STATE OF WISCONSIN

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

DISTRICT I

Case No. 2023AP2055

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

ANTHONY JOHN VALDEZ,
Defendant-Appellant.

Appeal of a Final Decision and Order Filed October 17, 2023, Denying Defendant-Appellant's Motion for Postconviction Relief, the Honorable David Swanson Presiding, in Milwaukee Co. Cir. Ct. Case No. 21CF135

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Did Circuit Judge Borowski err by relying on fact information about crime rates and sentencing norms to reach his sentencing decision without notice to Valdez or his counsel that he would consider such data?

   On postconviction motion Judge Swanson ruled (A. App. 106) that Judge Borowski was only "speaking anecdotally" based on his experiences in Milwaukee homicide courts.

2. Did Judge Borowski err by relying on aggravating information that was not relevant to a sentencing for vehicular homicide?

   On postconviction motion Judge Swanson ruled (A. App. 106) that Judge Borowski instead relied on facts set forth in the criminal complaint and other factually similar cases before him.

3. Did Judge Borowski improperly rely on inaccurate information to skew the length and severity of Valdez's sentence?

   On postconviction motion Judge Swanson ruled (A. App. 105) that Judge Borowski's sentencing decision was not skewed by reliance on an inaccurate sentencing norm because the sentencing outcome for Valdez was less than the maximum possible sentence and the ten-year years of confinement recommended by the prosecution.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellant does not request oral argument because, consistent with Wis. Stat. (Rule) § 809.22(2)(b), the written arguments can fully develop the theories and legal authorities on each side so that oral argument would be of marginal value.

Publication is permitted under Wis. Stat. (Rule) § 809.23.

STATEMENT OF THE CASE

On January 14, 2022, following pleas of guilty to two counts of homicide by negligent operation of a vehicle, 20-year-old Anthony Valdez was sentenced by Milwaukee County Circuit Court Judge David L. Borowski to two consecutive sentences that totaled eight years in prison as initial confinement. (R. 40, Judgment of Conviction).

Valdez filed a postconviction motion (R. 71) filed on January 30, 2023, which asserted that errors occurred at sentencing, and requested modification of sentence or resentencing. Following the submission of briefs, Judge Borowski was reassigned a different caseload. The postconviction motion then was denied in a written decision

filed by Circuit Judge David Swanson on November 3, 2023. (R. 103; A. App. 103-107).

STATEMENT OF FACTS

The criminal complaint (R. 2) charged Anthony Valdez with two counts of second-degree reckless homicide. The Court eventually accepted defendant's pleas to reduced charges, based on the facts set forth in the complaint (R. 52; Transcript of Plea Proceedings, August 19, 2021, at 15), which provided in part:

> Complainant notes that on July 10, 2020 at approximately 8:52 PM, the Milwaukee Police department responded to multiple reports of a serious two vehicle accident at the intersection of 27th and Cleveland (the above mentioned address) in Milwaukee County, Wisconsin.
>
> PO Bongard reports that he responded to that location and conducted a scene investigation. PO Bongard reports that he observed a 2010 white Infiniti, registered to the defendant, with severe front end damage. He also observed a 2009 red Dodge Journey, damaged almost beyond recognition and resting on it's driver side, wrapped around the post of an overhead traffic signal. PO Bongard reports that the Journey's driver, [. . .] had been extricated from the vehicle by the Milwaukee Fire Department but was deceased on scene. PO Bongard reports that the Journey's front seat passenger, [. . .] was also deceased on scene. Complainant has reviewed copies of the completed autopsy reports conducted in this case. Said reports reflect that Dr. Jacob Smith of the Milwaukee County Medical Examiner's Office conducted an autopsy of [the driver] and concluded he died due to multiple blunt force injuries and ruled his death an accident. Dr. Smith also conducted an autopsy of [the passenger] and concluded that she died due to multiple blunt force injuries and ruled her death an accident.
>
> PO Bongard reports that blood was collected from the defendant at 9:35 PM on July 10th , 2020 and sent to the Wisconsin State Crime Laboratory. PO Bongard reports that he eventually received results of that testing, conducted by toxicologist Leah Macans, which was positive for delta-9-tetrahydrocannabinol (THC), a restricted controlled substance, at a level of 13 ug/L.
>
> Det. Froilan Santiago reports that he responded to Froedtert Hospital and spoke with the defendant, Anthony Valdez. Det. Santiago reports that defendant Valdez admitted driving the Infiniti involved

