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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP647-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY J. LAROSE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCE AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN ONEIDA COUNTY CIRCUIT COURT, THE HONORABLE PATRICK F. O'MELIA, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

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ISSUE PRESENTED

Anthony J. LaRose pleaded guilty to first-degree sexual assault of a nine-year-old child. After the court imposed a 45-year imprisonment term, LaRose moved for resentencing based on a claim of objective judicial bias. LaRose alleged three sources of judicial bias. First, the judge had prejudged the need for prison time based on the judge's comments when it sentenced LaRose after revocation in 2009. Second, the judge improperly and independently investigated LaRose's case by reviewing LaRose's juvenile records and past criminal records. Third, the judge's discussion of a divorce proceeding involving a woman with whom LaRose had an affair reflected the judge's hostility toward LaRose and suggested that the judge was not impartial.

The court denied the motion, determining that LaRose failed to show, by a preponderance of the evidence, that the judge was objectively biased.

Did LaRose overcome the presumption that the judge acted fairly, objectively, and without bias when he sentenced LaRose?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Similar to LaRose, the State requests neither oral argument nor publication.

SUPPLEMENTAL STATEMENT OF THE CASE

A. LaRose pleads guilty to first-degree sexual assault of a child and contempt.

The State charged LaRose with first-degree sexual assault (intercourse) of a child under the age of 12. (R. 1:1.) Following a report from the nine-year-old victim's mother that LaRose had inappropriately touched the child, LaRose confirmed to the parent that the allegations were true, and he apologized. (R. 1:1–2.) According to the complaint, LaRose had voluntarily turned himself into a facility "for suicidal and homicidal thoughts because he had molested a child." (R. 1:2.)

Under the plea agreement's terms that resolved this case as well as other pending cases, LaRose pleaded guilty to an amended charge of first-degree sexual assault (sexual contact) of a child and a charge of criminal contempt in a different case. (R. 16:3; 48:10.) On the sexual assault charge, the parties agreed to recommend a 34 to 37-year imprisonment term, consisting of a 14 to 17-year confinement term and a 20-year extended supervision term. (R. 16:3.) A separate case alleging battery by a prisoner and strangulation was dismissed and-read in for sentencing purposes. (R. 48:8–9.) The court ordered a presentence investigation report (PSI). (R. 48:18–19.)

B. LaRose's sentencing

1. The presentence investigation report

The PSI detailed the nature of LaRose's sexual assault of the child, including its frequency, which was "almost once a week." (R. 20:3–4.) While LaRose denied the child's allegations that he had sexual intercourse and engaged in certain other sexual conduct, LaRose admitted to inappropriate contact with the child. (R. 20:5; 21:4.) He also admitted that his assaults on the nine-year-old child would

have most likely continued if the child hadn't reported them. (R. 21:5–6.)

The PSI further included the child's mother's victim impact statement. (R. 20:6.) According to the report, the contempt charge was based on LaRose's repeated attempts to contact the child's mother in violation of a no-contact order while he was in jail. (R. 20:5.)

The PSI summarized LaRose's criminal history and correctional experience. (R. 20:8–11.) While the agent did not have access to LaRose's juvenile record, LaRose reported having a juvenile record like his adult record. (R. 20:10.) Similarly, LaRose's mother provided information to the agent about LaRose's contacts as a juvenile with the legal system. (R. 20:10.) In addition, the PSI discussed fights that LaRose had with two other jail inmates that resulted in the dismissed and read-in charges of strangulation and battery by a prisoner. (R. 20:10.) While LaRose acknowledged being revoked on a 2009 misdemeanor case, he also reported being successfully discharged from other probationary terms. (R. 20:10.)

The PSI further included the following information:

- LaRose's wife discussed LaRose's verbal and physical abuse, including an incident where she sustained injuries that required surgery. (R. 20:15.)
- LaRose's sexual history, including infidelity that resulted in impregnating his wife's best friend. (R. 20:12–13.)
- LaRose's mother described LaRose as lacking emotional intelligence. (R. 20:14.)

The PSI recognized LaRose's trouble maintaining employment. (R. 21:1.) LaRose described his wife as the "sole

breadwinner," and said that he did not know much about their bills or assets. (R. 21:2.)

