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OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT

THE HONORABLE WILLIAM M. GABLER, SR.,
Petitioner-Respondent-Petitioner,

v. APPEAL NO. 2016AP275

CRIME VICTIMS RIGHTS BOARD,
Respondent-Appellant,

WISCONSIN DEPARTMENT OF JUSTICE,
Respondent.

Appeal From the Final Order of
Eau Claire County Circuit Court Case No. 13cv473
The Honorable James J. Duvall Presiding

# APPENDIX TO PETITION TO BYPASS

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STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY

THE HONORABLE WILLIAM M. GABLER, SR.
Petitioner

v.

CRIME VICTIM RIGHTS BOARD

And

WISCONSIN DEPARTMENT OF JUSTICE
Respondents

FILED
CIRCUIT COURT
EAU CLAIRE COUNTY
DEC 18 2015
SUSAN SCHAFFER
CLERK OF CIRCUIT COURT

Case No.: 13 CV 473

## STATEMENT OF FACTS

I find the following facts are relevant to the Conclusions of Law and Judgment:

1. The Office of Crime Victim Services (CVS) is part of the Wisconsin Department of Justice (DOJ).

2. Jennifer Rhodes was employed full time by CVS as the Victim Resource Center Coordinator.

3. The Crime Victims Rights Board (CVRB) operates by authority of Wis. Stat. Chapter 950.09. CVRB is attached to DOJ for administrative purposes.

4. Julie Braun was employed 50% as a Policy Analyst for CVS and also employed 50% as the Operations Director of CVRB.

5. A criminal complaint was filed in Eau Claire County, WI on July 29, 2011 in *State v. Leigh Beebe*, Eau Claire Case N$^{o}$ 2011 CF 511 alleging sexual assault against minor victim, K.L.

6. On August 8, 2011, an Amended Complaint was filed adding Counts 2-5 involving a second victim, K.H, so that counts involving the two separate victims in two separate incidents were charged in a single Amended Complaint.

7. Hon. William Gabler was assigned to the case.

8. On December 14, 2011, Judge Gabler granted the Defendant's *Motion to Sever Charges*, severing the trial of the count involving K.L. from the trial of the counts involving K.H.

9. On January 11, 2012 a jury found the defendant guilty of assaulting K.L.

10. At a Scheduling Conference on January 18, 2012, the trial on the counts involving K.H. was set for August 7 and 8, 2012.

11. The prosecutor requested Judge Gabler sentence Mr. Beebe on Count 1 involving victim K.L. before the trial on Counts 2-5 involving victim K.H. Judge Gabler denied State's request, indicating the sentencing on the counts involving K.L. was "to be scheduled after jury trial".

12. On April 13, 2012, CVS received information about K.L.'s concern about the delay in holding the sentencing hearing on the counts in which she was the victim. The matter was assigned to Jennifer Rhodes, the Victim Resource Coordinator for CVS.

13. After receiving the referral, but before the June 19, 2012 letter to Judge Gabler, Ms. Rhodes conducted the following activity:

    (a) Ms. Rhodes spoke with K.L. on the phone and then "start[ed] making contacts to gather more information about [K.L.'s] concerns or complaints." (Trans. at 69:18-21.)

    (b) Ms. Rhodes requested a copy of the transcript from the January 18, 2012 scheduling conference. Record, page 282. Rhodes had difficulty obtaining the transcript because "no one could seem to figure out what hearing this had occurred at" and she needed to locate the court reporter. (Trans. at 119:3-10.)

    (c) Ms. Rhodes obtained the CCAP summary for Eau Claire County Case No. 12CV72. (Record, page 308-15).

    (d) Ms. Rhodes contacted the Victim Witness Coordinator for Eau Claire County, Jodi Voegli Hollister.

    (e) Rhodes contacted Assistant District Attorney Meri Larson. (Trans. at 70:2-19.)

14. Rhodes stated her goal in making these "contacts" was to "gather more information, additional clarification on the case." (Trans. at 70:18-19.) She testified: "I just consider it gathering information so I can better understand what is going on." (Trans. at 117:5-7.) Rhodes testified that she "did not consider the information gathering as mediation. Information gathering is not part of per se the mediation process." (Trans. at 115:2-6.)

15. On June 19, 2012 Jennifer Rhodes sent a letter to Judge Gabler. (Record, page 263).

(a) This was Ms. Rhodes's first contact with Judge Gabler.

(b) This was the only contact with Judge Gabler by either CVS or CVRB until October 23, 2012.

16. The June 19, 2012 letter concluded with the following request "I am asking that you consider sentencing Mr. Beebe as soon as possible." (Record, page 299).

17. According to Ms. Rhodes:

(a) The purpose of her letter was to "reach a resolution on K.L.'s behalf ...." (Trans. 88:10-13.)

(b) Her letter did not "in any way ask Judge Gabler if he would be willing to consent to mediate [K.L.'s] complaint." (Trans. at 87:10-12.)

18. Ms. Rhodes testified there was no "practice or policy of CVS to get consent of anyone other than the victim before engaging in mediation[.]" (Trans at 112:11-14.)

19. Ms. Rhodes testified that she did not ask Judge Gabler for his consent to mediate "[b]ecause that just wasn't the normal protocol we did." (Trans. at 120:16-21.)

20. Jill Karofsky is the Executive Director for and oversees the operation of CVS. Wisconsin's Victim Resource Center (VRC) is part of CVS.

21. The *Affidavit of Jill J. Karofsky in Support of Summary Judgment for DOJ*, states at ¶9, "When appropriate and only with the consent of the victim, the VRC staff will seek to mediate a complaint." (emphasis added.).

22. There are no facts in evidence that the DOJ, CVS and VRC have any practice or policy to obtain consent to mediate a complaint from the subject of the complaint.

23. Judge Gabler received the letter on June 25, 2012.

24. Upon receipt Judge Gabler conferred with James Alexander of the Wisconsin Judicial Commission.

25. Judge Gabler testified he believed:

(a) The letter was an ex parte communication.

(b) That had he acted on the request in the letter Judge Gabler would have had to disclose it to the ADA and the Defense Attorney.

(c) He felt that would have violated the confidentiality required by the letter.

(d) He felt that had he acted on the letter he would have been improperly influenced.

26. The trial for the counts involving the other victim, K.H., was scheduled to be held less than 2 months after his receipt of the letter on June 25, 2012.

27. Judge Gabler testified that even had he acted immediately upon receiving the CVS letter on June 25, 2012, sentencing could not have proceeded before the August 7, 2012 trial date considering:

(a) Time to schedule a hearing to meet with ADA and defense attorney to disclose the letter and get their input and order a PSI,

(b) 60 days for the Presentence Investigation to be done, and;

(c) The earliest he could have sentenced Mr. Beebe would have been early to mid September.

(d) The sentencing actually occurred mid October, 2012.

28. Judge Gabler responded by letter dated July 3, 2012. Record, page 264.

29. Judge Gabler's July 3, 2012 letter states that the "five most important reasons why [he] exercised [his] discretion to delay sentencing until after the August 7-8, 2012 jury trial" were:

(a) Mr. Beebe is constitutionally entitled to meaningful access to his attorney. Sentencing him to the remaining charges pertaining to K.L. would likely result in him being confined to prison, which would limit his access to his public defender. (Record, page 267).

(b) Due to personnel shortages, it would take at least two months for the Department of Corrections to complete a presentence investigation report. Further, as a PSI includes information about a defendant's general pattern of behavior, it would be premature to order the report before the remaining charges were adjudicated. Thus, "the reliable presentence investigation cannot be concluded until after the August 7, 2012 trial which will address the alleged sexual assault of K.H." (Record, pages 267-268).

(c) A conviction for sexual assault of K.H. would affect the sentence imposed on Beebe for the sexual assault of K.L. and, under *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, Judge Gabler was required to take into consideration all aggravating factors, including any history or pattern of undesirable behavior. "Under the unusual circumstances of this case, I can better discharge my duties and responsibilities as a circuit court

judge after both alleged assaults are resolved by a jury." (Record, pages 268-269).

(d) Sentencing Beebe for the charge relating to K.L. before the remaining charges pertaining to K.H. were adjudicated would result in unnecessary expense to the county and Department of Corrections, because the DOC would be required to prepare two separate presentence investigation reports and the Eau Claire Sheriff's Department would be required to transport Beebe from prison to trial. (Record, page 269).

(e) It would be extraordinarily difficult to conduct a trial for the charges pertaining to K.H. if Beebe were sentenced for the charge relating to K.L, and he appealed because the entire record would be transmitted to the Court of Appeals. (Record, pages 269).

(f) Judge Gabler also explained there were additional reasons for his decision to wait to sentence Beebe, including that K.L. would not suffer any substantial prejudice or harm due to the delay in light of the bond conditions that were set for Beebe. (Record, page 269).

30. Ms. Rhodes testified she considered Judge Gabler's July 3, 2012 letter as his consent to mediate. However Ms. Rhodes did not contact Judge Gabler again and took no further action towards "mediation" with Judge Gabler. Record, page 282. Rhodes did not take any steps to inquire if Judge Gabler wanted to do anything more to try and resolve the situation. (Trans. at 114:4-9.)

31. On July 11, 2012 Jennifer Rhodes contacted K.L about Judge Gabler's letter. (Record, page 282).

32. On August 2, 2011 K.L. filed a formal complaint with CVRB, (Record, page 326-28), claiming Judge Gabler:

(a) Violated her right to speedy disposition, and;

(b) Violated her right to reasonable protection from accused, and;

(c) The bond conditions were insufficient to protect her from the defendant.

33. On August 6, 2012, Mr. Beebe was convicted of Counts 4 and 5 charges involving K.H. Judge Gabler revoked the defendant's bond, ordered a Presentence Investigation on all five counts. Sentencing for the counts involving both K.H. and K.L. was scheduled for October 18, 2012.

34. On August 20, 2012 Julie Braun, Operations Director of the CVRB, acknowledged receipt of K.L.'s Complaint. (Record, pages 318-325).

35. Julie Braun called Ms. Rhodes the same day to confirm that CVS had closed its file on the matter. (Trans. 143:11-19; Record, page 317.)

36. The same day, Ms. Braun sent an email to Ms. Rhodes stating: "You have already verified that is closed and was mediated with Justice [sic] Gabler. Can you please send a summary of any action taken by the DOJ in this case?" (A.R. 317.)

37. This email was sent by Julie Braun using her CVS signature block.

38. Ms. Braun testified:

    (a) She was not aware that obtaining consent from Judge Gabler before mediation was part of the Department's requirement under 950.08(3). (Trans. at 154:5-9.)

    (b) She does not, as part of the verification process, ask whether the DOJ has obtained consent to mediate. (Trans at 154:10-16.)

    (c) In this case, that she did not verify that the DOJ obtained consent from Judge Gabler before mediation. Trans at 154:24-155:3.)

39. On September 25, 2012, Ms. Rhodes sent Ms. Braun a cover letter along with a narrative describing the actions she took with respect to K.L.'s complaint, a summary of the statements of the witnesses she interviewed, as well as a copy of the scheduling conference hearing transcript, CCAP entries for the case, the letter she sent to Judge Gabler, and his response. (Record, pages 282-283).

40. Ms. Rhodes' narrative concluded by stating: "It is believed that [K.L.'s] right to a speedy disposition, Wisconsin State Statute 950.04(k) [sic] has been violated." (Record, page 283).

41. Sentencing for the charges involving both K.H. and K.L. was held on October 18, 2012. Mr. Beebe received as to each victim a sentence of two years confinement and three years extended supervision, with the sentences to run consecutively.

42. On October 23, 2012, Ms. Braun forwarded a copy of K.L.'s formal complaint to Judge Gabler and indicated that the CVRB would make a probable cause determination. (Record, page 276).

43. On October 29, 2012, Attorney Fiedler notified Julie Braun he was representing Judge Gabler. (Record, page 272.)

44. On November 20, 2012 Judge Gabler filed a response. (Record, pages 260-70.)

45. On November 20, 2012 Attorney Fiedler also filed a response. Record, pages 164-259. This was supplemented by a letter dated December 19, 2012. (Record, pages 160-63.)

46. CVRB did not disclose to Judge Gabler or Mr. Fielder the information it received from CVS until after the DECISION AND ORDER it issued on July 26, 2013.

47. On February 11, 2013 the CVRB issued its *Probable Cause Determination.* (Record, page 68-113, 151.)

48. CVRB's *Probable Cause Determination* stated on page 43-44, (Record, page 110-111),:

(a) That either the complainant, K.L., or respondent Gabler may request a hearing to resolve any disputed facts …

(b) That if the complainant or the respondent believes that any of the facts preliminarily found by the Board … is erroneous or disputed, the party shall, within 15 calendar days following the date of the Order, provide written notice to the Board specifically identifying the fact(s) or factual inference(s) the party believes to be erroneous or disputed and the factual basis for the party's belief.

(c) That if the Board determines on the basis of any information provided in paragraph 2 of this Order that there are disputed issues of material fact, the Board shall … schedule a hearing to resolve the disputed factual issues.

(d) That if the Board determines that there are no disputed issues of material fact, the Board shall issue a final decision based upon the findings of fact and conclusions of law contained in this Probable Cause Determination …

49. On March 11, 2013 Judge Gabler filed a *Motion to Dismiss… and Request for Hearing.* (Record, page 127-142.)

50. On July 24, 2013 CVRB issued its *DECISION AND ORDER DENYING MOTION TO DISMISS AND MOTION FOR EVIDENTIARY HEARING.* (Record, page 44-67.)

51. The *DECISION AND ORDER* stated "The Board determines that Gabler's alternative motion for a hearing does not demonstrate that there are disputed issues of material fact that require a hearing to resolve." (Record, page 66.)

52. On July 26, 2013 the CVRB issued its *FINAL DECISION AND ORDER* finding that Judge Gabler violated K.L's rights to a timely disposition. (Record, page 1-37.)

53. The *FINAL DECISION AND ORDER* stated:

(a) "The Board informed the parties that the Board would convene a hearing if it determined that a party identified disputed issues of material fact." (Record, page 1.)

(b) The Board "determined that the undisputed material facts establish" a violation. (Record, page 2.)

(c) "That, as a remedy authorized by Wis. Stats §950.09(3) for Gabler's violation of K.L's statutory right under Wis. Stats §950.04(1v)(k) to speedy disposition of the case in which K.L. was the victim, and Gabler's violation of K.L.'s constitutional right under Wis. Const. art I, §9m to timely disposition of the case in which K.L. was the victim, the Board will issue a Report and Recommendation directed to Gabler consistent with this Final Decision and Order." (Record, page 36.)

(d) "This is a final, appealable order of the Board, and as such makes final and appealable any previous non-final orders of the Board." (Record, page 37.)

(e) "That notice of the parties' appeal rights is attached to this Final Decision and Order." (Record, page 37.)

54. The *FINAL DECISION AND ORDER* was accompanied by a document entitled *APPEAL RIGHTS.* (Record, pages 38-39.)

55. On July 26, 2013 the CVRB released a document entitled report and recommendation of the *WISCONSIN CRIME VICTIMS RIGHTS BOARD.* (Record, pages 40-43.)

BY THE COURT

Dated: December 15, 2015

James Duvall
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT EAU CLAIRE COUNTY

THE HONORABLE WILLIAM M. GABLER, SR.
Petitioner

v.

CRIME VICTIM RIGHTS BOARD

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WISCONSIN DEPARTMENT OF JUSTICE
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FILED
CIRCUIT COURT
EAU CLAIRE COUNTY
DEC 18 2015
SUSAN SCHAFFER
CLERK OF CIRCUIT COURT

Case No.: 13 CV 473

**CONCLUSIONS OF LAW AND JUDGMENT RE:**
**CH. 227 APPEAL AND DECLARATORY RELIEF**

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## INTRODUCTION

Victims have rights. Those rights are enforceable. This decision addresses the proper recognition and enforcement of victim rights within the constitutional, statutory and regulatory framework. But as we examine the process used in this case, let nothing be interpreted as any lack of respect for the rights of crime victims, the rights of defendants or the rights of any of the involved parties to be treated with respect and with due process.

Crime Victim Services (CVS) and the Crime Victim Rights Board (CVRB) provide important services to crime victims and nothing in this decision should be interpreted as opposing the important work they do. This decision examines how that work was done in this case within that constitutional, statutory and regulatory framework.

Finally, while this case requires us to examine the procedures used, I am totally convinced that the persons involved were doing their jobs as they understood them to be with respect for the persons involved. We can all learn by examining what we do. May this decision be accepted as a positive step in the important work of those involved.

## CVS EXCEEDED ITS STATUTORY, REGULATORY AND IMPLIED POWERS

CVS did not mediate the complaint with Judge Gabler's consent. It engaged in liaison function unrelated to a mediation role. It reached a finding as to whether a violation occurred without any adjudicatory authority. It inaccurately reported its actions

to CVRB. It violated its confidentiality rules by providing more information to CVRB than information on process and outcome. These points are discussed in this section.

While this section finds CVS's role towards Judge Gabler is limited to the mediation function, I recognize CVS's other important service to victims, including maintaining a toll-free line and providing an informational program under §950.08(1) and (2). But those victim focused functions are not relevant to the discussion here.

As it relates to Judge Gabler as the subject of a complaint, the statutory authority of CVS is outlined in §950.08 which states:

> The department may receive complaints, seek to mediate complaints and, with the consent of the involved parties, actually mediate complaints regarding the treatment of crime victims and witnesses by public officials, employees or agencies or under crime victim and witness assistance programs. The department may act as a liaison between crime victims or witnesses and others when seeking to mediate these complaints and may request a written response regarding the complaint from the subject of a complaint. If asked by the department to provide a written response regarding a complaint, the subject of a complaint shall respond to the department's request within a reasonable time.