> in the crash and claimed he was fleeing a dark blue 4 door sedan, whose driver had pointed a gun at him approximately 2 intersections prior to the crash. Det. Michael Thomae reports that the defendant's passenger, MNS also stated that they were fleeing a confrontation with a dark blue Chevrolet Malibu whose driver had pointed a handgun at them.
>
> PO Bongard reports that he located surveillance video which captured the crash. Said video shows the victim's Dodge Journey attempt to turn left from 27th Street onto W. Cleveland Avenue while the defendant's car is still several hundred feet north of the intersection and approaching. The Dodge Journey has cleared the left travel lane entirely and is partially through the right travel lane when the defendant's white Infiniti strikes it at a high rate of speed. The Dodge Journey is pushed into the air and into a large overhead traffic signal support with such force the van is wrapped around the support post. PO Bongard reports that 4.2 seconds after the impact, a grey sedan with no headlights travels through 27th Street at a high rate of speed.
>
> PO Bongard reports that multiple analyses were done on said video, attempting to estimate the speed of the Infiniti based on its movement, and that both concluded that the Infiniti was travelling at a minimum of approximately 110 MPH as it approached the intersection. PO Bongard notes that he has been a Police Officer for 25 years, is currently assigned to the Crash Reconstruction Unit of the Milwaukee Police Department, and in the capacity has been responsible for visiting and documenting hundreds of accident scenes, often aided by video and the recovery of airbag crash modules documenting the exact speed of vehicles involved in crashes.
>
> Based on that experience, and comparing it to the damage done to the vehicles involved as well as the videos of the crash, PO Bongard believes the above mentioned estimates of the defendant travelling at least 110 miles per hour are accurate.

At the time of the accident Mr. Valdez was 19 years-old and he had no criminal history as an adult or as a juvenile.

There were three critical stages of proceedings before Judge Borowski: (1) a May 27, 2021, hearing (R. 47) where the parties advised the judge of the status of the plea negotiations (hereinafter "pre-plea proceedings"); (2) an August 19, 2021, guilty plea hearing (R. 52); and (3) the January 14, 2022 sentencing hearing (R. 55).

During pre-plea proceedings, the prosecution advised the Court, that there had been lengthy plea negotiations, and that it would agree to amend the original charges of two counts of second degree reckless homicide to two counts of homicide by negligent operation of a vehicle in return for the defendant's guilty pleas, while recommending a total maximum sentence of ten years confinement. (R. 47; Transcript of Adjourned Plea Hearing on May 27, 2021, at 3). The prosecution explained that it offered the amended charges because of certain mitigating factors: the defendant's quick acceptance of responsibility (Id.) and the corroborated fact that Valdez was "fleeing a man" who was chasing him in a car after confronting him at gunpoint at an intersection (Id. at 6-7).

During the same pre-plea proceedings, Judge Borowski stated that based on his "off-the-record" discussion with counsel a ten-year prison time sentence was inappropriate.

> I had a conversation with the lawyers off the record , and when I was discussing this with the lawyers off the record, . . . candidly, I expressed grave concern to both sides about the recommendation of ten years in custody for killing two people.

(Id. at 2).

At Valdez's sentencing hearing Judge Borowski described that off-the-record discussion as follows:

> And I remember specifically the first time Mr. Schindhelm suggested this amendment. Candidly, I pitched a fit. . . . My initial reaction was I was so appalled that the State would consider this that I raked Mr. Schindhelm and your prior defense attorney over the coals, then I raked them back in the

> other direction because *we have an epidemic of bad driving and people being killed on the roads* in utter carnage, and it's always the victim who is minding their own business that's killed.

(R. 55; Transcript of Sentencing Hearing on January 14, 2022, at 23) (Emphasis added).

At the earlier pre-plea proceedings, and after the off-the-record discussion, Judge Borowski continued:

> But this case has to be seen in light of the bigger picture. And Mr .Valdez, the defendant in this case, is charged with killing two people, driving - - to describe it as reckless is an understatement - - at over 100 miles an hour on South 27th Street.
>
> And in this case , the allegations are exceedingly reckless. The defendant was allegedly going, not 100, but 110 miles an hour.

(R. 47;Transcript of Adjourned Plea Hearing on May 27, 2021, at 5).

> [M]aybe there's some way for either or both sides to change my mind, but at this point this does not strike me as appropriate. It does not strike me as in the interest of justice, and a recommendation of ten years for killing two people. . . .

(Id. at 6).

> [B]asically, you have an allegation that may be corroborated by another car speeding through an intersection, but that doesn't excuse someone going 110 miles an hour, number one. . . . Again, not excusing going 110 miles an hour - - most cars can't even get to 110 miles an hour - - and again, killing two people.

(Id. at 8).

Also, during the pre-plea proceedings, Judge Borowski stated that he was relying on the sentences he had imposed in other double-homicide-by-reckless-driving cases for guidance:

> Within the last two weeks I sentenced a woman to 15 years of initial confinement for driving recklessly and killing two people on South 27th Street.

(Id. at 4).

> Most reckless driving cases over the years - - not all - - result in sentences of 15 years, 20 years of initial confinement, some that are higher than that.

(Id. at 5).