LaRose reported that he had a sex addiction and sought extramarital sex. (R. 21:3.) A psychologist who conducted a psychosexual evaluation of LaRose opined that LaRose was "well above average risk range to sexually re-offend." (R. 21:4.) When asked how he feels about his prior record, LaRose told the agent that "he hates the sexual assault part." (R. 20:11.) He went on to say, "it's going to sound bad, but some of the people deserved it, some didn't, but I've apologized to all of them." (R. 20:11.)

The presentence agent recommended that LaRose receive 30 to 35 years of initial confinement and 7 to 10 years of extended supervision. (R. 21:13.)

2. The sentencing hearing

Both the State and LaRose asked the court to follow the joint recommendation of a 14 to 17-year confinement term followed by a 20-year extended supervision term. (R. 49:11, 23.)

In her sentencing comments, LaRose's counsel addressed LaRose's character, his educational history, his mental health status, and his acceptance of responsibility. (R. 49:13–17.) Counsel noted LaRose's first arrest as an 8-year-old, and she represented that impulse control and anger issues characterized his youth. (R. 49:14.) Counsel discussed the reasons why a different judge placed LaRose at Lincoln Hills rather than at a residential treatment facility. (R. 49:14–15.)

In its sentencing comments, the court described probation as the "preferred sentence" unless probation would unduly depreciate the seriousness of the offense, or if LaRose's treatment needs were better met while he was in custody. (R. 49:26.) In making its sentencing determination,

the court explained that it considers several factors, including the severity of any injuries the victim sustained, the effect on the victim, LaRose's age, education, and employment, his criminal record, undesirable behavior patterns, family history, substance abuse issues, and remorse. (R. 49:26.)

With respect to LaRose's criminal record, the court stated that it was "able to go back to the juvenile records" even if his counsel could not. (R. 49:27.) The court then noted an incident where LaRose "hit a teacher or pushed the teacher." (R. 49:27.) When the court expressed uncertainty about where the offense occurred, LaRose interjected, "Rock County." (R. 49:27.) While discussing LaRose's adult criminal history, the court stated, "I read the complaints going back, it's a lot of the same behavior, just a different age." (R. 49:27–28.) More specifically, the court noted that it reviewed the complaint accusing LaRose of placing a chokehold on a person when he was in the jail. (R. 49:28.) The court also discussed the circumstances of LaRose's domestic violence case. (R. 49:29.)

The court described LaRose's employment history as "sporadic, short-term employment," noted his "inability to get along with coworkers or people in authority," and found that LaRose was unable to "keep a stable lifestyle for the family." (R. 49:29–30.)

The court also addressed LaRose's undesirable behavior patterns, including his daily marijuana usage in the house when the children were there "to the point where they have tested positive in their hair for THC." (R. 49:31–32.) The court further discussed LaRose's narcissistic tendencies and described him as manipulative. (R. 49:33–34.) Noting LaRose's admitted "very strong sexual addictions," the court observed that he had "been unfaithful to [his] wife . . . fathered a child with another married woman who, by the way, just this morning I had her in court . . . And I did her divorce today." (R. 49:32–33.) The court said that it asked the woman whether her husband knew that "somebody else had fathered

the child." (R. 49:33.) It also commented, "always waking up to that every day, being reminded that my wife was unfaithful or my husband was unfaithful." (R. 49:33.) The court later commented that as it "sat this morning doing the divorce," it asked itself whether the woman and her husband were victims of LaRose's undesirable behavior patterns. (R. 49:41.)

With respect to LaRose's crime, the court said that it was not a "one-time thing." (R. 49:36.) It described LaRose's conduct toward the child as "more than grooming. This was complete manipulative control of a little one . . . that trusted you." (R. 49:36.) The court also noted that as LaRose "pointed out, this would still be going on" if the child had not said something and her mother not acted. (R. 49:37–38.)

With respect to the first-degree sexual assault conviction, the court imposed a 45-year imprisonment term, consisting of a 25-year initial confinement term and a 20-year extended supervision term. (R. 49:44.) The court's initial-confinement sentence was less than what the PSI agent recommended, which was 30–35 years. (R. 21:13.) The court ordered a year in the county jail, concurrent, on the contempt charge. (R. 49:44.)

