

FILED
04-11-2025
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT
CASE NO. 2022AP000647 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY J. LAROSE,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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INTRODUCTION

In 2009, Judge Patrick O'Melia sentenced Anthony LaRose for a misdemeanor. He imposed six months' jail, commenting that prison seemed inevitable should LaRose someday face sentencing for a felony. He also opined that the State should have charged LaRose as a repeater, implying that he considered prison time appropriate then and there.

Years later, Judge O'Melia sentenced LaRose again, this time for a felony. But first, he independently investigated LaRose's juvenile and adult records without notifying the parties. Then, the morning of sentencing, he presided over a divorce involving a woman who'd had a child with LaRose while both were married to others. Judge O'Melia repeatedly remarked on the divorce at LaRose's sentencing, speculating that it was in part LaRose's fault and that the couple might be his victims. Judge O'Melia also voiced his wholly negative view of LaRose, criticizing not just his criminal conduct, but also his personality and lifestyle.

In the end, Judge O'Melia imposed 45 years of imprisonment, including 25 years of initial confinement—about a decade more than the parties had jointly recommended. Postconviction, LaRose moved for resentencing on objective bias grounds: under the circumstances set forth above, a reasonable person would question whether Judge O'Melia was acting as a neutral and detached magistrate when imposing sentence.

The circuit court and court of appeals denied relief. As to Judge O'Melia's independent investigation into LaRose's record, the court of appeals noted that Judge O'Melia's findings mirrored information that appeared (albeit indirectly) in the pre-sentence investigation report, and that LaRose hadn't challenged the PSI as inaccurate. It further held that Judge O'Melia did not engage in ex parte communications during his indepen-

dent investigation and didn't thereafter manipulate the information he gathered "in a way that disadvantaged LaRose." *State v. LaRose*, No. 22AP647-CR, unpublished slip op., ¶44 (Wis. Ct. App. March 25, 2025) (App. 20). Absent evidence that Judge O'Melia relied on inaccurate information due to his independent investigation, engaged in ex parte communications during that investigation, or lied about his findings to LaRose's detriment, the court of appeals saw no objective bias problem: while Judge O'Melia's investigation was "not recommended, [it] was not improper." *Id.* (App. 20).

While LaRose seeks review of his objective bias claim for all the reasons he raised in the lower courts, the court of appeals' analysis of the independent-investigation issue is what particularly merits this Court's attention. The due process right to a neutral and detached magistrate intertwines, in this realm, with a host of other concerns, including the due process right to notice and an opportunity to be heard, the due process right to be sentenced on accurate information, and judges' neutrality obligations under the Code of Judicial Conduct. This case presents the Court with an opportunity to untangle this web of rights and interests. In doing so, it can clarify the relationship between the recurring problem of judges independently investigating the facts of pending cases and the constitutional right the defendants in those cases hold to an impartial arbiter. For the reasons set forth, such clarification is warranted.

ISSUES PRESENTED

1. Would a reasonable person discern a serious risk of actual bias upon learning that a judge independently investigated a defendant's prior wrongdoing without notifying the parties or providing an opportunity to respond?

The lower courts considered this issue in the context of a broader objective bias claim, and both answered "no."

2. Does the accuracy of the judge's independent-investigation findings matter to the objective bias inquiry—or is a sentencing judge's reliance on inaccurate information an analytically separate due process problem?

The lower courts considered the apparent accuracy of the information Judge O'Melia gathered in holding that there was no serious risk of actual bias.

3. If Judge O'Melia's independent pre-sentencing investigation into LaRose's prior wrongdoing does not establish objective bias on its own, do the totality of the circumstances surrounding LaRose's sentencing do so?

The lower courts answered "no."

CRITERIA FOR REVIEW

This petition requests clarification of the objective bias standard and adjacent legal issues, including whether a judge's independent pre-sentencing investigation into a defendant's prior wrongdoing raises a serious risk of actual bias, and whether the accuracy of the judge's findings matters in answering that question. At stake here, and in any objective bias inquiry in a criminal case, is the state and federal due process right to a neutral and detached magistrate. Thus, this petition raises "[a] real and significant question of federal or state constitutional law." Wis. Stat. § 809.62(1r)(2). The issues presented are also legal, not factual, and will continue to recur absent binding clarification from this Court. § 809.62(1r)(c)3.

STATEMENT OF THE CASE AND FACTS

LaRose's appeal revolves around his sentencing hearing—what Judge O'Melia said, did, and relied upon in making his sentencing decision. The broader factual and procedural

picture is largely irrelevant. Thus, what follows is an overview of the case centered on Judge O'Melia's sentencing remarks.

The State charged LaRose with one count of first-degree sexual assault of a child. (1:1). The complaint alleged that LaRose's nine-year-old stepdaughter accused him of sexually assaulting her, and that LaRose promptly confessed. (1:1-2). It also said that police obtained incriminating evidence while searching LaRose's home. (1:2).