Because the legislature creates administrative agencies as part of the executive branch, such agencies have "only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates. *Wisconsin Citizens Concerned for Cranes & Doves v. Wisconsin Dep't of Natural Res.*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 334-35, 677 N.W.2d 612, 620.

The statutory powers expressly conferred on the CVS as they relate to Judge Gabler are limited to:

1. Receiving complaints
2. Seeking to mediate complaints
3. With the consent of the involved parties, actually mediating complaints
4. Acting as a liaison between crime victims or witnesses and others when seeking to mediate these complaints
5. Requesting a written response regarding the complaint from the subject of a complaint.

Information gathering accessory to these powers is authorized. I agree with Paragraph 11 of the *Affidavit of Jennifer Rhodes* where she describes the information gathering steps she took, stating "It is through those inquires that I can better learn details that help me know if the victim correctly understood what occurred, and also that can help me mediate an informal solution." I find her request for the transcript, her contacts with the Eau Claire VW Coordinator and ADA and other activities prior to the June 19, 2012 letter to Judge Gabler to be reasonably related to CVS's authorized power. The June 19, 2012 letter is also reasonably consistent with CVS's authority to request a written response regarding the complaint from the subject of a complaint.

§950.08(3) authorized CVS to "… seek to mediate complaints …"and, with the consent of the involved parties, actually mediate complaints …". I found the *AFFIDAVIT OF JILL J KAROFSKY* as perhaps illustrating the heart of some of the problems which appear in this case. At paragraph 9 she states "When appropriate and only with consent of the victim, the VRC staff will seek to mediate a complaint." (emphasis added). However §950.08(3) does not speak about consent of the victim, it speaks of "consent of the involved parties". Judge Gabler suggests that this requires the subject of the complaint to also consent. I agree. Judge Gabler is one of the "involved parties" whose consent is required.

CVS did not obtain Judge Gabler's consent to mediate this complaint. Ms. Karofsky's *Affidavit* does not describe any procedure used by CVS to seek consent from Judge Gabler. The only communication between CVS and Judge Gabler was the June 19, 2012 letter. That letter did not seek Judge Gabler's consent to mediate. Ms. Rhodes testified that her letter did not "in any way ask Judge Gabler if he would be willing to

consent to mediate [K.L.'s] complaint" and that she did not obtain Judge Gabler's verbal consent to mediate. She further testified that there was no "practice or policy of CVS to get consent of anyone other than the victim before engaging in mediation[.]" (Trans at 112:11-14.)

The June 19, 2012 letter did not request participation in any activity which might be construed as mediation. Its only request was "I am asking that you consider sentencing Mr. Beebe as soon as possible."

If the June 19, 2012 letter would be construed as mediation, there was no prior event where consent to mediate was given by Judge Gabler and therefore the June 19, 2014 letter would be mediation without consent.

Ms. Rhodes testified that she regarded Judge Gabler's July 3, 2012 letter as his consent to mediation. If so, the consent to mediate was first communicated at the time of Judge Gabler's July 3, 2012 letter. However, there was no CVS action subsequent to that which constituted actual mediation. From Judge Gabler's response it was obvious that there was a difference of opinion between Judge Gabler and the complainant. Yet CVS made no further contact with Judge Gabler. There was no subsequent event constituting actual mediation.

CVS argues §950.08(3) does not require CVS to provide or offer mediation, noting the use of the word "may". Assuming that is accurate, there is no statutory authority for them to act with respect to Judge Gabler in any capacity other than as a mediator. So while CVS may not be required to mediate, when it did act with respect to Judge Gabler, it could do so only as a mediator, and then only with Judge Gabler's consent.

Ms. Karofsky's *Affidavit* paragraph 8 states "During the informal process VRC staff assists crime victims by acting as a liaison between victims and criminal justice professionals." Yet §950.08(3) states "The department may act as a liaison between crime victims or witnesses and others when seeking to mediate these complaints." (emphasis added). The liaison function is accessory to and part of the mediation function. It is not separate from and independent of the mediation process. Because in this case CVS did not seek Judge Gabler's consent to mediate and did not mediate with consent, CVS had no separate valid liaison function and its actions could not be authorized as liaison services.

CVS's interaction with Judge Gabler as being limited to a mediator's role is supported by the regulatory scheme. CVRB §1.04 requires that all complaints filed with CVRB "shall be prepared on a complaint form obtained from the mediator". CVRB 1.05(1) requires the board to "contact the mediator and request verification that the substance of the complaint has been presented to the department …". It is clear that if CVS interacts with Judge Gabler in any way, it does so as a mediator and then only with consent.

No CVS adjudicative function is expressly authorized and none can be implied because it is inconsistent with CVS's mediator's role. Ms. Rhodes concluded her report to Ms. Braun by stating: "It is believed that [K.L.'s] right to a speedy disposition, Wisconsin State Statute 950.04(k) [sic] has been violated." (A.R. 283.) There is no authority for CVS to make such a finding. Reporting a conclusion in favor of one party or the other is inconsistent with CVS's role as an impartial mediator and is not required or

helpful to the mediation process. Therefore, it is not an implied power accessory to the mediation function.

There are three ways in which these findings are material. First, CVS inaccurately reported to CVRB that it had mediated the matter[1]. CVS had not. Finding Nº 15, page 10, *FINAL DECISION AND ORDER* (Record page 10) stated "The mediator completed the Department's informal mediation activities under Wis. Stats. §950.08(3) on or about July 11, 2012." That Finding is not supported by the evidence.

Second, § 950.09(2) Wis. Stats. conditions CVRB authority to review a complaint upon CVS's completion of its action under §950.08(3)[2]. CVRB 1.05(1) requires CVRB to "request verification" that CVS had completed its required actions. CVRB did not verify there was mediation with consent, which is particularly troubling given Julie Braun's dual employment as Policy Analyst for CVS and Operations Director for CVRB. In either role she had the opportunity and responsibility to verify that CVS had completed its activities. She did not[3]. Because CVS had not completed its required action, Ms. Braun and the CVRB should have rejected the request to review the Complaint.

---

[1] Julie Braun's email to Jennifer Rhodes stated, "You have already verified that this case is closed and was mediated with Justice Gabler." (Record page 317).

[2] § 950.09(2) Wis. Stats states "[a] party may not request the board to review a complaint under this subsection until the department has completed its action on the complaint under s. 950.08(3)."

[3] The conclusion that CVRB did not perform its verification function as required by CVRB §1.05 is confirmed by the testimony of Julie Braun:

> Q. "So in verifying whether they did their job, part of that verification process was not seeing whether they obtained consent to mediation. Is that what I am understanding?
> A. That's correct.
> (Trans. 154: 10-14.)
>
> Q. . . . Did you determine before making the decision whether or not to return the complaint to the complainant, did you verify they had obtained consent from Judge Gabler before mediation?
> A. No.
> (Trans. 154:24 to 155:3.)

Finally, CVS reported to CVRB that it had found a violation had occurred without adjudicatory authority. While I don't see that Finding specifically referred to in CVRB's *FINAL DECISION AND ORDER*, that Finding is part of the administrative record on which the *FINAL DECISION* is based.

But any CVS errors may have been less material had CVS not provided the information it did to CVRB. That issue is discussed in the next section.

## CVS VIOLATED ITS CONFIDENTIALITY RULES BY PROVIDING ITS RECORDS TO THE CVRB

The records of CVS are confidential unless confidentiality is waived by the subject of the complaint. §950.095(1)(a), Wis. Stats. There was no waiver. Yet CVS sent the contents of its file to CVRB. There appears no authority for CVS to disclose its confidential record to CVRB.

CVRB 1.05(4) states, "If the Department has completed its action as provided in §950.08(3), Stats., the mediator shall provide the board with information on the mediation process and its outcome. This information may take the form of a memorandum, other written documentation, or both." (emphasis added) The confidentiality provisions of §950.095(1)(a) may only be reconciled with the confidentiality provisions of CVRB 1.05(4) giving both sections meaning by finding that CVS can disclose information on the mediation process, such as steps taken, and its outcome, such as whether mediation was successful, without disclosing its confidential records, including content of communication during mediation.

The disclosure from CVS to CVRB of its confidential record, including oral or written communication relating to the dispute in mediation, is particularly troubling

because information in CVRB's files was not confidential once CVRB made a probable cause finding. CVRB cannot preserve the confidentiality and did not do so in this case. The only way to give the confidentiality provision of §950.095(1)(a) meaning is for CVS to not disclose its records to CVRB beyond information on process and outcome.

Maintaining the confidentiality of information CVS obtained during the mediation process is consistent with the confidentiality of information obtained in mediation in other statutes. For example §904.085(3)[4] states " … no oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding." A finding that CVS may disclose information on the process, but not oral or written communication and other records would be consistent with §904.085(3) and §950.095(1)(a).

Further, the confidentiality provisions of the CVS process are consistent with the goal of openness in the mediation process. This suggests any information gained in the mediation process should remain confidential and not be disclosed to other agencies in an investigative report.

Looking at the facts of this case, on August 20, 2012 CVRB requested CVS to "send a summary of any action taken by DOJ in this case." Record, page 317. That is consistent with a request for "information on the mediation process and its outcome." CVS could have fulfilled its duty under CVRB 1.05(4) to inform the Board of the

[4] I am not sure whether §904.085(3) technically regulates the administrative actions of CVS and CVRB. I note it refers to "any judicial or administrative proceeding". I note §904.085 covers oral or written communication "relating to a dispute in mediation". Whether or not consent to mediation was given or mediation actually occurred, communication gathered by CVS would relate to a dispute in mediation. Whether or not it strictly applies, it is illustrative of the proper interpretation of the confidentiality provisions of §950.095, which clearly do apply.

mediation process and its outcome by reporting the itemized steps it took similar to the letter dated September 25, 2012 (record 282-3) without the attachments, without describing the content of conversations and without the finding on page 2. That would have preserved the confidentiality of its records while still complying with CVRB 1.05(4).

What CVS did send is found in Record 282-315. That information went far beyond information on the process and outcome and disclosed basically CVS's entire confidential record. This violated §950.095, Wis. Stats.

§950.095(1)(a) makes all records of CVS confidential, whether or not they are part of mediation. Any part of its records, whether relating to mediation, liaison activity or investigation, is confidential, even as to CVRB.

CVS and CVRB are separate entities and one is not entitled to the records of the other. This is illustrated by Rhodes's Affidavit, paragraph 34. CVS through Ms. Rhodes asked for information from CVRB through Ms. Braun in February, 2013. Ms. Braun replied that she "did not discuss CVRB cases with anyone except the parties." Exactly, and CVS could have made the same response to CVRB in August 2012. Even had mediation with consent occurred, Rhodes as CVS should have reported on the process and the outcome of mediation without disclosing the content of her records. If there was no mediation with consent, she should have reported only that and nothing more.

In light of the foregoing confidentiality rules, I find the information provided by CVS to CVRB should only be information on the process and the outcome, but not CVS's confidential records.

CVS IS DISMISSED FROM THE 227 ACTION

I denied an earlier motion to dismiss CVS as a party to the Ch. 227 appeal because of the allegation that CVS worked in consort with and under the direction of CVRB in its adjudicatory function. For the reasons stated above I do not find that has been established.

I do find CVS breached the confidentiality provisions of §950.095. But that would not make them a proper party in the 227 appeal. Therefore CVS is dismissed as a party defendant in the 227 appeal.

THE CVRB *FINAL DECISION AND ORDER* IS A REVIEWABLE DECISION

CVRB argues that its *FINAL DECISION AND ORDER* was not a final decision for the purposes of an appeal. However, the decision was entitled *FINAL DECISION AND ORDER*. Paragraph 3, page 37 specifically states "This is a final, appealable order of the Board ...". CVRB gave Judge Gabler a document entitled *APPEAL RIGHTS* setting forth the appeal procedure followed here. Record 38.

The *FINAL DECISION AND ORDER*, Paragraph 1, page 36, states "That, as a remedy authorized by Wis. Stat. §950.09(3)for Gabler's violation of K.L.'s statutory right ... and Gabler's violation of K.L.'s constitutional right ..., the Board will issue a Report and Recommendation directed to Gabler ...". The Report and Recommendation was a remedy directed at Judge Gabler based on a finding specific to this case.

I conclude it is a reviewable decision.

JUDGE GABLER HAS STANDING TO SEEK 227 REVIEW

CVRB argues Judge Gabler has no standing to appeal because the decision did not directly cause injury to Judge Gabler's interest. I find it did directly cause injury to his interest and it is the type of injury recognized by law.

The FINAL DECISION AND ORDER found Judge Gabler violated K.L.'s constitutional rights, stating at paragraph 3, page 37:

> That, as a remedy authorized by Wis. Stats §950.09(3) for Gabler's violation of K.L's statutory right under Wis. Stats §950.04(1v)(k) to speedy disposition of the case in which K.L. was the victim, and Gabler's violation of K.L.'s constitutional right under Wis. Const. art I, §9m to timely disposition of the case in which K.L. was the victim, the board will issue a report and recommendation directed at Gabler consistent with this final decision.

That finding is public record.

As explained by the United States Supreme Court, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971) (quoted in Bracegirdle, 159 Wis. 2d at 417).

Judge Gabler was found guilty of violating a person's constitutional and statutory rights. That finding would certainly impinge upon his good name, reputation, honor and integrity within the legal community and the community at large. It could be used against him in an election, or if he would seek higher office or a different job. This finding was made by an agency with the power to issue a public reprimand and to fine a public official. See Wis. Stat. § 950.09(2) (remedial powers granted to CVRB). It could serve as the foundation for a complaint with the Judicial Commission. Potentially it could create civil liability. It likely would affect him in the future performance of his duties as a judge. It could affect his relationship with the DA, the Victim Witness

Coordinator or others with whom he works. It could affect the public's perception of the court.

Judge Gabler has a personal stake in the outcome of this proceeding. Therefore, he has standing.

## CVRB VIOLATED JUDGE GABLER'S DUE PROCESS RIGHTS BY USING CONFIDENTIAL INFORMATION IT OBTAINED FROM CVS

I conclude CVRB violated Judge Gabler's right to due process by basing its decision on probable cause and its *FINAL DECISION* on the confidential CVS record.

On August 20, 2012 CVRB requested CVS "send a summary of any action taken by DOJ in this case." Record 317. This request by CVRS may be consistent with § CVRB 1.05(4), which allows a DOJ "mediator" to "provide the board with information on the mediation process and its outcome."

However, CVS provided more than "information on the mediation process and its outcome." Jennifer Rhodes on behalf of CVS provided its entire confidential record to Julie Braun, who is employed by both CVS and CVRB. Ms. Braun should be fully aware of the confidential nature of CVS's records and that the regulations only authorize CVS to report on the process and results of mediation. Having wrongfully received the confidential information from Ms. Rhodes, Ms. Braun in her capacity either with CVS or CVRB could have declined to send it on to CVRB. She did not do so.

Judge Gabler had the right to the confidentiality of the CVS record. CVRB knowingly relied upon confidential information it should not have had as the sole source

of information for determining probable cause and making its *FINAL ORDER*. This violated Judge Gabler's due process rights.

CVRB VIOLATED JUDGE GABLER'S DUE PROCESS RIGHTS BY CONDUCTING INVESTIGATIVE ACTIVITY BEFORE FINDING PROBABLE CAUSE

I conclude CVRB violated Judge Gabler's right to due process by taking investigative action before its finding of probable cause.

§950.09(2) states "...the board may not begin any investigation ... until the board first determines that there is probable cause to believe that the subject of the complaint violated the rights of a crime victim. CVRB 1.06(1) provides "The board may conduct an investigation of any complaint which meets the probable cause standards under this chapter". CVRB did not find probable cause until February 11, 2013. Therefore CVRB itself could not take any investigative action before that date.

The term "begin an investigation" would include information gathering outside of the filed Complaint. In her position with CVRB Ms. Braun knew she could not conduct any investigative activity, such as asking for and receiving CVS's file beyond its report on mediation process and outcome. Having received information beyond process and outcome from Ms. Rhodes, Ms. Braun in her capacity with CVRB forwarded that information on to the Board. She knew she had gathered information beyond that submitted with the Complaint, which is prohibited investigative activity before a finding of probable cause.

It is reasonable to conclude that this was the part of a pattern of information sharing between CVS and CVRB and a pattern of CVRB's use of confidential information gathered from CVS in making its probable cause determination. CVS had no

reason of its own to send information in its file to CVRB apart from assisting CVRB's information gathering. Ms. Rhodes sent the full file without request and Ms. Braun both in her capacity with CVS and CVRB received the gathered information without question and forwarded it to the Board. There is no evidence the Board itself declined to consider the information gathered by CVS.

CVRB VIOLATED JUDGE GABLER'S DUE PROCESS RIGHTS BY DENYING HIS REQUEST FOR A HEARING.

> There was only one catch and that was Catch-22 .... Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions.
>
> - Joseph Heller, *Catch-22*

CVRB 1.07(1) provides that "[a] hearing may be requested by any party or the board." The regulation goes on to prescribe the timing and procedures to be used at the hearing.

CVRB 1.07(5) states that once a hearing has been requested, the parties "shall be afforded reasonable opportunity to be represented by counsel to call witnesses, and to present evidence."

§ 227.44(1) states "In a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice."

