STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2021AP000431-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GRAHAM L. STOWE,

Defendant-Appellant.

On Appeal from an Order Denying Conditional Release and Order Denying Postdisposition Relief, Entered in the Brown County Circuit Court, the Honorable Kendall M. Kelley Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

In April 2019, Mr. Stowe petitioned the circuit court for conditional release from Mendota Mental Health Institute, where he is confined on an NGI commitment. At the outset of the conditional release hearing and before receiving any evidence, the court repeatedly stated that it did not believe Mr. Stowe had made enough progress to be released and encouraged Mr. Stowe to withdraw his petition. The issue presented is:

> Whether the circuit court's comments would cause an objective, reasonable observer to believe that the court prejudged Mr. Stowe's petition for conditional release.

The circuit court answered no.

This Court should answer yes and reverse and remand for a new hearing before a different judge.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. The appeal can be decided by application of well-established law to the facts of the case.

SUMMARY OF ARGUMENT

"[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States*, 463 U.S. 354, 361 (1983) (internal quotation omitted).[1] A State cannot confine a person in a mental institution unless it proves by clear and convincing evidence that person currently meets the conditions for commitment. *Foucha v. Louisiana*, 504 U.S. 71, 77-78 (1992).

To afford Due Process, the Wisconsin Legislature has created a statutory scheme that provides individuals the right to petition the circuit court for conditional release at regular, six-month intervals. Wis. Stat. §971.17(4)(a). The court "shall" grant the petition unless the State proves by clear and convincing evidence that the person poses too great a risk. Wis. Stat. § 971.17(4)(d).

An individual also has a Due Process right to an impartial tribunal, and this right includes a protection against prejudgment. *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d. Here, the court's comments at the outset of Mr. Stowe's hearing would cause an objective, reasonable observer to believe that the court prejudged his petition before hearing the evidence and before holding the State to its burden of proof. Mr. Stowe's request for relief is narrow. He simply requests a new conditional release hearing before a different judge.

[1] Due Process is guaranteed by the Fifth and Fourteenth Amendments. U.S. Const. amend. V; amend. XIV, § 1.

STATEMENT OF THE CASE AND FACTS

In 2005, Mr. Stowe was found NGI after the State stipulated and the court agreed that, due to mental disease or defect, he was not responsible for his criminal conduct. *See* Wis. Stat. § 971.15(1).[2] Mr. Stowe was "delusional and hallucinating" during the offenses. R.43:4.[3] The Brown County Circuit Court, the Honorable Kendall M. Kelley presiding, entered an order committing Mr. Stowe to the Department of Health and Family Services for thirty-nine-and-a-half years. R.47. The court placed Mr. Stowe at Mendota Mental Health Institute. R.48:1.

On April 24, 2019, Mr. Stowe filed a petition for conditional release. *See* Wis. Stat. § 971.17(4)(a). The court appointed Dr. William Schmitt to examine him. R.407. *See* Wis. Stat. § 971.17(4)(c). Dr. Schmitt filed his report on May 31, 2019. R.425. On June 24, 2009, and continuing to the following day, the court held a conditional release hearing. R.543, 544; App.3-64, 65-112. *See* Wis. Stat. § 971.17(4)(d). In a

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[2] Under this provision, "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law." Wis. Stat. § 971.15(1).

[3] The charges were first-degree reckless endangerment, felony intimidation of a victim, false imprisonment (three counts), and bail jumping. R.43:4. The facts of the offense are not relevant to this appeal.

conditional release proceeding, the court "shall grant the petition" unless the State meets its burden to prove by clear and convincing evidence that the person poses a significant risk to self, others, or property if released. *Id.*

At the outset of the conditional release hearing, the court advised Mr. Stowe that based on the examiner's report it did not believe Mr. Stowe had made sufficient progress to be released. In support, the court also referenced this Court's recent decision affirming the denial of Mr. Stowe's prior petition. The court stated:

> But I wanted to invite you to consider the possibility that if you wish to wait to have counsel and continue to progress in the treatment that you're in, on this same petition, there's a possibility that that would work to your advantage.
>
> One of the disadvantages you have now is that some of these changes -- you read the report. You've made good progress, but you haven't had enough time to really get the full benefit of that, or to at least be able to convey that benefit. And so in that sense time would likely be - - if you continue to make the same kind of progress, time would definitely be on your side there.
>
> I think that, in fact, I would - - just recently received another Court of Appeals decision, and it struck me at the time that I thought that those were I hope for you very valuable. The Court of Appeals review[sic] the work that I do; it is a really important function of what we do. If I make

> a mistake, they correct it. That's their job, and that give[sic] me confidence.

