STATE OF WISCONSIN

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

DISTRICT III

Case No. 2021AP0431-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

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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INTRODUCTION

This appeal concerns an allegation of judicial bias at Defendant-Appellant Stowe's conditional release hearing. Stowe was found not guilty by reason of mental disease and defect in 2004, after tying up and threating his ex-girlfriend, beating her father, and threatening to kill himself while his ex-girlfriend watched. He was placed on conditional release. His release was revoked when he consumed alcohol and had contact with the victim. He later escaped the institution where he was confined. Stowe filed subsequent petitions for conditional release, which the court denied.

Stowe again petitioned for release in 2019. He requested counsel, but the public defender's office did not respond, and Stowe told the court he was prepared to go forward without an attorney. At the beginning of the evidentiary hearing, the court made remarks to ensure that Stowe understood the benefits of having representation. The court gave Stowe an opportunity to wait longer if he wanted to retain counsel. The court also stated that he read some of the submissions and developed initial impressions. The court shared those impressions and indicated that development of certain topics would be helpful but did not say he reached a conclusion.

Stowe argues that the judge's comments amount to objective bias and a due process violation. Stowe is mistaken. The court's comments, put in context, reflected the court's desire for Stowe to understand his rights to be represented by counsel. And while the judge did say that additional time and a lawyer might possibly work to his benefit, those statements would not cause a reasonable observer to conclude that the court prejudged the outcome – especially when the court heard testimony from both parties and properly applied the evidence to the relevant legal standard when it denied Stowe's petition. This Court should affirm the circuit court.

ISSUE PRESENTED

Whether the circuit court's comments at the conditional release hearing would cause an objective, reasonable observer to believe that the court prejudged Stowe's petition for conditional release, such that they would constitute objective bias.

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case. Wis. Stat. § 809.23(1)(b)1.

STATEMENT OF THE CASE

Stowe's confinement and prior conditional release petitions.[1]

In the early morning of February 9, 2004, Stowe entered his ex-girlfriend's residence, forcing her and their two-year-old daughter out of bed at gunpoint. (R. 1:5.) He handcuffed his ex-girlfriend and her 14-year-old brother, and zip-tied their ankles. (R. 1:5.) When his ex-girlfriend's father arrived, Stowe beat him with a baton and poured gasoline on him, threatening to set him on fire. (R. 1:6–7.) Stowe told his ex-

[1] Stowe argues that the particular facts that led to his confinement are not relevant to this appeal. (Stowe Br. 7 n.3.) The State disagrees. A court may consider "the nature and circumstances of the crime" when evaluating a petition for conditional release. Wis. Stat. § 971.17(4)(d). The court did that here. (R. 544:38.) The court's application of the proper criteria in deciding Stowe's conditional release petition is relevant to whether certain isolated comments reflected prejudgment. *See In re Z.B.*, 2018 WI App 35, ¶ 28, 382 Wis. 2d 272, 915 N.W.2d 731 (unpublished, cited for persuasive value).

girlfriend he was going to take her away and force her to watch him commit suicide. (R. 1:5.) The family escaped when Stowe passed out and his ex-girlfriend called 911. (R. 1:6–7.)

Stowe entered no contest pleas to three counts of false imprisonment, first-degree recklessly endangering safety, intimidation of a victim by use of force, and felony bail jumping (R. 46; 49.) Stowe was evaluated, and the circuit court found him not guilty by reason of mental disease or defect. (R. 45.) The circuit court committed Stowe to institutional care. (R. 45.) He was eventually placed at Mendota Mental Health Institute (MMHI). (R. 425:2.)

Stowe was placed on conditional release in 2007, but that release was revoked in 2009 after he violated numerous rules. The main violations occurred when he visited a bar and consumed alcohol, knowing his ex-girlfriend was working there. (R. 88; 518:5; 519:4–5.) Stowe remained in confinement for several more years, and then escaped MMHI in 2013 and was on the run for 102 days. (R. 425:2.) He was eventually caught, convicted of Escape, and sentenced to prison for two years. (R. 425:2.) He returned to MMHI in October 2015. (R. 425:2.)

The court's denial of Stowe's 2019 conditional release petition.