C. Postconviction Proceedings

LaRose moved for resentencing, alleging that the sentencing judge exhibited the appearance of bias (objective bias), which violated his due process rights.[1] LaRose also asserted that the judge's on-the-record comments demonstrated objective bias because they showed that the judge prejudged LaRose's sentence and formed an opinion from facts outside the record. (R. 73:6.) Specifically, LaRose

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[1] LaRose also contended that the court erroneously exercised its sentencing discretion when it considered an improper factor (gender). (R. 73:1, 6–7.) LaRose has abandoned this claim on appeal. (LaRose's Br. 10.)

argued that the judge had previously sentenced him after revocation in 2009. (R. 73:18–23.) And, during that sentencing hearing, the judge commented that LaRose had "been in court so much," and that "[w]e'll just keep putting you in jail and put you ultimately in prison because that's where you're headed." (R. 73:4–5, 21.) The judge further opined in 2009 that the State "should have cited you with a repeater," and that if LaRose is ever convicted of a felony, "I'm not sure how another court could really keep you from prison." (R. 73:5, 21–22.)

The court held a hearing. It noted that it heard the divorce case on the morning of LaRose's sentencing, and that it "didn't really put two and two together in terms of any sort of relationships until later." (R. 86:9.) The court stated that its comments about the divorce case at LaRose's sentencing "were meant as there are collateral damages in cases." (R. 86:9.) The court explained that it did not "suggest that the divorce was in any way related directly to this. I was simply, perhaps, thinking out loud but wondering the effects of his actions that perhaps are unforeseen at this point." (R. 86:10.) According to the court, "[t]hat was the only reason reference to the divorce case." (R. 86:10.)

The court next pointed out that LaRose's sexual behavior is "mentioned throughout the [PSI] regarding other children." (R. 86:10.) LaRose "was a very sexual person, unfaithful, and a history of that. So the reference to the divorce was inconsequential, frankly." (R. 86:10.)

The court then discussed its reference to LaRose's juvenile record. (R. 86:10.) The court acknowledged that it commented that the PSI agent did not have access to LaRose's juvenile record, but that it "was all discussed by [LaRose's] mom to the author of the [PSI], that he was an eight-year-old child, battery by kicking a teacher. And that's all the Court referenced." (R. 86:10.) The court recognized that as an adult "[t]here was incidents in the jail that were referenced by the

author of the PSI that were consistent with [LaRose's] 15 years prior." (R. 86:11.) Therefore, the court didn't "see any issues with that, again if the issue is a person, reasonable observer in court, would question fairness or impartiality." (R. 86:11.)

With respect to its comments when it sentenced LaRose in 2009, the court stated that it did not remember that case until it read LaRose's postconviction motion and attached exhibit. (R. 86:11.) The court had "no recollection of that case," and so it was "not sure how that would have affected my decision-making process when I sentenced Mr. LaRose." (R. 86:13.)

The court determined that LaRose failed to meet his burden by a preponderance of the evidence that a reasonable observer would question the court's fairness and impartiality. (R. 86:13–14.)

LaRose appeals.

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

LaRose failed to rebut the presumption that the judge acted impartially at his sentencing hearing.

LaRose contends that two types of recognized objective bias were present in his case: (1) the judge's on-the-record comments show that he prejudged LaRose's sentence; and (2) the judge's on-the-record comments reveal that he formed an opinion from facts outside the record reflecting a high degree of antagonism toward LaRose. (LaRose's Br. 11–13.) As will be demonstrated below, LaRose fails to prove either claim of bias.

A. A defendant asserting judicial bias must overcome the presumption that judges act impartially.

"A fair trial in a fair tribunal is a basic requirement of due process." *B.J.M.*, 392 Wis. 2d 49, ¶ 21 (citation omitted). This Court "presume[s] that a judge has acted fairly, impartially, and without bias." *Id.* "A defendant may rebut the presumption by showing that the appearance of bias reveals a great risk of actual bias." *Herrmann*, 364 Wis. 2d 336, ¶ 3.

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 v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009)).[2] Under the objective test, the question is "whether a reasonable person

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[2] LaRose makes only an objective, not a subjective, bias claim. (R. 86:4–5; LaRose's Br. 12.)

could question the judge's impartiality." *Gudgeon*, 295 Wis. 2d 189, ¶ 21.