CVRB 1.06(3) states "Following its investigation and prior to the hearing under s. CVRB 1.07, the board shall provide copies to the parties of any documentation obtained during its investigation."

Judge Gabler requested a hearing. In its *DECISION AND ORDER DENYING MOTION TO DISMISS AND MOTION FOR EVIDENTIARY HEARING* CVRB denied Judge Gabler a hearing. In doing so CVRB stated at page 21 (Record 64) "No disputed

material facts exist with respect to Gabler's exercise of discretion to delay Beebe's sentencing until after the second trial."

CVRB refused to provide Judge Gabler access to the information before it until after the hearing denial. CVRB argues CVRB 1.06(3) does not require production of any documentation if there is no hearing.

The problem may be illustrated as follows: (1) CVRB will not give Judge Gabler a hearing unless he establishes an issue of material fact; (2) Judge Gabler needed to know the facts being considered by CVRB in order to raise a material issue of fact, but; (3) CBRB refused to provide Judge Gabler with the facts it was considering until after it denied his request for a hearing. This is circular logic, a Catch-22.

Several issues of material fact now known are presented in this case:

1. There is presented the factual issue of whether CVS violated its confidentiality rules under §950.095(1)(a) which Judge Gabler would not have been able to address without full access to the CVRB information.
2. Similarly Judge Gabler could not address CVRB's reliance on confidential material obtained from CVS because he didn't have the opportunity to know what CVS provided to CVRB.
3. There is a factual issue as to whether mediation actually occurred, whether it was held with consent and "whether CVS had completed its actions as provided in s. 950.08(3)", a prerequisite to CVRB's authority to review a complaint under CVRB §1.05(3).

4. Judge Gabler places at issue the accuracy of the statement of the Eau Claire VW Coordinator that "they have a lot of problems with the judge treating victims poorly". (Record page 282).
5. Judge Gabler places at issue the accuracy of the statements of ADA Larson that "... the Judge despises cases with multiple incidents and will turn a single case into several trials. Judge Gabler does not view K as a victim any longer since the trial is over" and that "Judge Gabler is demeaning to victims and "is shutting them down like crazy" and is "very controlling of every little thing."" (Record page 282).[5]
6. The factual impact of Code of Judicial Conduct considerations on Judge Gabler's communication with CVS and CVRB.

Most importantly the issue presented involved a balancing of many factors- a victim's right to speedy disposition, a defendant's right to be sentenced based on accurate information, a judge's authority to consider all factors relevant to sentencing, a defendant's presumption of innocence, a judge's ability to consider even bad acts of which the defendant was not convicted and other factors. Which factors apply to this case, their proper weight and deference to a Judge's discretion are all material facts.

The consideration of these factors involve a determination of questions of fact. A number of the factors relate to third parties- the Defendant, the Defense Attorney, and the District Attorney. Was resolution of the remaining charges a fact relevant to Judge Gabler's sentencing decision? What was the defendant's position, did he join in or

[5] The transcript from the January 18, 2012 Scheduling Conference where the sentencing date was set suggests that Judge Gabler was not demeaning to the victim and did not shut down consideration of victim's rights. He encouraged the ADA to make a record of her concerns, reviewed the Victim's Rights law, §950.04(1v), discussed various factors and exercised his discretion on the record.

oppose the earlier sentencing date? What prejudice would the defendant have suffered had the sentencing been held in April? The victim is not the only one with rights in this case, and without a hearing these parties had no opportunity for input for their rights to be considered.

CVRB rejected consideration of any facts supporting the decision not appearing in the record at the January 18, 2012 Scheduling Conference, stating "Those after-the-fact justifications are not material." *DECISION AND ORDER*, page 22 (Record 65). The rejection of an opportunity for a more complete examination of the factors involved in an exercise of discretion is not supported by law. As the Wisconsin Supreme Court stated:

> Thus, we are confronted head-on with the question of what explanations are required of a circuit court when it exercises its discretion, in a scheduling order, to depart from the deadlines in state law. Must the circuit court "explain on the record why" a deviation from the deadline in state law is "necessary and appropriate"? *Hunter,* 300 Wis.2d 213, ¶ 15, 730 N.W.2d 184.
>
> We think not. The language from *Hunter* requiring a trial court to explain on the record why it has deviated from the scheduling deadlines in Wis. Stat. § 802.08(2) is hereby withdrawn.
> *Hefty v. Strickhouser*, 2008 WI 96, ¶¶ 49-50, 312 Wis. 2d 530, 556, 752 N.W.2d 820, 832

As stated by Judge Gabler, the request to separately sentence the defendant on one count of a multiple count complaint "came up spontaneously at the scheduling conference with no prior warning. Judge Gabler did not have the benefit of full briefing or oral argument." *Petitioner's Reply Brief to Crime Victim Rights Board's Ch. 227 Review Brief*, page 15. An appellate court reviewing a judge's exercise of discretion would not take CVRB's limited view. It would search the entire record to search for facts relevant to the exercise of discretion.

CVRB did not consider whether the *Code of Judicial Conduct*'s ethical restrictions affected Judge Gabler from fully engaging in the mediation process or providing full details of all aspects of the issue. The *Code* prohibits Judge Gabler from engaging in ex parte communications. I agree with Judge Gabler that this type of communication does not fall within the "scheduling exception" for ex parte communications under SCR 60.04(1)(g)1 because the type of communication involved here was specifically directed to gain a procedural advantage, that is one party's desire to change the sentencing date without notice to any other parties to the criminal case. Judge Gabler may have been within the *Code* had he chose to not respond to CVS or CVRB's communications at all.

CVS suggests the "unless authorized by law" exception found in SCR 60.04(1)(g)5 allowed Judge Gabler to respond. Yet the comments to SCR 60.04(1)(g) state: "To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge." Further the Comment states "If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties." These comments suggest that even if communication with CVS or CVRB is authorized, it should be disclosed to the Defendant, the DA and placed in the court record, which implicates the confidentiality clause of Ms. Rhodes's letter.

Ms. Rhodes's June 19, 2012 letter to Judge Gabler contained a clause forbidding him from disclosing the content of the letter to anyone, such as the DA or defense attorney or the court record. Even assuming, without deciding, that Judge Gabler was able to waive the confidentiality requirements as the "subject of the complaint", he was

not required to do so. Had Judge Gabler disclosed the ex parte contact from CVS, he would have violated the confidentiality restrictions imposed by CVS. If he did not disclose the CVS contact, the *Code* may well have limited his ability to respond to CVS. Without a hearing CVRB could not fully consider the effect of the Code on Judge Gabler's written response, or give Judge Gabler the opportunity to fully develop the record.

Other Code provisions may apply. SCR 60.04(4) states a judge shall recuse himself in a proceeding when he becomes aware of facts and circumstances which reasonable well informed people knowledgeable of judicial ethics standards would reasonably question the judge's ability to be impartial because (a) the judge has personal knowledge of disputed evidentiary facts concerning the processing or (d) the judge knows he has an economic interest in the subject matter. Ms. Rhodes's letter gave Judge Gabler personal knowledge of information not known or disclosed to the defense or the DA, namely information about the impact of the crime on this victim. The letter was the first contact in a process that could have resulted in CVRB imposing a forfeiture against Judge Gabler under §950.09(2)(d). Reasonable persons may reasonably question a judge's ability to be impartial with such undisclosed contact with a judge on an existing case which may end up with the Judge facing personal economic consequences. CVRB considered none of this, and did not give Judge Gabler the opportunity for a hearing to raise such issues.

"[A] minimal rudiment of due process is a fair and impartial decisionmaker." *Guthrie v. WERC*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983). "This applies to administrative agencies [that] adjudicate as well as to courts." *Withrow v. Larkin*, 421

U.S. 35, 46 (1975). Due process requires a hearing before an agency when the agency acts in a quasi-judicial capacity and determines the parties of the parties. *Ruhmer v. Wis. State Teachers Ret. Bd.*, 48 Wis. 2d 419, 428, 180 N.W.2d 542 (1970) ("The 'rudiments of fair play' should require, after an initial determination unfavorable to the respondent, that she have a hearing on reasonable notice and an opportunity to present all evidence, testimony and argumentation to the finder of fact.") *Mid--Plains Tel, Inc. v. Public Serv. Comm'n*, 56 Wis. 2d 780, 785, 202 N.W.2d 907 (1973) ("Generally, the fundamental or essential requirement of procedural due process of law is notice and hearing, that is opportunity to be heard either before a court or the administrative agencies[.]").

CVRB's refusal to grant a hearing directly relates to their position that they were not required to disclose "any documentation obtained during its investigation." Probable cause was found on February 11, 2013. If CVRB's decision was based in its investigation after February 11, 2013, Judge Gabler was clearly denied the opportunity for a hearing. If CVRB argues they investigated nothing after February 11, 2013 and relied on information it gathered before February 11, 2013, that brings us back to the concern of the violation of CVS's confidentiality provisions and CVRB's restriction on investigation before a probable cause finding. Judge Gabler should have been granted a hearing.

CVRB's refusal to provide information and to allow a hearing or to consider additional supplemental information raises a substantial question as to Judge Gabler's opportunity to be heard and violated his due process rights.

JUDGE GABLER, NOT CVS, IS BOUND BY THE *CODE OF JUDICIAL CONDUCT*'S RESTRICTION ON EX PARTE COMMUNICATION

I disagree with Judge Gabler's position that CVS is bound by the *Judicial Code of Conduct*'s restriction on ex parte communication. SCR 60 regulates the conduct of judges; it is Judge Gabler that is bound. Ms. Rhodes's June 19, 2012 letter did not violate SCR 60.04(1)(g), but Judge Gabler may have had he fully engaged in communication with CVS without disclosure to all other parties. Again, such disclosure would have placed Judge Gabler in conflict with the confidentiality rules of §950.095(1). All this again emphasized the need for a hearing to fully develop the facts if CVRB were to fairly perform any adjudicatory role.

THESE PROCEDURAL ERRORS OR FAILURES MATERIALLY PREJUDICED JUDGE GABLER

CVRB alleges that if there were procedural errors or failures, they did not prejudice Judge Gabler to a material degree. It argues that an error is prejudicial if, but for the error, there probably would have been a different result.

Had CVS properly conducted its mediation, it is unclear whether the complaint would have been filed at all. Had CVS preserved the confidentiality of its record, the CVRB might have found probable cause based on the face of the Complaint but would probably have conducted its own investigation and held a hearing to develop the allegations of the Complaint. Had Judge Gabler had all the information from CVRB at the time he was addressing whether material issues of fact occurred, the CVRB would probably have granted a hearing. Had there been a hearing, it is unclear what evidence would have been presented and whether it would have shaped CVRB's decision. Because of the totality of the circumstances, I find there probably would have been a different result.

I find there were procedural errors or failures which prejudiced Judge Gabler to a material degree and but for the errors or failures there probably would have been a different result.

## THE CVRB UNCONSTITUTIONALLY INTRUDED UPON A CORE ZONE OF EXCLUSIVE JUDICIAL POWERS

### The Doctrine of Separation of Powers

The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative, and executive branches." *State ex rel. Friedrich v. Cir. Ct. for Dane Co.*, 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995). The constitutional powers of each branch fall into two categories: exclusive powers and shared powers. *State v. Horn*, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). The exclusive powers represent those core constitutional zones of authority, which are to be "jealously guarded" by each branch of government. *Barland v. Eau Claire Co.*, 216 Wis. 2d 560, 573, 575 N.W.2d 691 (1998).

The purpose of separation of powers doctrine is "to maintain the balance between the three branches of government, to preserve their respective independence and integrity, and to prevent concentration of unchecked power in the hands of any one branch." *State v. Washington*, 83 Wis. 2d 808, 825-26, 266 N.W.2d 597 (1977). The separate branches must take steps to protect against other branches infringing upon their areas of exclusive authority or attempting to coerce the use of its exclusive authority. See *State v. Stenklyft*, 2005 WI 71, ¶ 89, 281 Wis. 2d 484, 697 N.W.2d 769 (C.J. Abrahamson, concurring/dissenting for majority of court).

The judiciary's core constitutional powers include those inherent powers which are "essential to the expedition and proper conducting of judicial business.'" *Barland*, 216

Wis. 2d at 579. The inherent powers of the judiciary are constitutionally exclusive. Any exercise of those powers by another branch of government is unconstitutional.

The Exclusive Authority of the Wisconsin Supreme Court to Regulate and Sanction the Judiciary

One of the inherent and exclusive powers of the Wisconsin Supreme Court is the power to regulate courts and sanction members of the judiciary. Article VII, Section 3 of the Wisconsin Constitution provides that "[t]he supreme court shall have a general superintending control over all inferior courts." This power is "'unlimited in extent . . . undefined in character . . [and] unsupplied with means and instrumentalities.'" *In re Kading*, 70 Wis. 2d 508, 519, 235 N.W.2d 409 (1975) (quoted source omitted).

Additionally, Article VII, Section 11 of the Wisconsin Constitution provides: "Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law." This provision provides the only disciplinary alternatives for judicial misconduct. *In re Judicial Disciplinary Proceedings against Auilk*, 146 Wis. 2d 57, 77, 429 N.W.2d 759 (1988). Under this provision, the Wisconsin Supreme Court has the sole authority and responsibility for imposing judicial discipline. *In re Disciplinary Proceedings Against Breitenbach*, 482 N.W.2d 52, 57 (Wis. 1991) ("By voluntarily dismissing the judicial disciplinary proceeding . . . . , the parties would in effect usurp this court's constitutional authority and responsibility for the imposition of judicial discipline.").

Under the disciplinary system established by the Supreme Court, the Judicial Commission, investigates possible misconduct and disability and determines whether

there is probable cause of either. If so, the Commission initiates and prosecutes a proceeding against the judge in the Wisconsin Supreme Court.

The Judicial Commission is part of the judicial branch.[6] The Commission has nine members, including one court of appeals judge, one circuit court judge, and two attorneys, all appointed by the Supreme Court; and five non-lawyer members appointed by the governor with Senate confirmation. §767.83. The fact that the Supreme Court allows the Judicial Commission containing nonjudicial officers appointed by the executive branch to perform its investigatory and prosecution function may suggest receiving complaints, investigation, and determining probable cause are functions shared with the executive branch while the Court itself reserved the power to adjudicate and discipline.

The adjudicatory function is performed by judicial officers. A panel of three court of appeals judges is named to hear the matter. That judicial panel files with the Supreme Court its findings of fact, conclusions of law, and a recommendation regarding disposition. The Supreme Court reviews the panel's report, adopts its own findings and conclusions, and determines the appropriate sanction or other disposition.

Article I, Section 9m, states, "The Legislature shall provide remedies for the violation of this section." The constitutional recognition of the rights of crime victims in Article I, Section 9m, is not inconsistent with the judicial branch's exclusive power to discipline judges. By creating §950.09(2)(b) the legislature allowed CVRB to refer a violation by a judge to the Judicial Commission, from where a complaint may be

[6] *See State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 289, 238 N.W.2d 81, 82 (1976): "the Wisconsin Judicial Commission was created by the Wisconsin Supreme Court as an agency of the judicial branch of our state government, effective January 1, 1972; and that the Court promulgated the Judicial Commission Rules of Procedure effective April 1, 1973."

considered by the Supreme Court. All of the victim rights may be enforced through the judicial branch. Had CVRB done so, its role would have been constitutionally consistent with the doctrine of separation of powers. But the CVRB did not choose that option in this case. Instead the CVRB chose to exercise the power to adjudicate and sanction, and in doing so infringed upon a core, exclusive power of the judiciary.

§950.09(2) provides that after reviewing a complaint, the CVRB "may do any of the following":

> (a) Issue private and public reprimands of public officials, employees or agencies that violate the rights of crime victims provided under this chapter, ch. 938 and article I, section 9m, of the Wisconsin constitution.
>
> ...
>
> (c) Seek appropriate equitable relief on behalf of a victim if such relief is necessary to protect the rights of the victim.
>
> (d) Bring civil actions to assess a forfeiture under s. 950.11. Notwithstanding s. 778.06, an action or proposed action authorized under this paragraph may be settled for such sum as may be agreed upon between the parties... .

§§950.09(2)(a), (c), and (d) of the Crime Victim's Rights Act intrude upon the Supreme Court's exclusive power to regulate and sanction members of the judiciary to the extent that it allows an executive branch agency to reprimand, sanction, and fine a sitting judge.

§950.09(3) states "In addition to its powers under sub. (2), the board may issue reports and recommendations concerning the securing and provision of crime victim rights and services." Had the CVRB issued a report or recommendation without a finding that Judge Gabler violated the victim rights and without imposing a remedy "directed at Judge Gabler", it is possible even that may have been consistent with the doctrine of separation of powers.

But the *FINAL DECISION AND ORDER*, paragraph 1, page 36, stated:

> That, as a remedy authorized by Wis. Stats §950.09(3) for Gabler's violation of K.L's statutory right under Wis. Stats §950.04(1v)(k) to speedy disposition of the case in which K.L. was the victim, and Gabler's violation of K.L.'s constitutional right under Wis. Const. art I, §9m to timely disposition of the case in which K.L. was the victim, the board will issue a report and recommendation directed to Gabler consistent with this final decision.

