STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case Nos. 2019AP001753-CR & 2019AP001754-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BENJAMIN J. KLAPPS,

Defendant-Appellant.

On Appeal from an Order Revoking
Conditional Release under Wis. Stat. § 971.17(3)(e)
Entered in Winnebago County Circuit Court,
Judge Scott C. Woldt, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

United States Code

Wisconsin Statutes

OTHER AUTHORITIES CITED

ARGUMENT

Klapps is entitled to a new revocation hearing.

A. The circuit court's reliance on previously filed reports from psychologist Allen Hauer show the court was objectively biased.

1. This court should address the merits of Klapps's bias claim.

"A fair trial in a fair tribunal is a basic requirement of due process." *State v. Carprue*, 2004 WI 111, ¶59, 274 Wis. 2d 656, 683 N.W.2d 31 (quoted source omitted). Having a biased judge preside at a hearing and make a decision violates due process and "such error could not be waived[.]" *Id.*, ¶57. Thus, the state's arguments that this claim of error is defaulted or forfeited should be rejected.

First, relying on federal habeas cases to interpret Wis. Stat. § 971.17(7m)(a), the state argues that Klapps has procedurally defaulted his due process judicial bias claim by not filing a postdisposition motion. (State's brief at 5-7). Procedural default under the federal habeas statute has no bearing on state procedure, so the state's reliance on the federal cases is wholly inapt.

Further, there are no cases finding procedural default under § 971.17(7m) in a case where the appeal raises a fundamental due process error that cannot be waived. And for good reason. A judicial bias claim presents a question of law decided by this court independently based on the record of the proceeding at issue. *State v. Goodson*, 2009 WI App 107, ¶7, 320 Wis. 2d 166, 771 N.W.2d 385. A postdisposition hearing can add nothing to the record bearing on the issue.

The flaw in the state's argument is evident from its claim (brief at 6) that a postdisposition motion would have given the circuit court the opportunity to address the error by reopening the hearing to take additional testimony, allowing Klapps to supplement the record with additional evidence, ordering an independent evaluation, or providing a justifiable basis for its reliance on Hauer's reports. Those are not the remedies for a judicial bias claim; instead, the remedy is a new hearing before a different judge. *Goodson*, 320 Wis. 2d 166, ¶18. Prevailing at a postdisposition hearing would mean the same remedy, and this court is in the same, if not better, position to review the bias question as the circuit court.

Second, the state argues Klapps forfeited his bias claim by not raising it at the revocation hearing. (State's brief at 7-9). Klapps addressed forfeiture in his brief-in-chief (at 17-19), relying on *Carprue*. The state argues *Weaver v. Massachusetts*, 137 S. Ct.

1899 (2017), and *State v. Pinno*, 2014 WI 74, 356 Wis. 2d 106, 850 N.W.2d 207, defeat Klapps's reliance on *Carprue*. Not so. Both *Weaver* and *Pinno* involve the defendant's failure to object to the closure of the courtroom as a violation of the right to public trial. While that, like the denial of an impartial judge, is a structural error, the right to a public trial, *unlike* the right to an impartial judge, is subject to exceptions. *Weaver*, 137 S. Ct. at 1907-08; *Pinno*, 356 Wis. 2d 106, ¶¶56-63. Violation of the right to a public trial does not automatically "infect the entire … process" or "render a [proceeding] fundamentally unfair the way a biased tribunal does. *State v. Gudgeon*, 2006 WI App 143, ¶9, 295 Wis. 2d 189, 720 N.W.2d 114 (quoted source omitted). Indeed, while *Weaver* was addressing whether a defendant needed to show prejudice for counsel's failure to object to a structural error to prevail on an ineffective assistance of counsel claim, it did so "specifically and *only* in the context of trial counsel's failure to object to the closure of the courtroom during jury selection." *Weaver*, 137 S. Ct. at 1907 (emphasis added).

