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FILED
03-02-2018
Clerk of Circuit Court
Outagamie County
2015CF000470

**OFFICE OF THE DISTRICT ATTORNEY
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TO: Judge McGinnis
FROM: Melinda Tempelis, District Attorney
DATE: March 02, 2018
RE: State of Wisconsin vs. Kevin R. Dunay
Outagamie County Case No. 2015CF000470
Agency Case No. Lfv15-001269

In preparation for sentencing on March 8, 2018, I am including copies of 19 jail calls for the court's consideration.

The letters provided by defense illustrate a law abiding citizen with a temporary lapse in judgement, who is not a threat to the public. The PSI outlines a prosocial defendant, who is remorseful for his actions and has no animosity towards the victim. Mr. Dunay reports he is prosocial and confronts people to discuss problems and resolve situations. However, I believe the content of these jail calls show the true character of the defendant, view of his crime and the victim, his lack of remorse and vengefulness.

While the entirety of the 19 calls is provided to the court for completeness, there are particular points of significance outlined below. There are also directions attached to assist the court with playing the calls. In addition to these calls, the defense has previously been provided with all the calls the State reviewed.

July 30, 2017 – 12:30 to the end
August 1, 2017 – 14:10 to the end
August 6, 2017 – 8:30 to the end
August 21, 2017 – 12:15 to the end
August 29, 2017 – 20:25 to the end
August 31, 2017 – 8:55 to the end
September 14, 2017 – 15:50 to the end
September 30, 2017 – 9:35 to the end
November 16, 2017 – 9:54 to the end
November 26, 2017 – 11:05 to the end
November 27, 2017 – 18:43 to the end
December 1, 2017 – 7:40 to the end

03/02/2018

STATE OF WISCONSIN - VS - Kevin R. Dunay

December 5, 2017 – 19:30 to the end
December 22, 2017 – 20:15 to the end
December 25, 2017 – 6:10 to the end
December 26, 2017 – 14:05 to the end
January 6, 2018 – 10:35 to the end
January 8, 2018 – 12:35 to the end
January 12, 2018 – 14:30 to the end

cc: Atty. Buckett

Date Signed: 03/02/18
Electronically Signed By:
Melinda Tempelis
District Attorney
State Bar #: 1032157



1 STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

2 BRANCH I

3 -----

4 STATE OF WISCONSIN, Transcript of:
SENTENCING HEARING

5 Plaintiff,

6 -vs-

7 KEVIN R. DUNAY, Case No. 15-CF-470

8 Defendant.

9 -----

10 HONORABLE MARK J. MCGINNIS
11 JUDGE PRESIDING

12

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16

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APPEARANCES:

18 MELINDA J. TEMPELIS, District Attorney, 320
19 South Walnut Street, Appleton, Wisconsin 54911, appearing
on behalf of the plaintiff.

20 ROBERT W. BUCKETT, Bucket & Weil, LLC, 120
21 North Main Street, Suite 320, West Bend, Wisconsin 53095,
appearing on behalf of the defendant.

22 The Defendant appeared in person.

23

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25 Date of proceedings: March 8, 2018

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TRANSCRIPT OF PROCEEDINGS

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THE COURT: All right. We will go on the record today in Case No. 15-CF-470. This is the matter involving the State of Wisconsin and Kevin Dunay. Mr. Dunay is present and with Attorney Robert Buckett. Attorney Tempelis is here on behalf of the State.

My understanding is there are three individuals on the phone from the state of New Jersey -- Officer Brandon Stahmann, Detective Thomas Laird, and Officer Mike Masters. Did I get that right?

MS. TEMPELIS: I believe that Officer Stahmann is from Fox Valley Metro Police Department. He might be on the phone. He's having some phone issues.

THE COURT: Okay. Is Officer Stahmann on the phone? What about Detective Laird?

DETECTIVE LAIRD: Yes, your Honor.

THE COURT: And Officer Masters?

OFFICER MASTERS: Yes, your Honor. I am here.

THE COURT: So we have two of the officers on the phone. We're set today for a sentencing hearing. I just want to -- I would think there's a

1 lot of things that are going to be talked about with
2 you. One of the things that I want to make sure
3 that I don't forget is a half hour or so ago I was
4 informed by CJU, which are the officers here, that
5 due to threats, Mr. Dunay, or comments or messages
6 that you have provided there's significant concern
7 about safety in the courtroom today. So I -- That's
8 what I was told. I didn't get anything more
9 specific. I imagine we are going to get into that
10 in the hearing, and I had asked them if they felt
11 there was sufficient manpower here to go forward
12 with the hearing. Their answer was yes and we said
13 let's go forward. So I have had that communication,
14 thought I would let everybody know. Anything that
15 you want to know about that, Ms. Tempelis?

16 MS. TEMPELIS: No.

17 THE COURT: Mr. Buckett?

18 MR. BUCKETT: No. I have nothing to add.

19 THE COURT: Okay. I received this week a
20 letter from Attorney Tempelis, which is dated
21 March 2. Have you had a chance to go through that,
22 Mr. Buckett?

23 MR. BUCKETT: Yes. I am guessing you are
24 referring to the memo with the phone calls that were
25 provided to the Court. I did receive that, yes.

1 THE COURT: Okay. You have had a chance
2 to listen to those messages to the extent that you
3 wanted to?

4 MR. BUCKETT: Yes. They were provided to
5 me when I was first appointed to the case. So I
6 have had them for some time. I did inform Mr. Dunay
7 when I met with him earlier this afternoon that the
8 phone calls, which he was aware of, had been
9 provided to the Court.

10 THE COURT: Okay. Any questions or issues
11 on that, Ms. Tempelis?

12 MS. TEMPELIS: No.

13 THE COURT: Mr. Buckett?

14 MR. BUCKETT: No.

15 THE COURT: All right. Then, Mr. Buckett,
16 have you had a chance to go through the presentence
17 report with Mr. Dunay?

18 MR. BUCKETT: Yes, sir. And, further, I
19 provided him with his own copy that in between
20 meetings that we had he marked up with a few things
21 that he wanted to talk to me about; and then at our
22 subsequent meeting we went through it page by page,
23 very thoroughly, so yes.

24 THE COURT: I take it you'll cover in
25 argument any issues that you have with any part of

1 it?

2 MR. BUCKETT: Yes. I don't think we had
3 any outright factual errors that we would need to
4 point out to the Court right away; but yeah, we will
5 address any other issues during my presentation.

6 THE COURT: Okay. Mr. Dunay, have you had
7 sufficient time to go through that presentence
8 report and to discuss it with your attorney?

9 THE DEFENDANT: I found some more issues
10 that I wanted to be able to present to him that I
11 haven't had an opportunity to do so.

12 THE COURT: Okay. We can take a brief
13 recess today in a minute or two and do that. My
14 question was have you had sufficient time to go
15 through that report and to discuss it with your
16 attorney? I think what you said is you want to talk
17 about a couple more issues?

18 THE DEFENDANT: Yeah. I found some more
19 factual errors in the report.

20 THE COURT: Okay. Well, when you say more
21 factual errors, according to your attorney there
22 weren't any factual errors. Factually it was
23 correct but there's some argument.

24 THE DEFENDANT: No. There were some
25 statements that are totally incorrect.

1 THE COURT: Okay. Which statements are
2 those, if you just start on page 1 and walk me
3 through those?

4 MR. BUCKETT: A moment, sir.

5 THE COURT: The record should indicate
6 that Attorney Buckett is consulting privately with
7 Mr. Dunay.

8 MR. BUCKETT: Judge, if I may, while
9 Mr. Dunay is looking, when he says more factual
10 errors, when I met with him after he had had an
11 opportunity to discuss his copy of the PSI, he
12 brought up items with me that he said were factual
13 errors. I basically gave him the homework
14 assignment. Take a look at the PSI. Let me know if
15 there's anything that you think are factually
16 incorrect.

17 The items that he brought up with me I
18 felt were more impressions by the agent or the
19 writer of the PSI that I told him we could address
20 but that those were not factual errors. So that is
21 why I, I guess, answered the Court's inquiry like I
22 did; and I'll allow him to add in anything he wants.

23 THE COURT: That's how I understood it to
24 be when you commented. Mr. Dunay, to the extent
25 that you disagree with your attorney --

1 THE DEFENDANT: Yeah, well, the first
2 thing is on No. 7.

3 THE COURT: Just reference page number, if
4 you would.

5 THE DEFENDANT: Yeah, Page No. 7.

6 THE COURT: Okay.

7 THE DEFENDANT: And under defendant's
8 version, I don't -- in the second -- under, yeah,
9 the second sentence it said that he stated the facts
10 in the criminal complaint were accurate. I don't
11 recall.

12 THE COURT: The second sentence?

13 THE DEFENDANT: The second sentence. I
14 don't recall ever stating that I agreed that all of
15 the facts in the criminal complaint were accurate.

16 THE COURT: Okay.

17 THE DEFENDANT: Okay.

18 THE COURT: Just one second, Mr. Dunay.
19 Did somebody else just join us on the phone?

20 OFFICER STAHMANN: Yes, sir. That's me.
21 This is Officer Stahmann with metro police
22 department.

23 THE COURT: Okay.

24 THE DEFENDANT: That simple statement --

25 THE COURT: If I understand it, Mr. Dunay,

1 you are saying that the presentence writer
2 fabricated when they put in here that you stated the
3 facts in the criminal complaint were accurate?

4 THE DEFENDANT: I don't recall saying --
5 making that statement.

6 THE COURT: Okay.

7 THE DEFENDANT: I said that I may -- I may
8 have made a statement that, you know, my version and
9 the version from, you know, the victim were similar;
10 but I don't recall saying that it was entirely
11 accurate.

12 THE COURT: Okay.

13 THE DEFENDANT: And then in the same
14 paragraph he writes this went on. This went on from
15 February 2015 until he was arrested on June 19,
16 2015. That's false. It would have been through --
17 from October to February, I believe, so that is not
18 factual.

19 THE COURT: Okay. So the masturbating
20 together on TextNow and Skype went on from --

21 THE DEFENDANT: Yes.

22 THE COURT: I'm not done.

23 THE DEFENDANT: October.

24 THE COURT: Mr. Dunay, listen. We can't
25 talk at the same time.

1 THE DEFENDANT: I apologize.

2 THE COURT: Okay. So you are saying it
3 went on for several months, but those months instead
4 would be October of 2014 through February of 2015?

5 THE DEFENDANT: Yes, that is correct.

6 THE COURT: Okay. Anything else? The
7 record should indicate that Mr. Dunay and Attorney
8 Buckett are consulting privately.

9 THE DEFENDANT: I think that's -- I think
10 that was it.

11 THE COURT: Okay.

12 THE DEFENDANT: Those two items.

13 THE COURT: Okay. The rest of the
14 presentence report is accurate?

15 THE DEFENDANT: Other than issues that my
16 attorney may cover. There was some issues that he
17 may address.

18 THE COURT: Okay. And other than that
19 it's accurate?

20 THE DEFENDANT: I believe so, yeah.

21 THE COURT: Is there any reason that you
22 shouldn't be sentenced today?

23 MR. BUCKETT: Your Honor, if I may just
24 jump in, I was going to bring this up prior to
25 getting going. I had sent a letter to the Court

1 earlier this week. I think it came in on Monday,
2 and to summarize that letter stated that Mr. Dunay
3 brought up the issue with me that he wanted a
4 psychological evaluation done that the Court could
5 consider at sentencing. I guess, long story short,
6 that request for adjournment for that reason was not
7 granted. So I know Mr. Dunay was disappointed about
8 that. I wouldn't say that that has in any way
9 affected our ability to be prepared this afternoon,
10 but I think that's kind of why he was hesitating a
11 bit when deciding how to answer that question.

12 THE COURT: Is that right, Mr. Dunay?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Okay. And we'll address that
15 issue momentarily. There's several that we need to
16 do; but is there any other reason, Mr. Dunay, that
17 you shouldn't be sentenced today?

18 THE DEFENDANT: No.

19 THE COURT: Has the State complied with
20 the victim rights statute?

21 MS. TEMPELIS: We have.

22 THE COURT: Is there restitution being
23 requested?

24 MS. TEMPELIS: There is a restitution
25 amount that was filed on December 12 of 2017. It's

1 to the victim's mother, which is \$17,483.69. Those
2 were bills and mental health visits as a result of
3 this incident as well as, I believe, some time off
4 of work that she had as a result of having to take
5 care of her daughter.

6 THE COURT: Any objection to those
7 amounts, Mr. Buckettt?

8 MR. BUCKETT: Your Honor, I discussed the
9 amounts with Mr. Dunay. He said he doesn't object
10 to paying restitution here. His issue was that the
11 restitution summary, I guess, lacked a lot of
12 specificity as to what those doctor's visits were
13 for. I know the State said mental health treatment
14 today. I had inquired with the State's
15 victim/witness coordinator as to whether they had
16 any more information and I don't think they were
17 able to get any but I --

18 THE COURT: The record should indicate
19 that Attorney Buckettt is consulting privately with
20 Mr. Dunay.

21 MR. BUCKETT: Your Honor, Mr. Dunay is
22 contesting that figure. So I don't know that we'd
23 be able to address that today, but he is contesting
24 the \$17,000 and change.

25 THE COURT: What's his position on

1 contesting it, if there is one?

2 MR. BUCKETT: Sorry to interrupt, sir. I
3 think his position is that the victim had prior
4 mental illness and he is concerned that any sort of
5 mental health treatment she was getting she may have
6 been getting before and it may not be directly
7 related to this case.

8 THE COURT: What is the State's position
9 on the defendant's position on credit?

10 MS. TEMPELIS: He has been in the
11 Outagamie County Jail since June 12 of 2017. So
12 it's 269 days. I believe he was taken into custody
13 on June 30 of 2015 when he was in New Jersey. He
14 sat in New Jersey and they still have a case pending
15 there. If we count back to June 30, it's 982 days.
16 My understanding is he has not entered a plea, had a
17 trial, or been sentenced in New Jersey. So there's
18 not anything but he wasn't placed on bond in our
19 case until this June 12 date, but I believe that
20 when we had opened the case on a warrant back in
21 June of 2015 around the 26th New Jersey executed a
22 warrant and arrested him shortly thereafter on the
23 30th.

24 THE COURT: So the State's position is
25 982?

1 MS. TEMPELIS: I believe so.

2 THE COURT: Mr. Buckett?

3 MR. BUCKETT: I had the opportunity to
4 discuss that figure both with Mr. Dunay and with the
5 State prior to the hearing, and that is the number
6 that we have as well. Thank you.

7 THE COURT: Okay. So there's an agreement
8 that 982 days of credit be provided. I received a
9 bunch of letters in this case of support for
10 Mr. Dunay, and I just want to make sure that the
11 State has received those and there's no objection to
12 any of it.

13 MS. TEMPELIS: I believe I received all of
14 those as well.

15 THE COURT: Mr. Buckett, anything else
16 regarding those letters?

17 MR. BUCKETT: No. They were not in the
18 file that was provided to me by Mr. Tarnowski.
19 However, I got every one that was submitted through
20 the eFiling system and have reviewed all of them.

21 THE COURT: Okay. Is there anybody else
22 that's going to say anything prior to the arguments
23 for the State that you are aware of?

24 MS. TEMPELIS: No.

25 MR. BUCKETT: No, sir.

1 THE COURT: Okay. Then the last issue
2 that I have is this letter that is dated March 5;
3 and I received it on March 6, asking -- Mr. Buckettt,
4 you had asked that we adjourn today's hearing so
5 that Mr. Dunay can speak with a psychologist for the
6 purpose of providing the Court with an evaluation of
7 his psychosexual behavior. Mr. Dunay was going to
8 interrupt; and so my questions are directed at you,
9 Mr. Buckettt, not at Mr. Dunay. I think you have
10 answered that already on what you are looking --
11 What are you exactly looking for?

12 MR. BUCKETT: Your Honor, in other cases I
13 have had of this nature I have hired a psychologist
14 who specializes in analyzing, I guess, psychosexual
15 behavior.

16 THE COURT: What does psychosexual
17 behavior mean?

18 MR. BUCKETT: Well, to put it pretty
19 succinctly, they analyze the sexual tendencies and
20 behavior of the defendant and provide a summary as
21 to how big of a risk that person is to reoffend if
22 they were to be placed back into the community. I
23 had spoken about that with Mr. Dunay. He wanted me
24 to bring that to the Court's attention, that that
25 was something that he was interested in having done.

1 THE COURT: The first time that was
2 brought up by Mr. Dunay was March 5?

3 MR. BUCKETT: No, your Honor. It was -- I
4 met with him on the 22nd of February at the jail
5 here; and that was the first time the subject was
6 broached. I told him that in my opinion it was a
7 bit of a risky move because I felt that any sort of
8 potential benefit that that document may have could
9 be offset by -- I guess I say this with all due
10 respect -- any annoyance that the Court may have of
11 putting this hearing off another time. I know it
12 had already been adjourned because of the switch in
13 attorneys. I told him that that was something that
14 I thought he may want to be careful about. He took
15 that into consideration, and we left that meeting on
16 the 22nd with at least my understanding being that
17 we were not going to pursue that avenue.

18 I met with him again on the 27th, the next
19 week; and at that point he said he had had more time
20 to think about it and he for sure wanted to do that.
21 And I again kind of explained my position, that we
22 were getting very close to sentencing. There was no
23 way that that document could be prepared that
24 quickly, and he indicated that he wanted me to try
25 again to do that. So at that point I contacted the

1 doctor's office that I had used previously for these
2 types of things. That office is in Milwaukee. They
3 got back to me -- I think it was on March 1 --
4 stating that the doctor I had used most recently
5 would not be available just due to, I guess, not
6 wanting to make the trip here but that they had
7 someone else in their office that may be able to do
8 that. I got word late on March 2 that there was a
9 doctor from their office that would be willing to
10 come up here and do that.

11 THE COURT: Who is that?

12 MR. BUCKETT: The name -- I don't have the
13 name of that doctor in my file. Amelia Brost is the
14 doctor that I have used before from Milwaukee and
15 it's somebody in her office.

16 THE COURT: How do you spell that person's
17 last name?

18 MR. BUCKETT: B-R-O-S-T. And by the time
19 I had gotten that information on, I believe, the
20 2nd, was a Friday, it was too late to get anything
21 to the Court before the weekend. So I sent that
22 letter to the Court on Monday and then obviously I
23 did get the response from your judicial assistant on
24 Tuesday. What I would just note just so the record
25 is clear when I had met with Mr. Dunay on the 27th I

1 indicated to him and obviously the Court knows I'm
2 not familiar with this county. I indicated that I
3 wasn't certain that the Court would grant another
4 adjournment and that we prepare as if the Court
5 would not and be ready to go for sentencing today,
6 and we did do that. So I am certainly, I would say,
7 prepared as normal; but that is still Mr. Dunay's
8 request, that the Court consider that.

9 THE COURT: Why is it that Mr. Dunay
10 didn't do that at all during the last 982 days?

11 MR. BUCKETT: Your Honor, that I can't
12 really comment on. It's possible that Mr. Tarnowski
13 didn't discuss that being a viable option with him,
14 but I don't have a better explanation than that. I
15 know it first came on February 22 between us.

16 THE COURT: And you didn't -- Well,
17 Mr. Dunay, is there any reason why you haven't
18 sought or participated in an evaluation from a
19 psychologist to determine your psychosexual
20 behavior, meaning tendencies and behavior in a
21 sexual manner, prior to February 22?

22 THE DEFENDANT: Can I speak with my
23 attorney for a moment, please?

24 THE COURT: Absolutely. The record should
25 indicate that Mr. Dunay is consulting with Attorney

1 Buckett privately.

2 MR. BUCKETT: Your Honor, there was
3 one more thing Mr. Dunay wanted me to point out. He
4 states that another reason for having a psychologist
5 brought in to do a report for sentencing was to
6 mitigate any potential effect the phone calls that
7 the State provided in its memo may have on the Court
8 and, I think, his thought process that the
9 psychologist could possibly get inside of his head
10 as to why he would make those calls. That's me kind
11 of paraphrasing the conversation we just had, but
12 that is another reason.

13 THE COURT: Okay. The State provided
14 those to me in a letter dated March 2. Did you get
15 them before that time?

16 MR. BUCKETT: I did. I got them on
17 January 31. That was my first trip to the jail to
18 see Mr. Dunay. Prior to seeing him I stopped by the
19 district attorney's office to introduce myself to
20 Ms. Tempelis, and she provided them to me at that
21 point.

22 THE COURT: Just so I understand what you
23 mean by what you just said, how would a psychologist
24 mitigate, was the word you used, what was said?
25 What was said on the telephone calls that would

1 somehow be impacted by what any psychologist may
2 say?

3 MR. BUCKETT: Well, your Honor, the State
4 provides its own explanation in the memo that
5 accompanied those calls as to --

6 THE COURT: I am not asking for their
7 explanation. I am asking for yours.

8 MR. BUCKETT: Well, I think that would
9 kind of be why the psychologist would come in, to
10 provide a professional opinion as to why somebody
11 would say something like that if they don't mean it.

12 THE COURT: Say something like what?

13 MR. BUCKETT: Well, the things that are in
14 the phone calls.

15 THE COURT: What are those things that
16 he's going to have a psychologist address? Let's
17 just make the record clear as to what's being
18 requested. Just so you understand, Mr. Buckett,
19 because I respect the approach, you never annoy me
20 with motions or requests.

21 MR. BUCKETT: I understand. That's why
22 I --

23 THE COURT: Let me finish. But I become
24 annoyed when I think people are manipulating the
25 process or the system for some benefit of their own

1 in a dishonest, sort of underhanded way. I am not
2 suggesting that you are doing that or attempting to
3 do that, but I will say directly that I believe
4 Mr. Dunay is. I will address that when we get to
5 the sentencing part of today, but Mr. Dunay and I
6 had a conversation when he got rid of Mr. Tarnowski
7 on the record about how that sentencing hearing was
8 going to proceed on February 2. And he assured me
9 that that would happen, and he answered all of the
10 questions the right way, and his body language
11 suggested something completely different.

12 And I knew just in the way he handled it,
13 the sneaky demeanor that he did, that he was
14 attempting to push off that first sentencing
15 hearing. I forget if I said it during that hearing,
16 but I think I did because I normally would just say
17 what I am observing. And as it turns out I think
18 two or three months removed that Mr. Dunay has been
19 playing a lot of games and manipulating and delaying
20 and doing things intentionally just like he did when
21 he just said he has all of these factual disputes;
22 and when I asked him to identify them, he identified
23 two. And if you remember his first comment to me,
24 he said, well, he has many more than what he
25 originally talked with you about.

1 I asked him to go through that sheet one
2 by one and he identified two. It seems like his
3 first answer was pretty manipulative, pretty not
4 straightforward, pretty self-serving and I -- When I
5 read your letter on March 6, I was in the middle of
6 a trial. So I was in Day 2 of a trial. I got
7 handed this. My handwriting on the bottom says at
8 this time denied. I didn't put denied. I put at
9 this time denied because with the information that I
10 had I didn't have enough to grant it. I didn't know
11 what the State's position was. I didn't know what
12 the victim's position was. I didn't know the exact
13 reasons. This is a pretty short letter. So I am
14 trying to explore those things today. So I would
15 like you --

16 MR. BUCKETT: Understood.

17 THE COURT: -- to explain to me when you
18 say there's things that came out in these telephone
19 calls where Mr. Dunay would like to have some
20 psychologist analyze it. Tell me exactly what it
21 is, what the psychologist could or would say about
22 it.

23 MR. BUCKETT: Sure. Well, in the phone
24 calls and I guess I am not that hesitant to get into
25 the specifics since I am sure the State would at

1 sentencing.

2 THE COURT: I expect they are. Is that
3 right, Ms. Tempelis?

4 MS. TEMPELIS: Yes.

5 THE COURT: Don't be afraid to get into
6 specifics especially when you are using it as a
7 basis to get an expert.

8 MR. BUCKETT: Certainly. In the 'phone
9 calls Mr. Dunay speaks to his father. He makes
10 threatening remarks towards the Court, towards
11 Ms. Tempelis, towards the victim and her family, and
12 specifically makes remarks about, I guess, how he
13 would act, getting even, upon release.

14 THE COURT: What do you mean by that, if
15 you can, with any more specificity so the record's
16 clear?

17 MR. BUCKETT: Well, it's me inferring
18 because he tells me he would never do these things
19 but my inference --

20 THE COURT: Well, you heard the messages,
21 right?

22 MR. BUCKETT: Yes, sir.

23 THE COURT: Okay. So just what you heard.

24 MR. BUCKETT: My inference is that he
25 would, if we are taking those words at face value,

1 commit acts of violence towards the people that he
2 believes have wronged him at various points during
3 the last nearly three years.

4 THE COURT: Those people include?

5 MR. BUCKETT: Again, your Honor, the
6 State, Ms. Tempelis, the victim, and her mother.

7 THE COURT: And just so I understand it,
8 so that's your position in terms of asking for a
9 psychologist to do this psychosexual evaluation,
10 would be to provide some professional analysis of
11 why someone like Mr. Dunay would make comments that
12 are threatening violence on the judge, the district
13 attorney, and the young girl that he victimized?

14 MR. BUCKETT: Yes. That's exactly right.
15 I think that.

16 THE COURT: And what's that professional
17 going to say?

18 MR. BUCKETT: Well, without speaking with
19 Mr. Dunay, I can't say exactly what the doctor would
20 be able to put in a report; but I can tell the Court
21 that in an ideal scenario for Mr. Dunay that the
22 doctor would testify something to the effect of or
23 not testify but put in a report something to the
24 effect of the fact that he's been locked up for
25 nearly three years, has -- after never having been

1 in custody before has, I guess, created kind of an
2 angry demeanor for him that he feels a need to vent
3 to his father; and then obviously, again, in an
4 ideal world what this professional would be able to
5 give an opinion to is that he is not a serious risk
6 to actually follow through on these comments or
7 threats. I think what Mr. Dunay brought up to me
8 and what I do agree with is that those things would
9 sound a lot better coming out of the mouth of a
10 doctor rather than his attorney or himself.

11 THE COURT: Okay. I don't have any
12 problem just accepting that that's what somebody
13 would say as long as everybody's okay saying I don't
14 really care what that professional says. When I
15 listen to those tapes and I heard the demeanor and
16 the tone and the language that Mr. Dunay says, I
17 think it's pretty serious; and whether or not I
18 think he's going to carry them out or have the
19 capacity to carry them out I don't know; but to
20 suggest that he's got -- he has an opportunity to
21 vent, I am okay with that. I think everybody should
22 vent; but like you said, what's messed up about it
23 is that when you are venting because you think the
24 judge or the district attorney or the little girl
25 who you victimized were the ones that put you there,

1 not yourself, in my opinion it shows a lack of
2 acceptance of responsibility or accountability, the
3 inability to recognize why you are really there, and
4 sort of spins that off onto others. That's
5 troubling.

6 Now, I will accept at face value that some
7 expert will come in here and say don't take it
8 serious. He really didn't mean it. He wouldn't
9 carry it out. I don't think we will need an expert
10 to do that, but I will trust that you have an expert
11 that says that, and I imagine we will get ten other
12 experts who will say ten other things depending how
13 much you pay him and what side is paying him that
14 amount of money. What's the significance of some
15 person coming in and saying that? Isn't that
16 opinion just one part of everything?

17 MR. BUCKETT: It is just one part but,
18 again, I think I would just kind of repeat how I
19 answered the question last time. In my opinion I
20 think that a doctor saying that has more weight than
21 just me addressing it. Obviously I've gotten these
22 tapes. I know what they say. I was certainly going
23 to address them and give you a similar explanation
24 than I have already given.

25 After speaking with Mr. Dunay, it was his

1 hope that having somebody else make those statements
2 that's a professional would have more impact on the
3 Court. You have obviously noted that it likely
4 would not because you can get an expert in here to
5 say almost anything. So I understand that but that
6 is the reason that we had for making that request in
7 addition to the sexual behavior and tendencies.

8 THE COURT: We are going to come back to
9 the sexual behavior; but I want to make clear, if I
10 haven't, to have an expert come in and provide an
11 opinion that, well, Mr. Dunay would never really
12 carry those things out, what's their expertise in
13 getting to that conclusion? Are they any more of an
14 expert in that area than any of the rest of us?

15 Now, if you have an expert that says that
16 wasn't Mr. Dunay's voice and it wasn't him who said
17 it, I would be interested in that. If you have an
18 expert that says based on some psychological makeup
19 of Mr. Dunay or something that's part of him, his
20 character or personality, that he's venting and
21 saying all of those things for a certain reason and
22 to try to understand why someone would say that,
23 that might be of some significance.

24 To reach the ultimate conclusion to say,
25 well, I don't think they are ever going to carry it

1 out, I don't know if a psychologist or a
2 psychiatrist or anyone else is any more of a
3 professional in that than any of the rest of us.
4 You listen to a conversation. You evaluate
5 credibility. You listen to tone, demeanor, context,
6 number of times it was said. Then you kind of just
7 reach your own conclusion based on that.

8 My focus here is why is that person any
9 more of an expert than you are on that? Maybe you
10 are saying, well, because we are going to pay a
11 doctor and they have a doctor title. Maybe some
12 judge will be foolish enough to believe them more
13 than I believe an attorney. If that's what you are
14 trying to get at, I say, well, that's no good. If
15 it's something more connected or something more
16 expert related, then I am interested in listening.

17 MR. BUCKETT: I do not believe it is more
18 expert related than what I have already said. When
19 the Court first asked the question, I responded by
20 saying that my reason for hiring the doctor was to
21 evaluate his psychosexual behavior, those
22 tendencies. Mr. Dunay wanted that second point
23 brought in so I brought it up but I think the -- if
24 we are looking at this as a pie chart, the vastly
25 larger piece of the pie is those sexual tendencies

1 and likelihood to reoffend.

2 THE COURT: Okay. So let's get to that
3 part of your argument. What's the expert going to
4 tell us on that?

5 MR. BUCKETT: Well, from past experience
6 the expert comes in, interviews the defendant.

7 THE COURT: I know the process. I have
8 had a lot of cases with it.

9 MR. BUCKETT: Okay.

10 THE COURT: I think best-case scenario for
11 Mr. Dunay is what?

12 MR. BUCKETT: The best-case scenario is
13 that the conclusion of that report by the doctor
14 suggests to the Court that he is a low risk to
15 reoffend.

16 THE COURT: So when you said psychosexual
17 tendencies, what would the report say regarding his
18 psychosexual tendencies?

19 MR. BUCKETT: Well --

20 THE COURT: That he doesn't like to engage
21 in sexual activities, masturbations and other
22 activities, with teenage girls?

23 MR. BUCKETT: _ I think the Court's asking
24 me a little bit to make a medical conclusion that I
25 am not qualified for but I -- Obviously he's done

1 these things already. So the doctor can't cover
2 over that. I think the primary focus of the report
3 would be how big of a risk would he be in the
4 community because obviously the amount of time that
5 we are going to be asking for is probably going to
6 be significantly different than the State.

7 So part of what I am sure the Court is
8 going to consider is say I go along, and I am using
9 the Court's voice here. Say I go along with
10 Mr. Dunay and his attorney and release him after
11 this shorter period of time back into the community.
12 How can I trust that he won't go right back to these
13 sorts of behaviors that he's engaged in here? That
14 is where the doctor comes in; and, again, hopefully
15 the doctor would then say that if you release him in
16 this shorter period of time I think that the Court
17 can have faith that this isn't something that will
18 crop up again. I can't make any further medical
19 conclusion but that's the ideal scenario.

20 THE COURT: And just so I understand, the
21 conclusions regarding risk to reoffend would have
22 all been an opportunity to hire prior to getting
23 those tapes. It seems like the second part of the
24 argument when you said Mr. Dunay wanted to get it
25 after we received the tapes, that goes to simply his

1 comments.

2 MR. BUCKETT: Well, he brought it up with
3 me after those tapes, yes.

4 THE COURT: I am not suggesting that you
5 are misrepresenting anything to us. I am not trying
6 to trip you up. I am just saying the issues with
7 risk to reoffend have been out there a long time.

8 MR. BUCKETT: Certainly. This
9 theoretically could have been something that was
10 done in 2015. I -- I don't dispute the Court about
11 that whatsoever. I have been Mr. Dunay's lawyer for
12 about five weeks so I can't really comment on any
13 discussions he has had with Mr. Tarnowski or in New
14 Jersey or anything else.

15 THE COURT: Are you prepared to go to
16 sentencing today?

17 MR. BUCKETT: Absolutely.

18 THE COURT: Okay. Ms. Tempelis, you have
19 been silent on that whole discussion. So any part
20 of it that you want to factor in on or provide
21 comments? It's just kind of open ended.

22 MS. TEMPELIS: I understand Attorney
23 Buckett's just gotten on this case. I understand
24 their request. I will just leave it to the
25 discretion of the Court whether the Court wishes to

1 proceed today or if the Court thinks that the
2 defendant should be granted his request.

3 THE COURT: Well, I start my analysis by
4 understanding that this is a very serious case that
5 comes with very serious consequences potentially;
6 and it's a case that I prefer and I expect everyone
7 else prefers to be done properly the first time so
8 that there are no issues, real issues, on appeal
9 that we have to do a second time.

10 With that being said, I believe that
11 Mr. Dunay is a manipulative con artist. I will
12 cover that in more detail momentarily. I am waiting
13 to get the arguments, but that's what I have
14 concluded based upon all of my contacts with
15 Mr. Dunay, based upon my communications with
16 Mr. Dunay, and his demeanor, his words, his body
17 language.

18 I don't have a lot of trust in him doing
19 things in good faith. The best example that I can
20 give is the example that I had with him when
21 Attorney Tarnowski withdrew and I think -- I think
22 we talked about it on the record that day, that he
23 was making efforts to push this off, to prolong it,
24 to delay it and complicate it. I think Mr. Dunay's
25 response today when he said there's many factual

1 disputes in the presentence report in addition to
2 what his attorney had said and then he highlighted
3 two of them is another example. He just wanted to'
4 throw into the record that there's all of these
5 factual disputes in hopes that I would blow past it,
6 but instead I just had him itemize them.

7 And I think now the record is pretty clear
8 that according to Mr. Dunay there are only
9 two factual disputes and those two are pretty
10 insignificant. One of them was that he didn't
11 acknowledge the allegations in the complaint. To
12 the extent that that's true or not true probably
13 really doesn't matter because at the time I took his
14 plea he acknowledged enough of it that he was
15 convicted of four of these offenses and most of
16 which he acknowledged in his version is in the
17 presentence report on page 7, is sufficient to what
18 was in the complaint.

19 The second correction that he had was
20 instead of it being between February and June it was
21 between October and February. So he extended the
22 number of months and made it a longer period of time
23 that he was engaging in this sexual relationship or
24 sexual conversations wherein they masturbated
25 together so really no significance, just an

1 extensive relationship with a young girl; and there
2 were no other factual corrections.

3 So when I get a request to say we want to
4 have this psychosexual evaluation done by a
5 professional, I think there is potentially merit to
6 that and we have to just pause and take a
7 consideration. If it is what you said, Mr. Bucket, that
8 that an individual is going to come in, a paid
9 professional, and provide opinions that Mr. Dunay is
10 a low risk to reoffend, I would probably not change
11 my mind on what I think his risk to reoffend is.

12 I would say that based just upon my
13 reviewing of everything, my personal experiences
14 with Mr. Dunay, and what I understand the risks are
15 including the conversations that have been recorded
16 and submitted, which I just found out this week.
17 And the second part, like you said, probably isn't
18 that significant because as you go through it I
19 don't know if I am really going to listen to a
20 psychologist's explanation of if somebody's going to
21 carry out significant threats. I think he would
22 carry them out based upon what I have observed and
23 what I understand.

24 So given what's been put on the record
25 today, given the timing of this case and all of the

1 other issues as well as all of the recommendations
2 that are about to be made, I think that retaining a
3 psychologist or a psychosexual therapist or
4 professional would have very little impact, if any,
5 on the relevant issues here including seriousness of
6 the offense, the character of Mr. Dunay, and the
7 risk to reoffend.

8 I will for purposes of the sentencing sort
9 of take into consideration that there is some expert
10 out there somewhere that would provide an opinion in
11 their professional degree based on whatever their
12 meetings are and reviewing the whole record that
13 Mr. Dunay is a low risk to reoffend, and I will
14 comment on that at the time that I make the
15 sentence. I will also accept the fact that there's
16 probably some professional out there that would
17 write a rote report that would say based upon his
18 expertise the threats of violence that Mr. Dunay
19 communicated in his telephone conversations they
20 believe in their opinion wouldn't ever, in fact, be
21 carried out.

22 And I can respectfully disagree with those
23 professional opinions, but I will consider those and
24 I expect there is a professional out there that
25 would say both of those things and probably from

1 that Milwaukee office. So is there any other
2 benefit other than those two facts?

3 MR. BUCKETT: No, sir.

4 THE COURT: Anything else, Ms. Tempelis?

5 MS. TEMPELIS: No.

6 THE COURT: Okay. Go ahead, Ms. Tempelis.

7 MS. TEMPELIS: Thank you. Kevin Dunay is
8 essentially an all-American dream. He's smart.
9 He's college educated. He has his master's degree.
10 He's a talented engineer. He had a great job. He
11 was married to a seemingly kind wife, considering
12 the letter that she wrote. He had three sons. He
13 was active in their lives. He coached youth sports.
14 He lived in a beautiful subdivision at home in New
15 Jersey, and he was a sole provider for his family.

16 That was his public persona, the person
17 the community saw, the person his family saw, and
18 the people that wrote the letters of support for
19 him; but his wife started to notice a difference.
20 She said their son had cancer. His mother passed
21 away so he began to change. In her letter she said
22 they had no idea that Kevin had a secret life and he
23 has devastated his family. He has devastated his
24 three boys, and their stability and world has
25 essentially been rocked and has come crashing down

1 when he got arrested for these offenses.

2 But this isn't about his family, but it is
3 the secret life of Kevin Dunay. It's about the
4 devastation he's left in his wake, the undeniable
5 impact on his family but, more importantly, the way
6 he has completely shattered the life of [REDACTED] The
7 criminal justice system is about protecting the
8 public. In many ways one of the most critical is
9 the protection of our most vulnerable members of
10 society and certainly the children in our community.
11 In the federal system the system considers this so
12 extraordinarily serious that there's a mandatory
13 minimum of 15 years in the federal system.
14 Obviously in the state of Wisconsin that is not the
15 case.

16 It used to be we were just concerned about
17 protecting kids from people they knew or who was --
18 and people who were in the community; but this crime
19 was perpetrated on a 13-year-old girl in our
20 community in one of our middle schools by someone
21 who was 962 miles away. It is about the defendant's
22 manipulation, his planning, his behaviors and his
23 actions that have, in fact, brought him here to
24 Wisconsin.

25 The defendant was on multiple social media

1 apps and was having contact with some adults but had
2 images on his tablet. When we had images of his
3 tablet from New Jersey, there were eight folders
4 labeled with different girls' names. One of them
5 was [REDACTED]. This isn't a situation where there was a
6 lapse in judgment. As he indicated this was from
7 October of 2014 to February of 2015, so over the
8 course of months, multiple conversations, multiple
9 points of contact, infinite numbers of times that he
10 could have started making different decisions than
11 the ones that he had.

12 But he was in contact with other people,
13 other people he would solicit and that he was
14 sexually attracted to. Now, obviously this isn't
15 about him but -- or it isn't about all of those
16 other people; but it's about [REDACTED]. But I put that
17 out there as an understanding that the apps that he
18 was on and that he was using allowed him to access
19 and talk to multiple people and it was [REDACTED] that,
20 in fact, responded.

21 In sentencing the defendant we look at the
22 character of the defendant, the protection of the
23 public, and we look at the defendant who is in need
24 of serious intervention, treatment, and counseling
25 in many different ways; but he is not in a position

1 to be open to it at least according to all of the
2 jail calls, which total well over 25 hours that
3 Investigator Stahmann has listened to.

4 He doesn't think he did anything wrong.
5 He has no empathy towards the victim and everything
6 he talks about is about him. He has a grandiose
7 sense of self-worth, and on August 31 he talks about
8 in one of the calls how he's not like most of these,
9 quote, fucking people in this fucking jail. They
10 didn't have a life. I did.

11 He has superficial charm. He can clearly
12 present well to the people in his community back in
13 New Jersey. He clearly can present decently to the
14 presentence investigator, who did not listen to
15 these calls, and so he can -- He can present himself
16 in a professional setting, in a personal setting, in
17 a social setting in a very positive, prosocial way;
18 but he needs his constant stimulation and he is not
19 someone who can be bored. These calls, these
20 contacts -- They were happening at night. There
21 were a lot of them and his phone calls in the jail
22 also continued to talk a lot about his contacts.

23 He's manipulative, which I will get into
24 more. He clearly lacks remorse or guilt. He's
25 callous and he lacks empathy toward the victim.

1 He's engaged himself in promiscuous sexual behavior
2 that is illegal and inappropriate and he has failed
3 to accept responsibility for his actions despite his
4 comments in the presentence investigation. When we
5 look at the Gallion factors, we look at protection
6 of the community, punishment, and rehabilitation.

7 In the beginning of his contact with [REDACTED]
8 he was extremely predatory. He has young kids. In
9 fact, interestingly enough, [REDACTED] had a birthday
10 this week on Monday. His son had a birthday on
11 Tuesday. They are exactly one day apart. They are
12 the same age. So when he's having contact with
13 [REDACTED] he is having contact with someone the exact
14 same age as his oldest child.

15 So they began talking about life, school,
16 topics he certainly would know how to communicate
17 with a child of that age considering he had one. On
18 November 27 in one of his jail calls he talks about
19 his ability and his willingness to manipulate to get
20 his way. In that case he was talking about if he
21 got put on a mental health hold because of suicidal
22 ideations, but nevertheless he talks about his
23 willingness and ability to manipulate. On August 6
24 he talks about how he's an engineer, he project
25 plans, how he has done project planning his entire

1 life. We talk about how smart he is, how capable he
2 is at trying to create a criminal life-style.

3 When you have these skills, they can be
4 put to good use like he did in engineering or
5 probably to coach his kids' various sports games,
6 but it can also be used for illegal activity like we
7 have here. He told [REDACTED] he was single and divorced
8 when, in fact, he was married and had children. He
9 talked to [REDACTED] about wanting to see her body and
10 she was unsure but he told her it was okay, they
11 were in a relationship, and he loved her.

12 She began feeling it was okay to send her
13 first picture. Kevin, in fact, wanted to send her a
14 tablet so they would better be able to communicate,
15 but she didn't want to give out her address, which
16 was smart; and although she -- he knew she lived in
17 Appleton, she also didn't want her mom to find out
18 about it.

19 To [REDACTED] they were going out. She didn't
20 think that they would be caught. He didn't think so
21 and he loved her and that that made this okay. They
22 used Kik, TextNow so their number would be altered
23 and there would be no real phone numbers, which
24 Kevin suggested and brought up, which allowed her
25 not to be able to contact him at his home; and we

1 look at his ability to engineer a plan and think
2 through how he was going to win her over.

3 Then they used Skype, which allowed them
4 to visually see and watch all of the sexual activity
5 that he engaged in and that he had her engage in to
6 pleasure him. Kevin sent her naked pictures of him,
7 of his chest, his genitals, his face puckered up in
8 a kissing face. He started masturbating in videos
9 and pictures. He sent her a photo where there was
10 semen on a wood table, and probably one of the most
11 repulsive things is the father-daughter role-play
12 that he engaged in with her.

13 He talked to her so that they could each
14 masturbate. There were more than 50 photos and he
15 tried and [REDACTED] tried to make the videos and photos
16 look nice for him. She wanted them to be perfect
17 because she thought that they were in a
18 relationship. She clearly was in a 13-year-old
19 girl's bedroom. There should be no question about
20 that.

21 Her photos that she sent him that he
22 wanted were of unclothed breasts, photos of her in
23 an aroused state, photos of her pubic mound, and
24 videos that are outlined in the complaint that are
25 absolutely repulsive.

1 In one video one of the quotes was that it
2 said, quote, fuck it hard, please, daddy, outlining
3 that most repulsive father-daughter role-play. Her
4 behaviors and the way she presents is that she's
5 very immature. She's very vulnerable. She's very
6 young, and she's not someone who looks older than
7 she was.

8 At one point she's in counseling. The
9 defendant knows she's in counseling. She's had
10 other traumas and other very challenging life
11 experiences in her past before she met Kevin, but
12 she mentioned that to him and he wanted to make sure
13 that she did not talk to him, again that
14 manipulation and the thought process he goes
15 through.

16 Now, as I talked about, the criminal
17 justice system is about protecting the public. It's
18 about protecting most vulnerable children that we
19 have. As I said, she just turned 16 this week. At
20 the time she was 13 years old and she had prior
21 victimization which has impacted her brain
22 development. The defendant knew she had been
23 assaulted prior. He knew that she had a lot of
24 life's challenges and he should have stepped in in
25 that father-daughter role; and instead of engaging

1 in the sexual behaviors he did, he should have
2 stepped in and been an adult and been an appropriate
3 role model and parent figure. But yet he knew she
4 wasn't functioning at a level of girls her age. She
5 was in EBD classes. She suffered with depression.
6 She had emotional and behavioral issues and she has
7 no father figure.

8 You know the defendant's actions. We talk
9 about that predatory nature of those October 2014 to
10 2015 timelines. She wanted to go to college by him
11 so they could see each other. They talked about
12 marriage. They are 35 years apart. They talked
13 about the future, names of their children because,
14 again, she thought he was divorced and didn't have
15 kids. Kevin knew she was 13 years old at that time.
16 So he is having a conversation about marrying and
17 having children with somebody who is the same age as
18 his son.

19 She talked about going to see him over her
20 spring break when she was in high school and thought
21 she would be able to go. Then we look at the
22 victim's impact and the Gallion factors of the
23 gravity of the offense and the defendant's
24 culpability. As I indicated previously, the
25 daddy-daughter role-play is just repulsive. There

1 was a photo with a quote in it of [REDACTED]; and she
2 talked about how, quote, I love you more than life
3 itself.

4 This 13-year-old girl, who should be
5 playing with her friends, who should want to be
6 going to movies and going to the mall and doing
7 things that a 13-year-old should do and probably not
8 even have a boyfriend or at least have giddy
9 boyfriends at that stage, is talking about how she
10 loves a man 35 years older than herself more than
11 life itself, which becomes even more problematic and
12 more concerning when you consider her depression and
13 her suicidal ideations that she was having and has
14 had since then.

15 She found someone who preyed upon those
16 vulnerabilities that she had. She talked about him
17 in one of the messages about how she was having
18 panic attacks, how she was having nightmares and she
19 was trying to get good grades at school. She would
20 often have to support him and remind him that she's,
21 quote, not breaking up with him when she wouldn't be
22 available or she would go away for the weekend with
23 a friend who didn't have wife because she had some
24 13-year-old-girl stuff going on; but it's her, the
25 13-year-old, that's trying to support him and remind

1 him that she's not breaking up with him.

2 You look at her mental health that's
3 outlined, the severe anxiety and depression since
4 she was young, that her father left at an early age,
5 that she had previously been sexually assaulted,
6 that she had been in therapy and doing well. That
7 is probably one of the most important things. Kids
8 are really resilient, and with the right help and
9 the right counseling kids can really turn around
10 from some really serious life, traumatic experiences
11 that they have had. She had been doing well until
12 she met the defendant.

13 She talked about how she had been taking
14 medication for her anxiety and depression. When she
15 started having contact with him, that all changed.
16 Her doing well started to go downhill after he had
17 been arrested. When he was arrested, she had mixed
18 emotions because he told her that he loved her and
19 would marry her and that truly shows how vulnerable
20 she is when she's only that age.

21 She wanted to trust him and she hated
22 herself for letting him get caught because she felt
23 that it was her fault because she had been
24 cooperative with Investigator Stahmann and, in fact,
25 never led on to him that she was working with law

1 enforcement at a certain point and didn't share that
2 with him so that Investigator Stahmann was able to
3 do his investigation. But she was concerned about
4 him getting caught, this concern that she had. Even
5 after all he did, she is still worried about him
6 unlike what we see about him worrying about her now.

7 She was angry at her mom for turning over
8 her cell phone, which you can imagine; and yet she
9 was totally cooperative and never told him. Now,
10 she can't stand him. She carried a knife with her
11 because she's worried about who else was out there.
12 Since the incident she has been depressed. She has
13 tried to kill herself a couple times and then on
14 multiple mental health holds, hence the restitution
15 requests. She has been a cutter. She carved whore
16 and slut and doesn't deserve happiness into her
17 chest.

18 I find that interesting because if you
19 look at the criminal complaint and you look at the
20 names that he called her and the repulsive comments
21 that he would say to a 13-year-old, we have her --
22 him calling her daddy's little girl. We have him
23 calling her all sorts of whore, slut, and all sorts
24 of other completely inappropriate comments and names
25 especially for her age that she shouldn't even be

1 listening to.

2 At one point he talks about how she is his
3 sex toy in bed, my little slut. So now that we have
4 her carving those things into her chest, we see the
5 impact that this has had, how she believes that,
6 these terrible things that he told her when he
7 thought he was sexually aroused and getting
8 something out of this, that she emotionally took
9 that.

10 We talk about the impact that a sexual
11 assault can have on someone and how devastating that
12 can be. He makes mention that there wasn't any
13 victim in this case because certainly he didn't
14 cause any harm to anybody. The emotional harm he
15 has caused this child is inexplicable. Quite
16 frankly, I don't know if she ever comes back from
17 this if she can get her life back on track the way
18 that she should because of the contact and the
19 things that he was saying to her and did with her.

20 Since this incident she's been at an
21 all-time low. She's been hospitalized six times.
22 She refuses to talk to counselors and has not worked
23 through this at all. The PSI talks and outlines the
24 impact that it's had on her family and how it's
25 affected everyone. Even sisters younger than her

1 have seen her try to kill herself and talk horribly
2 about herself and beat herself up about this. Her
3 mom's constantly worried that she's going to get a
4 phone call saying that something happened to [REDACTED].
5 Her younger sister talks about how she misses her
6 sister, but she's happy when she's in the hospital
7 and she's safe because she can't die there.

8 You look at how expensive hospitalizations
9 are. That's why the figure in the restitution
10 summary is so significant. It's very expensive.
11 Her mom is a single mom. She's trying to pay her
12 bills, but she couldn't always pay her bills because
13 she couldn't work because she would have to take
14 care of [REDACTED], who was always on the verge of
15 falling off. They also have concern that at some
16 time he will come for her daughter and harm her
17 family. I haven't even shared with them what these
18 phone calls say.

19 We look at the defendant's lack of
20 remorse. We look at the Gallion factors --
21 protection of the community, punishment, and the
22 gravity of the offense and rehabilitation. What's
23 interesting is there's no drugs or alcohol really
24 outlined in here as an issue that he has, which
25 means that we get him in his pure state of who he

1 is, not altered by alcohol, not altered by drugs.

2 This is who he is. As I talked previously
3 in these jail calls, Investigator Stahmann has
4 listened to hours and hours of jail calls, over 25,
5 I think, he estimates. You can hear in some of the
6 sampling of the calls -- the Court only got a few
7 and Attorney Buckett got plenty more -- the tone of
8 his voice, the disdain, the anger, and the hatred.
9 In any of these hours of calls that Investigator
10 Stahmann has listened to there's no comment anywhere
11 about wanting help despite what we see in the
12 presentence.

13 He minimized the impact and the emotional
14 harm; and this harm that he's created, I believe, is
15 far worse even than the physical. It has affected
16 her mental development, a brain that is still
17 growing and trying to develop until she's about 25.
18 There's promises in here about future, their
19 marriage, their children.

20 On page 6 it talks, six of the
21 complaint -- We can see the conversation in here
22 about the daddy-daughter role-play they had and the
23 names that I was looking for before. We can look in
24 here and see how he calls her my little slut doggy.
25 You are my whore, my horny little bitch, daddy's

1 naughty little girl. Your ass will be slapped and
2 whipped as a reminder you are mine, always were and
3 always will be. Love, hugs, and kisses for my
4 beautiful and sexy wife. She's 13 and he's married.

5 There's no remorse. On page 8 of the PSI
6 he talks about how he's remorseful, how he has no
7 animosity for ██████████, how she's an intelligent,
8 beautiful young lady, how sorry he is and wishes
9 nothing but the best for her. On December 6, last
10 year, in a jail call his dad talks about how he's
11 here because that's what you'll get for playing with
12 little girls. That's what it will get you. He
13 talks about how I will get the last laugh. Trust
14 me. It's just a matter of how much time I have to
15 sit here before it happens.

16 On September 14 his dad says, dad -- Dad
17 says, you better show remorse because you are the
18 perpetrator, not the victim; and you need to protect
19 that -- project that when you talk to the judge.
20 And he reminds him that these calls are recorded and
21 can be brought to sentencing, but yet even back in
22 September it doesn't change a single thing.

23 On July 30 he told his dad that he told
24 his attorney we're going to put this alleged victim
25 on the stand and you're going to rip them a new

1 asshole. That's what he says about [REDACTED] despite
2 what he says in the PSI and despite all of the stuff
3 he said in the criminal complaint and then some.

4 There's no comment about the impact of the
5 victim in any of these phone calls. He talks about
6 how it's a stupid-ass crime that's not even a big
7 deal. He talks on September -- I'm sorry --
8 September 14 and August 29 how there is no victim.
9 Nobody fucking got hurt. This is crazy. This is
10 ridiculous. The reality is it was a victimless
11 crime. It was a victimless crime, stupidity; but it
12 was a victimless crime, victimless. I hardly think
13 [REDACTED] mom sees it that way or her sisters.

14 There's no comment in here about wanting
15 what's best for the victim despite how they talked
16 about, you know, getting married, having kids, him
17 knowing that she was 13 and all of those things; but
18 on July 30 he told his dad that comment about how
19 they wanted to put her on the stand, no comment
20 about the impact on the victim and that this really
21 isn't a big deal.

22 On page 5 to 7 of the PSI he talks about
23 how he knew she was 13. He got emotionally
24 attached. He was stressed out at work. He talks
25 about how there are no drugs or alcohol involved and

1 they were both comfortable doing this. She was okay
2 with it. They were both pleased, quote, the
3 release of stress that they both enjoyed, as if he's
4 talking about someone his own age.

5 He liked having a regular sex partner.
6 She was young but she was a physically grown woman.
7 He has no realization at all how inappropriate this
8 is. He is sexually aroused by a 13-year-old girl
9 with significant issues at this point in time, that
10 she shared that she was in counseling and all of the
11 other things we've talked about. Yet he's sexually
12 aroused by her and continues time and time again to
13 have all of these sexual conversations and videos
14 and he's 35 years older than her.