Similarly the letter from Julie Braun to victim K.L. dated July 26, 2013 reads in part "As a remedy for the violation, the Board issued a Report and Recommendation …"

The *FINAL DECISION AND ORDER* adjudicated that Judge Gabler violated the victim's rights. It pronounced a remedy for that violation. Its action was "directed to Gabler". Notwithstanding the reference to §950.09(3), the CVRB's FINAL DECISION AND ORDER performed an adjudicatory function specifically directed at Judge Gabler, making a final determination that he violated a specific person's constitutional and statutory rights. It provided a remedy for that adjudicated violation by issuing its Report and Recommendation . It gave him the right to appeal, a procedure inconsistent with CVRB's action being a mere report and recommendation. This is exactly the power reserved for the judicial branch.

The Court's Discretionary Authority to Manage Its Calendar

Apart from the broader concept of imposing sanctions, this case presents another challenge to the separation of powers doctrine, that being executive branch control over a court's docket.

"Wisconsin circuit courts have discretion to control their dockets. This power is inherent to their function. It is also granted by statute." *Hefty v. Strickhouser*, 2008 WI 96, ¶ 31, 312 Wis. 2d 530, 752 N.W.2d 820 (citing Wis. Stat. § 802.10).

*Complaint Against Grady*, 118 Wis. 2d 762, 774, 348 N.W.2d 559, 565 (1984) held that by purporting to establish time limits for judicial decision-making, sec. 757.025, Stats., was an unconstitutional exercise by the legislature of judicial power, and violated the separation of powers doctrine, stating:

> (T)he setting of time limits for judicial decision-making concerns the efficient and effective functioning of the court system and, therefore, is a matter of court administration. As such it comes within the administrative authority over all state courts which the Wisconsin Constitution vests in the supreme court, Art. VII, sec. 3(1), as amended in 1977. The legislature does not have the power to promulgate rules of court administration.
>
> However, the statute requiring the withholding a judge's salary for failure to decide cases within a specified time goes beyond court administration. It constitutes an attempt by the legislature to coerce judges in their exercise of the essential case-deciding function of the judiciary. In so doing, the legislature violates the well-established policy that the judicial branch of government must be independent in the fulfillment of its constitutional responsibilities. That policy, a part of American jurisprudence since the founding of our republic and first acknowledged in the English Act of Settlement in 1701, requires that a truly independent judiciary must be free from control by the other branches of government.
>
> The setting and enforcement of time periods for judges to decide cases lies within an area of authority exclusively reposed in the judicial branch of government. Section 757.025, Stats., is an intrusion by the legislature into the exclusively judicial area of judicial decision-making and, as such, is unconstitutional. *Complaint Against Grady*, 118 Wis. 2d 762, 782-83, 348 N.W.2d 559, 569 (1984)

Crime victims have rights. So do defendants. Scheduling is a discretionary action by a judge properly reviewable by the judicial branch. The executive branch through the CVRB cannot control court scheduling by adjudicating constitutional violations by judges with whom it disagrees without violating the separation of powers.

The problem of the executive branch exercising authority in this matter is illustrated by the unresolved question of whether any party, a DA, a defendant or a victim, has the right to be sentenced on one count in a multicount complaint before all

other counts are resolved.[7] In making the charging decision, the ADA could have charged the counts involving victim K.H. in a complaint separate from the charges involving victim K.L. She chose not to, which may be an appropriate exercise of prosecutorial discretion because all five counts charged in the complaint were connected to each other.[8]

But the consequence is that there was one case against Mr. Beebe, not two. The ADA should have known of the likelihood that the cases may be severed for trial. The severance decision was not appealed by the State in the criminal case. While the counts were severed for trial, all charges against Mr. Beebe remained in the single Eau Claire County Circuit Court Case Nº 2011 CF 511 because of the ADA's charging decision. All proceedings, including sentencing, proceeded within the same case file. The ADA took no steps to sever the case file for the charge involving K.L. from the other victim's cases. No complaint has been filed by K.L. against the ADA for that decision.

Does a defendant have the right to be sentenced before all counts are resolved? Alternatively does the defendant have the right to not be sentenced until all counts are resolved? Does a judge have the right to all the information the judge believes is relevant to a sentencing decision? How does the victim's right to speedy resolution of the case relate to the rights of a defendant and the Court? I know of no authority on these points.

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[7] I find no authority on this point either way, and none is cited. The Court of Appeals in *State v. Grant*, 2013 AP 515 ¶20, (2013) held that the law regarding partial verdicts is unsettled, commenting "At the same time, we recognize that whether the facts are interlocking might prove to be problematic and, since there is really very little value in announcing a partial verdict, it might be wise for trial courts to heed the suggestion of the New Jersey Supreme Court and avoid partial verdicts altogether." But *Grant* is somewhat distinguishable, involving the same jury on both counts.

[8] The transcript of the January 18, 2012 Scheduling Conference reads in part:
THE COURT: Well, you certainly thought it was connected insofar as you charged all of these counts together, so.
MS. LARSON: And I was willing to try them together. But since they've been separated, this is going to make the trial part of all of these cases go on for quite a lengthy period.

Resolution of these issues involves exercise of judicial discretion, subject to judicial review, and would be inappropriate subjects for executive branch action through the CVRB.

The problem of CVRB's review of acts of judicial discretion is further illustrated by its application of a different standard of review of an act of judicial discretion than that applied in a judicial setting. In any judicial review of a judicial act of discretion, appellate courts must "search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained." *McCleary v. State*, 49 Wis.2d 263, 282, 182 N.W.2d 512 (1971). In other words, when reviewing discretionary decisions, a reviewing body must look for reasons to sustain the decision. Here, the CVRB did not do that.

Allowing the CVRB to impose a standard of review of a discretionary decision which differs from that used in an appellate review would potentially lead to inconsistent results. It would potentially allow a judge to be sanctioned by CVRB while being upheld on appeal.

By finding Judge Gabler guilty of violating K.L.'s constitutional and statutory rights CVRB unconstitutionally infringed upon an area of authority exclusively reposed in the judicial branch of government, the court's inherent power to control its docket.

The CVS and the Doctrine of Separation of Powers

CVS has no authority to determine merit of the complaint or to take disciplinary action. The mediation/liaison function of CVS does not extend beyond the type of function the Supreme Court has given to the Judicial Commission. I do not find that the statutory authority given to CVS violates the doctrine of separation of powers if CVS remains within its statutory authority.

Judge Gabler Has Standing to Challenge the Constitutionality of the Crime Victim Rights Act

As stated in *Grady*:

> A person charged with a violation of a statute has a fundamental due process right to challenge the constitutionality of that statute. *See, generally,* 16 Am.Jur.2d, Constitutional Law, secs. 188 *et seq.* "A party has standing to challenge a statute if that statute causes that party injury in fact and the party has a personal stake in the outcome of the action." *Mast v. Olsen,* 89 Wis.2d 12, 16, 278 N.W.2d 205 (1979). Judge Grady is charged with judicial misconduct for having persistently failed to perform an official duty to comply with the provisions of sec. 757.025, Stats., and he has admitted his failure to comply with those provisions. Because Judge Grady may merit discipline for misconduct if the statute constitutionally establishes judicial duties, he has a personal stake in the outcome of this proceeding. Therefore, he has standing. *Complaint Against Grady*, 118 Wis. 2d 762, 773-74, 348 N.W.2d 559, 565 (1984)

For the reasons stated in the prior section I find Judge Gabler has standing to challenge the constitutionality of the power of the CVRB to discipline judges.

THE FACE OF THE COMPLAINT IS SUFFICIENT TO SUPPORT CVRB'S PROBABLE CAUSE FINDING

Judge Gabler requests this Court to set aside the FINAL DECISION AND ORDER because it is not supported by substantial evidence. Given the concerns addressed above, I address this in two parts.

Because I have held CVS improperly provided confidential information, that information should not have been considered by CVRB. The question posed then is whether the face of the Complaint supports a finding of probable cause. I find it does.

Deciding probable cause from the face of a complaint is a familiar function for a judge. Within the criminal process, a complaint supports probable cause if there is any reasonable inference upon which a factfinder could decide a violation occurred, even if there are other reasonable competing inferences. Conclusions and inferences need only

be sufficiently more than a mere possibility. I find the Complaint, Record page 278-280, sets forth sufficient facts for the CVRB to find probable cause. I don't see that anything more is required had the CVRB decided to then forward the complaint to the Judicial Commission under §950.08(2)(b). Access to the full CVS confidential file was not required to support a finding of probable cause.

CVRB'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD

Because I have found CVRB's constitutional power is limited to determining probable cause and referring the complaint to the Judicial Commission, I hesitate to take the second step of examining whether substantial evidence supported the CVRB adjudication that Judge Gabler violated K.L.'s rights, or whether substantial evidence supported its pronouncement of a "remedy" for that violation "directed to Gabler". However I will make a finding in the alternative, in the event the appellate court finds CVRB's adjudicatory powers to be constitutional.

I find the de novo standard of review appropriate. The issues presented here are of first impression. CVRB has no expertise or specialized knowledge in reviewing discretionary judicial decisions, reviewing sentencing factors to be considered by a judge, balancing a victim's speedy disposition rights with the rights of a defendant to be sentenced on accurate and complete information, application of the Code of Judicial Conduct, a court's independent authority to control its docket, and the unsettled law concerning separate sentencing in a multicount criminal case. The CVRB has no experience in administering the rights of a victim against a judge in an ongoing criminal case.

CVRB's finding that the delay was not reasonable is not supported by the evidence. This was a single case, filed that way by the DA's office. No authority exists expressly permitting or requiring sentencing on one count while the other count remains unresolved. There are definite reasons why this would not be advisable. A defendant is entitled to a presumption of innocence until convicted. If a judge presumed the defendant innocent on Count 2 in deciding the sentence in Count 1, a subsequent conviction on Count 2 would make the first sentence be based on inaccurate information. Alternatively if a judge assumed guilt on Count 2 in sentencing on Count 1, a subsequent acquittal on Count 2 would make the Count 1 sentence subject to challenge.

Judge Gabler cites many other valid reasons for the scheduling in this case. A judge needs to have full and accurate information when deciding a sentence. A defendant is entitled to be sentenced on accurate information. A defendant's ability to participate in preparation of a PSI and with the sentencing process may be impacted by the pending related charge. I see no evidence of unreasonable delay in either the scheduling of the second trial or in the sentencing process after conviction on the other counts. I note the motion to sever was considered in December, until then all counts were set for trial in January. There were compelling reasons why severing the trials was appropriate. The trial on the severed counts was promptly scheduled less than 30 days after the Motion to Sever was granted and it was set within a reasonable time. Given the PSI and sentencing process, the earliest a sentencing could have occurred on Count 1 was about in late March or April and the sentencing actually occurred in October, not an unreasonable delay given the important issues involved. The case was promptly handled throughout, from its filing

on July 29, 2011 to the trial date on Count 1 on January 10, 2012 and the plea on Counts 2-5 on August 6, 2012.

The transcript of the January 18, 2012 Scheduling Conference Judge Gabler considered the victim's speedy trial rights stating, "Well, regardless of what happens to Mr. Beebe in the second trial on June – rather August 7th and 8th, whether he's convicted or not, we will have a sentencing after that. In other words, I'm not going to wait for a sentencing if the state wants to try count 4." The transcript suggests that Judge Gabler was not demeaning to the victim and did not "shut down" consideration of victim's rights. He encouraged the ADA to make a record of her concerns, reviewed the Victim's Rights law, §950.04(1v), discussed various factors and exercised his discretion on the record.

Judge Gabler demonstrated respect for the victim and recognition of victim's rights. His July 3, 2012 letter stated, "Victims are entitled to be independent participants in the criminal justice system and not simply bystanders. We recognize that crime victims, by virtue of the crimes they suffer, experience profound tragedy at the time they are victimized, during the adjudicative process and in many instances throughout the remainder of their lives."

It is also interesting to note that from the CCAP record it appears the plea deal was negotiated and ready to proceed on July 19, 2012, less than a month after Judge Gabler received the first contact from CVS, but that the State requested further delay to comply with victim notification.

I note the length of delay was not great. Judge Gabler received the first and only contact on June 25, 2012. The trial on Count 2 was already set for August 7. The

defendant's bond was revoked and the PSI was ordered on August 6. At most the length of delay was from June 25 to August 6, a period of 42 days. Given the important issues at stake and the unsettled law in the area a delay of 42 days was not unreasonable.

By way of perspective, look at the timing of the handling of this case by CVS and CVRB. I am sure victims have the right to timely disposition of this complaint as well. CVS received the complaint on April 13, 2012, but the first contact with Judge Gabler wasn't until the June 19, 2012 letter. The filing of the complaint with CVRV happened on August 20, 2012, four months after the complaint even though during that time CVS sent only one letter to Judge Gabler and no follow-up. CVRB delayed from August 20, 2012 until February 11, 2013 before finding probable cause, and then until July 24, 2013 for its Final Decision without a hearing. Each of these periods is longer than the delay for which they sanction Judge Gabler. I don't necessarily criticize CVRB for its delay in issuing its decision. It needed good information to make a good decision. Judge Gabler did too and his decision affected the incarceration of another human being. The length of the process with CVS and CVRB from April 13, 2012 until July 24, 2013, longer than the entire criminal case took, affects the victim too, yet I assume neither CVS nor CVRB would feel it violated the victim's right to speedy resolution of these issues.

If CVRB has constitutional adjudicatory and sanction authority, I find the CVRB decision was not reasonably supported by the evidence.

JUDGMENT ON THE CH 227 REVIEW SETTING ASIDE THE DECISION OF CVRB

The FINAL DECISION AND ORDER of the CVRB is set aside. I find that §950.08(2)(a), (c) and (d) as applied to a judge as defined in SCR 60.01(8)

unconstitutionally intrudes upon two core zones of exclusive judicial powers, the exclusive power of the Supreme Court to regulate and sanction the judiciary and also the exclusively judicial area of judicial decisionmaking. Further I find §950.09(3) is unconstitutional when it is directed at a particular judge as a remedy based on a finding that the particular judge violated a law or regulation.

I decline to find unconstitutional the authority of CVRB to receive complaints alleging a violation by a judge of the rights of crime victims, to find probable cause or to refer to the Judicial Commission under §950.08(2)(b).

As separate and alternatives grounds, I find that the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure and a failure of CVRB to follow prescribed procedure. I find CVRB violated Judge Gabler's right to due process by basing its decision on probable cause and its *FINAL DECISION* on the confidential CVS record, by investigation before a probable cause finding, by denying Judge Gabler's request for a hearing and by failing to provide him with copies of documentation obtained during its investigation. I find that because CVS had not "completed its action on the complaint under s. 950.08(3)", CVRB had no jurisdiction to consider the complaint or determine probable cause. Finally, if CVRB has constitutional adjudicatory authority, I find the CVRB decision was not reasonably supported by the evidence.

The *FINAL DECISION AND ORDER* is reversed and I remand the matter to the CVRB with instruction that it be dismissed with prejudice. I considered but decline to remand the matter to CVRB with the power to either dismiss the Complaint, or to refer it to the Judicial Commission under §950.08(2)(b) without disclosure of confidential

information obtained from CVS. Despite my alternate finding that there is not substantial evidence to support a finding of a violation, if K.L. wishes to pursue a complaint with the Judicial Commission she may do so. I have no power to regulate despite my opinion on the merits of the issue. If CVRB's power to adjudicate, I have no power to do so by making any decision binding on M.L.

However I remain concerned about the victim's rights to speedy disposition, as is everyone involved. Given K.L.'s own right to file a complaint with the Judicial Commission, I see no benefit to K.L. for CVRB to have a separate and independent right to do so. Whatever screening function CVRB provides before any referral has long since been accomplished. CVRB's decision on whether to file a complaint would like be not able to be made as quickly as K.L.'s own. K.L. would have no procedural benefit for CVRB to preserve any right to make a referral. Any motivation CVRB may have to make a referral independent from K.L.'s own would be separated out by placing the referral decision in the hands of K.L. After all, this case is about K.L.'s rights, not rights of CVRB. CVS can provide information to K.L. about the referral process if she needs it. Therefor I dismiss rather than remand.

I set aside the *REPORT AND RECOMMENDATION OF THE WISCONSIN CRIME VICTIMS RIGHTS BOARD*, Record page 40-43 in its entirety. I considered, but decline, to try to redact portions of the report specific to the prohibited case specific adjudication. This decision may have raised points not previously considered by the CVRB at the time the REPORT AND RECOMMENDATION was originally issued. I assume without finding that CVRB can express opinions and nonbinding

recommendations on best practices for judges to consider. They can decide whether they wish to do so in a manner consistent with this opinion.

DECLARATORY JUDGMENT RELIEF AS TO BOTH CVS AND CVRB

The discussion above resolves the merits of the ch. 227 judicial review of the CVRB's final administrative decision. However, Wis. Stat. § 227.57(9) allows the Court to provide "whatever relief is appropriate," including declaratory relief. Judge Gabler has specifically requested declaratory relief against the CVRB relating to the manner in which it interprets and applied its powers under ch. 950. Moreover, Judge Gabler also brought a declaratory judgment action against the DOJ pursuant to Wis. Stat. § 806.04 relating to CVS's actions as set out above. Pursuant to these provisions, I find Declaratory Judgment relief is appropriate as to both CVS and CVRB. There is a controversy in which a claim of right is asserted against one who has an interest in contesting it. The controversy is between persons whose interests are adverse. Judge Gabler has a legally protectable interest in the controversy. The issue involved in the controversy is ripe for judicial determination.