Stowe filed a petition for conditional release in April 2019, which is the subject of this appeal. (R. 403.) Stowe requested counsel but did not hear back from the public defender's office. (R. 417.) He informed the court that he was prepared to represent himself at the hearing. (R. 417.)

At the beginning of the hearing, the court addressed the issue of counsel. (R. 543:4.) While the court was not going to prevent Stowe from representing himself, the court noted that it is beneficial to have a lawyer present one's case. (R. 543:4–5.) The court gave Stowe the opportunity to consider waiting

longer until a lawyer was appointed, and he progressed further in treatment:

> 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.

(R. 543:6.)

Referencing the conditional release examination report that was filed,[2] the court observed that Stowe "made good progress," but he 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.) "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." (R. 543:6.)

The court thought that the personal counseling Stowe was receiving was "a huge step forward." (R. 543:8.) However, the judge was "not sure yet," and stated that additional information would be helpful "before I would make a decision." (R. 543:8.)

The court observed that Stowe's professions of returning to the Catholic faith were positive, but hard to quantify in light of the conditional release criteria. (R. 543:10–14.) While acknowledging the sensitive issues surrounding religious professions (and its desire not to intrude), the court suggested that it might be helpful if a religious figure could comment on some of the changes he or she observed in Stowe, as a way to quantify the benefit in light of the criteria for conditional release. (R. 543:10–14.) The court stated:

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[2] (R. 425.)

> And so if you were to have more time, I would indicate I don't know that that information, other than the observation that it seems – from outside appearances it seems to have a positive benefit for you, to quantify that or to try to identify it in ways in which that would be, for you, something that would bear on one of the critical questions I have on dangerousness, for example, how that would work, trying to be able to quantify that would be helpful.

(R. 543:13–14.)

With all that said, the court gave Stowe the option to take additional time before returning for a continued hearing, if Stowe would "want to use that time to maybe develop some of these topics that I've talked about." (R. 543:15.)[3] The court gave Stowe the alternative option of returning promptly for the second day. (R. 543:15.) The court noted that, just as with Stowe's prior petitions, it could not deny his conditional release petition unless there was a legal basis to do so. (R. 543:15–16.) The decision of how to proceed was Stowe's. (R. 543:16.)

Stowe chose to proceed with the hearing that day and then return promptly to finish the hearing. (R. 543:16.)

The court heard testimony on June 24 and June 25, 2019. (R. 543–44.) The State called Dr. William Schmitt to testify. Dr. Schmitt had examined Stowe and prepared a conditional release examination report. (R. 425; 543:23–34.) Relying on his report, Dr. Schmitt testified that Stowe continues to pose substantial risk of bodily harm to himself and others. (R. 543:28.)

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[3] The court explained at the outset that schedule constraints would not permit them to finish the hearing in one day. (R. 543:3.)

Stowe called three MMHI employees to testify. (R. 543:34–56.) Dr. Schmitt was called again; he did not hear anything from these witnesses that changed his opinion with respect to Stowe's dangerousness or that conditional release was inappropriate at this time. (R. 543:56–57.)

The next day, Stowe testified on his own behalf, by reading a letter that he had written to his daughter. (R. 544:3–16.) The letter in part explained Stowe's experiences with the Catholic church as a child, (R. 544:6–7), and his recent return to faith (R. 544:10–13).

After testimony concluded, the State argued that the petition should be denied. (R. 544:17–18.) The State relied on Dr. Schmitt's report and testimony. (R. 544:18.) While Dr. Schmitt identified some positive factors, such as Stowe's willingness to have independent counseling, that counseling started in January 2019, and was "very, very recent." (R. 544:18.) Stowe had numerous angry outbursts in February 2019. (R. 425:7–8; 544:21.) The underlying facts in this case "remain incredibly frightening," and Stowe's actions "were incredibly dangerous and volatile." (R. 544:19.) Stowe's mental history and present mental condition supported continued confinement. (R. 544:19.) Nothing suggested arrangements had been made to ensure Stowe would take his medication. (R. 544:20.)

Stowe opposed continued confinement, arguing, among other things, that Dr. Schmitt's report contained inconsistencies, and that he is not the man he once was. (R. 544:22–28.)