15 The complaint -- When we look at the
16 complaint and we look at just the highlights, it's,
17 quite frankly, too repulsive to read. I know that
18 the Court has taken the time to do so, but we look
19 at how offensive those conversations are and the
20 impact that that can have on anyone, much less a
21 child. In the PSI on page 8 he talks about how he
22 minimizes this behavior because it's not like he was
23 cheating on his wife because this was over the
24 internet. Then he talks about she was in early
25 menopause so he wasn't receiving any sexual interest

1 from his wife, but he doesn't go in search of adults
2 his age.

3 In fact, he goes online and he finds a
4 13-year-old girl and that doesn't turn things
5 around. He doesn't accept responsibility. On
6 page 5 to 7 of the PSI he talks about how he's
7 stressed because his company was up for sale and
8 claims he's totally prosocial unless he's on a
9 tablet at night. He says he handles stress by
10 running, working out, or reading to clear his mind,
11 which is how he suggests he handles things even
12 though the jail calls look entirely different; but
13 he doesn't handle that stress of his job up for sale
14 that way.

15 In fact, he ends up on his tablet with
16 . On page 8 of the PSI he talks about how he
17 should have stopped when he found out her age and he
18 talks about how he's the only one to blame, no one
19 else to blame. He talks about how he threw away a
20 great family and a career. He's a great engineer
21 and can fix anything but can't fix this and feels
22 terrible for what he did.

23 He talks about how he has no animosity.
24 He takes full responsibility and he's remorseful,
25 and he never intended to hurt her. This goes to

1 exactly what I was saying before, that he has this
2 two-sided life. That's his social side. It's the
3 side he puts out to the community. That's the side
4 that people who wrote these letters see and he talks
5 about how he is staying strong. He wants to get
6 treatment and he's open to that.

7 But yet on the jail calls on December 6 he
8 talks about how the legal system is corrupt, how
9 he's going to teach the legal system a lesson, and
10 repeats this multiple, multiple times, continuously
11 pointing out people who have been involved in this
12 investigation all of the way back to New Jersey,
13 multiple conversations.

14 On December 5 he talks about how he's got
15 to teach someone a lesson and it might -- He's got
16 to teach the criminal justice system a lesson and it
17 might as well be him and makes tons of references to
18 teaching a lesson. Again, this goes back to this
19 lack of responsibility which he claims to have in
20 the PSI.

21 On November 27 he talks about revenge or
22 death or both or vengeance or death or both. On
23 August 31 he talks about how they shouldn't fucking
24 lie about their ages and shit like that. They are
25 experimenting, you know? It's not like anything

1 they weren't going to learn anyway. It is nothing
2 they didn't already know, meaning all of the sexual
3 behaviors and comments he had with [REDACTED].

4 On August 21 he again talks about how it's
5 a victimless crime, no accountability, no remorse.
6 On August 6 he talked about how the detectives in
7 this case in New Jersey lied and coerced and
8 misconstrued his statements. Yet when I read this
9 PSI those are his words without any indication of
10 anybody else's.

11 On page 20 in the PSI he talks about how
12 his perception is completely different now that he's
13 in this situation and that the behavior he displayed
14 was serious and he deserves to be in the situation
15 he finds himself in, which is true, but yet not when
16 he blames everybody else. December 5, that jail
17 call discusses referencing prosecutors and
18 detectives and how he will not be able to live
19 knowing that these people, the prosecutors and
20 detectives, out there destroyed his life.

21 On November 27 he talks about the
22 harbor -- how he harbors hatred and anger towards
23 the justice system even though that the PSI talks
24 about he is the only one to blame. He blames
25 everybody else. He blames the victim. He blames

1 the officers who have been involved. He blames the
2 prosecutor. He blames a federal prosecutor up in
3 the eastern district. It's all about how he's
4 wronged.

5 When I look at all of that, that's a lot
6 more information than that PSI outlines because we
7 see the truth of him in those jail calls and we see
8 how he really thinks about what he did. We see how
9 he really views the victim, and we see how he
10 completely lacks any accountability or remorse.

11 It's because of that that the State
12 believes that 15 years of initial confinement
13 including ten years of extended supervision is
14 appropriate. I think the conditions that are
15 outlined including DNA, restitution, including the
16 extradition costs for bringing him back to New
17 Jersey, no contact with the victim or her family, no
18 contact with anyone under 18 unless approved by the
19 agent, no internet usage, the sex offender registry,
20 and any assessments and counseling as the agent
21 recommends would be appropriate in this case. Thank
22 you.

23 THE COURT: Thank you, Ms. Tempelis.
24 During your comments, Ms. Tempelis, I think there
25 were two different sounds on the phone. I am not

1 sure if we lost people or added people. Do we still
2 have Officer Masters? Are you on the phone?

3 (No response.)

4 THE COURT: How about Detective Laird?

5 DETECTIVE LAIRD: Yes, your Honor. I am
6 still here.

7 THE COURT: All right. Officer Stahmann?

8 (No response.)

9 THE COURT: So it sounded like we lost the
10 two different officers at various times.
11 Mr. Buckettt, defense's argument?

12 MR. BUCKETT: Thank you, sir. One item I
13 had meant to address earlier but I didn't want to
14 interrupt once the Court turned it over to
15 Ms. Tempelis and I just wanted this to be clear for
16 the record in case this is reviewed by anyone down
17 the road.

18 THE COURT: I expect it will be.

19 MR. BUCKETT: I agree. I think this had
20 been brought up at the hearing where Mr. Tarnowski
21 withdrew, that there had been discussion of maybe a
22 withdrawal of Mr. Dunay's plea. He brought up that
23 issue with me; and I ordered a transcript from your
24 court reporter, who prepared it for me. I had the
25 opportunity to review it and review it with

1 Mr. Dunay.

2 I also wrote up for him a, I guess, short
3 kind of outline of factors that are to be looked at
4 when one is considering withdrawing a guilty plea;
5 and it was my conclusion that there was not a fair
6 and just reason, which is what there needs to be
7 prior to sentencing. After kind of reviewing with
8 him why I felt that way, he agreed that we would
9 proceed with sentencing rather than go down that
10 road. So I just -- I indicated to the State that as
11 well, that I considered that to be a closed issue.
12 So I just wanted that to be made clear prior to me
13 starting.

14 THE COURT: Anything you'd like to say on
15 that, Ms. Tempelis?

16 MS. TEMPELIS: No.

17 THE COURT: Mr. Dunay?

18 THE DEFENDANT: No.

19 THE COURT: Okay. So just so I
20 understand, Mr. Bucket, your client communicated
21 with you about the possibility or his interest in
22 withdrawing his pleas and you had enough time and
23 went through the legalities of that and recommended
24 that he not, that there's not a basis to file that
25 motion?

1 MR. BUCKETT: That's correct. He brought
2 it up at my first meeting with him on January 31 and
3 I told him that I would order a transcript from that
4 plea hearing to review if there was anything in
5 there that caught my eye; and then in the -- in that
6 period of time as well I also got the file from
7 Mr. Tarnowski. And specifically part of his file
8 included discussions that he had with the State with
9 regards to potential plea deals and things like that
10 where I felt that there wasn't anything on
11 Mr. Tarnowski's end that he was deficient about
12 that would have been apparent from that transcript.

13 THE COURT: All right. Mr. Dunay,
14 anything you want to say regarding that issue?

15 THE DEFENDANT: No.

16 THE COURT: You need to use the
17 microphone.

18 THE DEFENDANT: No.

19 THE COURT: All right. Are you then
20 prepared to make argument, Mr. Buckett?

21 MR. BUCKETT: I am, sir. Thank you.

22 THE DEFENDANT: Can I speak with my
23 attorney for a moment, please?

24 THE COURT: Sure. Mr. Dunay just asked to
25 consult privately with Mr. Buckett. I am going to

1 ask or I am going to allow that to happen.

2 Mr. Dunay is now talking privately with Attorney
3 Buckett.

4 MR. BUCKETT: Thank you, sir. I am ready
5 to go.

6 THE COURT: Okay. Mr. Dunay, anything
7 else? Anything you want to say regarding the issue
8 that was just raised by Attorney Buckett, which is
9 the plea withdrawal?

10 THE DEFENDANT: No.

11 THE COURT: Okay. And you have had time
12 right now to consult with Attorney Buckett regarding
13 that?

14 THE DEFENDANT: I wasn't -- I wasn't
15 speaking with him with regard to that issue.

16 THE COURT: Okay. So with respect to the
17 plea withdrawal issue, you agree that that's an
18 issue that you took up with Mr. Buckett?
19 Mr. Buckett looked at the transcript of the plea
20 hearing. He looked at Attorney Tarnowski's file and
21 he provided you the legal opinion that in his mind
22 there was no legal basis for you to make that
23 motion. I think that's what he just shared with us.
24 Do you agree that that's accurate?

25 THE DEFENDANT: Yes.

1 THE COURT: Okay. And as a result of
2 that, you made a decision to not file that motion;
3 is that correct?

4 THE DEFENDANT: Correct.

5 THE COURT: Anything else you want to say
6 regarding that issue?

7 THE DEFENDANT: No.

8 THE COURT: Okay. So by not making that
9 motion prior to sentencing, you understand we're
10 going forward now with sentencing, correct?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Okay. Thanks, Mr. Buckettt.

13 MR. BUCKETT: Thank you, sir.

14 THE COURT: Argument, please?

15 MR. BUCKETT: Yes. I'll start off first
16 by talking about the character of Mr. Dunay.
17 Obviously the PSI gets into it, but I think it's
18 important to be pretty thorough here. The State
19 portrays Mr. Dunay as or refers to the secret life
20 of Kevin Dunay. That's obviously, I think, accurate
21 in terms of a short period of time of his life; but
22 I don't think it's fair to characterize his entire
23 life as the sort of charade or house of cards. I
24 realize the State didn't use those words. That's me
25 paraphrasing.

1 This is somebody who for the vast majority
2 of his 50-plus years of living has been law-abiding,
3 a good family man, a good guy in the community; and
4 I think the Court's seen a lot of letters to that
5 effect. I don't think all of those people have been
6 hoodwinked by Mr. Dunay over the years and have been
7 fooled. I think this is actually who he is.
8 Clearly something happened 2014/'15 that caused him
9 to act in this manner. I will address those actions
10 as well, but the impression I got from the State's
11 presentation is that his whole life is just some
12 sort of lie that he's created, and it's only now
13 just caught up with him.

14 I just don't agree with that
15 characterization. Mr. Dunay was brought up in a
16 stable, two-parent house. He indicated his parents
17 weren't wealthy but that they were always able to
18 provide for him. He never needed for anything.
19 There were no AODA or violence issues in the house.
20 Although his mother's passed away, his father is
21 still very supportive.

22 I have had the opportunity to speak with
23 Bob Dunay a few times. I know he's still there for
24 Kevin despite his frustration as to his son's
25 actions that have led him here. Because his parents

1 were not wealthy, Mr. Dunay needed to put himself
2 through college. He did that by getting a few
3 scholarships because he got good grades in high
4 school and he also worked full-time at McDonalds
5 during the duration of his time at Fairleigh
6 Dickinson. I think that speaks to his work ethic
7 and his character.

8 And then after graduating there, he
9 continued at Fairleigh Dickinson getting a master's
10 degree in electrical engineering; and he also worked
11 full-time while he was doing that. He worked at
12 United States Postal Service working as a clerk and
13 mail carrier, and that was in his late 20s. He got
14 his master's at the age of 29, and then ever since
15 then he has been a full-time worker. He hasn't
16 bounced around. He has stayed at the same place of
17 employment that whole time, nearly 20 years.

18 It was while he was getting his master's
19 that he met his wife at the age of 27. They married
20 in 1997; and they have three children, all boys,
21 ages 13, 15, and 17. I think Mr. Dunay will
22 probably get into a few more specifics about his
23 sons and the impact that has had on him. So I will
24 leave a little bit of that to him.

25 By all accounts he had a very good

1 relationship with his family. They, he and his
2 wife, suffered a few medical issues with the
3 children. There was a leukemia diagnosis. They had
4 various miscarriages. So there were a lot of
5 difficult times while the kids were growing up, but
6 they were a happy family. Mr. Dunay reported that
7 he did hours of homework every night with his sons.

8 He usually helped them with math and
9 science because that was part of his background. He
10 helped them with English and reading and things in
11 those subjects because his wife, being Polish --
12 English was not her first language. He said he
13 had -- He didn't view that as a chore. He -- He
14 took great joy and pleasure from being able to help
15 his sons every night with that. Furthermore, he was
16 very active in their activities, coaching their
17 soccer teams, kind of helping out with their
18 baseball teams at practices, things like that.

19 He spent almost all nonworking hours with
20 his kids, he says; and I think that was one of the
21 issues with the PSI that he wanted me to bring up
22 because the PSI kind of frames him as being this
23 lonely person who had no activities; and it didn't
24 really say antisocial but kind of created this view
25 of him that he had nothing in his life so he turned

1 to these other outlets. Mr. Dunay doesn't agree
2 with that. After speaking with him, I don't either.
3 I think this was a devoted family man who enjoyed
4 spending all of his time with his wife and kids.

5 They also went to church every Sunday.
6 They went on vacations. They went to New York Mets
7 games. He enjoyed teaching his kids how to build
8 computers. They went to cancer survivor events
9 together because his middle son, as I stated,
10 previously had leukemia. He was always there for
11 them and I think will be as soon as he is out of
12 custody and is able.

13 I know that that desire to be a part of
14 his children's lives hasn't gone away. With regard
15 to his work, the broad outline of his history is
16 documented in the PSI. He was at RFL for 19 years
17 right up until when he was taken into custody. He
18 started as a final test engineer, worked his way up
19 to a senior hardware engineer. By the time he was
20 taken into custody he was making over \$100,000 a
21 year. So he was able to provide for his family to
22 the extent that his wife was able to stay at home
23 with the children.

24 I, not being very good at science myself,
25 needed him to really explain to me exactly what he

1 did at work and I still don't entirely understand
2 it; but he says he designs systems that were used in
3 utility systems worldwide, product integration, and
4 testing. He also did sales work, tech support. He
5 was really kind of a jack-of-all-trades at RFL. I
6 think that is indicated by at least one of the
7 letters from his colleagues there who wrote about
8 how valued his work was.

9 In 2014 a more senior engineer left the
10 company, and he was promoted to fill that vacancy.
11 He said at that point he went from working regular,
12 full-time, 40 hours a week, maybe a little more
13 sometimes, to over 60 hours a week. So that, I
14 think, kind of transitions into the behavior we're
15 looking at in 2014/'15 with [REDACTED]. That is when
16 things started to change.

17 He told me that he would get up early
18 every morning about 6 a.m. He would go into work.
19 He was working until the evening hours, 6, 7 p.m.
20 He would come home, help his kids with their
21 homework because he still wanted to be able to do
22 that; and before he knew it, it was already getting
23 close to midnight and he felt that he hadn't even
24 had a chance to take a breath yet because he had
25 been go, go, go since 6 in the morning.

1 He described for me his routine that as
2 someone that, I think, works kind of hard myself I
3 was just shocked by how much he was pushing himself
4 and not letting himself take a moment to breathe.
5 He said he was existing on 15 cups of coffee a day,
6 wasn't eating regularly, and what I also found
7 interesting was that outside of the sexual behavior
8 with ██████ in the midnight hours the poor
9 decision-making kind of moved into other parts of
10 his life.

11 He told me that he had never had any
12 issues with driving, be it tickets or accidents,
13 prior to this; but he got into two car accidents in
14 a short period of time including one where it was in
15 a parking lot where it was his car and only one
16 other car in the entire parking lot. The other
17 example he gave me was that he went and started
18 taking money out of his 401K and trying to play the
19 market, put it in, take it out, put it in, take it
20 out, et cetera. So he was acting very erratically
21 in these other instances as well, which I think is a
22 by-product of him feeling this increase of stress at
23 work.

24 There's obviously no excuse for what he
25 did; and I think despite what he said in the phone

1 calls, the PSIs, whatever, I think he knows that
2 deep down; but I only give these stories to the
3 Court to kind of provide a little bit of context for
4 what would change that would cause him to start
5 doing these things. It's not a situation where
6 Mr. Dunay was a habitual criminal for 20, 30 years
7 and now the house of cards fell down on him.

8 This isn't what we have here. This is
9 somebody who had, Ms. Tempelis said, the
10 all-American life or something to that effect; and I
11 agree but he had this increase of stress and it got
12 the best of him. And, again, that is certainly not
13 an excuse in the legal system and personally it's
14 not an excuse either; but it does provide, I think,
15 a bit of background as to why somebody with all of
16 these great things in their life would throw it all
17 away.

18 Now, with regard to the conduct that has
19 him where we all are today, he told me that these
20 things would happen, you know, generally late in the
21 evening or at least that's how it would begin, that
22 his wife and children would be in bed and that he
23 had been having difficulty sleeping. So he would in
24 his words kind of decide to unwind by going to these
25 adult chat rooms and looking to meet people to

1 engage in a variety of various sexual role-playing
2 scenarios. What I think is important to note is
3 these were adult chat rooms that he was going into;
4 and although it ended up with him going way, way too
5 far with ██████, who was a very young child, this
6 wasn't something that he sought out from the
7 beginning.

8 He didn't decide one day you know what? I
9 want to start a sexual relationship with a
10 13-year-old. He found himself in these chat rooms
11 to unwind at night and he came across ██████. They
12 developed this sort of role-playing relationship
13 where they would engage in these things, which I
14 agree with the State; and I'm sure the Court's going
15 to tell us how it feels as well and I am guessing --
16 I am guessing I am going to agree with your opinion
17 as well. It's very troubling. It's very
18 problematic. I realize that's an understatement but
19 that's as far as I will go.

20 I know that Mr. Dunay agrees with that.
21 In speaking with him he's embarrassed and ashamed at
22 the life he has thrown away and the life he has
23 found himself in. Now, Mr. Dunay understands that
24 this behavior was wrong, especially wrong because he
25 then found out how old ██████ was and he didn't cut

1 things off immediately at that point. He says he
2 knew it was wrong but that at that point [REDACTED] was
3 filling that void for him that he wasn't having at
4 home and that he just enjoyed -- I have used the
5 phrase a few times -- blowing off steam by engaging
6 in those scenarios.

7 I am hesitant to discuss the victim too
8 much because I think it's never appropriate to put
9 the spotlight on the victim here and try to shame
10 them in any way. But I think it's important to note
11 that these instances of behavior, the exchanging of
12 photographs and the various videos and things that
13 were taken and the chats that they had -- these were
14 all -- Excuse me. They were not anything that was
15 coerced out of the victim by Mr. Dunay in the sense
16 that he didn't threaten her or, you know, do
17 anything of that nature.

18 Obviously she's 13 and then 14. She can't
19 consent to these things. He understands that as
20 well. This wasn't something that arose out of
21 threats. This was a product of a 13-year-old
22 stumbling into an adult chat room. Mr. Dunay went
23 down the rabbit hole and did not come out when he
24 had the opportunity to do so. So it's extremely
25 problematic. He gets that. We all get that, but I

1 wanted to at least somewhat address why that
2 behavior came up and how it escalated to the point
3 that it did.

4 Now, as we have discussed earlier,
5 Mr. Dunay has been in custody for nearly
6 three years. The first roughly two years of that
7 was spent in New Jersey. He's now been in the
8 Outagamie County Jail, I think, for nearly a year,
9 maybe three-quarters of a year. During that time
10 he's been hardworking in the jail. He told me that
11 he is the block and floor trustee as part of his
12 duties. He cleans the floors, cleans the tables,
13 cleans the showers, the attorneys' rooms that are
14 kind of adjacent to the cells, that he -- he is not
15 currently doing it; but in the past he's done
16 biweekly bible study, that he works out every day.
17 He reads whatever they have available for him.
18 Whatever novels they have he reads.

19 So I think he makes good use of his time.
20 Where he runs into problems obviously is when he
21 gets on the phone with his dad, and those phone
22 calls make my job a lot more difficult today. I
23 understand that. Again, I would characterize that
24 the same way as I do his behavior with [REDACTED],
25 totally inappropriate and very troubling; but the

1 explanation that he gives me for that is that by
2 being in custody for nearly three years it has made
3 him a very angry individual and he has felt the need
4 to vent. I know I used that word earlier when we
5 were having the discussion about these calls, that
6 he feels the need to vent to his dad and that's why
7 he does these things.

8 It's impossible to know. The State can't
9 know. I can't know. The Court can't know what's in
10 Mr. Dunay's heart and what he actually thinks or
11 what he actually may do or not do, but I think given
12 that he has never shown any predilections towards
13 violence in his life before I tend to take him at
14 his word when he has discussed it with me, that he
15 is venting and unleashing that anger in kind of the
16 only way he can on the phone with his dad. So
17 obviously the Court will make its own determination
18 as to what sort of weight to place on those calls.
19 So I will leave that discussion at that.

20 Now, I agree with a lot of what
21 Ms. Tempelis said in terms of Mr. Dunay needing help
22 and specifically counseling and rehabilitation with
23 regard to his sexual behavior. I do not disagree
24 with any of the proposed conditions of extended
25 supervision that the State is asking for. I think

1 they are all appropriate.

2 The sentence that we are asking that the
3 Court consider is, I would say, in line with what
4 the presentence investigation puts it at the end of
5 that report, the recommendation they give. We are
6 asking for a little bit less of initial confinement
7 time, but we provide a counterbalance by
8 recommending more extended supervision. So with
9 that being said, we are asking that the Court
10 consider five years of initial confinement on
11 Count 1 followed by ten years of extended
12 supervision, and then from there the Court can
13 obviously get creative with all of the other counts.

14 I would ask that the Court consider
15 concurrent time and then, you know, perhaps there is
16 additional extended supervision time or maybe even
17 consecutive probation with imposed and stayed
18 prison. Again, the Court will get creative as it
19 sees fit. In terms of the meat and potatoes of the
20 sentence I think the five years in, ten years out is
21 a reasonable sentence here if we are looking at how
22 long the public needs to be protected from
23 Mr. Dunay, what an appropriate amount of time is to
24 punish him and then also to rehabilitate him.

25 I think he has had -- He has displayed

1 immaculate character over 48 years of his life and
2 he had months of very poor decision-making that
3 needs to be punished and it needs to be punished in
4 the prison system. The Court has to do that, but I
5 think the period of time that the State is asking
6 for is extreme given the nature of his offenses,
7 that it was -- I hesitate to use the word only
8 online contact but that's what it was. It was
9 online contact. He did not engage this -- this
10 child physically in any fashion.

11 So I think five years of time in initial
12 confinement is appropriate here. We would ask that
13 the Court consider something more in that range,
14 which is also what the PSI asks for. I think that
15 was six to eight years. Thank you, sir.

16 THE COURT: Thank you. Detective Laird,
17 you are still on the phone?

18 DETECTIVE LAIRD: Yes, sir.

19 THE COURT: Okay. Mr. Dunay, anything you
20 want to say before you are sentenced?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: If you could, make sure to use
23 the microphone.

24 THE DEFENDANT: I will. Excuse me. Your
25 Honor, I am, first and foremost, a husband and a

1 father of three teenage sons. I am family oriented,
2 love my family. Virtually all of my free time
3 outside of work is spent with my family. I attend
4 church with my family every Sunday. I've coached my
5 kids' soccer and baseball teams. I've made it a
6 point to be present at all of my sons' baseball,
7 soccer, basketball practices and games. I often
8 chaperone for the school field trips.

9 My family actively participates in many of
10 the Starlight New York, New Jersey chapter
11 activities in support of children with pediatric
12 cancer. My son Christian, as you already know, was
13 diagnosed at Age 2 with acute lymphatic leukemia,
14 ALL, and is doing good and in full remission.

15 My favorite family outings include Mets
16 games, the beach, blueberry, strawberry, apple
17 picking, theme parks, and fishing. Our past family
18 vacations included Disney, Disney World, which is
19 provided by the Make-A-Wish Foundation, Niagara
20 Falls, Hershey Park, an extended stay at the beach
21 in Point Pleasant, New Jersey. Our family home
22 activities include movies, video games, swimming,
23 gardening, outdoor games, and long walks.

24 I keep my sons focused on their education.
25 I often spend two to three hours each night checking

1 and helping them with their homework assignments. I
2 teach my sons about computers, software, and
3 electronics. I consider myself a very kind and
4 thoughtful person. I am very generous and like to
5 share. I try to be helpful when I see an
6 opportunity to do so. I often drop what I am doing
7 to help friends and neighbors. I am the go-to guy
8 when someone has computer or networking issues.

9 I love my job and my career choice as an
10 electrical engineer in the power utility industry.
11 I take great pride in that many of the communication
12 protection products I designed in the past 20 years
13 are responsible for keeping the lights on throughout
14 the world. I am very goal-oriented and a hard
15 worker that always strives for success. I always do
16 the best possible job regardless of how simple or
17 complex a given task.

18 I am thrifty and a modest person, and I
19 forego extravagance for practicality. I paid off my
20 home mortgage instead of taking expensive vacations.
21 I invested heavily in my 401K retirement rather than
22 buying new cars. I heat my home by wood stove with
23 firewood that I cut and split myself instead of
24 paying for expensive oil. I repair home
25 electronics, appliances, yard equipment, vehicles

1 myself instead of replacing them or paying for
2 service repairs.

3 I always consider myself a law-abiding
4 citizen. I have never been in any trouble before
5 now. I can be argumentative at times, but I always
6 admit when I am wrong and I take full responsibility
7 for my actions. I often dwell on my failures and my
8 shortcomings and find it difficult to forgive
9 myself. I have always had strong feelings and
10 empathy for people and families that suffer with
11 illness, poverty, disabilities and emotional
12 problems. Feeling the pain is both a blessing and a
13 curse.

14 Your Honor, [REDACTED] and I met in an adult
15 Kik chat room. She told me that she was 18 years
16 old. [REDACTED] and I both sought sexual gratification
17 by engaging in very sexual, explicit role-play. We
18 continued to meet on that chat-room application for
19 sexual role-play until we eventually decided to
20 communicate on Kik messenger.

21 It was clear we were both looking for
22 attention. It was on Kik messenger that [REDACTED] first
23 confided in me that she was only 13 years old. She
24 already knew that I was in my 40s since our first
25 conversation in that, in the adult Kik chat room.

1 On the Kik messenger I became aware that
2 ██████ was very sexually active and that she does
3 like -- she did like older, mature men. We often
4 met on Kik messenger for sexual role-play and began
5 to exchange sexually explicit photos and videos with
6 one another. We also had phone sex using the
7 TextNow phone app, and we masturbated together on
8 Skype video.

9 I became emotionally attached to ██████ as
10 I got to know her, and I believed we were in an
11 online relationship. I have never been to
12 Wisconsin. I never planned a trip to Wisconsin to
13 meet her. I would never agree to actually meet her
14 in person.

15 Your Honor, my version of the interaction
16 between ██████ and myself is the God-honest truth.
17 It is what I stated in my original confession to the
18 detectives, and it's supported by the numerous text
19 conversations in evidence. That said, regardless of
20 the circumstances, once I became aware of ██████
21 true age, I should have ceased all communication
22 with her immediately.

23 I am guilty as charged under Wisconsin
24 state law for my sexual behavior with a minor. Our
25 relationship was certainly socially unacceptable. I

1 am very ashamed of myself for allowing it to happen.
2 My oldest son is even the same age as [REDACTED]. I just
3 don't know what I was thinking.

4 I make no excuses for my behavior, and I
5 accept all responsibilities for my crime. [REDACTED] and
6 her family have my sincere apology for the
7 tremendous pain and suffering that I have caused
8 them. I want [REDACTED] to know that she must never
9 blame herself for this situation. The blame is mine
10 alone. I was the adult and should have ended our
11 conversation.

12 I wish [REDACTED] only happiness and hope that
13 one day she will find it in herself to forgive me.
14 I am sorry, [REDACTED]. I never intended to hurt you. I
15 have also caused tremendous pain and suffering for
16 my own family. My wife struggles each day to
17 support a family and raise our three teenage sons
18 all by herself.

19 THE COURT: Is she your wife or your
20 ex-wife?

21 THE DEFENDANT: She's my ex-wife but --

22 THE COURT: Okay.

23 THE DEFENDANT: I got -- I'm sorry. As
24 you know, I was actually divorced while with her
25 while I was in custody.

1 THE COURT: My understanding is you were
2 divorced in June of 2015, but it was going on prior
3 to that?

4 THE DEFENDANT: No. We weren't divorced.
5 No. We were divorced in, like -- I can't remember
6 the date. It might have been, like, August,
7 September, or October of --

8 THE COURT: In any event it's your
9 ex-wife.

10 THE DEFENDANT: Yeah. I was divorced when
11 we were incarcerated.

12 THE COURT: Okay.

13 THE DEFENDANT: Excuse me. I was the sole
14 source of income and health insurance for my family,
15 and they are ashamed of me too. My -- Excuse me.
16 My youngest son Patrick has taken my absence the
17 hardest. He's currently seeing a psychologist and
18 is on medication. My dad is very ashamed and
19 disappointed with me. My friends can't believe that
20 I could even do such a thing. I let down a lot of
21 people.

22 My wife and I have had experiences,
23 overcame so many traumatic challenges in the past
24 including complications at the birth of our sons
25 Michael and Patrick and the long fight with my son's

1 leukemia. I often ask myself how is it possible
2 that I can do something like this after all we've
3 been through? I'm so ashamed of myself. Excuse me.

4 I love my family and I miss them so much.
5 It's been almost three years since I have last seen
6 or hugged my sons. I don't think there's any way
7 possible that I could ever make up for the lost time
8 with them. I hope one day that my wife and sons
9 will find it in their hearts to forgive me.

10 Your Honor, I broke the law and I deserve
11 to be punished, punished. I just ask you to be
12 fair. I'm a 51-year-old father with three teenage
13 sons that desperately need me in these critical
14 years of their lives. I want to be able to put them
15 through college, be there for them, and help them
16 make the right choices in their lives.

17 Please take into consideration that I have
18 no criminal record and that I have already been
19 incarcerated for almost three years between New
20 Jersey and Wisconsin for this crime. I have had a
21 lot of time to reflect on my crime and its
22 consequences. I often think about all of those that
23 I have hurt -- ██████████ and her family, my wife and
24 kids, my dad, my extended family and friends. I
25 can't express enough just how sorry I am to

1 everyone. Hopefully someday they will all be able
2 to forgive me.

3 I just don't know whether I will be able
4 to forgive myself. I will attend counseling,
5 programs offered to me, and make all required
6 restitution and adhere to all probation requirements
7 upon release from my confinement. I know -- I know
8 that I will never again exhibit this criminal
9 behavior. With the support of family and friends in
10 the community, I know I will be able to get through
11 this. I want to be able to support my family again,
12 be a positive role model for my children, and be a
13 benefit to society.

14 Your Honor, I would like to take this time
15 to apologize for my horrendous statements and
16 behavior on the jail telephone. I know they were
17 recorded and I knew it the whole time. I just
18 didn't care anymore. Venting to my dad was all I
19 had or I would just simply lose my mind. You know,
20 it's either that or punch the other inmates or, you
21 know, cause commotion for the COs; but in that
22 respect I think I've been pretty much, you know, in
23 line with my behavior. Just I just had -- I just
24 want you to know that that's not really the real me.
25 That's not the real me. I would never act on those

1 statements.

2 I have been in jail for almost three years
3 now, and I have just been distraught throughout
4 this, all of the experiences that I have had in the
5 jail. I miss my family so much. I haven't seen or
6 even hugged my kids in almost three years now. I am
7 always sad and lonely. I have no privacy in the
8 jail. I haven't breathed fresh air or felt the sun
9 on my face in a very long time. I have just been in
10 survival mode this entire time. I have had to watch
11 my back, make sure no one steals from me or hits me
12 from behind. That's everyday life in jail.

13 The first two years I was in Jersey I was
14 in general population. Considering my crime, you
15 know, people don't appreciate that and they have it
16 out for you and it wasn't a good situation.

17 I ended up even with cracked ribs as an
18 accidental collateral damage because of an
19 altercation that happened between another CO --
20 between a CO and another inmate while I was in New
21 Jersey, received no medical treatment or pain
22 medication; and it took almost eight weeks for it to
23 finally heal before I could start working out again.

24 I watched my fellow inmate here in
25 Wisconsin, Daniel Kasuit (phonetic), get dragged out

1 of a cell into the day room, killed himself. I
2 watched as they rolled him into a body bag. I used
3 to socialize and play cards with him every day. My
4 first thought about Dan was he's free.

5 Being in jail has taken its toll on me. I
6 just feel helpless. I have even considered suicide
7 myself, and I stated that many times in those many
8 phone messages, but I could never do that to my
9 kids. I just really want to get through this, your
10 Honor, whatever punishment I have in store for me.
11 I just want to get back to my family, back to my
12 kids, back to my life.

13 I beg the Court's forgiveness for my
14 horrendous statements on the telephone. I want you
15 to know that's not me. I'm the person that my kids
16 know. I am their dad. Your Honor, I ask you to
17 have mercy on me for the sake of my children's
18 future. Thank you for your time and fair
19 consideration of my fate.

20 THE COURT: Mr. Dunay, I have a couple
21 questions for you.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: And I am not sure if you can
24 answer them, but I'd appreciate it if you would stay
25 focused with what my questions are and then just

1 simply answer it if you can.

2 THE DEFENDANT: Okay.

3 THE COURT: I was provided a whole series
4 of telephone calls that you made from the jail and
5 those have been referenced many different times this
6 afternoon. Understood?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: And, first of all, you said
9 that wasn't you on those telephone calls. I want to
10 make sure that it was you on those telephone calls,
11 correct?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Okay. And you identified
14 those as horrendous statements. You said that
15 twice. Do you remember that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: What was it about your
18 statements that you believe made them horrendous?

19 THE DEFENDANT: My threats to you, the
20 prosecutor, the justice system in general -- They
21 are horrendous.

22 THE COURT: Threats to the judge, to the
23 district attorney, and to the system?

24 THE DEFENDANT: Yes.

25 THE COURT: You were going to cause --

1 THE DEFENDANT: To the government,
2 everything. You know, I made a lot of just totally
3 crazy statements that I never meant.

4 THE COURT: I am not asking for your
5 intentions.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: I am asking for you to
8 identify which statements that you made that you
9 consider to be horrendous.

10 THE DEFENDANT: All of them, almost all of
11 them.

12 THE COURT: Okay.

13 THE DEFENDANT: Every time I got in
14 conversation with my dad, I -- I just released my
15 frustrations.

16 THE COURT: Okay. So you have identified
17 them?

18 THE DEFENDANT: Yes.

19 THE COURT: The one that you didn't bring
20 up right now was all of those statements that you
21 made about [REDACTED]. So I don't know if that was --
22 you don't think those are horrendous or you do?

23 THE DEFENDANT: No. They were just --
24 they were -- They were, frankly, awful.

25 THE COURT: Okay.

1 THE DEFENDANT: They were awful.

2 THE COURT: Not horrendous? Those ones
3 are awful? The other ones are horrendous?

4 THE DEFENDANT: They were horrendous as
5 well.

6 THE COURT: Okay.

7 THE DEFENDANT: I mean unacceptable.

8 THE COURT: All right.

9 THE DEFENDANT: Unacceptable.

10 THE COURT: So one of the factors that I
11 need to take a look at today, and we talked on it
12 probably two hours ago, was I need to take into
13 consideration your risk of reoffending.

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And that is a complicated
16 analysis but in part you heard me say before that I
17 think you are a pretty manipulative, deceitful,
18 dishonest, selfish individual. You heard me say
19 that?

20 THE DEFENDANT: Yes, sir, I did.

21 THE COURT: Okay. And I believe I've been
22 doing this job for 13 years; and I have sentenced a
23 lot of people, thousands every year; and many of
24 them have committed very similar violations that you
25 have.

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And my take on it is that when
3 the individual like you is making violent threats
4 about me, the system, the district attorney, the law
5 enforcement officers and the victim, that that says
6 something about their character or their personality
7 that is not good or negative. Do you agree or
8 disagree with that?

9 THE DEFENDANT: I agree with you, sir.

10 THE COURT: Okay. And I also factor in
11 that it's been years removed; and I sit here,
12 Mr. Dunay, and I am listening to you and I hear you
13 say you feel helpless. You are so ashamed of
14 yourself and you accept all responsibilities. And
15 to the extent on the messages that I listened to,
16 which was not all of them, it's just the ones that
17 Attorney Tempelis asked me to review, the things
18 that I heard from you repeatedly, not just one
19 venting conversation but in conversations that
20 really span six or seven months and were a number of
21 times, is that it was everybody else's fault that
22 you have yourself in the system.

23 I am prepared this afternoon to play each
24 one of those, if you want. We can stop the tape and
25 play it. Then I can say, well, what did you mean by

1 that? What did you mean by that? But there were
2 many, many sort of egregious or what you call
3 horrendous or awful comments that make very little
4 sense if one were to conclude that you are someone
5 who has taken full responsibility and you want to
6 move forward and do well.

7 So I would like you to try to explain that
8 because I don't believe you have accepted
9 responsibility, and I don't believe that you have a
10 good chance of doing well, and that's maybe hard for
11 me to say because I wish you did. I wish I could
12 sit here when I look at the pictures of your kids
13 and I read the letters on how they are struggling.
14 I wish I could come to the conclusion that you are a
15 low risk to reoffend.

16 So I would like you to try to explain how
17 some good guy who has taken all of the
18 responsibility in the world like you claim to have
19 taken -- how you would make such horrendous or awful
20 statements that threaten violence to all of us who
21 have nothing to do with your crimes.

22 THE DEFENDANT: Your Honor, there is no
23 excuse for those phone calls.

24 THE COURT: I didn't ask for an excuse.

25 THE DEFENDANT: I know.

1 THE COURT: So don't -- I don't appreciate
2 you twisting my words.

3 THE DEFENDANT: I am not.

4 THE COURT: That's the manipulative part.
5 If I thought it was a waste of time to ask you those
6 questions, I wouldn't ask them; but I am trying to
7 be up-front with you and tell you how I feel about
8 you --

9 THE DEFENDANT: I understand.

10 THE COURT: -- and about your case. What
11 I mentioned before is what I heard in those calls
12 which I just listened to in the last 48 hours, is
13 consistent with everything I have ever seen from you
14 in the courtroom, with the individual who doesn't
15 accept responsibility, is dishonest, conniving,
16 manipulative. So when I listened to it I was
17 surprised because it's not real often that we have
18 individuals threatening to do violence in the
19 courtroom, but I get threatened every week and I
20 don't lose a lot of sleep over it. But I do when
21 somebody comes in and says I accept real
22 responsibility. That wasn't me on the phone saying
23 all of those bad things. It's nobody else's fault.
24 I would like you to try to explain that to me.

25 THE DEFENDANT: Your Honor, I have no -- I

1 have had no previous history of any kind of
2 violence.

3 THE COURT: I don't care about your
4 previous history when it comes to that. When
5 somebody's threatening to do harm to me or to do
6 harm to the prosecuting attorney who is sitting
7 about 8 feet away from you and I am concerned enough
8 that I have three officers within about 6 feet of
9 you, I am trying to think back, Mr. Dunay, of the
10 number of times in my life where I have had this
11 amount of security in the courtroom; and it's maybe
12 once a year and I don't even think it was that.

13 THE DEFENDANT: I have just reached a
14 point of frustration being in -- have you ever --
15 Have you been in jail for three years?

16 THE COURT: This isn't your opportunity to
17 ask questions.

18 THE DEFENDANT: I know. It's -- As I
19 told you before, it's just everything has just been
20 building up. I have been prodded by
21 four jurisdictions with my case. I have been
22 shipped around. I've gotten hurt. All of the
23 things that I have -- I never -- I am just
24 distraught, your Honor.

25 THE COURT: Okay. My last --

1 THE DEFENDANT: I --

2 THE COURT: My last set of questions have
3 to do with something, and it's something we will
4 come back to. Ms. Tempelis referenced a lot of your
5 communications with this 13-year-old --

6 THE DEFENDANT: Yes.

7 THE COURT: -- after you knew she was 13.

8 THE DEFENDANT: Yes, sir.

9 THE COURT: And to some degree I'm
10 embarrassed to even repeat them here but it's my job
11 to.

12 THE DEFENDANT: Yes, sir.

13 THE COURT: So you say things like then
14 fuck you in the pussy and ass before we both
15 collapse in exhaustion. You're a very good
16 girlfriend and that was in response to where she
17 sent you a video saying please, daddy, stick it up
18 my ass; and then you say how you are coming. Then
19 it said show daddy what a whore you are, my bitch,
20 my whore, little fuck doll. Come, bitch, now.

21 Then you indicate again take my cock deep
22 in your tight ass like a whore. I will start easy
23 on your ass but eventually just tear into your deep
24 part, driving my cock deep. Daddy's going to come
25 in your ass. I could go on and on, and they are

1 graphic and one is worse than the next.

2 You sort of dodged those in your comments.
3 I didn't hear anything other than you are so ashamed
4 of yourself. What I have trouble trying to
5 understand is how this good guy -- you are
6 proclaiming yourself to be a good guy who is safe
7 and a low risk to reoffend -- says and does those
8 things by video, by pictures. It's not just typing
9 stuff out. You are masturbating live with her.

10 THE DEFENDANT: Yes, sir.

11 THE COURT: How does a good guy do that
12 for months after months?

13 THE DEFENDANT: I made the biggest mistake
14 of my life.

15 THE COURT: You didn't answer my question.

16 THE DEFENDANT: How does a good guy do
17 that?

18 THE COURT: See, well, let me just be
19 right up-front, Mr. Dunay. I have a 13-year-old
20 daughter.

21 THE DEFENDANT: Yes, sir.

22 THE COURT: And you have said it numerous
23 times today and at other times. She looks like a
24 woman, this girl that you are doing all of this
25 stuff to. She's 13; and I don't know if you

1 actually really believe that a 13-year-old, no
2 matter how mature they are, is a real woman. She
3 has real breasts. Then you are doing and saying
4 those things with her, masturbating live with her,
5 getting off sexually.

6 I am trying to figure out because I have
7 reached the conclusion that you are not a good guy.
8 Again, I will say that when I sentence you in a few
9 minutes but I'd like to -- Then I read all of these
10 letters about you and most of them or many of them
11 are saying, gosh, he was good. He coached the
12 teams. He was involved in this. He was a good
13 worker. I think I have a hard time trying to
14 understand how a good person does those things month
15 after month, time after time, telling a 13-year-old
16 that you are going to tear her ass apart. So I'd
17 like you to try to explain that.

18 THE DEFENDANT: (No response.)

19 THE COURT: You are looking down. You are
20 breathing heavy.

21 THE DEFENDANT: I am just -- I'm -- I'm
22 distraught right now.

23 THE COURT: So am I.

24 THE DEFENDANT: Yeah.

25 THE COURT: But we're probably distraught

1 for different reasons.

2 THE DEFENDANT: Yeah.

3 THE COURT: Okay. Quite frankly, I am not
4 asking for your mindset.

5 THE DEFENDANT: I am trying to clear my
6 head so I can -- your Honor, I -- Something happened
7 to me in late 2014. I was under a lot of pressure
8 in my life. I -- I think at that point I was in a
9 path of self-destruction, you know, because of my
10 workload, the company being sold, pressures on me.
11 I became -- I was basically the acting manager for
12 my company.

13 THE COURT: I have heard that story.

14 THE DEFENDANT: I know. It's true.

15 THE COURT: Listen, Mr. Dunay. It may be
16 true. What does that have to do with telling a
17 13-year-old that you are going to rip her ass apart?

18 THE DEFENDANT: I am not making -- trying
19 to give excuses for that. There's no excuse for
20 that.

21 THE COURT: I'm trying to connect the
22 dots. Where does a good person who is going through
23 stress --

24 THE DEFENDANT: I --

25 THE COURT: -- somehow get off with

1 masturbating with a 13-year-old and telling her you
2 are going to do all of this stuff to her?

3 THE DEFENDANT: I can't answer that, your
4 Honor. That's why we originally asked for a
5 psychologist to talk to me about this.

6 THE COURT: Okay.

7 THE DEFENDANT: I -- I acknowledge I need
8 help.

9 THE COURT: What type of help?

10 THE DEFENDANT: Therapies for my sexually
11 deviant behavior.

12 THE COURT: You are sexually deviant?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You prefer teenage girls?

15 THE DEFENDANT: I wouldn't say it was a
16 preference, your Honor.

17 THE COURT: You are the one. Let me ask
18 it a different way. You just told us that you are
19 sexually deviant.

20 THE DEFENDANT: Yes.

21 THE COURT: What's your deviance?

22 THE DEFENDANT: That I have spoken with, I
23 have engaged with the role-play with [REDACTED] and
24 others, other girls.

25 THE COURT: How many others?

1 THE DEFENDANT: Some of them I knew
2 their -- A lot of people I knew their ages. Some I
3 didn't know their ages, technically all, you know,
4 adults. Some were teens. Some lied. A lot of them
5 lied about their ages.

6 THE COURT: Notice how you didn't answer
7 the question?

8 THE DEFENDANT: I -- Yes, I have.

9 THE COURT: Okay. So you are -- You said
10 you are sexually deviant. What does that mean to
11 you?

12 THE DEFENDANT: That I am willing to --
13 that my behavior with ██████ for instance -- I --
14 I -- I didn't say no. That's a serious problem,
15 that I didn't tell her no.

16 THE COURT: Okay.

17 THE DEFENDANT: At that point, you know, I
18 knew there was something.

19 THE COURT: At any time in your life prior
20 to today have you requested assistance for your
21 sexually deviant behavior?

22 THE DEFENDANT: No, no, I haven't, not
23 until now.

24 THE COURT: Okay. And the reason you
25 wouldn't have sought help back in 2014 or 2015 was

1 what?

2 THE DEFENDANT: Because I was in jail
3 and --

4 THE COURT: No, you weren't.

5 THE DEFENDANT: Excuse me?

6 THE COURT: In 2014 you weren't in jail.

7 THE DEFENDANT: End of 2014. I'm sorry.

8 2014. Before I was incarcerated, you mean?

9 THE COURT: Yes.

10 THE DEFENDANT: No, no, not before.

11 THE COURT: Why didn't you seek help for
12 your sexual deviancy then?

13 THE DEFENDANT: When I knew that I had a
14 problem? You mean before? I'm sorry.

15 THE COURT: You are twisting and
16 manipulating again.

17 THE DEFENDANT: No, I'm not, no. I'm
18 trying to understand timeframe. You are suggesting
19 that I asked for help before I was incarcerated,
20 your Honor?

21 THE COURT: I am done. I am ready to
22 sentence you. What we are going to do is take a
23 break, allow everybody to go to the bathroom. The
24 staff has been going for over two and a half hours.
25 We have one other case, Mr. Duros. So you guys can

1 move on and we will start back up in maybe ten or
2 12 minutes.

3 (Off the record.)

4 THE COURT: All right. We will go on the
5 record in 17-CF-1007 -- I'm sorry -- 15-CF-470,
6 State of Wisconsin versus Kevin Dunay; and Mr. Dunay
7 is here and with Attorney Buckett and Attorney
8 Tempelis is here. Detective Laird, are you on the
9 phone still?

10 DETECTIVE LAIRD: Yes, I am, your Honor.

11 THE COURT: Okay. Mister --

12 MS. TEMPELIS: I believe Officer Stahmann
13 might be on the phone.

14 THE COURT: Okay. Investigator Stahmann,
15 are you back on the phone?

16 OFFICER STAHMANN: I am, your Honor.

17 THE COURT: Thanks, Ms. Tempelis.

18 Mr. Dunay, you are here to be sentenced with respect
19 to four different criminal offenses. There's been a
20 couple of hours' worth of arguments and comments and
21 conversation today along with the presentence report
22 and all of the other letters and documentation that
23 we have received. I am taking all of that into
24 consideration in terms of your sentence.

25 As the attorneys have alluded to, it's my

1 responsibility today to take into consideration the
2 seriousness of the offenses, your character, and the
3 risk that you have of reoffending and then try to
4 structure your sentence to accomplish the sentencing
5 goals of punishment, rehabilitation, deterrence, and
6 community protection.

7 There are a lot of things that I'm going
8 to say but one of the first things that I absolutely
9 need to say because I think it's critical is that I
10 think you are one of the most conniving,
11 manipulative, dishonest, and dangerous individuals
12 that I have ever had an opportunity to meet. We can
13 take that into consideration in all of those factors
14 in many different ways. And I say that for many
15 different reasons, but the conversation that I had
16 with you in those last five minutes is a good
17 example.

18 Your telephone messages or your
19 conversations with your dad is another good example.
20 You're very smart. You just read a 15-minute
21 statement to me that you had written out on those
22 sheets of paper, and that presentation was
23 thoughtful. It was articulate. It was organized
24 and to some smaller degree it was almost believable.

25 You come across in some ways trying to be

1 sincere, but my belief in this case is the real
2 heart of this and your attorney said none of us are
3 going to know what truly is in your heart. I think
4 that's a good comment, and I don't know really
5 what's in your heart. But I have done this long
6 enough and been involved with enough people that I
7 think deep inside you have some very serious issues
8 and you have exhibited or displayed those issues in
9 a multitude of ways from the time that you started
10 engaging in this relationship with [REDACTED] and
11 continuing right up until today when you have
12 expressed yourself here in court, that you have a
13 well-written statement and then when you get asked a
14 question you sort of try to manipulate the question.

15 You manipulate the answer and you refuse
16 to address those difficult questions square on. You
17 used a comment today that I forget exactly what you
18 said, but you were troubled or bothered or your mind
19 wasn't clear and that's obvious. But I think that
20 as -- that you are the guy who is sitting there
21 telling a 13-year-old girl you are going to rip her
22 ass apart. You are going to come all over the
23 place. You are calling her your little girl, whore,
24 slut, bitch; and you are going to do all of these
25 nasty sexual things with her. And I am convinced

1 that that is a significant part of who you are and
2 who you will be whenever it is that you get out.

3 When I listened to the recordings and you
4 make very horrendous statements, if I use your term,
5 or threatening and violent statements that are
6 inappropriate on so many different levels, if you
7 use my term, I think that truly is who you are.
8 You've expressed that as I'm an angry guy and I am
9 venting my frustrations and I think you are angry.

10 THE DEFENDANT: It's been too long.

11 THE COURT: I'm sorry?

12 THE DEFENDANT: I've been in jail too
13 long.

14 THE COURT: Okay. And some of us think it
15 hasn't been long enough. But, you know, you think
16 you've been in jail too long so somehow you can
17 justify threatening individuals involved in the
18 system -- the judge, the DA, the officers, the
19 system -- and we're all messed up and it's not you.
20 And the reality, you know, Mr. Dunay, is as I sit
21 here today I think to myself wouldn't it be nice if
22 none of us had to spend our time dealing with you in
23 these issues? Wouldn't it be really nice if that
24 47-year-old guy out in New Jersey would have acted
25 with some amount of common sense and decency and

1 respect, if not for himself but for his family and
2 the 13-year-old girl in Wisconsin, that he would
3 have refrained from engaging in all of these
4 criminal conversations and exchanges with that young
5 kid?

6 Wouldn't it be really nice if that guy who
7 is a pervert, who gets off sexually by doing these
8 things and saying these things to the 13-year-old,
9 when he's in custody was at least mature enough or
10 responsible enough or smart enough that he's not
11 going to blame people who didn't commit that
12 criminal offense, that he understands that he's been
13 in jail for three years because he did something
14 that society believes is very serious and he's been
15 in jail for three years because society believes
16 that he continues to be a serious threat to people
17 in the community?

18 But you refuse to accept what any of us
19 think might be right or wrong or unacceptable versus
20 acceptable. You made a comment during your written
21 statements and I found it to be interesting to
22 whatever degree interesting is when I listen to you
23 and you said what you had done was socially
24 unacceptable with ██████. I am not sure why you
25 added the word socially. What you did was

1 unacceptable socially, legally, morally, within your
2 marriage, as a father, as a responsible engineer,
3 ethically. You can put any word in front of it, but
4 somehow you minimized it by saying socially
5 unacceptable. And I thought it was interesting that
6 you didn't talk about how -- Well, you did. You
7 said it's a crime in the state of Wisconsin. It's
8 really a crime in every state.

9 THE DEFENDANT: I'm an engineer. I am
10 always just very specific, you know? I can't
11 explain it.

12 THE COURT: You are not real specific when
13 I asked you how a good guy does those things. Then
14 you are vague and you are confused and you don't
15 know how to answer it.

16 THE DEFENDANT: Because I don't have a
17 good answer for that because it's unacceptable and
18 it's immoral as you said. I shouldn't -- Your
19 Honor, at the first day I was in jail for this in
20 New Jersey I learned my lesson. I would never, ever
21 do this again.

22 THE COURT: And if I believed you,
23 Mr. Dunay, then I would probably sentence you
24 different today.

25 THE DEFENDANT: I know.

1 THE COURT: But I am of the opinion today
2 that these are very serious crimes, not just by
3 title, not just because you've been convicted of
4 them, not because there's a maximum sentence that
5 could put you in prison basically for the rest of
6 your life but because of the nature of your conduct,
7 the number of communications, the content of that
8 communication, the sort of vulgar and ridiculous
9 comments that are being made when you are 35 years
10 older than this teenager; and you manipulated her.

11 You handled her the way that you could to
12 be sexually gratified, which you have acknowledged
13 multiple times that this was all done for sexual
14 gratification; and then somehow you are able to
15 twist it to say it felt like you had this ongoing
16 sexual partner, which I expect you think is legit.

17 THE DEFENDANT: No. I was being honest.

18 THE COURT: That is all messed up.

19 THE DEFENDANT: Yeah.

20 THE COURT: With respect to your risk to
21 reoffend, I have accepted what Attorney Buckett has
22 indicated. I am sure there's some expert somewhere
23 that will come in and say you are a low risk and I
24 would say I disagree with that. The presentence
25 report indicates on page 26 that on the Static-99R

1 you came back with a total score of two, which puts
2 you as an average risk category for being charged or
3 convicted of another sexual offense.

4 As Ms. Tempelis indicated, that doesn't
5 take into consideration all of the other factors
6 that we know about you. That Static-99 test isn't
7 low risk. It's average risk, and then I think we
8 have to take into consideration what you have said
9 today, what you haven't said today, and then all of
10 those things that have been said while you've been
11 incarcerated. It's been an ongoing blame game.

12 THE DEFENDANT: Your Honor, I know deep in
13 my heart I am to blame.

14 THE COURT: I'm not sure why you still
15 feel like you need to talk.

16 THE DEFENDANT: Sorry.

17 THE COURT: Nobody's asking you a question
18 but, you know, that arrogance that you have that you
19 feel at liberty to just interrupt and say whatever
20 you want to say is sort of consistent with what I am
21 trying to say when I evaluate your character.
22 There's no respect that you have for anything that
23 Ms. Tempelis said or anything that I am saying. You
24 were lowering your head and moving in a very
25 disrespectful way during most of Attorney Tempelis'

1 comments similar to what you are doing right now.