During the subsequent guilty plea proceedings, the prosecution stated: "As the court knows from our past discussions and from the complaint as stated, this is an extremely serious case where the defendant's car was traveling at an incredibly high rate of speed." (R. 52; Transcript of Plea Hearing on August 19, 2021, at 5). Nonetheless, the prosecution considered the facts of defendant's case to be "unique" (Id.) because "the defendant was fleeing from a man who may have had a gun in this case," and independent witnesses corroborated that defendant, while driving, had in fact been confronted by another driver who not only pointed a gun at him but was chasing him.

At the guilty plea proceedings, Judge Borowski again expressed his views on sentences that were imposed in other double-homicide-by-reckless-driving cases, which led him to state that he would be imposing a prison sentence:

> [E]very case is different, every case has its own set of circumstances, every defendant is unique and has different circumstances, but as Mr. Schindhelm is certainly aware and Ms. Tate is probably aware, I mean you know in situations where two people are killed in a driving homicide, *I mean you're normally looking at a sentence in the 20 to 30-year range. Each case is different.*
> *Again, you know, but I know myself those have been sentences that I've imposed in very, very similar cases . . . .*

(Id. at 8.) (Emphasis added.)

Later, at the same guilty plea hearing Judge Borowski again advised Valdez that he would be going to prison:

> [T]he State is going to recommend 10 years of initial confinement. Your attorney is free to make an argument, but you need to understand, Mr. Valdez, that *this is a prison case. You're going to prison*; do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT**:** I mean there's no doubt about that. There were two people killed. *I'm sure Ms. Tate is not going to suggest anything less than some sort of a prison sentence.* Two people were killed in an extremely reckless situation; do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And I'm sure that's extremely uncomfortable for someone your age, but that is what it is; do you understand?
>
> THE DEFENDANT**:** Yes, sir.

(Id. at 13) (Emphasis added.)

Based on the pre-plea and plea proceedings, and the complaint, Judge Borowski accepted defendant's guilty plea (Id. at 15):

> Based on the stipulation, based on my reading of the complaint, based on what's been indicated in court by counsel and the defendant, I'm finding a factual basis exist for the charges of and pleas to two counts of homicide by negligent operation of a motor vehicle.

At the sentencing hearing on January 14, 2022, Judge Borowski acknowledged that the general *Gallion*[1] factors should be applied (Id. at 21). Even so, at one point, he railed against the overall number of homicides of all types committed over the last two years ("we

[1] *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. These primary factors include the gravity of the offense, the character and rehabilitative needs of the defendant, and protection of the public. *State v. Naydihor*, 2004 WI 43, P78, 270 Wis. 2d 585, 678 N.W.2d 220.

set an all-time high for homicides in Milwaukee.") (Id.). He also pointed to record-setting firearms offenses, deploring the number of "non-fatal shootings" (Id. at 22). He followed that assertion by pointing to the rise in automobile theft cases, noting that the "rate is three to four times what it was just a few years ago." (Id.). Then, after noting the estimated speed of defendant's car, he recalled the other double-vehicular-homicide cases in which he had imposed sentences:

> You were going the State said 110. That would not surprise me at all. You must have maxed out your vehicle. It had to be at least a 100 miles an hour, maybe more than that.

(Id. at 23).

> I remember some of them. There's one in my first stint in homicide where the defendant had stolen a car from a family member who is going 90 or a 100 miles an hour. . . . That defendant is serving 25 or 30 years in prison.

(Id. at 24).

> Then there's the Ojeda case that Mr. Schindhelm refers to. . . . She's serving -- you can correct me if you remember, Mr. Schindhelm, I think it's 15 years in prison. It might be 20, but it was 15 or 20.

(Id. 24-25).

> [T]he sentence I'm going to give you, even if it's the maximum is less than any sentence I've ever handed out for a double vehicular homicide. I had another case within the last year that occurred on about 51st and Center. That case was worse than yours because that defendant was already wanted for a homicide in North Dakota. . . . That person is doing 25 years in prison and, if anything, that was light on my part.

(Id. at 25-26).

ARGUMENT

I. Introduction

Two factors played a major role in Judge Borowski's sentencing decision: (1) his factual conclusion that there had been recent, unusually high incidences (i.e., "an epidemic") of fatal car crashes in Milwaukee, along with other criminal offenses; and (2) his factual conclusion that the sentencing "norm" for double vehicular homicide cases ranged either from 15 to 20 years, or from 20 to 30 years, initial confinement

Valdez, relying on *State v. Tiepelman*, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d, had argued that Judge Borowski's sentencing decision was infused with unrelated, and irrelevant topics, and was based both on unreferenced facts and inaccurate facts. *Tiepelman* instructs that a defendant is entitled to resentencing if he/she meets a two-pronged test by showing that the information at the original sentencing was inaccurate and that the court actually relied on the inaccurate information at sentencing.

After considering Valdez's arguments and the State's Response (which was adopted and incorporated by reference), Judge Swanson's decision discussed the above-noted factors that appeared in Judge Borowski's sentencing decision. As to the first factor, Judge Swanson stated: "The court agrees with the State that Judge Borowski's initial concerns

were well-grounded given the widespread problems with dangerous driving in Milwaukee County and the aggravating facts set forth in the complaint." (A. App. 105).