The court denied the petition, finding that the State met its burden that Stowe would pose a significant risk of harm to himself or to others if conditionally released. (R. 544:29, 38, 42–43.) The court pointed to the reasoning in Dr. Schmitt's report, which walked through Stowe's underlying offense, one of the things the court may consider when deciding

conditional release. (R. 425:2; 544:29–30.)[4] The report also documented Stowe's progress and setbacks. (R. 425; 544:30.) The court pointed out that Stowe was conditionally released early on, but then specific frightening behavior (namely, drinking and having contact with the victim) led to his reconfinement. (R. 425:2; 544:30–31.) And while he made progress again after that, he escaped. (R. 425:2; 544:31.) Those incidents set Stowe back thousands of steps and were "huge obstacles" to overcome because they compromised confidence that he was not a danger to himself or others. (R. 544:31, 42.)

The court concluded that Stowe had not made sufficient progress to warrant release. (R. 544:38, 42.) The court considered his mental history and present mental condition. (R. 544:38.) Especially in light of Stowe's personality disorder, the court was not persuaded that he had the tools yet to avoid risk to himself or others. (R. 544:32–33.) As stated in Dr. Schmitt's report, Stowe was having trouble interacting with people in authority positions. (R. 425:7–8; 544:34–36.)

However, the court was encouraged by Stowe's progress in receiving treatment.[5] (R. 544:33–34.) The court also noted that the letter Stowe read to the court, which was addressed to his daughter and described his religious transformation, "reflected a very genuine change for you." (R. 544:39–40.)

In short, while the court found that Stowe was "moving in a positive direction," the testimony and records established clear and convincing evidence of a significant risk of harm to himself and others. (R. 544:38–39.) The court entered a written order denying the petition. (R. 433.)

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[4] *See also* Wis. Stat. § 971.17(4)(d).

[5] Dr. Schmitt's report, which was admitted into evidence, stated that Stowe was in the early stages of developing a rapport with a MMHI physician. (R. 425:9.)

Stowe's postdisposition motion and the court's denial.

Stowe filed a postdisposition motion. (R. 492.) He argued, as relevant here, that the court's remarks at the beginning of the conditional release hearing showed objective bias.[6] (R. 492:3–8.) He asked for a new conditional release hearing with a new judge. (R. 492:3–8.) The State opposed the motion. (R. 507.) In a decision and order, the circuit court denied Stowe's motion. (R. 510.)

The court explained that Stowe misunderstood the court's colloquy regarding self-representation, mistaking it for prejudgment. (R. 510:4.) The court was attempting to convey that waiting for representation might be beneficial because the State was represented by experienced counsel, and Stowe, "however intelligent or capable, lacked equivalent training and experience." (R. 510:6.) The court tried to explain how a lawyer and additional time could work to Stowe's advantage. (R. 510:7.) In terms of Stowe's religious experience, the court remarked that it was difficult to incorporate this into the factors listed in Wis. Stat. § 971.17(4)(d). (R. 510:7.) The Court believed Stowe's experiences were important, but it was having trouble incorporating those experiences into the factors listed in section 971.17(4)(d). (R. 510:7.) The Court was not suggesting that Stowe's experiences were self-serving and not credible. In fact, the Court stated that those experiences were important and could reflect some beneficial changes. (R. 510:7.)

[6] Stowe made other arguments, including that the court erroneously shifted the burden of persuasion to Stowe, (R. 492:8–9), and that his continued confinement was unconstitutional (R. 492:9–12). He abandoned these arguments on appeal. (Stowe Br. 11 n.4.)

While acknowledging that it was perhaps too focused on assisting Stowe in understanding the substance and procedures associated with the petition, or with the potential dangers of self-representation, the court concluded that Stowe had not established that the Court demonstrated pre-judgment regarding Stowe's petition. (R. 510:6.)

This appeal followed.

STANDARD OF REVIEW

Whether a judge was objectively biased is a question of law that this Court reviews independently. *State v. Pirtle*, 2011 WI App 89, ¶ 34, 334 Wis. 2d 211, 799 N.W.2d 492. A judge is presumed to have acted fairly, impartially, and without prejudice. *State v. Goodson*, 2009 WI App 107, ¶ 8, 320 Wis. 2d 166, 771 N.W.2d 385. "A defendant may rebut the presumption by showing that the appearance of bias reveals a great risk of actual bias." *State v. Herrmann*, 2015 WI 84, ¶ 3, 364 Wis. 2d 336, 867 N.W.2d 772. Such a showing constitutes a due process violation not subject to the harmless error analysis. *In re Paternity of B.J.M.*, 2020 WI 56, ¶ 16, 392 Wis. 2d 49, 944 N.W.2d 542; *State v. Gudgeon*, 2006 WI App 143, ¶ 9, 295 Wis. 2d 189, 720 N.W.2d 114.