I grant the following Declaratory Judgment relief:

1. CVS may not mediate a complaint without the consent of all the involved parties, both the complainant and the person alleged to have violated the complainant's rights.
2. CVS may act as a liaison between crime victims or witnesses and others only when seeking to mediate complaints.
3. While CVS may report to CVRB information on the mediation process and outcome, all records of CVS remain confidential and may not be disclosed to

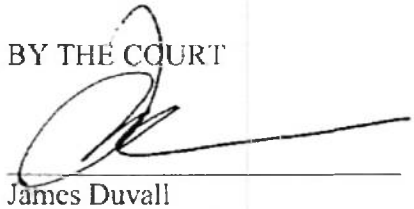
CVRB unless the subject of the complaint waives the right to confidentiality as provided in §950.095(1)(a).

4. CVS may not report to CVRB a finding as to whether or not a violation has occurred, both because of the confidentiality provisions of §950.095(1)(a) and because CVS is not granted power to perform an adjudicatory function.

5. CVRB may not receive and use information from CVS without a waiver under §950.095(1)(a) other than verifying the department has completed its action under CVRB 1.05(1) and also information on the mediation process and outcome authorized under CRVB 1.05(3).

6. If the subject of the complaint requests a hearing, before denying the hearing request based on its conclusion that there exist no material issue of fact, CVRB shall provide copies to the parties of any documentation obtained during its investigation and provide the subject of the complaint an opportunity to establish the existence of a material issue of fact.

BY THE COURT



Dated: December 15, 2015

James Duvall
Circuit Court Judge

This is a final order for purposes of appeal under Wis. Stat. § 808.03(1) as to both 13CV473 and 13CV584, which cases have previously been consolidated into 13CV473.

STATE OF WISCONSIN CRIME VICTIMS RIGHTS BOARD

In the Matter of Complaint Against

THE HONORABLE WILLIAM M. GABLER, Case No. 12-125

Respondent.

FINAL DECISION AND ORDER

## INTRODUCTION AND SUMMARY

This matter was commenced on August 2, 2012, by K.L.[1] The complaint filed with the Crime Victims Rights Board ("Board") alleged that Eau Claire County Circuit Court Judge William M. Gabler ("Gabler") violated K.L.'s statutory and constitutional crime victim right to speedy disposition of the case in which K.L. was involved as a victim, and violated K.L.'s crime victim right to reasonable protection from the accused throughout the criminal justice process. On February 11, 2013, the Board issued a determination that there was probable cause to believe that Gabler violated K.L.'s speedy disposition right, and determined that there was not probable cause to believe that Gabler violated K.L.'s right to reasonable protection from the accused. The Board offered each party the opportunity to identify any findings of fact in the probable cause determination that the party believed to be erroneous or disputed, and the factual basis for the party's belief. The Board informed the parties that the Board would convene a hearing if it determined that a party identified disputed issues of material fact, and would issue a final decision and remedial order based on the findings and conclusions in the probable cause determination if the Board determined that there were no disputed material facts.

[1]This decision uses initials to refer to crime victims K.L. and K.H. in order to protect their privacy.

On March 8, 2013, Gabler submitted a motion to dismiss the probable cause determination and K.L.'s complaint and an alternative motion for an evidentiary hearing. The Board considered the motions at its April 12, 2013, meeting. On July 24, 2013, the Board issued a Decision and Order that denied Gabler's motions to dismiss and alternative motion for a hearing, and directed the issuance of a Final Decision and remedial order.

The Board has determined that the undisputed material facts establish that Gabler violated K.L.'s crime victim right under Wis. Stat. § 950.04(1v)(k) to a speedy disposition of the case in which K.L. was involved as the minor victim of a sexual assault when Gabler waited to sentence K.L.'s assailant while charges remained pending against the assailant for sexual assaults against another victim. The Board has determined that the appropriate remedy in this case is the issuance of a Report and Recommendation concerning the speedy disposition rights of crime victims between the date of conviction and the imposition of sentence.

## FINDINGS OF FACT

**Procedural History: Criminal Proceedings.**

1. On July 29, 2011, the Eau Claire County District Attorney's Office filed a criminal complaint against Lyle Beebe ("Beebe"), alleging that he committed a third-degree sexual assault against K.L., a minor, on July 22, 2011. Beebe made an initial appearance by videoconferencing from the jail that same date. A $2,000 cash bond was set and Beebe was ordered to have no unsupervised contact with unrelated minors or with K.L.

2. On August 8, 2011, the date set for Beebe's preliminary hearing, the State amended the complaint filed against Beebe to add allegations that Beebe sexually assaulted K.H. in June 2004 when K.H. was a minor, that Beebe drugged and sexually assaulted K.H. earlier in the day on July 22, 2011, and that when K.H. awoke after the assault, K.H. drove Beebe to K.L.'s

home and dropped Beebe off there. Beebe's preliminary hearing was rescheduled for August 23, 2011. Probable cause was found as to all four counts.

3. Beebe was arraigned on September 8, 2011. Beebe entered a not guilty plea. The next day, the court issued notice that the case would be tried to a 12-person jury on January 10, 2012.

4. On November 28, 2011, Beebe filed a motion to sever the three charges. On December 14, 2011, Gabler issued an oral ruling that determined that the counts that involved K.L. as the victim were improperly joined with the counts that involved K.H. as the victim, and ordered the counts to be tried separately. Gabler granted the State's request to try the alleged crimes against K.L. first. Gabler's ruling was reduced to a written order on December 16, 2011.

5. At the conclusion of a jury trial held on January 10 and 11, 2012, the jury found Beebe guilty of third degree sexual assault of K.L. on July 22, 2011. A scheduling conference was set for January 18, 2012.

6. Shortly after convening the January 18, 2012, scheduling conference, the court and legal counsel for the parties went off the record to discuss scheduling. After an off-the-record discussion that Gabler characterized as "long" (Transcript, January 18, 2012, Scheduling Conference, at 4:13), Gabler set the schedule for trying the allegations against Beebe that involved K.H. as the victim, culminating in a jury trial for August 7 and 8, 2012 (*Id.* at 5:13-18).

7. Gabler then took up a matter that the prosecutor raised during the off-the-record discussion; *i.e.*, the sentencing of Beebe in the case that involved K.L. as the victim. The exchange between court and counsel, which is at the heart of the issues before the Board, is

quoted in its entirety (Transcript, January 18, 2012, Scheduling Conference, at 5:19 through 12:8, (bracketed references added)):

> [THE COURT:] Now we want to take up something that Ms. Larson [the prosecutor] brought up off the record. And that's something that we discussed briefly after the jury returned its guilty verdict on January 11th. And that is the sentencing of Mr. Beebe in the case involving [K.L.] as the victim, the third degree sexual assault conviction.
>
> Ms. Larson, you indicated that -- Well, I'll let you again articulate why you want to have Mr. Beebe sentenced on the third degree sexual assault with [K.L.] as the victim.
>
> MS. LARSON: Well, as is clear from what you just described, the second set of facts is not going to be even tried until August. And then there's a remaining charge involving another allegation with [K.H.].
>
> [K.L.]'s case was separated from [K.H.]'s cases. And I believe that the victim rights statute should suggest that we not delay this for seven, eight or longer months to resolve these other matters. I think [K.L.]'s entitled to some finality.
>
> THE COURT: Well, if -- if I would proceed to sentence Mr. Beebe for the third degree sexual assault for which he was convicted, the earliest that we could get a presentence investigation, very earliest would be some time during the week of March 19th, because we know that the Department of Corrections takes at least eight weeks, two months. And recently I've been getting requests from presentence preparers to have even a longer time period. So we're talking the end of March as a practical matter before I'd get a presentence investigation. Then we'd have to have time thereafter. I suppose we could -- I do have some time in early April.
>
> But in light of Mr. Beebe's past history, its -- well, let's say that it is at least possible that the presentence investigation would recommend prison. It's possible then that you, Ms. Larson, would recommend prison. And if I decided to impose a prison sentence, then we have Mr. Beebe in prison, which is a complicating factor, for Mr. Beebe, for the court, in connection with bringing him back for a trial. So that's the -- that's the primary thing that I'm thinking about.
>
> Is that a likely scenario, in other words, that --
>
> MS. LARSON: That I'll be asking for prison? Definitely.
>
> THE COURT: Okay.

MS. LARSON: But I don't think that it's any more difficulty to bring Mr. Beebe back than anyone else. And I'd be perfectly willing to have him brought back a week or even two weeks ahead of the trial in order to accomplish whatever needs to be done.

I think that waiting until after his third trial would be scheduled, which I'm not sure when that would be, that could delay sentencing here for like a year. And that would not be appropriate in my estimation.

THE COURT: Well, if -- Well, regardless of what happens to Mr. Beebe in the second trial on June -- rather August 7th and 8th, whether he's convicted or not, we will have a sentencing after that. In other words, I'm not going to wait for a sentencing if the state wants to try count four.

MS. LARSON: Well, right.

THE COURT: So you don't have to worry about that.

MS. LARSON: But if he is convicted, you would probably order a presentence investigation, which would be some time in October. And then it would be November before sentencing would take place. So it's a long delay.

THE COURT: It is. It is.

You mention the victim/witness statute. What -- What part of Section 950.04 do you contemplate as -- as being involved in necessitating or suggesting that we have an earlier sentencing involving the victim [K.L.]?

MS. LARSON: Well, I didn't bring the statute book with me.

But I think, I mean, my perception is that [K.L.'s] part of the case does not require this kind of a delay to be resolved in sentencing. And that being the case, waiting another seven, eight, nine months for finality for [K.L.'s] portion of the case I think is -- it -- it -- I mean, it -- I'm sure [K.L.] thinks it's not acceptable. [K.L.]'s just trying to get [K.L.'s] life back on track right now. And having that kind of a delay, especially when it's not connected to the facts or the trial of this other part of the case, I think is an undue delay.

THE COURT: Well, you certainly thought it was connected insofar as you charged all of these counts together, so.

MS. LARSON: And I was willing to try them together. But since they've been separated, this is going to make the trial part of all of these cases go on for quite a lengthy period of time.

THE COURT: Well, I have read the victim rights law, Section 950.04(1v). The only paragraph that addresses a victim's rights or suggested victim rights under these circumstances is sub (k), which states in relevant part: Quote. To a speedy [pg. 10] disposition of the case in which they are involved as a victim in order to minimize the length of time they must endure the stress of their responsibilities in connection with the matter. Unquote.

[K.L.] has no further responsibilities in connection with the case. [K.L.]'s already testified.

MS. LARSON: [K.L. will] be here for sentencing.

THE COURT: Yeah, but [K.L.] has no responsibilities in connection with sentencing.

Ms. Bahnson [Beebe's attorney], what's your response, if any?

MS. BAHNSON: Well, since the date of the incident, I mean, it's been over six months. I guess I don't see how it's, you know, that much more of a delay if we wait until -- I mean, if Mr. Beebe is convicted of these, of this at this next trial, I mean, we're going to be asking for another PSI. And, I mean, we'll -- I guess just makes sense to wait to see what happens, I mean.

And I guess for my convenience it would be nice, that it would be easier to communicate with Mr. Beebe regarding the trial if he is not in prison obviously.

THE COURT: Okay. I'm going to exercise my discretion in not sentencing Mr. Beebe until we try at least the second part of the case on August 7th and 8th.

The reason I do that is, as I previously indicated, the testimony of [K.L.], [K.L.'s] active participation in the matter, other than giving a witness -- other than giving a victim statement at the sentencing, is concluded. [K.L.]'s under no greater or no less stress having sentencing delayed.

I'm further satisfied that [K.L.] and all of the other witnesses and those people mentioned in the new bond are safe from Mr. Beebe. He is prohibited from having any contact with any of these people under any circumstances. And so I'm satisfied that that has been fulfilled.

The other thing is, and -- and we're seeing this more and more and more and I'm having more and more experience in this area, and, that is, that when people are imprisoned, as Mr. Beebe might be for the guilty verdict, it imposes a huge burden on the courts and on the county to retrieve him, to have an in-custody defendant.

But, more importantly, for the reason that Ms. Bahnson just indicated, and particularly more so in this particular case, this second trial may be as complicated as the first trial, and she needs adequate access to Mr. Beebe for this type of a case. And so, therefore, it's appropriate that Mr. Beebe be present.

And I'm satisfied that he's not going to leave the jurisdiction.

So for those reasons, I'm not going to sentence him or order a presentence investigation now.

There will be a presentence investigation of some type ordered after the August 7th trial.

Okay. Thank you.

8. On August 6, 2012, Beebe pleaded no contest to the 2004 sexual assault of K.H. and no contest to the drug-related charge.

9. On October 18, 2012, Gabler sentenced Beebe to 2 years confinement and 2 years extended supervision for each of the sexual assault convictions, with the sentences to run consecutively. Gabler sentenced Beebe to 3 years confinement and 3 years extended supervision for the drug-related charge, to run concurrently with the sentences for the sexual assaults. Gabler gave Beebe credit for 213 days of confinement that Beebe had served prior to October 18, 2012.

**Procedural History: Crime Victims Rights Proceedings.**

10. On April 13, 2012, K.L. contacted the Office of Crime Victim Services in the Wisconsin Department of Justice ("Department") to express concern about the sentencing delay and safety concerns that a convicted man was free even though he knew he was facing prison time.

11. On June 19, 2012, after obtaining a copy of the January 18, 2012, scheduling conference, the Department mediator communicated K.L.'s speedy disposition concerns to Gabler, and asked Gabler to consider sentencing Beebe as soon as possible.

12. In response to the Department mediator's June 19, 2012, request that Gabler consider sentencing Beebe as soon as possible, Gabler on July 3, 2012, sent a written response. The first portion of Gabler's response argued that the legislatively-defined purpose of a crime victim's right to speedy disposition of the case in which they are involved as a victim is to "minimize the length of time they must endure the stress of their responsibilities in connection with the matter," Wis. Stat. § 950.04(1v)(k); that K.L.'s rights as a victim, including the right to speedy disposition, were "completely fulfilled" when K.L. completed what Gabler considered K.L.'s final responsibility in the case: testifying at trial pursuant to the district attorney's request.

13. Notwithstanding Gabler's legal argument, Gabler's July 3, 2012, letter acknowledged that "all justice system partners must demonstrate sensitivity to the needs, rights and feelings of victims" (*id.* at 2). The letter further stated (*id.*):

> Victims are entitled to be independent participants in the criminal justice system and not simply bystanders. We recognize that crime victims, by virtue of the crimes they suffer, experience profound tragedy at the time they are victimized, during the adjudicative process, and in many instances throughout the remainder of their lives. In [K.L.]'s case, any lingering stress and anxiety [K.L.] feels is understandable because of the nature of the offense committed against [K.L.] and also because [K.L.]'s assailant has not yet been sentenced. Closure and true healing can only begin to be experienced when a case is fully resolved–that is after sentencing.

14. In addition, Gabler's July 3, 2012, response provided factual and procedural background on the case, stated that the Director of State Courts' most recent weighted caseload study indicated that Eau Claire County should have almost two additional judges to handle the county's cases, and identified what Gabler described as the five most important reasons he had for exercising his discretion to delay Beebe's sentencing until after the August 7-8, 2012, trial.

Gabler acknowledged that he did not articulate all of those reasons at the January 18, 2012, scheduling conference. Gabler's July 3, 2012, letter identified the following reasons:

1. The deleterious effect upon Beebe's attorney's ability to prepare for the August 7-8, 2012, trial if Beebe was sentenced to and confined in prison prior to the August 2012 trial.

2. The court's need for a reliable presentence investigation report that contained information about the offense, the circumstances of its commission, the defendant's general personality, social circumstances and general pattern of behavior in order to sentence Beebe for his crime against K.L.; the relevance of the amended complaint's allegation that K.H. drove Beebe to K.L.'s residence to establish a pattern of behavior by Beebe; and the low probability that Beebe would cooperate with the author of a presentence investigation report or that the author could obtain proof that K.H. drove Beebe to K.L.'s residence, prior to the August 7-8, 2012, trial.

3. The potential aggravating effect that a conviction of Beebe for the sexual assault of K.H. immediately prior to his sexual assault of K.L. could have to justify the court's imposition of a longer period of incarceration for Beebe's sexual assault of K.L.

4. The expenditures of public funds saved by sentencing Beebe after the August 2012 trial, including time and travel costs saved by the public defender program because Beebe would not be imprisoned prior to the August 2012 trial, transportation costs saved by the Eau Claire County

Sheriff's Department because Beebe would not be imprisoned prior to the August 2012 trial, and presentence investigation report costs saved by the Department of Corrections because the court would order only one rather than two presentence investigation reports.

5. The adverse effect that sentencing Beebe to prison for his crime against K.L. would have on the court's disposition of the allegations relating to K.H., because of the near-certainty that Beebe would appeal his conviction for sexually assaulting K.L. and that the court's entire file would be shipped to the court of appeals prior to the August 2012 trial.

15. The mediator completed the Department's informal mediation activities under Wis. Stat. § 950.08(3) on or about July 11, 2012.

16. K.L. filed a formal complaint with the Board on or about August 2, 2012. The complaint alleged that Gabler: (1) violated K.L.'s statutory crime victim right under Wis. Stat. § 950.04(1v)(k) to a speedy disposition of the case in which K.L. was involved as a victim; (2) violated K.L.'s right under art. I, sec. 9m of the Wisconsin Constitution to timely disposition of the case; and (3) violated K.L.'s right under art. I, sec. 9m of the Wisconsin Constitution to reasonable protection from the accused throughout the criminal justice process.

17. On October 23, 2012, the Board's operations director provided Gabler with a copy of K.L.'s August 2, 2012, complaint and requested a response. On October 30, 2012, Attorney Patrick J. Fiedler ("Attorney Fiedler") notified the Board the he represented Gabler with respect to K.L.'s complaint.