As to the second factor, Judge Swanson ruled: "The court finds no support for the defendant's claims that Judge Borowski prematurely judged the sentence or that he had a "skewed perception of the sentencinsg norm, ..." He also concluded: "The court is satisfied that Judge Borowski sentenced the defendant based on the *unique* set of facts and circumstances *in this case*, not based on any perception of sentencing norms in unrelated matters. . . ." (A. App. 106-107), and that "[t]he court is not persuaded that the surface-level CCAP data or criminal complaints in unrelated matters [submitted by the defendant to support his postconviction motion] demonstrate that the court relied on inaccurate information. Judge Borowski was speaking anecdotally based on his extensive experience in the homicide courts." (A. App. 106). Judge Swanson concluded: "The fact that Judge Borowski imposed a *lesser* sentence than the State recommended belies a finding of bias" (A. App. 105), and that "Judge Borowski put aside his concerns and accepted the plea agreement under the circumstance of this case demonstrates an *absence* of bias." (A. App. 105).

Anthony Valdez therefore seeks appellate review of the decision by Judge Swanson and the underlying sentence by Judge Borowski.[2]

II. The circuit court erroneously sentenced Anthony Valdez to eight-years of confinement because it used an improper procedure and improper factors to determine the sentence.

A. Because Judge Borowski procedurally erred by relying on irrelevant data to reach his sentencing decision without notice to Valdez or his counsel that the judge would consider such information, Valdez was denied due process because the information could not be scrutinized or challenged.

Anthony Valdez's first objects to Judge Swanson's decision (and to the underlying sentencing decision by Judge Borowski) based on procedural errors. For one, Judge Borowski fueled his sentencing analysis with irrelevant facts that had nothing to do with deterring vehicular homicides, the offense for which Valdez had been convicted.

[2] The standard of review for this case involves both appellate review of a discretionary sentencing decision and the less deferential appellate review of whether an error implicating due process of law occurred. "We review a sentencing decision to determine whether the circuit court erroneously exercised its discretion. A discretionary sentencing decision will be sustained if it is based upon the facts in the record and relies on the appropriate and applicable law. *State v. Travis*, 2013 WI 38, ¶16, 347 Wis. 2d 142, 152-53, 832 N.W.2d 491, 496. "Whether a defendant has been denied due process is a constitutional issue which this court decides independently of the circuit court or court of appeals, benefiting from the analysis of these courts." *Travis*, 2013 WI 38, ¶20, 347 Wis. 2d at 154, 832 N.W.2d at 497.

Valdez was not convicted of homicides involving shootings, or stabbings, or other intentional crimes, yet the judge factored in, or at least articulated his consideration of, what he perceived was a dramatic rise in all types of homicides ("we set an all-time high for homicides in Milwaukee."). Relevant data, for example in the FBI's Uniform Crime Report (UCR) statistics shows, however, that the vast bulk of homicides in the Milwaukee area during the years 2020 and 2021 (the years Judge Borowski referred to) resulted from intentional shootings, stabbings, beatings, abuse, and arson.[3] But, had Valdez been given advance notice that Judge Borowski intended to consult and rely upon different data, he could have challenged the judge's purported logic. He was deprived of a process to do so.

Judge Borowski then went beyond homicides to focus on record-setting non-fatal firearms offenses, bemoaning the number of "non-fatal shootings" (Id. at 22). Obviously, that data had nothing to do with deterring vehicular homicides.

His data references then veered into his assessment of a rise in automobile theft cases, observing that the "rate is three to four times what it was just a few years ago." (Id.).

[3] See, Milwaukee Homicide Database | Journal Sentinel - jsonline.com at https://projects.jsonle.com/apps/Milwaukee-Homicide Database/ (last accessed on March 4, 2024).

That was at least the third irrelevant category of data that Judge Borowski mentioned to inform his sentencing decision.

Procedurally, all of these judicial pronouncements about rising crime rates were made without advance notice that Judge Borowski would be using them in order to set Valdez's sentence. Yet in *Gardner v. Florida*, 430 U.S. 349 (1977), the Court stated that "[t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Id. at 358. In *State v. Skaff*, 152 Wis. 2d 48, 447 N.W.2d 84 (Ct. App. 1989), the Court of Appeals stressed the importance of an advance notice procedure in the context of a sentencing court's reliance on presentence investigation facts, for which the defendant had not received notice. There, such a procedure was unduly prejudicial to Skaff's sentencing because it denied him "an essential factor of due process, *i.e.*, a procedure conducive to sentencing based on correct information." *Skaff*, 152 Wis. 2d at 57.

> [Skaff] complains of the denial of means to ascertain whether there was any misinformation. Until Skaff reads his PSI, its correctness is unknown to anyone. If the PSI contains errors, given the wide sentencing discretion possessed by the trial court, a possibility exists that such errors skewed the sentence.

