STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2022AP000647 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY J. LAROSE,

Defendant-Appellant.

On appeal from a judgment of conviction
and order denying postconviction relief,
both entered in the Oneida County Circuit Court,
the Honorable Patrick F. O'Melia, presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. Introduction.

The facts surrounding Mr. LaRose's sentencing would lead a reasonable person to question whether Judge O'Melia could "hold the balance nice, clear and true between the State and the accused."[1] First, when he sentenced Mr. LaRose after revocation several years ago, Judge O'Melia commented that Mr. LaRose was headed to prison, would eventually be sent there, and "should have" been charged as a repeater already. Then, when he sentenced Mr. LaRose in this case, Judge O'Melia prepared by independently seeking out and reviewing Mr. LaRose's juvenile records (among other things) and by drawing a host of unfavorable inferences during an unrelated divorce proceeding he happened to preside over the same day.

An ordinary person would view Judge O'Melia's remarks and actions, in combination, as suggesting he failed to remain neutral and disinterested—a due process requirement. A reasonable person would instead suspect that Judge O'Melia caved to prejudgment, to his preference for a "particular outcome,"[2] to his interest in evidence outside the record, and to his "unequivocal antagonism" towards Mr. LaRose.[3] It follows that

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[1] *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

[2] *See State v. Gudgeon*, 2006 WI App 143, ¶26, 295 Wis. 2d 189, 720 N.W.2d 114.

[3] *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

Mr. LaRose's sentencing was marred by objective bias and that he should be resentenced by a different judge.[4]

The State responds that the law governing objective bias claims is in flux, and that regardless of whether it has changed, Mr. LaRose has not met his burden. As for Judge O'Melia's predetermination that prison time was warranted here, the State contends that his professed failure to recall Mr. LaRose's past sentencing means what the judge said at that point is irrelevant. Finally, regarding Judge O'Melia's sentencing comments this time around, the State disregards his reliance on information from outside the record because it overlapped with the contents of the PSI and was thus, in the State's view, fair game.

The State's reasoning fails at several critical points. Its presentation of the governing law is confused; its argument emphasizes facts that don't factor into the objective bias analysis; and it debunks straw men instead of engaging with the legitimate issues presented. This Court should apply the law as it is (not as the State wants it to be) and should apply it to the facts as a reasonable person would perceive them (not as Judge O'Melia sees them). In doing so, Mr. LaRose submits, the Court will recognize telltale signs of partiality that would cause an ordinary person to doubt Judge O'Melia's fairness. That, in itself, is a due process violation—regardless of what was in Judge O'Melia's heart or mind when imposing sentence.

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[4] *See State v. Goodson*, 2009 WI App 107, ¶18, 320 Wis. 2d 166, 771 N.W.2d 385.

II. The appearance of bias is a form of objective bias.

The appearance of bias is a form of objective bias.[5] Many published cases say as much, and no case has overturned them.[6] In *Miller v. Carroll*,[7] the Wisconsin Supreme Court noted that it was using the United States Supreme Court's "serious risk of actual bias" language,[8] not the "appearance of bias" language it had previously used.[9] But it didn't call state precedent into question. There was no reason (or basis) to do so, as Justice A.W. Bradley's concurrence details: under federal objective bias case law and Wisconsin's appearance-of-bias precedent alike, defendants must show that objective facts reveal "a serious risk of actual bias."[10] This is "an exacting standard," but it's not the same as an actual bias requirement.[11] A defendant's evidentiary burden in an objective bias case revolves around the reasonable perceptions of ordinary people—not the subjective, often unknowable truth of the judge's decisionmaking.[12]

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[5] *Id.*, ¶9; *see also State v. Herrmann*, 2015 WI 84, ¶30, 364 Wis. 2d 336, 867 N.W.2d 772.

[6] *See, e.g., Goodson*, 320 Wis. 2d 166, ¶9; *Gudgeon*, 295 Wis. 2d 189, ¶24.

[7] *Miller v. Carroll*, 2020 WI 56, ¶25 n.18, 392 Wis. 2d 49, 944 N.W.2d 542.

[8] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

[9] *Herrmann*, 364 Wis. 2d 336, ¶30.

[10] *Miller*, 392 Wis. 2d 49, ¶51 (A.W. Bradley, J., concurring).

[11] *Id.*

[12] *Id.*, ¶¶41-51.

In the end, the State seems to concede that the appearance-of-bias framework remains intact (at least for now). And it does. While the State may wish *Miller* had overturned prior cases, its wishes have nothing to do with what the law says. The appearance of bias, when it creates a serious risk of actual bias, still violates due process.