18. On November 20, 2012, Gabler submitted a written response to K.L.'s complaint. The same day, Attorney Fiedler submitted a separate written response to K.L.'s complaint on behalf of Gabler.

19. Gabler's November 20, 2012, response to K.L.'s August 2, 2012, complaint incorporated by reference the substance of his July 3, 2012, response to the Department mediator. In addition, the letter provided information about case-related events since July 3, 2012, argued that art. I, sec. 9m of the Wisconsin Constitution did not provide K.L. an independent source of enforceable victim rights, argued that K.L. had no victim right with respect to the terms and conditions of a defendant's bond, argued that the Wisconsin Supreme Court gave circuit courts discretion in scheduling matters including sentencing, and argued that he could conscientiously sentence Beebe under the protocol set forth in *State v. Gallion*, 2004 WI 42, ¶¶ 40-43 and n.10-11, 270 Wis. 2d 535, 678 N.W.2d 197, only after Beebe had been convicted of sexually assaulting both K.L. and K.H.

20. Attorney Fiedler's November 20, 2012, response on Gabler's behalf to K.L.'s August 2, 2012, complaint attached copies of the amended complaint, transcripts of the August 23, 2011, preliminary hearing, the January 18, 2012, scheduling conference, and the October 18, 2012, sentencing hearing, and the Board's January 15, 2010, Report and Recommendation concerning the victim right to speedy disposition.

21. Attorney Fiedler's November 20, 2012, response also summarized Gabler's reasons for waiting to sentence Beebe for his crime against K.L. until after all of the charges were resolved. First, Gabler did not want to prejudice Beebe's defense in the August 2012 trial by confining him to prison while awaiting that trial. Second, Gabler sought to prevent the trial-related transportation costs that Eau Claire County would incur if Beebe were imprisoned.

Third, Beebe was not a danger to the community or the witnesses involved in the proceedings if he remained free after his January 2012 conviction. Fourth, Gabler believed that a useful presentence investigation report could only be obtained if Beebe cooperated and provided information to the report's author, and believed that Beebe had no reason to cooperate until the remaining charges against him had been resolved. Fifth, Gabler needed complete information about all of the facts surrounding the charged offenses, the defendant's personality and personal history, and the victim's role in the offense in order to consider the aggravating and mitigating circumstances and explain on the record the reasoning and rationale for sentencing, and Gabler determined that he would not have what he needed until all of the charges against Beebe were resolved.

22. Attorney Fiedler's November 20, 2012, response argued that there was no unnecessary impediment to the orderly and ordinary course of the criminal proceeding in which K.L. was involved as a victim, because this unusual case required multiple trials for multiple charges involving two separate victims, in order for Gabler to possess all of the relevant information he needed to sentence Beebe. Attorney Fiedler's response also argued that Gabler's multiple reasons for delaying sentencing were not only reasonable, but necessary to ensure that Beebe was sentenced based on a complete factual record.

23. On December 19, 2012, Attorney Fiedler submitted a supplemental response on behalf of Gabler to K.L.'s August 2, 2012, complaint. The supplemental response quoted paragraphs from Gabler's and Attorney Fiedler's November 20, 2012, responses, and referred the Board to *State v. Frey*, 2012 WI 99, 343 Wis. 2d 358, 817 N.W.2d 436.

24. On February 11, 2013, the Board issued a determination that there was probable cause to believe that Gabler violated K.L.'s speedy disposition right, and determined that there

was not probable cause to believe that Gabler violated K.L.'s right to reasonable protection from the accused. The Board offered each party the opportunity to identify any findings of fact in the probable cause determination that the party believed to be erroneous or disputed, and the factual basis for the party's belief. The Board informed the parties that the Board would convene a hearing if it determined that a party identified disputed issues of material fact, and would issue a final decision and remedial order based on the findings and conclusions in the probable cause determination if the Board determined that there were no disputed material facts.

25. On March 8, 2013, Gabler submitted a motion to dismiss the probable cause determination and K.L.'s complaint and an alternative motion for an evidentiary hearing. The motion to dismiss asserted that the Board's review of Gabler's decision to sentence Beebe for his crime against K.L. after Beebe's trial for the crimes alleged against K.H. unconstitutionally intruded upon the core powers of the judiciary and violated the separation of powers doctrine. The motion to dismiss also asserted that the term "speedy disposition" as applied in this case is unconstitutionally vague. In the alternative, Gabler asserted that if the complaint and the probable cause determination were not dismissed, he was entitled to a hearing to determine the following facts:

1. Whether Gabler properly exercised his legal discretion when he ordered separate trials for Beebe;
2. Whether Gabler properly exercised his legal discretion [when] he ordered that the charges related to K.L. be tried first;
3. Whether Gabler properly exercised his legal discretion when he chose to sentence Beebe after the second trial when he would be in full possession of the relevant facts and information;

4. What options Gabler had when the Board communicated with him *ex parte* and requested that he unilaterally change course to sentence Beebe; and

5. What constitutes a "speedy disposition" in a complex, multiple-felony criminal proceeding?

26. On July 24, 2013, the Board denied Gabler's motion to dismiss and alternative motion for a hearing, and directed the issuance of this Final Decision and remedial order.

**CONCLUSIONS OF LAW**

1. The complaint that K.L.'s crime victim rights were violated by respondent Gabler was presented to and mediated by the Department pursuant to Wis. Stat. § 950.08(3) before K.L. filed a complaint with the Board, as required by Wis. Stat. § 950.09(2).

2. Respondent Gabler is a "public employee" and a "public official" within the meaning of Wis. Stat. § 950.09(2)(a) and (11). Gabler is therefore subject to the Board's statutory authority to determine whether he violated the rights of a crime victim under Wis. Stat. ch. 950, Wis. Stat. ch. 938, or article I, section 9m of the Wisconsin Constitution, and to impose a remedy for any rights violation found.

3. Wisconsin Stat. § 950.02(1m) defines "crime" as "an act committed in this state which, if committed by a competent adult, would constitute a crime, as defined in s. 939.12." Wisconsin Stat. § 939.12 defines a "crime" as "conduct which is prohibited by state law and punishable by fine or imprisonment or both."

4. Wisconsin Stat. § 940.225(3) defines the act of third-degree sexual assault, makes that act a felony, and therefore makes that act a crime. Wis. Stat. § 939.60.

5. Wisconsin Stat. § 950.02(4)(a)1. defines "victim" as "[a] person against whom a crime has been committed."

6. Wisconsin Stat. § 950.02(1) defines "child" as "a person who is less than 18 years of age."

7. K.L. was less than 18 years of age on July 22, 2011, on January 18, 2012, and during nearly the entire period between January 19, 2012 and October 18, 2012.

8. K.L. became a child victim of crime because of the third-degree sexual assault Beebe committed against K.L. on July 22, 2011.

## I. Violation of K.L.'s statutory right to speedy disposition of Beebe's sentencing for his crime against K.L.

### A. Introduction; standards of analysis.

9. Wisconsin Stat. § 950.04(1v)(k) provides that victims of crimes have the right "[t]o a speedy disposition of the case in which they are involved as a victim in order to minimize the length of time they must endure the stress of their responsibilities in connection with the matter."

10. Wisconsin Stat. § 950.01 (2009-10) provides:

> In recognition of the civic and moral duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the legislature declares its intent, in this chapter, to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity; and that the rights extended in this chapter to victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants.

11. Wisconsin Stat. § 950.055(1) provides, in relevant part, that "[t]he legislature finds that it is necessary to provide child victims and witnesses with additional consideration and different treatment than that usually afforded to adults."

12. Wisconsin Stat. § 971.105 provides, in relevant part:

> In all criminal . . . cases . . . involving a child victim or witness, as defined in s. 950.02, the court and the district attorney shall take appropriate action to ensure a speedy trial in order to minimize the length of time the child must endure the stress of the proceeding. In ruling on any motion or other request for a delay or continuance of proceedings, the court shall consider and give weight to any adverse impact the delay or continuance may have on the well-being of a child victim or witness.

13. In analyzing allegations of violations of the right to a speedy disposition, the Board employs the following methodology. First, each delay is identified. Second, the Board determines the reason given for the delay. Third, the Board determines whether the delay is reasonable. Fourth, if the Board determines that the delay is unreasonable, it determines whether the delay is attributable to the respondent. Violation of the right to a speedy disposition occurs only if each of the four elements is present.

14. Gabler argues that the decision to delay the sentencing of a convicted criminal defendant is part of a circuit court's inherent power to control its docket, and that such decisions are reviewed under the highly deferential erroneous exercise of discretion standard. *See* Gabler's July 3, 2012, letter, at 3; Gabler's November 20, 2012, letter, at 2, ¶ D; Attorney Fiedler's November 20, 2012, letter, at 3. There is some authority to support the proposition that challenges to a circuit court's decision to deny a continuance to a criminal defendant are reviewed under the erroneous exercise of discretion standard. *See, e.g., State v. Echols*, 175 Wis. 2d 653, 680, 499 N.W.2d 631 (1993) (denial of continuance requested by defendant).

*See also Hefty v. Strickhouser*, 2008 WI 96, ¶ 31, 312 Wis. 2d 530, 752 N.W.2d 820 (challenge to provisions of scheduling order).

15. The exercise of discretion by a trial court is not the equivalent of unfettered decision making. *Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.*, 2002 WI 66, ¶ 65, 253 Wis. 2d 238, 646 N.W.2d 19; *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). To be sustained, a discretionary determination "must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law." *Hartung*, 102 Wis. 2d at 66. "[A] discretionary determination must be the product of a rational mental process by which *the facts of record and law relied upon are stated and are considered together* for the purpose of achieving a reasoned and reasonable determination." *Id.* (emphasis added). "It is not enough that the relevant factors upon which discretion could have been based may be found obscurely in the record. If the exercise of discretion is to be upheld, it must be demonstrated on the record that those factors were considered in making the discretionary determination." *Id.* at 67.

16. Where a scheduling decision affects a constitutional right, the trial court's discretionary decision making is subject to greater scrutiny. Criminal defendants and crime victims both have constitutional rights to a speedy disposition of the criminal proceedings in which they are involved. Wisconsin appellate courts have recognized that a criminal defendant's Sixth Amendment right to a speedy trial continues through sentencing. *State ex rel. Hager v. Marten*, 226 Wis. 2d 687, 700 n.8, 594 N.W.2d 791 (1999), citing *State v. Allen*, 179 Wis. 2d 67, 505 N.W.2d 801 (Ct. App. 1993). Article I, sec. 9m of the Wisconsin Constitution identifies a victim's right to timely disposition of the case as one of the specific privileges and protections that the state is obligated to ensure through legislatively-created remedies for violations.

17. In *Allen*, the court identified some of the policy considerations that support the extension of a defendant's speedy trial right to the sentencing phase. Those considerations include "extreme anxiety for a convicted person waiting to learn how long he or she will be imprisoned." 179 Wis. 2d at 73. Victims, too, experience anxiety arising from uncertainty about whether the person convicted of committing the crime(s) against them will be incarcerated, and if so, how soon the offender will return to the community. Sentencing delays create risk for the convicted defendant that witnesses necessary to support a defendant's plea for a lesser sentence may become unavailable. *Id.* at 73-74. Sentencing delays create similar risk for crime victims, because delays might limit the availability of witnesses necessary to support a greater sentence. Defendants may argue an interest in prompt sentencing in order to take advantage of the services and programs that are available in the prison setting needed for the defendant's rehabilitation. *Id.* at 78. Crime victims, and the public in general, have an "'interest in prompt and certain punishment for criminal offenses, both to minimize the possibility of criminal activity by the accused while released on bail pending sentence, and to aid the deterrent effect of penal sanctions.'" *Id.* at 74, quoting *Gonzales v. State*, 582 P.2d 630, 633 (Alaska 1978).

18. Where a criminal defendant asserts that his speedy trial right is violated by a delay in sentencing, Wisconsin's courts use the four-part balancing test established in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to evaluate the claim. Not surprising in light of the similar interests of victims and defendants to a speedy disposition of the matter in which they are involved, the *Barker* factors are similar to the factors that the Board uses to evaluate alleged violations of a crime victim's right to speedy disposition. *Barker* directs the courts to consider the length of the delay, the reason for the delay, whether the defendant asserted his speedy trial right, and prejudice to the defendant. *Id.* at 530. Notwithstanding the similarity of the factors for

analyzing the speedy disposition rights of victims and defendants, the application of those factors in the context of sentencing delays requires a reviewing tribunal to place much greater weight on the interests of the victim and society, because the defendant has been convicted. As stated in *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986):

> The alteration of defendant's status from accused and presumed innocent to guilty and awaiting sentence is a significant change which must be taken into account in the balancing process. Once guilt has been established in the first instance the balance between the interests of the individual [defendant] and those of society shift proportionately.

*See also Allen*, 179 Wis. 2d at 75.

**B. Identification of the period of delay.**

19. The period of delay in this case began with the unspecified date in early April 2012, when Gabler first had time available on his calendar after allowing time for preparation of a presentence investigation report (Transcript of January 18, 2012, Scheduling Conference, at 6:16 through 7:4), and ended on October 18, 2012, the date of Beebe's sentencing hearing. The period of delay was between 6 and 6.5 months.

**C. Gabler's statement of reasons for the delay, and the reasonableness of the reasons given.**

**1. Reasons for sentencing delay identified at the January 18, 2012, scheduling conference.**

20. At the January 18, 2012, scheduling conference, Gabler identified four reasons on the record for delaying until after the August 7-8, 2012, trial to sentence Beebe for Beebe's sexual assault of K.L.: (1) K.L.'s right to speedy disposition was limited to the time during which K.L. had an as-yet unfulfilled responsibility to provide testimony at the trial; (2) Beebe was not a flight risk and presented no danger to K.L., other witnesses, or the public if he

remained in the community; (3) if Beebe were incarcerated in prison prior to the August 7-8, 2012, trial, the county and the court would bear the burdens of retrieving Beebe for proceedings where his presence was required; and (4) Beebe's attorney needed access to Beebe to prepare for the August 7-8, 2012, trial that would not be possible if Beebe was incarcerated in prison prior to trial and returned to the Eau Claire County jail one or two weeks prior to the trial (January 18, 2012, Scheduling Conference, at 11:1 though 12:3).

**a. Limitation of the right to speedy disposition.**

21. Gabler erroneously limited the right of a crime victim to a speedy disposition of the case in which the victim was involved, (a) by mistaking the purpose of Wis. Stat. § 950.04(1v)(k) with the right that it confers, (b) by too narrowly construing the scope of a victim's responsibilities in connection with a prosecution, and (c) by disregarding the duty that Wis. Stat. § 971.105 places on courts to consider and give weight to the adverse impact that the delay in sentencing would have on the well-being of K.L., a child victim. The Board determines that the sentencing delay cannot be justified by Gabler's first proffered justification for delaying Beebe's sentence until after the August 7-8, 2012, trial.

a. Article I, sec. 9m of the Wisconsin Constitution directs the State to ensure that crime victims have the privilege and protection of "timely disposition of the case," and directs the Legislature to provide remedies for the violation of art. I, sec. 9m. The Legislature has implemented the constitution's mandate to ensure the protection of crime victims to a timely disposition of the case by enacting Wis. Stat. § 950.04(1v)(k); *i.e.*, the right "[t]o a speedy disposition of the case in which they are involved as a victim." The second clause of Wis. Stat. § 950.04(1v)(k) describes

the purpose that the Legislature hoped to be achieved by a speedy disposition of the case; *i.e.*, to "minimize the length of time [victims] must endure the stress of their responsibilities in connection with the matter," but does not limit the speedy disposition right defined in the initial clause of the section. Just as a criminal defendant's Sixth Amendment speedy trial right continues through sentencing, a crime victim's art. I, sec. 9m speedy disposition right continues through the full duration of a criminal case. Compliance with the victim's speedy disposition right is measured by the delay, if any, between when disposition should reasonably have occurred and actual disposition, not by the predicted quantum of a victim's stress occasioned by the delay.

b. The Legislature has recognized that crime victims have a "civil and moral duty . . . to fully and voluntarily cooperate with . . . prosecutorial agencies" and that their cooperation is important to "the general effectiveness and well-being of the criminal justice system of this state[.]" Wis. Stat. § 950.01. The scope of a victim's responsibilities in a criminal prosecution is, therefore, broader than the duty to provide testimony as a witness during the guilt phase of a criminal proceeding. The prosecutor fulfills his or her professional responsibility to the criminal justice system by pursuing the State's interest in a fair adjudication of guilt and the State's position about the appropriate sentence for the defendant. A victim's civic and moral duty to fully cooperate with prosecution agencies similarly encompasses the phase of a criminal proceeding that adjudicates

guilt and the disposition phase that determines the defendant's sentence. For example, Wis. Stat. § 972.15(2m) provides that the person preparing a presentence investigation report "shall make a reasonable attempt to contact the victim to determine the economic, physical and psychological effect of the crime on the victim." That requirement would make no sense unless the Legislature expected victims to cooperate with the report writer to voluntarily provide information about the crime's effect.