Relying on *Goodson*, 320 Wis. 2d 166, LaRose asserts that there are two types of objective bias: the appearance of bias and actual bias. (LaRose's Br. 12.) However, several post-*Goodson* decisions reveal a disagreement over the proper formulation of the test for objective bias. In *Herrmann*, the lead opinion used the phrase "appearance of bias." 364 Wis. 2d 336, ¶ 40. 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). More recently, relying on *Caperton*, 556 U.S. 868, a majority of the court in *B.J.M.* defined the question as "whether there is 'a serious risk of actual bias—based on objective and reasonable perceptions.'" *B.J.M.*, 392 Wis. 2d 49, ¶ 24 & n.18 (citation omitted). But one member of the majority advocated for the "appearance of bias" framework articulated in *Herrmann*. *Id.* ¶¶ 38–63 (Bradley, J., concurring). Three justices in dissent rejected the "appearance of bias" framework. *Id.* ¶ 114 (Hagedorn, J., dissenting).

Regardless of the continued viability of the "appearance of bias" framework, the party asserting judicial bias under either framework must demonstrate a "serious risk of actual bias." *Id.* ¶ 22; *Herrmann*, 364 Wis. 2d 336, ¶¶ 35–36. A judge's statements and conduct suggesting that a judge has prejudged a sentence may demonstrate a serious risk of actual bias that violates due process. *State v. Marcotte*, 2020 WI App 28, ¶ 21, 392 Wis. 2d 183, 943 N.W.2d 911.

LaRose also argues that "[a]nother longstanding and interrelated pair of bias problems occurs when a judge's on-the-record comments reveal an opinion formed from facts outside the record, and the opinion betrays 'such a high degree of . . . antagonism' toward the defendant that 'fair

judgment [becomes] impossible.' *See Liteky v. United States*, 510 U.S. 540, 555 (1994)." (LaRose's Br. 13.)

Liteky does discuss judicial remarks and bias, but in full it says the following:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.,* apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555 (1994) (citation omitted). Thus, *Liteky* makes clear that even a judge's *hostile* remarks "do not support a bias or partiality challenge" unless the remarks display a "deep-seated" antagonism. *Id.*

B. The judge's statements during LaRose's 2009 sentencing after revocation do not show prejudgment in his current sentencing.

LaRose first argues that the judge's remarks during LaRose's sentencing after revocation in 2009 suggests "he prejudged the need for prison time" in the present case. (LaRose's Br. 11, 13.) This argument fails.

First, nowhere in his appellate brief does LaRose recognize that the judge expressly addressed and rejected this argument. As noted above, at the postconviction hearing the judge informed the parties it did not remember the 2009 case until it read LaRose's postconviction motion and attached exhibit. (R. 86:11.) Because the judge had "no recollection" of the 2009 case, the judge was "not sure how that would have affected my decision-making process when I sentenced Mr. LaRose" in 2022. (R. 86:13.) Not remembering the 2009 case makes it impossible for the judge to prejudge LaRose's current sentence on that basis.

Second, the court's factual finding that it had "no recollection" of LaRose's 2009 case is a factual finding that this Court owes deference unless clearly erroneous. *State v. Wiskerchen*, 2019 WI 1, ¶ 17, 385 Wis. 2d 120, 921 N.W.2d 730. LaRose, by failing to even recognize the court's decision, does not argue that the factual finding is clearly erroneous.

Third, despite his experience with this same circuit court judge in 2009, LaRose was apparently satisfied with the assignment of the judge, because he never requested a substitute judge.

But LaRose argues that *Gudgeon*, 295 Wis. 2d 189, *Goodson*, 320 Wis. 2d 166, *State v. Lamb*, 2018 WI App 66, 384 Wis. 2d 414, 921 N.W. 2d 522 (unpublished) (R-App. 3–8), and *Marcotte,* 392 Wis. 2d 183, support his claim that the

court prejudged his case and that there was an appearance of bias. These cases are inapposite.