2 THE DEFENDANT: I'm distraught, your
3 Honor.

4 THE COURT: Okay. That's okay to be
5 distraught.

6 THE DEFENDANT: I'm sorry. I'm
7 distraught.

8 THE COURT: And your attorney is telling
9 you to stop talking and you are disregarding and
10 disrespecting him too, you know, because, of course,
11 he doesn't know anything. He's just an attorney so,
12 again, it's just another example that we are all to
13 blame and you are the victim in this but you are not
14 the victim.

15 Your character, Mr. Dunay, and I say this
16 in as much a respectful way that I can. I can't
17 imagine meeting anyone with much worse of a
18 character and I don't say that to too many people.
19 I look at these pictures of your boys and obviously
20 there's been something good in their life. They
21 look like nice kids, well taken care of; and they
22 all have their own issues like most kids do.

23 And I try to say, well, he had some part
24 of that. There must be something good in there.
25 Then I read all of these letters; and I say, well,

1 there must be something good that all of these other
2 people have seen for a number of years. None of it
3 is consistent with what I have seen or observed,
4 watched, listened to the way you are sitting right
5 now, the sort of disrespectful posture that you take
6 on.

7 And maybe what you answered when we were
8 talking was when you said something snapped in 2014
9 and you changed, maybe there's some merit to that.
10 I don't know, but I have really focused on from that
11 2014 period up until now, and I am looking at the
12 character that you have today, and as I have
13 indicated it's low. It's as low as I can go when I
14 evaluate it. I don't have any trust or faith that
15 you will do the right thing or the responsible thing
16 or be accountable at any time going forward in the
17 future.

18 You mentioned you might need counseling
19 for your sexual deviance. Your facial expression
20 when you said that -- I think you realized that you
21 said something that you shouldn't have said and you
22 tried to hem and haw on the answer. That's fine. I
23 don't really care but anybody who is engaging in
24 that activity with ██████ -- You obviously have some
25 deviant sexual issue. We can put many different

1 terms on it.

2 That's not even the most important part of
3 this case. The most important part in this case in
4 my opinion is the way that you have failed to
5 properly address it. You manipulate. You lie. You
6 misrepresent. You are disrespectful to everybody.
7 You become violent on occasion. You are threatening
8 on other occasions. You vent. You are angry, and
9 all of those things lead me to believe that you are
10 a high risk to reoffend in many different ways.

11 That's not even taking into consideration
12 all of the other relationships that you had going on
13 during the time that you were on the internet.
14 Maybe 15 years ago when you were 35 maybe you would
15 have been a low risk to reoffend, but I am not
16 evaluating the person at the age of 35. I am
17 evaluating you today. That's different than what
18 everybody else that submitted letters is evaluating.
19 I take into consideration all of those good things
20 from your past and as well as what's gone on in the
21 last four years. That's sort of my result.

22 I think the community needs to be
23 protected from you. I think you need to be
24 protected from yourself. I think you are a danger
25 to hurt people physically, sexually, and in other

1 ways. I am concerned in a -- as I sit here today;
2 and just so the record is clear, I feel some
3 concerns for Attorney Buckett and his safety and
4 some responsibility to protect him just on the way
5 that you just sighed really loud so the whole
6 courtroom could hear and the officers in the
7 courtroom have relocated, I would imagine, because
8 they sense the same dangers. So they have gotten
9 closer, and they are positioned differently. They
10 are in a position to make sure everybody else is
11 safe.

12 Again, when we are doing that in this
13 courtroom, is that a type of person that we trust to
14 be released in the community today? Absolutely not.
15 Or at any time in the near future? Answer,
16 absolutely not. So there's a lot more that I could
17 say, Mr. Dunay; and I am not sure it's necessary. I
18 expect you'll appeal this and it can go up and have
19 others analyze whether or not I have covered my
20 bases.

21 The summary is it's a very serious
22 violation. You have low character. You are a
23 medium to high risk to reoffend even with a
24 potential expert or experts indicating something
25 different.

1 You indicated that all you are asking for
2 today is that we be fair. I pride myself on being
3 fair. I expect you think I am not fair because you
4 are not going to get the result that you are asking
5 for, and I don't really judge fair on results. I
6 judge it on the process and you can be rest assured
7 that I have thought a lot about you and this case
8 and what the right thing to do is not only for you
9 but for your family, for this community, and for
10 ██████ and all of the other people involved.

11 And with that being said, your sentence is
12 the following. The recommendations in this case --
13 The State recommends 25 years, 15 of initial
14 confinement and ten of extended supervision. The
15 defense recommended 15 years with five years in and
16 ten years of extended supervision. The presentence
17 report recommends anywhere between 11 and 14 years
18 including six to eight years of initial confinement
19 and then the rest of it, being concurrent.

20 I am going to set your sentence,
21 Mr. Dunay, so that all four counts are running
22 consecutive to one another, which means they add to
23 each other and it's as follows. Count 1, you are
24 going to be sentenced to the Wisconsin state prison
25 system for a period of 18 years. Your initial term

1 of confinement in prison is eight years. The time
2 you will serve on extended supervision is ten years.
3 That will be consecutive to Counts 2, 3, and 4.

4 With respect to Count 2, your sentence is
5 to the Wisconsin state prison for a period of time
6 of eight years. Your initial term of confinement in
7 prison is two years. The time you will serve on
8 extended supervision is six years. That sentence
9 will be consecutive to Counts 1, 3, and 4.

10 With respect to Count 3, I am going to
11 sentence you to the Wisconsin state prison system
12 for a period of three years. Your initial term of
13 confinement in prison is one year. The time you
14 will serve on extended supervision is two years.
15 That sentence is consecutive to Counts 1, 2, and 4.

16 THE DEFENDANT: Consecutive?

17 THE COURT: With respect to Count 4, I am
18 going to sentence you to the Wisconsin state prison
19 system for a period of three years. Your initial
20 term of confinement in prison is one year. The time
21 you will serve on extended supervision is two years.

22 That total sentence then is 12 years of
23 initial confinement followed by 20 years of extended
24 supervision. I thought that it's extremely
25 important that you be supervised. This will allow

1 you to be supervised well into your 80s. You are
2 shaking your head in defiance.

3 THE DEFENDANT: Twelve years is way too
4 much, your Honor.

5 THE COURT: You will be given credit for
6 the agreed-upon time of 982 days.

7 THE DEFENDANT: Way too much time, your
8 Honor.

9 THE COURT: The clerk is going to provide
10 you a copy of this. While you are on extended --

11 THE DEFENDANT: Way too much time, your
12 Honor.

13 THE COURT: Mr. Dunay, don't interrupt me.

14 THE DEFENDANT: That's not fair.

15 THE COURT: Okay. Don't interrupt.

16 THE DEFENDANT: What the hell difference
17 does it make at this point?

18 THE COURT: It can make a lot of
19 difference.

20 THE DEFENDANT: It doesn't make a lot of
21 difference.

22 THE COURT: It can make a difference.

23 THE DEFENDANT: That much time?

24 THE COURT: So here is going to be your
25 last warning, Mr. Dunay. I don't want to change

1 things, make things worse, get you in additional
2 trouble. So I am instructing you to quit
3 interrupting me. Mr. Buckett, have you had a
4 conversation with him to try to encourage him to
5 follow that?

6 MR. BUCKETT: Can I have one moment, sir?

7 THE COURT: Yes. The record should
8 indicate that Mr. Buckett is consulting privately
9 with Mr. Dunay. Good, Mr. Buckett?

10 MR. BUCKETT: Yes, sir. Thank you for
11 that.

12 THE COURT: Thank you. Mr. Dunay, while
13 you are on extended supervision, you will be
14 required to follow certain terms and conditions.
15 Those terms and conditions will require that you
16 comply with the Wisconsin sex offender registry
17 program, that you submit a DNA sample, that you
18 participate and cooperate with any assessments,
19 treatment, or counseling as recommended, that you
20 have no contact whatsoever with K.M.C., and by no
21 contact that means anything directly or indirectly
22 with her, her family, her school, or her employment.
23 I'm going to order that you have no contact with any
24 person under the age of 18 without first receiving
25 approval from your agent.

1 I'm going to order that you make payment
2 of all court costs, supervision fees, and
3 obligations as a condition of your probation. You
4 are going to be prohibited from using any computer,
5 cellular device, or any other device that would
6 allow you to access or be involved with the internet
7 or with social media accounts unless you first
8 obtain approval from your agent. I'm going to order
9 that you pay restitution. That amount is in dispute
10 so my office will be in contact with you guys. I
11 imagine we need to schedule a hearing.

12 MR. BUCKETT: Your Honor, I think that
13 would be a good idea. Then I would just ask the
14 State if they can at all give me any more
15 specificity. My thought is that the hearing might
16 then come off the calendar but I think that's
17 probably the best route for now.

18 THE COURT: So, Ms. Tempelis, can you give
19 as much documents in the next month?

20 MS. TEMPELIS: Yes.

21 THE COURT: Okay. So 30 days from today
22 the State will provide you those documents. My
23 office will get in contact with the two of you
24 tomorrow; and we'll schedule a restitution hearing
25 for 60 days from now, which will give you a chance

1 to go through it, Mr. Buckett. Is that good or do
2 you want it sooner?

3 MR. BUCKETT: No. That's satisfactory.
4 Thank you.

5 THE COURT: Sixty or 90 days. At that
6 restitution hearing Mr. Dunay can appear from prison
7 so we won't transfer him back here. He will appear
8 by telephone. Any objection to that, Mr. Buckett?

9 MR. BUCKETT: One moment.

10 THE COURT: The clerk just reminded me of
11 video conference so if the prison cooperates.

12 MR. BUCKETT: It would be his preference
13 to be brought here, judge.

14 THE COURT: Okay. I don't really care
15 what his preference is unless there's some
16 opportunity.

17 MR. BUCKETT: I think he would have the
18 right to be here, if I am not mistaken.

19 THE COURT: Okay. For what reason?

20 MR. BUCKETT: Well, I think for any
21 hearing he has the right to be present in the
22 courtroom.

23 THE COURT: Okay. And so you are
24 objecting to the video conference?

25 MR. BUCKETT: Well, on his behalf.

1 THE COURT: I just --

2 MR. BUCKETT: Yes.

3 THE COURT: With the safety issues we have
4 taken up the time of the four officers here; and
5 given the safety issues, the transportation costs,
6 the risks that Mr. Dunay poses, in my opinion what I
7 am going to do is I'm going to say it's going to be
8 by video conference. We will provide you an
9 opportunity, Mr. Buckettt, if you are here, to
10 consult with him privately during that hearing or
11 you can go to the prison and be with him; but I
12 expect it's just documentation and maybe one or two
13 witnesses.

14 MS. TEMPELIS: Yes.

15 THE COURT: And then, Mr. Buckettt, just
16 let me know in writing in the next 30 days if you
17 think there's some argument that makes that
18 unlawful. I want to make it lawful but I also want
19 to make it -- try to make it practical and safe for
20 everybody. And if [REDACTED] going to be here in
21 person, which maybe she has to be here or her mom
22 has to be, I don't think it's beneficial to have
23 Mr. Dunay here unless it's absolutely critical.

24 MR. BUCKETT: I completely understand, and
25 I will take a look at that. If there's anything I

1 see that is different, I will certainly let the
2 Court know.

3 THE COURT: Okay. So that's the
4 restitution. Anything else in terms of conditions,
5 Ms. Tempelis?

6 MS. TEMPELIS: It just would be
7 assessments and counseling per agent and then there
8 was extradition costs from New Jersey.

9 THE COURT: Okay. I said those. I did
10 say the counseling and assessments, and as a
11 condition of extended supervision he is also
12 required to pay the extradition amount. Do we know
13 what that is?

14 MS. TEMPELIS: I do. It's \$1,140.

15 THE COURT: Okay, so \$1,140. If you
16 violate any of those conditions of extended
17 supervision, Mr. Dunay, you'll be returned to prison
18 to serve not more than the time remaining on your
19 sentence. The time remaining on your sentence is
20 the total length of your sentence less any time that
21 you have served in custody. You are not eligible
22 for the Challenge Incarceration Program. You are
23 not eligible for the Earned Release Program. A copy
24 of that written explanation of determinate sentence
25 has been placed in front of you, Mr. Dunay, so you

1 have that for your information. Anything else frc
2 the State, Ms. Tempelis?

3 MS. TEMPELIS: No. Thank you.

4 THE COURT: Anything else, Mr. Buckett,
5 from your side?

6 MR. BUCKETT: No. Thank you.

7 THE COURT: All right. I appreciate both
8 of your work and time this afternoon, and thanks to
9 the officers. We're adjourned.

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(Proceedings concluded.)

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1 STATE OF WISCONSIN)

2) SS:

3 OUTAGAMIE COUNTY)

4

5

6 I, TERRA TORRES, RPR, RMR, CRR, do hereby
 7 certify that I reported the foregoing matter and that the
 8 foregoing transcript, consisting of 120 pages, has been
 9 carefully compared by me with my stenographic notes as
 10 taken by me in machine shorthand and by me thereafter
 11 transcribed and it is a true and correct transcript of
 12 proceedings had in said matter to the best of my
 13 knowledge.

14

15 Dated this 26th day of March, 2018.

16

17

18

19

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21

22

(Electronically signed by Terra Torres)
 TERRA TORRES, RPR, RMR, CRR, CRC
 Official Reporter

23

24

25

Case 2015CF000470

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02-20-2019

Clerk of Circuit Court

Outagamie County

2015CF000470

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February 20, 2019

Hon. Mark McGinnis
320 S. Walnut St.
Appleton, WI 54911

RE: State v. Kevin Dunay; Case 15CF470

Dear Hon. Mark McGinnis:

I was appointed by the SPD to represent the defendant on appeal in the above noted case. In furtherance, I am writing for various reasons.

First, Dunay asks this court to recuse itself from this case. As this court is likely aware, the State recently charged Dunay in 18CF868 with six counts of threat to a judge, prosecutor, or police officer. Further, in reviewing the facts of that case, the facts alleged that Dunay threatened to kill this judge. It appears this court is aware of that case, as CCAP indicates all judges within this county have recused themselves from that case. If there was any question of a reason to recuse itself on Case 15CF1269, there certainly appears to be reason now. For that reason, Dunay requests this Court recuse itself on this case so that another judge can review the postconviction motions. If this court does not recuse itself, Dunay will file a formal motion requesting it do so as to preserve this argument on appeal.

Second, Dunay filed a motion to withdraw pleas. Dunay would ask to schedule a hearing to address this motion.

Third, in the event the motion to withdraw pleas is denied, Dunay asks to address his motion for resentencing.

Fourth, in the event that motion for resentencing is denied, Dunay asks to hold a restitution hearing. Regarding restitution, at sentencing, Dunay indicated he was contesting restitution, and the sentencing court indicated it would have its assistant schedule a restitution hearing. See page 115 of Transcript. However, no restitution

Case 2015CF000470

Document 100

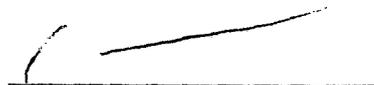
Filed 02-20-2019

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hearing occurred, but restitution did show up on the judgment of conviction. As this court knows, under Wis. Stat. 973.20, Dunay does have a right to contest restitution, and he wishes to exercise that right. For that reason, Dunay wishes to exercise his right to a restitution hearing.

If you have any questions, feel free to contact me.

Sincerely,



Timothy O'Connell

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FILED

02-20-2019

Clerk of Circuit Court

Outagamie County

2015CF000470

STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

**DEFENDANT'S MOTION TO
WITHDRAW GUILTY PLEAS**

-vs-

Kevin R. Dunay,

Defendant.

Case No. 15CF470

The defendant, appearing specially by his attorney and reserving his right to challenge the court's jurisdiction, moves the Court for an order authorizing the defendant to withdraw his pleas of guilty. The defendant brings this motion pursuant to section 971.08 and 809.30 of the Wisconsin Statutes, and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), *Ernst v. State*, 43 Wis. 2d 661, 170 N.W.2d 713 (1969), *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50 (1996), *State v. Hampton*, 2004 WI 107, 274 Wis.2d 379, 683 N.W.2d 14, and *State v. Reppin*, 35 Wis. 2d 377, 151 N.W.2d 9 (1967); *Ward v. Jenkins*, 613 F.3d. 692 (Ct. App. 7th Circuit (2010).

AS GROUNDS, defendant asserts the following:

In reviewing the applicable law, the Supreme Court noted that when a defendant seeks to withdraw a guilty plea after sentencing, he must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in "manifest injustice". *State v. Thomas*, 2000 WI 13, P16, 232 Wis.2d 714, 605 N.W. 2d 836. In doing so, a defendant may invoke *Nelson/Bentley*, and argue some factor extrinsic to the plea colloquy like ineffective assistance of counsel or coercion, rendered the plea inform. *State v. Howell*, 2007 WI 75, P74, 301 Wis.2d 350, 734 N.W.2d 48. To get an evidentiary hearing, a defendant must allege facts, which if true, would enable the defendant to relief. *Id.* at P75.

Here, Dunay asserts, before entering his guilty pleas, he was informed by his trial counsel that the court would run all counts concurrent with each other. Furthermore, he asserts, that his trial counsel informed him that he needed to plead to all counts, or otherwise the federal prosecutor would also charge him, and if the federal prosecutor also charged him, he would be facing at least 15 years of confinement on the federal charge(s). As a result, of this information, Dunay chose to enter his guilty pleas.

Subsequently, after entering his pleas, Dunay learned the counts could run consecutive to each other. Furthermore, the federal prosecutor did not require him to plead to all counts. Had Dunay known this correct information, Dunay asserts he would never had entered his guilty pleas.

In applying the law, Dunay's assertions would require an evidentiary hearing. Here, both of his assertions, if true, show counsel's performance was deficient and prejudicial. It was deficient since it was incorrect, and it was prejudicial since Dunay would not have entered guilty

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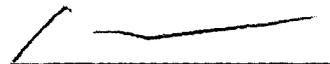
Page 2 of 2

pleas had he known better. As a result, Dunay has alleged facts, which if true, would enable him to a hearing.

For the reasons stated in this motion, Dunay asks this court to schedule an evidentiary hearing to address this motion.

Date: February 20, 2019

O'Connell Law Office
Attorneys for the Defendant



Timothy O'Connell

State Bar No. 1063957

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Case 2015CF000470

Document 102

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FILED
02-20-2019
Clerk of Circuit Court
Outagamie County
2015CF000470

STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

**DEFENDANT'S MOTION
FOR RESENTENCING**

-vs-

Kevin R. Dunay,

Defendant.

Case No. 15CF470

The defendant, appearing specially by his attorney and reserving his right to challenge the court's jurisdiction, moves the Court for an order authorizing the defendant to be resentenced in front of a new court. The defendant brings this motion pursuant to section 971.08 and 809.30 of the Wisconsin Statutes, and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), *Ernst v. State*, 43 Wis. 2d 661, 170 N.W.2d 713 (1969), *State v. Bentley*, 201 Wis.2d 303, 548 N.W.2d 50 (1996), *State v. Hampton*, 2004 WI 107, 274 Wis.2d 379, 683 N.W.2d 14, and *State v. Reppin*, 35 Wis. 2d 377, 151 N.W.2d 9 (1967); *Ward v. Jenkins*, 613 F.3d. 692 (Ct. App. 7th Circuit (2010).

AS GROUNDS, defendant asserts the following:

Facts.

The defendant pled to four counts: child sexual exploitation; child enticement; causing a child to view sexual activity; and, exposing genitals to a child. Before sentencing, however, the State provided a transcript which provided Dunay indicating a number of disparaging remarks about the court such as this court is the "worst", and a "fuckin piece of shit", and that he also made threats of harm towards those in the justice system that are part of his conviction and sentence.

At sentencing, the State asked for a total of 15 years initial confinement followed by 10 years extended supervision. The defense asked for five years initial confinement followed by ten years extended supervision. The court, on numerous occasions throughout the sentencing hearing, specifically referenced the defendant's statements that he threatened harm to the court, and it then imposed a total sentence of 12 years initial confinement followed by 20 years extended supervision.

Law on defendant's right to a fair judge.

Criminal defendants are entitled to "an impartial and unbiased judge." *State v. Sarinske*, 91 Wis.2d 14, 34, 280 N.W.2d 725 (1979). "When analyzing a judicial bias claim, we always presume that the judge was fair, impartial, and capable of ignoring any biasing influences. *State v. Gudgeon*, 2006 WI App 143, P20, 295 Wis.2d 189, 720 N.W.2d 1 14. The presumption of impartiality is, however, rebuttable. *Id.* To determine "whether a defendant has rebutted the presumption in favor of the court's impartiality, we

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generally apply two tests, one subjective and one objective.” *State v. Goodson*, 2009 WI App 107, P8, 320 Wis.2d 166, 771 N.W.2d 385. “Either sort of bias can violate a defendant’s due process right to an impartial judge. *Gudgeon*, 295 Wis.2d 189, P20, 720 N.W.2d 114.

First, as for the subjective test. Regarding this test, the subjective component is based on the judge’s own determination of whether he will be able to act impartially. *State v. Rochelt*, 165 Wis.2d 373, 378-379, 477 N.W.2d 659 (Ct. App. 1991).

As for the objective test, the test “asks whether a reasonable person could question the judge’s impartiality”. *Gudgeon*, 295 Wis.2d 189, P21, 720 N.W.2d 114. In addressing this test, the issue is whether there was an actual bias, which “certainly meets this objective test,” or apparent bias, which can satisfy the objective test “only where the apparent bias revealed a great risk of actual bias.” *Id.* at P21-24.

Argument.

Here, the court did not see an issue with whether it could be impartial. As a result, the subjective test does not apply.

However, under the objective test, whether there was actual or apparent bias, there does seem to be an issue. Here, as noted above, the court learned the defendant made threats to the entire criminal justice system and he referred to the court in disparaging words such as the “worst”, and a “fuckin piece of shit”. As a result, at sentencing, the court specifically stated it was concerned of the defendant’s statements that he threatened harm to the court, and then it addressed this issue on a number of occasions throughout the sentencing. Considering such, it appears there was actual bias as it was on the court’s mind at the time it imposed sentence.

Furthermore, there was also apparent bias. The fact that the judge was threatened, and referred to as some fairly negative references, would make anyone question the court’s partiality. Thus, the apparent bias revealed a great risk of actual bias.

Infective assistance of counsel and applicable law.

Here, the argument of asking the court to remove himself was not raised before sentencing. As a result, it is raised now as an ineffective assistance of counsel claim. In addressing ineffectiveness, our high court has stated:

To prove an ineffective assistance of counsel claim, a defendant must first demonstrate that counsel’s performance was deficient, meaning that it “fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L.Ed. 2d67 (1984). Courts are “highly deferential” in scrutinizing counsel’s performance, and “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. The defendant must also show that the deficient performance prejudiced the defense. *Id.* at 692. This requires a “reasonable probability that, but for counsel’s professional errors the result of the proceeding would have been different.” *Id.* at 694.

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State v. McGuire, 2010 WI 91, P65, 328 Wis.2d 289, 786 N.W.2d 227.

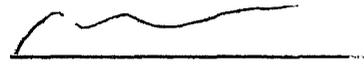
In applying the above, trial counsel should have objected. It would have been deficient not to ask for a new judge – considering the statements Dunay made prior to sentencing, and the statements the court made at sentencing. Furthermore, the failure to do so was prejudicial since it denied the defendant the opportunity to be sentenced in front of an impartial court – as discussed above.

Remedy.

Considering the above, Dunay would request this court hold a Machner hearing, and then to make a ruling whether Dunay should be granted a new sentencing hearing in front of a new court.

Date: February 20, 2019

O'Connell Law Office
Attorneys for the Defendant



Timothy O'Connell

State Bar No. 1063957

Case 2015CF000470

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Filed 02-22-2019

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FILED
02-22-2019
Clerk of Circuit Court
Outagamie County

STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY
2015CF00470

STATE OF WISCONSIN,

Plaintiff,

**DEFENDANT'S MOTION
FOR JUDGE TO RECUSE
ITSELF**

-vs-

Case No. 15CF470

Kevin R. Dunay,

Defendant.

The defendant, appearing specially by his attorney and reserving his right to challenge the court's jurisdiction, moves the court to recuse itself from this case.

Law on defendant's right to a fair judge.

Criminal defendants are entitled to "an impartial and unbiased judge." *State v. Sarinske*, 91 Wis.2d 14, 34, 280 N.W.2d 725 (1979). "When analyzing a judicial bias claim, we always presume that the judge was fair, impartial, and capable of ignoring any biasing influences. *State v. Gudgeon*, 2006 WI App 143, P20, 295 Wis.2d 189, 720 N.W.2d 114. The presumption of impartiality is, however, rebuttable. *Id.* To determine "whether a defendant has rebutted the presumption in favor of the court's impartiality, we generally apply two tests, one subjective and one objective." *State v. Goodson*, 2009 WI App 107, P8, 320 Wis.2d 166, 771 N.W.2d 385. "Either sort of bias can violate a defendant's due process right to an impartial judge. *Gudgeon*, 295 Wis.2d 189, P20, 720 N.W.2d 114.

First, as for the subjective test. Regarding this test, the subjective component is based on the judge's own determination of whether he will be able to act impartially. *State v. Rochelt*, 165 Wis.2d 373, 378-379, 477 N.W.2d 659 (Ct. App. 1991).

As for the objective test, the test "asks whether a reasonable person could question the judge's impartiality". *Gudgeon*, 295 Wis.2d 189, P21, 720 N.W.2d 114. In addressing this test, the issue is whether there was an actual bias, which "certainly meets this objective test," or apparent bias, which can satisfy the objective test "only where the apparent bias revealed a great risk of actual bias." *Id.* at P21-24.

Facts and Argument.

This court is asked to recuse itself from any postconviction motions. As this court is likely aware, the State recently charged Dunay in 18CF868 with six counts of threat to a judge, prosecutor, or police officer. Further, in reviewing the facts of that case, the facts alleged that Dunay threatened to kill this judge. It appears this court is aware of that case, as CCAP indicates all judges within this county have recused themselves from that case. To avoid the appearance of any bias, Dunay requests this Court recuse itself on this case so that another judge can review the postconviction motions.

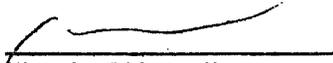
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Conclusion.

Dunay respectfully requests this court grant this motion without a hearing.

Date: February 22, 2019

O'Connell Law Office
Attorneys for the Defendant



Timothy O'Connell

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(920)-360-1811

1 STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

2 BRANCH I

3 -----

4 STATE OF WISCONSIN, Transcript of:
5 Plaintiff, SCHEDULING CONFERENCE

6 -vs-

7 KEVIN R. DUNAY, Case No. 15-CF-470

8 Defendant.

9 -----

10 HONORABLE MARK J. MCGINNIS
11 JUDGE PRESIDING

12

13

14

15

16 APPEARANCES:

17 ROBERT J. KAISER, JR., Wisconsin Department of
18 Justice, 17 West Main Street, PO Box 7857, Madison,
19 Wisconsin 53707-7857, appearing telephonically on behalf
20 of the State of Wisconsin.

21 TIMOTHY T. O'CONNELL, O'Connell Law Office, 403
22 South Jefferson Street, PO Box 1625, Green Bay, Wisconsin
23 54305-1625, appearing telephonically on behalf of the
24 defendant.

25 The Defendant appeared telephonically.

26

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Date of proceedings: March 21, 2019

30

1 received various documents from you -- defendant's
2 motion for judge to recuse itself and then a
3 defendant's motion to withdraw guilty pleas,
4 defendant's motion for resentencing. Are those the
5 three items that are pending?

6 MR. O'CONNELL: This is in the cover
7 letter that, I believe, was filed on February 20. I
8 also sought a restitution hearing.

9 THE COURT: Okay. That's fair. I do have
10 your February 20 letter. So we have those
11 four issues that need to be addressed, right?

12 MR. O'CONNELL: Yeah. And also, judge, we
13 had -- As part of our e-mail there's an Attorney
14 Robert Buckett. I believe the judicial assistant
15 was going to call him. He represents the defendant
16 at sentencing.

17 THE COURT: Yes.

18 MR. O'CONNELL: It doesn't sound like he's
19 on the line right now.

20 THE COURT: He's not. I wanted to get
21 this. He was supposed to call in at 9:45, if I
22 understood it right. It's now 9:55. I think she's
23 still trying to get in touch with him. We will
24 patch him in if we get him.

25 MR. O'CONNELL: Okay.

1 THE COURT: So we have the four issues.
2 My understanding is Mr. Dunay is currently being
3 charged with the threats that he has made against n
4 as well as the threats that he has made against
5 attorney -- District Attorney Tempelis. Is that
6 true?

7 MR. KAISER: That's correct, judge.

8 MR. O'CONNELL: That's correct.

9 MR. KAISER: I am the prosecutor on this
10 case.

11 THE COURT: You are, Mr. Kaiser?

12 MR. KAISER: Yes.

13 THE COURT: Okay. And I -- I think I get
14 notices from your office, Mr. Kaiser, of hearings or
15 what happened at a hearing and I think my responses
16 have all been just thank you or no response. I
17 don't really know the details of that case. I
18 haven't looked at the details. I haven't provided
19 any input on it just so everybody knows that; and
20 maybe you can answer this, Mr. Kaiser. Is he being
21 charged with the threats that he made against me
22 prior to the time that I sentenced him or after
23 sentencing or both?

24 MR. KAISER: Both.

25 THE COURT: All right. That helps then.

1 I didn't look into that yet. I knew that there were
2 threats, of course, before sentencing; and we
3 addressed that at the sentencing hearing. Then I
4 had received information from law enforcement after
5 and my family also received information about
6 threats that had taken place after. So it's good to
7 have that information. So, Mr. O'Connell, are you
8 going to file anything else to support any of the
9 four issues that you want addressed or is everything
10 filed?

11 MR. O'CONNELL: Everything's filed.

12 THE COURT: Okay. How much time would you
13 like, Mr. Kaiser, to respond in writing, if you want
14 time, or are you just ready to schedule a hearing?

15 MR. KAISER: Judge, given the fact that
16 normally when I call people like Mr. Buckett and
17 Mr. Tarnowski to speak with me before a hearing so I
18 know what they are going to say they usually tell me
19 the advice of ethics counsel is that they not speak
20 with me prior to the hearing, so it would be hard
21 for me to prepare a pleading prior to the hearing
22 when I don't know what counsel's going to say about
23 the defendant's claims. So my preference would be
24 to have the hearing sooner than later and then I
25 would prepare a brief for the Court which would be

1 based on the facts that we adduce at the hearing.

2 THE COURT: Okay. And that seems to make
3 sense. So how much time are we going to need for a
4 hearing?

5 MR. KAISER: Well, I think given the
6 number of issues including the restitution hearing
7 we would need at least a full half day.

8 THE COURT: Do you agree, Mr. O'Connell?

9 MR. O'CONNELL: Sure. Judge, the other
10 thing, I guess, we are going to -- The other thing
11 that I talked to Attorney Kaiser -- this is before
12 this hearing and I didn't know the judge -- how the
13 Court wanted to handle this. In my letter where
14 I -- in the event that all of these motions were
15 denied I thought -- The defendant's seeking a
16 restitution hearing. There is a particular issue
17 regarding in this case the victim's mother had
18 indicated there's lost wages and then there's a
19 number of medical bills. I know this is something
20 where Attorney Kaiser is objecting to my request
21 here. It's just a matter of procedural, how the
22 Court wanted to handle this.

23 What we'd be asking for is some discovery.
24 I may be better off just sending a letter or maybe a
25 motion to the Court. If Attorney Kaiser wants to

1 respond, he could respond.

2 The reason I am seeking to do it this wa
3 is because us getting the information -- By us
4 getting an answer whether we are going to get this
5 information or not get this information, I think it
6 will make it a smoother transition when the actual
7 hearing occurs. I just don't want a situation where
8 we had this hearing and the Court rules, oh, we are
9 entitled to discovery so we have to schedule another
10 hearing. I would rather get everything all at once.

11 If it's okay with the Court, what I'd like
12 to do is maybe just send out a letter, file it, or a
13 motion just seeking why we are seeking what we are
14 seeking and Attorney Kaiser -- You know he's going
15 to object to it. Then the Court can make a -- can
16 make a ruling whether we are entitled to it or not.

17 MR. KAISER: What I indicated to counsel,
18 judge, is I am happy to do what I can with victim
19 witness to ascertain whatever bills the victim's mom
20 is relying on to make the claim; but what I told him
21 was that unless I was ordered directly by the Court
22 for purposes of restitution that I didn't believe
23 any records of any actual counseling that the victim
24 got, which would include her descriptions of her
25 interactions with the defendant, would in any way be ,

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1 necessary for the Court to make a determination as
2 to whether the restitution requested is appropriate.

3 So if counsel's got support for the
4 position that he's entitled to any more than just
5 the actual bills themselves, I would be happy to
6 look at it. I don't think he is and that's what I
7 would be willing to provide. So if he's going to
8 prepare a pleading asking for more than the bills
9 indicating the amounts owed, then I would suggest
10 that I would be looking for case law in there to
11 support that position.

12 THE COURT: Sure. So, Mr. Kaiser, why
13 don't you provide him up-front the bills? I think
14 that's an agreement, right?

15 MR. KAISER: That's fine.

16 THE COURT: Okay. So you will have those,
17 Mr. O'Connell. Mr. O'Connell, if you want something
18 more than the bills or documentation supporting the
19 lost wages, for example, just submit authority that
20 you think exists that would allow you to get that.

21 MR. O'CONNELL: Okay.

22 THE COURT: So let's schedule a half a day
23 to address this. How would May 6 work?

24 MR. KAISER: I'm going to be at the
25 prosecutors' conference all that week, your Honor.

1 We teach at the prosecutors' conference that week so
2 that's our obligation.

3 THE COURT: Got it. How would June 7
4 work?

5 MR. KAISER: I'm in the middle of a murder
6 trial in Hudson, St. Croix County that week.

7 THE COURT: When is that over?

8 MR. KAISER: We are shooting to have that
9 done the following Friday, the 14th.

10 THE COURT: Okay. How would the morning
11 of June 24 work?

12 MR. KAISER: I'm sorry. I'm off that
13 week. My daughter is getting married at the end of
14 that week. We've got a lot of work to do so I'm
15 going to be on vacation that week.

16 THE COURT: The morning of June 21?

17 MR. KAISER: That would be great.

18 MR. O'CONNELL: That's Friday morning?

19 THE COURT: Friday morning, yes.

20 MR. O'CONNELL: Yeah. That works for me
21 also. I'm Attorney Tim O'Connell.

22 MR. TARNOWSKI: This is Tarnowski. That
23 works for me.

24 THE COURT: So let's do this. Let's put
25 it on for the morning of Friday, June 21 starting at

1 8:30 and you -- We will have the morning to deal
2 with those four issues.

3 MR. KAISER: Thank you, judge.

4 THE COURT: Anything else we need to do
5 today?

6 MR. KAISER: Nope. I will get those
7 things to counsel as soon as I have a chat with
8 victim witness in Outagamie County.

9 THE COURT: Excellent.

10 MR. O'CONNELL: Judge, just to clarify
11 then regarding the motion to recuse, that is
12 something the judge or the Court is denying that?

13 THE COURT: Not formally right now because
14 I -- You can present whatever you want; but I have
15 done the research on it. I have a temporary draft
16 of a memorandum and the case law on it. I am
17 interested in listening to whatever it is that you
18 are going to present.

19 MR. O'CONNELL: Okay.

20 THE COURT: But for now, yes, I don't see
21 any merit in it at this point based on what you
22 submitted.

23 MR. O'CONNELL: Okay.

24 THE COURT: Okay. Good.

25 MR. O'CONNELL: Thank you, judge.

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THE COURT: All right. Thank you. We're going to hang up. We're adjourned. Bye-bye.

(Proceedings concluded.)

STATE OF WISCONSIN)

) SS:

OUTAGAMIE COUNTY)

I, TERRA OTIS, RPR, RMR, CRR, CRC, do hereby certify that I reported the foregoing matter and that the foregoing transcript, consisting of 11 pages, has been carefully compared by me with my stenographic notes as taken by me in machine shorthand and by me thereafter transcribed and it is a true and correct transcript of proceedings had in said matter to the best of my knowledge.

Dated this 19th day of September, 2019.

(Electronically signed by Terra Otis)
TERRA OTIS, RPR, RMR, CRR, CRC
Official Reporter

Case 2015CF000470

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FILED

04-05-2019

Clerk of Circuit Court

Outagamie County

STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

**DEFENDANT'S BRIEF
IN SUPPORT OF
RESTITUTION
DISCOVERY**

-vs-

Case No. 15CF470

Kevin R. Dunay,

Defendant.

Kevin Duany seeks additional discovery before the scheduled restitution hearing.

Law.

Wisconsin Statute 973.20(14)(d) addresses this issue. In said statute, it indicates "Discovery is not available except for good cause shown." Wis. Stat. 973.20(14)(d).

Facts.

Here, the victim is asking for a total of \$17,483.69 in restitution. In reaching that number, first, the mother indicates she missed work, and her wages lost were in the amount of \$3,586.52. Second, the victim accrued a \$12,660.42 bill from St. Elizabeth Hospital, between 4/12/16 and 4/19/16. Third, she accrued a \$23.06 bill from Network Health System INC, for services provided by John Oestreicher on 4/13/16. Fourth, she accrued a \$675.61 bill from Network Health System INC, for services provided by Deborah Scuglik, between 4/13/16-4/19/16. Fifth, she accrued a \$388.08 bill for services provided by Dean Smith between 4/16/16 and 4/17/16. Sixth, she accrued a \$200.00 bill from St. Elizabeth Hospital, for services provided on 11/16/16.

There is good cause for the victim to provide discovery before the restitution hearing.

Here, it appears the facts provided are vague, and they do not provide Dunay the opportunity to verify or challenge.

First, the mother of victim indicates she missed a total of 15.5 days of work. However, she does not provide what days she missed, and what she did on those days. Furthermore, the mother of the victim indicates her salary was \$25.50 per hour for four days, \$30 per hour for 10 days, and \$26.71 per hour on 1.5 days. Without getting information to verify, Dunay has no way of preparing a defense, or even knowing if a defense is available.

Second, as for the victim's bills, they do not indicate what the bills are for. Did she break a leg? Did she have surgery? Did she go in for an annual examination? Furthermore, in reviewing the PSI, the mother of the victim indicates that the victim has been in and out of treatment before she met the defendant. Thus, it is important to know whether her treatment after communicating with Dunay, if it actually was for counseling, whether it was regarding Dunay or her previous issues. Notably, the bills were for all services provided approximately a year or later after the conduct terminated, and all during a very narrow time frame. Finally, it appears the

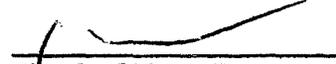
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deductibles were met; however, the bills are all much larger than the deductible. As a result, it is important to provide an update on the status of these bills. For instance, are they now paid or still considered the patient's responsibly, or were they later considered "medical necessities" and thus no longer required by the victim to pay? Again, without getting verification, Dunay has no way of preparing a defense, or even knowing if a defense is available.

Ultimately, it is important that the victim provide verification. Documentation to support these questions are necessary to even determine whether a hearing is necessary. Thus, by the victim providing such, it may even save the court the time to hold the hearing. Furthermore, if the victim is not required to provide information, this restitution hearing will simply be a hearing where the court takes the victim's word with no opportunity to verify, thus a real injustice. Considering such, good cause is shown.

Date: April 5, 2019

O'Connell Law Office
Attorneys for the Defendant



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Case 2015CF000470

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Filed 05-01-2019

Page 1 of 1

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FILED

05-01-2019

Clerk of Circuit Court
Outagamie County

2015CF000470

May 1, 2019

Hon. Mark McGinnis
320 S. Walnut St.
Appleton, WI 54911

RE: State v. Kevin Dunay; Case 15CF470

Dear Hon. Mark McGinnis:

I represent the defendant in the above noted case.

On March 21, 2019, this court held a scheduling conference. At said time, the court denied the defendant's request to recuse itself, and it then scheduled a hearing for plea withdrawal, a new sentencing hearing, and a restitution hearing. As for the restitution hearing, Dunay indicated there was a disagreement among the parties whether he was entitled to specific discovery on restitution. As a result, he suggested he submit a brief, the State submit a brief, and the court ultimately enter a ruling on the issue before the hearing so that we could get all of the issues resolved at the next hearing rather than facing the possibility of having to schedule two postconviction motion hearing since the defendant would not yet have the discovery; besides it would also help both sides since they would know going into the hearing what the issues are. As a result, it was Dunay's understanding that the court approved said suggestion.

Afterwards, on April 5, 2019, the defendant submitted a brief in support of his argument why he is entitled to said discovery. However, as of now, the State has not responded nor has it provided said discovery to the defendant. As a result, Dunay respectfully requests this court enter an Order requiring the State to respond with an argument, or otherwise this Court to enter an Order that the failure to provide such will result in a forfeiture of a restitution argument.

Sincerely,



Timothy O'Connell

Case 2015CF000470

Document 114

Filed 05-01-2019

Page 1 of 12



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**FILED
05-01-2019
Clerk of Circuit Court
Outagamie County
2015CF000470**

**Josh Kaul
Attorney General**

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

**Robert J. Kaiser, Jr.
Assistant Attorney General
kaiserrj@doj.state.wi.us
608/266-3863
FAX 608/267-2778**

May 1, 2019

VIA E-FILING

Hon. Mark McGinnis
Judge, Outagamie County Circuit Court
Outagamie County Courthouse
320 South Walnut Street
Appleton, Wisconsin 54911

Re: *State v. Kevin Dunay*
Outagamie County Case No. 15-CF-470

Dear Judge McGinnis:

The State is in receipt of the Defendant's letter of May 1, 2019. Briefly in response, the State would advise the Court:

1. As the defense noted in their letter, the Court advised the defense at the last hearing on March 21, 2019, to provide some legal support for their argument that they are entitled to more discovery than the statute requires. In the defense brief of April 5, 2019, there is no more legal support for their contentions than a citation to the portion of the statute which the State already cited to the Court, Wis. Stat. § 973.20(14)(d), which provides, "Discovery is not available except for good cause shown." There is no statute or case law cited providing this Court with a legal basis upon which to order additional discovery.
2. Because the State has already filed its letter of March 25, 2019, supplying the defense with the attached bills which had already been forwarded to Attorney Buckett previously, it is already clear to the defense that the State contests this demand, so to say that a failure to answer the defense's April 5 pleading by this time is a concession of their contentions is without merit. (See attached.)

Case 2015CF000470

Document 114

Filed 05-01-2019

Page 2 of 12

Hon. Mark McGinnis
Judge, Outagamie County Circuit Court
May 1, 2019
Page 2

3. This prosecutor has requested follow-up from the victim/witness unit of the Outagamie County District Attorney's Office in order to see if there is any additional information which can be supplied to the defense prior to the June 21 hearing. That request is being processed and the information is being sought, but as the Court and experienced counsel are aware, obtaining information from health care providers is not an expeditious process, and certainly not one the State expects will be completed anytime soon.
4. This prosecutor is preparing for a murder trial beginning the first week in June and proceeding into the second week in June in St. Croix County. During that preparation time, I will be conducting an evidentiary hearing with legal argument on a Polk County case. I will be teaching all week, each day, at the Child Abuse Prosecution training track at the Statewide Prosecutor Education and Training conference running all next week in Green Bay, which conference is organized and presented by the prosecutors in the Criminal Litigation Unit of the Department of Justice. And of course, there are three other motions pending in this case that I will have to prepare for as well as this restitution issue, to be heard and argued the same day. I do not expect to receive additional information on this case, and then have the time to prepare a response, which would allow me to file that response prior to June 17.

The State appreciates the Court's kind attention to this matter and files this letter with the Court to assure the Court that the State does not concede or otherwise forfeit any argument in opposition to the Defendant's discovery request and his attempts to minimize his financial responsibility to the victim and her family in this case.

Sincerely,

/s/ Robert Kaiser, Jr.
ROBERT KAISER, JR.
Assistant Attorney General

RJK:ajs

Enclosures

Case 2015CF000470

Document 114

Filed 05-01-2019

Page 3 of 12



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**Josh Kaul
Attorney General**

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Robert J. Kaiser, Jr.
Assistant Attorney General
kaiserrj@doj.state.wi.us
608/266-3863
FAX 608/267-2778

March 25, 2019

Timothy O'Connell
O'Connell Law Office
403 South Jefferson Street
Post Office Box 1625
Green Bay, Wisconsin 54305-1625

Re: *State v. Kevin Dunay*, Outagamie County Case No. 15-CF-470
Restitution information

Dear Mr. O'Connell:

Attached please find the final summary with attached bills that was forwarded to Attorney Buckett after the sentencing hearing in preparation for the restitution hearing that did not happen.

Pursuant to Wis. Stat. § 973.20(13)(a)1., the defense is only entitled to whatever documents exist that support the victim's claim of loss suffered. The defense is not entitled to any other documents created during the course of the treatment of the victim consequential to the offenses the Defendant committed against her. As you noted in our conversation the other day, Wis. Stat. § 973.20(14)(d) provides, "Discovery is not available except for good cause shown." That the Defendant would like to have in his possession the victim's descriptions in therapy of what he did to her is not a good cause for such discovery.

Thank you for your continued courtesy and cooperation in this matter. I look forward to seeing you on June 21, 2019.

Sincerely,

Robert Kaiser
Assistant Attorney General

RJK:ajs

Enclosures

Case 2015CF000470

Document 114

Filed 05-01-2019

Page 4 of 12

RESTITUTION SUMMARY
December 12, 2017

State Of Wisconsin vs. Kevin R. Dunay
Court Case No. 2015CF000470
Defendant's Date of Birth: 04/30/1966
Name of Judge: Mark J. McGinnis
Co-Defendants: None

| Victim Name | Dollar Amount |
|---|----------------------|
|  | \$17,483.69 |
| Combined Locks, WI 54113 | |

| | |
|--|--------------------|
| SUBTOTAL | \$17,483.69 |
| RESTITUTION SURCHARGE District Attorney's Office; 320 S Walnut Street; Appleton, WI 54911 | \$1,748.37 |
| TOTAL RESTITUTION AMOUNT | \$19,232.06 |

NOTE: THE INDIVIDUAL VICTIM MUST BE PAID PRIOR TO ANY INSURANCE COMPANY LISTED TO RECEIVE REIMBURSEMENT.

Submitted by Stephanie A. Jens , Victim Witness Coordinator

Comments: None

Case 2015CF000470

Document 114

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Page 5 of 12

These are not
Bills yet but
it states

the amount we
will be responsible

for. So fee

total \$13,947.17

Case 2015CF000470

Document 114

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Page 6 of 12

| Item | Date of Purchase | Purchase Price | Cost to Replace Item |
|------|------------------|----------------|----------------------|
|------|------------------|----------------|----------------------|

| | | | |
|--|--|--|--|
| Lost Days of work from me (Mother) off needing to help my daughter | | | |
|--|--|--|--|

| | | | |
|----------------------|---------------------|----------------------|-----------------------|
| total # of Days 15.5 | 4 days @ \$25.50/hr | 10 days @ \$30.00/hr | 1.5 days @ \$26.71/hr |
|----------------------|---------------------|----------------------|-----------------------|

total cost of missing work \$3,536.52 (not including possible extended shifts where I would have been kept longer than 8 hrs)

Please return this form and all documents as soon as possible to
 Carolyn Zydol, Victim-Witness Coordinator
 Office of Victim-Witness Advocacy
 Sussex County Prosecutor's Office
 19-21 High Street
 Newton, New Jersey 07860
 FAX 973-383-4929
 CZydol@scpo.sussex.nj.us

If you have any questions, please call the County Office of Victim-Witness Advocacy 973-383-1570 ext. 4522

Case 2015CF000470

Document 114

Filed 05-01-2019

Page 7 of 12

EMPLOYEE BENEFIT PLAN
THEDACARE, INC
 Administered by:
Meritain Health
 P.O. Box 27267
 Minneapolis MN 55427-0267

Print Date: 03-06-17

THIS IS NOT A BILL

* EXPLANATION OF BENEFITS *

#BWNCQWH
 #EC///TWDEETDC4#

COMBINED LOCKS WI 54113

Claim No: [REDACTED]
 Participant: [REDACTED]
 ID No: [REDACTED]
 Address: [REDACTED]
 Patient: [REDACTED]
 Group Name: THEDACARE INC
 Group No: [REDACTED]
 Processed On: 03-06-17 By: DJW
 Patient Acct. No: [REDACTED]
 Provider: ST. ELIZABETH HOSPITAL
 PO BOX 856934
 MINNEAPOLIS MN 554866934
 TIN: 390816818

| PROCEDURE / REVENUE CODE | DATES OF SERVICE | TOTAL CHARGES | PROVIDER DISCOUNT | INELIGIBLE AMOUNT | NOTES | APPLIED TO DED. | APPLIED TO COPAY | BEN. % | OTHER CARRIER'S PYMT | PYMT MADE BY PLAN | PATIENT RESPONSIBILITY |
|--------------------------|-------------------|-----------------|-------------------|-------------------|-------|-----------------|------------------|--------|----------------------|-------------------|------------------------|
| / 0124 | 04-12-16 04-19-16 | 8477.00 | | 8477.00 | a | | | | | 0.00 | 8477.00 |
| / 0250 | 04-12-16 04-19-16 | 403.42 | | 403.42 | a | | | | | 0.00 | 403.42 |
| / 0300 | 04-12-16 04-19-16 | 945.00 | | 945.00 | a | | | | | 0.00 | 945.00 |
| / 0430 | 04-12-16 04-19-16 | 182.00 | | 182.00 | a | | | | | 0.00 | 182.00 |
| / 0450 | 04-12-16 04-19-16 | 1100.00 | | 1100.00 | a | | | | | 0.00 | 1100.00 |
| / 0513 | 04-12-16 04-19-16 | 177.00 | | 177.00 | a | | | | | 0.00 | 177.00 |
| / 0915 | 04-12-16 04-19-16 | 276.00 | | 276.00 | a | | | | | 0.00 | 276.00 |
| / 0915 | 04-12-16 04-19-16 | 84.00 | | 84.00 | a | | | | | 0.00 | 84.00 |
| / 0915 | 04-12-16 04-19-16 | 414.00 | | 414.00 | a | | | | | 0.00 | 414.00 |
| / 0915 | 04-12-16 04-19-16 | 92.00 | | 92.00 | a | | | | | 0.00 | 92.00 |
| / 0942 | 04-12-16 04-19-16 | 510.00 | | 510.00 | a | | | | | 0.00 | 510.00 |
| TOTALS | | 12660.42 | | 12660.42 | | | | | | 0.00 | 12660.42 |

CLAIM NUMBER DEID580 CONTINUED ON NEXT PAGE

* IF YOU HAVE ANY QUESTIONS ABOUT THIS EXPLANATION OF BENEFITS CALL *
 CUSTOMER SERVICE 866-521-0161

COPY 1

Case 2015CF000470

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Page 8 of 12

CONTINUATION OF CLAIM NUMBER OE8588

PAGE 2

NOTES

- a. In order for the above referenced charge(s) to be considered, additional information is required from the provider of services. PROVIDER: Please attach the following information to this form and return to the address listed above, or fax it to our office at 763-852-6067.
- Precertification was not obtained prior to services being rendered as required by the plan. Please submit a letter of medical necessity, a copy of the physician orders for the service along with any supporting documentation for the service being rendered.
- *** FAILURE TO PROVIDE THIS INFORMATION WILL RESULT IN THE NON-PAYMENT OF THIS CLAIM. ***
- ENROLLEES: You can view eligibility, benefit information and claim status online at your convenience! To gain access, logon to www.thedacarehealthplan.com.

This document contains important information that you should retain for your records.

This claim was processed in accordance with the group health plan described in your Summary Plan Description (SPD). If your claim was denied (in whole or in part), the decision to deny your claim was based on the Medical Benefits and/or Plan Exclusion section(s) of the Plan because the benefits requested are not covered by the Plan and this document serves as notice of an adverse benefit determination. (Please refer to the reason(s) provided for additional information.)

If you think this determination was made in error, you have the right to appeal (see the back of this page for information about your appeal rights). If you are enrolled in an ERISA-governed plan and your appeal is denied and all levels of review have been exhausted, you have the right to bring a civil action under ERISA 502(a). (To determine whether your health plan is an ERISA-governed plan, please refer to your SPD.)

The following language is required by law and is for informational purposes only. This language is intended to assist those plan participants who may not speak English as their predominant language.

SPANISH (Español): Para obtener asistencia en Español, llame al 866-521-0161

TAGALOG (Tagalog): Kung kailangan niyo ang tulong sa Tagalog tumawag sa 866-521-0161

CHINESE (中文): 如果需要中文的帮助, 请拨打这个号码 866-521-0161

NAVAJO (Dine): Dinek'ehgo shika at'ohwol ninisingo, kwijigo holne' 866-521-0161

* IF YOU HAVE ANY QUESTIONS ABOUT THIS EXPLANATION OF BENEFITS CALL *
CUSTOMER SERVICE 866-521-0161

COPY 1

Case 2015CF000470

Document 114

Filed 05-01-2019

Page 9 of 12

EMPLOYEE BENEFIT PLAN
THEDACARE, INC
 Administered by:
 Meritain Health
 P.O. Box 27267
 Minneapolis MN 55427-0267

Print Date:02-10-17

THIS IS NOT A BILL

*** EXPLANATION OF BENEFITS ***

#BWNCOWH
 #EC////TWDEETDC4#



COMBINED LOCKS WI 54113

Payment To:
 NETWORK HEALTH SYSTEM INC
 PO BOX 848583
 BOSTON MA 02284

| PROCEDURE / REVENUE CODE | DATES OF SERVICE | TOTAL CHARGES | PROVIDER DISCOUNT | INELIGIBLE AMOUNT | NOTES | APPLIED TO DED. | APPLIED TO COPAY | BEN. % | OTHER CARRIER'S PYMT | PYMT MADE BY PLAN | PATIENT RESPONSIBILITY |
|--------------------------|------------------|---------------|-------------------|-------------------|-------|-----------------|------------------|--------|----------------------|-------------------|------------------------|
| 96101 | 04-13-16 | 262.00 | 31.44 | | a | | | 90 | | 207.50 | 23.06 |
| TOTALS | | 262.00 | 31.44 | | | | | | | 207.50 | 23.06 |

Processed Under Medical Plan For Services Provided By
JOHN M OESTREICHER
 TIN: 391127163

Claim No: NVE7386
 Participant: [REDACTED]
 ID No: [REDACTED]
 Address: COMBINED LOCKS WI 54113
 Patient: [REDACTED]
 Group Name: [REDACTED]
 Group No: 13964.A11
 Processed On: 02-10-17 By: DJW
 Patient Acct. No: [REDACTED]

In Network Deductible Accumulations
 Individual 600.00 of 600.00
 Family 1200.00 of 1200.00

NOTES

- a. Expenses adjusted due to discount agreement with First Health.
- ENROLLEES: You can view eligibility, benefit information and claim status online at your convenience! To gain access, logon to www.thedacarehealthplan.com.