LaRose pleaded guilty to an amended charge, and the parties jointly recommended 14 to 17 years' initial confinement followed by 20 years' extended supervision. (16:1, 3).

At sentencing, after the parties' arguments and LaRose's allocution, Judge O'Melia listed the considerations relevant to his decision. Then he discussed them in depth.

He began with LaRose's "past criminal record." (49:27; App. 43). He noted that, while "counsel probably can't," he was "able to go back to [LaRose's] juvenile records." (49:27; App. 43). He then described an incident in which LaRose allegedly "hit ... or pushed [a] teacher," causing police to respond. (49:27; App. 43). Judge O'Melia commented that, due to this incident, LaRose's record "started very young, younger than [he'd] actually ever seen." (49:27; App. 43). "Usually it'll start off as a CHIPS case or something like that," Judge O'Melia explained, "but here [LaRose was] involved in delinquent behavior." (49:27; App. 43).

Judge O'Melia then moved on to LaRose's adult record. After summarizing LaRose's criminal convictions, he opined: "[A]s I read the complaints going back, it's a lot of the same behavior, just a different age." (49:27-28; App. 43-44).

As for LaRose's varied employment history, Judge O'Melia remarked that "it's not very prosocial these different

types of employment.” (49:30; App. 46). He then admonished LaRose: “You’re not able to really keep a stable lifestyle for the family ... to the point where you ultimately began taking care of the children in lieu of working and [you] allow[ed] your wife to work and be the breadwinner.” (49:30; App. 46).

Next Judge O’Melia discussed the “undesirable” conduct he believed LaRose had engaged in, whether prosecuted for it or not. (49:31; App. 47). First he noted that, while “it’s not against the law to sit at home all day and eat potato chips and play video games, ... that’s an undesirable behavior pattern. And in this case we’ve kind [of] got that, but it’s kind of aggravated with smoking dope and having kids in the house.” (49:31; App. 47). He also disapproved of LaRose’s sexual behavior, saying: “[Y]ou ... have ... some very strong sexual addictions to the point where you’ve been unfaithful to your wife on more than one occasion, [and] fathered a child with another married woman.” (49:32-33; App. 48-49).

In fact, Judge O’Melia noted, he had seen the “married woman” in court that very morning when, coincidentally, he presided over her divorce. (49:33; App. 49). “And I had to ask her about” her son, he continued, “because I wanted to make sure that the dad in that case knew that somebody else had fathered the child. Well, anyway, he did.” (49:33; App. 49). Judge O’Melia concluded by opining that the divorce may not have been “a direct result of what happened” between the woman and LaRose, but their child in common could not have helped: “Having that, always waking up to that every day, being reminded that your wife was unfaithful” (49:33; App. 49).

Eventually Judge O’Melia turned to LaRose’s personality, deeming him manipulative and narcissistic (though he conceded he wasn’t sure LaRose met the definition of narcissistic). (49:33-34; App. 49-50). He also discussed the victim in this case, and the collateral damage LaRose’s offense likely caused

beyond the victim. (49:36-43; App. 52-59). Returning to the divorce he'd presided over, Judge O'Melia asked: "[G]eez, are they a victim of what happened or what you do, you know? Because of your undesirable behavior patterns is that [other woman] a victim?" (49:41; App. 57). Finally, he summarized his views on LaRose by describing him as "a 34-year-old narcissist with ... a ninth grade education with ... sporadic employment [and a] long criminal history, [who] smokes dope almost every day while he's in charge of the children," and who has "an insatiable appetite for sex of any kind, with anyone, even the daughter." (49:43; App. 59).

The circuit court imposed 25 years of initial confinement followed by 20 years of extended supervision. (40:1). Thus, LaRose received about a decade more incarceration than the parties had jointly requested. (*See* 16:3).

Postconviction, LaRose pointed out that this was not the first time he'd been sentenced by Judge O'Melia. (73:4). In 2009, Judge O'Melia presided over his sentencing after revocation in Oneida County Case No. 09-CM-613. (73:18-23; App. 70-75). During that hearing, Judge O'Melia told LaRose his conduct had reached "a point where [judges] almost don't care what you do." (73:21; App. 11). He continued: "We'll just keep putting you in jail and put you ultimately in prison because that's where you're headed. They should have cited you with a repeater.... [And] if this continues and there's a felony, boy ... I'm not sure how another court could really keep you from prison. And you're not too far from a felony." (73:21-22; App. 11-12).

On this record, LaRose moved for resentencing before a different judge, citing the appearance of judicial bias. (73:7-8). If that relief was denied, LaRose also sought simple resentencing, arguing that Judge O'Melia erroneously exercised his discretion by relying on an improper factor (LaRose's gender). (73:15-16).