In *Gudgeon*, 295 Wis. 2d 189, ¶ 26, which concerned a probation extension decision, the judge stated in a note to the parties, "I want his probation extended." 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 *Lamb*, the parties recommended probation. Despite that recommendation, the court told the defendant, prior to hearing arguments on sentencing, that "there's a possibility [you'll go home today], but it's probably not going to happen." *Lamb*, 384 Wis. 2d 414, ¶ 5. (R-App. 5.) This Court held that the 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. (R-App. 6.) Finally, in *Marcotte*, 392 Wis. 2d 183, ¶ 19, the judge told Marcotte before sentencing after revocation that he would be sentenced to prison if he did not succeed in drug court. This Court concluded that the judge's statement, in conjunction with another factor, gave "rise to a great risk of actual bias." *Id*. ¶ 18.

None of the scenarios seen in *Gudgeon*, *Goodson*, *Lamb*, or *Marcotte* happened here. In this case, the unrefuted record shows that the judge had no recollection of LaRose's prior sentencing from a decade prior, that the judge made no comments about that prior sentencing during LaRose's current sentencing, and that the judge had not prejudged

LaRose's sentence. The judge's remarks do not amount to a "high degree" or "deep-seated" "antagonism as to make fair judgment impossible." *Liteky*, 510 U.S. at 555.

For the above reasons, LaRose fails to show that the judge prejudged the need for prison time or exhibited objective bias.

C. The judge's inquiry into LaRose's record does not show objective bias that implicates his due process rights.

LaRose next argues that the judge's inquiry into his record "suggests a departure from his role as a neutral and detached magistrate." (LaRose's Br. 17.) The State disagrees.

At the sentencing hearing, the judge said that it looked at juvenile records related to an incident in which LaRose hit or pushed a teacher, resulting in the police being called. (R. 49:27.) LaRose contends that the judge's investigation of his juvenile record violated the Code of Judicial Conduct's prohibition against independent investigation, that the judge failed to provide the parties with an opportunity to respond, and, therefore, the judge violated his due process rights. (LaRose's Br. 17–19.)

For several reasons, this Court should reject LaRose's efforts to transform what he perceives to be a violation of the Code of Judicial Conduct ("the Code") into a judicial bias claim implicating his due process rights. While the Code is intended "to provide guidance to judges . . . [and] a structure for regulating conduct," its Preamble *cautions* against the kind of use that LaRose makes of it in this case. The Preamble provides: "the purpose of the Code would be subverted if the Code were invoked by lawyers or litigants for mere tactical advantage in a proceeding." SCR Chapter 60, "Preamble." Indeed, even if a judge's actions in a specific case violate the Code, that alone may not be dispositive of whether any litigant in the underlying case is entitled to relief. *Cf. State v.*

Cooper, 2019 WI 73, ¶ 22, 387 Wis. 2d 439, 929 N.W.2d 192 (explaining that the fact that a lawyer violated Supreme Court Rules when representing a client did not mean, *ipso facto*, that the client was entitled to relief in his underlying case).

Furthermore, while SCR 60.04(g) prohibits courts from engaging in *ex parte* communications, it does *not* expressly prohibit a judge from conducting an independent investigation. Rather, a comment following SCR 60.04(g) provides, "A judge must not independently investigate facts in a case and must consider only the evidence presented." But as the Preamble cautions, "[t]he Commentary is not intended as a statement of additional rules." Thus, the comment upon which LaRose relies on is no rule at all, and is an inadequate basis for a due process claim grounded in judicial bias.

LaRose nonetheless relies on two judicial discipline cases, *Judicial Commission v. Piontek*, 2019 WI 51, 386 Wis. 2d 703, 927 N.W.2d 552, and *Judicial Commission v. Calvert,* 2018 WI 68, 382 Wis. 2d 354, 914 N.W.2d 765, to advance his claim. (LaRose's Br. 18–19.) But the judge's conduct here is nothing like the conduct that occurred in either case.