ARGUMENT

Stowe failed to rebut the presumption that the judge acted impartially at his conditional release hearing.

The presumption of judicial impartiality is hard to rebut. Objective bias is most often found under extreme facts, or instances where the court states that it has made up its mind or desires a specific outcome prior to testimony. Stowe fails to meet that standard here. The judge's comments at the beginning of the hearing, fairly read in the context of the entire proceeding, do not rise to the level of a constitutional violation. Stowe's arguments to the contrary either

misinterpret the judge's statements or misapply the law. This Court should affirm the circuit court.

A. A finding of objective bias is confined to rare and extreme instances, such as when a court makes statements that clearly express prejudgment or a desired outcome.

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868, 876 (2009) (citation omitted). However, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *Id*. (citation omitted).

Wisconsin courts presume that "a judge has acted fairly, impartially, and without bias." *B.J.M.*, 392 Wis. 2d 49, ¶ 21. A party asserting bias may rebut this presumption by a preponderance of the evidence. *Id*. When the appearance of bias reveals a great risk of actual bias, the presumption of impartiality is rebutted, and a due process violation occurs. *Herrmann*, 364 Wis. 2d 336, ¶ 46.

Courts recognize two types of judicial bias: subjective and objective. *B.J.M.*, 392 Wis. 2d 49, ¶ 21. Subjective bias is based on the judge's own determination that he or she cannot act impartially. *Id*. Objective bias occurs when there is a "serious risk of actual bias—based on objective and reasonable perceptions." *Id*. ¶ 22 (quoting *Caperton*, 556 U.S. at 884).

Here, the judge concluded he was not subjectively biased, (R. 510:8–9), and Stowe does not challenge that determination on appeal (Stowe Br. 12 n.5). Subjective bias is therefore not at issue.

To assess objective bias, a reviewing court applies the standard from *Caperton*. *B.J.M.*, 392 Wis. 2d 49, ¶ 24. "Due process requires an objective inquiry" into whether the circumstances "would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice,

clear and true." *Id.* (citation omitted). "It is the exceptional case with 'extreme facts' which rises to the level of a 'serious risk of actual bias.'" *Id.* (citation omitted.) "Application of the constitutional standard … will thus be confined to rare instances." *Id.* ¶ 52 (citation omitted.)

Case law provides guidance as to when "extreme facts" rise to the level of a due process violation. In *Caperton*, the petitioner's due process rights were violated when a state supreme court justice refused to recuse himself after receiving large campaign contributions from the respondent corporation's chief executive officer. *Caperton*, 556 U.S. at 884–87. And in *B.J.M.*, a circuit court judge accepted a Facebook friend request from the mother in a custody dispute after a contested hearing, but before rendering a decision. *B.J.M.*, 392 Wis. 2d 49, ¶ 2. A majority of the Wisconsin Supreme Court held that the totality of circumstances and extreme facts of the case, viewed objectively, rose to level of serious risk of actual bias. *Id.* ¶¶ 35, 38, 65.

The Wisconsin Supreme Court has yet to precisely define the standard for objective judicial bias after *Caperton*.[7] Regardless of how one articulates the precise standard, pre-*Caperton* case law is instructive, given the nature of the bias allegation here.

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[7] In *State v. Herrmann*, the lead opinion used the phrase "appearance of bias." 2015 WI 84, ¶ 40, 364 Wis. 2d 336, 867 N.W.2d 772. Four of the court's members in two separate concurrences took issue with the "appearance of bias" standard. *Id.* ¶ 108 (Prosser, J., concurring); *Id.* ¶¶ 114, 157–59 (Ziegler, J., concurring). *In re Paternity of B.J.M.*, 2020 Wis. 56, ¶ 25 n.18, 392 Wis. 2d 49, 944 N.W.2d 542, a four-member majority generally agreed with the standards regarding objective bias, but one of those justices advocated for the "appearance of bias" framework that was articulated in the lead opinion in *Herrmann*. *In re B.J.M.*, 392 Wis. 2d 49, ¶ 38–63 (Bradley, J., concurring); *Id.* ¶ 96 (Ziegler, J., concurring). Three justices in dissent rejected the "appearance of bias" framework. *Id.* ¶ 114 (Hagedorn, J., dissenting).