Contrary to the state (brief at 8), it does not matter that Klapps's bias claim involves the appearance of bias rather than actual bias. Either one violates a litigant's right to due process. "[A]ctual bias—either its presence, or the great risk of it—is the underlying concern of objective bias analysis[,]" *Goodson*, 320 Wis. 2d 166, ¶14, and a judge's conduct may demonstrate both kinds at the same time, *id.* ¶¶13, 15-16. And Klapps need not show he was unaware of Hauer's reports or that they were

inaccurate. That imposes a harmless error analysis that has been expressly rejected by the case law. *Gudgeon*, 295 Wis. 2d 189, ¶9.

2. The circuit court improperly considered Hauer's reports.

Citing Wis. Stat. § 971.17, the state argues the circuit court could properly consider Hauer's reports at the revocation hearing. Specifically, the state relies on § 971.17(3)(a) and (4)(d), which provide that in deciding whether to order conditional release either at the time of original commitment or at the time a committed person petitions for 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, where the person will live, how the person will support himself or herself, what arrangements are available to ensure that the person has access to and will take necessary medication, and what arrangements are possible for treatment beyond medication.

Given this language, the state argues, a judge hearing a petition to revoke conditional release may consider previously filed psychological reports to determine whether revocation is appropriate. (State's brief at 10-14).

The state itself identifies the flaw in this argument—namely, that § 971.17(3)(d), the conditional release revocation statute, does not include language similar to § 971.17(3)(a) and (4)(d) or refer back to those statutes. (State's brief at 12). The fact the legislature used the broad language about what a judge may consider in sub. (3)(a) and (4)(d) but *not* in sub. (3)(d) demonstrates it intended the revocation hearing to be different and, in particular, that it intended the revocation decision not be based on reference to anything and everything in the record. By using different language in related statutes the legislature created different processes for granting conditional release and revoking conditional release once it has been granted. *American Transmission Co., LLC v. Dane County*, 2009 WI App 126, ¶14 n.7, 321 Wis. 2d 138, 772 N.W.2d 731 ("Where the legislature uses similar but different words in a statute, particularly [in] the same section, we presume the legislature intended that the words have different meanings."); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) (canon of "Presumption of Consistent Usage" requires that "a material variation in terms suggests a variation in meaning").

Far from being absurd (state's brief at 14), it makes sense that the legislature intended the revocation process to differ. A person on conditional release has a liberty interest in remaining out of institutional care; a person awaiting commitment or seeking release from institutional care does not.

Thus, § 971.17(3)(c) puts the burden of proof on the state and requires speedy disposition of the revocation petition. Further, the case law imposes the minimum requirements of due process, including notice of the claimed violation, the opportunity to both confront and call witnesses, and "a neutral and detached hearing body…." *State v. Jefferson*, 163 Wis. 2d 332, 337-38, 471 N.W.2d 274 (Ct. App. 1991). These minimum statutory and due process requirements are inconsistent with allowing a court to conduct a wide-ranging, self-directed assessment of the entire record to decide the revocation petition.

The state also claims the circuit court could take judicial notice of Hauer's reports because they were in the court record and their existence was known to Klapps. Sure, the *existence* of the the reports is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so the *existence* of the reports meets the standard under Wis. Stat. § 902.01(2). (State's brief at 14-15). But the court did not just note the reports *existed*; it cited and relied on and adopted their *content*. The content is Hauer's *opinions*. Those are not "facts" capable of accurate and ready determination or not subject to dispute.

Thus, neither § 971.17 nor the judicial-notice rule allowed the circuit court to consider Hauer's opinions. Instead, they had to be admitted as evidence, either through direct testimony from Hauer or the admission of one or more of his reports. The state did not call Hauer as a witness, or even mention

his opinions or argue they were relevant and significant. Had the state done that Klapps would have known that the judge might consider them. As it happened, until the court made its oral ruling and said it relied on "what Dr. Hauer said…." (203:23; A-Ap. 123), no one but the judge knew the looming significance of Hauer's past opinions to the revocation decision.