R.543:6; App.8. The court continued that, "I just offer the possible observation to you that -- that time, especially if you can continue with some of the treatment that you're in now . . . might be beneficial for you." R.543:7; App.9.

The court acknowledged that there would be additional testimony if the hearing proceeded but the "gist of it is you've made some progress, but, you know, it's a little early to be able to see what that's going to do for you." R.543:7; App.9. The court noted that "we've been at this for awhile [sic]" and suggested, "if you had more time and perhaps even more information about the benefits of the personal counseling and so forth I could see that that would likely accrue to your benefit, from my perspective." R.543:9-10; App.11-12.

The court further noted that Mr. Stowe had returned to his Catholic faith. The court offered a "candid" thought that incarcerated persons will sometimes claim to have had a spiritual awakening but "it's pretty short-lived for them." R:543:10-11; App.12-13. The court said it was "interested in trying to determine if there's a way to quantify that benefit for you" and suggested that, "a priest or some other person" could testify about "any observations" about Mr. Stowe's sincerity. R.543:12-13; App.14-15. To "be a bit more blunt here," the court suggested that if Mr. Stowe "were to have more time" to bring in another witness to "quantify" it, "that would be

helpful." R.543:13-14; App.15-16. The court also noted that Mr. Stowe intended to represent himself, and cautioned him that an attorney could say the exact same things but have more of an effect because it would not sound "self-serving or anything else." R.543:14; App.16. In addition, in the court's opinion, an attorney would be more "accurate." R.543:5; App.7.

While acknowledging that "you're an adult and you can make that decision," the court offered that Mr. Stowe should consider not going forward and instead "come back for review" at a later time. R.543:15; App.17. The court noted that the case had been going on a long time and the court had denied Mr. Stowe release numerous times. As such, it might seem "as though that's personal or something like that. It's really not intended to be." R.543:16; App.18. Ultimately, the court asked Mr. Stowe whether he wanted to get started with the hearing and Mr. Stowe said yes. R.543:16; App.18. The court offered one last time that "to be, again, very candid, I think there are some more positive things that have occurred. I don't know if they've matured yet. But we have been doing this for awhile," but "we'll see." R.543:17; App.19.

The evidentiary portion of the hearing is not relevant to this appeal. After the close of evidence, the parties made arguments. The State argued that the petition should be denied. R.544.17-22 App.19-24. Mr. Stowe, of course, argued in support of his release. R.544:22-28; App.24-30.

The court began its ruling by stating that it had "[m]ade a number of remarks at the outset and the court stands by those, that's why I made them." R.544:28; App.92. The court explained its conclusion that Mr. Stowe should not be released, which it summed up by stating, "I still believe, based on his testimony, based on all of the records that have been here that there remains clear and convincing evidence" that Mr. Stowe was a significant risk of harm to himself or others. R.544:38; App.102. The court then returned to the topic of Mr. Stowe's religious beliefs stating, "you would need to. . . find some resource that might have a way of helping to describe your progress in that setting . . . in a tangible way." R.544:40; App.104. The court suggested that, for future petitions, Mr. Stowe should give the court "additional information," including about "the faith issues." R.544:43; App.107.

A written order denying Mr. Stowe's petition was entered on August 6, 2019. R.433; App.113.

Mr. Stowe filed a motion for postdisposition relief. R.492. As relevant here, he argued that the court's remarks would suggest to a reasonable observer that the court prejudged his petition before the conditional release hearing.[4] The State filed a response to the motion on November 6, 2020. The State acknowledged that it would have been "better practice for the Court to reserve comments about the

[4] Mr. Stowe does not renew on appeal the other claims raised in his motion.

defendant's religious experience or his progress in treatment until after hearing the testimony," but argued that the court's comments did not rise to objective bias. R.507:4.

