correct it, thereby avoiding an unnecessary appeal. *Coffee*, 2020 WI 1, ¶ 19. It also prevents "sandbagging." *Id.* (citation omitted).

This Court may only address waived or forfeited errors under its discretionary reversal authority set out at Wis. Stat. § 752.35, *State v. Beasley*, 2004 WI App 42, ¶ 17 n.4, 271 Wis. 2d 469, 678 N.W.2d 600; or in the form of a challenge to the effective assistance of trial counsel for not objecting, with the burden of proving both deficient performance and actual prejudice squarely on the defendant. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910–13 (2017); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Coffee*, 2020 WI 1, ¶ 22; *Pinno*, 356 Wis. 2d 106, ¶¶ 81–86.

Klapps forfeited his judicial bias challenge by not objecting. *See Pinno*, 845 F.3d at 330–31 (forfeiture of public trial violation claim by not objecting at trial). This is so even assuming the judicial bias claim is deemed structural error. *Id.*; *Pinno*, 356 Wis. 2d 106,¶¶ 55–66.

Klapps maintains that a judicial bias claim is somehow different from other structural errors that can be forfeited but he does not adequately explain why. (Klapps's Br. 17–19.) It is important to note that Klapps does not argue that judge Woldt was *actually* biased against him at the hearing; only that Judge Woldt was *potentially* biased because his reliance on Dr. Hauer's reports created the *appearance* of bias. *Cf. State v. Carprue*, 2004 WI 111, ¶¶ 57–58, 274 Wis. 2d 656, 683 N.W.2d 31 (the defendant claimed he had "a biased judge" and argued that the trial judge "was not impartial"). Klapps alleged only that Judge Woldt's decision "created an appearance of bias that revealed a great risk of actual bias." (Klapps's Br. 13–14.)

Klapps relies on *Carprue* to argue that his claim of the appearance of judicial bias cannot be forfeited because it is structural error. The subsequent decisions by the United States Supreme Court in *Weaver* and by the Wisconsin Supreme Court in *Pinno* defeat that argument. The claim can only be reviewed in the form of a challenge to the effective assistance of trial counsel for not objecting. *Weaver*, 137 S. Ct. at 1910–13. If, on the other hand, Klapps had shown after the fact that Judge Woldt was actually biased against him (because of proven racial or ethnic bias, a monetary interest in the outcome, a personal relationship with the victim or the victim's family, or a personal vendetta against Klapps) it would be reasonable to hold that he did not forfeit the actual bias claim by failing to object especially if proof of the judge's actual bias came to light after the hearing. That was plainly not the case here. The claim here is only that there was the potential for actual bias based on the judge's reliance on Dr. Hauer's reports at the hearing. As with other structural trial errors, Klapps was required to timely bring this matter to the trial court's attention when it arose. He did not. He also did not even bring it to the court's attention on postdisposition review. Klapps does not argue that he was unaware of Dr. Hauer's reports or that they were inaccurate. *Cf. Coffee*, 2020 WI 1, ¶ 31 ("[T]he forfeiture rule does not apply to previously unknown, inaccurate information first raised by the State at sentencing.").

Finally, Klapps does not argue that his attorney was ineffective for failing to interpose a judicial bias objection. *See Pinno*, 356 Wis. 2d 106, ¶¶ 81–82; *Carprue*, 274 Wis. 2d 656, ¶ 47 (when there is a failure to object, the alleged error is normally addressed in the form of a challenge to trial counsel's effectiveness). This Court should, therefore, affirm without reaching the merits of his constitutional challenge.

## II. Klapps failed to prove the appearance of judicial bias because the trial judge as fact-finder properly considered Dr. Hauer's reports when assessing Klapps's present dangerousness.

Klapps argues that he was denied due process because Judge Woldt's consideration of Dr. Hauer's reports created the appearance of judicial bias. "Specifically, the circuit court's statement of reasons for granting the state's petition to revoke conditional release created an appearance of bias that revealed a great risk of actual bias, and that appearance of bias violated Klapps's due process right to an impartial decision maker." (Klapps's Br. 13–14.)

