STATE OF WISCONSIN

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

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2021AP751 - CR

JUSTIN CHURCH,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION MOTION IN THE CIRCUIT COURT FOR FOREST COUNTY, THE HONORABLE LEON D. STENZ PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. JUSTIN CHURCH IS ENTITLED TO RESENTENCING AS THE CIRCUIT COURT PREJUDGED THE SENTENCING OUTCOME, VIOLATING HIS RIGHT TO AN IMPARTIAL TRIBUNAL AND ERRONEOUSLY EXERCISED ITS DISCRETION

For the first time on appeal, the state argues that Church forfeited his objective bias claim. (*See* State's Br. 8-9). As this argument was not raised by the district attorney in postconviction briefing (R37) nor during the postconviction hearing (R57), the argument cannot raised on appeal. *See State v. Eugene W.*, 2002 WI App 54, ¶13, 251 Wis. 2d 259, 641 N.W.2d 467 (To preserve an issue for appeal, a party must raise it "with sufficient prominence such that the [circuit] court understands that it is called upon to make a ruling."); *Townsend v. Massey*, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155 ("[T]he forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court.").

If the Court wishes to entertain the state's argument, forfeiture by lack of objection by trial counsel does not apply, as the case law relied upon by the state did not exist at the time of trial counsel's representation. As to the merits of the issue, the state seeks to restrict objective bias to only two types – "expressed statement" of a desired outcome or an "unequivocal promise" of what will happen at sentencing. (State's Br. 5). These categories do not exist in law. This extremely restrictive interpretation of a circuit court's language would require this Court to abandon the objective bias test entirely.

A. Forfeiture does not apply

Forfeiture should not be applied to a defendant's fundamental constitutional right to an impartial tribunal. This Court has held predetermined sentencing is a structural error and

> …differ[s] in magnitude from other constitutional errors because they are "defect[s] affecting the framework within which the trial proceeds, rather than

> simply ... error[s] in the trial process itself." Id. (citation omitted). These defects "infect the entire trial process" because they "depriv[e] defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence' " and thereby "render a trial fundamentally unfair." *State v. Gudgeon*, 2006 WI App 143, ¶9, 295 Wis. 2d 189, 198–99, 720 N.W.2d 114, 118–19 *citing Neder v. United States*, 527 U.S. 1, 8-9, 119 S.Ct. 1827 (1999) (citations omitted).

The case relied upon by the state to support its forfeiture argument did not exist at the time trial counsel represented Church. *State v. Klapps*, was decided on December 23, 2020. 2021 WI App 5, 395 Wis.2d 743, 954 N.W.2d 38. Trial counsel's representation of Mr. Church ended at or around the time of Sentencing on December 11, 2019.

Mr. Church further asserts that *State v. Klapps* is distinguishable from the Case currently before this Court. Klapps argued that the judge who presiding over the revocation of his conditional release hearing was biased against him because the judged referenced a psychologist's opinion rendered in reports filed in prior proceedings in which Klapps' conditional release was revoked. Id. at ¶1. The state argued Klapps forfeited his right to appeal because he did not file a postconviction motion (id. at ¶17), as such the Court undertook a statutory analysis of Wisconsin Statute §971.17(7m) in reaching its conclusion that forfeiture applied (id. at ¶¶18-26). Of importance to the Court was giving the circuit court judge the opportunity to address the issue through postconviction motion proceedings. Id. at ¶27. Here, Church properly filed a Notice of Intent to Appeal and filed a timely postconviction motion giving this Court insight into the circuit court's justification for its prison comment. Aside from the lack of objection during the hearing to revoke his condition release and the lack of a postconviction motion, Klapps failed to show how the use of the psychologist's opinion from a prior case equated to judicial bias. Id. at ¶¶43-44.

Regardless of the holding in *Klapps*, the law is clear that we cannot retroactively apply a duty upon trial counsel to object based on case law that did not exist at the time of trial counsel's representation. Trial counsel is not deficient

for failing to raise an issue of unsettled law. *State v. Breitzman*, 2017 WI 100, ¶49, 378 Wis.2d 431, 904 N.W.2d 93. Instead, "ineffective assistance of counsel cases should be limited to situations where the law or duty is clear...." *State v. Lemberger*, 2017 WI 39, ¶33, 374 Wis. 2d 617, 893 N.W.2d 232 (*quoting State v. McMahon*, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994)). A defense attorney is simply "not required to object and argue a point of law that is unsettled." *McMahon*, 186 Wis. 2d at 84. A law is considered unsettled if the issue can reasonably be analyzed in two different ways. Id.

Therefore, we turn our analysis to the state of the law at the time of trial counsel's representation. Both parties agree that the controlling case law on the issue of predetermined sentencing is found in *State v. Gudgeon* and *State v. Goodson*. (State's Br. 13). In *Gudgeon*, the defendant did not object when the circuit court judge wrote "no - I want his probation extended" in response to a probation officer's letter. *See* 2006 WI App 143. The defendant in *Gudgeon* did not object when the circuit court held a hearing to extend probation for non-payment of restitution. *See* Id. Gudgeon did not appeal the extension of his probation. Id. at ¶5. When Gudgeon was revoked from probation for other violations, he filed a postconviction motion raising the issue of judicial bias for the first time. *See* id at 5. Protecting against judicial bias was of such importance to this Court that it considered Gudgeon's claim when he did not appeal the extension of his probation or his subsequent revocation. Id. at ¶¶1 & 9.