In every case, the court must impose the sentence that "'call[s] for the minimum amount of custody or confinement which is 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). Information from the victim about how the crime affected the victim's life is relevant to one of the considerations that a court must take into account at sentencing; namely, the gravity of the crime. *State v. Voss*, 205 Wis. 2d 586, 595-96, 556 N.W.2d 433 (Ct. App. 1996); *see also Gallion*, 270 Wis. 2d 535, ¶ 65. The victim is the best source of information about the economic, physical and psychological effect of the crime upon him or her. The importance of the victim's voluntary disclosure of that information to the court's required consideration of the gravity of the offense, and the importance of the victim's voluntary cooperation to the effectiveness and well-being of the criminal justice system further demonstrates that the victim's

responsibilities in connection with the matter include responsibilities in the sentencing phase of the case.

c. Wisconsin Stat. § 971.105 imposes two requirements on a circuit court faced with potential delays in a criminal proceeding that involves a child victim. The first sentence requires the court to "take appropriate action to ensure a speedy trial in order to minimize the length of time the child must endure the stress of the proceeding." *Id.* The second sentence requires the court to "consider and give weight to any adverse impact the delay or continuance may have on the well-being of a child victim or witness" in ruling on "any motion or other request for a delay or continuance of the proceedings." *Id.* The duty imposed by the second sentence applies to motions that could result in delay in post-trial proceedings as well as motions that could result in delay in proceedings before trial. The duty imposed by the second sentence applies to the court's consideration of actions taken on its own initiative that would result in the delay of proceedings, as well as actions requested by the prosecution or defense that could result in delay. The second sentence requires the court to consider and give weight to every adverse impact that delay may have on the well-being of a child victim, not just the particular stress created by contemplated delays in the commencement or completion of the trial of the defendant.

Gabler's brief remarks at the January 18, 2012, scheduling conference pertaining to the effect of a sentencing delay on K.L.'s

well-being—"[s]he's under no greater or no less stress having sentencing delayed" (Transcript, January 18, 2012, Scheduling Conference, at 11:5-6)—support two alternative inferences, both erroneous. Gabler's statement could be construed as a corollary of the erroneous legal position that the right to speedy disposition applies only to decisions that would delay the victim's duty to testify at trial, and that the court could not, as a matter of law, consider the adverse effect of a post-trial sentencing delay on a victim's well-being.

Alternatively, construed as a factual finding that a six-month delay in sentencing Beebe would not cause child victim K.L. additional stress, Gabler's statement lacks a foundation in the record. During the January 18, 2012, scheduling conference, the prosecutor represented to the court that K.L. was "just trying to get [K.L.'s] life back on track right now" (January 18, 2012, Scheduling Conference, at 9:9-10), asserted that delaying the sentencing of Beebe until after the August 7-8 trial was unacceptable to K.L., and argued that such a delay in achieving finality for K.L., when Beebe's crime against K.L. was not connected to the facts or the trial involving Beebe's alleged crime against K.H., was undue (*Id.* at 9:3-13). The record of the January 18, 2012, scheduling conference contains no support for Gabler's determination that "[K.L. is] under no greater or no less stress having sentencing delayed" (*Id.* at 11:5-6). Wisconsin Stat. § 971.105 required Gabler to consider the adverse impact that a delay in sentencing Beebe would have on child victim K.L. The

prosecutor represented that K.L.'s well-being would be adversely affected by delaying Beebe's sentencing until the conclusion of the second trial. Gabler failed to consider K.L.'s status as a child victim, and failed to give weight to the adverse impact that a sentencing delay would have on K.L.'s well-being, as required by Wis. Stat. § 971.105.

**b. Beebe not a flight risk; Beebe not a danger to victims, witnesses, or the community.**

22. Gabler's second reason for delaying Beebe's sentencing was that Beebe was not a flight risk and presented no danger to K.L., other witnesses, or the public if he remained in the community (January 18, 2012, Scheduling Conference, at 11:7-12). The extent of a defendant's flight risk and a defendant's ability to conform his conduct to the conditions of his bond are appropriate to consider at sentencing, because they assist the court in evaluating the extent to which confinement is necessary in order to protect the public. *Gallion*, 274 Wis. 2d 535, ¶ 23; *McCleary*, 49 Wis. 2d at 276. It is far less clear whether a court's belief about a convicted defendant's flight risk or a court's belief about the danger that a convicted defendant presents to victims, witnesses, and the public are proper factors in determining whether to delay sentencing, where the victim has asserted his or her constitutional right to a speedy disposition. At the time of the January 18, 2012, scheduling conference, Beebe's status as a convicted felon awaiting sentencing for a sex crime greatly limited any legitimate interest he once had—prior to trial and while he was still presumed innocent—to continued presence in the community. At the very least, Gabler was obligated to balance Beebe's limited interest in remaining in the community against the substantial interest of the public and K.L. in prompt and certain punishment to minimize the possibility of further criminal activity by Beebe and to aid in the deterrent effect of

penal sanctions. *Allen*, 179 Wis. 2d at 74; *Gonzales*, 582 P.2d at 633. The Board determines that the sentencing delay cannot be justified by Gabler's second proffered justification because Gabler failed to consider the public interest in prompt and certain punishment of convicted defendants.

**c. Burden on the county and the court if Beebe were incarcerated in prison prior to the August 7-8, 2012, trial.**

23. Gabler's third reason for delaying Beebe's sentencing was that if he sentenced Beebe to incarceration in prison prior to the August 7-8, 2012, trial, the county and the court would bear the burdens of retrieving Beebe for those proceedings where his presence was required (January 18, 2012, Scheduling Conference, at 11:13-19).

a. Gabler did not specifically identify at the January 18, 2012, scheduling conference the retrieval burden that would be imposed on the court if Beebe were incarcerated prior to the August 7-8, 2012, trial. Wisconsin Stat. § 971.04, however, identifies a number of specific proceedings at which the defendant must be present, and a catch-all provision that requires the defendant to be present at other proceedings when the court orders it. The retrieval burden imposed on the court would be the burden of completing each transport order directing the Eau Claire County Sheriff's Department to transport Beebe from his place of incarceration to the Eau Claire County Circuit Court. The Wisconsin Court System has a one-page, fill-in-the-blank form, available as a PDF document and in Word format, that contains the required elements for transport orders. *See* General Form GF-190, available online at *http://www.wicourts.gov/forms1/circuit/index.htm*. The Board concludes that the

sentencing delay cannot be reasonably justified by the burden on the court associated with issuing orders to produce Beebe for required appearances.

b. Gabler did not identify a factual basis at the January 18, 2012, scheduling conference for his determination that the costs of transporting Beebe from prison to the Eau Claire County Circuit Court would be borne by the Eau Claire County Sheriff's Department. As a matter of law, a circuit court can assess transportation costs against a convicted defendant under some circumstances; not under others. As a general matter, a circuit court is authorized to impose the sheriff's transportation costs on a defendant "[if] the [sheriff's] expenses associated with the execution of orders to produce are ordinarily charged to and payable by another" and "[if] the actual assessments were consistent with Wis. Stat. § 814.70." *State v. Dismuke*, 2001 WI 75, ¶ 26, 244 Wis. 2d 457, 628 N.W.2d 791; *see also State v. Ferguson*, 202 Wis. 2d 233, 238, 242, 549 N.W.2d 718 (1996) (only costs enumerated in Wis. Stat. § 973.06 are taxable against a defendant; to be a "fee" under Wis. Stat. § 973.06(1)(c), cost must be chargeable to and payable by another; "fee" does not include an internal operating expense of a governmental unit that can be prorated or costed); *State v. Peterson*, 163 Wis. 2d 800, 804, 472 N.W.2d 571 (Ct. App. 1991) ("fee is 'a fixed charge (e.g., for a professional service) . . . and disbursement means 'funds paid out.' . . . Both terms contemplate the payment of funds to another").

Thus, under some circumstances, a sheriff's cost of transporting a defendant can be taxed to the defendant under Wis. Stat. § 973.06. *State v. Bender*, 213 Wis. 2d 338, 343, 570 N.W.2d 590 (Ct. App. 1997) (private

transportation company invoiced sheriff for costs of transporting defendant from Florida to Wisconsin to testify; transportation costs lawfully taxed to defendant under Wis. Stat. § 973.06(1)(a)). If Beebe could be lawfully taxed for the costs of transporting him from prison to Eau Claire, Gabler's proffered cost justification would lack a factual basis, and would be unreasonable on that basis.

Alternatively, if the sheriff's department would in fact bear the cost of transporting Beebe from prison to Eau Claire for required appearances associated with the August 7-8, 2012, trial, that allocation of expense would reflect the Legislature's policy judgment that the internal operating expenses of governmental law enforcement agencies in connection with criminal proceedings should be borne by those agencies. *Dismuke*, 244 Wis. 2d 457, ¶ 22; *Ferguson*, 202 Wis. 2d at 242; *Peterson*, 163 Wis. 2d at 804 ("[w]hile law enforcement departments expend money in the investigation of criminal offenses and in discharging other responsibilities that our society assigns to law enforcement officers, the statute does not authorize imposition of these expenses on the defendant"). Article I, sec. 9m of the Wisconsin Constitution specifically reserves to crime victims the fundamental right to "speedy disposition of the case" and directs the Legislature to provide remedies for the violation of art. I, sec. 9m. Although the constitutional rights of crime victims enumerated in art. I, sec. 9m do not trump the constitutional rights of criminal defendants, and although art. I, sec. 9m constrains the Legislature from enacting remedies for violations of victim rights that would limit the rights of the accused, nothing in the Wisconsin Constitution or the statutes authorizes courts to balance the constitutional rights of

crime victims against the internal expenses of law enforcement agencies incurred in the discharge of their assigned duties. To the extent that Gabler relied on the transportation expense that would be incurred by the Eau Claire County Sheriff's Department if Beebe were imprisoned prior to the August 7-8, 2012, trial, as a justification for delaying Beebe's sentencing, Gabler's determination rested on an erroneous interpretation of law, and was therefore unreasonable.

c. Gabler's July 3, 2012, letter, identified two other public agencies that would incur additional expense if Beebe were sentenced to prison prior to the August 7-8, 2012, trial: the Public Defender and the Department of Corrections (July 3, 2012, letter, at 4, ¶ 1 and 6, ¶ 4). Nothing in the transcript of the January 18, 2012, scheduling conference suggests that Gabler actually considered either cost category as a factor in his decision to delay Beebe's sentencing, however, so the Board will not consider those after-the-fact justifications.

**d. Denial of Beebe's lawyer's access to Beebe if Beebe were imprisoned prior to the August 7-8, 2012, trial.**

24. Gabler's fourth reason for delaying Beebe's sentencing was that Beebe's incarceration in prison would deprive his attorney of the access to Beebe that she needed to prepare for the August 7-8, 2012, trial (January 18, 2012, Scheduling Conference, at 11:20 through 12:3). Beebe's attorney made no such claim (*Id.* at 10:11-21). The prosecutor offered to bring Beebe back from prison to the Eau Claire County jail two weeks prior to trial, to facilitate Beebe's local and in-person communication with his counsel (*Id.* at 7:20-25). Gabler determined, however, that Beebe's attorney's access to Beebe at the Eau Claire County jail,

combined with the face-to-face and telephone access she would have to Beebe if he were incarcerated, would not be adequate to allow her to prepare for Beebe's August 7-8, 2012, trial.

a. The record of the January 18, 2012, scheduling conference does not contain a factual basis for Gabler's determinations that the August 7-8, 2012, trial might be as complicated as the trial that involved K.L. as the victim, and that Beebe's attorney could not adequately prepare for the August 7-8, 2012, trial if she had two weeks of access to Beebe in the Eau Claire County jail immediately prior to trial.

Beebe's attorney argued only that "for my convenience it would be nice, that it would be easier to communicate with Mr. Beebe regarding the trial if he's not in prison obviously" (January 18, 2012, Scheduling Conference, at 10:19-21). Beebe's counsel did not assert that she could not adequately prepare for the August 7-8, 2012, trial if Beebe were imprisoned during some or all of the time between January 18 and August 7, 2012. Beebe's attorney, who prepared for Beebe's January 10-11, 2012, trial presumably was in a better position than Gabler to determine whether the August 7-8, 2012, trial was likely to be as complicated as the first trial, and whether she could adequately prepare for the August 7-8, 2012, trial if Beebe were imprisoned for some period of time between January 18 and late July and if Beebe were returned to the Eau Claire County jail for the two weeks prior to trial offered by the prosecutor. Gabler's finding that Beebe's attorney could adequately prepare for the August 7-8, 2012, trial only if Beebe were free in the community for the entire January 18 to August 7, 2012, period, lacked a foundation in the record. Gabler's speculation that Beebe's

attorney could not adequately prepare for trial if Beebe were sentenced to prison in April 2012 for his crime against K.L. therefore is an unreasonable justification for delaying Beebe's sentencing.

b. Gabler's July 3, 2012, letter asserted a constitutional dimension to his concern about Beebe's access to counsel. The letter stated that "Mr. Beebe is constitutionally entitled to meaningful access to his lawyer over a lengthy period of time, and not just the one or two weeks the Assistant District Attorney mentioned on January 18, 2012" (July 3, 2012, letter, at 4, ¶ 1). Gabler did not identify that concern as a factor in his January 18, 2012, decision to delay sentencing. Gabler's July 3, 2012, letter did not provide any legal authority to support the proposition that a defendant's access to his legal counsel is not "meaningful" if the access is by telephone or if legal counsel must travel to the place of the defendant's incarceration in order to communicate face-to-face. Nor has the Board been able to locate any such authority. Gabler's proffered constitutional justification for delaying Beebe's sentencing lacks a factual or legal justification, and is therefore unreasonable.

**2. Reasons for sentencing delay identified subsequent to the January 18, 2012, scheduling conference.**

25. In addition to the reasons Gabler identified at the January 18, 2012, scheduling conference for delaying Beebe's sentencing, Gabler's July 3, 2012, letter to the Department mediator asserted two additional justifications. First, Gabler asserted that important information about the connection between Beebe's assault of K.L. and Beebe's alleged assault of K.H. needed to establish whether there was a pattern of conduct that would affect the length of the

sentences for both crimes could only be obtained through testimony in the August 7-8, 2012, trial or a presentence investigation report that followed that trial (July 3, 2012, letter, at 5-6, ¶¶ 2-3). Second, Gabler's July 3, 2012, letter asserted that if he sentenced Beebe to prison prior to the August 7-8, 2012, trial, Beebe would have almost certainly appealed the sentence, the circuit court would have been required to transmit the entire circuit court case file to the court of appeals, and that the absence of the physical file would make it extremely inconvenient and difficult for the court to resolve the remainder of the case (*Id.* at 6, ¶ 5).

26. Gabler's November 20, 2012, response to the complaint that K.L. filed with the Board incorporated by reference the reasons for delay stated in his July 3, 2012, letter to the Department mediator. Attorney Fiedler's November 20, 2012, response to the complaint on Gabler's behalf summarized the reasons for delay that Gabler offered in his July 3, 2012, letter to the Department mediator.

27. The Board evaluated the merits of Gabler's July 3, 2012, after-the-fact justifications for the delay in sentencing Beebe, and determined that they lacked a factual or legal basis (February 11, 2013, Probable Cause Determination, at 30-38, ¶¶ 26-38). In this Final Decision and Order, the Board declines to consider any reasons for delaying Beebe's sentencing until after the second trial for a simpler reason. Gabler made the decision to delay Beebe's sentencing at the January 18, 2012, scheduling conference, and identified there the four factors that he considered. The record of that conference contains no evidence that Gabler considered the two factors first identified in his July 3, 2012, letter to the Department mediator. *Hartung*, 102 Wis. 2d at 66-67.

**D. Whether the delay in sentencing Beebe was attributable to Gabler.**

28. The Board determines that the 6 to 6.5 month delay in sentencing Beebe for his crime against K.L. from early April 2012 to October 18, 2012, was attributable in its entirety to Gabler.

**E. Conclusion: Statutory right to speedy disposition of sentencing of Beebe for his crime against K.L.**

29. The Board concludes that the four factors identified at the January 18, 2012, scheduling conference as the basis for delaying Beebe's sentencing until after the August 7-8, 2012, trial, singly or in combination, lacked a factual basis, a legal basis, or both; unreasonably delayed Beebe's sentencing; and therefore violated K.L.'s crime victim right under Wis. Stat. § 950.04(1v)(k) to a speedy disposition of the case in which K.L. was involved.

**II. Alleged violation of K.L.'s constitutional right to speedy disposition of Beebe's sentencing for his crime against K.L.**

30. K.L.'s August 2, 2012, complaint to the Board alleged that art. I, sec. 9m of the Wisconsin Constitution provided crime victims the right to a speedy disposition of the case separate from the speedy disposition right conferred by Wis. Stat. § 950.04(1v)(k), and that Gabler's delayed sentencing of Beebe for the crime he committed against K.L. violated that constitutional right.

31. Gabler's July 3, 2012, response to the Department mediator argued that (Gabler's July 3, 2012, letter, at 2):

> Article I, Section 9m of the Wisconsin Constitution is a statement of purpose that describes the policies to be promoted by the State. Schilling v. Crime Victim's Rights Board, 2005 WI 17, ¶ 1[,] 278 Wis.2d 216, 220, 692 N.W.2d 623. Among other things, the policy advanced by the Wisconsin Constitution and the Victim's

Rights Statutes is to provide for timely and speedy disposition of cases. See Article I, Section 9m Wisconsin Constitution and § 950.04(1v)(k).

Gabler's November 20, 2012, response to K.L.'s complaint repeats the argument (Gabler's November 20, 2012, letter, at 2, ¶ B).

32. Gabler too broadly states the holding of the *Schilling v. Crime Victims Rights Board*, 2005 WI 17, ¶ 1, 278 Wis. 2d 216, 692 N.W.2d 623. The only provision of art. I, sec. 9m at issue in that case was the section's first sentence; *i.e.*, "[t]his state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy." Only the section's first sentence was held to be a "statement of purpose that describes the policies to be promoted by the State and does not provide an enforceable, self-executing right." *Schilling*, 278 Wis. 2d. 216, ¶ 1.