Klapps's judicial bias claim is to say the least a stretch. It conflates the routine act of judicial fact-finding and decision-making with judicial animus. Because trial Judge Woldt ruled against Klapps resulting in revocation of his conditional release, so the argument goes, this must mean that Judge Woldt was biased against him. This argument is wrong as a matter of law and plain common sense. Moreover, Judge Woldt only did what the law allowed him to do when he considered Dr. Hauer's reports.

### A. Judge Woldt was allowed to consider Klapps's crimes, his past performance, and his mental health history as reflected in Dr Hauer's reports.

Underlying Klapps's judicial bias claim is his apparent argument that Judge Woldt was prohibited from considering Dr. Hauer's reports at all. The governing statutes and case law plainly allowed Judge Woldt to consider those reports because they provided information relevant to the assessment of Klapps's present dangerousness under Wis. Stat. § 971.17.

The issue here is not one of judicial bias. It is one of statutory construction. After the initial commitment hearing, upon a finding of not guilty by reason of mental disease or

defect, "[i]n determining whether commitment shall be for institutional care or conditional release, the court may consider, *without limitation because of enumeration, the nature and circumstances of the crime, the person's mental history* and present mental condition." Wis. Stat. § 971.17(3)(a). A person found guilty of a crime but not guilty by reason of mental disease or defect, "has been found to have committed all the requisite elements of a criminal offense. His or her mental instability raises a legitimate concern for societal safety and signals a risk of the commission of additional anti-social acts." *State v, Mahone*, 127 Wis. 2d 364, 370, 379 N.W.2d 878 (Ct. App. 1985).

The same broad considerations are relevant at a hearing held in response to a petition for conditional release when the court considers whether to continue institutional care or order the conditional release of the committed person. Wis. Stat. § 971.17(4)(d). "Again, making that determination, the court considers the same factors as it did with the initial commitment, such as the nature of the crime and that person's history of mental illness to inform its determination." *State v. Wood*, 2010 WI 17, ¶ 37, 323 Wis. 2d 321, 780 N.W.2d 63. These considerations "taken together, create at least an implicit finding of dangerousness, if not an express finding," and they "continue to be present until they are changed or upset." *Id*. ¶ 38. This is a "non-exhaustive list of factors . . . that the court *may*, but is not required to, consider in determining dangerousness." *State v. Randall*, 2011 WI App 102, ¶ 16, 336 Wis. 2d 399, 802 N.W.2d 194.

The issue to be decided at Klapps's 2019 revocation hearing was also one of present dangerousness. *Mahone*, 127 Wis. 2d at 375. "In other words, the focus of the inquiry at any stage of post-commitment proceedings under sec. 971.17, Stats., is properly upon the concept of dangerousness." *Id*. at 376. Dr. Hauer's reports were relevant to the court's assessment of Klapps's present dangerousness because they

chronicled his mental health history and his past performance both while institutionalized and while conditionally released when assessing whether he could be safely released into the community and, if so, under what conditions. (R. 115; 120; 127; 165; 173.)

Klapps may argue that his crimes, mental health history and past behavior in the institution and on conditional release are irrelevant at a revocation hearing because, unlike in Wis. Stat. § 971.17(3)(a) and (4)(d), there is no language in Wis. Stat. § 971.17(3)(e) that expressly allows the court to consider "without limitation" the crimes that resulted in commitment and the individual's "mental history." But subsection (3)(e) is, like its counterparts at subsections (3)(a) and (4)(d), a subsection of Wis. Stat. § 971.17. All three subsections of that statute are concerned with assessing the person's present dangerousness. *Mahone*, 127 Wis. 2d at 376.

When construing a statutory provision such as section 971.17(3)(e), this Court must consider the meaning of that provision in the context of the entire statute and related sections. *Peterson v. Volkswagen of Am., Inc.*, 2005 WI 61, ¶ 19, 281 Wis. 2d 39, 697 N.W.2d 61; *State v. Matthew A.B.*, 231 Wis. 2d 688, 708, 605 N.W.2d 598 (Ct. App. 1999).