Statements that clearly express prejudgment or a clear desired outcome can rise to the level of a due process violation. For example, *Gudgeon* concerned a probation extension decision for a criminal defendant. The judge stated in a note to the parties, "I want his probation extended." 295 Wis. 2d 189, ¶ 26. This statement signified the judge's personal desire for a particular outcome, such that a reasonable person would discern a great risk that the court "had already made up its mind to extend probation long before the extension hearing took place." *Id*. Similarly, in *Goodson*, the circuit court promised to sentence Goodson to the maximum period of time if he violated his supervision rules. *Goodson*, 320 Wis. 2d 166, ¶ 13. This Court ruled that a reasonable person would conclude that a judge would intend to keep such a promise—that the judge had made up his mind about Goodson's sentence before the reconfinement hearing. *Id*. This constituted objective bias. *Id*.

In several other cases, this Court found a judge's clear statements of a desired outcome evidence of prejudgment. In *State v. Lamb*, a case concerning a sentencing decision, the defendant's lawyer and the State recommended probation. Despite that recommendation, the court told the defendant, prior to hearing arguments on sentencing, that the defendant "was going to prison today." *State v. Lamb*, 2018 WI App 66, ¶ 6, 384 Wis. 2d 414, 921 N.W.2d 522 (unpublished, cited for persuasive value). This Court held that court's comments revealed a serious risk of actual bias because a reasonable lay observer would interpret them as prejudging Lamb's sentence. *Id*. ¶ 14. And in *State v. Marcotte*, the judge told the defendant that he would be sentenced to prison if he did not succeed in drug court. *State v. Marcotte*, 2020 WI App 28, ¶ 19, 392 Wis. 2d 183, 943 N.W.2d 911. This statement and another factor created the appearance of bias sufficient to give rise to a great risk of actual bias. *Id*. ¶ 18.

On the other hand, when a court's pre-hearing comments show a reflection on the law and facts of the case, but do not show that the court had made up its mind, that does not rise to the level of objective bias. In *In re Z.B.*, a termination of parental rights case, the county department contended the circuit court improperly weighed statutory factors before the dispositional hearing. *In re Z.B.*, 2018 WI App 35, ¶ 22, 382 Wis. 2d 272, 915 N.W.2d 731 (unpublished, cited for persuasive value). The county argued that the court's statement that it had been weighing the factors meant that it had "resolved" the factors before the dispositional hearing. *Id.* ¶ 23.

This Court rejected that argument. *Id.* ¶ 28. The circuit court's comment did not show that it had made up its mind prior to the dispositional hearing. *Id.* That the circuit court may have been aware of the statutory factors prior to the actual dispositional hearing does not violate due process because the circuit court did not indicate a decision was already made. *Id.* Further, the court's decision at the conclusion of the dispositional hearing showed that the case was not prejudged. *Id.* The circuit court weighed the statutory factors and other applicable factors based on evidence in the record. *Id.*

B. Stowe has failed to rebut the presumption of impartiality.

Applying these principles here, Stowe has not met the high bar necessary to overcome the presumption of impartiality. The court's comments do not show that a reasonable person would discern a great risk prejudgment as in *Goodson, Gudgeon*, *Lamb*, or *Maricotte*, nor is this one of the exceptional cases with extreme facts that rises to the level of a serious risk of actual bias, as in *Caperton* or *B.J.M.*

The court's pre-testimony comments were in response to Stowe's initial request for counsel. They aimed to ensure Stowe understood the benefits of representation, and were intended to help Stowe, as a pro se litigant, understand the process at the conditional release hearing and topics that the judge would like to see developed, including his options for therapy and his professed return to faith, which he put at issue. (R. 543:8, 10–14; *see also* Statement of the Case.) True, the court acknowledged that it had read Dr. Schmitt's report. But it would be highly unusual for the Court *not* to have reviewed the information provided by the Court appointed evaluator. The fact the Court shared some of its thoughts – in the context of discussing the procedural aspects of the case – does not demonstrate objective bias in the form of prejudgment. Indeed, courts routinely inform the parties of their initial thoughts at a hearing and ask them to address specific topics before issuing oral decisions. The court's comments here are no more than that.