Judge O'Melia heard LaRose's postconviction motion and rejected both claims. (*See* 85). He held that there was no appearance of bias and found that he had not relied on LaRose's gender. (86:5-7, 13-14; App. 32, 38-39).

LaRose appealed only the first ruling. The court of appeals affirmed, holding that the totality of the circumstances did not establish the appearance of bias. *LaRose*, No. 22AP647-CR, ¶55 (App. 27). It concluded that Judge O'Melia's comments at LaRose's 2009 sentencing were too far removed in time and substance to raise a concern in this case; that his independent factual investigation was "not recommended" but "not improper"; and that his discussions about the divorce hearing he'd presided over (and related topics) were "within his bounds to comment on." *Id.*, ¶¶54-55 (App. 26-27).

This petition follows.

ARGUMENT

- I. This Court should grant review to clarify whether demonstrating that a sentencing judge conducted an independent investigation into a defendant's prior wrongdoing—without giving the parties notice or an opportunity to respond—establishes objective bias.**

Every defendant has a constitutional right to an impartial sentencing judge. *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. The right is not to a favorable sentence; it's to a particular quality—neutrality—in the sentencer. Facts raising a serious risk that a judge was *not* neutral when imposing sentence, whether or not the sentence imposed was justifiable or even favorable, offend due process and necessitate resentencing before a different judge. *State v. Gudgeon*, 2006 WI App 143, ¶¶9, 24, 295 Wis. 2d 189, 720 N.W.2d 114. There is no harmless error in this realm; again, it's not about the outcome

(i.e., whether a neutral magistrate would have been more lenient) but the fundamental necessity of impartiality in the decisionmaker. *Id.*, ¶9.

While a court is presumed to act impartially, a defendant can overcome that presumption by showing bias by a mere preponderance of the evidence. *Id.*, ¶20. There are two basic categories of judicial bias a defendant may prove: objective and subjective. *Id.* This case involves objective bias. There are also two types of objective bias: actual bias and the appearance thereof. *Id.*, ¶21. The appearance of bias is the constitutional defect at issue. It exists whenever there is a serious risk of actual bias evidenced by statements the sentencing court made that would lead a reasonable person, “taking into consideration human psychological tendencies and weaknesses,” to conclude the judge “cannot be trusted” to remain neutral. *Id.*, ¶24.

While LaRose relied on several facts in raising objective bias in the lower courts, a crucial one was the independent factual investigation Judge O’Melia conducted prior to sentencing.

Though no party submitted them for consideration or referenced them at any point, Judge O’Melia sought out and reviewed LaRose’s confidential juvenile records and past criminal complaints. Judge O’Melia thus did his own digging instead of relying solely on the more limited facts of record. In doing so, he violated the longstanding tenet that “[a] judge must not independently investigate facts in a case and must consider only the evidence presented.” SCR 60:04(g) (comment). He also failed to give the parties the chance to respond to the facts outside the record on which he relied—either by correcting them, if needed, or contextualizing them, as is so often the defense attorney’s task—further violating LaRose’s due process rights.

This Court should grant review to clarify whether such conduct establishes the appearance of bias. When a judge steps out of his or her neutral-arbiter role and engages in evidence gathering about a defendant's past wrongdoing, can a reasonable onlooker trust that the judge will thereafter return to impartiality? Or is such a lapse an indicator of bias that a reasonable onlooker could neither ignore nor forget?

This Court discussed a distinct but nevertheless analogous situation in a judicial disciplinary proceeding that resulted in a judge's five-day suspension. *See Judicial Commission v. Piontek*, 2019 WI 51, 386 Wis. 2d 703, 927 N.W.2d 552. Before sentencing, Judge Piontek "conducted an independent internet investigation" that revealed "what he believed to be incriminating information" about the defendant. *Id.*, ¶16. That information turned out to be incorrect. *Id.*, ¶18. However, the parties were unable to correct the judge's misconceptions because he "did not provide the parties or their attorneys with ... notice of his intent to conduct his investigation or the nature of his investigation and its results." *Id.*, ¶17. The defendant was ultimately granted resentencing on the grounds that the sentencing court relied on inaccurate information, violating due process. *Id.*, ¶20. The Judicial Conduct Panel, meanwhile, ordered a suspension, citing *Judicial Commission v. Calvert* to support its decision. *See* 2018 WI 68, 382 Wis. 2d 354, 914 N.W.2d 765.