In *Piontek*, a judge conducted his own online investigation of a criminal defendant's nursing credentials because he did not believe that the defendant had been truthful in her comments to the presentence investigation writer. *Piontek*, 386 Wis. 2d 703, ¶ 18. In the underlying case that formed the basis for disciplinary action, the defendant moved for resentencing because the information was inaccurate. *Id.* ¶ 19. This Court reversed the judge's order denying the defendant's postconviction motion because the record demonstrated that the judge relied on the misinformation, thus depriving the defendant of her right to be sentenced based on accurate information. *Id.* ¶ 20. In the disciplinary action, the supreme court determined that the

judge violated his duty of neutrality by conducting an independent investigation and by failing to allow the defendant to respond to the inaccurate allegations. *Id.* ¶ 37.

Unlike in *Piontek*, LaRose has not suggested that the juvenile record information that the judge considered was inaccurate. Indeed, his limited research about LaRose's conduct as a juvenile merely confirms the far more detailed information that LaRose's mother provided about the incident to the PSI agent.[3] (*Compare* R. 20:10 *with* R. 49:27.) And, at sentencing LaRose did not dispute that the information his mother provided about the incident was inaccurate. (R. 49:3, 16–18.) Notably, the judge characterized much of the information that LaRose's mother provided as "mitigating." (R. 49:7.) Finally, the judge did not engage in conduct like that seen in *Piontek*, where the judge characterized the defendant's attempt to explain the outside information as "lies," suggested that she should "close [her] mouth," and told her not to comment further about the matter. 386 Wis. 2d 703, ¶ 18. By contrast, here the judge did not react negatively to LaRose when he interjected that the juvenile incident occurred in Rock County. (R. 49:27.) The judge's conduct does not reveal the kind of loss of impartiality or bias that prompted discipline in *Piontek*. 386 Wis. 2d 703, ¶¶ 14, 22, 29.

Calvert is also of no help to LaRose. In *Calvert*, the supreme court disciplined a court commissioner in an injunction case who engaged in *ex parte* communications by contacting a law enforcement agency and obtaining additional

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[3] LaRose's mother told the PSI agent that LaRose's first contact with the legal system "began around age 8 when he was arrested for battery." (R. 20:10.) She explained that LaRose had "kicked one of his teachers." (R. 20:10.) LaRose's mother also told the PSI agent that LaRose "had behavioral issues while growing up." (R. 20:10.) She enrolled LaRose in "the Sprite Program, described as a 'boot camp', twice before opting to send him to Lincoln Hills" when he was 16 or 17. (R. 20:10.)

information about the case. 382 Wis. 2d 354, ¶¶ 17–18, 26. The supreme court noted that the commissioner "lied to the parties in a particularly manipulative manner, falsely claiming that he had communicated with individuals in the judicial and law enforcement systems in such a way that the parties were doomed to failure and future legal troubles should they ever seek additional recourse." *Id.* ¶ 26. It characterized the commissioner's actions as giving the "impression to the litigants before him that the judge had essentially rigged the judicial and criminal justice systems against them." *Piontek*, 386 Wis. 2d 703, ¶ 38. The court determined that the commissioner's investigation implicated SCR 60.04(g)'s prohibition against *ex parte* communications because the court communicated with the police chief about the underlying dispute involved in the litigation. *Calvert,* 382 Wis. 2d 354, ¶¶ 7–8.

Conversely, the judge's conduct here does not even come close to the conduct that prompted supreme court discipline in *Calvert*. It certainly does not demonstrate objective bias, i.e., a "serious risk of actual bias—based on objective and reasonable perceptions." *B.J.M.*, 392 Wis. 2d 49, ¶ 22 (citation omitted). Here, the judge did not communicate with a party or any witness concerning LaRose's delinquent conduct as an eight-year-old; rather, he reviewed records of LaRose's involvement with the juvenile justice system. (R. 49:27.) The judge did not expressly invoke the principles of judicial notice when he referenced LaRose's juvenile record. But because Wis. Stat. § 902.01(3) confers discretion on a circuit court to "take judicial notice, whether requested or not," the judge's unprompted review of facts that he could judicially notice under Wis. Stat. § 902.01(2) did not constitute an improper *ex parte* communication.

Contrary to LaRose's claim, *Piontek* and *Calvert* do not support his claim that the judge here was objectively biased so as to implicate his due process rights.

D. The circuit court's comments about the divorce proceeding and about LaRose's character do not show objective bias.

LaRose next argues that the judge's comments about the divorce proceeding he oversaw immediately before LaRose's sentencing as well as the court's "discussion of his all-encompassing hostility" towards LaRose support his claim that the court was biased. (LaRose's Br. 19.) For the following reasons, these arguments fail.