Further, like the judge in *In re Z.B.*, the circuit court properly weighed the statutory factors based on the evidence the parties presented when it reached its decision.[8] (R. 544:28–42; *see also* Statement of the Case.) Stowe has not rebutted the presumption of impartiality.

Stowe's arguments to the contrary are without merit. Stowe cites *Stingle*, an unpublished case pertaining to Wisconsin Department of Natural Resources wetland removal. That case is distinguishable. The issue there was whether Stingle violated a statute by discharging fill material into a wetland without a permit. *State v. Stingle*, 2020 WI App 55, ¶ 1, 948 N.W.2d 494 (unpublished). The court's comments during the State's presentation of evidence implied that the

[8] Stowe is not challenging whether the court's decision was a proper application of the evidence to Wis. Stat. § 971.17(4)(d). (*See generally* Stowe Br.)

areas in question qualified as wetlands (a key issue in the case), that Stingle should have already removed the fill from them, and that his refusal to do so was simply because he was "stubborn" and "set on the position" that he did not need to remove the fill. *Id*. ¶ 39. This Court decided that, based on those comments, a reasonable person would conclude the judge had made up his mind—before Stingle even had an opportunity to present his case. *Id*. ¶ 42, 45.

Unlike *Stingle*, the court's comments at Stowe's hearing did not imply that it had made up its mind. In fact, the judge's comments show the opposite. The court told Stowe that there was a *possibility* that waiting for counsel and undergoing treatment for longer would work to his advantage. (R. 543:6.) The judge did not say that Stowe's petition would be denied if Stowe opted to go forward pro se.

Stowe argues that the court "encouraged" him "to withdraw his petition rather than proceed to the hearing." (Stowe Br. 16.) Stowe misunderstands the judge's comments. The court encouraged Stowe to wait to proceed with the hearing until he could secure counsel. The judge said that Stowe could wait to have counsel "on this same petition." (R. 543:6.) At no point did the judge tell Stowe to "withdraw" his petition. But even if one could construe the record that way, giving Stowe the option to wait for counsel would not lead a reasonable person to conclude that the judge made up his mind as to the outcome. Stowe was the one who requested counsel, and the judge was responding to that request. The court also made clear that Stowe could decide to go forward without representation, and return "promptly" for a second day of testimony. (R. 543:15.) Stowe chose the latter.

Stowe also argues that the court "repeatedly stated that it did not believe Mr. Stowe was ready to be released." (Stowe Br. 16.) This argument is belied by the record. The court did make comments that waiting "to get the full benefit" of treatment might be beneficial for him. (R. 543:6.) But saying

that additional time for treatment would possibly work to his advantage, or even that time "would definitely be on your side," (R. 543:6), is not the same as saying that the court made up its mind that Stowe's conditional release petition should not be granted.

As Stowe acknowledged, the court said that witnesses still needed to testify. (Stowe Br. 16); (R. 543:7.) Further, the court said it could not deny Stowe's petition unless there was a legal basis to do so. (R. 543:15–16.) Comparing these comments to those made in *Goodson* (promising to sentence Goodson to the maximum period of time if he violated his supervision rules), *Gudgeon* (stating, "I want his probation extended"), *Lamb* (stating that the defendant "was going to prison today"), or *Maricott* (telling the defendant that he would be sentenced to prison if he did not succeed in drug court), the court's comments here do not rise to the level of a due process violation. They would not lead a reasonable observer to conclude that there was a high risk of actual bias.

Stowe also argues that the court prejudged the outcome by stating "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.'" (Stowe Br. 16.) While Stowe seems to suggest that the *court* said this, what the court actually did was paraphrase Dr. Schmitt's report:

> I've read Dr. Schmitt's report. It's just a report. He'd have to testify and presume it would be consistent with that and so forth.
>
> But sort of 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.) The court's comment does not show that it had predetermined whether to credit Dr. Schmitt's report.