State v. Skaff, 152 Wis. 2d at 58, 447 N.W.2d at 88. That is the precise error that Valdez had raised in his postconviction motion: at the time he was sentenced Judge Borowski was relying on crime data that Valdez and his counsel had no means to challenge for inaccuracies, even though there was a real likelihood that it was "skewing" the sentencing outcome. Accordingly, Valdez's sentence is procedurally flawed.

B. Judge Borowski relied on information in aggravation of the sentence that was not relevant to a sentence for vehicular homicide.

The corresponding error that resulted from Judge Borowski's unreferenced fact-finding was a substantive one: Judge Borowski clearly relied on irrelevant data to bolster his sentencing analysis. See, *State v. Coffee*, 2020 WI 1, ¶38, 389 Wis. 2d 627, 650, 937 N.W.2d 579, 590 ("A circuit court actually relies on incorrect information when it gives '"explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'") (citing *State v. Tiepelman*, 2006 WI 66, ¶14, 291 Wis. 2d 179, 717 N.W.2d An improper sentencing factor is one "totally irrelevant or immaterial" to the sentencing decision. *Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980).

Valdez has already highlighted the irrelevant character of the data to which Judge Borowski alluded. "Use of a[n] . . . imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis

. . . .” *Stringer v. Black*, 503 U.S. 222, 237 (1992). The surprise references by Judge Borowski to irrelevant aggravating data, for which Valdez and his counsel had no forewarning, improperly disadvantaged the defense. The Supreme Court’s decision in *State v. Coffee*, 2020 WI 1, ¶29, 389 Wis. 2d 627, 646, 937 N.W.2d 579, 588, explained the dilemma faced by Valdez and his counsel:

> Defense counsel cannot possibly make an informed decision of how exactly to object, if at all. Nor can defense counsel possibly know whether the objection would help or hurt the defendant. Nor can defense counsel know, at the time the suspected inaccurate information is introduced, whether the circuit court will actually rely on it. At oral argument, this court asked the State what an appropriate contemporaneous objection at sentencing would look like. The State's only response was that it would depend on the facts of each case. But if counsel does not know what counsel does not know, then defense counsel cannot possibly be required to make an appropriate objection based on the unknown facts.

(Underlining in original). These aggravating data references had no rational connection to Valdez’s case. See, *State v. Gallion*, 2004 WI 42, PP39, 58, 270 Wis. 2d 535, 678 N.W.2d 197 (“When making a sentencing pronouncement, the court must provide a ‘rational and explainable basis’ with ‘delineation of the primary sentencing factors to the particular facts of the case.’”).

Judge Borowski’s reliance on inaccurate facts undercut the validity and rationality of Valdez’s sentence. "Discretion is erroneously exercised when a sentencing court

actually relies on clearly irrelevant or improper factors. . . .” *State v. Harris*, 2010 WI 79, ¶3, 326 Wis. 2d 685, 786 N.W.2d 409.

C. Judge Borowski relied on inaccurate information to skew the length and severity of Valdez’s sentence.

Valdez’s appeal relates not only to Judge Borowski’s irrelevant references to undifferentiated homicide data, to non-fatal shootings data, and to car theft data, but also to his skewed references to vehicular homicide sentences. Transcripts of the proceedings reveal, that because of this skewing, Judge Borowski harbored an objective bias about what punishment should be imposed. "[C]omments indicating a circuit court has prejudged a defendant's sentence can give rise to objective bias." *State v. Marcotte*, 2020 WI App 28, ¶20, 392 Wis. 2d 183, 943 N.W.2d 911.

Judge Borowski openly prejudged what type of sentence he would impose and stated on the record what the appropriate punishment should be (here, a lengthy period of prison time) without even considering a probationary sentence that could have included conditional jail time. Yet, “it is improper for a court to approach sentencing decisions with an inflexibility that bespeaks a made-up mind. *See State v. Martin*, 100 Wis. 2d 326, 302 N.W.2d 58 (Ct. App. 1981) (trial court's statement that it would never grant straight

probation to a person convicted of a drug offense was improper).” *State v. Halbert*, 147 Wis. 2d 123, 128, 432 N.W.2d 633, 635 (Ct. App. 1988).

The record shows the existence of objective bias “where objective facts demonstrate that a judge treated a party unfairly." *Marcotte*, 2020 WI App 28, ¶17. When a sentencing judge’s comments “show that he rejected those alternatives – or decided he would not even consider them” long before sentencing, *Id. at* ¶26, a disqualifying, objective bias exists.” *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385.

Judge Borowski’s unalterable and unyielding commitment, on the record, that he would be imposing a long prison term, even before Valdez had entered a plea, defeated any claim that he was an impartial sentencing judge – he unequivocally stated what his desired outcome would be and he openly followed through on his promise to Valdez that he would be sending him to prison (i.e., “You’re going to prison.”). Two cases directly support Valdez’s position: *State v. Goodson*, 2009 WI App 107, 320 Wis. 2d 166, 771 N.W.2d 385; and *State v. Lamb*, No. 2017AP1430-CR, 2018 WI App 66, 384 Wis. 2d 414, 921 N.W.2d 522 ¶11 (Sept. 25, 2018).[4]

[4] Pursuant to Wis. Stat. RULE 809.23(3)(b), authored, unpublished opinions issued on or after July 1, 2009, may be cited for their persuasive value.