III. The record establishes the appearance of bias at Mr. LaRose's sentencing.

The State implies throughout its brief that any judicial bias here was harmless. This argument remains subtextual, as it must: settled law deems judicial bias a structural error, which cannot, by definition, be harmless.[13] The State recites that principle in its discussion of the governing law, but its arguments follow the letter and not the spirit of the structural error doctrine. It stresses the severity of Mr. LaRose's offense, the valid sentencing considerations in the mix, and Judge O'Melia's postconviction remarks about how little the outside information he gathered mattered to him. In doing so, the State tries to convey that, biased judge or not, Mr. LaRose got a reasonable and justified sentence.

Of course, that isn't the question. Even if Mr. LaRose had gotten a lenient sentence—less than anyone asked for, with plenty in the record to support a harsher penalty—objective bias would entitle him to resentencing before a different judge. The bias, not the sentence, is the constitutional problem.

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[13] *Gudgeon*, 295 Wis. 2d 189, ¶20.

The first significant indicator of unconstitutional bias that the State tackles is prejudgment: the comments Judge O'Melia made when he sentenced Mr. LaRose several years ago. But the State's focus is not on the comments themselves or what they foretold; it's on Judge O'Melia's statement at the postconviction hearing that, when he sentenced Mr. LaRose here, he did not remember that he'd sentenced him before. So, Judge O'Melia explained, the views he expressed several years ago played no role in his decisionmaking. The State characterizes these statements as findings of fact, and it considers them dispositive of the prejudgment issue.

The State loses sight of the objective nature of the appearance-of-bias inquiry. Imagine a reasonable person who is aware that, several years ago, Judge O'Melia commented that a judge would ultimately put Mr. LaRose in prison and that the State should already have made a prison sentence possible. Then this reasonable person sees that Mr. LaRose is before Judge O'Melia for another round of sentencing. They know Judge O'Melia believed imprisonment was warranted years ago, and they know he believed Mr. LaRose would inevitably end up in prison. They do not—and cannot—know what Judge O'Melia remembers from Mr. LaRose's earlier case, or whether he harbors the same views about Mr. LaRose today. But knowing the judge's beliefs and inclinations about Mr. LaRose all those years ago, and knowing that Mr. LaRose now faces prison time, the reasonable person will suspect that imprisonment is all but guaranteed.

This suspicion is what matters: not what a reasonable person would believe with full information about the judge's beliefs, memories, and thought processes (an unattainable goal in any case), but what they'd believe given the objective facts available.[14]

In addition to infusing a subjective element into the objective bias test, the State asks this Court to let a sentencing court's retrospective explanation of its decision justify that decision. Wisconsin case law disfavors such post hoc review. In the context of a plea breach at sentencing, for example, the Wisconsin Supreme Court declined to allow an evidentiary hearing "to determine whether [the defendant] would have received a different sentence" in the "absence of error."[15] It held that "such a hearing would necessarily involve speculation and calculation" (much like the postconviction hearing in this case) and would thus "be inappropriate, and irrelevant."[16] Accordingly, the postconviction findings of fact the State points to should not be part of this Court's inquiry.

Beyond the judge's rationalization of his sentencing decision, the State makes three additional claims aiming to disprove prejudgment: it contends that the facts here are distinguishable from those in *Gudgeon*,

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[14] *See Miller*, 392 Wis. 2d 49, ¶41 (A.W. Bradley, J., concurring).

[15] *State v. Smith*, 207 Wis. 2d 258, 280, 558 N.W.2d 379 (1997).

[16] *Id.*

Goodson, *Lamb*,[17] and *Marcotte*,[18] so those cases don't control; that Mr. LaRose's failure to seek substitution means he must not have been bothered by Judge O'Melia's behavior; and that Mr. LaRose can't meet his burden under *Liteky*. This Court can quickly dispense with these arguments:

- The precise facts of past appearance-of-bias cases are different from the facts here (and from each other). But they share something critical: in each ease, the judge made on-the-record comments (oral or written) revealing a preconceived notion about the appropriate disposition in a future proceeding. And in each case, the judge had the opportunity to follow that preconceived notion—and did. The details will necessarily vary from case to case, but when they follow that pattern, they weigh towards objective bias.

- No case has made a substitution request or a request for recusal a prerequisite to asserting the right to a neutral magistrate postconviction. There are all sorts of reasons a person might not seek substitution, from a lawyer's failing to mention the right to a missed deadline. The question postconviction is whether the record shows

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[17] *State v. Lamb*, 2018 WI App 66, ¶¶2-6, 384 Wis. 2d 414, 921 N.W.2d 522 (unpublished op.) (App. 53-54).

[18] *State v. Marcotte*, 2020 WI App 28, ¶¶1-13, 392 Wis. 2d 183, 943 N.W.2d 911.

a due process violation warranting relief—not why a person didn't seek to address his concerns in some other way earlier on.