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SPANISH (Español): Para obtener asistencia en Español, llame al 866-521-0161

TAGALOG (Tagalog): Kung kailangan niyo ang tulong sa Tagalog tumawag sa 866-521-0161

CHINESE (中文): 如果需要中文的帮助, 请拨打这个号码 866-521-0161

NAVAJO (Dine): Dinck'chgo shika a'ohwol nihisingo, kwilijigo holne' 866-521-0161

*** IF YOU HAVE ANY QUESTIONS ABOUT THIS EXPLANATION OF BENEFITS CALL *
 CUSTOMER SERVICE 866-521-0161**

COPY 1

Case 2015CF000470

Document 114

Filed 05-01-2019

Page 10 of 12

EMPLOYEE BENEFIT PLAN
THEDACARE, INC
 Administered by:
 Meritain Health
 P.O. Box 27267
 Minneapolis MN 55427-0267

Print Date:02-10-17

THIS IS NOT A BILL

* EXPLANATION OF BENEFITS *

#BWNCQWH
 #EC////TWDEETEDC4#
 [REDACTED]

COMBINED LOCKS WI 54113

Payment To:

NETWORK HEALTH SYSTEM INC
 PO BOX 848583
 BOSTON MA 02284

| PROCEDURE / REVENUE CODE | DATES OF SERVICE | TOTAL CHARGES | PROVIDER DISCOUNT | INELIGIBLE AMOUNT | NOTES | APPLIED TO DED. | APPLIED TO COPAY | BEN. % | OTHER CARRIER'S PYMT | PYMT MADE BY PLAN | PATIENT RESPONSIBILITY |
|--------------------------|------------------|----------------|-------------------|-------------------|-------|-----------------|------------------|--------|----------------------|-------------------|------------------------|
| 99223 | 04-13-16 | 501.00 | 60.12 | | a | 440.88 | | | | 0.00 | 440.88 |
| 99233 | 04-14-16 | 260.00 | 31.20 | | a | 159.12 | | 90 | | 62.71 | 166.09 |
| 99233 | 04-15-16 | 260.00 | 31.20 | | a | | | 90 | | 205.92 | 22.88 |
| 99233 | 04-18-16 | 260.00 | 31.20 | | a | | | 90 | | 205.92 | 22.88 |
| 99233 | 04-19-16 | 260.00 | 31.20 | | a | | | 90 | | 205.92 | 22.88 |
| TOTALS | | 1541.00 | 184.92 | | | 600.00 | | | | 680.47 | 675.61 |

Processed Under Medical Plan For Services Provided By
DEBORAH L SCUGLIK
 TIN: 391127163

Claim No: [REDACTED]
 Participant: [REDACTED]
 ID No: [REDACTED]
 Address: [REDACTED]
 COMBINED LOCKS WI 54113

In Network Deductible Accumulations
 Individual 600.00 of 600.00
 Family 600.00 of 1200.00

Patient: [REDACTED]
 Group Name: [REDACTED]
 Group No: [REDACTED]
 Processed On: [REDACTED] By: DJW
 Patient Acot. No: [REDACTED]

CLAIM NUMBER NVE7382 CONTINUED ON NEXT PAGE

Case 2015CF000470

Document 114

Filed 05-01-2019

Page 11 of 12

EMPLOYEE BENEFIT PLAN
THEDACARE, INC
Administered by:
Meritain Health
P.O. Box 27267
Minneapolis MN 55427-0267

Print Date:02-10-17

THIS IS NOT A BILL

* EXPLANATION OF BENEFITS *

#BWNCOWH
#EC///TWDEFTEDC4#

COMBINED LOCKS WI 54113

| PROCEDURE / REVENUE CODE | DATES OF SERVICE | TOTAL CHARGES | PROVIDER DISCOUNT | INELIGIBLE AMOUNT | NOTES | APPLIED TO DED. | APPLIED TO COPAY | BEN. % | OTHER CARRIER'S PYMT | PYMT MADE BY PLAN | PATIENT RESPONSIBILITY |
|--------------------------|------------------|---------------|-------------------|-------------------|-------|-----------------|------------------|--------|----------------------|-------------------|------------------------|
| 99233 | 04-16-16 | 260.00 | 31.20 | | a | 228.80 | | | | 0.00 | 228.80 |
| 99232 | 04-17-16 | 181.00 | 21.72 | | a | 159.28 | | | | 0.00 | 159.28 |
| TOTALS | | 441.00 | 52.92 | | | 388.08 | | | | 0.00 | 388.08 |

Processed Under Medical Plan For Services Provided By
DEAN R SMITH
TIN: 391127163

Claim No: [REDACTED]
Participant: [REDACTED]
ID No: [REDACTED]
Address: [REDACTED]
Patient: [REDACTED]
Group Name: [REDACTED] INC
Group No: [REDACTED]
Processed On: [REDACTED] By: DJW
Patient Acct. No: [REDACTED]

In Network Deductible Accumulations
Individual 388.08 of 600.00
Family 388.08 of 1200.00

NOTES

- a. Expenses adjusted due to discount agreement with First Health.
- ENROLLEES: You can view eligibility, benefit information and claim status online at your convenience! To gain access, logon to www.thedacarehealthplan.com.

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NAVAJO (Dine): Dine'ehgo ahika a'ohwol ninisingo, kwijigo holne' 866-521-0161

* IF YOU HAVE ANY QUESTIONS ABOUT THIS EXPLANATION OF BENEFITS CALL *
CUSTOMER SERVICE 866-521-0161

COPY 1

Case 2015CF000470

Document 114

Filed 05-01-2019

Page 12 of 12

EMPLOYEE BENEFIT PLAN
THEDACARE, INC
 Administered by:
 Meritain Health
 P.O. Box 27267
 Minneapolis MN 55427-0267

Print Date:04-07-17

THIS IS NOT A BILL

*** EXPLANATION OF BENEFITS ***

Payment To:

ST ELIZABETH HOSPITAL
PO BOX 856934
MINNEAPOLIS MN 554856934

#BWNCQWH
 #EC////TWDEETEDC4#

COMBINED LOCKS WI 54113

| PROCEDURE / REVENUE CODE | DATES OF SERVICE | TOTAL CHARGES | PROVIDER DISCOUNT | INELIGIBLE AMOUNT | NOTES | APPLIED TO DED. | APPLIED TO COPAY | BEN. % | OTHER CARRIER'S PYMT | PYMT MADE BY PLAN | PATIENT RESPONSIBILITY |
|--------------------------|------------------|---------------|-------------------|-------------------|-------|-----------------|------------------|--------|----------------------|-------------------|------------------------|
| / 0250 | 11-16-16 | 28.62 | 3.43 | | a | | 25.19 | | | 0.00 | 25.19 |
| 99284 / 0450 | 11-16-16 | 696.00 | 83.52 | | a | | 174.81 | 100 | | 437.67 | 174.81 |
| TOTALS | | 724.62 | 86.95 | | | | 200.00 | | | 437.67 | 200.00 |

Processed Under Medical Plan For Services Provided By
ST ELIZABETH HOSPITAL
PO BOX 856934
MINNEAPOLIS MN 554856934
TIN: 390816818

In Network Deductible Accumulations
 Individual 0.00 of 600.00
 Family 0.00 of 1200.00

Claim No: [REDACTED]
 Participant: [REDACTED]
 ID No: [REDACTED]
 Address: [REDACTED]
 COMBINED LOCKS WI 54113

Patient: [REDACTED]
 Group Name: THE DACARE INC
 Group No: [REDACTED]
 Processed On: [REDACTED]
 Patient Acct. No: [REDACTED] By: DJW

NOTES

- a. Expenses adjusted due to discount agreement with First Health.
- ENROLLEES: You can view eligibility, benefit information and claim status online at your convenience! To gain access, logon to www.thedacarehealthplan.com.

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CHINESE (中文): 如果需要中文的帮助, 请拨打这个号码 866-521-0161

NAVAJO (Dine): Dinck'ehgo shika atohwol ninsingo, kwijigo holne' 866-521-0161

*** IF YOU HAVE ANY QUESTIONS ABOUT THIS EXPLANATION OF BENEFITS CALL ***
CUSTOMER SERVICE 866-521-0161

FILED
10-11-2018
Clerk of Circuit Court
Outagamie County

2018CF000868

STATE OF WISCONSIN CIRCUIT COURT

OUTAGAMIE COUNTY

STATE OF WISCONSIN

Plaintiff,

-vs-

KEVIN R. DUNAY
Wisconsin Department of
Corrections
Wisconsin State ID 01563296
DOB: 04/30/1966
Sex/Race: M/W
Eye Color: Blue
Hair Color: Partially Gray
Height: 6'1"
Weight: 205 lbs.

COURT CASE #:

Ref. Agency: Fox Valley Metro Police
Agency Case #: LFV18-001027

Defendant.

SUMMONS

THE STATE OF WISCONSIN TO SAID DEFENDANT:

A complaint, a copy of which is attached, having been made accusing the Defendant of committing the crime(s) of:

| <u>THE CRIME(S) OF:</u> | <u>OFFENSE DATE:</u> | <u>CONTRARY TO WIS. STAT(S):</u> |
|--|---------------------------|----------------------------------|
| Threats to Judge, Repeater | 07/30/2017- 08/26/2018 | §§ 940.203(2), 939.62(1)(b) |
| Threats to Prosecutors, 3 Counts, Repeater | 06/2016 – 08/2018 | §§ 940.203(2), 939.62(1)(b) |
| Threats to Law Enforcement, 2 Counts, Repeater | 06/2016 – 08/2018 | §§ 940.203(2), 939.62(1)(b) |

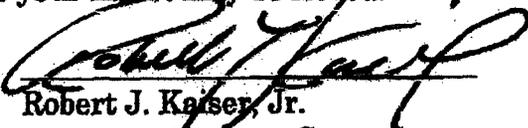
The original of such complaint will be filed in the office of the Clerk of Courts for Outagamie County, Wisconsin.

You, the Defendant, are therefore summoned to appear before the Circuit Court of Outagamie County, at the Outagamie County Courthouse, before Court Commissioner Brian Figy, 320 South Walnut Street, Appleton, Wisconsin on Monday, October 15, 2018, at 2:00 PM.

And in case of your failure to appear, a warrant for your arrest may be issued.

October 11, 2018

Date


Robert J. Kaiser, Jr.
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Summons and Criminal Complaint upon the within named defendant by:

- Personal service Substitute service by leaving with: _____
- Attempted Not Found

Date: _____

By [title of officer serving]: _____

**IF YOU REQUIRE THE ASSISTANCE OF AUXILIARY AIDS OR SERVICES
BECAUSE OF A DISABILITY, CALL (920) 832-5131 AND ASK FOR THE COURT
ADA COORDINATOR.**

Case 2018CF000000

STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY

STATE OF WISCONSIN
Post Office Box 7857
Madison, Wisconsin 53707-7857,

Plaintiff,

v.

Case No. 18-CF-

KEVIN R. DUNAY
Dodge Correctional Institute
1 West Lincoln Street
Waupun, Wisconsin 53596
Eye Color: Blue
Hair Color: Gray to partially gray
Height: 6'1" Weight: 205 lbs.,

Defendant.

CRIMINAL COMPLAINT

The above-named complaining witness being first duly sworn states the following:

COUNT 1: THREATS TO A JUDGE

The above named Defendant on or about between July 30, 2017, and August 26, 2018, in Outagamie County, Wisconsin, intentionally threatened to cause bodily harm to the person of the Honorable Mark J. McGinnis, a judge, where, at the time of the threat, the Defendant knew or should have known that the Honorable Mark J. McGinnis was a judge, and where the threat was in response to any action taken by Judge McGinnis in his official capacity, and Judge McGinnis did not consent

IF YOU REQUIRE THE ASSISTANCE OF AUXILIARY AIDS OR SERVICES BECAUSE OF A DISABILITY, CALL (920) 832-6151 AND ASK FOR THE OUTAGAMIE COUNTY CIRCUIT COURT ADA COORDINATOR.

to being threatened, contrary to Wis. Stat. § 940.203(2), a Class H felony, and upon conviction may be fined not more than ten thousand dollars (\$10,000) or imprisoned for not more than six (6) years or both.

Further, invoking the provisions of Wis. Stat. § 939.62(1)(b), because the Defendant was convicted on December 1, 2017, of the felony crime of Sexual Exploitation of a Child, contrary to Wis. Stat. § 948.05(1)(a), the maximum term of imprisonment may be increased by not more than four (4) years.

COUNT 2: THREATS TO A PROSECUTOR

The above named Defendant on or about between July 30, 2017, and August 26, 2018, in Outagamie County, Wisconsin, intentionally threatened to cause bodily harm to the person of the Honorable Melinda Tempelis, District Attorney of Outagamie County, a prosecutor, where, at the time of the threat, the Defendant knew or should have known that the Honorable Melinda Tempelis was the district attorney, a prosecutor, and where the threat was in response to any action taken by District Attorney Tempelis in her official capacity, and the district attorney did not consent to being threatened, contrary to Wis. Stat. § 940.203(2), a Class H felony, and upon conviction may be fined not more than \$10,000 (ten thousand dollars) or imprisoned for not more than six (6) years or both.

Further, invoking the provisions of Wis. Stat. § 939.62(1)(b), because the Defendant was convicted on December 1, 2017, of the felony crime of Sexual Exploitation of a Child, contrary to Wis. Stat. § 948.05(1)(a), the maximum term of imprisonment may be increased by not more than four (4) years.

COUNT 3: THREATS TO LAW ENFORCEMENT OFFICER

The above-named Defendant on or about between June 2016 and August 2018, in Outagamie County, Wisconsin, did intentionally threaten to cause bodily harm to the person of Sussex County Prosecutor's Detective Thomas Laird, a law enforcement officer, without his consent and in response to any action taken by Detective Laird in his official capacity, and, at the time of the threat, the Defendant knew or should have known that Detective Laird was a law enforcement officer, contrary to Wis. Stat. § 940.203(2), a Class H Felony, and upon conviction may be fined not more than ten thousand dollars (\$10,000), or imprisoned not more than six (6) years, or both.

Further, invoking the provisions of Wis. Stat. § 939.62(1)(b), because the Defendant was convicted on December 1, 2017, of the felony crime of Sexual Exploitation of a Child, contrary to Wis. Stat. § 948.05(1)(a), the maximum term of imprisonment may be increased by not more than four (4) years.

COUNT 4: THREATS TO LAW ENFORCEMENT OFFICER

The above-named Defendant on or about between June 2016 and August 2018, in Outagamie County, Wisconsin, did intentionally threaten to cause bodily harm to the person of Hardyston Detective Michael Masters, a law enforcement officer, without his consent and in response to any action taken by Detective Masters in his official capacity, and, at the time of the threat, the Defendant knew or should have known that Detective Masters was a law enforcement officer, contrary to Wis. Stat. § 940.203(2), a Class H Felony, and upon conviction may be fined not more than ten thousand dollars (\$10,000), or imprisoned not more than six (6) years, or both.

Further, invoking the provisions of Wis. Stat. § 939.62(1)(b), because the Defendant was convicted on December 1, 2017, of the felony crime of Sexual Exploitation of a Child, contrary to Wis. Stat. § 948.05(1)(a), the maximum term of imprisonment may be increased by not more than four (4) years.

COUNT 5: THREATS TO A PROSECUTOR

The above named Defendant on or about between June 2016 and August 2018, in Outagamie County, Wisconsin, intentionally threatened to cause bodily harm to the person of the Honorable Francis Koch, Prosecutor of Sussex County, New Jersey, a prosecutor, where, at the time of the threat, the Defendant knew or should have known that the Honorable Francis Koch was a prosecutor, and where the threat was in response to any action taken by Prosecutor Koch in his official capacity, and Prosecutor Koch did not consent to being threatened, contrary to Wis. Stat. § 940.203(2), a Class H felony, and upon conviction may be fined not more than \$10,000 (ten thousand dollars) or imprisoned for not more than six (6) years or both.

Further, invoking the provisions of Wis. Stat. § 939.62(1)(b), because the Defendant was convicted on December 1, 2017, of the felony crime of Sexual Exploitation of a Child, contrary to Wis. Stat. § 948.05(1)(a), the maximum term of imprisonment may be increased by not more than four (4) years.

COUNT 6: THREATS TO A PROSECUTOR

The above named Defendant on or about between June 2016 and August 2018, in Outagamie County, Wisconsin, intentionally threatened to cause bodily harm to the person of Assistant Prosecutor Laura Nazzaro, of the Office of the Prosecutor of Sussex County, New Jersey, a prosecutor, where, at the time of the threat, the

Defendant knew or should have known that Laura Nazzaro was a prosecutor, and where the threat was in response to any action taken by Assistant Prosecutor Nazzaro in her official capacity, and Assistant Prosecutor Nazzaro did not consent to being threatened, contrary to Wis. Stat. § 940.203(2), a Class H felony, and upon conviction may be fined not more than \$10,000 (ten thousand dollars) or imprisoned for not more than six (6) years or both.

Further, invoking the provisions of Wis. Stat. § 939.62(1)(b), because the Defendant was convicted on December 1, 2017, of the felony crime of Sexual Exploitation of a Child, contrary to Wis. Stat. § 948.05(1)(a), the maximum term of imprisonment may be increased by not more than four (4) years.

FACTS:

Beginning in approximately October 2014 and continuing through approximately February of 2016, the Defendant was living in Stockholm, New Jersey with his wife and three teenage sons and engaging in an online sexual relationship with a 18-year-old girl in Outagamie County, Wisconsin. The Defendant was a 20-year experienced engineer with a masters' degree in electrical engineering. At some point in 2014, the Defendant cruised internet chatrooms at night. He met the victim who he initially thought was 18 years old, but who he soon learned was actually 13 years old, and an eighth grader. She was living in Outagamie County, Wisconsin. Their online relationship progressed to engaging in very sexual, explicit role-playing. They exchanged sexually explicit photos and videos. They had phone-sex using the TextNow phone app, and masturbated together on Skype video. This information is derived from the criminal complaint in Outagamie County Case No.

Case 2018CF000868

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15-CF-470, statements of the Defendant's child sexual exploitation victim, the Defendant's confession to those crimes to Detectives Laird and Masters, Testimony before the Sussex County Grand Jury, and from the Defendant's and his attorney's statements to the court at the Defendant's sentencing in Outagamie County, Wisconsin, before the Honorable Mark J. McGinnis, Circuit Court Judge, for the crimes of Sexual Exploitation of a Child, Child Enticement, Causing a Child to View Sexual Activity, and Exposing Genitals to a Child.

These crimes came to light when the victim's mother saw photographs of her daughter's unclothed breasts and the victim told her she had sent those to the Defendant and that the Defendant was continuing to ask for more photographs; the victim's mother reported this to your complainant. Your complainant's investigation led to the Defendant's home in Sussex County, New Jersey where Sussex County Prosecutor's Detective Thomas Laird and Hardyston Detective Michael Masters conducted a follow-up investigation during which the Defendant confessed to them the above-described crimes. The Defendant was arrested on June 30, 2015, and was eventually indicted by a Sussex County Superior Court Grand Jury on four felony counts of Endangering the Welfare of a Child. The Defendant was held in the Sussex County Jail on those charges until his extradition and transfer to the Outagamie County Jail, Outagamie County, Wisconsin, on June 12, 2017. While the Defendant's case remained open in Sussex County, New Jersey, it was being prosecuted by Sussex County Prosecutor Francis Koch and Assistant Prosecutor Laura Nazzaro.

Your complainant has reviewed the reports of Sussex County Sheriff's Sgts. Andrew Boden and Daniel Truppo, and New Jersey State Police Detective Sgt.

B.F. Murphy of their interviews with the following fellow Sussex County Jail inmates of the Defendant, as well as the inmates' handwritten statements. In summary, the Defendant's fellow inmates related as follows:

Troy Leonard reported that the Defendant would talk all day long in the jail, even in the shower, about how he was going to get his vengeance. The Defendant was obsessed with killing Detectives Laird and Masters for destroying his life. He said they ruined his life, so he will ruin theirs. He also talked about killing his wife, his attorney, Prosecutor Koch, and Assistant Prosecutor Nazzaro. The Defendant explained that he was an engineer by trade and could make a device that was GPS signaled that he could detonate or set to go off with a timer. The Defendant told Leonard about guns that he inherited from his father that were not registered and that he had some of these guns hidden where the police did not find them when searching his home, and others that he had given to someone to hold for him until he got out of prison. The Defendant said that he would shoot all of his victims with either a rifle or his blue steel .357 revolver. The Defendant kept Bible verses in his cell regarding vengeance and an eye for an eye. The Defendant said he would stalk his victims to learn their routine and then shoot them when they least expect it. The Defendant said that he knew where Prosecutor Koch lived because their kids used to be friends. The Defendant said that he hoped to kill some of his victims' family members at the same time that he killed his victims, and then he would kill himself. The Defendant said he knew the addresses of all of those who put him in jail, that his mission is to, "Kill, Kill, Kill" and that, "There is going to be a bloodbath." Leonard said the Defendant could be heard in telephone calls to his wife and his attorney

telling them how he wanted to kill the prosecutors and detectives, saying, "I will get my vengeance." The Defendant told Leonard, "I came in for a little incident and I'm gonna leave a serial killer."

David Vargas, another fellow Sussex County jail inmate, said that the Defendant made threatening statements towards the detectives and prosecutors every day. He blamed the detectives for lying to him during their interview with him. The Defendant would even sing in the shower about how he was going to kill Detective Laird, and lay on his bunk and recite over and over, "I can't wait to kill Laird." The Defendant would announce every morning that he was one day closer to vengeance. He would shout that as long as he could hold a cold steel gun when he got out, he would kill the detectives and the prosecutors. He said he had a shotgun and a pistol he could kill them with. The Defendant explained different ways he could kill Detective Laird. A common scenario he explained was that he would go to Laird's home and knock on the door and when Laird answered, he'd say, "Remember me?" and then shoot Laird in the face, kill everyone else in the house, and then either kill himself or flee to Mexico. As jail calls were not very private, Vargas stated that he could hear the Defendant telling his wife in phone calls that he was going to get guns from his friends and kill the detectives and the prosecutors involved in his case.

Inmate Roy Teague stated that he had shared a cell with the Defendant and that the Defendant would make threats to the prosecutors and detectives on his case multiple times a day, all day long, even in the shower or just lying on his bunk. As regards Assistant Prosecutor Nazzaro, the Defendant said that he would go to her home, knock her out, pull down her pants, shove his "cock" up her "ass" and make her

say his name. When he was done with that, he would hang her upside down and watch her bleed like a pig. Teague said the Defendant repeated this scenario more times than he could count. He also repeatedly talked about killing Prosecutor Koch. The Defendant said that he knew Prosecutor Koch prior to being arrested as his son played baseball with Prosecutor Koch's son. He knew where Prosecutor Koch lived. The Defendant said he had several guns hidden in his house and he would use those guns to kill Prosecutor Koch when Prosecutor Koch was having a picnic with his family -- the Defendant said he would gun them all down. The Defendant talked about killing Detective Laird most often, saying that Laird had tricked him into confessing to his crimes. The Defendant said that the way he would get Laird would be that he would break into Laird's home and wait until Detective Laird's family came home. He would hit them over the head with a blunt object, knocking them out, then he would cut off their heads and put their heads in the refrigerator and then wait and watch for Laird to come home and open the refrigerator door. Once he got to see the look on Laird's face, then he would cut Laird's throat. The Defendant would repeat this scenario multiple times a day. As to Detective Masters, the Defendant said he would follow him until he went to a donut shop, then he would walk up next to him and blow his brains out. He would repeat this scenario every day throughout the day, along with many other threats to these victims, repeated countless times throughout the day.

Your complainant has had the opportunity to listen to the telephone calls the Defendant made while he has been in the Outagamie County Jail, Outagamie County, Wisconsin. At the beginning of each call that the Defendant initiated, a

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recorded message reminded him that the call was subject to monitoring. On July 6, 2017, in a call to his father, Robert Dunay, the Defendant's father told the Defendant that his talking on the telephone in the jail in New Jersey got the Defendant's, "ass in more of a jam than you even know," to which the Defendant replied, ". . . then I guess I'll make good on it when I get out." The Defendant said, "Depending on what sentence I get, I'm going to do certain things . . . when I go back to New Jersey, I'll probably [sic] going to get more charges, you know, and then it's no longer going to be, it's going to be more of a promise than anything else."

On July 20, 2017, the Defendant said,

"I lost everything. I lost my job, my career, my family, my kids, every fuckin dime I ever made, I have nothing. I have nothing for my life to show for. There's only one thing that I can still get, and I'm bound, and I'm hoping, you know, if things don't work out the way I want them too, like go back, you know, just go back to a normal life, then I'm going to go seek that other thing that I'm going, that I'm I'm not going to say anything, but we all know what it's going to be."

Dunay's father: "Your implications are very, very ... "

Dunay: "I really don't give a fuck anymore dad. I really don't give a fuck. I don't."

On July 30, 2017, the Defendant said,

"I just want to end this as soon as possible . . . And I'll take as many as I can with me. . . I will live the life of a felon. And any of my intelligence and knowledge will be used against everything . . . If I choose to live, that's what I'm going to do. Period. . . . They fucked with the wrong person . . . I'm going to finish it when I get out . . . IF I get out . . . Just let this anger simmer, you know, in here, a little bit longer. Another year maybe. Just let it simmer, and then make the mistake and let me out. . . . either way I'll end up dead. Doesn't matter. That's my short-term goal."

On August 6, 2017, the Defendant said, "I'll tell ya. Those fuckin' detectives and the fuckin' prosecutor in Jersey and now this fuckin' prosecutor here in Wisconsin, they're just looking to totally fuck me over . . . Well, I follow my own law. An eye for an eye. A tooth for a tooth. I follow my own laws." The Defendant went on to tell his father:

Dunay: "I'm just sitting here waiting for the end, basically. Couple more months, waiting for the end. Assuming the trial thing is October 10th. Sentencing will probably November, December. Probably by December, January I'll know how much time I'm getting. I'm either coming home and going back to my life and try to pick up the pieces, or, I'm gonna go to prison, either for a short time and take care of business when I get out, or a long time, and I'm gonna hang it up. Those are the three choices. It all depends on what the sentencing is. And that's written in stone, I'm not changing that. That's been in stone since It's the truth dad, just be prepared, you know. You know. I'm an engineer, I do a lot of project planning and things like that, and my life is a project, what's left of it, and I have it all planned out what's gonna happen. Yup. No more surprises."

Dunay: "You tell that to the fuckers in, that fuckin detective and the prosecutor. You tell that to them, alright. Especially when this fucking detective, they lie and coerce, and they misconstrue my statements, ok? They fucking lie to the grand jury, ok? You don't think I'm gonna let that slide, you know that? I am not one of those that turns the other cheek. I live strictly in the Old Testament, ok? An eye for an eye. Fuck em".

Dunay: "I'm full of hatred and it's gonna come out one way or another, ok?"

Dunay: "If I don't get 3 years or less, and just get the fuck out now, there's no chance of me ever getting my life back, and I'm not even going to try after that. At that point, they better make sure they give me enough time that I never get out. Ok? Cuz I have plans."

On August 16, 2017, the Defendant said:

Dunay: "... I'll be going to fuckin prison for fuckin 10 years anyways so it doesn't matter. If they let me get less then they made a mistake. Fuckers. Payback's a bitch, that's all I can tell ya. Payback's a bitch".

Dunay: "If I wasn't fucking lied to by those fucking detectives in Jersey, OK, and get fucked over by them. If I didn't talk, that's right, I'd be better off, but you know what? He lied to me, he fucked me over, and now payback's a fuckin bitch. That's right. I'm going back to Jersey. Yup. I'm going back to Jersey, better fuckin watch it. Payback's a bitch when I get out of here."

Dunay: "I hate the cops, I hate the fucking detectives, I hate the fucking justice system, I hate this fucking government, I hate this fucking country". "They better make sure they fucking put me away for life. They better make sure they put me away for a long time. Cuz I'm gonna be one angry, I'm gonna be one fucking angry and vengeful son of a bitch when I get out of here. I hope they use this against me. They'll be smart to do it."

On August 21, 2017, the Defendant said:

Dunay: "I'll get the last laugh. Vengeance is mine, saved the Lord. That's taken directly

from the Bible. Yup. Mmmhmm. Yup. Mmmhmm. Yup. This has not taught me to be a better person. I was a good person before I ended up in here. Not anymore. I'm gonna be comin out with a fuckin vengeance, I'll tell ya that".

Dunay: "Oh well. Things will come full circle and they will regret that they put me here. They'll regret it".

On August 31, 2017, the Defendant, in talking to his father, said:

Dunay: "If they make the mistake to only put me in for only 4-5 years, I'm going to be a very angry, vengeful person when I do get out. So. They better fuckin make sure they put me away for a long time. I am very angry and hateful right now, fucking, law enforcement and fucking justice system, very hateful of them. Very hateful."

Dunay: "It's all corrupt. And this jail/prison system/justice system doesn't work either. I was a decent person before I got into jail, for the most part. But I'm gonna come out of prison a, a fuckin, with a lot of rage, anger, hatred, and vengeance. That's what's gonna happen when I get out. That's gonna be me when I get out. They definitely changed me. That's what they wanted, that's what they're gonna get, that's for sure. I'm not going to be rehabilitated".

Dunay: "I was not a criminal coming in, but I'm definitely going to be a criminal coming out, I'll tell you that. I'm going to use all of my engineering skills and everything else. Just wait and see what I'm capable of when I get out. Just wait and see".

Dunay: "Ahh fuck them. I'm just telling you how it's going to be. That's what they turned me into. They turned me into a very hateful person. Full of hate. I hate cops. I hate detectives. I hate prosecutors. I hate judges. Hata. I wish there was a stronger word for it. I hate them."

Dunay: "They better fuckin put me away for life. Those fuckers."

Dunay's father: "They probably will. You keep talking like this. It's gonna happen".

Dunay: "Like I said, I have my threshold on time. Depending on how many years I get. It'll be one thing or another. My life is already over Dad, see that's the problem. I'm too smart. Ok? I'm not like most of these fuckin people in this fuckin jail. They didn't have a life before they came here. Ok? They didn't have a life. So when they get out, they're right back where they were before. I lost everything. They took everything from me. Destroyed me. I have nothing left to go back to. I lost my job, my career, my kids, my wife, all my money. I have nothing left to live for. I have nothing left to live for but vengeance. That's all I have left is anger and vengeance."

Dunay: "My mind is made up." "I'm definitely going to be famous, you know, I'm definitely going to be famous."

Dunay's father: "You won't be famous you'll just be dead".

Dunay: "We'll see how many I take with me. I hope they got that on recording so they can charge me again".

On September 9, 2017, the Defendant said:

Dunay: "Yeah, well. This is just turning me into an angry, very angry and bitter person. Cuz, you know. Uh. Maybe it's not a good idea they ever let me out. Cuz I know what I'm capable of at this point".

On September 13, 2017, the Defendant said:

Dunay: "I said, we'll go to fuckin trial. I don't fuckin care. I said, 10-15 years, I said, I'm either gonna hang myself, or I'm gonna come out and I'm gonna come at her, I'm gonna come back with a vengeance"

Dunay: "They are not rehabilitating me, they're making someone who's gonna sit in prison and who's gonna be fuckin very angry for 10 years until he gets out"

Dunay: "Well, that bitch better fucking put me in fuckin prison the rest of my life. That's all I can say. I'm so fuckin angry, I am so, I am beside myself. I've never hated in my life, like this, I learned how to hate in this fuckin place."

Dunay: "I told the lawyer, if they're gonna put me in fuckin prison they better, the fuckin prosecutor better make sure she puts me in for fuckin life, she better fuckin make sure she puts me in for fucking life. Make the mistake and let me out in my lifetime and (whistles). It'd be a fuckin mistake on her part. That's all I'll say at this point". "You gonna put me away for fuckin 10 years you better make sure you put me away for fuckin 30. You let me out, that'll be a big fuckin mistake she ever made in her life".

Dunay: . . . "I said if I do live, it'll only be for one reason, and you know what that reason is".

Dunay: "It's probably a big mistake if they ever let, it's probably a big fuckin mistake if she ever fuckin lets me out of fuckin, outta here. Big fuckin mistake. I'm so fuckin angry right now".

On September 18, 2017, the Defendant said:

Dunay: "And if they make the mistake to only give me 5-7 years, I will persevere long enough to ..."

Dunay: "I'll keep my tools nice and handy. I'll need them when I get the fuck out of here. That's all I'll say".

On September 27, 2017, the Defendant said to his father:

Dunay: "Oh and you know who is being so helpful with the prosecutor's office here in Wisconsin? That fucking Detective Laird in New Jersey. That fuckin scumbag piece of shit".

Dunay's father: "Well you confided in him when you opened your mouth. You did it to yourself".

Dunay: "Yeah well, yeah well, there will be a day, there will be a day, that's all I say. There will be a day. Day of reckoning. But anyway. Yeah that fucker."

On September 30, 2017, the Defendant said to his father:

Dunay: "Don't worry, I have my plan. I'll be coming back to Wisconsin for a second time, that's for sure. Yup. That'll be an interesting trip back, I'll tell ya".

Dunay's father: "I don't wanna hear it"

Dunay: "Yep. Well, there's nothing to say. It's a done deal"

On October 29, 2017, the Defendant said to his father:

Dunay: "Yeah well, he also didn't get hit with multiple jurisdictions like I did. Thanks to that fuckin prick detective in New Jersey, that fuckin son of a bitch. I hope he fuckin dies".

Dunay's father: "Well, he probably will."

Dunay: "They'll get theirs in the end. What goes around comes around".

On November 5, 2017, the Defendant said:

Dunay: "Well, if the prosecutor ever makes the mistake to let me the fuck out, you know"

On November 8, 2017, the Defendant said:

Dunay: "I happened to be the lucky one to get this fucking cunt. Of all the prosecutors, I got the cunt. So, that fucking bitch better put me in for life. That's all I can say. This may not be personal for her, it's personal for me. This is very personal."

Dunay: "And chances are I'm gonna fuckin rot in a fuckin Wisconsin prison for the next

10-15 years so. And after that, watch out Wisconsin, I'll tell you that. You created a monster".
 Dunay: "This state is, you know, they wanna bury you. You know, give me 10 years, god forbid you ever let me out. God forbid. I am fuckin pissed. You know. She's a fuckin cunt. The prosecutor is a fuckin cunt and she's fuckin with my life."

On November 12, 2017, the Defendant said:

Dunay: "If that bitch puts me away, tries to put me away for 10 years, you know, that fuckin bitch puts me away for 10 years, it'll be the biggest fuckin mistake she ever made"

On November 16, 2017, talking to his father, the Defendant said:

Dunay: "If they ever let me out of here, I'll get some fuckin payback, don't worry, one way or another."

Dunay's father: "When you've got an attitude like that, who the hell wants you out?"

Dunay: "Yeah, well, they fuckin fucked my life and kept me here for 28 months fuckin with me"

Dunay's father: "You haven't been a very nice person either. You've got no remorse, you got nothing about what the hell you did".

Dunay: "It's a fuckin piece of shit justice system. It's a fuckin police state. So of course there's a lot of hatred on my part right now. I have nothing left but hatred for this fuckin system. I hate detectives, I hate fuckin prosecutors, and they made this personal."

On November 19, 2017, the Defendant said:

Dunay: "I got news for ya. With this fuckin cunt, uh, DA Tempelis, I'm almost better off going federal. Because this fuckin cunts got such a hard on for me, for whatever reason, I don't know if she was sexually abused or raped or something when she was a child, but that fuckin cunt has it out for me for some reason". "And I hope that fuckin bitch rots in hell"

On November 26, 2017, the Defendant said:

"I'm just a very vengeful person, that's all I say" "Payback's a bitch" "Those fuckers that destroyed my life".

On November 26, 2017, the Defendant and his father Robert Dunay discussed

the Defendant shaving his head and the Defendant said:

Dunay: "This way when I grow my hair back they won't see what's coming, you know, they won't know it's coming when I get out. I'll be in my original disguise. Yep. I'm adamant about that. There's nothing gonna change my mind. I'll fix it when I get out. I'll fix it. I will fix it. Lucy doesn't think I can fix this. I will prove her wrong. I'm gonna fix it. I'm gonna fix this great. I'll make every fuckin newspaper in the country".

Dunay: "This is what happens when you keep an animal in a cage. It gets angry and its gonna fuckin bite you when it gets out".

Dunay: "I have nothing left besides anger and hatred. That's all that's left inside of me".

Dunay: "I have nothing but anger and hatred left inside of me. And I will capitalize upon that when I get out".

Dunay: "I don't expect to live after this is all done. Even if I wait ten years to get out. It'll be over quick. Real quick. There's only one reason I'm staying alive right now".

Dunay: "No. I know revenge. I know that. I know that one. I know that. I know revenge. And those fuckers destroyed my life. I did something stupid, but I don't fuckin deserve being in a

fucking cage for almost 30 fuckin months. They treat you like an animal for fuckin 30 months and then they're gonna fuckin put me in fuckin prison for 10 or more years. Fuck that. Somebody's gonna pay for that".

Dunay: "I will get the last laugh. I will get the last fucking laugh. You'll see"

Dunay's father: "You really shouldn't be talking like this on the telephone".

Dunay: "I really don't fuckin care anymore. That fucking prosecutor, DA Tempelis can suck my big fuckin dick. Do you think I care about what I say on the phone? I hate her fuckin guts. This is personal".

On November 27, 2017, the Defendant said:

Dunay: "I harbor a lot of anger and hatred towards the justice system. You make the mistake and let me out within ten years, I might just live long enough to, uh, to do something about when I get out."

Dunay's father: "When you talked to those goddamn detectives when they came to your house, you fucked yourself like you never could have done anything if you wanted to."

Dunay: "Yeah well if they give me the opportunity for payback ... you know"

Dunay: "Yeah well, yep, and now my life is either gonna be vengeance or death, or both, actually."

On December 1, 2017, prior to entering his pleas, the Defendant said:

Dunay: "Just wait til I get out of here." "I get 5 years to plan"

Dunay: "More time to plan" "They have to let me out someday"

On December 1, 2017, after entering his pleas to the four felonies pending

before Judge McGinnis, the Defendant said:

Dunay: "You should've seen those two fuckin' New Jersey detectives up on the big screen in the courtroom today all smug, you know, all smiling all smug, you know, like they did a great job. Those fuckers got another thing coming" "Those fuckers better remember I might be home, I might be back in New Jersey in 2 ½ years" "They'll see my face again, I'll promise you that" "I've got business to take care of, lot of business to take care of" "I'll be a busy man when I get out of prison".

Dunay: "And then I'm gonna shoot out the, I'm gonna take care of business and head to Argentina" "Those fuckers can't get me once I'm there. There's no extradition from Brazil or Argentina".

Dunay: "That prosecutor can suck my dick. I could care less" "She's a fucking cunt".

Dunay: "Yeah they were online. All smug. Detective Laird and Detective Masters, both those fuckers, I would love to fuckin kick their teeth in. I probably will one day. I'll get a chance to kick their fuckin teeth in when I get back to New Jersey."

On December 5, 2017, the Defendant said:

Dunay: "Like I said, I'll wait it out, I'm gonna wait til February 2nd and then I'm gonna be like I told ya so', and then I'm gonna be like 'Now you know what I'm gonna do when I get outta here' and that'll be the last time you hear from me, so".

Dunay: "That fucking cunt prosecutor has it out for me, I'm telling ya. She's making a fucking example, she's making an example out of me ok? And so is the fucking US Attorney, ok? But I will get the last laugh, I promise you about that"

Dunay: "Well, I'll be one of the crazy ones when I get out. Yeah. Somebody's gotta teach it a lesson."

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It might as well be me".

Dunay: "I will not be able to live with myself knowing that I missed my childrens, I've destroyed my children's childhood. And I will not be able to live with myself knowing those fuckers are out there that destroyed my life."

Dunay's father: "They didn't destroy your life, you destroyed your life by going on the goddamn computer with that young girl. That is where you destroyed your life".

Dunay: "Those fuckin detéctives and prosecutors destroyed my life and I will not ever forgive them, and I'll never forget". "My hatred runs deep. When I get out. .. hatred runs deep". "We'll see what happens when I get out"

On December 6, 2017, the Defendant said:

Dunay: "Yeah well, I'll get the last laugh when I get out, trust me. I will get the last laugh. It's just a matter of how much, you know, just a matter of how much time I'm going to have to sit here and wait before that happens".

On December 22, 2017, the Defendant, again, talking to his father, said:

Dunay's father: "The thing is, you might be making things harder for yourself the way you're going. Harder and costlier".

Dunay: "It doesn't matter. As long as I get out within 10 years I know what I'm going to do. OK? As long as I get out within 10 years I KNOW what I'm going to do. It really doesn't matter whether it's fuckin 3, 5, 10 years. If it's more than 10, then you know, I've got other things I've got to take care of, you know".

Dunay: "Dad, listen, I learned how to be angry and I learned how to hate. OK? That's exactly what happened since I've been in jail. I learned how to hate".

On December 25, 2017, the Defendant said:

Dunay: "Yep. All I have is my anger left dad. That's all I have left is my anger. I will release it once I get out of here. I will release it. Trust me. I will. Promise".

Dunay: "Well. Just wait til I get out. Then you're gonna see what really happens. Just wait."

On January 5, 2018, the Defendant said:

The judge that I'm facing, Judge McGinnis, he's a fucking hanging judge. He hates sex offenders."

On January 6, 2018, the Defendant said:

Dunay: "Well at this point they better pray he puts me away for life, they better fucking pray they put me away for life anyway, so."

Dunay: "Mmmhmm. Well payback's a bitch, you know. Payback's a bitch".

Dunay: "Yeah well. They're fuckin with my life. Yep. They're fuckin with the wrong person."

Dunay: "Yep. Well. They fucked with the wrong person."

Dunay: "... Yep. They fucked with the wrong person. They fucked with the wrong person. They sure did."

On January 8, 2018, while again talking to his father, the Defendant said:

Dunay: "At this point that fuckin bitch better put me away for fuckin life. I might just get out. OK?"

Dunay's father: "What a mess. What a mess".

Dunay: "Yeah well, I'll clean it up when I get out, trust me. My anger builds here more and more every day."

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Dunay's father: "Well, I ain't gonna be here when you get out".

Dunay: "Well good then you're not gonna have to watch the news or read the papers about what happens when I get out. Yup."

Dunay: "This fucking judge McGinnis is a fucking hanging judge."

Dunay's father: "They're all hanging judges".

Dunay: "Well this guy is fuckin, he's the worst. He's a fuckin piece of shit".

Dunay's father: "Well, when he listens to your reporting him as a piece of shit you'll really gonna get it stuck up your pooper".

Dunay: "Yea whatever, ok."

Dunay's father: "What a mess you got yourself in".

Dunay: "I'll straighten it out when I get out, trust me. I keep saying that, and I promise. I'll be infamous. I'll be infamous. Yeah I'll be infamous. Yeah I'll be infamous".

Dunay's father: "You're not gonna get out then".

Dunay: "Doesn't really matter dad. They gotta let me out someday".

On January 12, 2018, the Defendant, again, talking to his father, said:

Dunay: "Well you know what? Listen. It doesn't fucking matter dad. To be honest with you. It doesn't matter if I get 5, 7, or, I'm going to do the same thing when I get out of here. It doesn't fucking matter. It's just, I'll be sitting in fucking prison a little bit longer, it's warehouse. That's about it. Nothing's gonna change when I get out. You don't get it, do you. It doesn't fucking matter. You just don't get it. I have nothing left to go back to. There's only one reason I'm getting out of fucking prison."

Dunay's father: "I don't want to hear that shit".

Dunay: "Well it's the truth. That's god-honest truth".

Dunay's father: "Well who caused the whole fucking problem."

Dunay: "The fucking justice system. The fucking detectives. The prosecutors. Yeah."

Dunay: "Yeah, well. There'll be payback. Don't worry. That's what I'm living for."

Dunay: "... Don't worry about it. Just read the papers and watch the news once they fucking let me out of here. That's all I'll say."

Dunay: "Well just. I'm being honest with you. I'm gonna do what I'm gonna do when I get out. You know. There's nothing really. I'm being honest about that. There's nothing left for me when I get out. And, I have a lot of anger towards a lot of people over this. So."

On January 30, 2018, the Defendant said:

Dunay: " Well who caused the whole fucking."

Dunay: "Oh absolutely. Alright I won't say it again, but that's what's gonna happen. I'm just gonna take care of business when I get out. That's that."

Dunay: "Well I got plenty of time to plan. That's for sure. Plenty of time to plan."

Dunay: "My life is fuckin over. It's worthless."

Dunay: "I'll just make it my life mission to strike back at the Justice System, that's all. I'll fight them."

Dunay's father: "... Your big mouth has gotten yourself into a lot of this problem."

Dunay: "No it hasn't. It's those fuckin detectives and piece of shit prosecutors. Mmmhmm."

Dunay's father: "It was you screwing around in the first place."

Dunay: "Those detectives in New Jersey fucked me over first. And now you got this fucking cunt prosecutor here. And the fucking piece of shit Judge that's gonna fuck me."

Dunay's father: "Don't talk like that, cause he's probably going to listen to these tapes."

Dunay: "I DON'T FUCKING CARE! I DON'T FUCKING CARE!"

Dunay's father: "Well you should care."

Dunay: "I don't fucking care."

Dunay: "I'm take care of business in Wisconsin then I'm gonna go back to New Jersey and take care of business there. Put an end to this nonsense. Once and for all."

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Dunay: "All I got is myself right now. And my plan to take care of business. That's about it. Finish my business and get the fuck out of this Just get the fuck out of here."

Dunay: "Well I'm gonna finish this. I started this, I'm gonna finish it. As soon as they let me out of the door, I'm gonna finish it."

Dunay: "Well, I told you I'm full of hatred and anger, so."

Dunay: "... I'll take it out on whomever when I get out. All that pent up anger inside of me. I'm gonna release it one of these days when I get out of here. This fucking justice system fucked me over. This fuckin law enforcement fucked me over. Yeah well, I'll never forget that. I think about it every day."

Dunay: "I used to be a good person. They made me what I am. Just remember that."

Dunay: "I said they made me what I am. The justice system. They made me what I am. And what I will become, when I get out."

Dunay: "I'll get the last laugh, don't worry. It might not be in a year or two. It might not be in six years, but I'll get the last laugh when I get out. Trust me on that one."

Dunay: "My life's over, Dad. It's worthless. I do not value my life anymore. And neither do I value other's lives anymore."

Dunay: "Yep. And now this is just all about vengeance. That's all it is."

Dunay: "Yep. Yep. As it says in the Bible. Vengeance is mine, sayeth the Lord. An eye for an eye."

Dunay's father: "The Bible 's just a history book."

Dunay: "Yep. And I'm gonna make more history."

Dunay's father: "Well. Anyway, that's not a good thing."

Dunay: "Well I always wanted to be famous. If we're into this. Might as well, one way or another, I'm gonna do it."

On January 31, 2018, the Defendant said:

Dunay: "My Dad says I'm my worst enemy. Making all those statements on the phone. You know, basically veiled threats and everything else. He's worried that I buried myself now."

On January 31, 2018, the Defendant also said:

Dunay: "Oh better yet, he was handed a disc from the prosecutor today, with all my phone conversations, just so ya know".

Dunay's father: "Well I tell ya, like I told ya, you gotta watch your mouth".

Dunay: "Yeah. I didn't say anything that bad. Doesn't matter. I didn't make any direct... I didn't make any direct... uh."

Dunay: "I'll probably get 12-15 years in. I'll be fucking 65 years old by the time I get out. I'll still have enough strength to do what I'm gonna do. That's about it."

Dunay: "Don't worry, I'll fix things when I get out. I'll fix things when I get out."

Dunay: "I will have my satisfaction. This fuckin life is worthless to me right now. It's just a matter of how I'm gonna end it. That's about it."

Dunay: "Yeah so he recommended 6-8 years. 6-8 years. That's way too ... well that gets me out in time ... well, I don't wanna get into what I'm gonna do but uh ... That's reasonable enough time. To guarantee that my life is fucking over but at least I can, I'll be young enough to take care of things when I get out."

Dunay: "Well, yeah well, the Justice System is gonna need a reality check, I think. I think that's what they need, a reality check. That's what I think. Yeah like I said, you'll never see me out of prison, but uh, I'll be famous. I'll be famous when I get out. I'll be famous. That's for sure."

Dunay: "It's the fucking, it's the fucking Justice System. I made a stupid mistake. I made a fucking stupid mistake."

Dunay: "Good they better fucking put me away for life then. They fucking better put me away for fucking life. Good. That's right. That's right. I wanna make sure they got that recorded."

On February 5, 2018, the Defendant said to his father:

Dunay: "Yeah well I didn't get it, so. But it's irrelevant because it doesn't matter how many letters she sends or whatever, I'm doomed. And I'm going to prison probably 8-12 years ok, so. No matter what you do, no matter what you say, no matter what happens, it doesn't matter."

Dunay's father: "Oh yes it does."

Dunay: "No it doesn't. They ain't, he's not gonna give me fuckin 5 years, I'm telling you right now. It's gonna be at least 8-12."

Dunay's father: "Probably maybe even more because of your belligerence and your big mouth on the phone and your threatenings and stuff."

Dunay: "I am not threatening anybody. Will you fucking stop saying that stupid shit on the fuckin phone? I am not threatening anybody. I never threatened anyone. I made statements, but I never threatened. Ok? The Justice System doesn't work, period."

Dunay: "... Yeah I hate fucking cops. I hate fuckin Well, they'll see me, they'll see my face again when I go back to Jersey."

On February 15, 2018, the Defendant said to his father:

Dunay: "I've never fuckin been to this state before, OK? I'm gonna do fucking time in a god damn state that I've never been to before. How crazy is that?"

Dunay: "Yep. If they ever let me out I'll clean it up. Promise. I'll clean it up."

Dunay's father: "I don't wanna hear that".

Dunay: "That's a positive thing what are you talking about. That's positive. I'm gonna clean it up."

Dunay: "And if they go with the feds, if the feds take me, I'll be back here any, I'll come back here anyway. Just to pay a visit. I'm gonna come back with bells on. I'm a very angry person dad. I'm a very angry, hateful person at this point. They turned me into this person.

They turned me into this person here. This fucking, this fucking justice system. It's very hard to contain myself. Very hard to contain myself at this point"

Dunay: "Gotta plan for the future, you know, gotta plan for the future".

Dunay: "... But now I know what this fuckin law enforcement and justice system is in this country. And something has to be done about it."

Dunay's father: "Well, you're not going to be able to do it".

Dunay: "I don't know what you're talking about I didn't say about doing anything. I just said something has to be done about it".

17:05 Dunay: "I'm not gonna, you know, more than 10 years I'm not doing it. I'm not doing it. 10 years or more I'm not doing it. And less than 10 then I know what else, I know what I'm gonna do, so. At least I'll have some purpose in life, the rest of my life. But there's nothing to go back to."

On February 22, 2018, the Defendant said to his father:

Dunay: "That's what this fucking law enforcement and justice system here did, was destroy my life."

Dunay: "Well I'm gonna fix it I promise you I'll fucking fix it don't worry. I'll fix it".

Dunay's father: "Your threats and your insinuations are enough to keep you in jail for the next 50 years Kevin."

Dunay: "I made no threats. I don't fucking care. I don't fucking care anymore. Don't you get it? I don't fucking care."

Dunay: "Now that's a fucking piece of shit. Tempelis and fuckin the US Attorney, fucking

Meiera. He used to be here, he used to fuckin work in this, and he fuckin, the federal defender, Krista, even told me that because he used to work here, he basically watches the cases and he's friends with Tempelis so they collude and uh and basically forcing people to fuckin uh, to destroy their lives and to keep them in prison as long as possible. That's what their fucking jobs are to do, to put me away as long as possible."

Dunay's father: "Yeah well, it looks like you're helping them by acting all belligerent."

Dunay: "Yeah I guess they shouldn't let me out, huh?"

On February 23, 2018, the Defendant said to his father:

Dunay: "Rational? I lost all sense of being rational since I've been in this fucking jail for three years. Nobody fucking cares about me. Nobody fuckin cares. Nobody fuckin cares."

On February 28, 2018, Outagamie County Jail Mental Health Professional and Community Liaison Josette Smith, MA, LPC, met with the Defendant in the Outagamie County jail after learning of his frequent angry statements and behavior and offered her expert assistance. During this meeting, the Defendant called District Attorney Melinda Tempelis a "fucking bitch." Ms. Smith met with the Defendant again after his sentencing on March 8, 2018, because the Defendant had been placed on suicide watch. The Defendant told her that he could commit suicide, or he could "become the monster they made [him] out to be," while in prison and then when he is released from prison, he "will have nothing" and he, "will kill." He stated that he plans to kill the judge and other people when he is released from prison and he said, "I have nine years to plan that." Ms. Smith reported that the Defendant was calm, coherent, and lucid at the outset of their 45 minute contact, but he became increasingly angry and engaged in threats of murder before the end of the contact. He appeared to be unable to respond to suggestions to calm down. At the close of her contact with him, Ms. Smith could hear the Defendant spend approximately another 30 minutes kicking and pounding his cell door making statements that he would, "kill the judge and that cunt . . ."

On March 8, 2018, Outagamie County Circuit Court Judge Mark A. McGinnis presided over the Defendant's sentencing, as he did at the time of the Defendant's plea. Appearing for the State as the prosecutor on the matter was Outagamie County District Attorney Melinda Tempelis. Appearing by telephone from New Jersey were Detectives Laird and Masters. The court, the prosecutor, and the defense attorney acknowledged that they had received recordings of the Defendant's jail calls as set forth above in this Complaint. The court spread of record the fact that the content and tone of the calls had resulted in heightened security measures being taken in the courtroom that day for the sentencing hearing because the Defendant's threats created, "significant concern about safety in the courtroom today." The Defendant's attorney acknowledged that the Defendant's telephone calls from the Outagamie Jail were, "threatening remarks towards the Court, towards Ms. Tempelis, towards the victim and her family, and, specifically makes remarks about, I guess how he would act, getting even, upon release . . . [he would] commit acts of violence towards the people that he believes have wronged him at various points during the last nearly three years." The court found, "When I listen to those tapes and I heard the demeanor and the tone and the language that Mr. Dunay says, I think it's pretty serious . . . I would say that based just upon my reviewing of everything, my personal experiences with Mr. Dunay, and what I understand the risks are including the conversations that have been recorded and submitted . . . I think he would carry them out based upon what I have observed and what I understand . . . on August 6 he talks about how he's an engineer, he project plans, how he has done project planning his entire life . . . about how smart he is, how capable he is at trying to create a criminal life-

style." The court found that in the calls the Defendant spoke about, "... how the legal system is corrupt, how he's going to teach the legal system a lesson, and repeats this multiple, multiple times, continuously pointing out people involved in this investigation all of the way back to New Jersey, multiple conversations."