What distinguishes subsection (3)(e) from the other two pertinent subsections of Wis. Stat. § 971.17 is its requirement that the Department prove "by clear and convincing evidence that any rule or condition of release has been violated, or that the safety of the person or others requires that conditional release be revoked." Nothing in subsection (3)(e), however, prohibits the court from also considering other relevant information of record beyond the specific alleged violations when determining present dangerousness. Nothing in subsection (3)(e) prohibits the court from considering the nature of the crimes that led to the initial commitment, the individual's mental health history, or his past performance while institutionalized and on conditional release. Indeed, the

alleged violation of a "rule or condition of release" and "the safety of the person or others," cannot be accurately assessed in a vacuum. Presumably, the "rule or condition of release" was imposed at least in part in response to the initial commitment order, the person's mental health history, as well as his past performance while institutionalized and on conditional release. When assessing the risk to "the safety of the person or others," the court must necessarily look into the nature of the crimes, the person's mental health history, and his past performance while institutionalized and released, along with the new alleged rules violations, to accurately assess the gravity of the present risk to himself and the public. "[P]ast violence is relevant to a finding of current dangerousness. . . . Indeed, where a person's past acts of violence were products of mental illness, consideration of the nature and seriousness of those past violent crimes is vital to assessing the level of danger posed when the mental illness is untreated." *Wood*, 323 Wis. 2d 321, ¶ 45. When assessing "present dangerousness" for purposes of court-ordered medication under Wis. Stat. § 971.17(3)(c), the Wisconsin Supreme Court chronicled the individual's crimes that led to his initial commitment, his performance while committed, and his mental health history, including that "each of the seven petitions for conditional release that Wood filed during his time at Mendota failed, chiefly because of evidence that he remains a risk." *Wood*, 323 Wis. 2d 321, ¶ 50.

Those same broad considerations are every bit as relevant to the decision whether to revoke conditional release as they are to the initial commitment decision and to the decision whether to order conditional release after commitment. In all three situations, the court as fact-finder must determine whether the individual is presently dangerous to a degree that he must be institutionalized upon a finding of not guilty by reason of mental disease or defect, Wis. Stat. § 971.17(3)(a); must remain institutionalized after

commitment in response to a petition for conditional release, Wis. Stat. § 971.17(4)(d); or must be re-institutionalized after conditional release in response to a petition to revoke conditional release, Wis. Stat. § 971.17(3)(e).

When revocation is ordered, the person is re-committed "until the expiration of the commitment *or until again conditionally released under this section*." Wis. Stat. § 971.17(3)(e). Assuming Klapps again petitions for conditional release "under this section," he would again proceed under Wis. Stat. § 971.17(4)(d) and the court could again consider a variety of factors including "without limitation" the nature of his crimes, his "mental history," and his past performance while institutionalized and conditionally released.[3] It would make no sense to prohibit the court from considering these same factors when deciding whether to order revocation, but then once again allow the court to consider those factors when later deciding whether to order conditional release after this most recent revocation. That would be an absurd reading of Wis. Stat. § 971.17 in general, and of Wis. Stat. § 971.17(3)(e) in particular. The courts must avoid a construction of the statute that would produce an unreasonable or absurd result. *State v. Kittilstad*, 231 Wis. 2d 245, 260, 603 N.W.2d 732 (1999).

Dr. Hauer's reports from 2015 through 2018 discussed all of these relevant factors in assessing Klapps's dangerousness. The trial court could properly take judicial notice of these reports because they were in the trial court record and their existence was known to Klapps. The existence of the reports is also "not subject to reasonable dispute" because their existence was "capable of accurate and ready determination by resort to sources whose accuracy

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[3] Klapps has in fact filed another petition for conditional release which is now pending. (R. 201.) Judge Woldt has ordered that he be examined by Dr. Kevin Miller. (R. 202.)