The issue of predetermined sentencing was again not forfeited in *Goodson* when the defendant did not object at the original sentencing hearing to the court stating: "[I]f you deviate one inch from these rules, and you may think I'm kidding, but I'm not, you will come back here, and you will be given the maximum, period. Do you understand that?" 2009 WI App 107, ¶2, 320 Wis. 2d 166, 170, 771 N.W.2d 385, 388. Again, *Goodson* did not objection when his extended supervision was revoked and

> The court reminded Goodson of its warning that 'you would sentence yourself based ... upon your actions at the time you left prison. And if you became a law-abiding, good citizen, then you would never have been here ... but if you screwed up ... then you'd be given the maximum.' Id. at ¶5, 320 Wis. 2d 166, 172, 771 N.W.2d 385, 388.

These controlling cases on the issue of predetermined sentencing gave trial counsel no notice that an objection to the judge was necessary to preserve the issue. To the contrary, these cases demonstrate that trial counsel does not need to put himself in the difficult position of objecting to the judge at any point.

Trial counsel would have known from *State v. Gudgeon* that predetermined sentencing is a structural error that leads to fundamental unfairness. 2006 WI App 143, ¶9. Trial counsel also would have known from *Weaver v. Massachusetts* that structural errors that lead to "fundamental unfairness" are not subject to prejudice analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). "Neither this reasoning nor the holding here calls into question the Court's precedents deeming certain errors structural and requiring reversal because of fundamental unfairness." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1904 (2017). Knowing that the prejudice prong of *Strickland* does not apply, it follows that trial counsel would not believe his duty to object under the deficient prong would not apply either.

The lack of objection on the part of both of these defendants discussed above makes logical sense, just as it makes sense that Church's counsel did not object in this Case. Until a sentence is imposed, the predetermined sentence is not a completed act on the part of the circuit court judge. Once the judge orders a sentence consistent with the previous statement, the act of predetermined sentencing is complete.

Objecting to opposing counsel or witness testimony is normal and expected. Objecting to a judge is neither of those things. At one point, Black's Law Dictionary's case law annotation for the term "Objection" noted "It is directed to thing done by one other than judge or court, and 'exception' going to action or ruling of court." OBJECTION, Black's Law Dictionary (4th ed. 1957)

quoting State ex rel. Brockman Mfg. Co. v. Miller, 241 S.W. 920, 922 (Mo. 1922). The state is asking this Court to require trial counsel to object to a judge's comment when made and before sentence is pronounced to preserve the issue. The state argues for the time of this objection based on a case in which a juror drew a noose and trial counsel was made aware of the issue, but did not object. *See State v. Marhal*, 172 Wis.2d 491, 493 N.S.2d 785 (Ct. App. 1992). This Case has nothing to do with the right to an impartial jury. No predetermined sentencing case law requires an objection before sentencing.

In practice, if an objection is required at the time of the judge's comment, trial counsel either has to hope his suspicion that the judge will follow through on the comment is incorrect or risk harming his client by upsetting an already biased judge by objecting. Requiring an objection before sentencing would allow an objectively biased judge to refuse to remove himself from the case and order a sentence consistent with the biased comment, so long as the biased judge pointed to another reason for imposing said sentence. In effect, it makes objective bias harder to root out. The whole concept behind objecting is to promote efficiency. Objecting prior to sentencing accomplishes the exact opposite. Judges who may not follow through on their statements would now have to pause the proceeding, potentially entertain written motions on objective bias and hold a hearing. Requiring an objection when a judicial comment is made impedes judicial economy.

B. Objective Bias Test v. "Unequivocal Promise"

Aside from forfeiture, the state implicitly requests that this Court abandon the reasonable person objective bias test in favor of a more restrict new test. At issue is the defendant's constitutional due process right to an impartial judge. When analyzing this case, both sides agree that the applicable case law is found in *State v. Gudgeon* and *State v. Goodson*. (State's Br. 13). The objective bias test

found in both of these cases assesses the "appearance of partiality" based on whether a reasonable person could question a judge's impartiality. *Gudgeon*, 2006 WI App 143, ¶21. "In short, the appearance of bias offends constitutional due process principles whenever a reasonable person—taking into consideration human psychological tendencies and weaknesses—concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." Id. at ¶24.