The court in *Goodson* determined that there was an impermissible appearance of bias where the defendant was warned by the circuit court that if his extended supervision or probation was ever revoked, "you are going to come back here, and you are going to get the maximum." *Goodson,* 320 Wis. 2d 166, ¶¶1-2. After Goodson's extended supervision was revoked, the court, as promised, sentenced him to the maximum sentence. *Id.*, ¶¶1, 5. The appeals court concluded that these facts showed objective bias, explaining that "[a] reasonable person would conclude that . . . the judge had made up his mind about Goodson's sentence before the reconfinement hearing." *Id.*, ¶13. Thus, the circuit court impermissibly prejudged the defendant's reconfinement sentence by "unequivocally promis[ing] to sentence Goodson to the maximum period of time if he violated his supervision rules." *Id.* "Our jurisprudence eschews the notion that a court may determine a sentence without scrutinizing individual circumstances."*Id. at* ¶17. The appeals court reversed Goodson's reconfinement judgment and ordered that a new refinement hearing be conducted before a different judge; "[T]he court's unequivocal promise to impose the maximum sentence and

its subsequent follow-through on that promise violated Goodson's due process right to be sentenced by an impartial judge."

In *Lamb*, the appeals court also concluded that the defendant had demonstrated objective bias when he showed the existence of "a serious risk" that the circuit court had prejudged his sentence. When Lamb entered a no-contest plea to battery by a prisoner, the circuit court knew that the parties planned to recommend probation. *Id.*, ¶¶1, 14. At Lamb's sentencing hearing, prior to any argument by counsel or allocution by Lamb, the court rejected Lamb's stated hope "of leaving today." *(Id.*, ¶¶5, 14), and repeatedly told him that his release was "probably not going to happen." *Id.* The appeals court concluded those statements demonstrated a serious risk that the judge "had already made up his mind about what kind of sentence Lamb would receive." *Id.*, ¶16. Lamb's conviction was reversed.

> However justified Lamb's prison sentence may have been, we cannot ignore the constitutional requirement that Lamb be sentenced by an impartial tribunal. Our adherence to this fundamental precept of due process compels us to reverse Lamb's conviction and remand with directions that he receive a new sentencing hearing before a different judge.

Judge Swanson's comment that defense counsel and defense counsel's PSI author each recommended a sentence to prison hardly cured Judge Borowski's earlier pronouncements; he coached them to make those recommendations. So, a fair assessment

of the record shows that he coached defense counsel (and by inference, defense counsel's PSI author) to not argue for anything less than prison.

Judge Borowski's pronouncements, that 15-to-20, or 20-to-30, year prison sentences were the norm, fueled his sentencing calculus, and he relied on this inaccurate information to impose Valdez's sentence. See, *State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75, 77 (Ct. App. 1998) (defendant who requests resentencing must show the court actually relied upon inaccurate information in sentencing). While a sentencing court is not required to take into account sentences imposed for comparable misconduct, see *State v. Smart*, 2002 WI App 240, ¶13, 257 Wis.2d 713, 652 N.W.2d 429, when it expressly chooses to base a sentence on comparable sentences, the accuracy of its perceptions regarding those other sentences is, by definition, highly relevant to the issue of sentencing. Here, Judge Borowski calculated the sentence to be imposed based on his perception of the sentencing norm (i.e., a either "15- to 20-year" range or a "20- to 30-year" range of prison time) for comparable offenses. The judge used his misperception of the "norm" to set Valdez's sentence. *See, State v. Loomis*, 2016 WI 68, ¶31, 371 Wis. 2d 235, 251, 881 N.W.2d 749, 757 (the sentencing court "misapplies the law when it relies on clearly irrelevant or improper factors.").

As Valdez demonstrated through exhibits attached to his postconviction motion, the court's "norm" was substantially off the mark. First, in undersigned counsel's LEXIS review of reported appellate cases dealing with sentences for homicide by negligent driving, the range of sentences turned out to be much lower; the range even included sentences to probation. *See, e.g*., *Wisconsin v. King*, 187 Wis. 2d 548, 567, 523 N.W.2d 159, 165 (Ct. App. 1994) (trial court sentenced King to a three-year term of probation for a vehicular homicide charge); *State v. Schutte*, 2006 WI App 135, ¶12, 295 Wis. 2d 256, 267-68, 720 N.W.2d 469, 474 (for three fatalities resulting in three convictions under Wis. Stat. § 940.10, defendant received three concurrent, five years' initial confinement sentences that were stayed with five years' probation and one-year conditional jail time imposed).[5]