LaRose first argues that because the judge did not give the parties notice of its consideration of the divorce, it's failure to do so was improper. (LaRose's Br. 20 (citing *Piontek*, 386 Wis. 2d 703, ¶ 37).) But the judge's presiding over a separate hearing that morning and its mention of it later at LaRose's sentencing cannot be construed as an "independent investigation" that requires notice. Further, the parties *did* have notice about aspects of the divorce that the sentencing court discussed—the information was in the PSI, where LaRose "indicated he has another child as a result of an extra-marital affair." (R. 20:13.) LaRose also told the PSI agent he had an affair with his wife's friend and that his wife's friend and her husband raise the child as their own. (R. 20:13.) LaRose did not object to this information in the PSI at sentencing. Finally, LaRose's sexual conduct was a permissible topic for the sentencing court's consideration. As the postconviction court pointed out, LaRose's sexual behavior is "mentioned throughout the [PSI] regarding other children." (R. 86:10.) LaRose "was a very sexual person, unfaithful, and a history of that. So the reference to the divorce was inconsequential, frankly." (R. 86:10.)

LaRose next argues that there is no evidence that the sex with his wife's friend was anything but consensual or that LaRose "lure[d]" the woman away. (LaRose's Br. 20.) That is true. The judge commented that LaRose having a child with his wife's friend "didn't help [that] marital relationship," to

which LaRose admitted, "[y]es, sir." (R. 49:33.) The judge then questioned whether his wife's friend and husband are victims of LaRose's "undesirable behavior patterns." (R. 49:41.) But the judge did not comment or suggest that the sex was not consensual or that LaRose had "lured" his wife's friend away from her husband. (R. 49:33.)

Finally, LaRose argues that the judge's focus on LaRose's "undesirable behavior patterns" shows "an unconstitutional degree of antipathy." (LaRose's Br. 20–21.) He also argues that the judge's statements amount to "unequivocal antagonism." (*Id.* (citing *Liteky*, 510 U.S. at 555).) As noted above, the postconviction court pointed out that LaRose's sexual behavior is "mentioned throughout the [PSI] regarding other children." (R. 86:10.) And, as the sentencing judge recognized, LaRose's crime in this case was not a "one-time thing." (R. 49:36.) Rather, LaRose's conduct toward the child victim was "more than grooming. This was complete manipulative control of a little one . . . that trusted you." (R. 49:36.) LaRose further admitted to the PSI agent that the assaults on the child "would still be going on" if the child had not said something and her mother not acted. (R. 49:37–38.) The judge's "negative commentary" and "antipathy" (LaRose's Br. 21) towards LaRose was justified. His comments did not, however, "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. Indeed, the judge even sentenced LaRose to a *lower* initial confinement sentence than the PSI agent recommended.

E. The totality of the circuit court's statements do not amount to objective bias.

LaRose's final argument on appeal is that the totality of the judge's statements establishes the appearance of bias. (LaRose's Br. 21–22.) But they don't. Rather, the totality of the circumstances shows that the sentencing judge described

probation as the "preferred sentence" unless probation would unduly depreciate from the seriousness of the offense, or if LaRose's treatment needs were better met while he was in custody. (R. 49:26.) The totality of the circumstances also shows that in making his sentencing determination, the judge explained that he considers several factors, including the severity of any injuries the victim sustained, the effect on the victim, LaRose's age, education, and employment, his criminal record, undesirable behavior patterns, family history, substance abuse issues, and remorse. (R. 49:26.) The judge then went through the factors and determined that a sentence of 25 years' initial confinement and 20 years' extended supervision was appropriate. (R. 49:44.) The judge's statements throughout sentencing do not amount to a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. Rather, the judge's statements support the sentence imposed.

LaRose is not entitled to resentencing.

CONCLUSION

This Court should affirm the judgment of conviction and sentence and the circuit court's order denying postconviction relief.

Dated this 10th day of March 2023.

Respectfully submitted,

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FORM AND LENGTH 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 5,522 words.

Dated this 10th day of March 2023.

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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 10th day of March 2023.

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