cannot reasonably be questioned"; here, Klapps's commitment and conditional release files at the Department and the trial court records in these consolidated cases. Wis. Stat. § 902.01(2)(b). Even if one could debate whether these reports are the kind of documents of which a court could take judicial notice, (Klapps's Br. 19–20), or might be hearsay, Klapps forfeited any challenge to their admissibility by not objecting at the hearing and by not pursuing the issue of admissibility on postdisposition review in the trial court before appealing. In any event, the formal rules of evidence do not apply at a revocation hearing. *Mahone*, 127 Wis. 2d at 372. These reports were properly considered under the authority of Wis. Stat. § 971.17. The trial court properly considered Dr. Hauer's reports regarding Klapps's dangerousness in 2015–18 to assist it in assessing his present dangerousness in March 2019.[4]

### B. Klapps has proven only that Judge Woldt ruled against him and he disagrees with that ruling.

Klapps has proven nothing more than his dissatisfaction with the outcome and with Judge Woldt's decision to consider Dr. Hauer's reports, along with the testimony at the hearing, as support for his decision to revoke.

A claim of judicial bias "must be based upon something other than rulings in the case." *Berger v. United States*, 255 U.S. 22, 31 (1921). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). The alleged judicial bias "must stem from an extrajudicial source and result in an

[4] Klapps also had the right to insist on an independent psychological evaluation "at any hearing under this section," including at his revocation hearing, regardless of whether the court considered Dr. Hauer's reports. Wis. Stat. § 971.17(7)(c). Klapps did not exercise that right.

opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp*, 384 U.S. 563, 583 (1966); *see, e.g.*, *Rockwell v. Palmer*, 559 F. Supp. 2d 817, 832 (W.D. Mich. 2008); *Alley v. Ball*, 101 F. Supp. 2d 588, 634–37 (W.D. Tenn. 2000). Furthermore, "absent a pervasive and perverse animus . . . a judge may assess a case and potential arguments based on what he or she knows from the case in the course of the judge's judicial responsibilities." *State v. Rodriguez*, 2006 WI App 163, ¶ 36, 295 Wis. 2d 801, 722 N.W.2d 136 (citing *Liteky*, 510 U.S. at 555).

Klapps concedes that his hearing "comported in many ways with the minimum requirements of due process." (Klapps's Br. 13.) Klapps received reasonable notice of the revocation hearing. Wis. Stat. § 971.17(7)(a). At the hearing, Klapps was afforded his statutory rights to counsel, to remain silent, to cross-examine the witness who testified for the Department, to present his own witnesses, and to have the hearing transcribed. Wis. Stat. § 971.17(7)(b)(1)–(4). He also had the right to an independent psychological evaluation. Wis. Stat. § 971.17(7)(c). Klapps does not claim that he was denied any of those rights.

As required by Wis. Stat. § 971.17(3)(e), the trial judge, not a jury, served as the fact-finder at Klapps's revocation hearing. Judge Woldt was required to determine whether the Department proved "by clear and convincing evidence that any rule or condition of release has been violated, or that the safety of the person or others requires that conditional release be revoked." Wis. Stat. § 971.17(3)(e). "The court shall hear the petition . . . . If the court determines after hearing that any rule or condition of release has been violated, or that the safety of the person or others requires that conditional release be revoked, it may revoke the order for conditional release . . . ." *Id.* Judge Woldt ruled that the Department proved its case and he ordered revocation. Klapps does not

argue that the evidence was insufficient to support that decision.

Judge Woldt did nothing more than find the facts in favor of the Department and against Klapps. If that amounts to judicial bias in violation of the Due Process Clause of the United States Constitution, then any judge who acts as fact-finder in a trial to the court or at any other fact-finding hearing is as a matter of law objectively biased in favor of the prevailing party and against the losing party. The result, according to Klapps, must be a new court hearing/trial for the losing party before another judge who no doubt will also be accused of bias if he again rules against the same party. That, obviously, is not the law.

### C. Judge Woldt was not objectively biased against Klapps.

#### 1. The law applicable to a judicial-bias challenge

Klapps had the due process right to a fair revocation hearing before an impartial judge. *Herrmann*, 364 Wis. 2d 336, ¶ 25; *Pinno*, 356 Wis. 2d 106, ¶ 92; *Goodson*, 320 Wis. 2d 166, ¶¶ 7–8. "A fair hearing before a fair and unbiased adjudicator is a basic requirement of due process under the Fourteenth Amendment." *Alston v. Smith*, 840 F.3d 363, 368 (7th Cir. 2016) (citing *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)).