At the sentencing on March 8, 2018, the Defendant told Judge McGinnis, "I beg the Court's forgiveness for my horrendous statements on the telephone." The Defendant admitted under questioning by the court that those calls the court listened to before the sentencing were made by him. When asked why the Defendant described those calls as "horrendous," the Defendant told the court, because of, "My threats to you, the prosecutor, the justice system in general – They are horrendous." The court concluded from the totality of the record that the Defendant was one of the most, "conniving, manipulative, dishonest, and dangerous individuals" that the court had ever had an opportunity to meet in 13 years on the bench. The court found that a significant part of who the Defendant was, and would be, whenever he got out of prison, was captured in the very horrendous, threatening, and violent statements the court heard on the jail call recordings, and found that he is a, "... high risk to reoffend in many different ways," including hurting people physically.

Judge McGinnis sentenced the Defendant to 12 years of initial confinement and 20 years of extended supervision, for a total sentence of 32 years, to which the Defendant responded to the court, without the court's permission to speak, "Twelve years is way too much, your Honor . . . Way too much time your Honor . . . What the hell difference does it make at this point?"

The Defendant's intent regarding his plans to kill the judge, the prosecutors, and the police upon his release from prison did not cease upon his transfer to the Wisconsin State Prison System's Dodge Correctional Institution after Judge McGinnis' sentencing. Your complainant obtained from Lt. Audie Ritschke at Dodge the procedure to download inmate telephone calls. Your complainant reviewed 25 telephone calls that the Defendant made between April 4, 2018, and June 13, 2018. Regarding Judge McGinnis, the Defendant told his father, "He's the FUCKER that put me away!" The Defendant said, "He's a piece of shit anyway, but that's besides the point." He said, "I only see this ending one way . . . this is not going to end well. Even when I get out of here, it's not going to end well. It's not going to end well." The Defendant said, "McGinnis is a piece of shit. I know this is recorded and I don't care, he's a piece of shit."

The Defendant said, ". . . I'm allowed to call a judge a piece of shit, aren't I? He was, he really was. And you know it. And so was that fucking DA, she's a piece of shit too. Both of them. I should have been home already. I should have been home already." He said, "I got a lot of crazy thoughts, but I won't express them on the phone anymore. I got myself in enough trouble, so." The Defendant said, "Because by the time I get out, I'll have nothing left to go back to . . . I'm assuming that, with my plans. I'm assuming I'll have nothing left to go back to. . . . The judge saw to it that I don't have anything left to go back to. He's made my life worthless. . . . I got business to take care of when I get out anyways, so."

The Defendant's father told the Defendant that he was just, "digging [his] hole deeper," but the Defendant said, "Well just remember, I will get out, . . . I will

get out one day. And I'll remember." The Defendant told his father, "You probably don't wanna be around." The Defendant said, "That's alright, I know what I'll do when I get out in nine years. I only have one thing to do." The Defendant said, "Yeah that fucking piece of shit judge and that fucking prosecutor didn't give a shit." He said, "Their biggest mistake might've been . . . I'm not even gonna say it because I'm gonna get myself in trouble. I'll be out in nine years so, that's all I'll say. I'll be out in nine years, and I don't forget. . . . I've got nothing left to lose now, right. So, nothing left to lose." Regarding Judge McGinnis, the Defendant said, "This is punishment. Fuckers. Especially that fuckin piece of shit Judge McGinnis." He said, "Well, there's always nine years and then I know what to do. Then I know what to do. Yep. . . . This is just a oneway trip for me when I get out. One way, one way trip, so. . . . That judge fucked me . . . All I can tell you is they have to let me go, eventually. That's all I'm gonna say. They have to let me go someday. . . . I can wait the nine years. I'll wait the nine years out, don't worry. They gotta let me out. They let me out eventually. . . . they underestimated me because I make promises. . . . I make promises. I got nothing left to go back to when I get out of here, so . . . I'm just a ticking time bomb when I get out in nine years. . . . slow fuse, that's all, slow fuse. . . . I'll fix it. I'll fix it. When I get out in nine years, I'll fix it. I'll fix everything."

The Defendant discussed his plans to carry out his threats: "I'll make whatever money I need here, hopefully, and then, . . . I already calculated how much money I need, and that's it . . . I only need a couple thousand to get done what I need to get done, that's it . . . I could get a work release for the last year and a half just to make enough money and I'll be good. Yep, I told you I'm adamant on that. I'm adamant on

that. There's nothing you can say, or anybody can [to] change my mind what I'm going to do when I get out. . . . I'll never see the kids again, so it doesn't matter. You can thank the fuckin piece of shit judge for that, and the prosecutor, and the detectives. You can thank those fuckers for that. . . . I've accepted my fate. I know the time I'm gonna do and when I get out . . . you know, I planned my future, man, I planned my future. I planned it. I got nine more years to plan for it. . . . Just counting the days until they make the mistake to let me out. . . . I've got nothing left to lose, Dad, they took everything from me. Fuckers. . . . right now I'm in check. But wait til I get out. It'll be checkmate and I'll clear the board. I'm gonna finish the game. I'll finish the game when I get out."

The Defendant said, "I already know what I'm going to do in the future. . . . Those fuckers. The prosecutor and the fuckin judge are home with their families right now. Those pieces of shit. Yup. Yup. I think about them every day. I think about them every day. . . . Oh just wait til I get out. Just wait til I get out. Just counting down the days. Just wait til I get out. You've seen nothing yet. . . . Because I know what I'm gonna do when I get out. I only have one thing on my mind I'm gonna do when I get out. There's nobody gonna stop me. . . . I was fucked over by the criminal justice system. That fuckin piece of shit judge. That fuckin piece of shit judge. And that fuckin piece of shit prosecutor. Yup. Yup." His father warned him, "You're not helping yourself talking like that," but the Defendant replied, "I don't care."

On or about September 7, 2018, your complainant received copies of jail calls this Defendant made from the Jefferson County Jail, Jefferson County, Wisconsin, where he has been housed serving his prison sentence. The rule book the Defendant

received when he entered the Jefferson County Jail informed him that his calls may be monitored and recorded and before each call the Defendant was informed that the calls were monitored and recorded. In a call on August 26, 2018, with his father, Robert Dunay, the Defendant's father told him, "You know you're being recorded don't you?"

In a jail call on August 5, 2018, the Defendant told his friend, "I know what my path is going to be when I get out of here I know what I'm gonna do you know. I know what I'm gonna do. A LOT of people know what I'm gonna do when I get outta here. . . . that judge and fucking prosecutor. Those fucking pieces of shit. They really fucking handed it to me. Yup. Yup. What goes around comes around, you know. What goes around comes around. So, you know, unless I get out of here in the next year or two, you know . . ."

When his friend suggested, rather than that, that he wait and see how he feels in nine years when he gets out, the Defendant retorted, "Oh, no, I know exactly. I'm planning. I have a big, I have my bucket list when I get out, you know, things I'm going to do before I die. . . . It won't take very long at all. . . . I'm going to stay alive long enough to take care of it. That's about it. That's what they wanted, that's what they're gonna get. They wanted to destroy me, and that's what they did. . . . If I'm not out of this in the next two years, I know what I'm gonna do when I get out. . . . The only thing I have going for me right now is that I can have the last laugh when I get out. That's about it. . . . I can have the last laugh when I walk out. Then I'm free and I can do whatever the fuck I want. For better or for worse, whatever I want."

The Defendant also talked to his father on August 5, 2018. The Defendant told his father, "I'm fated to what my fate's going to be when I get out of here. That's what I'm, that's what it's going to come out to be. That's what I expect. I'm committed to it. . . . They have to let me out. . . . As soon as they let me out of those doors, I will fix it. I will fix this when I get out. I will fix this. . . . I don't need any money when I get out. I only need a couple thousand dollars . . . the last year I'm here I'll be able to get work release. I'm going to make just enough money for the supplies I need to do the job when I get out." The Defendant proclaimed, "My life is worthless," and when his father asked him, "And who made it worthless?", the Defendant responded, "That fucking judge, that fucking prosecutor, that fucking attorney and that fucking investigator."

In continuing to expound upon his plan, the Defendant explained to his father, "I'll get out when I'm 60, then I'm gonna do what I'm gonna do. I probably won't join you in heaven; I'm going to hell. I guarantee you that much. I'll be firing that furnace in hell when I get out, once I get done. I won't even see my 61st birthday. I'll be out by 60, dead by 61, guaranteed. . . . I have just nothing but anger and hatred inside of me. And I have every reason to feel that way. . . . I get to go to prison for the next nine years. Nine years of planning just for less than a month. Well maybe a little more than a month. But it won't take long once I get out. . . . Dad, my life is over. That fucking judge. And that fucking piece of shit, that fucking piece of shit judge, and that fucking prosecutor, and those fucking detectives, fucked me over."

In discussing how his sentencing went, as described above, the Defendant told his father, "They used whatever I said on the phone because I was pissed off. I was

blowing off steam they used it against me, that's what killed me. So, yup, now it's no longer steam anymore. It's no longer steam. It's no longer steam anymore. It's not steam anymore. It's . . . yup, it's over. . . ." The Defendant went on, "If I didn't have a plan, Dad, I would hang it up already. If I didn't have a plan when I get out, I would have hung it up already. This is just about revenge. . . . And I'm sure everything I'm saying right now is going to get me in even more trouble and I don't even fucking care anymore because my life is worthless. My life is worthless now. . . . I'm going to finish it. I start the game now. I'm going to finish it. . . . Yup, you haven't seen nothing yet. Just wait til I get out of here."

On August 10, 2018, the Defendant told his father, "I know what I'm doing. . . . I know what I'm doing when I get out . . . and that's not gonna change no matter what anyone says." His dad beseeches him, "Just gotta pick up and start all over again, Kevin," but the Defendant is resolute in his determination to get revenge: "Dad, I'm not doing that. I told you . . . It's not part of my plan, OK? Unless I win the appeals and they resentence me and I get a reasonable, you know, I get to go home within a year or two, all bets are off. Everything else is unacceptable. And I'm just going to sit here, do my time, and I'm gonna do what I'm gonna do, period." About Judge McGinnis, the Defendant said, "I mean, how can I not hate that fucking son of a bitch!?"

On August 26, 2018, the Defendant told his father, "I'm gonna carry out my promises that's all. I keep my promises. . . . I know what my mission, what my fate is, and what my mission is when I get out of here, so, at leaset I have control over that, and nothing can change my mind on that . . . There's nothing left to go back to,

Dad." His father said, "As intelligent as you are you should be able to pick up where you left off." But the Defendant was having none of it: "No, no, you don't understand. Too much time has gone by. . . I'm smart enough to know what I'm gonna do and get away with it when I get out. . . . This is my life, and all I can do is sit here and wait til they let me out. And then I'm just gonna carry on, you know, with the plan with the rest of my very short life when I get out. . . . I'll be 60 years old, I'll still be physically fit and capable. . . . That fucking piece of shit Judge McGinnis. He was a fucking piece of shit in that courtroom."

Judge McGinnis, District Attorney Tempelis, Detective Laird, Detective Masters, Prosecutor Koch, and Assistant Prosecutor Nazzaro did not consent to being threatened.

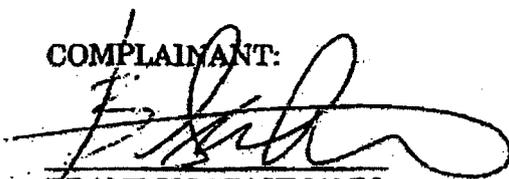
This Complaint is based on the information and belief of your complainant who is a police officer for the Fox Valley Metro Police Department and who learned of these offenses from personal investigation as well as from police reports from the Outagamie County Sheriff's Department; the Hardyston, New Jersey Police Department; the Sussex County, New Jersey, Sheriff's Office; the New Jersey State Police; the Sussex County Prosecutor's Office; and the Outagamie County District Attorney's Office, which reports your complainant believes to be truthful, accurate, and reliable in as much as they were prepared during the course of those officers' official duties.

Further, your complainant believes that information furnished by Judge McGinnis, District Attorney Tempelis, Detective Laird, Detective Masters, Prosecutor Koch, Assistant Prosecutor Nazzaro, Josette Smith, Roy Teague, Troy

Leonard, and David Vargas to be truthful, accurate, and reliable in as much as these named persons providing information witnessed the events they described.

Further, your complainant believes that information from the Outagamie County Circuit Court, the Outagamie County Jail, the Dodge Correctional Institution, and the Jefferson County Jail is derived from records made and kept in the regular course of the business of those entities and regularly relied upon by law enforcement officers to be truthful, accurate, and reliable.

COMPLAINANT:



BRANDON STAHMANN
Fox Valley Metro Police Department
Outagamie County, Wisconsin

Subscribed and sworn to before me and approved
for filing this 11th day of October, 2018.



ROBERT J. KAISER, JR.
Assistant Attorney General
Wisconsin Department of Justice
State Bar #1011333
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Case 2015CF000470

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Filed 06-21-2019

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FILED
06-21-2019
Clerk of Circuit Court
Outagamie County
2015CF000470



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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June 20, 2019

Hon. Mark J. McGinnis
Outagamie Co. Circuit Court, Br. 1
Government Center
320 South Walnut Street
Appleton, Wisconsin 54911

Re: *State of Wisconsin v. Kevin Dunay*
Outagamie Co. Case No. 15-CF-470

Dear Judge McGinnis:

Attached please find the affidavit of [REDACTED], the victim's mother in this case, answering the questions posed by the Defendant's demand for discovery relating to the restitution in this matter. As noted in prior correspondence, the defense is not entitled to discovery without good cause being shown, Wis. Stat. § 973.20(14)(c), but the State has imposed on Ms. [REDACTED] to answer the defense's questions notwithstanding.

The State offers this affidavit in lieu of any additional testimony regarding the requested restitution in this case pursuant to Wis. Stat. § 973.20(14)(d), which provides that the Court "may waive the rules of practice, procedure, pleading or evidence" and "conduct the proceeding so as to do substantial justice between the parties." The Defendant and the Court have been provided with the financial documents setting forth Ms. [REDACTED]'s financial obligations, up until the time of the original sentencing. The other questions the defense has have been answered. Proceeding to a decision on the proposed order in this fashion in fact does substantial justice for both parties.

Thank you for your courtesy and kind attention to this matter.

Sincerely,

Robert Kaiser, Jr.
Assistant Attorney General

RJK:ajs

Enclosure

Case 2015CF000470

Document 116

Filed 06-21-2019

Page 2 of 3

STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 15-CF-470

KEVIN R. DUNAY,

Defendant.

AFFIDAVIT OF [Redacted]

STATE OF WISCONSIN)

COUNTY OF OUTAGAMIE)

I, [Redacted], being duly sworn and under oath, do hereby state as follows:

1. The 15.5 days I lost from work during the pendency of this case were lost due to time spent having to be at hospitals because of my daughter, the victim herein, being there and needing my help, all of those days occurring after I discovered her on-line relationship with the Defendant.
2. Because of the times that I had to miss work, I had to change jobs and so my pay at different jobs was different from the previous job.
3. All the medical bills I am responsible for are for medical events that occurred after I discovered the Defendant's on-line relationship with my daughter, and include psychiatric hospitalizations, psychological counseling, and other medical care for things that I described to the Pre-Sentence Report writer (pp. 8 - 9) that my daughter went through because of the Defendant, including suicidal overdoses, suicidal self-stabbings, and other self-destructive acts. There were no hospitalizations for anything like a broken leg or anything else for which the Defendant would not have been responsible.
4. All of the bills which I received and have requested reimbursement for were for medical, psychiatric, and psychological care given to my daughter after I discovered her on-line relationship with the Defendant, none were for care given to her before that. I stand by the request I filed when the case ended, even though the cost to me of care for my daughter because of what the Defendant did to her has continued to accumulate to this day.
5. None of the bills I previously gave to the District Attorney's Office to file with the Court have been dismissed by any provider out of "medical necessity," nor have any carriers paid any amounts of the bills I have received. They have refused to pay the bills either because my daughter, as understandably distraught as she was, left the programs she was in against doctors' advice, or because care in facilities like Winnebago Mental Health were outside the coverage of my health insurance carrier.

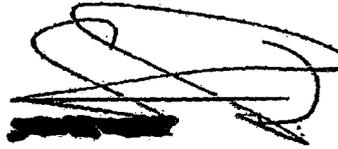
Dated at 1303 this 20 day of June, 2019

Case 2015CF000470

Document 116

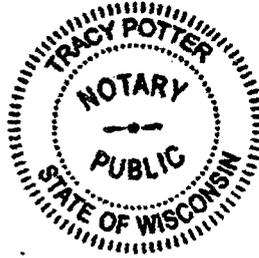
Filed 06-21-2019

Page 3 of 3

A handwritten signature in black ink, appearing to be "Tracy Potter", written over a horizontal line.

Subscribed and sworn to before me
This 20th day of June, 2019


Notary Public, Calumet County, WI.
My commission is permanent.
My commission expires 2/19/2023





1 STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY
2 BRANCH I

3 -----

4 STATE OF WISCONSIN, Transcript of:
5 Plaintiff, EVIDENTIARY HEARING

6 -vs-

7 KEVIN R. DUNAY, Case No. 15-CF-470
8 Defendant.

9 -----

10 HONORABLE MARK J. MCGINNIS
11 JUDGE PRESIDING

12
13
14
15

16 APPEARANCES:

17 ROBERT J. KAISER, JR., Wisconsin Department of
18 Justice, 17 West Main Street, PO Box 7857, Madison,
Wisconsin 53707-7857, appearing on behalf of the State of
Wisconsin.

19 TIMOTHY T. O'CONNELL, O'Connell Law Office, 403
20 South Jefferson Street, PO Box 1625, Green Bay, Wisconsin
54305-1625, appearing on behalf of the defendant.

21 The Defendant appeared in person.

22
23
24

Date of proceedings: June 21, 2019

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95

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1 him. Otherwise I guess we could go forward as is.

2 THE COURT: Well, Attorney Tarnowski, you
3 are here on this hearing?

4 MR. TARNOWSKI: I was subpoenaed, yes.

5 THE COURT: So I would like to not waste
6 Mr. Tarnowski's time.

7 MR. O'CONNELL: Okay.

8 THE COURT: But I think this hearing has
9 been scheduled for several months.

10 MR. O'CONNELL: I am prepared. I was
11 prepared. I talked to the defendant. I thought all
12 of the questions -- anything he had was answered.

13 THE COURT: Okay. So do you want to spend
14 a minute with him right here, see if any of them are
15 resolved or that he doesn't want to take them up?

16 (Discussion off the record.)

17 THE COURT: The record should indicate
18 that Attorney O'Connell is consulting privately with
19 Mr. Dunay.

20 MR. O'CONNELL: Your Honor, if I could
21 just have two more minutes, I think we will be ready
22 to go.

23 THE COURT: Okay.

24 MR. O'CONNELL: Your Honor, thanks for
25 the -- Thanks for the time. From my end I know I

1 have had numerous conversations with the defendant.

2 I know -- I think it was late last year I
3 had filed a motion to withdraw. The issue was the
4 defendant wanted a number of issues filed and
5 argued, and I believed I could only argue a limited
6 amount of those issues. I know there was the motion
7 to withdraw as counsel. At that point we had -- I'm
8 not sure if it was a hearing or if it was some or if
9 it was on the record or if it was off the record.

10 THE COURT: First of all, it wouldn't have
11 been off the record --

12 MR. O'CONNELL: Okay.

13 THE COURT: -- because I have never done
14 anything in cases since 2007 off the record; and I
15 especially wouldn't do anything in this case off the
16 record. My practice for the last 12 years has been
17 I'm just on the record. It was due to an experience
18 in a trial where I was off the record in chambers
19 with counsel, and then we made a record of it but it
20 was misconstrued months after the trial. So my
21 practice whether it's a divorce case, a small claims
22 case, an eviction case, or something like this with
23 Mr. Dunay, I am just on the record here in the
24 courtroom and everything's being recorded so there's
25 no way to misconstrue.

1 MR. O'CONNELL: Okay. And I know at
2 that -- at that -- well, on that -- At that hearing
3 on the record the defendant had decided that he was
4 willing to waive those issues; and I'm happy to
5 proceed with the issues that I felt had merit. So
6 then I did file these motions. I have had numerous
7 conversations with the defendant. Just now for the
8 first time I was informed by the defendant that
9 he's -- he has concerns that there are issues that
10 I'm not pursuing on his behalf, in addition to that
11 how I'm handling, I guess, this today. He's not
12 satisfied with my work. He is asking to -- which I
13 know he will -- he will indicate to you but he's
14 asking to represent himself pro bono.

15 Two things that I'd like to note to the
16 Court. No. 1, I have brought up to him that I
17 understand there's two attorneys here. You may want
18 to take -- You may want to take testimony from them.
19 So at least they don't have to come back here for
20 another hearing. It's my understanding he is
21 prepared to address that himself.

22 The second thing is or I guess there's
23 two additional things. The second thing is that on
24 the record I know he needs to -- I know the Court
25 would need to do a colloquy with him so he

1 understands that if I do withdraw that the public
2 defender's office will not appoint him another
3 attorney and he'll be responsible to handle this
4 appeal by himself.

5 And the last thing that I'd like to say is
6 the Court of Appeals -- They are the Court that
7 would have the determination. I'm sorry. They
8 would have the authority to grant him an extension
9 to file any postconviction motions because obviously
10 at this point we are beyond that. That's something
11 that he would have to -- It's something that it
12 would be within the Court of Appeals' discretion at
13 the end of the day to allow him to file additional
14 motions. It's something that he would have to know
15 that also. I would assume that they probably would
16 allow him to do so but --

17 THE DEFENDANT: If I am going to go
18 pro se, I want to preserve even this postconviction
19 hearing and all motions, all issues.

20 THE COURT: Mr. Dunay, it's not your
21 chance to talk right now. Attorney O'Connell was
22 talking. Don't interrupt him. Go ahead,
23 Mr. O'Connell.

24 MR. O'CONNELL: Your Honor, so the -- I
25 guess the last part was already -- the last thing I

1 would like to note is regarding the -- whether the
2 defendant would even be able to file any
3 postconviction motions because we are beyond that
4 timeline. It's something where I could file a
5 motion just before I end up withdrawing. I could
6 file one last motion for extension on his behalf
7 explaining to the Court of Appeals. It would be
8 within their discretion whether they would grant it.
9 They are the Court with that authority. From my end
10 I don't want to step in the defendant's way. I know
11 he has the right to represent himself, and I don't
12 want to step in his way if he chooses to represent
13 himself.

14 THE COURT: All right. So I want to just
15 say something that I said once before to Mr. Dunay
16 and it may come across a little bit different today
17 but what has happened from now going backwards to
18 8:30 so right now it's 8:43. So for the last
19 13 minutes I think this is just another example of
20 Mr. Dunay being a conniving, manipulating individual
21 who's using everybody sort of against each other;
22 and I don't appreciate it.

23 So we are going to march through these
24 issues one by one; but as I look out here at you
25 guys, I see you, Mr. O'Connell. Pretty soon you are

1 going to be sitting where Mr. Tarnowski is because
2 he's going to have an ineffective assistance claim
3 against you. Mr. Tarnowski is here. You are
4 Mr. Buckett? You are dressed down. I didn't
5 recognize. We have three attorneys who have
6 represented Mr. Dunay over time, and now I think I
7 am being told Mr. Dunay wants to represent himself.

8 And when you were talking, Mr. O'Connell,
9 he's shaking his head in disagreement with some of
10 the things you were saying, and I am wondering why
11 we are dealing with this this morning at 8:30 or
12 8:45 other than Mr. Dunay again trying to manipulate
13 and connive the system. One other thing needs to be
14 put on the record just so it's clear. Attorney
15 Kaiser, I have never met you before, I don't think,
16 right?

17 MR. KAISER: Correct.

18 THE COURT: This is the first time that I
19 have ever met Mr. Kaiser or had any contact with
20 him. I didn't know what he looked like until this
21 morning when he walked out here, and I know
22 eventually some Court will look at Attorney Kaiser
23 representing the State in that new case against
24 Mr. Dunay where I think I am a part of that case
25 with you. You and I have never met. You and I have

1 never talked.

2 MR. KAISER: Correct.

3 THE COURT: My involvement in that case is
4 pretty minimal, to the extent that I haven't even
5 talked to the person handling the case. Do you
6 agree?

7 MR. KAISER: Yes.

8 THE COURT: So I just wanted to get that
9 out there as we go forward today. So my idea, just
10 so everybody knows, is we have some issues that need
11 to be decided. They are going to be decided today;
12 and, quite frankly, Mr. Dunay, I don't care if you
13 represent yourself. I don't care if Mr. O'Connell
14 represents you, and I don't care if you have all
15 three of them represent you. But if this is an
16 effort to manipulate, delay, or scheme the system
17 like you often tend to do, you know, I just want the
18 record to be clear that that's what you are doing so
19 when they read it up above they can understand
20 exactly what's happening here.

21 It's not your turn to talk so you are as
22 if you are about to talk as I am talking. You will
23 talk when somebody asks you to talk. Understood,
24 Mr. Dunay?

25 THE DEFENDANT: (No response.)

1 THE COURT: That was a question.

2 THE DEFENDANT: I may. I have -- I have
3 the right to ask to speak.

4 THE COURT: You actually don't. You will
5 talk when it's your turn to talk. Do you understand
6 that?

7 THE DEFENDANT: Do you understand you
8 should have recused yourself from this case?

9 THE COURT: You are not going to ask
10 questions or else, Mr. Dunay, the hearing's going to
11 be very challenging for you. So that's not the way
12 it's going to go today. I prefer to just have a
13 real simple hearing where the evidence is presented
14 and the decisions are made and everybody gets to
15 argue what they want to argue. You obviously want
16 to create issues.

17 THE DEFENDANT: No, I don't have to create
18 issues. I have a series of issues --

19 THE COURT: Okay.

20 THE DEFENDANT: -- legitimate issues that
21 I would like to raise on the record in front of the
22 Court.

23 THE COURT: You will get your opportunity
24 at the right time.

25 THE DEFENDANT: Great.

1 THE COURT: We are here for four issues,
2 and those are the four issues that have been briefed
3 that everybody's had an opportunity to respond to.
4 Let's go back to your issue, Mr. O'Connell. Your
5 representations to the Court, Mr. O'Connell, are
6 today Mr. Dunay does not want you to represent him?

7 MR. O'CONNELL: That's correct.

8 THE COURT: Okay. And in your opinion you
9 believe he's making that decision freely,
10 voluntarily, and intelligently?

11 THE DEFENDANT: Excuse me. May I?

12 THE COURT: It's not your time to talk.

13 THE DEFENDANT: I would like to speak with
14 Mr. O'Connell first.

15 THE COURT: Mr. O'Connell, why don't you
16 consult.

17 THE DEFENDANT: Can we go privately?

18 THE COURT: Go ahead. You can do it right
19 here privately.

20 THE DEFENDANT: This is not privately.

21 THE COURT: Go ahead, Mr. Dunay, if you
22 want that opportunity. You can have a private
23 conversation just like you did for the five minutes
24 before.

25 (Discussion off the record.)

1 THE COURT: As they are talking,
2 Mr. Tarnowski, do you need to be anywhere this
3 morning? What's your schedule?

4 MR. TARNOWSKI: I don't have to be
5 anywhere until 10:30.

6 THE COURT: Where do you need to be at 10?
7 Somewhere?

8 MR. TARNOWSKI: I've got some child-care
9 responsibilities this morning.

10 THE COURT: So you need to be out of here
11 at what time?

12 MR. TARNOWSKI: 10:30.

13 THE COURT: Mr. Buckett, same with you?

14 MR. BUCKETT: This is my Friday so I can
15 be here as long as the Court needs me.

16 THE COURT: Okay.

17 MR. O'CONNELL: Judge, he does want me to
18 continue as counsel. He is willing to pursue these
19 issues that I have raised.

20 THE COURT: Okay. So you -- You just had
21 about four or five minutes to consult with
22 Mr. Dunay?

23 MR. O'CONNELL: Yes.

24 THE COURT: You are representing to us now
25 that he's changed his mind and he prefers that you

1 represent him?

2 MR. O'CONNELL: That is correct.

3 THE COURT: Okay. He understands what
4 that means? You have gone through that with him?

5 MR. O'CONNELL: I have. I have spent a
6 number of minutes talking with him about this. I
7 know we have also discussed this months ago when I
8 previously had filed a motion to withdraw and then
9 withdrew that motion.

10 THE COURT: Okay. And are you okay
11 staying on the case?

12 MR. O'CONNELL: I am.

13 THE COURT: And Mr. Dunay understands
14 through that representation, hopefully, or through
15 your communications with him that there are issues
16 that are ready to be heard today?

17 MR. O'CONNELL: That's correct, not that
18 this is any -- This is just general information; but
19 what I can tell the Court is Mr. Dunay is aware. I
20 have raised a number of issues. I guess, just
21 simple Appellate Law 101, this Court for the most
22 part gets to address any issues for the first time.
23 If there's any issues that we brief that have merit
24 after today's hearing, we can then raise those
25 issues to the Court of Appeals; but if the issues

1 are not raised to this Court, they are waived, which
2 is what he understands and is aware of.

3 THE COURT: Okay. I just want to be sure
4 that I understand, that everybody understands what
5 you just said. So you had told us this morning and
6 you had mentioned it once before that sometime last
7 fall or in the winter there was a breakdown in the
8 relationship between you and Mr. Dunay and there
9 couldn't get to be an understanding or an agreement
10 as to issues that were going to be presented in the
11 postconviction motion, fair?

12 MR. O'CONNELL: Yes.

13 THE COURT: And Mr. Dunay has represented
14 even today that he's got a bunch of other things
15 that he's going to bring up or that he wanted to be
16 heard on?

17 MR. O'CONNELL: Yes.

18 THE COURT: And he understands that
19 whatever those other issues are other than the four
20 issues in this case they have not been raised and
21 he's waiving those?

22 MR. O'CONNELL: That's correct.

23 THE COURT: Okay. And you have had that
24 conversation with him?

25 MR. O'CONNELL: I have.

1 THE COURT: And so you're prepared to
2 proceed then with the four issues involving, as I
3 understand it, recusal, withdrawal of pleas, motion
4 for resentencing, and restitution?

5 MR. O'CONNELL: Yes.

6 THE COURT: Mr. Kaiser, is the State
7 prepared to move forward with those four?

8 MR. KAISER: We are, your Honor. I would
9 just ask the record reflect for appellate purposes
10 that the conversation that counsel is talking about
11 where he had originally filed the motion to withdraw
12 and then there was a record made regarding the
13 defendant agreeing to have him continue -- That was
14 on February 14, 2019. We are prepared to go
15 forward.

16 THE COURT: Okay. What's the plan today,
17 Mr. O'Connell?

18 MR. O'CONNELL: I was -- My plan was to go
19 through each of the motions one by one. There's
20 four of them. I think some of -- Like the first
21 one, the motion to recuse, I think that's already
22 been raised; and I think the Court's already denied
23 that. But it was just a matter of I wanted to put
24 on the record and, I guess, make it formal that our
25 argument was that the -- that there is an objective

1 bias and a both actual and apparent bias. My
2 understanding is the Court has -- has denied that
3 motion. So I think at that point, assuming that the
4 Court agrees with that statement, I could move on to
5 the second, which would be the motion to withdraw
6 the plea.

7 THE COURT: Well, what I meant is we have
8 two attorneys sitting here. So are you calling them
9 as witnesses today?

10 MR. O'CONNELL: Yes.

11 THE COURT: Okay. And I would like to do
12 that up front just so they can get out of here.

13 MR. O'CONNELL: Okay.

14 THE COURT: And then we can do whatever
15 else. Are there going to be other witnesses other
16 than the two attorneys today?

17 MR. O'CONNELL: Those are the only
18 two witnesses that I have.

19 MR. KAISER: I have the district attorney
20 here as well.

21 THE COURT: And she's going to testify?

22 MR. KAISER: Yes.

23 THE COURT: Okay. So for order why don't
24 we start with Attorney Tarnowski because he needs to
25 leave first, and then Attorney Buckettt can go

1 second. Is that good with you, Mr. O'Connell?

2 MR. O'CONNELL: That's fine.

3 THE COURT: All right. Mr. Dunay, you
4 heard what your attorney just said regarding the
5 representation of you and the issues that are
6 presented and the status of the case; is that
7 correct?

8 THE DEFENDANT: Yeah.

9 THE COURT: And you understand that that's
10 what it is?

11 THE DEFENDANT: Yeah.

12 THE COURT: Okay. Mr. Tarnowski, if you
13 could, raise your right hand. The clerk's going to
14 swear you in.

15 ALAN TARNOWSKI, having been called as a
16 witness, having been first duly sworn on oath, was
17 examined and testified as follows:

18 THE CLERK: Please state and spell your
19 full name for the record.

20 THE WITNESS: Alan Tarnowski, A-L-A-N,
21 T-A-R-N-O-W-S-K-I.

22 THE COURT: All right. Mr. O'Connell,
23 your witness.

24 DIRECT EXAMINATION

25 BY MR. O'CONNELL:

1 Q Attorney Tarnowski, you received a copy of the
2 motion to withdraw the pleas; is that correct?

3 A Yes.

4 Q And although not put in the motion, do you recall
5 the defendant did plead to all four counts?

6 A Yes.

7 Q And, further, that the State was free to argue at
8 sentencing?

9 A Yes.

10 Q Now, in the motion Mr. Dunay alleges that you
11 informed him he would need to plead to all
12 four counts or otherwise the federal prosecutor
13 would also charge him and a conviction in the
14 federal court meant a mandatory 15 years'
15 incarceration; and Mr. Dunay indicates that's the
16 reason why he pled to all four charges. Now, he
17 indicates he received the file sometime thereafter
18 he entered his plea; and he indicated that there
19 does not appear to be any requirement that he have
20 to plead to all four counts to avoid the federal
21 charges. My question is did you tell the defendant
22 that he had to plead to all four charges or
23 otherwise he would be facing federal charges which
24 included a mandatory 15 years?

25 A And I just want to make sure. Has Mr. Dunay waived

1 attorney-client privilege on the record?

2 THE COURT: That's a good question,
3 Mr. Tarnowski. Mr. O'Connell?

4 MR. O'CONNELL: Should I discuss that with
5 him?

6 THE COURT: Yeah. Otherwise I can do it,
7 if you want.

8 MR. O'CONNELL: Okay.

9 THE COURT: So this is a motion,
10 Mr. Dunay, where you have called Attorney Tarnowski
11 to testify on your behalf regarding these pending
12 motions; and the questions that are being asked of
13 him require -- if he's going to answer require him
14 to reveal attorney-client communications.
15 Attorney-client communication is a communication
16 between an attorney and a client that's
17 confidential; and it can only be waived by the
18 client, which is you.

19 THE DEFENDANT: Yeah, I am waiving.

20 THE COURT: Mr. Tarnowski has indicated
21 and I think it's a good indication, Mr. Tarnowski,
22 that he does not want to answer these questions
23 unless you have authorized him to answer them; and
24 in order to authorize him, you are waiving your
25 attorney-client privilege for purposes of this

1 hearing. By waiving it not only is Attorney
2 O'Connell going to be able to ask questions to
3 Mr. Tarnowski and he answers them but then also
4 Attorney Kaiser is going to be able to, and
5 Attorney Tarnowski will then share his
6 communications that he had with you during his
7 representation of you in this case. Do you
8 understand that?

9 THE DEFENDANT: Yeah, fine. I waive it.

10 THE COURT: Okay. Do you understand
11 there's advantages and disadvantages of doing that?

12 THE DEFENDANT: That's fine.

13 THE COURT: Okay. And have you had enough
14 time to think about that and think about the
15 advantages and disadvantages?

16 THE DEFENDANT: Not really enough time but
17 I guess I have no choice since we are sitting here
18 today.

19 THE COURT: Well, you have a choice. You
20 can withdraw your motion or you can not have this
21 witness testify about the motion; but if you -- If
22 your decision is that you are going forward with
23 your motion and Attorney Tarnowski is going to
24 testify to support your motion or to support your
25 arguments surrounding that motion and you want his

1 testimony, then you're right. You would have to
2 allow him to answer those questions. You don't have
3 to have him testify if you don't want. The record
4 should indicate that Attorney O'Connell is
5 consulting privately with Mr. Dunay.

6 (Discussion off the record.)

7 THE COURT: Mr. O'Connell, you have had
8 several different minutes. I am interested in
9 what's the status?

10 MR. O'CONNELL: At this point I --
11 Mr. Dunay has brought his own questions; and it
12 looks like he's got 31 questions he typed out. He
13 brought it in today. I have never seen them. He's
14 asking me to ask all of these questions. I have a
15 very limited amount of questions. We have a
16 disagreement over what questions should be asked to
17 Attorney Tarnowski, and I have indicated to
18 Mr. Dunay that if he wants his questions asked we
19 can't both be asking questions. So if he wants
20 those questions asked, I'm going to withdraw and
21 then he can ask the questions, whatever he's
22 permitted to do.

23 THE COURT: Just so the record's clear,
24 you have a set of questions and he has a set of
25 questions. I'm not sure if they are the same or if

1 they are similar, but I imagine that you are
2 representing to us that many of Mr. Dunay's
3 questions aren't relevant or appropriate.

4 MR. O'CONNELL: That is what I believe.

5 THE COURT: You have read through them?

6 MR. O'CONNELL: I haven't read through
7 them. I am prepared for this hearing. I am ready
8 to go. I have my list of questions. He's brought
9 in other stuff which at this point we're -- We're at
10 the hearing right now. I don't feel it would be
11 appropriate for me to be going through, spending
12 15 minutes reviewing all of these documents that he
13 asked me to review and then giving it, I guess,
14 allowing myself some time to review them.

15 I don't think I even need the time. I
16 don't believe I need the time either. I am ready to
17 go. I know what I need to do. It's just a matter
18 of if he wants -- If he wants me to represent him, I
19 am ready to go. I am prepared. If he doesn't want
20 me, if he wants to ask these questions, then he's
21 going to have to have me withdraw; and he can ask
22 whatever he is permitted to do.

23 THE COURT: All right. Mr. Dunay, back to
24 my question. Is it your position that you
25 understand that Mr. Tarnowski's going to testify and

1 you waive your attorney-client privilege?

2 THE DEFENDANT: I need another moment with
3 my attorney.

4 (Discussion off the record.)

5 THE COURT: The record should indicate
6 that Mr. Dunay and Attorney O'Connell are consulting
7 privately.

8 MR. O'CONNELL: Your Honor, I just had
9 another conversation with Mr. Dunay and he again,
10 which -- and he's had -- I know he's been back and
11 forth on the fence this entire last 35 minutes, last
12 40 minutes now. He's been back and forth.

13 He's now made the decision which -- that
14 he is not satisfied with the way that I am pursuing
15 the arguments. He wants to drop everything today
16 and he wants to file a motion for extension asking
17 for the Court of Appeals to grant him additional
18 time to file a postconviction motion and which has
19 already been stated on the record but I will state
20 it again. Obviously the Court of Appeals -- It's
21 within their discretion whether they would grant him
22 that additional time to file any potential
23 postconviction motions. They may deny it
24 altogether.

25 If they do grant it, then that would be up

1 to him; and the second thing again is I want to
2 repeat that if I do end up withdrawing today that he
3 needs to understand that he'll be responsible for
4 all -- following all rules for the postconviction
5 procedure and the appeal; and the public defender's
6 office will not appoint him any further counsel.

7 THE COURT: Mr. Kaiser, do you take a
8 position on it?

9 MR. KAISER: No.

10 THE COURT: Mr. Dunay, do you agree with
11 what your attorney just said? Now your position has
12 changed again?

13 THE DEFENDANT: Yes.

14 THE COURT: Okay. And do you understand
15 that if you make your decision to represent yourself
16 I will very likely make the decision that we're
17 going to go forward today anyway?

18 THE DEFENDANT: I disagree with that.

19 THE COURT: I don't care if you disagree.
20 I just want you to understand that that's an option
21 because you making your decision to represent
22 yourself or have Attorney O'Connell represent you
23 should have no impact on what's happening today.

24 THE DEFENDANT: I am not prepared to argue
25 these issues that my attorney here is prepared to

1 argue for.

2 THE COURT: Okay. Well, then it sounds
3 like Attorney O'Connell should be continuing to
4 represent you.

5 THE DEFENDANT: Absolutely not.

6 THE COURT: Okay.

7 THE DEFENDANT: I -- I reserve the right
8 to go pro se and pursue postconviction relief.

9 MR. O'CONNELL: Your Honor, just to shed
10 some light, I think, on what he's -- what Mr. Dunay
11 is conveying, I think, what his concern is, he
12 doesn't want me to represent him because he doesn't
13 want to go the route that I am going. However, he's
14 also indicating that he's not himself prepared to
15 represent himself and to pursue these issues.

16 So I think what his position is is that he
17 wants to drop everything today and -- and file a
18 motion for extension with the Court of Appeals
19 asking for additional time; and if they grant him
20 that additional time, then he would file whatever he
21 felt was appropriate at that time. I think that's
22 why he's saying that he's not prepared but yet on
23 the other hand he also doesn't want me to represent
24 him.

25 THE COURT: Mr. Kaiser?

1 MR. KAISER: Thank you, your Honor. The
2 State just asks that this record reflect that all of
3 the witnesses that would be necessary to decide the
4 issues that are here are here today. The State is
5 ready to proceed on the issues at hand.

6 Secondly, I don't understand how the
7 defendant can't be prepared to litigate issues that
8 apparently he told his attorney what his issues are.
9 I'm confident Mr. O'Connell didn't make up this
10 stuff about the feds threatened this or the feds
11 promised that. That's from the defendant.

12 So the State is taking the position that,
13 first of all, we'll be objecting to the Court of
14 Appeals to any extension of time for the defendant
15 to file anything else besides what's already been
16 filed and, secondly, we certainly will be objecting
17 to any reiteration of any of the arguments that were
18 presented today whether it's the recusal motion, the
19 restitution motion, or the motions to withdraw the
20 plea or for resentencing because we are prepared
21 here today to litigate these issues and have them be
22 decided by the Court.

23 We're prepared to argue them under the law
24 and have the Court decide them. There is an
25 extension to August 19 according to the March 25,

1 2019, order of the Court of Appeals; and the State
2 believes that since February 14 of 2019 this
3 defendant has had more than enough time to get
4 before the Court the issues that can be had.

5 Finally, as a matter of quality
6 postconviction and appellate practice, legions of
7 cases have made clear that it's the job of
8 postconviction and appellate counsel not to bring up
9 every single thing a defendant tells us but, rather,
10 to find those things that which, first of all, have
11 legal support for argument and, second of all, for
12 which factual support is either in the record or can
13 be developed by further testimony.

14 Those are the issues we have before us
15 here today. The State is prepared to argue against
16 the assertion of any other cases or any other
17 arguments which counsel clearly has decided did not
18 merit attention before the Court on today's date.

19 THE COURT: Thank you, Mr. Kaiser.

20 MR. O'CONNELL: Your Honor, if I may, the
21 Court may take the suggestion. It may not but one
22 thought that I had was we have two attorneys here
23 right now. I understand. I am just looking at
24 this. I understand Mr. Dunay has laid out a number
25 of questions that he would like asked. So I think

1 he's prepared to at least ask those questions where
2 if I did withdraw he could ask the questions. They
3 could answer. They could answer; they could. They
4 could be -- They could be done with the case and
5 there's no longer a need for them to come back here
6 at a -- at a later date.

7 And then at that point if Mr. Dunay wished
8 to file, which I think he does, file a motion for
9 extension, the State can object to it; and at the
10 end of the day that will be up for the Court of
11 Appeals whether they are going to grant that or not
12 grant that. At least that way we can get the
13 attorneys out of here.

14 THE COURT: Well, you know, this whole
15 thing -- This is no offense, Mr. O'Connell, to you
16 because I think you are in a tough spot; but just
17 listen to what's happened for the last 40 minutes,
18 42 minutes. Mr. Dunay has manipulated and connived
19 and played games; and we are all sitting around
20 afraid of what the Court of Appeals someday might
21 do. And I think we have an obligation to handle
22 this case like we do every other case.

23 THE DEFENDANT: I have a suggestion, your
24 Honor.

25 THE COURT: No. I am not listening. It's

1 not your turn to talk, Mr. Dunay.

2 THE DEFENDANT: All right.

3 THE COURT: So we just took this last
4 break about 14 minutes ago when I asked Mr. Dunay if
5 he's waiving his privilege to have
6 Attorney Tarnowski testify, and I am going to come
7 back to that question. So, Mr. Dunay, you can --
8 You can either waive the privilege or you don't have
9 to waive the privilege. If he doesn't waive the
10 privilege, it sounds like Mr. Tarnowski is going to
11 stand up and leave and be done testifying because
12 Mr. Dunay doesn't want to waive the privilege.

13 If he wants to waive the privilege, then
14 what will happen is, Mr. O'Connell, you are going to
15 continue your examination of Mr. Tarnowski. You can
16 ask the questions you have. You can look at
17 Mr. Dunay's questions that he has and you can ask
18 the questions that you think are appropriate given
19 the fact that you're the attorney on the case and
20 it's your role to then ask those questions. If they
21 are improper questions, you can ask them; and if
22 there's an objection, I can overrule them or I will
23 sustain the objection, whatever it is; but that's
24 going to be your decision.

25 So, Mr. Dunay, are you waiving the

1 privilege to have Attorney Tarnowski testify today?

2 THE DEFENDANT: I need to talk with my
3 attorney.

4 THE COURT: The record should indicate
5 that Attorney O'Connell is consulting with Mr. Dunay
6 again privately.

7 (Discussion off the record.)

8 THE COURT: Mr. Dunay, I am going to ask
9 you to make a decision. It's been several more
10 minutes. Somehow in this whole process we have lost
11 appreciation for the fact that we have two attorneys
12 sitting here. We have five or six different
13 officers. We have a district attorney who has
14 probably got thousands of cases down on her desk
15 that she can get back to. We have an attorney from
16 the attorney general's office who drove up from
17 Madison who is spending the day here.

18 THE DEFENDANT: And this is my life, your
19 Honor.

20 THE COURT: I understand. You need to
21 answer the question.

22 (Discussion off the record.)

23 THE COURT: The record should indicate
24 that Mr. Dunay is talking again to Attorney
25 O'Connell. Eventually, Mr. O'Connell, I think what

1 I am going to be required to do is if Mr. Dunay
2 continues this combative nature then I will just
3 make a finding that he's not waiving his privilege
4 even though he's playing games with us on how his
5 words are being used and the questions that he's
6 used, and then we won't allow it.

7 It's either he's going to put on the
8 record that he's freely, voluntarily, intelligently,
9 and knowingly waiving his attorney-client privilege
10 and he's doing it for strategic advantage or he's
11 not; and when he doesn't, then Mr. Tarnowski's going
12 to be excused. We will bring Mr. Buckett up and we
13 will do that one much quicker. If he doesn't waive
14 it, then Mr. Buckett's excused. Then we are down to
15 Ms. Tempelis as I understand the way that the
16 motion's presented, just so Mr. Dunay knows what is
17 about to happen.

18 (Discussion off the record.)

19 THE COURT: Okay. It's been two or
20 three more minutes, Mr. O'Connell. Just so you and
21 Mr. Dunay know, I'm going to give you about one more
22 minute. Then I am going to make a finding that
23 based upon Mr. Dunay's demeanor, his comments today,
24 that he's not going to make that waiver.
25 Mr. Tarnowski's going to be excused.

1 (Discussion off the record.)

2 THE COURT: Mr. O'Connell?

3 (Discussion off the record.)

4 THE COURT: All right. Mr. O'Connell,
5 it's been about two or three minutes since I made
6 that last comment. What's the status?

7 MR. O'CONNELL: He hasn't provided me an
8 answer.

9 THE COURT: Okay. Mr. Dunay, what's your
10 decision?

11 THE DEFENDANT: (No response.)

12 THE COURT: Just so everybody's on the
13 same page, Mr. Dunay, this is directed to you. We
14 are at the point in this hearing where you are --
15 you have an opportunity to waive your
16 attorney-client privilege with the communications
17 that you had between Mr. Tarnowski and you during
18 the time that he was representing you. It's your
19 privilege only. If you don't waive it now, what's
20 going to happen is I'm going to excuse Mr. Tarnowski
21 unless there's other questions that you might have
22 that aren't attorney-client.

23 MR. KAISER: Thank you.

24 THE COURT: Mr. O'Connell, you can finish
25 that, those questions. Mr. Kaiser, you can ask

1 questions that don't require that disclosure. Then
2 he will be excused. Mr. Dunay, what's your
3 decision?

4 THE DEFENDANT: (No response.)

5 THE COURT: Mr. Dunay is refusing to
6 answer the question.

7 THE DEFENDANT: I am not refusing. I am
8 still thinking.

9 THE COURT: Okay. So he's got his head
10 down, hasn't looked up. He's shaking his head, and
11 so I am going to find for now that Mr. Dunay has not
12 waived his attorney-client privilege and you can
13 continue your questioning, Mr. O'Connell, with
14 answers or questions that don't reveal those
15 communications. Mr. Dunay, if at any time in the
16 next couple of minutes you change your mind and you
17 want to waive that privilege, please let us know.
18 Otherwise we are proceeding the way that we just
19 indicated. Any questions regarding the procedure,
20 Mr. O'Connell?

21 MR. O'CONNELL: Just one. Did the --

22 THE COURT: No, regarding the procedure on
23 what we are going to do.

24 MR. O'CONNELL: No.

25 THE COURT: Okay. Any questions regarding

1 the procedure?

2 MR. KAISER: No.

3 THE COURT: All right. Go ahead,
4 Mr. O'Connell.

5 MR. O'CONNELL: Did the defendant -- I
6 know we got lost in this. . Did the defendant
7 actually end up waiving his right to attorney-client
8 privilege regarding Attorney Tarnowski?

9 THE COURT: No. That's what I just found.

10 MR. O'CONNELL: I'm sorry. Yeah.

11 THE COURT: Now, you get to ask questions
12 that don't get into attorney-client communications
13 if you have anything left. Mr. Dunay, now you want
14 to talk?

15 THE DEFENDANT: Yeah. I'm going to
16 execute my right to go pro se.

17 THE COURT: What does that mean?

18 THE DEFENDANT: I intend to represent
19 myself, and I am asking for additional time to
20 prepare for postconviction. I have several issues
21 that I could bring up on my own behalf. However,
22 it's not in the form of a motion but I could. I am
23 going to bring them up verbally.

24 MR. O'CONNELL: Your Honor, just doing
25 appellate work, this Court -- I know I have to say

1 this on the record. The Court wouldn't have the
2 authority to grant Mr. Dunay the right to file
3 postconviction motions down the road. It's the
4 Court of Appeals that will have that authority and
5 that will be within their discretion.

6 THE COURT: You said that before today.

7 MR. KAISER: We object to any additional
8 motions being filed.

9 THE COURT: Okay. Mr. Kaiser, do you take
10 a position on Mr. Dunay's request right now that he
11 proceed pro se?

12 MR. KAISER: No position.

13 THE COURT: Okay. Mr. O'Connell, anything
14 else on that?

15 MR. O'CONNELL: No, your Honor.

16 THE COURT: Mr. Dunay, I want to make sure
17 that you understand a couple of things before I make
18 my decision on that. Again, my goal in this is to
19 make sure that we are clear, we are straightforward,
20 we are not manipulating one another or the system.
21 When you indicate I want to execute my right to go
22 pro se or represent myself, you understand what that
23 means is, first of all, Attorney O'Connell is going
24 to be off of the case and he's no longer
25 representing you?

1 THE DEFENDANT: Yep.

2 THE COURT: And you understand that
3 there's -- we are going to go forward with the
4 hearing today, meaning attorney -- What will happen
5 if this is granted is Mr. O'Connell's going to get
6 up and leave and then we are going to continue the
7 hearing with Mr. Tarnowski being asked questions and
8 you can ask questions that are appropriate and then
9 the State will ask questions and we're going to
10 continue today? Understood?

11 THE DEFENDANT: Sure.

12 THE COURT: Okay. So I know you said that
13 you want a continuance for more time. That's going
14 to be denied as it relates to these four issues. We
15 are going to proceed today with that, correct?

16 THE DEFENDANT: Sure. But I have several
17 other issues that I intend to put on the record.

18 THE COURT: You may or may not have an
19 opportunity to do that. You understand that? You
20 can always submit those other issues in writing. We
21 have already wasted 58 minutes.

22 THE DEFENDANT: I would like to verbally
23 bring up several issues.

24 THE COURT: I didn't ask what you'd like.

25 THE DEFENDANT: If I am representing

1 myself --

2 THE COURT: If you represent yourself,
3 there's a couple things. It doesn't mean that you
4 are going to be given more latitude than what you
5 are given right now. So you don't get to violate
6 court rules or court orders just because you are
7 representing yourself. So if you have other issues
8 that you want to bring up, I will tell you right now
9 we're not going to do that this morning unless we
10 get done with these four issues first; and if we
11 have extra time before noon, then we might use that
12 time for you to make a record. Otherwise you can
13 submit those in writing just like you have in other
14 situations. Okay. So there are ways to make a
15 record and you can do that in written form. We are
16 not going to waste court time on that. We are going
17 to deal with the issues today that we are here on.
18 Understood?

19 THE DEFENDANT: No, I'm not sure I
20 understand.

21 THE COURT: Okay. Then I will break it
22 down for you. Before you answered that question,
23 Mr. Dunay, I just want the Court of Appeals to
24 understand you stared at me for about ten seconds --

25 THE DEFENDANT: Yeah.

1 THE COURT: -- without answering.

2 THE DEFENDANT: I'm entitled to think.

3 THE COURT: Okay. So I want you to
4 understand something. So if you -- When you say I
5 want to execute my right to represent myself and go
6 pro se, the practical side of that is going to be
7 Mr. O'Connell is going to stand up, walk out of the
8 room, and you are now representing yourself and we
9 are going to go forward this morning with these
10 four issues, meaning Attorney Tarnowski's going to
11 finish his testimony. Attorney Buckettt's going to
12 finish his testimony and Attorney Tempelis. That's
13 going to be the procedure that we use. Understood?