To reach its conclusion, the state takes the words "express statement" (State's Br. 14) and "strong language" (id), to make its new proposed test that short of an "unequivocal promise" no objective bias can ever exist (id. at 5, 11). It draws the words "express statement" from an unknown source, "strong language" from *State v. Gudgeon* and "unequivocal promise" from *State v. Goodson*. However, these words are not holdings of the case but descriptions used in the opinions. While the *Goodson* Court called the judge's comment that he would give the maximum sentence if the defendant was revoked an "unequivocal promise" it still applied the objective bias test. *See* Id. at ¶¶8, 9, 10. *Goodson* also shows the issue with objecting at the time the comment was made. This comment was not an unequivocal promise until the sentence after revocation was imposed. Unequivocal means no doubt. The judge who made the comment at the original sentencing hearing may not have been the judge at the revocation hearing or may have been persuaded to impose a different sentence if not objectively bias. There was no use of the words "unequivocal promise" or "strong language" in *State v. Marcotte*, which the state also relies upon (State's Br. 13). 2020 WI App 28, 392 Wis. 2d 183, 943 N.W.2d 911. The judge warned Marcotte that he would "go to Dodge" if he failed Drug Treatment Court may not have failed Drug Treatment Court. Again, *Marcotte* illustrates why objecting before the sentence is imposed is impossible. Marcotte could have been motivated by the judges words and succeeded in Drug Treatment Court. Without the defendant's failure, the sentence would not have been imposed and the appellate issue would not have existed. The judge in the

unpublished *Lamb* case, cited by the state, used the words "possibility" in reference to probation and it was "probably not going to happen." (State's Br. 13 *citing State v. Lamb*, No. 2017AP1430-CR, 2018 WL 4619535 (Wis. Ct. App. September 25, 2018) (unpublished). (R-App. 3–7).). The words "unequivocal promise" and "strong language" were not used in the opinion to describe the court's comment in *Lamb*, but the *Lamb* Court still found objective bias. *See* Id.

The state's argument on the merits, if adopted, would result in a holding that required an "unequivocal promise" or "strong language" on the part of the judge to prove objective bias. (*See* State's Br. 11-15). This argument fails in two ways. First, "Sound like prison, agree, [prosecutor]?" does not contain weak language. It is asking a prosecutor to agree with the judge's statement. Second, and more importantly, this is not the test for objective bias. To adopt the state's argument is to abandon the objective bias test entirely.

When applying the correct test found in *Goodson* and *Gudgeon*, the circuit court's prison statement shows a great risk that it had determined what sentence it would impose in this Case five months before the sentencing hearing. A reasonable person hearing the circuit court's question to the prosecutor of "Sound like prison, agree, [prosecutor]?" on July 24, 2019 and then learning that the court followed through on that statement at the December 11, 2019 Sentencing, by imposing a prison sentence would question the court's impartiality. Moments before the court's prison question to the prosecutor, defense counsel moved to dismiss the case because of the harm caused by not producing the defendant for the hearings. R53:4. The judge directed the prison question to the prosecutor, not both counsels. Id. at 5. This alone would give a reasonable person the impression that the defense counsel was being excluded by the court in favor of the state and that the judge had predetermined the sentence in accordance with the state's recommendation.

The state maintains the position that the judge's comment was made in "jest." (State's Br. 5 & 14). However, it does not take into consideration that the

court's comment was made in humor when narrowing the focus of its analysis to "strong language." (*See* State's Br. 13-14). The fact that the court is laughing about this defendant's charge warranting a prison sentence would not go unnoticed by a reasonable person observing this proceeding. The objective bias test requires that we take that into consideration. Further, no case law exists stating humor is exception to the objective bias test. A reasonable person observing the proceeding would conclude that the court was not holding the balance "nice, clear and true' under all the circumstances." *Gudgeon*, 2006 WI App 143, ¶24.

At the end of its brief the state arguments without citation to the record that the circuit court could have sentenced the defendant to prison based on information learned at the sentencing hearing. (State's Br. 15-16). However, the court was aware that the state's recommendation was a prison sentence, bifurcated by four (4) years of initial confinement and two (2) years of extended supervision before making its comment on July 24, 2019, because the state shared its recommendation on the record a month prior at the June 12, 2019 hearing. R55:3. Contrary to the state's argument, when pronouncing the sentence, the court cited no facts unknown to it at the time of the July 24, 2019 statement. *See* R51:22-27. In addition, the fact that the court adopted the state's exact sentencing recommendation of (4) years of initial confinement and two (2) years of extended supervision (R55:3 & R51:24-25) would cause a reasonable person to believe that the court was joking with the state because it was not impartial.

Church has met his burden in overcoming the presumption of impartiality. A reasonable person observing these proceedings would question the fairness and integrity of the judicial system. A person familiar with human nature would conclude that the average judge could not be trusted to "'hold the balance nice, clear and true' under all the circumstances" present in this Case. *See Goodson*, 2009 WI App 107, ¶9.

Conclusion

For the above reasons and those found in the brief in chief, Justin Church respectfully requests an order reversing the circuit court's denial of his postconviction motion and remanding the case for resentencing before a different judge.

Dated at Pewaukee, Wisconsin this 9th day of December, 2021.

Respectfully submitted,

electronically signed by Katie Babe
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FORM AND LENGTH CERTIFICATION - RULE 809.19(8)

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 2,872 words.

Electronically Signed by Katie Babe

SERVICE CERTIFICATION

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. A copy of the reply brief was mailed to

Justin Church on December 9, 2021 at: Justin Church, DOC #493340, Stanley Correctional Institution, 100 Corrections Drive, Stanley, WI 54768-6500.

Electronically Signed by Katie Babe