- Mr. LaRose cites *Liteky* in discussing two interrelated indications of bias: (1) Judge O'Melia's reliance on the information he personally gathered from outside the record, and (2) the negative views about Mr. LaRose that Judge O'Melia formed from that information. These aspects of the bias record are distinct from prejudgment. The State's incorporation of *Liteky* into its prejudgment argument is thus misplaced.

Following its prejudgment discussion, the State turns to Judge O'Melia's inquiry into, and reliance on, facts outside record. It brings three central arguments.

First, it says that Mr. LaRose alleges a violation of the Code of Judicial Conduct, and such a violation is not an independent basis for an objective bias claim. It also notes that the judges in the disciplinary cases Mr. LaRose has cited behaved far more egregiously than Judge O'Melia did here. To both contentions, Mr. LaRose responds: correct.

In assessing whether the record establishes the appearance of bias, the rules governing judicial conduct provides useful guidance, as they codify many of the norms that demonstrate—to a reasonable person—that a

judge is neutral.[19] This Court has therefore held as follows: "[A]lthough a violation of an ethical rule does not, standing alone, show that a judge's conduct offends due process, we may consider Wisconsin Supreme Court Rules (SCR) when considering a claim of objective bias."[20] Mr. LaRose does not ask the Court to do anything more than that.

The State next contends that Judge O'Melia had authority to judicially notice the facts in question, so his solo inquiry into those facts wasn't a problem. It also emphasizes, rightly if unnecessarily, that Judge O'Melia did not engage in any ex parte communication. These two lines of argument are tangled in the State's brief, rendering its main point unclear. In any case, only the judicial notice argument merits attention, as Mr. LaRose has never claimed that Judge O'Melia engaged in ex parte communication.

Wisconsin Stat. § 902.01 governs judicial notice of adjudicative facts—facts like the details, causes, and aftermath of Mr. LaRose's juvenile missteps. Under sub. (2), judicially noticeable facts are those "not subject to reasonable dispute" that are either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The State contends that Mr. LaRose's juvenile records fall within this category, and that Judge

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[19] *Miller v. Carroll*, 2019 WI App 10, ¶27, 386 Wis. 2d 267, 925 N.W.2d 580, *aff'd*, 2020 WI 56, 392 Wis. 2d 49, 944 N.W.2d 542.

[20] *Id.*

O'Melia's mere *capacity* to judicially notice the records means considering them wasn't a problem. The State is doubly wrong. First, confidential court records aren't "generally known or capable of accurate and ready determination."[21] And whether a judge takes judicial notice sua sponte or upon request, the parties must have notice; only then can they exercise their right to "timely request an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed."[22] Judicial notice principles thus do not justify Judge O'Melia's independent investigation into facts pertinent to Mr. LaRose's sentencing.

Finally, as for Judge O'Melia's discussion of an unrelated divorce proceeding, the State points out that some of the information gleaned from the divorce proceeding was presented, in some form or other, in the PSI. The State also discusses Judge O'Melia's negative views about Mr. LaRose—which overlapped with his discussion of the divorce—characterizing them as well-founded. The State concludes by reminding this Court that Mr. LaRose received less prison time than the PSI recommended (though more than either party requested).

The thread connecting these arguments is the State's request that the Court look beyond the specifics to the big picture—that, in its view, Mr. LaRose got a reasonable sentence after a fair sentencing hearing.

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[21] *See State v. Christian*, 142 Wis. 2d 742, 746, 419 N.W.2d 319 (1987).

[22] Wis. Stat. § 902.01(5).

The State's emphasis on the big picture is appropriate, in one sense: the test for objective bias is rooted in the totality of the circumstances. But despite the State's effort to minimize and distract from Judge O'Melia's improper statements and actions, the totality of the circumstances reveals objective bias. The signs of bias ran the gamut: statements Judge O'Melia made several years ago, prejudging the need for prison here; Judge O'Melia's independent investigation into confidential court records he knew the parties couldn't easily access; his comments about a divorce he'd just presided over, during which he somewhat shockingly volunteered his knowledge that he believed Mr. LaRose was the biological father of the divorcing couple's son; and his lengthy recitation of Mr. LaRose's problematic traits and lifestyle, real or imagined.

This is not a case where one discrete statement raised the red flag of bias. Instead, it is a case where a host of comments and actions over the course of several years built a record of bias that a reasonable person would be unable to ignore. Mr. LaRose respectfully requests that this Court acknowledge what the record makes clear—the appearance of bias—and grant him resentencing before a different judge.

CONCLUSION

For the reasons set forth here and in his brief-in-chief, Mr. LaRose respectfully requests that this Court reverse the circuit court's order denying postconviction relief and remand the case for a new sentencing hearing before a different judge.

Dated this 31st day of March, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,540 words.

Dated this 31st day of March, 2023.

Signed:

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