Second, counsel's affidavit with exhibits, submitted in support of the motion (R. 73), pointed to the existence of unreported convictions for homicide by negligent driving under comparable facts, that involved the defendant's operation of their vehicles at high

[5] Judge Borowski announced early on that a prison sentence was the only outcome he would entertain. Yet this rigid, inflexible policy of imposing prison sentences, and always rejecting probationary sentences, was rejected by our courts. *See, State v. Martin*, 100 Wis. 2d 326, 302 N.W.2d 58 (Ct. App. 1981) .

speeds, leading to collisions and multiple fatalities. In *State v. Donte J. Barnes*, Milwaukee County Circuit Court Case No. 2016CF3875, the defendant was convicted under Wis. Stat. § 940.10 of causing two fatalities. He was sentenced by Milwaukee County Circuit Judge Conen to two consecutive, three-year, initial confinement terms that were stayed, and he was placed on four years' probation with one year of conditional jail time. Barnes was driving at an estimated 80mph in a 30mph zone. According to the criminal complaint and news articles attached to counsel's affidavit (A. App. 121-131), the seventeen-year-old driver, Barnes, had two fifteen-year old passengers with him when he drove his car into a tree, where "the impact tore the car in half." Both teenagers died from their injuries after having just played basketball with Barnes.

In *State v. Travis J. Wollersheim*, Fond du Lac County Circuit Court Case No.2017CF541, the defendant was convicted under Wis. Stat. § 940.10 of causing two fatalities. He was ordered to serve two concurrent, three-year probation terms, with six month's conditional jail time. According to the criminal complaint and news articles attached to counsel's affidavit (A. App. 132-146), Wollersheim's criminally negligent driving resulted in the deaths of a father and his eight-year-old son.

In *State v. Carly J. Otterly*, Fond du Lac County Circuit Court Case No.2012CF252, the defendant was convicted under Wis. Stat. § 940.10 of causing three fatalities. She was ordered to serve three concurrent, six-year probation terms, with one year's conditional jail time with work release to attend school. Otterly, then nineteen years old, was driving at an estimated 103-109 mph. According to the criminal complaint and news articles attached to counsel's affidavit (A. App. 147-159), Otterly had eight teenage passengers in her SUV when it rolled over. Three teenage friends of Otterly's died from their injuries.

Lastly, a separate affidavit by Barry J. Widera, a data researcher with Court Data Technologies LLC, in Madison, Wisconsin, with attached relevant data, was offered in support of the postconviction motion. The affidavit and data (A. App. 160-189) attested to the existence of statewide CCAP data about for homicide by negligent driving convictions under Wis. Stat. § 940.10 involving multiple fatalities and about multiple homicide cases either by intoxicated use of a vehicle, use of a vehicle w/PAC, or use of a vehicle – controlled substances under Wis. Stat. § 940.09(1)(a), (1)(b), and (1)(am) (hereinafter "impaired driving cases"). The case data relating to negligent driving homicide convictions referred to 25 closed cases, while the case data referring to impaired driving homicide convictions referred to 52 closed cases.

While bearing in mind, that then 19 year-old Anthony Valdez, with no prior criminal convictions, was sentenced to a total of 96 months prison confinement (with back-to-back, 48-month terms), the attached Widera data showed that out of the 25 closed cases, nine resulted in probationary sentences, with some even having no conditional jail time. While the data did not detail whether the cases with prison confinement terms were run concurrently or consecutively, another six cases involved terms of less than 48 months initial confinement; and if other cases with terms over 48 months did not involve consecutive time, those sentence totals would also be less than Valdez's. (Even some of the sentences in the 52 cases for the more serious offenses under Wis. Stat. § 940.09(1)(a), (1)(b), and (1)(am) involved less initial confinement terms than Valdez's sentence.)

Thus, the postconviction motion, with factual data about less severe sentences, even probationary sentences being imposed in comparable cases, provided a compelling argument for sentence modification or resentencing. Valdez had a due process right to be sentenced based on true and correct information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Judge Borowski's norm for sentencing was not true or correct.

By using a skewed norm for the appropriate range of initial confinement, if any, applicable to Valdez's offenses, Judge Borowski used the functional equivalent of the

wrong sentencing guideline. The Wisconsin Supreme Court's analysis of such a circumstance in *State v. Travis,* 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491 is germane. The Court concluded that Travis was sentenced "under the [court's] erroneous belief that the defendant was subject to a five-year mandatory minimum period of confinement;" and because the error was not harmless, Travis was entitled to be resentenced. *Travis*, 2013 WI 38, ¶87. The Court's reasoning is particularly relevant to Valdez's case:

> When the circuit court imposes a sentence with the misunderstanding that a mandatory minimum period of confinement applies, the framework for sentencing is thrown off, and the sentencing court cannot properly exercise its discretion based on correct facts and law. Furthermore, this kind of misunderstanding of the law violates the defendant's due process right to a "fair sentencing process" in which the sentencing "court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information."

Travis, 2013 WI 38, ¶80.