Stowe also argues that the court discounted Stowe's pro se representation as "self-serving and not credible." (Stowe Br. 17.) This too is belied by the record. Stowe incorrectly interprets the Court's commentary about self-representation as evidence of impartiality or pre-judgement. Stowe gives short shrift to the importance of discussing the defendant's right to counsel and the disadvantages of proceeding without counsel. Conducting a meaningful colloquy regarding self-representation is not objective partiality.[9]

Stowe contends that the judge found his statements about his return to the Catholic faith as "self-serving," and by asking for Stowe to have a witness testify as to his religious experience, he was effectively asking Stowe to waive privilege with private communications with clergy members. (Stowe Br. 18.) Stowe misunderstands the court's comments and fails to persuasively explain how this argument is relevant.

The court noted that the letter Stowe read to the court, which described his return to the Catholic faith, "reflected a very genuine change for you." (R. 544:39–40.) But the court said that that was not enough to determine how Stowe's return to faith affected his risk, which is a factor the court must consider on conditional release. (R. 544:40.) While acknowledging the sensitive issues surrounding religious professions (and its desire not to intrude on those issues), the court suggested that it might be helpful if a religious figure could comment on some of the changes he or she observed in Stowe, as a way to quantify the benefit in light of the criteria for conditional release. (R. 543:10–13.) In that vein, the court stated, "[t]o the extent that you would be able to identify how

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[9] Stowe acknowledges that under *State v. Klessig*, the circuit court must conduct a colloquy to ensure (among other things) that the defendant makes a deliberate choice to proceed without counsel, and that the defendant is aware of the difficulties and disadvantages of self-representation. *See State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997); (*see also* Stowe Br. 17 n.8).

that affects your risk in a tangible way would be helpful." (R. 544:40.) The judge did not mandate that Stowe have a religious figure testify, and it certainly was not asking Stowe to waive privilege. But because Stowe put forth his faith as probative of his fitness for release, the court was attempting to guide him on how to connect this with the statutory criteria for release. (R. 544:40.) These comments do not show prejudgment or objective bias.

Stowe argues that the judge's acknowledgment that "we've been at this awhile" and "it could look personal" is "implicit acknowledgment that an objective appearance of bias had developed." (Stowe Br. 20.) Stowe stretches the court's comments beyond accuracy and logic. The judge was telling Stowe that its prior denials of Stowe's petitions were not personal, but rather, a reflection of the need to adhere to the statutory criteria when deciding Stowe's conditional release petition. These comments do not show objective bias.

True, the same judge has presided over Stowe's hearings since his case's inception.[10] But that in itself is not evidence of bias. As the judge explained in its oral decision, several significant setbacks undermined the court's confidence that Stowe would not pose a risk to himself or others upon release: (1) his knowing contact with the victim and consumption of alcohol in her presence, and (2) his escape from MMHI. These incidents, coupled with Stowe's recent violent outbursts and problems interacting with people in authority positions, led the court to conclude once again that Stowe was not ready for release.

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[10] The court has denied Stowe's conditional release petitions since 2009, finding that the State met its burden to show that Stowe remained dangerous and did not meet the criteria for conditional release. (R. 112; 179; 280; 330; 396.) This Court has affirmed the conditional release decisions Stowe challenged on appeal. (*See* R. 155; 214; 237; 357; 438.)

When deciding a conditional release petition, the court is entitled to consider, among other things, "the nature and circumstances of the crime, the person's mental history and present mental condition." Wis. Stat. § 971.17(4)(d). While each conditional release petition is to be decided independently, the fact that the court takes into consideration prior events is not contrary to the statute. The court took this history into consideration, but also considered the testimony and credited Dr. Schmitt's report and testimony. The court's decision, while a denial like prior decisions, was a proper application of the evidence to the law.

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Stowe has not overcome the presumption that the judge was unbiased. While Stowe's desire to be released is understandable, he is not entitled to a new hearing with a new judge simply because he does not like the court's decision, or because the court denied his petition once again. The court is confined to evaluating his dangerousness to himself and to the community. The court's remarks at the beginning of his hearing do not rise to the level of a constitutional violation.

CONCLUSION

The State respectfully requests that this Court affirm the circuit court's order denying Stowe's petition for conditional release and its order denying Stowe's motion for post disposition relief.

Dated: October 22, 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5609 words.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 22nd day of October 2021.

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