In *Calvert*, a circuit court commissioner conducted an independent factual investigation, "which included engaging in ex parte communication," and made "false statements to the parties that any further calls to police about their dispute would result in disorderly conduct tickets." *Piontek*, 386 Wis. 2d 703, ¶34. The Judicial Conduct Panel determined that a 15-day suspension was necessary because the commissioner's misconduct was "undeniably serious." *Calvert*, 382 Wis. 2d 354, ¶26. This Court agreed: "[A] judge's objectivity and impartiality are

critical to the proper functioning of the judicial system,” it held, and the commissioner in question was “far from objective and impartial.” *Id.* His bias was evidenced by a range of misconduct, including that “[h]e independently investigated the facts of a case pending before him.” *Id.*

Piontek and *Calvert* are disciplinary cases, not objective bias appeals. But they demonstrate the error in Judge O’Melia’s ways, and they make clear that judicial neutrality requires abstaining from independent factual investigation in pending cases. It is the prosecutor’s role to dig up the dirt on a defendant, so to speak, and the defense attorney’s role to either correct or acknowledge and contextualize information presented about a client’s past misdeeds. When a judge plays a prosecutorial role—even temporarily, via a presentencing investigation into a defendant’s record—*Piontek* and *Calvert* suggest that a reasonable onlooker would have reason to question the judge’s capacity to sentence the defendant impartially.

In sum, their logic indicates that Judge O’Melia’s sua sponte inquiry into LaRose’s record—and his failure to notify the parties or provide them with a chance to respond—at least contributed to the appearance of bias. Given that the lower courts disagreed, there appears to be a disconnect between the principle that impartiality requires abstaining from independent factual investigation and the application of that principle in the context of an objective bias analysis.

This Court should grant review to bridge this gap and provide guidance on the objective bias implications of the recurring problem of judges independently investigating the facts of pending cases.

II. This Court should grant review to clarify whether the accuracy of a judge's independent-investigation findings matters in assessing whether the judge acted as a neutral and detached magistrate.

One reason the court of appeals determined that LaRose didn't prove objective bias, despite the independent factual investigation Judge O'Melia undisputedly conducted, was that the information Judge O'Melia gathered appeared to be correct. Granted, that information isn't in the record; no one knows what all he reviewed or what all he gleaned from his review. But his sentencing comments do not reveal any reliance on inaccurate information. LaRose did not allege such reliance.

There's no question that, when sentencing judges independently investigate the facts of pending cases, they run the risk of discovering false information. If they rely on that false information, they run afoul of the due process imperative that sentencing decisions be based on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Independent of any bias problem, then, a judge's independent investigation into the facts may result in a due process violation.

The question for this Court is whether a judge's independent factual investigation is *only* problematic from a bias standpoint if it turns up falsehoods. The lower courts relied on the absence of any allegation of inaccuracy in holding that LaRose had not proven objective bias. But why? While reliance on inaccurate information is a potential consequence of an independent factual investigation, the lapse in neutrality such investigation betrays appears to be a problem in its own right. The due process entitlement to an impartial arbiter, after all, is not subject to harmless error analysis: should a biased judge impose a favorable sentence, the defendant is still deprived of due process. So, if an independent investigation into a defendant's past wrongdoing evinces bias—as LaRose argues above,

and as the Code of Judicial Conduct asserts—it seems like the accuracy of the results of that investigation are irrelevant. There may be an additional due process problem given inaccurate information, but the bias problem remains regardless.

This Court should grant review to clarify what relevance, if any, the accuracy of a judge's findings has in determining whether the judge's independent factual investigation establishes objective bias.

III. If this Court grants review to address the first three issues, and if it determines Judge O'Melia's independent factual investigation did not render him objectively biased on its own, then it should further address whether the totality of the circumstances surrounding LaRose's sentencing raise a serious risk of actual bias.

While the overarching objective bias question litigated in the lower courts is not the review-worthy issue presented here—and is thus outside the scope of this petition—LaRose submits that the record is rife with reasons to question whether Judge O'Melia presided impartially. On the factual record set forth above, a reasonable person would conclude that Judge O'Melia prejudged the need for imprisonment, drew a host of negative conclusions about LaRose based on his own improper investigation into LaRose's past, and felt such hostility toward LaRose that he may have been unable to assess (or bring himself to impose) the "minimum amount of ... confinement ... consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197 (quoting *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)). The indications that Judge O'Melia fell short of neutrality and detachment were simply too prevalent for a reasonable

onlooker to ignore: taken together, they raised the appearance of bias and thus violated due process.

As noted above, there is no such thing as harmless error in this context. *See Gudgeon*, 295 Wis. 2d 189, ¶20. Thus, under these circumstances, resentencing by a different judge is required. *See Goodson*, 320 Wis. 2d 166, ¶18. LaRose submits that this Court should grant review and hold just that.

CONCLUSION

For the reasons set forth, Anthony LaRose respectfully requests that this Court grant review.

Dated this 11th day of April, 2025.

Respectfully submitted,

Electronically signed by Megan Sanders

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,505 words.

CERTIFICATION AS TO APPENDIX

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

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated and filed this 11th day of April, 2025.

Signed:

Electronically signed by Megan Sanders

Megan Sanders, SBN 1097296