3. The circuit court was objectively biased.

The state's argument on the substance of the bias claim begins with a claim that Klapps has done nothing but state a disagreement with a ruling the judge made based on the proceedings in the case, which can never exhibit bias. (State's brief at 15-17). Not so. Instead, for the reasons given above, it was improper for the court to look at and rely on them at the revocation hearing. Thus, instead of being information the court properly learned in the course of the proceedings, Hauer's reports were extrajudicial information that caused the court to prejudge the result.

The state next argues that appearance of bias claims can succeed only in narrow circumstances. (State's brief at 17-18). Indeed, citing *Richardson v. Quaterman*, 537 F.3d 466 (5th Cir. 2008), the state asserts it occurs only in "only three situations"—when the judge has a direct personal or pecuniary interest in the outcome of the case; when the judge has been the target of personal abuse or criticism of a

party; or when the judge functions in the dual role of investigating and adjudicating the case. (State's brief at 20).

This is misleading. Federal circuit court decisions are not binding on this court. *State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993). Moreover, *Quarterman* is a habeas case applying the strict standard of federal review of state convictions under 28 U.S.C. § 2254(d)(1), so it is concerned only with scenarios in which the U.S. Supreme Court has clearly established that the appearance of bias violated due process. *Quarterman*, 537 F.3d at 472-74.

As even the state has to admit (brief at 18-21), Wisconsin case law recognizes the test for bias is not nearly so circumscribed. Even in the absence of actual bias, due process is violated when there is an appearance of bias on the judge's part that reveals a great risk of actual bias. *Gudgeon*, 295 Wis. 2d 189, ¶¶20-24; *Goodson*, 320 Wis. 2d 166, ¶¶9, 14. *See also State v. Herrmann*, 2015 WI 84, ¶¶32-46, 364 Wis. 2d 336, 867 N.W.2d 772. The appearance of bias offends due process principles when a reasonable person—taking into consideration human psychological tendencies and weaknesses—would conclude that the average judge could not be trusted to "hold the balance nice, clear and true" under all the circumstances. *Gudgeon*, 295 Wis. 2d 189, ¶¶23-24; *Goodson*, 320 Wis. 2d 166, ¶9. This test for determining whether there was a serious risk of actual bias or prejudgment "can apply to a multitude

of scenarios…." *Herrmann*, 364 Wis. 2d 336, ¶38. Further, *Herrmann* recognized that "[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record[,]" but nevertheless "justice must satisfy the appearance of justice." *Id.*, ¶39 (quoted source omitted).

A judge who appears to have prejudged the facts or outcome cannot decide a case consistent with due process. In *Gudgeon* this court found the appearance of bias violated due process where the judge said in advance of a probation extension hearing that "I want his probation extended." 295 Wis. 2d 189, ¶¶2-3. "The ordinary reasonable person would discern a great risk that the trial court in this case had already made up its mind to extend probation long before the extension hearing took place. Further, nothing in the transcript of the extension hearing would dispel these concerns." *Id.*, ¶26. Similarly, in *Goodson* this court concluded the trial court's statements prior to a reconfinement hearing violated due process because a reasonable person would conclude "that the judge had made up his mind about [the defendant's] sentence before the reconfinement hearing." 320 Wis. 2d 166, ¶13. The court recognized that "'when a judge has prejudged ... the outcome,' the decision maker cannot render a decision that comports with due process." *Id.*, ¶17.

The circuit court's statement of its reasons for revocation demonstrate it had prejudged the outcome based on Hauer's reports:

> Clearly, based upon the nature of the underlying offenses which are sexual in nature, the mental history here with Mr. Klapps -- *and I think this goes back to what Dr. Hauer said -- that really there's nothing you can do with Mr. Klapps. It's not really -- it's more of a there's no mental -- or psychotropic drugs or anything like that can change him. It's more of a personality disorder, and there's nothing we're really going to do to change him. He is a predator, a sexual predator, and all he does is try to prey on people and use predatory skills such as intimidation of people to try to get them to succumb to his predatory instincts which I don't think there's anything we're going to be able to do to change him. That's what Dr. Hauer says*, and from time to time we try to give him another shot on conditional release and within months we're back here with a hearing for withdrawal of the conditional release *because of the predatory instincts taking over once again*.