A due process violation is proven only on rare occasions such as when the adjudicator has a pecuniary interest in the outcome or has been the target of abuse or criticism by a party. *Withrow*, 421 U.S. at 47; *see Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) ("We have thus identified only *two* situations in which the Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case,

and when the judge is presiding over certain types of criminal contempt proceedings."); *see also Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016) ("When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome."). "Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level." *Williams*, 136 S. Ct. at 1910.

It is assumed that the judge whose impartiality is being challenged is a person "of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Withrow*, 421 U.S. at 55 (citation omitted). To prove a due process violation, the party claiming judicial bias must overcome the strong presumption that the adjudicator acted honestly and with integrity. *Id.* at 47. The legal presumption against judicial bias can be rebutted with proof of an appearance of bias that "reveals a great risk of actual bias." *Herrmann*, 364 Wis. 2d 336, ¶¶ 3, 67.

The Due Process Clause sets the outer constitutional boundaries for "extreme circumstances"; most instances of alleged judicial bias do not rise to a constitutional level. *Pinno*, 356 Wis. 2d 106, ¶ 94 (citing *Caperton*, 556 U.S. at 884, 886–87). "A fundamental principle of our democracy is that judges must be perceived as beyond price. . . . [I]n limited situations the appearance of bias can offend due process." *Herrmann*, 364 Wis. 2d 336, ¶ 40. "When the appearance of bias reveals a great risk of actual bias, the presumption of impartiality is rebutted, and a due process violation occurs." *Id.* ¶ 46. "[I]t is not reasonable to question a judge's impartiality unless one can prove by objective evidence that actual bias or the probability of a serious risk of actual bias

exists." *Id.* ¶ 113 (Ziegler, J., concurring). "Such circumstances are exceedingly rare." *Id.* ¶ 115. There is a rebuttable presumption, however, that the trial judge "acted fairly, impartially, and without prejudice." *Id.* ¶ 24 (plurality opinion); *Goodson*, 320 Wis. 2d 166, ¶ 8. The party claiming judicial bias bears the burden of proving bias by a preponderance of the evidence. *Herrmann*, 364 Wis. 2d 336, ¶ 24.

There are subjective and objective tests for determining whether the presumption of judicial impartiality has been rebutted and the due process right to trial by an impartial decision-maker has been violated. *Herrmann*, 364 Wis. 2d 336, ¶ 26. The subjective test asks the judge to make his or her own determination whether he or she is actually biased. *See id.* The objective test asks whether the judge's impartiality "can reasonably be questioned." *Id.* (quoting *State v. Rochelt*, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Ct. App. 1991)); *see also State v. Gudgeon*, 2006 WI App 143, ¶ 21, 295 Wis. 2d 189, 720 N.W.2d 114 ("[T]he objective test, asks whether a reasonable person could question the judge's impartiality."). The objective test may be satisfied by proof of actual bias or apparent bias. *Gudgeon*, 295 Wis. 2d 189, ¶¶ 21–23; *State v. Neuaone*, 2005 WI App 124, ¶ 16, 284 Wis. 2d 473, 700 N.W.2d 298.

The issue under the objective test is "whether a reasonable person could conclude that the trial judge failed to give the defendant a fair trial." *Herrmann*, 364 Wis. 2d 336, ¶ 27. Klapps must prove that there was "a serious risk of actual bias," or synonymously, "a 'great' risk of actual bias." *See id.* ¶ 35 & n.2 (quoting *Gudgeon*, 295 Wis. 2d 189, ¶ 23). "The inquiry as to whether such a probability exists is an objective one." *Alston*, 840 F.3d at 368. The issue, pertinent here, is whether the average judge in the position of Judge Woldt was likely to be neutral, or whether there was a

potential for bias sufficiently strong to overcome the presumption of honesty and integrity. *Id.*

**2. Klapps failed to prove an appearance of bias.**

Presumptive bias sufficient to establish a due process violation occurs in only three situations: (1) when the judge has a direct personal and pecuniary interest in the outcome; (2) when the judge "has been the target of personal abuse or criticism" by a party; or (3) when the judge functions in the "dual role of investigating and adjudicating the case." *Richardson v. Quarterman*, 537 F.3d 466, 475 (5th Cir. 2008) (citation omitted). Klapps's case involved none of those limited situations.