The same logic should have applied in Valdez's case. The sentencing court's entire framework for deciding the appropriate sentence was skewed by its reliance on an incorrect perception of other sentences imposed in vehicular homicide cases. Valdez's sentencing proceedings were "lacking in due process."

Judge Borowski started his sentencing considerations in May, 2021, when he first refused to accept the State's proposed negotiated plea, to reduce the charges from two counts of second degree reckless homicide (that carried, if consecutive, initial confinement

of twenty-five years, maximum) to two counts of negligent driving homicide (that instead carried, if consecutive, initial confinement of ten years, maximum).

That was the starting point where the judge relied on inaccurate fact information (his own fact conclusions) to set a presumptive sentencing range for his eventual decision. "Most reckless driving cases over the years - - not all - - result in sentences of 15 years, 20 years of initial confinement, some that are higher than that." (Transcript of Adjourned Plea Hearing on May 27, 2021, at 5). Judge Swanson placed emphasis on the fact that Judge Borowski eventually settled on a sentence lower than the 15 or 20 years. But the fact that Judge Borowski eventually chose to impose sentence that was lower than his stated "norm," did not disprove that his starting point was distorted by his misperceptions of normal sentencing ranges. Indeed, at the very next hearing in August, 2021, when the State and defense joined to again present the same negotiated plea, Judge Borowski upped his view of a presumptive sentencing range – to a norm of 20 to 30 years. "[Y]ou know in situations where two people are killed in a driving homicide, I mean you're normally looking at a sentence in the 20 to 30-year range. Each case is different. Again, you know, but I know myself those have been sentences that I've imposed in very, very similar cases . . . ." (Transcript of Plea Hearing August 19, 2021, at 8).

Hard data, on the other hand, did not support Judge Borowski's assertions. The sentencing examples and two Court Data Technologies surveys of CCAP data, cited in Valdez's motion for postconviction relief, undermined Judge Borowski's exaggerated "fact" statements as to the results in "most reckless driving cases" and as to "normal" sentences in driving homicide cases.

These erroneous factual assertions by Judge Borowski set the framework for his overall sentencing conclusions. They fully disclosed what inaccurate information he was relying on. "When the court's starting point is skewed a "reasonable probability" exists that its final sentence is skewed too." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014). See also, *State v. Harris*, 2012 WI App 79, ¶23, 343 Wis. 2d 479, 495, 819 N.W.2d 350, 358 ("What we are saying is that the [PSI] summary in this case was skewed so negatively that the inaccurate unfavorable conclusions drawn by the court were foreseeable.").

No flexibility was shown by Judge Borowski when it came to deciding whether probation, or probation with jail conditions, or straight consecutive jail terms could be considered as options; the judge never included those options in his starting considerations when he stated that: "[e]very case is different, every case has its own circumstances, every

defendant is unique and has different circumstances." (Transcript of Plea Hearing August 19, 2021, at 8). Further, Judge Borowski was unwilling to listen to any argument made for a non-prison sentence; the judge made it plain to defense counsel that her sentencing argument options were far more limited: "I'm sure Ms. Tate is not going to suggest anything less than some sort of a prison sentence." (Transcript of Plea Hearing August 19, 2021, at 13).

All of these statements in the transcripts of proceedings show that Judge Borowski gave "explicit attention" to inaccurate information, which is the proper test for review in this Court. *State v. Travis*, 2013 WI 38, 347 Wis. 2d 142, 832 N.W.2d 491. There is no material difference between the several factual irrelevancies and the factually inaccurate sentencing-range factor that Judge Borowski gave explicit attention to in this case, and the circumstance in the *Tiepelman* case. There, the Supreme Court concluded, based on just one inaccurate statement by the circuit court, that Tiepelman had met his burden of showing that the circuit court actually relied on inaccurate information. *Tiepelman,* 2006 WI 66, ¶ 6, 291 Wis. 2d 179, 717 N.W.2d 1,

CONCLUSION

State v. Travis, 2013 WI 38, ¶18, 347 Wis. 2d 142, 153-54, 832 N.W.2d 491, 496 states: "It is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process." "Trial courts exercise awesome responsibility when they sentence a person convicted of criminal activity. Fundamental principles of fairness and due process require that they base sentencing decisions on legitimate considerations." *State v. Halbert*, 147 Wis. 2d 123, 127, 432 N.W.2d 633, 635 (Ct. App. 1988).

Anthony Valdez was denied due process of law both because the judge predetermined, without referencing his sources or foundation for his conclusions, before sentencing that Valdez should receive a prison sentence based on a "norm" of sentence ranges that objective facts have shown were seriously wrong. Accordingly, Anthony Valdez respectfully requests that his sentence be modified and reduced based on the accurate, objective facts or that his sentence be vacated and set for resentencing before a judge other than Judges Borowski and Swanson.

Dated at Milwaukee, Wisconsin, March 11, 2024.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b), (bm) and (c). The length of the brief is 7,399 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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