(203:23; A-Ap. 123 (emphasis added)). This reliance on Hauer's opinion was despite the fact that, as the court itself noted, "the only evidence before this court is that issued [sic] by the -- Mr. Woodridge in this case." (203:23; A-Ap. 123). The court's ready familiarity with Hauer's opinion, most recently expressed in a report filed almost 10 months before the hearing (173:2), shows the court was so struck by the opinion that it stayed in the court's mind or that

the court reviewed Hauer's reports again before or during the hearing.

Further, that Hauer's opinion influenced the court's judgment about the case in advance is evident from the plain language the court used to express it: Klapps "is a predator" and "I don't think there's anything we're going to be able to do to change him." (203:23; A-Ap. 123). This shows the court adopted Hauer's opinion that Klapps is dangerous to others and always will be, and regardless of the evidence actually elicited at the revocation hearing he should not be on conditional release. Just as in *Goodson* and *Gudgeon*, the trial court's statements gave the appearance that it had prejudged the matter and created an appearance of bias that "revealed a great risk of actual bias." *Gudgeon*, 295 Wis. 2d 189, ¶23.

Even if the state were right that the appearance of bias occurs only in one of the three circumstances it lists, the court's conduct in this case falls easily into the third category—the judge functioning in the dual role of investigating and adjudicating the case. Contrary to the state's insistence the judge was reviewing "relevant evidence of record" (brief at 22), the judge's act of reviewing dated expert opinion reports in the court file is not proper given the due process constraints on the revocation process and the question presented at the revocation hearing—Klapps's *current* dangerousness in light of his conduct on conditional release. Instead, the court investigated information beyond the evidence presented at the revocation hearing and

then used the fruits of that investigation to decide the case. This is very much akin to the judge acting both as a one-man grand jury and the presiding jurist at the trial of the same defendant, a scenario which the Supreme Court found violated due process in *In re Murchison*, 349 U.S. 133 (1955).

B. Alternatively, Klapps should be granted a new revocation hearing in the interest of justice.

Responding to Klapps's interest of justice claim, the state argues that a new hearing would be "pointless" because Klapps's hearing comported with statutory and due process requirements, Klapps does not challenge Hauer's opinions, and Klapps could have obtained an independent evaluation but did not. (State's brief at 24). This argument is misguided.

First, whether a new hearing is "pointless" is not the standard. The party seeking a new trial on the ground the real controversy was not tried does not need to show a probable likelihood of a different result on rehearing. *State v. Sugden*, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456.

Second, while Klapps had a hearing and confronted the single witness called by the state, the most important "witness," Hauer, was never called and was not questioned, as contemplated by § 971.17(3)(e) and *Jefferson*.

Third, as to Hauer's "accuracy," he is one expert, with one opinion; others who have examined and treated Klapps have come to less bleak conclusions (*e.g.*, 174:2-4; 179:9; 185:3-4).

Fourth, Klapps's cluelessness that Hauer's opinions would figure heavily in the outcome meant he had no inkling he would need an independent evaluation. Maybe Hauer would testify at a new hearing; at least Klapps can anticipate that and examine him and present alternative testimony.

For these reasons, the state's math is wrong. This is not a case of "zero plus zero." (State's brief at 20). It is a case where a new hearing will give Klapps the chance to know in advance the information the court may rely on in deciding whether to revoke.

CONCLUSION

For the reasons given above and in Klapps's brief-in-chief, this court should reverse the circuit court's order revoking conditional release and remand the case for a new revocation hearing before a different judge.

Dated this 13th day of February, 2020.

Respectfully submitted,

JEFREN E. OLSEN
Assistant State Public Defender
State Bar No. 1012235

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8387
olsenj@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,987 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 13th day of February, 2020.

Signed:

JEFREN E. OLSEN
Assistant State Public Defender