Judge Woldt did not have a "direct, personal, substantial pecuniary interest" in the outcome of Klapps's case. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). He did not suffer abuse or come under criticism or personal attack by any party to the proceeding. He was not involved in any investigative activity regarding Klapps's case beyond the routine task of reviewing the record before him in accordance with Wis. Stat. § 971.17. Judge Woldt did not adjudicate a contempt of court proceeding against Klapps. *See Caperton,* 556 U.S. at 876–81. He did not function as a "one-man grand jury." *Id.* at 880 (quoting *In re Murchison*, 349 U.S. 133, 133 (1955)); *see Herrmann*, 364 Wis. 2d 336, ¶ 46; *Pinno*, 356 Wis. 2d 106, ¶ 94. He did not hold "a pervasive and perverse animus" toward Klapps. *Rodriguez*, 295 Wis. 2d 801, ¶ 36.

In *Herrmann*, the Wisconsin Supreme Court rejected a judicial bias challenge based on the judge's remarks when she exercised sentencing discretion. *Herrmann*, 364 Wis. 2d 336, ¶ 68. The defendant in *Herrmann* drove drunk in 2011 and crashed into another car, killing one young woman and seriously injuring four other young women. *Id.* ¶ 5. At sentencing, the judge revealed that her sister and three other

young women had been killed by a drunk driver in 1976. *Id.* ¶ 16. One woman survived. *Id.* The judge said she thinks about that tragedy every day. *Id.* She could understand the pain suffered by the victims and their families, and she advised them that whatever sentence she imposes will not alleviate their pain. *Id.* ¶ 17. The judge also lamented society's culture of alcohol consumption and driving while drunk. *Id.* ¶¶ 13–14. The crash was indicative of society's lax attitude toward drinking and driving. *Id.* ¶ 18. She cited the history of alcohol abuse in the defendant's family that contributed to his abuse of alcohol. *Id.* ¶ 15. The judge imposed consecutive sentences totaling 31 years of initial confinement followed by 40 years of extended supervision. *Id.* ¶ 20. The court also imposed and stayed a prison sentence of 20 years of initial confinement for a count of hit and run causing death and placed the defendant on probation for 15 years. *Id.*

All seven Wisconsin Supreme Court justices agreed that this was not the "exceptional case" that created "a serious risk of actual bias." *Caperton,* 556 U.S. at 884. Specifically, the plurality opinion held: "We conclude that Herrmann has failed to rebut the presumption of impartiality. When the sentencing court's statements are viewed in context, they do not reveal a great risk of actual bias. Because we determine that no due process violation has been established, we affirm the court of appeals." *Herrmann*, 364 Wis. 2d 336, ¶ 68. "I agree with the bottom line of the lead opinion. On the basis of the facts set out in the lead opinion, I have no difficulty in concluding that the sentencing judge in this case was not biased against the defendant and that a reasonable person, fully apprised of the facts in the record, would not reach a different determination." *Id.* ¶ 69 (Prosser, J., concurring). "I agree with the lead opinion's conclusion that Jesse Herrmann has not shown that the sentencing judge, Judge Ramona A. Gonzalez, was objectively biased in violation of due process." *Id.* ¶ 112 (Ziegler, J., concurring).