33. It is a well-established principle of Wisconsin law that the Wisconsin Constitution limits the otherwise plenary power of the Legislature. *Vincent v. Voight*, 2000 WI 93, ¶ 29, 236 Wis. 2d 588, 614 N.W.2d 388 ("It is a 'fundamental principle' that the Wisconsin Constitution limits legislative power" (internal citation omitted)); *Jacobs v. Major*, 139 Wis. 2d 492, 506, 407 N.W.2d 832 (1987) ("State constitution Bills of Rights set the limit beyond which no human legislation should be suffered to conflict with the rights declared to be inherent and inalienable" (internal citations omitted)); *id.* at 506-07 ("State constitutions . . . typically establish governments of general powers, which possess all power not denied by the state constitution. . . . Our state constitution functions this way and restrains these general powers by a Declaration of Rights" (internal citations omitted)).

34. The second sentence of art. I, sec. 9m of the Wisconsin Constitution articulates the inherent and inalienable rights that "[t]his state shall ensure," including a crime victim's right to "timely disposition of the case." *Id.*

35. So construed, the statutory right to speedy disposition provided in Wis. Stat. § 950.04(1v)(k) reflects the Legislature's affirmation of the inherent and inalienable constitutional right to timely disposition of the case that the Wisconsin Constitution requires the State to ensure through the enactment of positive legislation.

36. Based on its determination that Gabler violated K.L.'s statutory right to speedy disposition of the sentencing of Beebe for his crime against K.L., the Board also determines that Gabler violated K.L.'s constitutional right to timely disposition of the case as to which K.L. was a crime victim.

37. Although a crime victim's right to timely or speedy disposition of the case has both a constitutional and a statutory foundation, the different foundations have no practical effect on the proceedings in this case. The third sentence of art. I, sec. 9m of the Wisconsin Constitution requires that "[t]he legislature shall provide remedies for the violation of this section." The Legislature's prescribed remedy for alleged violations of the constitutional right and the statutory right to speedy disposition is the informal Department mediation requirement of Wis. Stat. § 950.08(3), Board review to determine probable cause, Wis. Stat. § 950.09(2)(intro), Board determination of liability, and, where a violation is found, the Board's imposition of a legislatively-authorized remedy, Wis. Stat. § 950.09(2)(a)-(d) and (3).

### III. Alleged violation of K.L.'s constitutional right to reasonable protection from the accused throughout the criminal justice process.

38. K.L.'s August 2, 2012, complaint to the Board alleged that Gabler failed to provide K.L. with reasonable protection from Beebe throughout the criminal justice process, by deciding on January 18, 2012, to hold off on sentencing Beebe for his crime against K.L. until after the August 7-8, 2012, trial. K.L. felt that the bond was not clear enough in the restrictions it

placed on Beebe. K.L. felt unsafe and full of extreme anxiety after January 18, 2012, filed for a restraining order against Beebe on February 1, 2012, and obtained such an order on February 13, 2012.

39. Pursuant to Wis. Stat. § 227.45(3), *Mercado v. GE Money Bank*, 2009 WI App 73, ¶ 5 n.3, 318 Wis. 2d 216, 768 N.W.2d 53; *Teacher Retirement System of Texas, v. Badger XVI Limited Partnership,* 205 Wis. 2d 532, 539 n.3, 556 N.W.2d 415 (Ct. App. 1996); and *S.E. v. Waukesha County*, 159 Wis. 2d 709, 712 n.1, 465 N.W.2d 231 (Ct. App. 1990); the Board took official notice of CCAP entries in the case, which showed that Gabler modified the bond conditions against Beebe on January 11 and July 6, 2012, and revoked Beebe's bond on August 6, 2012.

40. The Board concluded that there was no probable cause to believe that Gabler violated K.L.'s right to reasonable protection from the accused, and directed that the Final Decision and Order dismiss that aspect of K.L.'s complaint.

**ORDER**

Based on the foregoing, it is hereby ORDERED:

1. That, as a remedy authorized by Wis. Stat. § 950.09(3) for Gabler's violation of K.L.'s statutory right under Wis. Stat. § 950.04(1v)(k) to speedy disposition of the case in which K.L. was the victim, and Gabler's violation of K.L.'s constitutional right under Wis. Const. art. I, § 9m to timely disposition of the case in which K.L. was the victim, the Board will issue a Report and Recomendation directed to Gabler consistent with this Final Decision and Order.

2. That K.L.'s claim that Gabler failed to provide K.L. with reasonable protection from Beebe during the pendency of the criminal proceedings against Beebe, be and the same hereby is dismissed.

3. That this is a final, appealable order of the Board, and as such makes final and appealable any previous non-final orders of the Board.

4. That notice of the parties' appeal rights is attached to this Final Decision and Order.

5. That a copy of this decision shall be provided to all parties in this proceeding identified in the "Service List" below.

Dated this 26th day of July, 2013.

Trisha Anderson

TRISHA ANDERSON
Chairperson, Crime Victims Rights Board

c: Service List

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**SERVICE LIST**

K.L.
[street address withheld]

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Julie Braun
Wisconsin Department of Justice
819 North 6th Street, Suite 180
Milwaukee, WI 53203

CRIME VICTIMS RIGHTS BOARD
819 North 6th Street, Suite 180
Milwaukee, WI 53203

APPEAL RIGHTS

To: K[redacted]L[redacted]

Date of mailing of decision: 26 July 2013

**A. JUDICIAL REVIEW.** If you think the Crime Victims Rights Board ("CVRB") has issued a final decision that is against your interests, you may seek to have a circuit court review that decision by:

1. **Filing** a petition for judicial review with the court within 30 days of the date on which the CVRB's decision was mailed to you, identified above

**and,**

2. **Serving** that petition for review on the CVRB and on the other parties to this case (all complainants and all respondents). You may have a lawyer help or represent you in seeking judicial review.

**Filing.** A petition for judicial review is a legal document filed with the circuit court that causes the circuit court to review the final decision of an agency such as the CVRB. The petition must state the nature of the Petitioner's interest (*for example*, that the Petitioner was either the complainant or the respondent before the CVRB), the facts showing that the Petitioner is a person aggrieved by the decision (*for example*, that the CVRB made a finding harmful to the Petitioner's interests), and the grounds upon which the Petitioner contends the CVRB's decision should be reversed or modified (*for example*, that the CVRB's findings of fact were not supported by the evidence or that its conclusions of law were unreasonable).

The petition must begin with a caption, which should look like this:

| | | |
|---|---|---|
| STATE OF WISCONSIN | CIRCUIT COURT | _____ COUNTY |
| (YOUR NAME), | | |
| Petitioner, | | |
| v. | | Case No. _____ |
| CRIME VICTIMS RIGHTS BOARD, | | |
| Respondent. | | |
| PETITION FOR JUDICIAL REVIEW | | |
| (Begin text of petition here) | | |

The petition must be filed in the circuit court of the county where the Petitioner resides, except that, if the Petitioner is a state agency, the proceedings shall be in the circuit court of the county where the Respondent resides. If you are uncertain about how to file a petition for judicial review, you should contact the clerk of circuit court for your county.

**Serving.** In addition to filing the petition for judicial review with the circuit court, you must:

1. Serve (provide a copy of) the petition for judicial review upon the **CVRB**, by certified mail addressed to: "Crime Victims Rights Board, 819 North 6th Street, Suite 180, Milwaukee, WI 53203,"

**and,**

2. Serve (provide copies of) the petition upon **all parties** who appeared before the CVRB in this case not later than 30 days after filing the petition in circuit court. The complainant(s) and respondent(s) whose names appear at the end of the decision are considered parties for purposes of judicial review, and they must all receive copies of the petition for judicial review.

Copies of the petition for judicial review must be provided to all complainant(s) and respondent(s) who appeared before the CVRB in one of the following ways:

a. Personally, or
b. By certified mail addressed to each complainant and respondent shown in the "Service List" at the end of the decision, or
c. When service is timely admitted in writing, by first class mail. This means that the person receiving service must sign, and return to the Petitioner, a postcard or other document demonstrating that they were timely served with the judicial review papers.

Proceedings for judicial review are governed by Wis. Stat. §§ 227.52 - 227.60.

**B. REHEARING.** If you think the Crime Victims Rights Board ("CVRB") has issued a final decision that is against your interests, you may file a written petition for rehearing within 20 days of the date on which the CVRB's decision was mailed to you, identified above. To be timely, the petition for rehearing must be actually received by the CVRB at 819 North 6th Street, Suite 180, Milwaukee, WI 53203, within the 20 day period. Petitions for rehearing are governed by Wis. Stat. § 227.49.

You do NOT need to file a petition for rehearing before you file a petition for judicial review.

A petition for rehearing must specify in detail the grounds for the relief sought. A rehearing will be granted only on the basis of (a) some material error of law, or (b) a material error of fact, or (c) new evidence sufficiently strong to reverse or modify the CVRB's decision which could not have been previously discovered by due diligence. The CVRB may order a rehearing or enter an order disposing of the petition without a hearing. If the CVRB does not enter an order disposing of the petition within 30 days of the filing of the petition, the petition shall be deemed to have been denied as a matter of law at the end of the 30 day period.

A timely-filed petition for rehearing serves to postpone the deadline for filing a petition for judicial review. If the CVRB serves an order denying the petition for rehearing, a petition for judicial review must be filed and served within 30 days after service of the order denying the petition for rehearing. If the CVRB does not enter an order disposing of a timely-filed petition for rehearing within 30 days of the filing of the petition, and the petition is therefore deemed to have been denied at the end of the 30 day period as a matter of law, a petition for judicial review must be filed and served within 30 days after the denial as a matter of law.

STATE OF WISCONSIN
Crime Victims Rights Board

# REPORT AND RECOMMENDATION OF THE WISCONSIN CRIME VICTIMS RIGHTS BOARD

Wisconsin Statutes section 950.09(3) authorizes the Crime Victims Rights Board ("Board") to "issue reports and recommendations concerning the securing and provision of crime victims' rights and services." The Board has become aware of a situation that provides the Board with an opportunity to recommend to judges the best practice for protecting a victim's right to a speedy disposition of the case.

## Factual Background

"A." was sexually assaulted as a minor in July 2011. The crime was reported and a criminal complaint was promptly filed. The criminal complaint was subsequently amended to add additional allegations that the offender had also sexually assaulted "B." on the same day as the assault against A., as well as several years prior when B. was still a minor. Upon a defense motion, the judge ruled that the counts were improperly joined and would be tried separately. The state requested that A.'s case be tried first and the judge granted the state's request.

At the conclusion of a jury trial in January 2012, A.'s assailant was found guilty of a felony sex crime and a scheduling conference was set for the following week. At the scheduling conference, the judge set the calendar for trying the allegations involving the other victim, B., including a jury trial which would take place in approximately 7 months. The court then considered whether to delay the sentencing phase of A.'s case until the case involving B. was concluded. The state argued that would be an undue delay in light of the fact that A.'s case was not connected to the facts or the trial involving B.'s case. The state argued that such a delay would be a violation of A.'s victim rights. The court disagreed and declined to schedule the sentencing in A.'s case until the conclusion of B.'s case.

Nine months later, after the offender pleaded no contest to the charges involving B., the offender was sentenced for the assault against A.

A. filed a complaint with the Board alleging the judge violated A.'s statutory right under Wis. Stat. § 950.04(1v)(k) to a speedy disposition of the case, A.'s right under art. I, sec. 9m of the Wisconsin Constitution to timely disposition of the case and A.'s right to reasonable protection from the accused throughout the criminal justice process under art. I, sec. 9m of the Wisconsin Constitution.

In analyzing allegations of violations of the right to a speedy disposition, the Board employs the following methodology. First, each delay is identified. Second, the Board determines the reason

given for the delay. Third, the Board determines whether the delay is reasonable. Fourth, if the Board determines that the delay is unreasonable, it determines whether the delay is attributable to the respondent. Violation of the right to a speedy disposition occurs only if each of the four elements is present.

The Board reviewed the court transcript to evaluate the reasons given on the record for the decision to delay the sentencing in A.'s case. The court identified four reasons on the record: (1) A.'s right to speedy disposition was limited to the time during which A. had responsibilities in connection with the case and A. had no responsibilities in connection with sentencing; (2) The offender was not a flight risk and presented no danger to A., other witnesses, or the public if he remained in the community; (3) if the offender were incarcerated in prison prior to the next trial, the county and the court would bear the burdens of retrieving him for proceedings where his presence was required; and (4) the offender's attorney needed access to him to prepare for the second trial that would not be possible if he was incarcerated and returned to the county jail one or two weeks prior to the trial. The court concluded that the sentencing in A.'s case would be delayed until the conclusion of B.'s case, declaring that A. was "under no greater or no less stress having sentencing delayed."

The Board found the reasons given by the court for the delay lacked a factual basis, a legal basis, or both and determined that the court unreasonably delayed sentencing in A.'s case. The Board found that the court violated A.'s statutory right to a speedy disposition and constitutional right to a timely disposition. [The Board did not find probable cause to believe the judge violated A.'s right to reasonable protection from the accused and that aspect of the complaint was dismissed.]

**Statutes Involved**

**Wisconsin Stat. § 950.04(1v)(k)** provides that victims of crimes have the right "[t]o a speedy disposition of the case in which they are involved as a victim in order to minimize the length of time they must endure the stress of their responsibilities in connection with the matter."

**Wisconsin Stat. § 950.105**, created by 2011 Wis. Act 283 (first effective April 27, 2012), provides that a crime victim "has a right to assert, in a court in the county in which the alleged violation occurred, his or her rights as a crime victim under the statutes or under article I, section 9m, of the Wisconsin Constitution. This section does not preclude a district attorney from asserting a victim's statutory or constitutional crime victim's rights in a criminal case or in a proceeding or motion brought under this section."

**Wisconsin Constitution Art. I, Sec. 9m** provides that the state shall ensure crime victims receive "timely disposition of the case."

**Wis. Stat. § 971.105** provides, in part, that in all criminal cases involving a child victim or witness, as defined in s. 950.02, "the court and the district attorney shall take appropriate action to ensure a speedy trial in order to minimize the length of time the child must endure the stress of the proceeding. In ruling on any motion or other request for a delay or continuance of proceedings, the court shall consider and give weight to any adverse impact the delay or continuance may have on the well-being of a child victim or witness."

**Recommendations:**

1. Victims' rights were established by the voters in this state with the adoption of a constitutional amendment and those rights were further enumerated by the state legislature with the enactment of Wis. Stat. Ch. 950. That chapter begins with language that makes clear the duty of public officials to honor and protect these rights:

   > "...the legislature declares its intent, in this chapter, to ensure that ...the rights extended in this chapter to victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants." *Wis. Stat. 950.01*

2. Compliance with the victim's speedy disposition right is measured by the delay, if any, between when disposition should reasonably have occurred and actual disposition. It is not measured by predictions about the amount of stress such a delay will cause.

3. The right to a speedy disposition must not be construed as narrowly as it was in this case. The court erroneously found that A.'s involvement with the case and A.'s right to a speedy disposition, ended after providing testimony at the trial. When the decision to delay was made, there was every reason to believe A. would continue to provide information that would assist in the presentence investigation report and that A. would make a victim impact statement at sentencing. The right to a speedy disposition applies throughout the life of a case, well beyond the guilt phase of a prosecution.

4. Victims' statutory and constitutional rights do not cease to apply when the prosecution or the court or any other state actor decides the victim is no longer "needed." Victims' rights are protections granted by law -- not indulgences granted by state actors. In fact, in 2012, [after the court's decision to delay sentencing in A.'s case], the state legislature gave victims explicit standing to assert their rights in court—a public policy decision that acknowledged the legitimate and independent interests held by victims during the criminal justice process.

5. The rights of victims must be considered *together* with the rights of defendants. Crime victims, and the public in general, have an "'interest in prompt and certain punishment for criminal offenses, both to minimize the possibility of criminal activity by the accused while released on bail pending sentence, and to aid the deterrent effect of penal sanctions.'" *State v. Allen*, 179 Wis. 2d 67, 74, 505 N.W.2d 801 (Ct. App. 1993), quoting *Gonzales v. State*, 582 P.2d 630, 633 (Alaska 1978). In the context of a sentencing delay, the courts must place much greater weight on the interests of the victim and society, because the defendant has been convicted. As stated in *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986):

   > The alteration of defendant's status from accused and presumed innocent to guilty and awaiting sentence is a significant change which must be taken into account in the balancing process. Once guilt has been established in the first instance the balance between the interests of the individual [defendant] and those of society shift proportionately.

   *See also Allen*, 179 Wis. 2d at 75.

6. A court's duty to promptly sentence a convicted defendant is even greater when the victim is a minor. The court is obligated under Wis. Stat. § 971.105 to consider and give weight to any adverse impact a delay may have on the well-being of a child victim or witness. The state's argument that the delay would adversely affect A. was improperly brushed aside with the court's proclamation that A. was "under no greater or no less stress having sentencing delayed." The truth of the matter was that A. suffered extreme anxiety from knowing the convicted sexual assailant of minors would live freely in the community for several months and be given the opportunity to re-offend, while awaiting another trial. In fact, A. sought (and received) an order of protection shortly after the decision to delay sentencing.

Dated this 26th day of July, 2013.

Trisha Anderson

TRISHA ANDERSON
Chairperson, Wisconsin Crime Victims Rights Board