By written decision and order, the circuit court denied the motion. R.510; App.114-127. The court denied that it was subjectively biased against Mr. Stowe. R.510:9; App.122.[5] In addition, the court concluded that Mr. Stowe misinterpreted its colloquy regarding self-representation and remarks about the history of the case. R.510:4-5; App.117-118. The court stated:

> Just as identifying for Stowe the significance of the history of the case as it regards the pending Petition does not reflect bias or prejudgment, directing the attention of a defendant to the risks and potential pitfalls associated with self-representation (particularly when, historically, Stowe had repeatedly asserted that the process was unjust), does not betray some pre-conceived notion on the part of the Court as to the outcome of the proceeding. Rather, it was an attempt by the Court to caution Stowe regarding the perils of self-representation in a proceeding in which his liberty was in the balance.
>
> . . .
>
> Although the Court was perhaps too focused on assisting Stowe in understanding the substance

[5] As explained in the Argument section, there are two kinds of bias claims: subjective and objective. Mr. Stowe does not appeal the court's ruling that it was not subjectively biased.

> and procedures associated with the Petition, or with the potential dangers of self-representation, based upon the analysis provided above, Stowe has not established any basis for concluding that the Court demonstrated any pre-judgment regarding Stowe's then pending Petition.

R.510:5-6; App.118-119.

Mr. Stowe appeals.

ARGUMENT

I. The circuit court's comments would cause an objective, reasonable observer to believe that the court prejudged Mr. Stowe's petition for conditional release.

A. Legal standard and standard of review.

A defendant has a due process right to an impartial tribunal. *Goodson*, 320 Wis. 2d 166, ¶8.[6] There are two tests for bias: subjective and objective. *Id.* Subjective bias can only be determined by the judge. If the judge rules that they were impartial—as occurred in Mr. Stowe's case—the inquiry ends there. *Miller v. Carroll*, 2020 WI 56, ¶21, 392 Wis. 2d 49, 944 N.W.2d 542.

[6] Although termed a "commitment," the NGI statutory scheme is under the Criminal Code and individuals are deemed "defendants." *See, e.g.*, Wis. Stat. § 971.17(1).

Objective bias is shown where the appearance of bias results in a great risk of actual bias. *Id*, ¶41. There is an appearance of bias "when a reasonable person could question the court's impartiality based on the court's statements." *Goodson*, 320 Wis. 2d 166, ¶9. It is presumed that a judge has acted impartially, yet this presumption is rebuttable under a preponderance standard. *Miller*, 392 Wis. 2d 49, ¶¶16, 21. Successful bias claims have been deemed "rare"; however, they are heavily fact dependent. *See id*., ¶24. Bias is structural error and is not subject to the harmless error doctrine. *Id*., ¶15.

One way that an individual can show objective bias is by demonstrating that a reasonable observer would interpret a court's comments to mean that it prejudged an outcome. *State v. Gudgeon*, 2006 WI App 143, ¶11, 295 Wis. 2d 189, 720 N.W.2d 114; *Goodson*, 320 Wis. 2d 166, ¶10; *see also, Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005) (if a judge "has prejudged the facts or the outcome of the dispute," the judge "cannot render a decision that comports with due process."). Although prejudgment is a subset of bias, a prejudgment claim differs from bias claims that deal with untoward conduct. For example, *Miller* dealt with the judge's inappropriate friendship with a litigant on a social media platform. *Miller*, 392 Wis. 2d 49, ¶ 25. Prejudgment claims do not require proof of untoward conduct. They simply require a showing that a reasonable observer would conclude that the court did not reserve judgment until after the hearing.

Whether a defendant was denied the right to an impartial judge is a question of law, reviewed independently by this Court. *Miller*, 392 Wis. 2d 49, ¶15. Where the defendant shows that the court was biased, the remedy is a new proceeding before a different judge. *See Goodson*, 320 Wis. 2d 166, ¶18.