14 THE DEFENDANT: I have a question. I have
15 these other issues that I would like to be brought
16 up in front of the circuit court.

17 THE COURT: Okay.

18 THE DEFENDANT: Postconviction. What?
19 What? What do I use? What mechanism do I use to
20 bring these issues up?

21 THE COURT: I have already answered that
22 about three times this morning.

23 THE DEFENDANT: To your court or to the
24 appellate court?

25 THE COURT: Now, I just want you to

1 listen. First of all, I don't give you advice. So
2 I am not going to tell you what to do or how to do
3 something. That's going to be on you and you are
4 going to be representing yourself. What I will tell
5 you is when you say I've got other issues that I
6 want to bring up --

7 THE DEFENDANT: Yes.

8 THE COURT: -- I don't know what those
9 issues are; but if they are issues that are other
10 than the four issues that we're here for today, you
11 are not going to bring those up today in this
12 courtroom. I can tell you that.

13 THE DEFENDANT: Let me ask you another
14 question.

15 THE COURT: No. I want you to understand
16 what I answered. Before you start asking questions,
17 let's answer and understand the first one. Okay.
18 So we're here on four issues. That's what's going
19 to happen today. If you have other issues that you
20 want to bring up, you can bring them up in whatever
21 mechanism you want, in whatever way you think is
22 best or appropriate. You need to follow the law,
23 but that's not going to be done this morning. Okay?

24 (Discussion off the record.)

25 THE COURT: Do you understand that,

1 Mr. Dunay? You are now consulting again with
2 Attorney O'Connell.

3 (Discussion off the record.)

4 THE COURT: Mr. O'Connell, you have had
5 another conversation with Mr. Dunay for the last
6 minute or two. Mr. Dunay, I would prefer that you
7 answer my questions. Did you understand what I just
8 said regarding those other issues?

9 THE DEFENDANT: Yeah. I understood what
10 you said.

11 THE COURT: Okay. And you understand if
12 you are representing yourself I am not going to give
13 you advice, legal advice, on how to handle your case
14 or handle certain issues? Attorney Kaiser sure
15 isn't going to do that because he's representing the
16 State of Wisconsin. And what the public defender's
17 office has already told you is that you are not
18 going to get another public defender to represent
19 you. So you will be representing yourself unless
20 you retain separate counsel using your own money
21 going forward. Do you understand that?

22 THE DEFENDANT: Yep.

23 THE COURT: And that will be from today
24 when you make this decision until the end of time.
25 Understood?

1 THE DEFENDANT: Yeah, I understood. I
2 still don't understand why you are sitting behind
3 that podium right now.

4 THE COURT: Okay.

5 THE DEFENDANT: You should have recused
6 yourself from this case. It's totally inappropriate
7 that you are the judge or I am the alleged assailant
8 in another case. I would like to have that on the
9 record.

10 THE COURT: It's on the record.

11 THE DEFENDANT: This is a circus court as
12 far as I'm concerned.

13 THE COURT: Okay. Anything else you want
14 to make on the record?

15 THE DEFENDANT: Yeah. The only thing that
16 you -- the only thing that you are doing -- You are
17 trying to stonewall my opportunity for a fair
18 postconviction.

19 THE COURT: Okay.

20 THE DEFENDANT: That's all this is.

21 THE COURT: Anything else?

22 THE DEFENDANT: Yes. I already heard you
23 lost your job as a truancy judge. I'm following
24 your cases accordingly.

25 THE COURT: Good. Okay.

1 THE DEFENDANT: I will see that you lose
2 this job too.

3 THE COURT: All right. Anything else?

4 THE DEFENDANT: (No response.)

5 THE COURT: Anything else, Mr. Dunay,
6 before we get back to the issues here?

7 THE DEFENDANT: (No response.)

8 THE COURT: It's that stare again. I am
9 not sure if it's intended for intimidation or
10 that's --

11 THE DEFENDANT: It's not intimidation.

12 THE COURT: Okay. So you understand the
13 disadvantages of representing yourself, that you
14 have just demonstrated them in the last 30 to
15 45 seconds?

16 THE DEFENDANT: You already railroaded
17 this case to begin with.

18 THE COURT: Okay.

19 THE DEFENDANT: I am not even -- I am a
20 nonresident of this state.

21 THE COURT: Okay.

22 THE DEFENDANT: Okay.

23 THE COURT: It has nothing to do with what
24 we are talking about today.

25 THE DEFENDANT: Really? You never -- This

1 Court never had personal jurisdiction or territory
2 jurisdiction over my case.

3 THE COURT: Is it your position today,
4 Mr. Dunay, that you are prepared to represent
5 yourself and you want Attorney O'Connell to be done?
6 Is that correct?

7 THE DEFENDANT: (No response.)

8 THE COURT: Again, it's the stare and the
9 nonanswering, but I would prefer that you answer.
10 If you don't answer, then, Attorney O'Connell, you
11 are going to go forward.

12 THE DEFENDANT: I prefer -- I prefer that
13 the appellate court listen to the motion of your
14 recusal first because I reserve my right to
15 postconviction, a fair postconviction; and this is
16 not --

17 THE COURT: Okay.

18 THE DEFENDANT: -- fair.

19 THE COURT: All right.

20 THE DEFENDANT: You should not be the
21 judge for my postconviction. I reserved it.
22 Regardless of what happens here at this, at this
23 point --

24 THE COURT: Okay.

25 THE DEFENDANT: -- I reserve my right to a

1 fair postconviction. You should not be up there.

2 THE COURT: Given --

3 THE DEFENDANT: I don't understand how.

4 THE COURT: Given my colloquy with
5 Mr. Dunay, I'm going to deny his request to
6 represent himself. He hasn't answered those
7 questions. He hasn't indicated to us on the record
8 that he's freely, voluntarily, intelligently waiving
9 his right to have an attorney, that he understands
10 the disadvantages and potentially the advantages of
11 it. His -- His comments and his colloquy and his
12 refusal to answer don't meet the threshold that I
13 can find that I would allow him to exercise his
14 right to represent himself.

15 THE DEFENDANT: That's ludicrous.

16 THE COURT: He may be doing it
17 intentionally. He may be doing it strategically.
18 He may be doing it because he's just whoever it is.
19 I have also made the finding that he hasn't freely,
20 voluntarily, and intelligently waived his privilege
21 to attorney-client. So, Attorney O'Connell, at this
22 time what I am going to have you do is finish your
23 examination of Attorney Tarnowski with the questions
24 that --

25 THE DEFENDANT: I object.

1 THE COURT: -- with questions that don't
2 require him to waive or to provide or disclose
3 attorney-client privileged communications. Go
4 again.

5 THE DEFENDANT: No. I allow him. This is
6 ridiculous.

7 THE COURT: Okay.

8 THE DEFENDANT: You won't even let me go
9 pro se?

10 THE COURT: You haven't answered the
11 questions that allow for that, Mr. Dunay. Go ahead,
12 Mr. O'Connell.

13 THE DEFENDANT: That's absurd.

14 MR. O'CONNELL: Your Honor, considering
15 the fact that the defendant then hasn't waived his
16 right to attorney-client privilege, I don't have any
17 further questions.

18 THE COURT: Mr. Kaiser, cross-examination
19 of Attorney Tarnowski?

20 MR. KAISER: Limited to questions not
21 about his communications with his client.

22 CROSS-EXAMINATION

23 BY MR. KAISER:

24 Q Mr. Tarnowski, is there some point during your
25 representation of Mr. Dunay that you got -- I don't

1 know. I think the feds call it -- a target letter
2 from the United States Attorney's Office?

3 A I received a target letter from, I believe it was,
4 Mr. Dunay's counsel in the federal system.

5 Q So they gave it to that person. Do you know who
6 that was?

7 A That was Attorney Krista Hallada Valdez.

8 Q Can you spell her name for the record?

9 A I believe it's -- First name is K-R-I-S-T-A, last
10 name, H-A-L-L-A-D-A, Valdez, V-A-L-D-E-Z.

11 Q Did you bring a copy of that letter with you today?

12 A I don't have it. I provided my entire file to
13 Mr. Buckett when Mr. Buckett succeeded me.

14 Q In terms of your conversations with District
15 Attorney Tempelis, do you recall that District
16 Attorney Tempelis represented the State in this
17 case; is that correct?

18 A She did.

19 Q All right.

20 MR. O'CONNELL: Your Honor, if I may, I
21 apologize. The defendant just indicated to me and I
22 want to make this really quick because I don't want
23 to be wasting more time here; but defendant
24 indicated he wanted to put an end to this and that
25 he wanted to represent himself. The question I

1 THE DEFENDANT: Yes.

2 THE COURT: All right. So let's walk
3 through it again, Mr. Dunay. You understand that
4 what you are asking us is that you be allowed to
5 represent yourself?

6 THE DEFENDANT: (Nodding head.)

7 THE COURT: Understood?

8 THE DEFENDANT: (No response.)

9 THE COURT: The record should indicate
10 that he has refused to answer. He's looked down.
11 He stared at me for about five seconds, and he's
12 looking down and we have had silence.

13 THE DEFENDANT: Yes. I reserve my right
14 to go pro se, but I refuse to go through with this
15 hearing. This is ludicrous.

16 THE COURT: We are going through with the
17 hearing either way, Mr. Dunay.

18 THE DEFENDANT: No. I reserve my right to
19 a fair postconviction.

20 THE COURT: All right. Go ahead,
21 Mr. O'Connell, with your questioning or -- I'm
22 sorry -- Mr. Kaiser.

23 MR. KAISER: Thank you.

24 BY MR. KAISER:

25 Q Mr. Tarnowski, do you recall that on or around the

1 24th of July, 2017, that you had a conversation
2 with the district attorney where she offered the
3 opportunity for the defendant to plead to
4 two charges and gave the opportunity for the State
5 to argue for a certain amount of time and for the
6 defense to argue for a certain amount of time?

7 A Yes. There was an offer made. I believe the offer
8 was Mr. Dunay was charged with four charges, carried
9 with a maximum penalty of 74 years. The district
10 attorney's offer was for him to plead to two of
11 those charges with a maximum penalty of 65 years. I
12 believe the State was to recommend per that offer
13 initial confinement time of 12 to 15 years in prison
14 followed by extended supervision. The defendant was
15 to recommend an initial confinement term of ten to
16 12 years followed by extended supervision per that
17 offer.

18 Q And the -- You got back to the district attorney and
19 told the district attorney that it was your
20 preference that the defendant plead to all
21 four counts and have an open sentencing?

22 A Well, there was attempts made to negotiate with the
23 district attorney to get the district attorney to
24 move off of that offer. The district attorney
25 refused to move off of that offer. There was also

1 the federal government was indicating that if
2 Mr. Dunay satisfactorily resolved the State charges
3 he would not be charged federally. The sexual
4 exploitation of a child charge in the federal court
5 was punishable by a mandatory minimum imprisonment
6 of 15 years. So I didn't think it was in
7 Mr. Dunay's interests to risk being charged
8 federally and face that 15-year minimum mandatory
9 penalty.

10 Q And that's true, right, the 15? It wasn't like
11 somebody made that up. That actually was the
12 mandatory minimum for even just one charge in
13 federal court?

14 A Correct, for the sexual exploitation of a child
15 charge in federal court.

16 Q So based on that the choice was made and you
17 communicated it to the district attorney that you
18 would prefer to plead to all four counts in State
19 court but have open sentencing and hope for less
20 than ten?

21 A Yes. Ultimately that was communicated to the
22 district attorney.

23 Q And, again, limiting our conversation to
24 conversations other than with the defendant, you
25 actually spoke yourself with Assistant United States

1 Attorney Andy Maier; is that correct?

2 A I believe I did have a brief conversation with
3 Attorney Maier.

4 Q And he communicated to you what you just related,
5 which is something to the effect of if the federal
6 system is satisfied with the -- with the ultimate
7 disposition in State court, then there would be no
8 federal prosecution?

9 A Yes.

10 Q All right. In those conversations with the United
11 States Attorney's Office or in the letter that you
12 saw that Mr. Hallada Valdez had, was there ever any
13 indication in those communications that the federal
14 government required him to plead to all four counts
15 in order for them to decide to not prosecute him?

16 MR. O'CONNELL: Your Honor, just I am in a
17 really difficult position right now.

18 THE COURT: You mean because of
19 Mr. Dunay's conduct?

20 MR. O'CONNELL: Yes.

21 THE COURT: Okay. I apologize for that,
22 Mr. O'Connell.

23 MR. O'CONNELL: And from my end I am
24 having a really difficult time being effective as
25 counsel right now. I understand that the State here

1 is asking questions of the witness. I can't -- I --
2 the last probably five, five to ten questions I have
3 been hearing -- I haven't even heard what the
4 answers are. I have been getting information out of
5 my right ear here consistently coming from Mr. Dunay
6 telling me that, again, that he does not want me to
7 represent him. He wants to represent himself and if
8 I bring this up to the Court again that he will
9 answer the Court's questions directly that he
10 doesn't want me to represent him.

11 At this point the other issue I guess I
12 would be raising here is whether the defendant has
13 forfeited his right to counsel. I just bring that
14 up because I can't effectively be representing him.
15 I don't even know what the questions are. I don't
16 even know what's been answered the last couple
17 minutes on the record.

18 THE COURT: It's interesting that you say
19 that because I just printed off the Wisconsin
20 Supreme Court's decision in *State v. Suriano*,
21 S-U-R-I-A-N-O, which is a 2017 decision where the
22 analysis involved the waiver of an attorney and the
23 forfeiture of an attorney; and in that case they
24 found that or they held that the defendant forfeited
25 his right to have counsel.

1 So I think we're dealing with both of
2 those. I have been trying to deal with both of
3 those as we go along. I know Mr. Dunay is doing
4 things intentionally. He was talking to you in an
5 agitated, animated way during the questioning by the
6 State of Mr. Tarnowski. So I am not surprised that
7 you can't listen and understand, and I understand
8 Mr. Dunay is probably not respecting you because I
9 think I saw you with your hand trying to shield him
10 off so you could listen. So he's interfering with
11 your representation. Is that what you are saying?

12 MR. O'CONNELL: Yes.

13 THE COURT: Okay. And I think I have seen
14 that happening. I appreciate you saying that,
15 Mr. O'Connell. That's why I apologize. I apologize
16 that you are in that position; but we have an
17 individual, Mr. Dunay, who is sitting here who is
18 manipulating.

19 THE DEFENDANT: I object.

20 THE COURT: He's conniving.

21 THE DEFENDANT: I object.

22 THE COURT: He's playing with the system.

23 THE DEFENDANT: I object.

24 THE COURT: And he's doing everything
25 possible.

1 THE DEFENDANT: I'm not even from
2 Wisconsin. I shouldn't be here.

3 THE COURT: Mr. Dunay, don't interrupt me;
4 and he's doing everything possible to make this
5 challenging or difficult, not only for you but for
6 everyone. I have tried to engage in a colloquy with
7 him several different times regarding his
8 representations and his interest in representing
9 himself and his interest in waiving his right to
10 have a lawyer; and I haven't gotten anywhere.

11 THE DEFENDANT: Yeah. I would like to
12 execute -- I would like to pursue pro se.

13 THE COURT: Okay.

14 THE DEFENDANT: I object to being in this
15 court with you.

16 THE COURT: You are going to be in this
17 court with me whether it's pro se or with Attorney
18 O'Connell.

19 THE DEFENDANT: Well, we will see about
20 that when it goes through an appeal.

21 THE COURT: Well, that's true. That's
22 right.

23 THE DEFENDANT: Yeah.

24 THE COURT: But for today you will be.

25 THE DEFENDANT: You should have recused

1 yourself even before my sentencing.

2 THE COURT: Okay. So is it your position
3 then, Mr. Dunay -- Again, we will try it. You are
4 representing to all of us that you want to represent
5 yourself?

6 THE DEFENDANT: For all of the issues
7 except for the restitution. For the restitution,
8 I -- for the restitution issue, I --

9 THE COURT: You can stop, Mr. Dunay.

10 THE DEFENDANT: I was entitled to a
11 different attorney.

12 THE COURT: Go ahead with your
13 examination, Mr. Kaiser.

14 MR. KAISER: Counsel, I think my question
15 was --

16 THE DEFENDANT: I am going pro se.

17 MR. KAISER: -- if I recall correctly --

18 THE COURT: Hold on one second.

19 Mr. Dunay, I don't want you to disrupt.

20 THE DEFENDANT: I am going pro se.

21 THE COURT: You are not going pro se.

22 THE DEFENDANT: Yes, I am.

23 THE COURT: Don't interrupt the
24 proceedings. Now, here is the problem, Mr. Dunay.
25 If you continue to interfere with the proceedings,

1 you are going to be removed from the proceedings
2 because you are being disruptive. You are
3 interfering with the questioning, and I am not going
4 to allow that to happen. So don't do it; and if you
5 get removed, we are just going to proceed this
6 morning with you making the decision that you don't
7 want to be part of the hearing and instead you are
8 just going to be disruptive.

9 THE DEFENDANT: No. I want to go pro se,
10 period.

11 THE COURT: Go ahead.

12 THE DEFENDANT: I want to go pro se.

13 BY MR. KAISER:

14 Q So my question --

15 THE DEFENDANT: I have the --

16 BY MR. KAISER:

17 Q -- Mr. Tarnowski --

18 THE COURT: Don't interrupt, Mr. Dunay.

19 THE DEFENDANT: I have the right to go
20 pro se.

21 BY MR. KAISER:

22 Q In conversations with anyone, Mr. Maier or anyone
23 else from the United States Attorney's Office, or in
24 the letter that you saw but you don't have
25 anymore --

1 THE DEFENDANT: This is a circus court.

2 BY MR. KAISER:

3 Q -- did the United States Attorney's Office ever tell
4 you that they would require the defendant to plead
5 to all of the counts in the State's information
6 before they would choose to not prosecute him?

7 A No, there was no such requirement.

8 MR. KAISER: No further questions.

9 THE COURT: All right. Any redirect,
10 Mr. O'Connell?

11 THE DEFENDANT: I would like to ask
12 questions on my own behalf. I ask the Court to do
13 so.

14 MR. O'CONNELL: Your Honor, I think the
15 Court made a -- at least a temporary finding
16 regarding whether the defendant would be permitted
17 to withdraw -- whether I would be permitted to
18 withdraw as counsel. I guess what's the Court's
19 position whether the defendant has forfeited his
20 right to counsel?

21 I bring that up in the sense of during
22 90 percent of the State's testimony -- I'm sorry --
23 the State's questioning I don't know what was being
24 said. I was unable to -- It's hard. It's hard for
25 me to be able to represent the defendant in this

1 particular situation not knowing what was asked
2 during cross-examination.

3 THE COURT: Mr. Kaiser, do you have a
4 position on that?

5 MR. KAISER: Just the record should
6 reflect that whatever it is that caused counsel to
7 not be able to be attentive to the questioning and
8 the answers was a knowing and intentional act on the
9 part of the defendant.

10 THE COURT: Do you agree with that,
11 Mr. O'Connell?

12 MR. O'CONNELL: The fact that I am still
13 representing Mr. Dunay, I think it would be best for
14 me to -- Unless I get a court order, I believe it
15 would be unethical for me to respond.

16 THE COURT: Okay. That's fair.

17 THE DEFENDANT: I object.

18 THE COURT: Well, the Wisconsin Supreme
19 Court in the *Suriano* decision, S-U-R-I-A-N-O,
20 addresses forfeiture and it indicates the following.
21 "Forfeiture requires very different procedures
22 covering a variety of scenarios where a defendant's
23 conduct results in the involuntary loss of counsel
24 by operation of law," and they cite to the *Cummings*
25 decision. In this decision it then goes on to read,

1 "The triggering event for forfeiture is when the
2 Court becomes convinced that the orderly and
3 efficient progression of the case is being
4 frustrated. Scenarios triggering forfeiture
5 include, one, a defendant's manipulative and
6 disruptive behavior, two, withdrawal of multiple
7 attorneys based on a defendant's consistent refusal
8 to cooperate with any of them and constant
9 complaints about the attorney's performance and,
10 three, a defendant whose attitude is defiant and
11 whose choices repeatedly result in delay,
12 interfering with the process of justice, and, four,
13 physical or verbal abuse directed at counsel or the
14 Court."

15 The conclusion by the Court in that
16 *Suriano* decision is and it indicates, "We reaffirm
17 our decision in *Cummings* applying a two-tiered
18 forfeiture, expressed waiver framework. We continue
19 to apply the *Cummings* standard governing forfeiture
20 of counsel cases, and we emphasize that the warnings
21 and procedures it suggests remain recommendations
22 only."

23 In that case in applying the *Cummings*
24 standard, the Supreme Court found that *Suriano* had
25 "forfeited his constitutional right to counsel by

1 engaging in voluntary and deliberate conduct, which
2 frustrated the progression of his case and
3 interfered with the proper administration of
4 justice."

5 It goes on to say that the Supreme Court
6 said that the record in the case "supports the
7 circuit court's finding that Suriano repeatedly
8 refused to cooperate with his attorneys, engaged in
9 recurrent dilatory tactics to manipulate and cause
10 delay, and verbally abused counsel, even causing one
11 of his lawyers to view Suriano as a physical
12 threat." Is that what you are asking about?

13 MR. O'CONNELL: That's correct.

14 THE COURT: What is your position on that?

15 MR. O'CONNELL: I can't effectively
16 represent the defendant on a number of issues here,
17 one of them just being during cross-examination I
18 wasn't able to follow. I think one or two questions
19 I heard and I was able to. One or two answers I
20 think I heard. The rest of it I wasn't able to. I
21 wasn't able to, and it's been consistently
22 throughout this hearing. I keep getting from the
23 defendant -- I keep hearing that he wants to
24 represent himself and it's extremely difficult to
25 focus on what I am actually here for.

1 THE COURT: Okay. So are you telling
2 us -- and I understand there's an ethical
3 obligations that you have; but are you telling us
4 that it's your position, understanding the *Suriano*
5 decision and the *Cummings* two-tiered forfeiture,
6 expressed waiver standard, that it's your belief
7 that Mr. Dunay has forfeited his right to counsel?

8 MR. O'CONNELL: Yes.

9 THE COURT: And that that forfeiture is
10 based upon his conduct and misconduct?

11 MR. O'CONNELL: That's correct.

12 THE COURT: And you believe that he's
13 doing that intentionally?

14 MR. O'CONNELL: I --

15 THE COURT: Or purposely?

16 MR. O'CONNELL: Your Honor, just under the
17 ethics unless the Court makes an order, I feel
18 uncomfortable answering.

19 THE COURT: I don't want to order. I am
20 just trying to get a feel from you. I know what I
21 have seen; but Mr. Dunay is going to say, well, I am
22 biased.

23 THE DEFENDANT: You are biased.

24 THE COURT: I have seen it since Day 1
25 with Mr. Dunay, and the record is clear in all of

1 these transcripts of what he does or attempts to do
2 in these proceedings, but anything else that you
3 want to say regarding --

4 THE DEFENDANT: You denied my due process
5 at the attorney withdrawal hearing.

6 MR. O'CONNELL: Whether I do feel -- I
7 know I have indicated this on the record. I have
8 had numerous conversations regarding these issues
9 with the defendant. Prior to today's hearing, I
10 felt comfortable coming here today. I thought that
11 we were both ready to go.

12 When I got here, all of a sudden Mr. Dunay
13 provided me a number of documents that he wanted me
14 to review, which at this point -- well, he's also --
15 I feel like we are going in circular conversations
16 over here where he's bringing up an issue to me. I
17 am answering it. He's bringing an issue up again,
18 and I am answering it. I feel like we keep going
19 around in circles.

20 I don't feel comfortable in, I guess,
21 giving an opinion whether the defendant's doing that
22 intentionally or not, but I can tell the Court
23 that's exactly what's happening regarding -- and --
24 And when I indicate that, I am basing this on
25 information. I think everything I have said has

1 request like you are making today?

2 MR. O'CONNELL: I would say maybe
3 one percent to a half a percent of the cases.

4 THE COURT: So these are the -- You deal
5 with a lot of challenging situations, challenging
6 cases with people who are in prison and asking for
7 postconviction relief?

8 MR. O'CONNELL: Yes.

9 THE COURT: And out of all of those cases
10 it's one percent or less where it rises to this type
11 of conduct?

12 MR. O'CONNELL: Yeah.

13 THE COURT: Okay. Mr. Kaiser?

14 MR. KAISER: Your Honor, I just think this
15 additional fact goes to the factors that you've
16 listed from the *Suriano* case, which is at least the
17 prosecutor's notes from February 14 of 2019 reflect
18 that at that time when Mr. O'Connell moved to
19 withdraw the defendant agreed on the record that
20 they would only pursue the issues that Attorney
21 O'Connell found to have merit, which is what brought
22 us here today. And it wasn't until today that
23 Mr. O'Connell finds out that the defendant now is
24 going back on what he said on the record at that
25 time. I think that goes to the factors that the

1 Court listed.

2 THE COURT: And you agree with that,
3 Mr. O'Connell?

4 MR. O'CONNELL: I do.

5 THE COURT: Okay. Mr. Dunay, anything you
6 want to say regarding that?

7 THE DEFENDANT: (No response.)

8 THE COURT: By that I am referring to
9 specifically your waiver of your right to an
10 attorney or your forfeiture of your right to an
11 attorney.

12 THE DEFENDANT: Well, I had requested from
13 the SPD appellate intake -- I had written numerous
14 letters that -- that I was not satisfied with
15 representation; and they denied me further
16 representation even though I provided several issues
17 that I asked them to take a look at and that was the
18 response that I got. They refused to look at other,
19 additional issues.

20 THE COURT: And I believe this was the
21 case. I don't have it in front of me, but didn't
22 the state public defender's office write a letter or
23 maybe you indicated in your letter, Mr. O'Connell,
24 that you were informed by the head person in Madison
25 that if you were to withdraw Mr. Dunay given the

1 history of his case and the history of the attorneys
2 on the case and whatever else is going on between
3 Mr. Dunay and that office -- that they would not
4 appoint another attorney?

5 MR. O'CONNELL: Yeah. If I haven't filed
6 a motion, I can represent to the Court that if I
7 withdraw today as counsel, if the defendant wishes
8 to have me waive -- I'm sorry -- if he wishes to
9 represent himself today that the public defender's
10 office will not appoint a future attorney in
11 representing him.

12 THE COURT: Okay. I just want to be clear
13 as I am reading through the Suriano decision that I
14 understood when -- I think you put that in a letter.
15 I remember reading it.

16 MR. KAISER: Judge, I don't mean to
17 interrupt.

18 THE COURT: No. I want you to interrupt.

19 MR. KAISER: In the motion to withdraw as
20 counsel, which was filed with the Court on
21 January 29, 2019, Mr. O'Connell represented that the
22 colloquy with the defendant would be to determine
23 whether he wishes to merely pursue the issues
24 counsel has identified of merit or whether the
25 defendant wishes to go pro se or with the help of

1 private counsel, implying that there would be no
2 further public defender appointments.

3 THE COURT: Is that true?

4 MR. O'CONNELL: Yes.

5 THE COURT: And that's based upon the
6 number of attorneys in the case, the history of the
7 case, or what other factors?

8 MR. O'CONNELL: It's the appellate public
9 defender's position that if it's a matter of us just
10 simply disagreeing on what issues have merit, they
11 are not going to appoint the defendant additional
12 counsel. In this case that's exactly what the issue
13 is. I believe there's certain issues of merit. He
14 believes there's additional issues with merit. For
15 that reason they will not appoint further counsel.

16 THE COURT: All right. You have already
17 indicated, Mr. Dunay, that you understand that part
18 of it, that if Mr. O'Connell is off the case whether
19 it's by waiver or by forfeiture, you are on your own
20 for the rest of the case. There's not going to be a
21 public defender. You have indicated that so I am
22 comfortable that the record is clear on that.

23 THE DEFENDANT: But I understand also
24 there's special circumstances, which I think would
25 apply to this case once I appeal.

1 THE COURT: All right. Is there anything
2 else that you'd like to say regarding the waiver
3 issue, Mr. Dunay, or the forfeiture issue of
4 counsel?

5 THE DEFENDANT: I -- I -- I don't waive my
6 right to have an attorney argue my restitution
7 issue. I should have had the restitution hearing
8 immediately either at my sentencing or shortly after
9 there. Apparently it went over a year before I -- I
10 had -- I work at -- by my job in prison. I don't
11 make much money, but I am having 55 percent of my
12 money taken out illegally because I haven't even had
13 a right to a restitution hearing in a timely manner.

14 MR. O'CONNELL: Your Honor?

15 THE COURT: Mr. O'Connell?

16 MR. O'CONNELL: If I may --

17 THE COURT: You are wondering if anybody's
18 here on the restitution issue?

19 MR. O'CONNELL: Yeah. He didn't actually,
20 the defendant in this case, if I recall this
21 correctly -- the defendant -- There never actually
22 was a restitution hearing; and from what I
23 understand, the victim's not even here. I don't
24 know if the State's even pursuing that issue.

25 THE COURT: Mr. Kaiser, do you know?

1 MR. KAISER: Yes, your Honor. The --
2 Unfortunately, this is not a brief explanation; but
3 I'm only a week away from a three-week homicide
4 trial in Hudson. During that time, I was unable to
5 work with the victim witness person here, Ms. Jens,
6 to try to get an affidavit prepared. When I was
7 finally back on Monday, I worked with Ms. Jens to
8 try to get an affidavit prepared from the victim,
9 the victim's mom, who became very ill during the
10 course of this week.

11 This morning an affidavit was eFiled
12 answering the questions the defense has, and that's
13 what we are going to stand on. I have a cover
14 letter attached to that explaining the statute,
15 restitution statute, and why we believe we can stand
16 on that affidavit in addition to the letters that
17 were already filed.

18 She did not want to be here, and my
19 position is that because the statute allows the
20 Court to make a decision without regard to the rules
21 of evidence, if the Court so chooses, that a sworn
22 affidavit should be sufficient to answer the
23 questions the defense has. We stand by the order
24 that's been entered already.

25 THE COURT: And I take it you haven't seen

1 that, Mr. O'Connell?

2 MR. O'CONNELL: I have not.

3 THE COURT: I haven't either. Would you
4 stay on for one issue when there's other issues?

5 MR. O'CONNELL: The only way that would
6 occur would be is if we did -- if we addressed the
7 restitution issue right now, then I withdrew. If
8 not, then no.

9 THE COURT: Okay. And you understand
10 that, Mr. Dunay?

11 THE DEFENDANT: Yeah.

12 THE COURT: Okay. So anything else that
13 you'd like to say regarding the waiver issue or the
14 forfeiture issue? Attorney Kaiser just handed to
15 us --

16 THE DEFENDANT: I'm not waiving my right
17 to counsel if that's what you are asking me.

18 MR. KAISER: Judge, just briefly, although
19 I have never seen it broken down in this way, one
20 difference between Wisconsin and other states and I
21 didn't come prepared to argue this today so I don't
22 have a case in front of me but I can assure the
23 Court that it's probably easily findable in the
24 judicial bench book, that Wisconsin is one of the
25 states that does not allow for what's called hybrid

1 representation, that a defendant can't both
2 represent himself on some things and have an
3 attorney on other things; and certainly that's true
4 for incidents during a trial in terms of closing
5 arguments or questioning witnesses.

6 So it's the State's position that he
7 either has an attorney or he doesn't have an
8 attorney. No matter how many issues they are, these
9 issues aren't acceptable in terms of them being
10 about a different case. They are all about this
11 case. Either he has a lawyer or he doesn't have a
12 lawyer, and I think the Court has made fairly clear
13 what the standard is going to be for judging whether
14 or not he's forfeited counsel on today's date.

15 THE COURT: Mr. O'Connell, we were, you
16 and I, were just handed the June 20 letter from
17 Attorney Kaiser and then the two-page affidavit from
18 ~~the defendant's lawyer, [redacted]~~. Do you have
19 that?

20 MR. O'CONNELL: I do.

21 THE COURT: All right. Anything else that
22 anyone would like to say regarding the waiver issue
23 or the forfeiture issue?

24 MR. KAISER: No.

25 THE DEFENDANT: I don't waive my rights to

1 counsel.

2 THE COURT: Understood. Anything else,
3 Mr. O'Connell?

4 MR. O'CONNELL: No, your Honor.

5 THE COURT: Okay.

6 MR. O'CONNELL: Well, I guess, just on
7 that, I know I have raised this before; but from my
8 end regarding the forfeiture of counsel, it's
9 putting me in a really tough position of
10 representing the defendant when I am not actually
11 able to adequately represent him when he is talking
12 to me while another witness is testifying.

13 THE COURT: Understood. We could -- I
14 mean one thing we could do is take a break, which we
15 are going to do anyway momentarily; and we could
16 have you just read through the court reporter's
17 questions and answers. They were pretty simple, I
18 think. They were probably things you already know
19 and maybe things -- I shouldn't say that. They seem
20 to be just obvious answers that Mr. Tarnowski gave
21 about contacts with various individuals including
22 Mr. Dunay's federal attorney; and if Mr. Dunay was
23 honest with you, then they should have just been
24 already known to you. I understand that might not
25 be the case, but we could give you an opportunity to

1 look through that. But are there other issues that
2 constitute the forfeiture? You are saying
3 everything else, right?

4 MR. O'CONNELL: Correct.

5 THE COURT: Okay. And by everything else,
6 just all of the challenges and difficulties that
7 Mr. Dunay has created to allow you to provide
8 effective representation?

9 MR. O'CONNELL: Correct.

10 THE COURT: Okay. What we're -- I know,
11 Mr. Tarnowski, you need to be out of here at 10:30.
12 I am going to honor that.

13 THE WITNESS: Yes.

14 THE COURT: And what we will do is take a
15 ten-minute break. We will start back up at 10:20,
16 understanding that Mr. Tarnowski is going to be out
17 of here at 10:30. All right. We're adjourned.

18 (Off the record.)

19 THE COURT: All right. We are going to go
20 back on the record in Case No. 15-CF-470, State of
21 Wisconsin versus Kevin Dunay. Mr. Dunay is here
22 with Attorney O'Connell and Attorney Kaiser is
23 present on behalf of the State. Attorney Tarnowski
24 and Attorney Buckettt are listening.

25 We've been presented with this issue of

1 waiver and forfeiture. I have cited the *Suriano*
2 decision and what the Supreme Court said regarding
3 those issues. I want the record to be clear this
4 morning that, first of all, as it relates to waiver
5 although Mr. Dunay has indicated several times this
6 morning verbally that he wants to represent himself
7 and he did so even over your questioning,
8 Mr. Kaiser, or at the same time in a very defiant,
9 aggressive way, I don't believe that he has freely,
10 voluntarily, and intelligently waived his right to
11 have a lawyer. He refuses to engage in that
12 colloquy despite his representations to counsel;
13 but, again, I just think that's consistent with
14 Mr. Dunay and the conniving, manipulative person he
15 is.

16 THE DEFENDANT: This is a circus court.
17 That's why, your Honor. You should recuse yourself.

18 THE COURT: All right. Mr. Dunay, we have
19 had this discussion about you potentially being
20 removed. Just another warning because eventually
21 when it happens I want to make sure that the
22 record's clear that you have had enough warnings.

23 THE DEFENDANT: I execute my right to go
24 pro se.

25 THE COURT: Okay. It's not appropriate

1 for you to interrupt me. It's not appropriate for
2 you to interrupt anybody, and it's your role today
3 to only speak when you are given that opportunity to
4 speak, which you are not given right now. You keep
5 violating that; but, again, I think that only helps
6 the record --

7 THE DEFENDANT: I keep telling you I want
8 to go pro se.

9 THE COURT: -- in trying to establish how
10 difficult and challenging of a person that you are.

11 THE DEFENDANT: I can't get a fair -- I
12 cannot get a fair trial with this Court.

13 THE COURT: Okay. So then that leads us
14 to the forfeiture issue; and the Wisconsin Supreme
15 Court has addressed that in *Cummings*, which is the
16 1996 decision, as well as the *Suriano* decision from
17 just two years ago. And what I think is important
18 as we sit here today is that, No. 1, that forfeiture
19 requires a very different procedure covering -- a
20 very different procedure covering a variety of
21 scenarios and I have highlighted those scenarios.

22 I think it's important for us to remember
23 that the *Cummings* approach using forfeiture and
24 expressed waiver protects a defendant's right to be
25 represented by counsel and the right to choose

1 self-representation, but it also facilitates a
2 circuit court's duty to administer justice in an
3 orderly, timely, and dignified manner; and that's a
4 direct cite from the *Suriano* decision.

5 We know that a defendant forfeits his
6 right to counsel when the Court becomes convinced
7 that the orderly and efficient progression of a case
8 is being frustrated and that that orderly and
9 efficient progression is being frustrated because of
10 the defendant's voluntary and deliberate choices.

11 I find today that Mr. Dunay continues to
12 make deliberate and voluntary choices, both verbally
13 and nonverbally, that interferes with the orderly
14 and efficient progression of this case. I am
15 convinced that if Mr. Dunay is representing himself
16 he will continue to make deliberate and voluntary
17 choices that interfere with and interrupt the
18 orderly and efficient progression of the case simply
19 because he doesn't listen to anybody, doesn't listen
20 to the Court, doesn't --

21 THE DEFENDANT: I'm in front of a biased
22 judge.

23 THE COURT: -- doesn't listen to his
24 attorneys, and won't take suggestions or advice from
25 anybody. What -- You know, what I am concerned with

1 as I go through this is that I just want there to be
2 clear understanding by Mr. Dunay because I think I
3 could forfeit his right right now and be on good
4 ground; but I want him to understand that if he
5 continues to engage in deliberate, voluntary choices
6 that interfere with your representation of him,
7 Mr. O'Connell, or interfere with the progression and
8 the efficiency of this case that I am going to
9 exercise that forfeiture.

10 I come back to, you know, the recommended
11 steps if there's going to be a forfeiture and it's
12 that a warning that Mr. Dunay's continuing, specific
13 conduct will lead to a finding that the right to
14 counsel is forfeited. Mr. Dunay is on notice again
15 about that, a colloquy with Mr. Dunay about the
16 difficulties and dangers of self-representation. He
17 refuses to engage in any meaningful colloquy but
18 I --

19 THE DEFENDANT: Because I object to you
20 being the judge in this forum.

21 THE COURT: But I think the record is
22 clear that Mr. Dunay has been informed especially
23 given his character and his demeanor that it will be
24 extremely difficult for him to represent himself.
25 He lacks self-control. He's uncooperative, and he

1 keeps interrupting. He's not just interrupting me.
2 He interrupts opposing counsel. He has no respect
3 or regard for anyone, third, that when the ruling
4 happens, it will be a clear ruling that sets forth
5 the factual findings.

6 THE DEFENDANT: Yeah, that you are a
7 biased judge.

8 THE COURT: Understood, Mr. Dunay. Again,
9 you just keep interrupting, which is telling me that
10 you are purposely making the decision that you want
11 me to forfeit your right to have counsel. So, you
12 know, eventually --

13 THE DEFENDANT: Do what you think you need
14 to do, your Honor.

15 THE COURT: Okay.

16 THE DEFENDANT: But I object. I am making
17 it clear that this is -- This is a farce.

18 THE COURT: Okay.

19 THE DEFENDANT: Your courtroom is a farce.

20 THE COURT: You have made that clear.

21 THE DEFENDANT: This is not -- This is not
22 fair justice. This is not fair.

23 THE COURT: So forfeiture cases by their
24 very definition, according to the Supreme Court,
25 involve a manipulative, disruptive, and potentially

1 violent or abusive defendant. Mr. Dunay is all of
2 those. The record is clear back in time that he's
3 all of those and he continues to be all of those.
4 The Supreme Court recommends in that *Suriano*
5 decision that we as circuit court judges continue to
6 give warnings so that the defendant is put on notice
7 that this could happen and another warning is being
8 given right now and although we are not required to
9 do that.

10 So what I am going to do at this time is
11 take that request, Mr. O'Connell, for forfeiture
12 under advisement. I understand that there might
13 have been a disadvantage of you not hearing
14 Mr. Tarnowski's questions, and so I am going to
15 provide you an opportunity to review the transcript
16 at a later date and we can take it up however you
17 think it's appropriate. Mr. Tarnowski, because your
18 examination is then complete --

19 THE DEFENDANT: I still have questions.

20 THE COURT: Is that correct,

21 Mr. O'Connell?

22 THE DEFENDANT: I have questions for
23 Mr. Tarnowski.

24 MR. O'CONNELL: Sir, I couldn't hear you.

25 THE COURT: You couldn't hear me because

1 Mr. Dunay was shouting out and you are sitting right
2 next to him. So you understand, Mr. Dunay, your
3 interruption right there interfered with your
4 attorney being able to represent you? So,
5 Mr. O'Connell, my question --

6 THE DEFENDANT: I don't want him to
7 represent me. I want to go pro se. I want to ask
8 Mr. Tarnowski questions.

9 THE COURT: Do you have any further
10 questions, Mr. O'Connell, for Attorney Tarnowski?

11 THE DEFENDANT: This is absurd.

12 MR. O'CONNELL: I do not.

13 THE COURT: So, Mr. Tarnowski, you are
14 excused.

15 THE DEFENDANT: I have questions for
16 Mr. Tarnowski.

17 MR. KAISER: Yes.

18 THE DEFENDANT: I would like to preserve
19 my right to -- to question Mr. Tarnowski at a later
20 date.

21 THE COURT: So, Mr. Dunay --

22 THE DEFENDANT: I want to be pro se.

23 THE COURT: You have a written list of
24 questions?

25 THE DEFENDANT: Yes.

1 THE COURT: Mr. O'Connell, I don't have
2 any problem if we mark those questions as an exhibit
3 so the record is clear as to what Mr. Dunay thought
4 he was going to ask or was intending to ask.

5 THE DEFENDANT: I would like these letters
6 that I was also going to bring up.

7 MR. O'CONNELL: Your Honor, I represent
8 the defendant. I don't see -- From my end I don't
9 see the need unless the Court wishes to. I am not
10 going to -- On my end I am not going to put them in
11 the record.

12 THE COURT: Okay. All right. I believe
13 we are then set for the second witness,
14 Mr. O'Connell.

15 THE DEFENDANT: I wish to put them on the
16 record.

17 THE COURT: Mr. O'Connell, your second
18 witness?

19 THE DEFENDANT: I wish to put these on the
20 record.

21 MR. O'CONNELL: I call Attorney Robert
22 Buckett.

23 THE COURT: All right. Mr. Buckett, if
24 you want to, come on up to the witness stand.

25 THE DEFENDANT: This is crazy.

1 THE COURT: And when you get up here, if
2 you can, remain standing and raise your right hand.

3 ROBERT BUCKETT, having been called as a
4 witness, having been first duly sworn on oath, was
5 examined and testified as follows:

6 THE WITNESS: Yes, I do.

7 THE CLERK: Please state and spell your
8 full name for the record.

9 THE WITNESS: My name is Robert Buckett,
10 first name spelled R-O-B-E-R-T, last name spelled
11 B-U-C-K-E-T-T.

12 THE COURT: All right. Should we have
13 that colloquy now about the attorney-client
14 privilege, Mr. Kaiser? You are shaking your head
15 yes?

16 MR. KAISER: Please, yes.

17 THE COURT: Mr. O'Connell, you are okay
18 with that?

19 MR. O'CONNELL: Yes.

20 THE COURT: Mr. Dunay, I will try it again
21 with you and this witness. Mr. Buckett represented
22 you. He was your attorney; and as a result of that,
23 any communications that you had with Attorney
24 Buckett during his representation of you are
25 confidential communications that he cannot disclose

1 or talk about unless you authorize him to by waiving
2 your right to an attorney-client privilege.

3 THE DEFENDANT: I once again execute my
4 right to go pro se.

5 THE COURT: Okay. And you understand that
6 you have an opportunity today because you have
7 Mr. Buckett here to waive that privilege and if you
8 don't want to waive it it's your decision only?

9 THE DEFENDANT: I execute my right to go
10 pro se.

11 THE COURT: Okay. When you say you
12 execute your right to go pro se --

13 THE DEFENDANT: Yes.

14 THE COURT: We'll try this again for the
15 seventh or eighth time today. Are you telling us
16 today that you no longer want Attorney O'Connell to
17 represent you? You want to represent yourself in
18 this case understanding that we're going to go
19 forward today with this hearing with the four issues
20 that are on for hearing today and that you are not
21 going to be appointed legal counsel going forward in
22 the future by the public defender's office? Is that
23 your understanding?

24 THE DEFENDANT: (No response.)

25 THE COURT: Again, the record should

1 indicate --

2 THE DEFENDANT: This is a farce.

3 THE COURT: -- that Mr. Dunay has stared
4 at me.

5 THE DEFENDANT: If you insist on going on
6 with this farce, go ahead.

7 THE COURT: You didn't answer the
8 question, Mr. Dunay. Again, seconds.

9 THE DEFENDANT: I said yeah.

10 THE COURT: Yes, what?

11 THE DEFENDANT: I understand what you
12 said.

13 THE COURT: Okay.

14 THE DEFENDANT: We can go on with this
15 farce if you would like.

16 THE COURT: Are you indicating to us today
17 that you are making a free, voluntary, intelligent,
18 and knowing decision to waive your right to have
19 counsel not only at today's hearing but knowing that
20 it will be that way for the rest of this case?

21 THE DEFENDANT: I don't know that for
22 sure.

23 THE COURT: Okay. Then we will go
24 forward. I take it --

25 THE DEFENDANT: No. I don't know that for

1 sure because I do have the right to request counsel.
2 Whether it's given to me is another question.

3 THE COURT: That's true.

4 THE DEFENDANT: Okay. That's what I --
5 that's what -- I am trying to preserve those rights.

6 THE COURT: I didn't ask if you could
7 request.

8 THE DEFENDANT: Uh-huh.

9 THE COURT: So you need to listen,
10 Mr. Dunay. As smart as you think you are, it's
11 really important that you focus on the words that
12 are being used in the question. So I didn't ask
13 about your request for anything. I don't really
14 care about your request --

15 THE DEFENDANT: Yeah, I know.

16 THE COURT: -- if you make a request
17 because that is not the standard for what I need to
18 do to make a waiver of your right to have an
19 attorney.

20 THE DEFENDANT: Just like you think you
21 are competent to still preside over this case. You
22 are not.

23 THE COURT: We are getting sidetracked
24 again. Is it your decision today that you are
25 freely, voluntarily, and intelligently waiving your

1 right to have an attorney, that you want to proceed
2 without Attorney O'Connell? You want to proceed
3 representing yourself?

4 THE DEFENDANT: Yes.

5 THE COURT: You are making -- Yes?

6 THE DEFENDANT: Yes.

7 THE COURT: You are making your decision
8 knowing that we're going to go forward today with
9 these four issues that are set for hearing? Yes?

10 THE DEFENDANT: Yeah.

11 THE COURT: Okay.

12 THE DEFENDANT: Sure.

13 THE COURT: Are you making that decision
14 understanding what Attorney O'Connell has said on
15 the record today is that it's extremely likely, in
16 fact, the public defender's office has represented
17 to you that they will not appoint counsel to
18 represent you going forward in this case?
19 Understood?

20 THE DEFENDANT: Yes, I understood. I
21 understand now, uh-huh.

22 THE COURT: You are making that decision
23 understanding that your decision to go pro se will
24 last not only today but it will last throughout the
25 rest of this case?

1 THE DEFENDANT: Most likely.

2 THE COURT: Okay. And do you understand
3 that there are many disadvantages with someone like
4 you representing yourself in a case like this?

5 THE DEFENDANT: Somebody like me? What do
6 you mean by that?

7 THE COURT: You don't get to ask
8 questions.

9 THE DEFENDANT: I would like to know what
10 you are inferring, sir.

11 THE COURT: Well, you are not a lawyer.

12 THE DEFENDANT: I'm not a lawyer.

13 THE COURT: You don't understand the legal
14 processes. You obviously don't understand how to
15 conduct yourself in a hearing.

16 THE DEFENDANT: Uh-huh.

17 THE COURT: And there are benefits and
18 advantages to have someone who is legally trained
19 involved, advising, and advising you on what to do
20 as well as consulting with you on strategy.

21 THE DEFENDANT: I understand. I agree. I
22 will agree that I let my emotions get ahead of me
23 here today.

24 THE COURT: Okay.

25 THE DEFENDANT: But I also know when I'm

1 getting railroaded by the Court. Okay?

2 THE COURT: Sure. That wasn't what I
3 asked.

4 THE DEFENDANT: I was railroaded in my
5 original case. I am getting railroaded in this
6 postconviction. You know, also with this new
7 pending case that's coming up this is -- You know,
8 it's absolutely ridiculous.

9 THE COURT: Okay. I just wanted to get my
10 question answered.

11 THE DEFENDANT: Yeah.

12 THE COURT: What was your answer?

13 THE DEFENDANT: I don't remember what the
14 question was.

15 THE COURT: Okay. That's the part of your
16 personality that I was talking about, that you get
17 asked a question. You start rambling on on other
18 things and you don't even remember what the question
19 is. You understand that that's a disadvantage when
20 you are that way in a case, right?

21 THE DEFENDANT: Yeah.

22 THE COURT: Okay. And do you understand
23 that there are advantages to having a lawyer, that
24 you have somebody who is legally trained --

25 THE DEFENDANT: I agree.

1 THE COURT: -- not on the law but on the
2 process and procedure used, that can give you advice
3 that may help you and help your case?

4 THE DEFENDANT: I understand that. I go
5 to the law. I do law research every single day.

6 THE COURT: Another example, you are
7 rambling off on something. I wasn't talking about
8 you doing legal research. I was talking about a
9 competent, skilled attorney like Attorney O'Connell
10 who handles a lot of appeals and understands the law
11 and the rules of procedure on appeal. Do you
12 understand that you are giving up or you are waiving
13 that right?

14 THE DEFENDANT: I am given no choice.

15 THE COURT: No. You are given a lot of
16 choices but most importantly you are --

17 THE DEFENDANT: No. I don't have a choice
18 the way this system is set up.

19 THE COURT: Since you have just indicated
20 that you don't have a choice, we will proceed. Go
21 ahead, Mr. O'Connell.

22 THE DEFENDANT: Enough is enough. I'm
23 going pro se, your Honor.

24 MR. KAISER: Judge --

25 THE DEFENDANT: I'm going pro se, period.

1 MR. KAISER: I realize colloquies are
2 heard but I think we need another colloquy about
3 conversations with the defendant whether or not they
4 are privileged.

5 THE COURT: Yes. I think his refusal to
6 answer -- So far I will make the decision that he
7 hasn't waived attorney-client privilege.

8 THE DEFENDANT: I am going pro se, period.
9 I am going pro se, period.

10 THE COURT: Mr. Dunay, Attorney O'Connell
11 is going to ask questions right now.

12 THE DEFENDANT: No. I'm going pro se.

13 THE COURT: Okay. And by --

14 THE DEFENDANT: Period.

15 THE COURT: What does the period mean?

16 THE DEFENDANT: Would you prefer
17 exclamation mark?

18 THE COURT: No. I am just asking what it
19 meant. Again, I didn't ask about my preferences.

20 THE DEFENDANT: Don't worry about that.

21 THE COURT: Go ahead, Mr. O'Connell. I
22 find that he is not freely, voluntarily, and
23 intelligently waiving his right to counsel.

24 THE DEFENDANT: I am waiving my right.

25 THE COURT: I find that he is -- has not

1 waived his right to --

2 THE DEFENDANT: I am waiving.

3 THE COURT: -- attorney-client
4 communications.

5 THE DEFENDANT: I am going to pro se.

6 THE COURT: Go ahead, Mr. O'Connell.

7 THE DEFENDANT: I am going pro se. This
8 is ridiculous. This is a circus.

9 MR. O'CONNELL: Without the defendant
10 waiving the attorney-client privilege, I don't have
11 any questions.

12 THE COURT: All right. Mr. Kaiser, any
13 questions for this witness?

14 MR. KAISER: Yes, your Honor.

15 THE DEFENDANT: I am going pro se. I
16 object.

17 THE COURT: You are interrupting again.

18 THE DEFENDANT: No. I'm going pro se.

19 THE COURT: I think you just used the eff
20 word as you were talking to the officers, and they
21 are shaking their head in agreement with that. You
22 are crossing a line real quickly.

23 THE DEFENDANT: Ask me. Ask me the -- Go
24 through the colloquy again, please.

25 THE COURT: Go ahead, Mr. Kaiser.

1 MR. KAISER: Thank you, judge.

2 THE DEFENDANT: I would like to go pro se.

3 THE COURT: I heard you. You are on the
4 record with that, Mr. Dunay. You do not have to say
5 it again, and I would appreciate you not interfering
6 with Mr. Kaiser's examination of this witness.

7 THE DEFENDANT: It doesn't make sense to
8 go forward. I am going pro se.

9 DIRECT EXAMINATION

10 BY MR. KAISER:

11 Q Mr. Bucket, how long have you been an attorney?

12 A I'm sorry. I couldn't hear you.

13 Q How long have you been an attorney?

14 A I graduated law school in May of 2011. I started a
15 practice with one of my classmates in June of 2011.
16 I have practiced since then. So it would be a
17 little over eight years.

18 Q During that time can you tell approximately how many
19 sentencings, criminal law sentencings, you have
20 done?

21 A I would -- hundreds. I would say comfortably over
22 500.

23 Q And you have been before Judge McGinnis before?

24 A I have not been before Judge McGinnis before. This
25 was my first and to this point only case in

1 Outagamie County.

2 Q One of the things that you were here for that I
3 asked Attorney Tarnowski was whether or not he still
4 had the -- I think it's called a target letter from
5 the United States Attorney's Office about Mr. Dunay.
6 Did you get a copy of that letter, or did you get
7 that letter from Mr. Tarnowski?

8 A It was in his file, yes. I do have it with me. It
9 was sitting back where I was.

10 Q Do you have it with you? Could I have it, please?

11 A You absolutely can.

12 THE WITNESS: Judge, would you like me to
13 grab it?

14 THE COURT: Yeah, absolutely.

15 MR. KAISER: Thank you. I appreciate it.
16 I will come up with you. May I approach the
17 witness, your Honor?

18 THE COURT: You may. Mr. O'Connell, if
19 you want to go up there with them too to see the
20 document, you can.

21 MR. O'CONNELL: Your Honor, again, just
22 for the record I would indicate I have no idea
23 what's been going on the past couple minutes. The
24 defendant has been in my ear telling me again to
25 raise it to the Court that he would like to

1 represent himself and that he'll immediately after
2 the Court's questions or he will directly answer the
3 Court's questions rather than talking about other
4 comments.