Like *Herrmann*, this case does not present that exceedingly rare situation involving "extreme facts [where] the probability of actual bias rises to an unconstitutional level." *Caperton*, 556 U.S. at 886–87. These facts are not "extreme by any measure." *Id.* at 887. The risk of judicial bias was not "too high to be constitutionally tolerable." *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam) (quoting *Withrow*, 421 U.S. at 47); *see also Richardson*, 537 F.3d at 475 (due process violation not proven where the judge's wife "was an acquaintance" of the homicide victim; this "does not come anywhere near to closely resembling the cases in which the Supreme Court has found presumptive bias."); *id.* at 476 (there was no appearance of bias because the judge "did not face a significant temptation to be biased against Richardson").

Klapps relies on the objective test and argues that a reasonable person could question Judge Woldt's impartiality because he referenced Dr. Hauer's reports in assessing his present dangerousness and, in doing so, prejudged him. (Klapps's Br. 15.) No. Judge Woldt did nothing more than rely on the evidence adduced at the hearing and on relevant evidence of record. Judge Woldt had no reason to be biased against Klapps. His mere consideration of Dr. Hauer's written evaluations from early 2015 through 2018 when assessing Klapps's suitability for continued conditional release to the community in early 2019 does not come close to raising the specter of objective judicial bias. It only shows that he properly acted as the fact-finder in assessing Klapps's present dangerousness after considering all relevant information of record at his disposal.

## III. Klapps is not entitled to discretionary reversal.

Klapps argues that he is entitled to a new revocation proceeding before an unbiased judge in the interest of justice. (Klapps's Br. 19–24.) This claim lacks merit because the real

controversy of his present dangerousness was fully and fairly tried.

### A. Klapps must convince this Court that his is the exceptional case that merits discretionary reversal in the interest of justice.

This Court's discretionary reversal power is formidable and should only be exercised in "exceptional cases." *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). Klapps bears the burden of proving by clear and convincing evidence that justice miscarried. *State v. Williams*, 2000 WI App 123, ¶ 17, 237 Wis. 2d 591, 614 N.W.2d 11.

This Court may not even consider whether to grant discretionary reversal until after it has determined that all other challenges to the conviction are without merit and, even without any other meritorious ground for relief, this is the rare "exceptional case" that warrants discretionary reversal. *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258 (citation omitted).

A court also may not grant discretionary reversal until after it has balanced the compelling state interests in the finality of convictions and proper procedural mechanisms against any factors favoring discretionary reversal. *State v. Henley*, 2010 WI 97, ¶ 75, 328 Wis. 2d 544, 787 N.W.2d 350.

### B. Klapps is not entitled to discretionary reversal for something so insignificant that it did not stir him to object or seek postdisposition relief in the trial court.

Klapps has fallen far short of proving that this is the exceptional case for discretionary reversal. Though Klapps now claims that the interest of justice demands a new hearing

because the judge was biased, this supposedly grave error did not even stir him or his attorney to object.

Klapps does not challenge the sufficiency of the evidence to support the revocation order. Klapps does not claim that he was unaware of Dr. Hauer's reports or of their findings and conclusions. He does not challenge Dr. Hauer's expertise or the accuracy of his reports. Klapps was afforded all of the statutory procedural protections provided at Wis. Stat. § 971.17(7)(a)–(c). Klapps received a fair hearing at which he was able to confront and cross-examine his caseworker who testified for the Department about the specific allegations that prompted the petition to revoke. Klapps had the opportunity to present his own witnesses and to demand an independent psychological evaluation but chose not to do so. Klapps does not claim that his trial attorney performed deficiently when he did not object to the court's consideration of Dr. Hauer's reports.

Granting a new hearing would be pointless. The Department would simply call Dr. Hauer as a witness and introduce his reports. The result would be the same. Finally, this could all be rendered moot soon depending on the outcome of Klapps's latest petition for conditional release now pending before Judge Woldt. (R. 201.)

The following statement best describes Klapps's request to be awarded a new revocation hearing based only on his claim that Judge Woldt should not have considered Dr. Hauer's reports. "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). It would be an erroneous exercise of discretion for this Court to reverse for the flimsy reasons Klapps offers.

## CONCLUSION

This Court should affirm the revocation order.

Dated this 15th day of January, 2020.

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 7,169 words.

Dated this 15th day of January, 2020.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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. Stat. § (Rule) 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 15th day of January, 2020.

_____
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