B. Viewed objectively, the court's comments show that it prejudged Mr. Stowe's conditional release petition.

The circuit court's remarks at Mr. Stowe's conditional release hearing indicated prejudgment. Prejudgment is shown where the court's statements would cause a reasonable person observing the proceeding to conclude "that the judge had made up his mind" before the hearing. *Goodson*, 320 Wis. 2d 166, ¶10. The primary prejudgment cases in Wisconsin are *Gudgeon* and *Goodson*. In *Gudgeon*, 295 Wis. 2d 189, ¶26, the defendant's probation agent proposed converting unpaid obligations to a civil judgment but the court instead stated that it wanted to extend the defendant's probation. These comments were made before the extension hearing occurred. In *Goodson*, 320 Wis. 2d 166, ¶12, the court stated at the sentencing hearing that if the defendant was revoked from supervision it would impose the maximum. In both cases, this Court found objective bias and reversed. *Id*., ¶10; *Gudgeon*, 295 Wis. 2d 189, ¶26.

A recent unpublished but persuasive decision of this Court is closer on the facts to Mr. Stowe's case. *State v. Stingle*, No. 2019AP491, unpublished slip op.

(July 28, 2020). In *Stingle*, the circuit court made remarks during the trial, before the defendant put on his case, indicating that it believed the defendant was guilty. The courts comments also suggested that the court "thought Stingle was being unreasonable by forcing the parties to go through a trial." *Id.*, ¶41; App.146. This Court found objective bias and remanded for a new trial before a different judge. *Id.*, ¶45; App.148.

The same result is warranted here where the court's remarks showed that it already believed Mr. Stowe should not be released and encouraged Mr. Stowe to withdraw his petition rather than proceed to the hearing. At the outset of Mr. Stowe's conditional release hearing, before any evidence was introduced, the court spoke at length about the examiner's report[7] and repeatedly stated that it did not believe Mr. Stowe was ready to be released. The court told Mr. Stowe that it believed he had made "good progress" with his treatment but had not "had enough time to really get the full benefit of that, or to at least be able to convey that benefit." R.543:6; App.8. The court acknowledged that there would be additional testimony if the hearing proceeded but the "gist of it is you've made some progress, but, you know, it's a little early to be able to see what that's going to do for you." R.543:7; App.9. Yet whether or not Mr. Stowe had made progress sufficient to warrant

[7] Examiner reports are not evidence unless and until they are received into evidence. *D.J.W.*, 2020 WI 4, 391 Wis. 2d 231, ¶6 n.4.

release could only be fairly determined after the evidence was introduced, not before.

The court encouraged Mr. Stowe to withdraw the petition. The court offered that "time . . . might be beneficial for you." R.543:7; App.9. The court stated, "you always have an opportunity to come back for review." R.543:15; App.17. While acknowledging that "you're an adult and you can make that decisions," the court offered that Mr. Stowe should consider not going forward and instead "come back for review" at a later time. R.543.15; App.17.

The court also made statements prematurely discounting Mr. Stowe's pro se representation as self-serving and not credible. Mr. Stowe asked to represent himself, which the court ultimately allowed. However, the court repeatedly urged him not to do so, saying that a lawyer would be more credible and "accurate." R.543:5, 14; App.7, 16. While it is entirely proper—and indeed required—that a court advise a defendant of the difficulties and disadvantages of self-representation,[8] the court ventured into prejudgment by directly stating it would find Mr. Stowe's presentation self-serving and inaccurate.

[8] Under *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997), the circuit court must conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

The court further noted that Mr. Stowe had returned to his Catholic faith and indicated that it would view Mr. Stowe's personal account of his spirituality as self-serving. The court suggested that incarcerated persons will sometimes claim to have had a spiritual awakening but "it's pretty short-lived for them." R:543:11; App.13. The court said it would need to have a way to "quantify" Mr. Stowe's religion and suggested that, "a priest or some other person" could "comment on any observations" to satisfy the court of Mr. Stowe's sincerity. R.543:13; App.15. In its closing remarks, the court was even more direct, stating that Mr. Stowe would "need" to find someone to describe his "progress in that setting . . . in a tangible way." R.544:40; App.104. In Wisconsin, a person's private communication to a member of the clergy is privileged. Wis. Stat. § 905.06. In effect the court asked Mr. Stowe to waive privilege in order to satisfy the court that he should be released.