5 THE COURT: Okay. Mr. O'Connell, if you
6 want to join up here, you can. I appreciate you
7 making a record of that. The only thing that was
8 asked was about the trigger letter and Mr. Buckett
9 indicated that he had it. He went back to his file
10 in the first row, grabbed his file, which I think
11 you now have up there with you. You have given
12 Mr. Kaiser this letter that he and Mr. O'Connell are
13 looking at. Should we mark that as an exhibit?

14 MR. KAISER: I was going to do that after
15 counsel has a chance to look at it.

16 THE COURT: Both of you are getting a
17 chance to look at it.

18 MR. KAISER: I ask it be marked, your
19 Honor.

20 THE COURT: Yes. Is this Exhibit No. 1?

21 MR. KAISER: Yes.

22 (Exhibit No. 1 marked for identification.)

23 THE COURT: It's being marked as
24 Exhibit No. 1. Any objection to that?

25 MR. O'CONNELL: No, your Honor.

1 THE COURT: I will give that back to you,
2 Mr. Buckett, so you have that.

3 THE WITNESS: Thank you, sir.

4 MR. KAISER: Actually, Mr. Buckett, I just
5 needed you to affirm that that's the letter that you
6 got from Mr. Tarnowski and he makes that statement,
7 judge. I am moving that into evidence.

8 THE COURT: All right. Exhibit 1 is
9 received.

10 (Exhibit No. 1 received.)

11 MR. KAISER: Thank you.

12 BY MR. KAISER:

13 Q Nowhere in there does the federal government say
14 that the defendant has to plead to all of the
15 charges in the information in order for him to be
16 able to be excused from federal prosecution; is that
17 fair to say?

18 THE COURT: I just want to stop for a
19 second. Mr. Dunay, you are now slamming on the
20 table twice or three times. That's not appropriate
21 either. Is that what you are going to say,
22 Mr. O'Connell?

23 MR. O'CONNELL: Yes, your Honor. It's
24 hard for me to focus.

25 THE COURT: Okay.

1 MR. O'CONNELL: It's really hard for me to
2 focus right now in this courtroom.

3 THE DEFENDANT: Again, I want to go
4 pro se.

5 THE COURT: It's hard because of
6 Mr. Dunay's conduct?

7 MR. O'CONNELL: Absolutely.

8 THE COURT: You want to make a record of
9 that, these last couple minutes?

10 MR. O'CONNELL: Yes. The defendant again
11 is -- I had missed this document, this letter that
12 the State has provided to the witness. I wasn't
13 aware of that. The State then did provide me the
14 opportunity to review it. I know we stopped the
15 hearing so I could review it. Now the State is
16 asking some questions.

17 I am not able to focus on anything that's
18 been asked here. The defendant is sticking a paper
19 in front of me and he keeps pointing and I don't
20 want to say -- I don't know if the word is pounding
21 on the table; but I can't focus. I mean I can't. I
22 don't know how the defendant expects me to represent
23 himself. I'm sorry. I am not aware of how the
24 defendant expects me to represent him and be able to
25 focus. I can't do multiple things at once.

1 THE COURT: He is interfering with you?

2 MR. O'CONNELL: Absolutely.

3 THE COURT: You think he's doing that
4 intentionally?

5 MR. O'CONNELL: I don't know if he's -- I
6 don't feel comfortable indicating he's doing it
7 intentionally; but he's absolutely doing it and it's
8 preventing me from paying attention to what's going
9 on here in the courtroom.

10 THE COURT: Mr. Dunay, during that last
11 question that still hasn't been answered you had
12 pounded the table and I call it pound because your
13 hand went down and made contact with the table loud
14 enough that I think everybody in the courtroom heard
15 including me and I'm probably 15 to 20 feet away
16 from you, and you had that document over in front of
17 Mr. O'Connell and I am -- I don't want you to pound
18 on the table. It's not acceptable. That stopped,
19 like, in preschool.

20 THE DEFENDANT: Yes, dad.

21 THE COURT: Okay. I am not your dad.
22 Don't get confused.

23 THE DEFENDANT: Yeah.

24 THE COURT: But we have some etiquette and
25 some rules, and the agitated and animations that you

1 were doing with Attorney O'Connell there you have
2 been doing all morning. I'm not reprimanding you
3 for that anymore. That's just sort of who you are
4 again.

5 THE DEFENDANT: Why didn't you recuse
6 yourself from this case?

7 THE COURT: The pounding on the table is
8 not acceptable.

9 THE DEFENDANT: Why didn't you recuse
10 yourself from this case?

11 THE COURT: We are focused.

12 THE DEFENDANT: It's inappropriate for you
13 to be the judge. I object to this whole hearing.

14 THE COURT: Mr. Kaiser, do you want to
15 repeat the question, please?

16 THE WITNESS: I remember what the question
17 was. I can answer it.

18 THE COURT: I know but Attorney O'Connell
19 wasn't able to hear. Mr. Dunay was pounding on the
20 table.

21 BY MR. KAISER:

22 Q Anywhere in that letter in Exhibit 1 does the United
23 States Attorney's Office indicate that the defendant
24 will be required to plead to all of the charges in
25 the State's information in order for him to be

1 excused from a federal prosecution?

2 A No, sir.

3 Q You also wrote a letter, which I assume is in the
4 electronic file, on January 31, 2018, where you
5 requested a set over of the sentencing from
6 February 2; is that correct? If you don't remember,
7 I have the letter and I can show it to you.

8 A I believe, yes, you are correct.

9 Q All right. Was part of the reason you requested
10 that set over due to the fact that you had received
11 some additional material from the district
12 attorney's office?

13 A I believe that's correct. I -- I am sure you are
14 going to explain to me what it is. I believe I
15 received some copies of telephone calls from their
16 office. So that's probably what I was referring to.

17 Q Just so this record's clear, the telephone calls
18 were actually recordings made of the defendant's
19 telephone calls from the jail; is that correct?

20 A That's correct.

21 Q All right. Between January 31 and March 8 of 2018,
22 which was the sentencing date, you had an
23 opportunity to review those with the defendant; is
24 that correct?

25 A I did.

1 Q All right. And you became aware that however one
2 would characterize them -- I am going to
3 characterize them as threats -- the defendant made
4 threats towards the district attorney, the
5 prosecutors in New Jersey, the police officers in
6 New Jersey, and Judge McGinnis; is that correct?

7 A I reviewed the phone calls and what was on them so
8 yes.

9 Q Now, the allegation here as you know -- Actually
10 sorry. Strike that. You have had an opportunity to
11 review the motion for resentencing; is that correct?

12 A Yes, sir.

13 Q You understand that the claim here is that you were
14 ineffective for failing to move to recuse Judge
15 McGinnis; is that right?

16 A I understand, yes.

17 Q All right. Now, understanding that collectively
18 here we are limited by not being able to ask you
19 about your conversations with the defendant, I'm
20 limiting my question to your experience and your
21 thought process as a lawyer. What would it be that
22 would have caused you to think to not ask for a
23 recusal?

24 A So just speaking in a general sense, my thought was
25 that -- Again, this was after reviewing the

1 recordings of the phone calls. My thought was that
2 the judge, Judge McGinnis, was addressed. The
3 district attorney was addressed. The victim and
4 when I say addressed, I mean talked about. The
5 victim was talked about. The criminal justice
6 system at large was talked about and in a
7 threatening manner, I guess, as you had
8 characterized it.

9 So my thought when preparing for
10 sentencing was, okay, I guess we can ask that the
11 judge recuse himself; but if we are successful, this
12 case will get sent to another judge and almost
13 undoubtedly those same phone calls will be brought
14 up in front of that other judge. And I would
15 imagine just because it's a different judge than
16 Judge McGinnis that new judge wouldn't look upon
17 them favorably. So it was kind of my thought
18 process that being in front of Judge McGinnis or
19 some other judge, whether it be in this county or
20 another one, it didn't really matter to me, that
21 those phone calls weren't going to be looked upon
22 favorably.

23 Q And did you consider the possibility -- I'm sorry.
24 You knew the judge was going to be supplied with
25 those either by way of recording or transcript; is

1 that fair to say?

2 A That's correct. I received the recordings from
3 Attorney Tempelis in person and so we had a
4 discussion and I am pretty sure that she said she
5 would bring them up at sentencing. So she wanted me
6 to have a chance to review them prior.

7 Q Did you consider -- Again limiting ourselves to us
8 collectively as attorneys, not any conversation with
9 the defendant, did you consider the possibility that
10 if you were to ask the judge to recuse himself and
11 he refused that you might find yourself facing an
12 even more antagonistic judge?

13 A That definitely crossed my mind as well and I had a
14 chance to review, you know, the case history on CCAP
15 and I saw that the case had been pending for a
16 while. That was something that crossed my mind as
17 well, that; and I didn't know Judge McGinnis at the
18 time. So I wasn't sure how he would react, but I
19 thought just kind of in a vacuum that any judge
20 could think of something coming up at the eleventh
21 hour like this as kind of a stall tactic. I know
22 generally judges don't look favorably upon that, so
23 that did cross my mind as well.

24 Q The -- I'm trying to think of how to ask it. You
25 recall that at the sentencing, if you do and let me

1 know if you don't?

2 A Well, I reviewed the 120-page transcript that you
3 e-mailed me in its entirety.

4 Q Thank you for taking your time to do that. I really
5 appreciate that. So you saw in there where the
6 defendant profusely apologized to the judge for his
7 behavior; is that correct?

8 A I did read that, yes.

9 Q All right. So another reason may have been to not
10 ask the judge to recuse himself would be if the
11 defendant were to apologize and demonstrate a
12 potential for rehabilitation by apologizing and
13 taking responsibility for those calls it might
14 actually help his cause in terms of the sentencing?
15 Would that be fair to say?

16 A I guess I will try to limit it to a general sense
17 like we are talking about, but I'll say this. I
18 have had clients, be it through phone calls or be it
19 through their conduct in the courtroom, leave what I
20 would characterize as unfavorable tastes in the
21 judges' mouth, so to speak; and I have often told
22 them that judges hear things like this every day.
23 They generally in my experience have pretty thick
24 skin. If you get out in front of it and apologize,
25 that usually these things can be smoothed over and

1 you are not going to damage yourself at sentencing;
2 and I'll say that that is what I have told many
3 clients in the past who have engaged in this sort of
4 behavior that we're looking at.

5 Q And, finally, and again my question is about your
6 sentencing strategy and tactic so if I am in error I
7 am confident you will tell me.

8 A I will.

9 Q But would it also be fair to say that a
10 consideration under these circumstances could be
11 that if you let this all go down as the district
12 attorney told you it was going to go down that the
13 judge might feel constrained in how he sentences the
14 defendant because he wouldn't want it to appear as
15 if he's placing more weight on these angry threats
16 from the jail maybe than the district attorney might
17 have preferred him to?

18 A All right. So I guess I will ask you to kind of
19 clarify your question when you said if the district
20 attorney said this would go down like it would go
21 down.

22 Q In other words when the district attorney said to
23 you the judge is going to know about all of these
24 things that the defendant said about him, all of the
25 names that he called him and everything else, might

1 it not have been a consideration for you that, well,
2 the judge to protect the record might not give as
3 much as he might have otherwise been inclined to
4 give because he doesn't want it to look like he let
5 these threats affect his judgment?

6 A That crossed through my mind. I would say my -- my
7 experience is just that and usually judges are
8 pretty good on the record about this, that they are
9 not going to give too much weight to it because that
10 would be, I think, just a pretty clear, obvious
11 appellate issue. I am not sure if I am doing a
12 great job of answering your question, but my thought
13 process is that judges are usually pretty good at
14 separating their personal feelings about a defendant
15 with the sentencing factors they have to look to.
16 So if the defendant's done something that's
17 personally offending them, like I said, they are
18 usually good at separating that. Again, I apologize
19 if that's not a good job of answering your question.

20 Q No. You did great.

21 THE COURT: Just so the record is clear,
22 Mr. Dunay, during that question and answer you
23 thought -- You must have thought it was really
24 funny?

25 THE DEFENDANT: It was amusing.

1 THE COURT: You laughed like
2 uncontrollably.

3 THE DEFENDANT: Yes, yes, at the circus
4 court.

5 THE COURT: It probably interfered with
6 Attorney O'Connell, which isn't good. If you could
7 just restrain yourself and act like the other people
8 in the courtroom, that would be great.

9 THE DEFENDANT: You are just an arrogant
10 asshole.

11 MR. KAISER: Mister --

12 THE COURT: Hold on. What did you just
13 say?

14 THE DEFENDANT: You heard me.

15 THE COURT: We will address that after
16 this witness.

17 BY MR. KAISER:

18 Q Mr. Buckett, your understanding of the law of
19 recusal in Wisconsin is that the judge has every
20 absolute right to make a determination whether the
21 judge believes he can be fair in the circumstances
22 of the case; is that correct?

23 A Yes.

24 MR. KAISER: I appreciate your help. I
25 appreciate you bringing your file. Thank you very

1 much.

2 THE COURT: Mr. O'Connell, anything?

3 MR. O'CONNELL: I do not.

4 THE COURT: Any reason for him not to be
5 excused?

6 MR. O'CONNELL: I do not have any reason
7 for him to stay.

8 THE COURT: Mr. Kaiser, are you good with
9 him leaving?

10 MR. KAISER: I am asking he be excused.

11 THE COURT: Do you have a copy of that
12 Exhibit 1 or not?

13 THE WITNESS: I have this in front of me.
14 I think there is actually a second copy in my file.

15 THE COURT: Can I take Exhibit 1 from you
16 just so we have it?

17 THE WITNESS: Certainly.

18 THE COURT: Do you want me to make a
19 photocopy for you?

20 THE WITNESS: No, because I believe I have
21 that same letter and then that letter was actually
22 attached to a separate e-mail that Attorney --
23 Attorney Tarnowski got. So I have two copies of
24 that exact same letter for the file.

25 THE COURT: So we will keep Exhibit 1.

1 He's going to take the rest of his file and he's
2 going to leave. Anything else for him,
3 Mr. O'Connell?

4 MR. O'CONNELL: I do not, your Honor.

5 THE COURT: Mr. Kaiser?

6 MR. KAISER: No.

7 THE COURT: You may step down. Thanks for
8 your testimony and time today, Mr. Bucket.

9 THE WITNESS: Thank you. Have a good day,
10 everyone.

11 MR. KAISER: Thank you. The State calls
12 District Attorney Tempelis.

13 THE COURT: All right. Attorney Tempelis,
14 if you want to, come on up to the witness stand. If
15 you could, remain standing and raise your right
16 hand.

17 MELINDA TEMPELIS, having been called as a
18 witness, having been first duly sworn on oath, was
19 examined and testified as follows:

20 THE WITNESS: I do.

21 THE CLERK: Please state and spell your
22 full name for the record.

23 THE WITNESS: Melinda, M-E-L-I-N-D-A,
24 Tempelis, T-E-M-P-E-L-I-S.

25 MR. O'CONNELL: Your Honor, if I may, the

1 defendant is again -- I cannot -- I haven't been
2 able to pay attention to the past, I want to say,
3 30 seconds. The defendant -- He's in my ear telling
4 me that he needs to go pro se and he needs me to
5 bring it up to you.

6 THE COURT: Okay. Is that correct,
7 Mr. Dunay?

8 THE DEFENDANT: Yes, sir. I want to
9 preserve several other issues --

10 THE COURT: Okay.

11 THE DEFENDANT: -- to be heard by the
12 Court.

13 THE COURT: All right. Mr. Kaiser, you
14 can start your direct examination.

15 MR. KAISER: Thank you.

16 THE DEFENDANT: Are you --

17 DIRECT EXAMINATION

18 BY MR. KAISER:

19 Q Ms. Tempelis, what do you do for a living?

20 A I am a prosecutor.

21 Q Where do you work?

22 A I work in the Outagamie County District Attorney's
23 Office.

24 Q What is your job there?

25 A I'm the district attorney.

- 1 Q How long have you been the district attorney?
- 2 A Since September of 2017.
- 3 Q What was your job before that?
- 4 A I was the deputy district attorney.
- 5 Q From when to when?
- 6 A From 2006 until I became the district attorney.
- 7 Q What was your job before that?
- 8 A I was an assistant district attorney.
- 9 Q From when to when?
- 10 A 2003 until 2006.
- 11 Q I realize it's a stupid question. The implication
- 12 is that are you an attorney licensed to practice law
- 13 in the state of Wisconsin; is that correct?
- 14 A Yes.
- 15 Q During the investigation of the case involving Kevin
- 16 Dunay, did you assume responsibility for supervising
- 17 and managing that case?
- 18 A I did.
- 19 Q And did there come a time when you talked to
- 20 Attorney Tarnowski about possibly settling the
- 21 matter after it was charged?
- 22 A We did.
- 23 Q At any time did you ever tell Attorney Tarnowski
- 24 that you would agree to recommending concurrent time
- 25 between any of the charges?

1 A Never.

2 Q At any time did you tell Mr. Tarnowski that he could
3 advise his client that the judge would be giving
4 concurrent time as to any of the charges?

5 A No.

6 Q Did there come a time when you understood what, if
7 any, interest the United States Attorney's Office in
8 the Eastern District of Wisconsin had in Mr. Dunay?

9 A Yes.

10 Q And what, if anything, did you understand their
11 position to be regarding what circumstances might
12 arise where he wouldn't be prosecuted by them?

13 A As it relates to the Eastern District of Wisconsin,
14 I believe they were aware of this case. At some
15 point in time they sent what I understand to be
16 what's called a target letter, that that letter
17 indicated that the US Attorney's Office for the
18 Eastern District was monitoring or aware of the case
19 and if it was, I think -- I don't know. I never
20 read the letter so I don't know if it was a matter
21 of if it was resolved in State court that they
22 weren't going to take interest in it any longer or
23 if they were just waiting to see what happened at
24 the State level but that they were certainly paying
25 attention.

1 Q No one in the United States Attorney's Office ever
2 told you that they would require him to plead to all
3 of the charges before they would make the decision
4 not to prosecute him; is that correct?

5 A Correct.

6 Q All right. Without relating any conversations that
7 there may have been with the defendant, did you
8 learn that the defendant actually met with a United
9 States public defender, federal public defender?

10 A I believe that might have happened a couple times.
11 Attorney Tarnowski had indicated to me that he had
12 talked to a federal public defender at some point in
13 time. I also believe that there was a delay from
14 the sentencing date partly because I provided
15 information to his defense attorney regarding
16 telephone conversations and that there was
17 conversation after that with the federal public
18 defender, I believe, as well.

19 Q All right. So, again, without saying what, if
20 anything, the defendant said, was it your
21 understanding from Mr. Tarnowski that the defense
22 team was in touch with an assistant public defender
23 from the federal system who would be able to give
24 them advice about what may or may not happen in the
25 federal system?

1 A Definitely.

2 Q I know you were present in court earlier; but just
3 to reaffirm this, your original offer to them, as
4 Mr. Tarnowski described it, was to plead to
5 two charges and read in two other charges; is that
6 right?

7 A That's correct.

8 Q And how did it come to be then that the defendant
9 ended up pleading to four charges?

10 A At some point in time -- I believe the plea took
11 place about December 1 of 2017. There were some
12 conversations in November. We had had some hearings
13 on the approach of our trial dates that we had, and
14 there were conversations about the defendant not
15 wanting to take the offer that I had because while
16 there was an offer to plead to two counts and read
17 in two counts there was a requirement that the
18 defense argue for, I believe it was, ten to 12 years
19 of initial confinement and then the State was going
20 to recommend, I believe it was, 12 to 15 or 13 to 15
21 or something like that.

22 So it required the defendant to go into
23 sentencing making a recommendation that he was going
24 to receive a significant amount of time. I was told
25 by Attorney Tarnowski that the defendant was not

1 interested in that offer, was not interested in
2 asking for the ten to 12 years. So there were then
3 conversations about, okay, well, if he pleads to all
4 four counts we could just request a presentence
5 investigation and go into sentencing with both of
6 the parties free to argue; and ultimately that's
7 what they decided to choose.

8 Q So it was the defense's choice to plead to all
9 four charges?

10 A Correct. It was my counter. It was essentially my
11 follow-up offer when they didn't like the original
12 one requiring him to ask for 12 to -- ten to
13 12 years of initial confinement.

14 Q And, just briefly, to keep it brief, I am going to
15 ask leading questions. You had a good case?

16 A Yes.

17 Q You had electronic evidence to prove the charges
18 that you had?

19 A Correct.

20 Q You had an admission by the defendant to law
21 enforcement to behavior, regarding his behavior?

22 A Correct.

23 Q Based on your extensive experience as a prosecutor,
24 would it be fair to say that this generally would be
25 the kind of case that would end up in a plea and not

1 a trial?

2 A That is what I thought.

3 MR. KAISER: No further questions.

4 THE COURT: Mr. O'Connell,
5 cross-examination?

6 MR. O'CONNELL: I don't have any
7 questions.

8 THE DEFENDANT: Statutes are
9 unconstitutional.

10 THE COURT: I'm sorry?

11 THE DEFENDANT: I said the statutes are
12 unconstitutional.

13 THE COURT: Which statute are you
14 referring to?

15 THE DEFENDANT: 948.05, 948.07(3), 948.10.
16 They do not apply to in-person exposure. There's
17 case law precedent in *State v. Stuckey*, *State v.*
18 *Wagner*.

19 THE COURT: What case?

20 THE DEFENDANT: *State v. Zarnke*.

21 THE COURT: We are done with this witness;
22 is that right?

23 MR. KAISER: I want to ask her
24 one question when he's done talking.

25 THE COURT: Okay. Go ahead.

1 BY MR. KAISER:

2 Q Ms. Tempelis, all of the issues we heard from the
3 defendant -- They were all raised and resolved
4 actually in front of the Court and had been
5 preserved for the appeal, hadn't they?

6 A I believe so. Specifically the issue regarding
7 constitutionality, I believe I filed something with
8 the Court in the fall of 2017 outlining that there
9 was a request to challenge the constitutionality. I
10 don't think that that issue ever was resolved
11 because I think some of the issues became moot when
12 the defendant decided to enter a plea.

13 MR. KAISER: Thank you. No further
14 questions, your Honor.

15 THE DEFENDANT: I need to know about the
16 most significant. There was a late motion put in
17 by -- by Attorney Tarnowski. I wasn't even aware
18 that he had put that late motion in for the
19 dismissal of 948.05.

20 MR. KAISER: I ask the witness be excused.

21 THE COURT: All right. Mr. O'Connell, any
22 objection to the witness being excused?

23 MR. O'CONNELL: No, your Honor.

24 THE COURT: All right. You may step down,
25 Attorney Tempelis.

1 MR. KAISER: I do have one more witness,
2 judge; and it really won't take that long, judge. I
3 promise.

4 THE COURT: Sure. I forgot to ask.
5 Attorney O'Connell, do you have other witnesses? I
6 know we were going to do the three attorneys first.
7 Now that they are done --

8 MR. O'CONNELL: The only other person I
9 plan on calling is the defendant.

10 THE DEFENDANT: Can I ask my attorney
11 one question?

12 (Discussion off the record.)

13 THE COURT: The record should indicate
14 that Attorney O'Connell and Mr. Dunay are talking
15 privately. Mr. Kaiser, if the defendant is going to
16 testify, do you think it makes sense to have him go
17 first?

18 MR. KAISER: That would be great.

19 THE COURT: Just before whoever it is that
20 you -- Who are you going to call?

21 MR. KAISER: I may not have to call the
22 police officer if he takes the stand and admits to
23 what's in the transcripts.

24 THE COURT: Okay.

25 MR. KAISER: Thank you.

1 THE COURT: Do you have other witnesses,
2 Mr. O'Connell?

3 MR. O'CONNELL: None other than the
4 defendant.

5 THE COURT: Mr. Dunay, you are going to
6 testify?

7 THE DEFENDANT: Apparently.

8 THE COURT: Okay. So what I -- I am going
9 to do, Mr. Dunay, is have you scoot over to -- next
10 to the table -- I'm sorry -- to the chair next to
11 you one over. You will have a table to set up your
12 stuff there just like the witness stand, and we will
13 conduct it that way. As you are moving your stuff,
14 you can remain standing and raise your right hand.

15 THE DEFENDANT: I really want to --

16 THE COURT: All right. If you could,
17 raise your right hand.

18 THE DEFENDANT: I would rather just go
19 pro se.

20 THE COURT: Are you going to refuse to
21 raise your right hand?

22 THE DEFENDANT: I don't know how I am
23 going to do that with these handcuffs on anyway.

24 MR. KAISER: Your Honor?

25 THE COURT: Yes.

1 MR. KAISER: Apologize for interrupting.

2 The defendant -- I mean theoretically the defendant
3 has a right to not testify. I realize his attorney
4 called him but it may be that we need to have a
5 colloquy with him about --

6 THE COURT: I will do that.

7 MR. KAISER: Apologize. I apologize for
8 interrupting.

9 THE COURT: We will not get there if he
10 refuses to be sworn in.

11 MR. KAISER: Correct.

12 THE COURT: It's a matter of raise your
13 right hand, Mr. Dunay. The clerk will swear you in.

14 KEVIN DUNAY, having been called as a
15 witness, having been first duly sworn on oath, was
16 examined and testified as follows:

17 THE DEFENDANT: Yep.

18 THE CLERK: You may be seated.

19 THE COURT: All right. Mr. Dunay, you are
20 under oath subject to the rules of perjury and the
21 first issue that I want to take up with you is
22 something that Attorney Kaiser just raised, that is,
23 that you have a right to testify and you also have a
24 right not to testify. Do you understand that?

25 THE DEFENDANT: Yep.

1 THE COURT: Do you understand that it's
2 your decision only? It's a decision that only you
3 can make. I can't force you to testify or make that
4 decision. Attorney O'Connell can't force you to
5 make that decision or to testify and Attorney Kaiser
6 cannot. Do you understand that?

7 THE DEFENDANT: Yep.

8 THE COURT: And are you making the
9 decision today that you want to provide testimony
10 regarding the four motions that are pending at this
11 time?

12 THE DEFENDANT: Yeah, but I want to go
13 pro se.

14 THE COURT: Okay. And do you understand
15 that by making the decision to testify regarding
16 those four issues what that means is the
17 attorneys -- Attorney O'Connell is going to have an
18 opportunity to ask you questions and then Attorney
19 Kaiser is going to have an opportunity to ask you
20 questions on cross-examination and it will be your
21 obligation or your role to answer those questions in
22 a respectful way, correct?

23 THE DEFENDANT: You didn't address my
24 issue about going pro se.

25 THE COURT: I actually have addressed it

1 all morning.

2 THE DEFENDANT: Okay.

3 THE COURT: I am trying to stick to you
4 following along with what's being asked. Did you
5 understand what I asked and are you in agreement
6 with that?

7 THE DEFENDANT: I understand what you are
8 saying but I -- I still want to go pro se.

9 THE COURT: Okay.

10 THE DEFENDANT: My -- my -- So far this
11 whole court -- It's ludicrous.

12 THE COURT: Great.

13 THE DEFENDANT: It's absurd. I mean I am
14 not getting any -- I am not getting any real
15 representation here; and I am in front of a Court
16 that's totally biased. It can't possibly get fair
17 or justice in this courtroom with you being here.

18 THE COURT: Okay.

19 THE DEFENDANT: What do you mean, okay?
20 You can't. You can't even subjectively decide that
21 you are not biased at this time. That's absurd.
22 That's absurd.

23 THE COURT: What?

24 THE DEFENDANT: Objectively we can all say
25 that you are biased. We all know that you are

1 biased. How could you not be?

2 THE COURT: Are you comfortable with his
3 understanding, Mr. O'Connell, that he's going to
4 testify and be subject to cross-examination?

5 MR. O'CONNELL: I am. Just, I guess, for
6 the record regarding the defendant's testimony, the
7 scope is strictly towards the motion to withdraw the
8 pleas. That's the only line of questioning I plan
9 on going down.

10 THE COURT: Is that understood,
11 Mr. Kaiser?

12 MR. KAISER: No. There's a motion for
13 resentencing where he makes allegations; and unless
14 they're withdrawing that motion and that way you
15 won't have to decide it, I still need to ask him
16 questions about it.

17 MR. O'CONNELL: My response to that is
18 we -- I know right now we are going completely out
19 of order rather than going through motion by motion.
20 We are getting all of the witnesses, getting the
21 testimony. Had we gone in order we would have
22 addressed the motion to withdraw a plea. There's no
23 sense of even getting to the motion for resentencing
24 if -- if we went on the motion to withdraw the plea.

25 So my intention was to address the motion

1 to withdraw the plea, if the Court denies it, then
2 move on to the next motion; but there would have
3 been no need then to even address because I don't
4 have any intention of asking the defendant
5 regarding -- any questions regarding the motion for
6 resentencing.

7 THE COURT: I think I agree with
8 everything that you just said, Mr. O'Connell; but if
9 the motion to withdraw pleas is denied, then you are
10 going to have Mr. Dunay testify about the motion for
11 resentencing or not?

12 MR. O'CONNELL: No.

13 THE COURT: Okay. So his testimony is
14 only going to be with respect to the motion to
15 withdraw pleas?

16 MR. O'CONNELL: Correct.

17 THE COURT: I think that's legitimate.
18 Right, Mr. Kaiser?

19 MR. KAISER: That's fine, but then there's
20 no evidence to support some of the claims in the
21 motion for resentencing.

22 MR. O'CONNELL: That's what we can argue.
23 That's fine.

24 THE COURT: Okay.

25 MR. KAISER: Okay.

1 THE COURT: We'll go with that
2 understanding. If that changes, Mr. O'Connell, let
3 me know; but that will be the scope of the direct
4 examination and then the scope of the
5 cross-examination. Of course I will give you a
6 little latitude because it's your witness.

7 The other thing that I think the record
8 should be clear on is when you said, well, we've
9 kind of gone out of order I don't know if we have
10 really gone out of order. We started with you and
11 the two attorneys that you had, and we picked those
12 in order of who had to get out of here first to
13 accommodate the schedule, but I thought you were in
14 agreement with that.

15 MR. O'CONNELL: Yes.

16 THE COURT: Then we called
17 Attorney Tempelis next simply because she needs to
18 be places probably too even though I understand
19 she's still sitting here. I always think it's
20 appropriate to allow people not to have to sit here
21 if they don't have to, but that shouldn't impact.
22 The fact that Attorney Tempelis has already
23 testified, I would think, wouldn't impact or be a
24 disadvantage to Mr. Dunay. I think it would be an
25 advantage to have heard what Attorney Tempelis said,

1 right?

2 MR. O'CONNELL: I agree with the Court. I
3 don't see what we did as any disadvantages to the
4 defense. The -- when I made the comment about
5 the -- about being out of order rather than going
6 through motion by -- addressing the first motion and
7 then move on to the second motion and then move on
8 to the third, I mean we took all of the testimony;
9 and then at some point this morning I am assuming we
10 will start addressing the motion, motion by motion.

11 THE COURT: Okay. That makes sense. So
12 you can start your examination of Mr. Dunay.

13 DIRECT EXAMINATION

14 BY MR. O'CONNELL:

15 Q Mr. Dunay, Attorney Tarnowski -- He testified
16 previously. During your previous conversations with
17 Attorney Tarnowski, did he indicate to you -- I
18 guess what was the offer that he had forwarded on to
19 you?

20 A Excuse me? What was that?

21 Q What was the offer that the State had -- I'm
22 sorry -- that Attorney Tarnowski had told you that
23 the offer was?

24 A It was -- I believe it was --

25 THE COURT: Well, one second. I just want

1 to be clear. That's an attorney-client
2 communication, right?

3 MR. O'CONNELL: Yeah.

4 THE COURT: I want Mr. Dunay to
5 understand. It looks like he did because he was
6 about ready to answer. Mr. Dunay, I just want to
7 let you know or inform you that you have a right to
8 not disclose attorney-client privileged
9 communications; and by attorney-client privileged
10 communications I mean communications between you and
11 an attorney that are private. Those communications
12 are confidential and they don't have to be disclosed
13 unless you waive your right to that confidentiality.

14 I know you were just about to answer it.
15 So I take it that you have made the decision that
16 you want to waive your right and tell us about
17 whatever it is that those communications are. You
18 are shaking your head in agreement with that?

19 THE DEFENDANT: Yes.

20 THE COURT: And you understand the
21 advantages and disadvantages of that right?

22 THE DEFENDANT: Yep.

23 THE COURT: Okay. Is it your decision
24 today that you are going to waive your right to
25 those communications and you're going to disclose

1 those privileged communications here in open court?

2 THE DEFENDANT: Yes.

3 THE COURT: All right. Go ahead,

4 Mr. O'Connell.

5 BY MR. O'CONNELL:

6 Q Mr. Dunay, what was the offer that the defense
7 counsel had provided you?

8 A I believe it was I had to plead to two of the
9 charges and that they were going to allow me to ask
10 for, like, ten to 12 while they were going to ask
11 for 15 years, same as what DA Tempelis suggested
12 earlier.

13 Q What was the reason? What was the reason why you
14 pled to all four charges?

15 A The reason I pled to all four charges -- I was told
16 by Mr. Tarnowski that I had to plead to all four of
17 the charges by the -- essentially by the feds and
18 that I had to resolve the entire case; and at the
19 time I knew that I was not even guilty of two of the
20 charges based upon two of the motions for dismissal
21 that I knew of at the time, the 948.07(3) and the
22 948.10. And Mr. Tarnowski made me aware that those
23 charges would get dismissed based upon previous
24 cases' precedent, cases that had precedent, *State v.*
25 *Stuckey* and also *State v. Wagner*.

1 And so he had told me that I would -- that
2 he would run -- that the judge would run these
3 concurrent and not to worry because I was concerned.
4 I am like why? It was December 1. I had this
5 letter here, this e-mail, from -- that my
6 attorney Tarnowski got from Andrew Maier and it was
7 dated November 13. And he said that -- Can I read
8 an excerpt from this e-mail?

9 THE COURT: Is it responsive to your
10 question, Mr. O'Connell?

11 MR. O'CONNELL: I guess I don't know.

12 THE WITNESS: Well, I am trying to set the
13 circumstances of how this occurred, how, you know,
14 he led to telling me not to worry, essentially not
15 to worry about the concurrency of these charges that
16 he had. He had these -- these great motions to
17 dismiss the 948.07(3) and 948.10. He told me the
18 feds are coming for you. This is on the day of
19 December 1, mind you, okay?

20 There's a letter here from Andrew Maier.
21 He's the assistant US attorney; and he says I
22 followed the State case against him and know that
23 you filed some motions on various issues with the
24 motion hearing set for December 1, 2017. I expect
25 to act before that with the charging decision. So

1 it is my hope that Mr. Dunay can be apprised of this
2 and prepare for transfer to federal custody and
3 prosecution here. If something should change,
4 please let me know as soon as possible, at any rate
5 no later than Thanksgiving Day. Mr. Dunay knows
6 what he did. He knows what he said to the
7 investigators who interviewed him, and the decision
8 should not take very long to reach.

9 On the morning of December 1 Mr. Tarnowski
10 came to me and said, Mr. Dunay, you have no choice
11 but to -- to plead to all of the charges, the State.
12 The federal -- the federal government wants you to
13 plead no contest to all of the charges. He's like
14 and, you know, well, we have these motions. We have
15 these motions to be heard, and he's like it doesn't
16 matter. He's like, you know, the feds are coming
17 for you. There's no time to hear these motions.

18 So this is what you are going to have to
19 do. You are going to have to plead no contest to
20 these four charges, so that's exactly what I did.
21 He told me to go in there and be a yes man. And
22 shortly after, shortly after the plea hearing,
23 within a day or so, I approached Mr. Tarnowski and I
24 said I want to withdraw my plea. And he said I
25 can't do that and he told me that you would have to

1 have another attorney do that for you.

2 I even made several phone calls to
3 attorneys on the outside trying to find an attorney
4 to do this for me and their -- It's even recorded on
5 the jail phones that I attempted this. Their advice
6 was for me to get a new public defender, to withdraw
7 my plea, at which time the day of the attorney
8 withdrawal hearing Mr. Tarnowski approached me and
9 said whatever you do don't say anything about
10 withdrawing your plea. He's like get a new attorney
11 first and let him do so.

12 Okay. So ultimately I went to that
13 attorney withdrawal hearing and I, you know --
14 Mr. Judge McGinnis, you know, he was trying, trying
15 to find out what was going on during that attorney
16 withdrawal hearing. He -- he -- He readdressed the
17 plea colloquy; and for each one of the questions I
18 said to him that's what I believed at that time
19 because it's like, you know, you know,
20 Attorney Tarnowski told me. He's like don't bring
21 it up. You might want to continue on going with
22 your sentencing later and everything else so don't
23 bring up to your attorney -- to Judge McGinnis that
24 you want to withdraw your plea at this time. Let
25 your new attorney hear that.

1 So that's what I abided by. I said okay.
2 I will go in there and I will just -- You know, we
3 will just agree that we don't get along and that,
4 you know, that he lied to me about something and
5 just leave it at that; but I had already known that.
6 I had already realized at that time that
7 Attorney Tarnowski lied to me. There was no
8 immediate -- I even spoke with my federal defender
9 and she told me that there was no immediacy for
10 having to not hear those motions.

11 I mean there -- Apparently there were more
12 motions even than I knew of at the time. I knew
13 about the 948.07(3) motion. I knew about the 948.10
14 motion. I knew about the evidence that was -- that
15 was destroyed that was unsealed here. That evidence
16 would have been thrown out. I knew that my Miranda
17 at the time was insufficient.

18 All of these -- All of these great motions
19 were not heard; and then I went into a plea hearing
20 and I wasn't even aware of that my attorney put a
21 late motion for dismissal of 948.05, the 948 .05
22 child exploitation charge. I had no idea. Why on
23 earth would I -- would I, you know, even consider
24 concurrency with that charge prior to my plea if
25 there was -- if there was a potential opportunity to

1 dismiss the most significant charge, 948.05, the
2 child exploitation charge?

3 With my own studying of the law over the
4 last year I -- I unwittingly determined that 948.05
5 charge -- I'm not even guilty according to the
6 *State v. Wagner* and *State v. Zarnke*. Then
7 ironically when I have my new attorney, Ms. Gratz --
8 She was the one that actually told me about this
9 948.05, this late motion by Mr. Tarnowski about the
10 948.05, that he was going to have that charge
11 dismissed as well. I am like what? I am like I
12 have no idea that there was even a motion for
13 dismissal of this charge.

14 Q Okay.

15 A And I -- You know, so for me to go to a plea
16 colloquy and not even be aware of all of the motions
17 that my attorney was granted that were good motions
18 that should have been -- that should have been heard
19 prior to any attempt at a plea, there was no -- the
20 defense should never -- there was no immediacy of --
21 of pleading no contest to all of the charges. There
22 was absolutely none when there was an opportunity
23 to -- to -- to show that, you know, there was an
24 opportunity to actually have charges dismissed,
25 which would have reduced my exposure.

1 It's absurd. It's more absurd especially
2 since there -- Apparently there was a motion for
3 948.05 to be heard, for me not even to listen to
4 that one, which is the most significant charge. I'm
5 beside myself.

6 When I went to the attorney withdrawal
7 hearing, you know, prior to that point I actually
8 thought Judge McGinnis was a fair judge; but the way
9 he treated me at that attorney withdrawal hearing
10 he -- He denied me my due process. He told me in no
11 uncertain words you are not allowed another attorney
12 to look at your case or work out your case. He is
13 only allowed to work on your sentencing. When I
14 heard those words, I was besides myself.

15 I mean I knew that I was being denied due
16 process and -- and -- and that's when I started
17 getting on the phone, talking with my, you know,
18 with my dad, making these -- I was just angry with
19 the judge at that point in time, you know, because I
20 knew I was being railroaded here by this Wisconsin
21 justice system.

22 And, you know, I should -- you know,
23 12 years for -- for talking with this girl over the
24 internet? And I had no -- I didn't even know for
25 sure that she was even from Wisconsin. I had no

- 1 phone -- I had no interaction with her over the
2 phone. I never attempted to visit with Wisconsin.
3 I never came to Wisconsin. There was no in-person
4 exposure to this witness, with this individual. I
5 have never been to Wisconsin before; and for me to
6 be brought here to Wisconsin and to face these
7 charges is an absurdity of the law.
- 8 Q Okay. I think --
- 9 A Sorry.
- 10 Q You had indicated this in there?
- 11 A Could you, please, put this on the record?
- 12 Q No.
- 13 A I would like this letter from Attorney Maier. I
14 would appreciate this, this e-mail to Mr. Tarnowski
15 from the Assistant US Attorney Maier. I read a
16 portion of that from this letter. I would like this
17 on the record.
- 18 Q I am the attorney and these type of motions -- I
19 decide what evidence is provided. If you want --
- 20 A But this shows. This shows the circumstances in
21 which I was basically forced into. I was basically
22 induced into a false pleading of no contest. I mean
23 this is evidence.
- 24 Q I am not going to argue with you.
- 25 A What?

1 THE COURT: Any other questions,
2 Mr. O'Connell?

3 MR. O'CONNELL: Yeah.

4 BY MR. O'CONNELL:

5 Q You had indicated in your answer -- It was fairly
6 long. I just wanted to make sure that I have done
7 this correctly. Did Attorney Tarnowski -- I think
8 you had indicated that he had told you you had to
9 plea to all four charges, not -- not something less
10 than four charges; is that correct?

11 A Yes, as evidenced by this letter by the assistant US
12 attorney telling me I had to resolve the entire
13 case.

14 Q Okay. What would be the result? I know you had
15 said the federal would charge you. What were they
16 going to charge you? What were the consequences?
17 What information were you provided?

18 A Oh, the feds?

19 Q Yes.

20 A I -- I didn't even -- I never saw this target letter
21 until well after November 13 when this e-mail was
22 sent to Attorney Tarnowski and the -- This target
23 letter was actually as an attachment to this e-mail.
24 So I didn't know about this until -- I could even
25 read an excerpt from this e-mail as well.

1 THE COURT: Mr. Dunay --

2 THE WITNESS: I am answering the question.

3 BY MR. O'CONNELL:

4 Q Again, what was -- The question was just a matter of
5 what was the consequences if you didn't? What were
6 you informed by Alan Tarnowski what the consequences
7 would be if you were charged by the federal
8 government?

9 A They said that they were going to charge me for
10 15 years.

11 Q You said they. I am asking what Alan Tarnowski told
12 you.

13 A Tarnowski?

14 Q Yeah.

15 A Tarnowski told me that they were -- Can you, please,
16 repeat the question?

17 Q I am asking you what did Attorney Tarnowski tell you
18 the federal government would do, what the
19 consequences would be, if you did not enter guilty
20 or no contest pleas in this case?

21 A Fifteen years mandatory.

22 Q Okay. Now, you had also indicated that
23 Attorney Tarnowski had told you that the -- at
24 sentencing the counts would run concurrent. What
25 specific words did he -- did he tell you regarding

1 whether they would run concurrent?

2 A What specific words?

3 Q Yeah. Did he promise you? What did he tell you?

4 A He said that the judge would run these concurrent
5 because all of my charges are of the same conduct.

6 Q Did he elaborate regarding whether he thought they
7 would or they absolutely would?

8 A He said the judge -- he said the judge is a fair --
9 he's a fair judge and he would run it -- like I
10 said, he would run my charges concurrent, that it
11 would make no sense to run them consecutive because
12 all of my charges are of the same conduct over the
13 internet.

14 Q Okay. So he didn't -- Based on that answer, it
15 sounds like he wasn't promising or guaranteeing. He
16 was indicating to you that it was likely that the
17 judge would run the counts concurrent; is that
18 correct?

19 A Um --

20 Q Or did he promise you or guarantee you?

21 A He didn't promise me, but his words implied that's
22 what I should expect.

23 Q I guess I am not looking at whether it was specific
24 or implied. I am asking whether it was -- there was
25 a guarantee, whether he was assuring you that would

1 occur?

2 A He simply said that the judge is going to run this
3 concurrent.

4 THE COURT: Mr. Dunay, I have a question
5 because I know this is dragging on.

6 THE WITNESS: Yes.

7 THE COURT: And I know, Mr. Kaiser, you
8 are going to ask it too; and, you know, when people
9 are testifying and it's so farfetched, you know, I
10 have a really hard time believing it, not because of
11 you or anything. But I am looking at a transcript
12 of when I took your plea, and in that transcript
13 there's a lot of conversation. I imagine,
14 Mr. Kaiser, you are going to go through this with
15 him on cross-examination.

16 MR. KAISER: I was going to.

17 THE COURT: Not only did you acknowledge
18 to committing these offenses and I am just going to
19 read what you said.

20 THE DEFENDANT: I was told be a yes man by
21 Mr. Tarnowski.

22 THE COURT: It's not a yes.

23 THE DEFENDANT: Yes man.

24 THE COURT: Don't interrupt me, okay? On
25 page 7 line 8, you said, I engaged in sexual

1 activity with a minor, exchanging pictures and video
2 and masturbation live with this girl and we also did
3 role-playing; and then you go on to tell me that you
4 did that when you were in New Jersey. She was in
5 Outagamie County. It was over the internet and you
6 knew she was 14 and you were 48, is what you told
7 me. That's the background of your words. That's
8 not saying yes. That's what -- you telling me what
9 you did; but here is when I go on point. I want to
10 just find this part of the transcript. I go through
11 with you each of the sentences, and then I say to
12 you the following:

13 This results in a total sentence
14 potentially of 74 and a half years in prison, fines
15 of up to \$120,000 or both. Understood?

16 And you said: Yes, sir.

17 And I said: Do you understand that I am
18 free to impose whatever sentence I think is
19 appropriate including up to the maximum sentence?

20 And you said: I understand.

21 Then I even went further. I said: Do you
22 understand when Mr. Tarnowski indicated that there's
23 not an agreement and it's an open sentence what that
24 means is the State is free to recommend whatever
25 sentence they think is appropriate?

1 You said: I understand.

2 And I asked: And you're free to recommend
3 whatever sentence you think is appropriate, you and
4 your attorney?

5 And you said: Yes.

6 And then my question is: Then I am free
7 to impose whatever sentence including a sentence
8 that's different than what's being recommended by
9 either or both of you?

10 And you said: I understand.

11 THE DEFENDANT: I was scared. I was
12 scared and induced into that plea, your Honor.

13 THE COURT: Okay.

14 THE DEFENDANT: I -- I was coerced by the
15 Assistant US Attorney Maier and also by the
16 ineffectiveness of strategy by Attorney Tarnowski.

17 THE COURT: Okay.

18 THE DEFENDANT: I should -- it was -- it
19 was the biggest mistake and I -- I -- I -- when we
20 had the attorney withdrawal hearing, I had every
21 intention to withdraw my plea and Mr. Tarnowski --
22 Like I said, he told me don't do it. Your new
23 attorney will do it.

24 THE COURT: I just want you -- Mr. Dunay,
25 just hold on. Then on line 8 you said:

1 We communicated over the internet with
2 Skype and we masturbate together online, had
3 explicit sexual communications over the Skype; and
4 that's when you told me that you knew she was 14 and
5 you were 48. Are you saying that Mr. Tarnowski
6 forced you to say those things?

7 THE DEFENDANT: No. He forced me to go
8 into a plea instead of using better judgment and
9 going forth. I mean it's obvious versus --
10 *Washington v. Strickland.*

11 THE COURT: My question was --

12 THE DEFENDANT: There's plenty of --

13 THE COURT: Mr. Dunay, if you can, just
14 answer the question. So he didn't force you, okay?

15 THE DEFENDANT: No. He -- I was forced
16 into going into -- for going -- My whole inside was
17 screaming don't do this. You know, don't do this.
18 Don't do this, but I was scared. I was scared
19 because my -- because Mr. Tarnowski came in on
20 the --

21 THE COURT: Mr. Dunay, hold on.

22 THE DEFENDANT: On the morning --

23 THE COURT: Mr. Dunay, you are being
24 disruptive again, okay, which is a continuous and
25 ongoing thing; but you had been doing good for at

1 least a couple of minutes. So I have just another
2 question.

3 THE DEFENDANT: Sure.

4 THE COURT: I talked to you about waiving
5 your rights and in detail on pages 12 and 13 and
6 then here is something I thought --

7 THE DEFENDANT: I didn't understand all of
8 those rights at that point because Mr. Tarnowski
9 didn't -- never even discussed with me what those
10 rights are.

11 THE COURT: Okay.

12 THE DEFENDANT: He never even discussed
13 with me the elements of the charges and showed me
14 what evidence actually proves.

15 THE COURT: Back to you, Mr. O'Connell.
16 Since he's not going to be responsive, I am not
17 going to spend anymore time. Go ahead.

18 BY MR. O'CONNELL:

19 Q Mr. Dunay, I know we had had -- We had reviewed this
20 previously; but you did sign the back of the plea
21 questionnaire, correct?

22 A Listen, I don't even -- I was so distraught that
23 morning; and like I said, I was scared into
24 believing the feds were coming for me that morning
25 by Mr. Tarnowski. I felt, you know, I had no

1 choice. He gave me no choice but to do the plea.
2 He said there's no time to do these motions. The
3 feds are coming for you. It doesn't matter. Those
4 charges that you are not even guilty of that I knew
5 at the time, which are 948.07(3) and 948.10 -- He
6 said don't worry about it. The judge is going to
7 run them concurrent anyway. So those charges don't
8 even matter but we have no time. You are going to
9 have to plead no contest this morning. I found out
10 later on that that was a lie. Okay. There was no
11 reason why we could not have gone forth. There's no
12 reason why we could not have gone forth with those
13 motion hearings first, which would have reduced my
14 exposure.

15 Q Okay. That is your signature, though?

16 A Yeah, yeah. It looks like it.

17 Q Okay. Just above it, your signature, on the second
18 page of the plea questionnaire it indicates that you
19 reviewed the entire document, that you have answered
20 everything correctly. My question is did you review
21 the entire document?

22 A No. He just told me to sign here. Like I said,
23 this happened quickly. This was the morning of my
24 motion hearing.

25 THE COURT: Mr. Dunay, you don't have to

1 keep saying the same things. So next question,
2 Mr. O'Connell.

3 BY MR. O'CONNELL:

4 Q Did you go over any part of the form?

5 A No. He said here, look at this. Look at this.
6 Sign here. We've got to do this quick.

7 Q So --

8 A I don't -- I don't even know. I don't even know
9 what it says.

10 Q Okay. So you never went over any of this?

11 A No, no.

12 THE COURT: Isn't there something unfair
13 about him --

14 MR. KAISER: Oh, yeah.

15 THE COURT: -- testifying like this
16 especially when it's unbelievable because it's
17 different than what he told me on the record but not
18 allowing Attorney Tarnowski to answer those
19 questions about what happened?

20 MR. KAISER: Judge, I am going to argue
21 that you draw every reasonable inference against the
22 defendant when he failed to waive his -- his
23 privilege with the attorney on the witness stand,
24 who is now gone and who can't answer it. All right.
25 That's what I am going to be asking for. I think

1 it's a legitimate inference that he wouldn't waive
2 because he didn't want me to ask all of these
3 questions, which I could have asked when
4 Mr. Tarnowski was here, which I couldn't ask when he
5 didn't waive; and now he hasn't waived. Now, he can
6 get and say whatever he wants.

7 The reasonable inference is he's lying and
8 that's why he's saying what he's saying now. That's
9 why he wouldn't answer your questions about waiver
10 earlier. That's what I am going to ask you to do
11 when I argue.

12 THE DEFENDANT: I had --

13 THE COURT: Mr. Dunay, it's not your
14 opportunity to talk.

15 THE DEFENDANT: Okay.

16 THE COURT: Mr. O'Connell, any further
17 questions for Mr. Dunay?

18 BY MR. O'CONNELL:

19 Q At the -- At the plea hearing the Court had asked
20 you if you understood the maximum penalties and you
21 indicated you understood and could impose up to the
22 maximum penalties. My question is why did you
23 indicate you understood?

24 A Why? Because I -- I was told by Mr. Tarnowski to be
25 a yes man. He told me to go in there and, oh, you

1 know, the judge -- the judge is -- He's a fair
2 judge; and, you know, just show a lot of remorse.
3 Don't worry about those other charges, you know?
4 Just go in there and just be a yes man.

5 Q The Court --

6 A The judge will be more lenient on you.

7 Q The Court also asked if there were any promises or
8 threats to get you to enter your plea. In response
9 you indicated no. What was -- What was the reason
10 why you indicated no?

11 A Because -- because I was -- Because I was ignorant
12 at the time.

13 Q Okay.

14 A He told me, you know, I -- I -- As I said, I was
15 induced to be a yes man at that plea knowing --
16 knowing well that there were -- there were motions
17 to have -- to have -- There was a reasonable chance
18 to have stuff dismissed. He induced me into
19 believing that I would have a fair, you know, a fair
20 sentencing.

21 Q Also -- also at the plea hearing the prosecutor
22 indicated it was her -- I am getting this from the
23 transcript.

24 A Sure.

25 Q At the plea hearing the prosecutor indicated that it

1 was her understanding that if you were pleading
2 guilty at that time that the federal prosecutor
3 would not charge you. The Court then asked you if
4 that was something you understood and if it impacted
5 your decision to plead guilty. In response you have
6 indicated you understood but it did not impact your
7 decision?

8 A I lied. I lied. I lied because Mr. Tarnowski had
9 me answer the questions the way he wanted me to
10 answer them to have a successful plea instead of,
11 you know, pursuing these, the motions that could
12 have dismissed several charges. And as I said when
13 I went -- when I was at that plea colloquy, that
14 plea was defective because I was even unaware of
15 one of the -- the most significant motion to have
16 the most significant 948.05 charge dismissed at that
17 point. Had I known I would never, never have pled
18 no contest. I would have gone forth. Any -- any
19 effective counsel, attorney would have gone forth
20 with those motions prior to going -- even
21 entertaining any plea of no contest. It's an
22 absurdity that Mr. Tarnowski would be so ineffective
23 as to not go forth with those motions, thinking to
24 have me believe, have me believe, that the judge
25 would be more lenient on me by not -- by actually

1 not going through these motions. It's absurd.

2 Q Okay. Just to confirm, just to clarify, you had
3 indicated to the Court at the plea hearing that --
4 that -- that the decision to plead guilty did not
5 have any impact -- I'm sorry -- that the federal --
6 the federal -- the information you provided that the
7 federal government would not charge you if you
8 entered guilty pleas that day -- You had indicated
9 to the Court that that fact did not make any impact
10 on your decision to enter a guilty plea. Is that --
11 was that actually -- Was that accurate information
12 you provided?

13 MR. KAISER: Objection, asked and
14 answered. He already said he lied. I don't know
15 how many times I have to hear him say he lied.