The court's closing remarks reinforced the appearance of prejudgment. The court emphasized the remarks it made at the "outset" of the hearing and said it "stands by those." R.544:28; App.92. It asserted "there remains clear and convincing evidence" supporting denial of the petition. R.544:38; App.102. These statements convey to an objective, reasonable listener that the court went into the hearing with a view to deny the petition and at the end was satisfied that nothing had disturbed the view it had already formed. This inverts the legal presumption. Under Wis. Stat. § 971.17(4)(d), the court "shall grant the petition" unless the State meets it burden to prove by

clear and convincing evidence that the person poses a significant risk of harm to self, others, or property if conditionally released.

During postdisposition proceedings, the circuit court denied that it had prejudged Mr. Stowe's petition and said Mr. Stowe misinterpreted its remarks. R.510:5-6; App.118-119. Yet this declaimer does not dispel the appearance of partiality. In recognition of the "difficulties in discerning the real motives at work in deciding a case," the United States Supreme Court has held that "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009). "Justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

The objective appearance of bias in this case gives rise to a serious risk of bias. The length of time this case has been in existence provides relevant context. Since the filing of the case, the same judge has presided over all of the hearings spanning sixteen years. This amounts to thirty-six hearings,[9] including nine conditional release proceedings and one revocation proceeding.[10] As the court twice noted,

[9] R.6, 31, 35, 45, 59, 66, 70, 79, 81, 86, 100, 109, 131, 141, 150, 156, 162, 191, 204, 249, 252, 260, 275, 278, 317, 319, 353, 364, 378, 384, 426, 427, 455, 476.

[10] As of the date of the hearing, Mr. Stowe had filed twelve petitions for conditional release, although some were voluntarily withdrawn. The first petition he filed, in 2006, he withdrew. R.52. The second petition he filed, in 2007, was

"we've been at this awhile." R.543:9, 17; App.11, 19. The court acknowledged that "it could look personal," at this point but was not "intended to be." R.543:16; App.18. Mr. Stowe does not argue that the court was being insincere when it stated it was not personal. However, the fact that the court was concerned about it looking personal to others is implicit acknowledgement that an objective appearance of bias had developed.

In the context of repeated conditional release proceedings, the line between the proceedings could begin to blur. Yet each petition triggers a separate statutory proceeding. Wis. Stat. § 971.17(4). When Mr. Stowe files a new petition, he has a right to new expert examinations. Wis. Stat. § 971.17(4)(c). He has a right to a new evidentiary hearing. Wis. Stat. § 971.17(4)(d). At the hearing, the State carries a new burden of proof. *Id.* The court is required to make a new finding that, based on the evidence the State has met its burden of proof to keep Mr. Stowe confined in a mental institution. *Id.* To be clear, Mr. Stowe does not argue that the court cannot consider his history or the history of the case. Of course, the court can consider his history, but the court must *also* hear and consider admissible evidence before judging the outcome.

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granted. R.57. He was revoked in 2009. R.88. Between 2010 and 2019, he filed ten petitions, two of which he withdrew. R.130, 335. The other eight petitions were denied. R.94, 147, 147, 188, 239, 255, 293, 368, 403.

Due process requires that a court withhold judgment until a conditional release hearing has concluded. The record must demonstrate that the court approached the hearing with an open mind. As Mr. Stowe has demonstrated, the court's comments here would lead an objective, reasonable observer to think otherwise—that the court did not keep an open mind but rather prejudged his petition. Mr. Stowe should be granted a new conditional release hearing before a different judge.

CONCLUSION

For the foregoing reasons, Mr. Stowe respectfully asks this Court to reverse and remand for a new conditional release hearing before a different judge.

Dated this 25th day of August, 2021.

Respectfully submitted,

Electronically signed by Colleen Marion

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 3,936 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or 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 one or more initials or other appropriate pseudonym or designation 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 25th day of August, 2021.

Signed:
Electronically signed by
Colleen Marion
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