16 THE WITNESS: I lied. I lied because
17 Mr. Tarnowski -- keep in mind --

18 THE COURT: Mr. Dunay, there's not --
19 There's not a question.

20 MR. O'CONNELL: Okay.

21 THE DEFENDANT: Ask me about the US
22 attorney, how for two years --

23 MR. KAISER: Judge, objection. There's no
24 question pending.

25 THE DEFENDANT: Two years the --

1 MR. KAISER: Objection. There's no
2 question pending.

3 THE COURT: Mr. Dunay, can you knock it
4 off? Can you knock it off, please?

5 BY MR. O'CONNELL:

6 Q My last question is the Court had asked you if you
7 went over the plea questionnaire and understood
8 everything on it. In response you indicated you
9 did. Did you, in fact, understand everything on the
10 form?

11 A Absolutely not.

12 Q Why did you tell the Court that?

13 A Because Mr. Tarnowski told me to be a yes man and
14 just conform to a successful plea as opposed to what
15 I actually believed in my heart, which was to go to
16 trial and which I exercised that right by having
17 Mr. Tarnowski withdraw.

18 And then on top of that Mr. Buckett
19 refused to withdraw my plea per my written and
20 verbal instructions to do so. He waved a piece of
21 paper in my hand and told me, oh, these are the only
22 reasons how you can withdraw your plea, which I
23 found out which is not true, okay, because if you --
24 If a person as myself chooses to withdraw his plea,
25 prior to sentencing, it only has to be based upon

1 fair and just reasons. There is no requirement to
2 go through the threshold of *Bangert* or *Nelson* then.

3 I exercised that right to withdraw my plea
4 prior to sentencing, and I had two attorneys.
5 First, Mr. Tarnowski refused to do so and he said I
6 withdraw. I asked Mr. Buckettt to do so. He also
7 refused to withdraw my plea. He even brought it up
8 on my sentencing that Mr. Dunay -- Mr. Dunay wanted,
9 wished to withdraw his plea. He waved a piece of
10 paper in the air and said but I went over with him
11 these reasons why he can't withdraw his plea.

12 Now, after going and researching the law
13 for over a year and a half now -- No, I'm not a
14 lawyer but I am intelligent enough to read and
15 understand what I read, okay? *Word* (sic) v.
16 *Jenkins* states that an attorney who refuses to
17 withdraw a plea prior to a sentencing is
18 ineffective; and I find that Mr. Buckettt was
19 ineffective and he should have. He should have
20 abided by my wishes and withdrew my plea --

21 MR. O'CONNELL: I have --

22 THE DEFENDANT: -- and brought them up on
23 fair and just reasons.

24 MR. O'CONNELL: I have no further
25 questions.

1 MR. KAISER: Just a couple things, judge.

2 THE COURT: Sure.

3 CROSS-EXAMINATION

4 BY MR. KAISER:

5 Q Page 13, at your plea do you remember being asked
6 this question and giving this answer?

7 The Court: Why is it you are entering
8 these pleas today and waiving all of these rights?

9 You: Because I am guilty of this. I am
10 guilty of those crimes.

11 Do you remember being asked that question and giving
12 those answers?

13 A Yes. Mr. Tarnowski --

14 Q All right. Thank you. Do you remember being asked
15 this question and giving this answer?

16 The Court: Okay. So if the feds charge
17 you, it's not going to matter to you?

18 The Defendant: No.

19 Do you remember being asked that question and giving
20 that answer?

21 A I remember that, yes.

22 Q And you lied, didn't you?

23 A Whatever you want to believe.

24 MR. KAISER: No further questions.

25 THE COURT: All right. Mr. Dunay, you can

1 rejoin. I'm sorry. Do you have any other
2 questions?

3 MR. O'CONNELL: I do not.

4 THE COURT: You can rejoin your attorney
5 at the table.

6 THE DEFENDANT: Your Honor?

7 THE COURT: Do you have any other
8 witnesses, Mr. O'Connell?

9 MR. O'CONNELL: I do not.

10 THE DEFENDANT: Your Honor?

11 THE COURT: Mr. Kaiser, do you have other
12 witnesses?

13 MR. KAISER: No. I was going to call
14 Mr. Stahmann regarding the sentencing questioning.
15 Since the defense -- I am not really sure what to
16 make of that. I will not raise any more issues in
17 that regard. Thank you.

18 THE DEFENDANT: Your Honor, can I ask --

19 THE COURT: I don't understand why you
20 have to keep interrupting. It just seems to be a
21 habit.

22 THE DEFENDANT: All right. I would
23 like -- Could you, please, put this e-mail into
24 evidence?

25 THE COURT: I have no idea what you are

1 referring to.

2 THE DEFENDANT: I referred to it twice
3 during my, you know, during my testimony.

4 THE COURT: Have you seen it?

5 MR. KAISER: I have not, first of all.
6 Second of all, since the defendant hasn't knowingly,
7 intelligently, and voluntarily waived his right to
8 counsel, he has a lawyer. He cannot be his own
9 lawyer when he has a lawyer. The lawyer states he
10 hasn't seen it. He doesn't know what it is. Any
11 good, competent counsel won't offer something into
12 evidence that he hasn't seen or offered. He can't
13 be his own lawyer at the same time. He's not a
14 lawyer. It's done.

15 THE COURT: Mr. Dunay, don't talk when
16 other people are talking.

17 THE DEFENDANT: Okay.

18 MR. O'CONNELL: Your Honor, if I may, I am
19 in agreement with the State on this. I am aware of
20 the document. I don't think it's relevant for --
21 for admitting it for the purpose of a hearing.
22 Since I am the counsel on the case, I am not going
23 to admit it.

24 THE COURT: That's with respect to any of
25 the four issues?

1 MR. O'CONNELL: That's in respect to any
2 of the documents that the defendant has that he
3 wishes to admit into the evidence.

4 THE COURT: So it's your position based on
5 strategy and what you think is appropriate and best
6 for Mr. Dunay that with regard to the four motions
7 that have been filed you've presented any documents
8 that are pertinent and helpful?

9 MR. O'CONNELL: Yes.

10 THE COURT: Okay. All right. Mr. Dunay,
11 you can rejoin your attorney at counsel table, I
12 think; but I just want to make sure. Mr. O'Connell,
13 no more evidence?

14 MR. O'CONNELL: Correct.

15 THE COURT: Mr. Kaiser, no more evidence?

16 MR. KAISER: Correct.

17 THE COURT: Okay. So I -- We are going to
18 need to take a break for the court reporter at least
19 soon; and so I -- What's the plan now,
20 Mr. O'Connell? What would you like to see happen
21 now that the evidence and the testimony is done?

22 MR. O'CONNELL: I personally probably
23 could make an oral argument on these, on these
24 motions, in five to ten minutes. I probably could
25 address all four of them. I don't know if the State

1 wishes --

2 MR. KAISER: I am ready to argue orally.

3 THE COURT: Okay. Go ahead then. Well,
4 do we want to take a break first? I know you guys
5 are driving. So I want to be --

6 MR. KAISER: She's the most important
7 person for appellate lawyers like us.

8 THE COURT: Why don't we do this? That
9 way it will get you guys to organize your arguments
10 too. Why don't we take a break and we will start
11 back up in ten minutes with the understanding that
12 argument will be made. I'm not sure if I am going
13 to make my decision today. I want to listen to what
14 the arguments are, and then we will decide how we
15 want to go forward.

16 MR. KAISER: Thank you, judge.

17 THE COURT: I also have this issue with
18 respect to Mr. Dunay's conduct in court that we need
19 to address too. In your argument you should address
20 that and the contemptuous behavior, the intentional
21 misconduct. We will start up in ten minutes.

22 MR. KAISER: Thank you.

23 THE COURT: We're adjourned.

24 (Off the record.)

25 THE COURT: All right. We are back on

1 record in 15-CF-470, State of Wisconsin versus Kevin
2 Dunay. Counsel is present. Mr. Dunay is here,
3 Mr. O'Connell. The record should indicate that
4 Mr. O'Connell and Mr. Dunay are consulting
5 privately.

6 (Discussion off the record.)

7 THE COURT: Mr. O'Connell, it's been
8 several minutes. We have all been sitting here. I
9 know you are still consulting with Mr. Dunay. Are
10 you able to make an argument or is there dispute
11 going on about that?

12 MR. O'CONNELL: Your Honor, I am able to
13 make an argument. The defendant has been talking to
14 me for a few minutes now about the suggestion where
15 he wants to make his own argument where -- that he
16 would represent himself, make his own argument, and
17 the question and answer that we -- I know we have
18 stated this on the record multiple times.

19 He is concerned about these additional
20 issues, which I have informed him again this Court
21 is only going to allow him to address these
22 four issues. If he wishes to do any further issues,
23 he's going to have to file a motion for extension
24 with the Court of Appeals and it's going to be up to
25 them whether they grant him any additional time to

1 file any later postconviction motions.

2 Ultimately it's his call whether he wants
3 me to argue these four issues, or otherwise I'll
4 withdraw. He can represent himself on these
5 four issues today, and he can ask the Court of
6 Appeals if they're willing to grant him additional
7 time to file other postconviction motions. I think
8 it's a fairly simple question and answer, just a
9 matter of what you want to do.

10 THE COURT: Well, I know Mr. Kaiser said
11 this earlier today; but back in February when I made
12 the decision about and you made the decision,
13 Mr. O'Connell, to stay on the case, Mr. Dunay
14 represented to us that he understood that you
15 staying on the case would mean we would focus on
16 these four issues. So there should be no
17 misunderstanding or belief by Mr. Dunay that he's
18 going to have an opportunity today or in closing
19 arguments to address anything other than the
20 four issues.

21 He somehow has forgotten that, but I
22 expect six months or a year down the road we're
23 going to listen to now you forced him or lied to him
24 or tricked him into saying either that then or this
25 today but you haven't done that, have you,

1 Mr. O'Connell?

2 MR. O'CONNELL: I have not.

3 THE DEFENDANT: I have problems with
4 waiving all of these other issues that are -- that
5 have merit.

6 THE COURT: Okay.

7 THE DEFENDANT: That's the issue. That's
8 the problem that I have here, your Honor.

9 THE COURT: Go ahead, Mr. O'Connell. Any
10 arguments that you want to make?

11 MR. O'CONNELL: Do you want us to argue
12 all of -- do you want me to make arguments on -- all
13 of the arguments all at once and then go to the
14 State or should we go motion by motion?

15 THE COURT: I think you can do it all at
16 once.

17 MR. O'CONNELL: As for the -- I filed a
18 motion for the Court to recuse himself; and I will
19 make this fairly brief. I already laid out my
20 reasons in the motion. What our argument is is that
21 there was both actual and apparent bias. As for the
22 actual bias, there's actual bias since the Court
23 specifically previously indicated it was concerned
24 that the defendant had made threats towards it. The
25 Court had indicated this at sentencing. Now, there

1 are even more provided in these new charges which I
2 have provided. It was an attachment, and I think I
3 filed it yesterday.

4 As for the appearance of bias, our
5 argument is the fact that the Court was called some
6 pretty nasty stuff and was threatened that there
7 would have been apparent bias thus the appearance --
8 the appearance -- I'm sorry. The apparent risk
9 revealed a great risk of actual bias.

10 THE COURT: I am confused, Mr. O'Connell.
11 First of all, you filed something yesterday. I was
12 in a jury trial. I received it late afternoon, and
13 I have not read it because what I understood that
14 something to be was a summons and a complaint from
15 the new case.

16 MR. O'CONNELL: Correct.

17 THE COURT: And I -- I didn't know. I
18 haven't read that document either at the time you
19 filed it or at any other time as that case has been
20 pending, and I don't know if you want me to read it;
21 but then if I read it, you are going to say I'm more
22 biased because I read it. So I have refrained from
23 reading that yesterday. I have never read that
24 complaint.

25 As you heard this morning and maybe

1 Mr. Dunay was not letting you listen but I have
2 never met Mr. Kaiser, who I understand to be the
3 attorney on the case. We haven't met. We haven't
4 discussed that case. I understand in that case that
5 I am a -- potentially a witness; is that right?

6 MR. KAISER: Yes.

7 THE COURT: And I was asked several months
8 ago, I think it was, to provide dates between a
9 certain timeframe of when I'm not available so that
10 if that case goes to trial that I will be able to
11 testify as a witness, and I did that by e-mail.
12 That's my knowledge of the case. So do you want me
13 to -- I am not going to make my decision today in
14 this case anyways. Do you want me to read that
15 filing that you submitted yesterday in this case?

16 MR. O'CONNELL: Your Honor, if I could
17 just have a minute, I was under the impression the
18 Court was aware of that case.

19 THE COURT: Say that again.

20 MR. O'CONNELL: If I could just have a
21 moment, I just want to review my -- the motion that
22 I filed.

23 THE COURT: Yeah. I am not talking about
24 the motion that you filed. I am familiar with the
25 case.

1 MR. O'CONNELL: Okay.

2 THE COURT: I am not trying to back away
3 from that. What I understand the case to be in
4 general is that there's threats against a judge and,
5 I believe, threats against the prosecutor and I
6 believe -- I believe Attorney Tempelis will be a
7 witness on those threats; and I am going to be a
8 witness on the judge threats. I would expect that
9 my testimony is going to be that I didn't consent.

10 MR. KAISER: Correct.

11 THE COURT: And I don't know what else
12 they plan on doing. Again, I haven't talked to them
13 about it.

14 MR. O'CONNELL: I guess my position then
15 would be -- is we don't -- We don't need you to
16 review the entire complaint. I think that the
17 information the Court's aware of, also the
18 information that I have provided in the motion, in
19 the motion for the Court to recuse itself -- I think
20 that that would be adequate. The reason why I --
21 one of the reasons why I added that complaint as an
22 attachment, which, I guess, is more of -- more
23 purposes for just making a record.

24 THE COURT: Okay. Just so the record is
25 clear, when you filed a defendant's motion for judge

1 to recuse itself and that was two pages and the
2 second page was just one line on the conclusion, I
3 have read that document.

4 MR. O'CONNELL: Okay.

5 THE COURT: That's what you are talking
6 about?

7 MR. O'CONNELL: Yes.

8 THE COURT: Okay. Then I read your
9 February 20, 2019, letter; and then I also read
10 defendant's motion to withdraw guilty pleas, which
11 was filed on February 20 as well, and the
12 defendant's motion for resentencing filed on
13 December or -- I'm sorry -- February 20; and that's
14 three pages. Those are the documents that I have
15 read.

16 Again, yesterday I was in a jury trial. I
17 forget if it was during the closing argument or if
18 it was while the jury was deliberating. I got a
19 hard copy of that filing that you filed yesterday.
20 It's right here, I believe. The first page is a
21 summons in *State of Wisconsin v. Kevin Dunay*. I
22 didn't even notice a case number, but what it says
23 is threats to a judge as a repeater and threats to
24 prosecutor, three counts, as a repeater, threats to
25 law enforcement, two counts, as a repeater.

1 I glanced at that summons and I thought to
2 myself I'm not going to read this because I didn't
3 know why it was filed, didn't know if you were
4 accidentally filing it; and I want the record to be
5 clear because I was going to ask it today. That's
6 why I have it with me right now. Do you want me to
7 read that document? Mr. Dunay keeps making those
8 disrespectful sounds and facial expressions.

9 THE DEFENDANT: Yeah. I said you're a
10 liar and didn't know about it.

11 THE COURT: So what's your choice,
12 Mr. O'Connell?

13 MR. O'CONNELL: I guess just so long -- if
14 I could just ask the Court because the Court
15 indicated what it was aware, what it wasn't aware,
16 any motion regarding the motion to recuse itself,
17 that I have filed for the Court to recuse itself, I
18 did put -- Do you have that motion in front of you?

19 THE COURT: Yes.

20 MR. O'CONNELL: Okay. Under the facts and
21 argument, the third line, I have in there further in
22 reviewing the facts of the case the facts allege
23 that Mr. Dunay threatened to kill this judge; and
24 that's based on the 18-CF-868 case. That's
25 obviously -- By reviewing it the Court would have

1 saw that.

2 Is that something I just -- just so I --
3 what -- I guess what I am trying to get at is I'd at
4 least be looking for the Court to be privy of that
5 fact. Otherwise if the Court wasn't aware
6 then because I mean at this point I have already
7 filed the motion. It's out there. It's just a
8 matter of whether there's support for it.

9 Is that something that either -- I mean if
10 we can -- if we all -- If the State's willing to
11 stipulate that's in there and the Court agrees to, I
12 guess, accept that, that that information is in
13 there, I don't see the need to then have the Court
14 read the entire document but if the Court's not
15 aware of it --

16 THE COURT: Not aware of what?

17 MR. O'CONNELL: The fact that in the
18 18-CF-868 case there's allegations that the
19 defendant had threatened to kill this Court or
20 kill -- kill this judge.

21 THE COURT: Okay.

22 MR. O'CONNELL: If that's being disputed,
23 then I would ask the Court to then review the
24 complaint; but if that's in agreement, then I guess
25 I don't see the need to go into each and every

1 sentence that's in that complaint.

2 MR. KAISER: Your Honor, I am not aware of
3 what it is that the Court received prior to
4 sentencing. So I realize it sounds a little bit
5 aside; but if you just give me a second, in other
6 words, I certainly wouldn't have expected that the
7 Court would have reviewed the complaint for today's
8 purpose or for the purpose of whenever the motion
9 for recusal was filed.

10 My expectation would have been that the
11 Court's decision whether to recuse itself regarding
12 this case and regarding 15-CF, these motions, would
13 be based on whatever it is the Court recalled of
14 what the Court learned of what the defendant had
15 said about the Court by the time of sentencing.

16 My only hesitancy in stipulating to what
17 counsel has accurately represented from the
18 transcripts is the important thing isn't what's in
19 the transcripts or what's in the recordings for the
20 purpose of deciding whether you can sit on these
21 postconviction motions. My opinion is it's
22 dependent upon what you recall about what was said
23 about you from what you learned at or around the
24 time of the sentencing.

25 THE COURT: I agree with everything

1 Mr. Kaiser just said. There's one other thing that
2 needs to be put out there. I don't know if we have
3 talked about it in this case, but Mr. Dunay is not
4 the only guy who has threatened to kill me or
5 threatened my life or called me names in the last
6 couple years, right?

7 THE DEFENDANT: I never threatened you.

8 THE COURT: There's several of these
9 things pending. So it's not that he's someone
10 special because he does that. It's -- and I am also
11 not the only judge sitting up here that has those
12 things pending. So we all get those certain
13 individuals that do those things, and my experience
14 in the last 14 years is you are always going to have
15 three or four of these pending, you know, with these
16 types of threats.

17 So I can't differentiate between what I
18 know, and before I read the complaint is I know
19 there's a new case being charged. I know you are on
20 the case, Attorney Kaiser. I don't even know if you
21 are on the case representing Mr. Dunay. What I
22 heard during the testimony is he's got somebody
23 else, but I can't even tell you who he has.

24 I was informed that there's some hearing
25 coming up in July and I think it's called a status

1 conference or a scheduling conference. I know I am
2 not going to be available for that. I don't think I
3 have to be available. I know I gave dates for a
4 trial. I am not sure if that trial's been
5 scheduled. I know Mr. Dunay made threats about me,
6 about Attorney Tempelis, and about the New Jersey
7 detectives and maybe others; but I don't recall that
8 specifically. And he did that during the time that
9 he was in the Outagamie County Jail, and I think I
10 addressed all of that at the sentencing.

11 So, you know, when Attorney Buckett said
12 that some judges will minimize it or just say they
13 will separate it, I take the approach that I just
14 say exactly what I know and what I feel about them
15 and how they affect the factors or the decision; and
16 I will also say I have not gone back to read that
17 transcript. I don't think I have ever read that
18 transcript other than today during this hearing I
19 pulled up the plea hearing transcript, and I went
20 through it when Mr. Dunay was testifying. But
21 whatever that transcript says will be what I know;
22 but as I sit here right now, I know he did make
23 threats. If you would have said did he make threats
24 to kill you, I read that in your letter or that
25 motion and so I take it that's true because you put

1 it in your motion.

2 And my recollection is more just sort of
3 vulgar threats, just kind of stuff he has done today
4 that I'm a circus or I'm a joke or I'm an asshole or
5 shit or something. That's what I kind of remember.
6 What I remember is what the threats were were these
7 very similar to how Mr. Dunay has acted here, just
8 disrespectful, aggressive, inappropriate --

9 THE DEFENDANT: Just like you.

10 THE COURT: -- comments.

11 THE DEFENDANT: Just like you.

12 THE COURT: Just like he's doing right
13 now, and that's what I remember. So I don't think
14 you have to have a stipulation. I think you can
15 have a stipulation that I read your filing and the
16 filing says that that's what he said. So I became
17 aware of it when you filed it. I'm not sure if
18 that's true or not true.

19 MR. O'CONNELL: Just for clarification, I
20 am doing this more for purposes of the record.

21 THE COURT: Sure.

22 MR. O'CONNELL: The Court's indicated it's
23 not sure if it's true or not true. When the Court
24 indicates that, the Court's referring to the Court's
25 not sure if the defendant had did it or didn't do it

1 but the Court is sure that there's charges against
2 the defendant, okay?

3 THE COURT: I agree. I'm sure there's
4 charges. I know there's charges because I got -- I
5 think I either got an e-mail recently or I got some
6 notice of some hearing in July.

7 MR. O'CONNELL: What I would -- I guess
8 what I would ask is at this point that the cat's out
9 of the bag and the Court had indicated it's likely
10 not going to be making a ruling today anyhow.

11 THE COURT: That's right.

12 MR. O'CONNELL: I would just ask then
13 before the Court did make a ruling -- I would ask
14 the Court to review that complaint before it made a
15 ruling on.

16 THE COURT: What's the benefit? I would
17 have asked you this last night when you were here.
18 When I got that, I go what's the purpose of me
19 reviewing that summons and complaint as it relates
20 to this case?

21 MR. O'CONNELL: As for that, that's
22 something -- I guess I am glad you raised that.
23 That is something where the State had also just made
24 an argument just a moment ago. What -- what --
25 Regarding the motion for the Court to recuse itself,

1 in our arguments we're kind of going at this
2 two different ways. One of them is that the --
3 whether the Court should have recused itself at
4 sentencing. That issue was not raised by defense
5 counsel. So it was raised as ineffective assistance
6 of counsel.

7 THE COURT: And today we heard counsel
8 indicate that there was -- that he was limited in
9 what he could disclose; but I thought his testimony
10 was pretty clear that he thought of the advantages
11 and the disadvantages and he used strategic thinking
12 and strategy in putting Mr. Dunay in the best
13 position possible as it relates to that issue.

14 MR. O'CONNELL: Yes.

15 THE COURT: That doesn't seem really
16 ineffective.

17 THE DEFENDANT: No?

18 MR. O'CONNELL: That's something that I
19 would like to just make a brief argument on that.

20 THE COURT: You are going to, yes.

21 MR. O'CONNELL: Regarding -- regarding --
22 that would be -- that was one way that we are
23 raising the issue.

24 THE COURT: Okay.

25 MR. O'CONNELL: This second way we were

1 raising the issue was regarding that motion itself
2 of the Court to recuse itself. What that is -- it's
3 regarding all conduct from the first set of -- for
4 all conduct that the Court is aware of from, I want
5 to say, the first set of phone calls to now, these
6 second set of phone calls where there is new charges
7 and with that new information --

8 THE COURT: One second. So these second
9 set of phone calls -- So you are telling me the
10 charges in the new case involve second sets of phone
11 calls?

12 MR. O'CONNELL: There is stuff.

13 THE COURT: I am not aware of that. I
14 just thought they were related to telephone calls.

15 MR. O'CONNELL: There is -- There is
16 information in there.

17 THE COURT: After sentencing?

18 MR. O'CONNELL: After sentencing.

19 THE COURT: You agree with that,
20 Mr. Kaiser?

21 MR. KAISER: Yes.

22 THE COURT: Okay.

23 MR. O'CONNELL: And because of all of the
24 conduct and this new information, that's why I filed
25 the motion to recuse, for the Court to recuse

1 itself, on these postconviction motions.

2 THE COURT: Okay. Anything else in
3 argument on any of these four?

4 MR. O'CONNELL: Okay. That's regarding
5 the motion to recuse. As for the motion to withdraw
6 pleas, obviously the defendant had a different -- a
7 different version than what the other witnesses had
8 had. The Court's heard anything or the Court's
9 heard everything. I guess I don't want to beat a
10 dead horse. The Court's pretty much tipped its hat,
11 whose version it finds truthful. So I don't want to
12 spend a lot of time on that but the argument -- I
13 just want to get it so I can make the record.

14 We are asking you to accept the
15 defendant's version. The defendant's version is
16 that the -- that the -- that its counsel had told
17 him that all of the counts that he pled to would run
18 concurrent and also his counsel had told him that he
19 needed to plead guilty to all counts or otherwise he
20 would be federally charged; and that's the reason
21 why he ended up or why he entered his guilty pleas.

22 If counsel had -- if the defendant's
23 version is truthful and the Court accepts that, the
24 trial counsel would have been -- trial counsel's
25 performance would have been deficient for providing

1 inaccurate information to the defendant. That would
2 have been -- and we would ask the Court to find that
3 that deficient performance would have been
4 prejudicial since the defendant indicated that had
5 he -- had he known the correct information he would
6 have never entered his guilty plea. Now --

7 THE COURT: What is your client's position
8 on that? What's the argument on when I had a
9 colloquy with him and that colloquy is different
10 than what he's represented?

11 MR. O'CONNELL: I had --

12 THE COURT: Let me just finish so we all
13 understand the question. I am sitting up here and I
14 say, okay, even if I believe Mr. Dunay today that
15 that's what he told him and I'm not suggesting I
16 believe him and I believe Attorney Tarnowski could
17 have answered other questions that would have been
18 helpful to us but he wasn't allowed because
19 Mr. Dunay didn't waive that privilege.

20 But even if I believe him, I sat here that
21 day and I had a colloquy with Mr. Dunay and I
22 believe -- I believe Mr. Dunay understood every
23 single question I asked.

24 THE DEFENDANT: I lied.

25 THE COURT: And we asked them many



1 different ways, as the transcript sets out; and I do
2 that with the colloquy because I'm not going to
3 accept his plea if it's not being made freely,
4 voluntarily, and intelligently. I think that's my
5 role. So as I went through that colloquy, I was the
6 one person assessing his credibility. I was the one
7 person that was looking at him, having a
8 conversation with him, trying to understand why he
9 was doing it, why he was pleading, making sure that
10 he understood all of his rights, making sure that he
11 understood the consequences and the way that it
12 would play out.

13 And at no time did any red flags go off in
14 my head that would suggest that it was anything
15 other than Mr. Dunay entering pleas freely,
16 voluntarily, and intelligently and understanding all
17 of the potential consequences because we talked
18 about it.

19 THE DEFENDANT: You are good at
20 railroading me. You are great at it.

21 THE COURT: Mr. Dunay is interrupting and
22 he's calling it railroading.

23 THE DEFENDANT: I was railroaded.

24 THE COURT: And he doesn't understand this
25 but there's other plea hearings where I will be

1 engaging with somebody; and if it doesn't make sense
2 to me or something's going wrong, I will stop the
3 hearing or I will start questioning it. You can go
4 through it, Mr. O'Connell.

5 THE DEFENDANT: Just like *State v. Lamb*.

6 THE COURT: My plea hearings can be pretty
7 different too meaning I don't have a standard
8 approach. It depends on whatever is there in front
9 of us. I don't understand how you get to it when
10 you say, well, the argument is let me withdraw my
11 plea because my attorney said something that led me
12 to do something I didn't want; but Mr. Dunay told me
13 that day that he was doing what he wanted. He was
14 doing it free from any promises or threats. He was
15 doing it understanding the maximum sentence.

16 THE DEFENDANT: That's the whole point of
17 a threat, your Honor.

18 THE COURT: He was doing it free from any
19 of the threats or the belief from the federal
20 government. We went through all of that.

21 THE DEFENDANT: That's the whole point of
22 a threat. Of course you are going to go up there
23 and lie at your plea. That's exactly what I did. I
24 did exactly what Mr. Tarnowski told me to do. Go up
25 there and just be a yes man.

1 MR. O'CONNELL: Your Honor, my -- The
2 defendant's position is that he was providing the
3 Court with inaccurate information because he was
4 told by his attorney he had to say that inaccurate
5 information.

6 THE DEFENDANT: The feds were coming for
7 me that morning. I had no time to go forth with
8 those motions.

9 THE COURT: This is the guy --

10 THE DEFENDANT: I was lied to.

11 THE COURT: -- who listened to
12 Mr. Tarnowski even though he's never listened to any
13 of his attorneys?

14 THE DEFENDANT: I was scared.

15 THE COURT: He's in constant conflict with
16 attorneys but he wants -- The guy who interrupts all
17 of us at all times is now going to cower down and
18 take the advice of his attorney? That's what you
19 are saying?

20 THE DEFENDANT: That was the first time.
21 That was the first time I cowered down. After that
22 I have been speaking up on my own behalf.

23 THE COURT: Okay.

24 THE DEFENDANT: I even cowered down at my
25 plea. I am sorry. I even cowered down at the

1 attorney withdrawal hearing because my -- my
2 attorney Tarnowski told me, oh, yeah. Don't bring
3 up the fact that you want to withdraw your plea,
4 okay? I did bring that up to Mr. Buckett. I told
5 Mr. Buckett in no uncertain terms I want you to
6 withdraw for my plea and he refused to do so and got
7 angry with me, waved a piece of paper and said you
8 can't withdraw your plea because these don't conform
9 to *Bangert* or whatnot. That's not the truth. He
10 lied to me too.

11 THE COURT: Mr. Dunay, it's not your turn
12 to talk. Go ahead, Mr. O'Connell.

13 THE DEFENDANT: I'm getting fed up with
14 this nonsense.

15 MR. O'CONNELL: Your Honor, your Honor,
16 that is what we're asking the Court to accept.

17 THE COURT: Okay.

18 MR. O'CONNELL: If the counsel was
19 ineffective, there would have been a manifest
20 injustice. If there's a manifest injustice, then
21 the defendant should be permitted to withdraw his
22 plea.

23 In the event the Court doesn't grant that
24 motion, then we move to the defendant's motion for
25 resentencing. Regarding the defendant's motion for

1 resentencing, this is -- This is the argument which
2 I had just previously indicated where our argument
3 is that counsel is ineffective for not asking the
4 Court to recuse itself; and I understand defense
5 counsel had provided his reasons for why he chose to
6 do what he decided to do.

7 However, our argument is that considering
8 the information he had at that point, which would
9 have been that the defendant had made threats to the
10 entire criminal justice system, that he referred to
11 this Court and I won't use the words but I won't --
12 I won't use, I guess, the cursing words but
13 basically a not-nice name and that the Court was the
14 worst and then at sentencing the Court had indicated
15 that it was concerned of the defendant's statements
16 that he had threatened harm to the Court,
17 considering all of that --

18 THE COURT: Hold on. That's what I said
19 or let's put it in context because that doesn't --
20 It seems like there should be another part of that
21 sentence. Again, I haven't gone back to review it;
22 but I doubt that that's what I said. So I don't
23 want the record to be -- Correct me, Mr. O'Connell.
24 Show me where I said that without the rest of the
25 sentence.

1 MR. O'CONNELL: I guess what I would do,
2 again, just to save time --

3 THE COURT: I don't want to save time. I
4 think when you make a representation like that that
5 bothers me because now you are acting like
6 Mr. Dunay, that I -- because I -- If I am wrong, I
7 want to be told I'm wrong. Here is my thing. I
8 have not read that transcript, but I can pretty much
9 assure you that that's not what I said because I
10 wouldn't say that unless I tied it into something.
11 I want the whole sentence to be read.

12 MR. KAISER: I missed it.

13 THE COURT: My feeling of it is here is
14 what I think of Mr. Dunay today and what I thought
15 of him, I think, back then is I think his conduct in
16 those calls demonstrated things about his character
17 and his risk to reoffend. And I probably said
18 things like he didn't -- doesn't appreciate
19 authority; and he's got a character that he's going
20 to say reckless and dangerous things about people
21 and that is concerning.

22 THE DEFENDANT: Take into consideration I
23 was in jail for three years.

24 MR. O'CONNELL: Your Honor, I guess --

25 THE COURT: Did you find that, first of

1 all? Is that just a misquote?

2 MR. O'CONNELL: No. The sentencing
3 transcript is 120 pages long.

4 THE COURT: Okay.

5 MR. O'CONNELL: I think I probably could
6 narrow it down to the last maybe 40 pages to try to
7 find it.

8 THE COURT: Do that during the time that
9 counsel is making argument. So as Mr. Kaiser is
10 making argument, you can go through it and we can
11 come back to it.

12 MR. O'CONNELL: Sure. Okay. I will do
13 that; and okay, if the Court -- Okay. If the Court,
14 you know, okay -- if the Court denies that motion,
15 then I guess I would move over to the -- I had filed
16 a motion. It was a brief in support of discovery
17 regarding the restitution which I haven't received.
18 I am assuming the fact that we're here right now and
19 I think we are going to be addressing the
20 restitution, that the Court has denied that motion;
21 or should I go into argument regarding that also?

22 THE COURT: Whatever you think is
23 argument. What we are asking for is verification
24 rather than just taking the victim's word here. I
25 think justice would require us some time to prepare

1 rather than just being handed a document. That
2 information that we were provided was a number of
3 bills; but I don't have anything to support whether
4 they were for a broken leg, whether they are for
5 mental illness. I do know they were approximately a
6 year later, when they were.

7 THE DEFENDANT: Over a year.

8 MR. O'CONNELL: When they were -- when the
9 victim went to -- Again, I don't know if it was a
10 hospital. I don't know if it was a psychiatrist. I
11 don't know what it was, but I know it was
12 approximately a year later. But I don't have any
13 information as to what it was, what the reason was,
14 why the person -- why the victim went there in the
15 first place.

16 Regarding the mother, she's also asking,
17 the mother of the victim -- she's also asking for --
18 also asking for -- for missed work. I don't have
19 any documentation to support what -- how much she
20 makes other than what -- her say-so about how
21 much she makes. Why the numbers -- There's
22 three different numbers she indicated she makes per
23 hour. Why there's a variance among them -- I don't
24 have any information. I don't have any time to
25 prepare for any of it and I don't think -- I think



1 justice would require that we are provided some --
2 some opportunity to have the information before
3 having -- before -- before -- before actually having
4 a restitution hearing.

5 Then regarding the restitution hearing
6 itself, I was provided just today and I don't know
7 if the Court was provided with that document. The
8 State had just provided -- it looks like it was
9 signed today by the -- by the victim. It was
10 notarized today by the victim. It was addressing
11 some -- it was addressing the information that I
12 provided in the motion for -- It addressed the
13 information regarding the information I was seeking
14 in the brief in support of the restitution
15 discovery.

16 I was coming here. I was planning on
17 asking specific questions in a lot more detail than
18 just what I was putting in here on the information I
19 was seeking before we actually had the hearing. I
20 am not aware. I know that the State has provided a
21 statute, a specific statute, which indicates that
22 the Court may waive the rules of practice,
23 procedure, pleading, or evidence and conduct a
24 proceeding. The State had provided a letter today
25 where I cited to a statute 973.20, which provides

1 that the Court may waive rules of practice,
2 procedure, pleading, or evidence and conduct the
3 proceeding so as to do substantial justice between
4 the parties; and I would object to that.

5 No. 1, again, I haven't had the
6 opportunity. It's my understanding under the
7 statute the defendant's entitled to a restitution
8 hearing to be able to ask that victim questions.
9 Some of the questions that I would be asking is what
10 she's claiming, the mother is claiming. She's
11 entitled to lost wages.

12 I was going to ask her, okay, what
13 specific days were you taking off? What did you do
14 on those days? Why did you need to take those days
15 off, I think, things that are relevant; and I am not
16 able to do any of that and -- and I guess the same
17 thing regarding that, the victim herself. I was
18 going to ask what is the -- What is your deductible?
19 How much are you out? How much have you paid? I am
20 not able to ask any of these questions. So I would
21 ask on behalf of the defendant for an actual
22 restitution hearing.

23 THE COURT: Anything else?

24 MR. O'CONNELL: I do not, your Honor.

25 THE COURT: All right. Mr. Kaiser?

1 MR. KAISER: Thank you, judge. First of
2 all, when the Court does consider the question of
3 whether to recuse itself from this hearing, I would
4 just ask the Court to take a look at *State v.*
5 *Harrell*, H-A-R-R-E-L-L, 199 Wis. 2d 654, where the
6 Court cites to the *American TV* case, which is the
7 leading case. It cites to 97 -- 957.19(2)(g) and it
8 says that when that statute asks whether a judge can
9 determine for any reason he or she cannot, or it
10 appears he or she cannot, act in an impartial
11 manner, the Court noted in *Harrell* it's about what
12 exists in the judge's mind and that is all that is
13 required by the statute.

14 They point out the fact that although the
15 defendant in that case encouraged an objective
16 standard, the fact is the Court declined to
17 establish one and went on to say that 757.19(2)(g)
18 leaves the responsibility of withdrawal to the
19 integrity of the individual judge or justice. To
20 imply that judges or justices of this state are not
21 able to make a determination honestly, openly, and
22 fairly is a great disservice to the quality of men
23 and women who serve this state in a judicial
24 capacity.

25 The Court has made that determination; and

1 just for the record, since the defense did file that
2 pleading, which I didn't do, it should be noted for
3 the record that our pleading in the new case was not
4 filed until October of 2018. So at the time of the
5 sentencing on March 8 of 2018 -- Going to the
6 sentencing question for a minute, at the time of the
7 sentencing on March 8, 2018, there was no case.
8 There was no pending case. This Court's
9 participation as a witness was not in any way a
10 factor in making a determination of whether or not
11 the attorney ought to have filed a recusal motion.

12 I go back to my original, just sticking
13 with the sentencing argument and then I will be done
14 with that one, which is it was -- It was for this
15 Court, which you could have done whether a motion
16 was filed or not. The considerations are still the
17 same. Once the Court had the information about what
18 the defendant said about the Court, the Court had it
19 in its own power to make a decision whether or not
20 to recuse itself. So whether or not the defense
21 made the motion or not is of really no moment.

22 When the Court, I contend, and you can
23 make this finding when you make your findings in
24 this regard. The Court would have considered the
25 question of whether or not the Court under sub.(g)



1 could have been fair. Whether or not the motion is
2 made, I think this Court understood it had an
3 obligation to make that determination; and the Court
4 made that determination.

5 And the fact that in the sentencing
6 hearing the Court made comments about this defendant
7 and his nature and character and what sentence he
8 deserved based in part on the character that he
9 demonstrated from the things of which the Court was
10 aware at the time of sentencing, as counsel pointed
11 out, those things would have been apparent to any
12 judge, not just to you, your Honor.

13 So I think those were all proper
14 considerations at the sentencing. The Court would
15 have considered whether or not to remove itself from
16 the case, and counsel was not ineffective for not
17 making the motion in the first place.

18 Then getting then to the question of the
19 withdrawal, I will point out to the Court I won't
20 waste a lot of time on it. I would point out to the
21 Court in the presentence investigation at page 16
22 there's a lengthy discussion of this defendant's
23 education and qualifications to do his work as an
24 electrical engineer. So we are not dealing here
25 with someone who didn't even graduate from high

1 school. We are dealing here with someone with a
2 master's degree who is claiming all of what he did
3 or didn't understand; and, judge, I think those
4 facts themselves in addition to the defendant's
5 conduct and behavior in this courtroom belie any
6 reason why this Court should accept anything that he
7 said here today.

8 The standard -- Even though the defendant
9 cited *Strickland v. Washington*, the standard is
10 actually found in *Hill v. Lockhart*, which is the
11 Supreme Court case which applied *Strickland v.*
12 *Washington* to a plea circumstance. And so I am
13 going to start, as the Court suggested, in
14 *Strickland v. Washington*. I will start with the
15 question of whether there's prejudice because you
16 can resolve this case on the prejudice prong without
17 ever getting to deficient performance.

18 And on the prejudice prong, judge, you
19 asked the important questions. What did you do?
20 And he told you in his own words. He didn't say
21 yes. He told you in his own words twice; and then
22 when you asked him why are you pleading guilty, he
23 said because I am guilty. None of those are the
24 word yes.

25 So on the question of prejudice, that is



1 and it says it in *Hill v. Lockhart*. Would the
2 defendant have entered the plea? Where is the basis
3 in this record to believe that this defendant would
4 not have entered his plea? In *State v. Thomas*,
5 232 Wis. 2d 714, the Court said the defendant's
6 burden at a hearing like this on the plea withdrawal
7 after sentencing is a heavy burden of establishing
8 by clear and convincing evidence; and the Court
9 calls it a higher standard of proof used after
10 sentencing because the presumption of innocence no
11 longer exists, not because in this case a defendant
12 said yes, I did it. This defendant actually
13 described it to you. The presumption of innocence
14 no longer exists.

15 THE DEFENDANT: I asked for a plea before
16 sentencing.

17 MR. KAISER: The State's interest in
18 finality of convictions requires a higher standard
19 of proof to disturb the plea; and you have to find,
20 judge, a serious flaw in the fundamental integrity
21 of the plea. That's because you did everything
22 correctly in terms of the plea colloquy. He's not
23 complaining that you didn't follow the statutory
24 restrictions of the plea colloquy. He's simply
25 complaining apparently now that he lied.

1 Well, isn't that interesting? Since the
2 only evidence that you could rely on to allow him to
3 withdraw his plea is his carrying on here today,
4 well, you have to decide that, well, let's see. He
5 admits to lying then, but he must be telling the
6 truth today. There is not a single scintilla of a
7 basis of a reason to believe he was telling the
8 truth today.

9 He has every reason to lie today to you
10 because he's trying to withdraw his pleas. So he's
11 got a bias. He's got a prejudice. If you look at
12 Jury Instruction 300, we can run down the list; and
13 he qualifies for every single one of those reasons
14 to not be found credible. But I am going to suggest
15 to the Court two very important reasons we saw today
16 of why you should find him not credible when he
17 claims that the solemn answers that he gave you and,
18 judge, those solemn answers are very, very
19 important.

20 In *State v. Jenkins*, 303 Wis.2d 157, the
21 Court said that the defendant -- that you, the
22 Court, can rely on the solemn answers that the
23 defendant gave during the plea colloquy. In fact,
24 the Court at 190 said the Court should rely on
25 matters outside the plea colloquy or the defendant

1 should be able to show why it's fair and just to
2 disregard -- disregard the solemn answers that he
3 gave you.

4 And I think what you said earlier in your
5 exchange with defense counsel was that you observed
6 the solemnity of the answers the defendant was
7 giving to you. You observed the credibility of the
8 defendant's statement to you that he had committed
9 the crimes and what the factual basis was.

10 So what happened here today? Well, first,
11 we have the defendant's conduct and I suggest
12 strongly to the Court that the defendant's
13 contumacious conduct here in this courtroom goes
14 directly to the question of his credibility. He
15 attempted to use his behavior --

16 THE DEFENDANT: This is my life, you
17 asshole.

18 THE COURT: Hold on a second. You just
19 called Mr. Kaiser an asshole?

20 THE DEFENDANT: Yeah.

21 THE COURT: That's inappropriate,
22 Mr. Dunay.

23 THE DEFENDANT: This is -- This is a
24 circus court. It's absolutely ridiculous that he is
25 sitting up there as the judge.

1 MR. KAISER: He's using --

2 THE DEFENDANT: He should have recused
3 himself immediately when he knew that.

4 THE COURT: Mr. Dunay, it's time for you
5 to stop. Based upon your conduct today and I guess
6 that's the last straw, Mr. Dunay. I find that you
7 have intentionally acted with misconduct basically
8 all morning. I find that your conduct has been
9 repeated. It has been abusive. It's been
10 unacceptable, not professional, and really entirely
11 inappropriate for a courtroom.

12 THE DEFENDANT: It's inappropriate for you
13 to be the judge for this case.

14 THE COURT: Understood.

15 THE DEFENDANT: I don't understand why you
16 didn't recuse yourself from. It makes no sense.

17 THE COURT: You don't understand a lot of
18 things, Mr. Dunay; but we're not here to talk about
19 what you don't understand.

20 THE DEFENDANT: It's because I'm being
21 railroaded by the system.

22 THE COURT: I find today that you are in
23 contempt. I was going to hold off, you know,
24 because calling me an asshole or an arrogant asshole
25 or using the eff word -- I don't want to pick

1 battles with you. It's a waste of time; but when
2 you look at a different attorney, someone who has
3 been practicing law for a lot of years and in a
4 public courtroom you call him an asshole, that is
5 something that just can't go and be ignored.

6 So I find that all of your conduct today
7 and it's been docketed and put on the record here,
8 interruptions, your inappropriate comments, your
9 pounding on the table, your calling the attorney
10 general an asshole -- I find that you are in
11 contempt. You, Mr. Dunay --

12 THE DEFENDANT: I heard him describing
13 things that are absolutely not true.

14 THE COURT: Don't interrupt me again.
15 Again, you continue to be in ongoing contempt.

16 THE DEFENDANT: Yeah.

17 THE COURT: The -- I find that in the
18 immediate view of all of us you have engaged in this
19 conduct that's disorderly. It's contemptuous. It's
20 inappropriate behavior. It interrupts the
21 proceedings.

22 THE DEFENDANT: I didn't even want to go
23 forward with this hearing today. I object to this
24 whole hearing. I wanted to go pro se, and I kept on
25 telling you that a million times.

1 THE COURT: It interferes with the court
2 proceedings; and it impairs the respect that's due
3 to the Court, which I understand you don't have any
4 respect for.

5 THE DEFENDANT: Not in your courtroom, no,
6 sir.

7 THE COURT: Where you cross the line is
8 when you disrespect Attorney General Kaiser. That's
9 just not acceptable.

10 THE DEFENDANT: Well, yeah.

11 THE COURT: Based upon that, you have an
12 opportunity to say anything, Mr. Dunay, in terms of
13 an apology, if you want. So anything you want to
14 say?

15 THE DEFENDANT: I'll apologize to
16 Mr. Kaiser.

17 THE COURT: Anything else that you want to
18 say?

19 THE DEFENDANT: That's it.

20 THE COURT: What do you apologize for?

21 THE DEFENDANT: For using the swear word.
22 I shouldn't have. I realize you are just a
23 prosecutor doing your job, but I'm sure you realize
24 that I am getting railroaded here and --

25 THE COURT: I find that given your

1 demeanor and your comments and the way you were
2 looking at him that your apology is disingenuous
3 like most other things.

4 THE DEFENDANT: No. I was apologizing.

5 THE COURT: It's not adequate because your
6 apologies should also be to Attorney O'Connell. It
7 should be to me. It should be to the workers in the
8 courtroom, to the officers that have you surrounded
9 because you are a physical threat of violence.

10 THE DEFENDANT: I am not a physical threat
11 of violence. I don't have any history of that, and
12 I object to that.

13 THE COURT: You are interrupting.

14 THE DEFENDANT: I object to what you just
15 said.

16 THE COURT: So I am going to order that.
17 Any objection to a sanction of a \$500 fine plus
18 30 days in lockup consecutive to all other
19 sentences, Mr. Kaiser?

20 MR. KAISER: No, your Honor.

21 THE COURT: Mr. O'Connell?

22 MR. O'CONNELL: Your Honor, I represent
23 the defendant. I'd object.

24 THE COURT: Okay. Anything you want to
25 argue? I am looking at 785.04(2)(b). The sanctions

1 that are available in this process is a fine of not
2 more than \$500, confinement in the County jail --

3 THE DEFENDANT: I am a State inmate. You
4 are not holding me here.

5 THE COURT: -- or both.

6 THE DEFENDANT: I am a State inmate. You
7 are not holding me here.

8 THE COURT: I think given the number of
9 violations, the nature of the violations, the fact
10 that they continue to be ongoing, I think the
11 maximum consequence is appropriate; and I would hope
12 that it would tell Mr. Dunay that he should knock it
13 off so that he doesn't keep piling them up. But
14 obviously he keeps interrupting and keeps being
15 disrespectful. So anything, Mr. O'Connell, with
16 respect to that consequence?

17 THE DEFENDANT: You can't hold me. I'm a
18 State inmate.

19 MR. O'CONNELL: I don't, your Honor.

20 THE COURT: Okay. So I am going to order
21 that a \$500 fine be due based upon that conduct and
22 that you serve 30 days in the --

23 THE DEFENDANT: Absolutely not.

24 THE COURT: -- County jail consecutive to
25 any and all other sentences.



1 THE DEFENDANT: Absolutely not. I'm a
2 State inmate. You cannot hold me here. Absolutely
3 not.

4 THE COURT: My understanding -- I don't
5 believe there needs to be an opportunity to purge.

6 MR. KAISER: No, not when it's in the
7 court process.

8 THE COURT: Do you have any issue with
9 that, Mr. O'Connell?

10 MR. KAISER: And just to say if there was,
11 the opportunity to apology would have been it, which
12 is why I thought you were doing it. That would have
13 been his opportunity to purge, which I took the
14 statement to be accusing me of believing what he
15 believes about the system to be anything but an
16 apology.

17 THE COURT: And I agree with that and the
18 allocution -- Had he properly apologized, there
19 wouldn't have been a consequence. Anything with
20 respect to purge?

21 MR. O'CONNELL: No, your Honor.

22 THE COURT: Okay. So that resolves the
23 sanction --

24 THE DEFENDANT: Can I --

25 THE COURT: -- issue.

1 THE DEFENDANT: -- apologize?

2 THE COURT: You can understand, Mr. Dunay,
3 if you interrupt again or your conduct engages in it
4 you are not going to be given those warnings.

5 THE DEFENDANT: Can you allow me to
6 apologize?

7 THE COURT: I gave you an opportunity.

8 THE DEFENDANT: I apologize to the Court.

9 THE COURT: Like most things with you, it
10 was disingenuous --

11 THE DEFENDANT: All right.

12 THE COURT: -- and self-serving --

13 THE DEFENDANT: All right.

14 THE COURT: -- manipulating --

15 THE DEFENDANT: All right.

16 THE COURT: -- and conniving.

17 THE DEFENDANT: Fine.

18 THE COURT: So, Mr. Kaiser, you can go
19 ahead.

20 MR. KAISER: Judge, I just had two other
21 points I wanted to make.

22 THE DEFENDANT: You are a piece of shit.

23 THE COURT: Hold on. You just looked at
24 me and said you are a piece of shit.

25 THE DEFENDANT: Yes, you are.



1 THE COURT: Anything you want to say
2 regarding allocution on that?

3 THE DEFENDANT: I -- I -- This is my last
4 demand to go pro se, okay? I go pro se on this
5 case.

6 THE COURT: I take it you don't want to
7 apologize. So based upon that, Mr. Dunay, I am
8 going to find that your conduct in calling me a
9 piece of shit is contemptuous behavior --

10 THE DEFENDANT: Okay.

11 THE COURT: -- that you did it in open
12 court in front of everybody.

13 THE DEFENDANT: Yep.

14 THE COURT: You engaged in disorderly,
15 contemptuous, and inappropriate behavior --

16 THE DEFENDANT: Fine.

17 THE COURT: -- that interrupted the
18 proceedings --

19 THE DEFENDANT: Fine.

20 THE COURT: -- showed a disrespect to the
21 Court.

22 THE DEFENDANT: Fine.

23 THE COURT: It was misconduct and it was
24 intentional.

25 THE DEFENDANT: Just like your misconduct.

1 THE COURT: And based upon that, I am
2 going to order that you pay another \$500 fine.

3 THE DEFENDANT: You are never going to see
4 it.

5 THE COURT: Serve another 30 days in the
6 Outagamie County Jail.

7 THE DEFENDANT: I ain't spending any time
8 in the Outagamie County Jail. I'm a State inmate.
9 What part don't you understand?

10 THE COURT: That 30 days will be
11 consecutive to the other 30 days and consecutive to
12 any and all other sentences. Mr. Kaiser?

13 MR. KAISER: Your Honor, the other point I
14 wanted to make in regards to credibility of the
15 defendant's statement is that during the time that
16 the attorneys were present it is now clear to us,
17 which we didn't understand before, why it took 15 or
18 20 minutes to figure out whether he wanted to waive
19 his privilege because he filed pleadings where he
20 disclosed privileged information; but yet we all
21 know that we still have to sit here and have him
22 waive his privilege knowingly, intelligently,
23 voluntarily. He wouldn't answer your question.

24 Well, it's clear why, because he's
25 thinking of what he's going to say when he finally

1 testifies; and the last thing he wanted us to do was
2 be able to ask those attorneys questions about what
3 he was going to say. So he chose to not answer your
4 questions so that he can go on record and up on
5 appeal and say, well, I never really waived.

6 THE DEFENDANT: That's ludicrous.

7 MR. KAISER: That's garbage. You gave him
8 a whole bunch of times to waive and he didn't do it.
9 So my position is and I hope you make this finding
10 so that the appellate court has an opportunity to
11 affirm this finding, which is that by failing to
12 waive when the attorneys were present he should have
13 held against him any reasonable inference of what
14 those attorneys might have said had they been here
15 and heard his accusations against them.

16 Anytime you are asking yourself, okay,
17 should I believe him when he claims
18 Attorney Tarnowski did this, should I believe him
19 when he claims Attorney Buckett did this, you should
20 answer the question no because he failed to waive
21 his privilege. By failing to waive the privilege,
22 he allows the inference that what he's telling us is
23 a lie.

24 Thus, you can then decide based on that
25 that everything he said about all of the issues,

1 whether pled or not, have no credibility because he
2 didn't give us the chance to test the credibility
3 when the attorneys were here.

4 THE COURT: I do make that finding.

5 MR. KAISER: I am hoping the appellate
6 court doesn't say to me, oh, Mr. Kaiser, you could
7 have called the lawyers back. If -- I don't think
8 they will do that. I think they will understand
9 what your Honor was trying to do, which is allow the
10 attorneys to get back to work. The defendant's
11 going to be here. Counsel and the police officer
12 are going to be here; but by -- By not allowing us
13 to ask them questions about their conversations with
14 him, he prevented us from being able to make the
15 findings that the *Machner* hearing is created for in
16 the first place.

17 That's why he has to testify at it.
18 That's why the attorneys have to testify at it, so
19 that we can get to the heart of this relationship.
20 So those are the findings that I am going to be
21 asking the Court to make. You knew and you told him
22 I can give you up to 74 years. So all of this
23 garbage about consecutive sentences versus
24 concurrent sentences is belied by your colloquy with
25 him and it's belied by the plea questionnaire that

1 he signed that had the maximum sentences on it.

2 There is no credibility to anything he
3 said. We're asking the Court in no uncertain terms
4 to find -- make that finding and that finding will
5 be on this record unassailable on appeal. We ask
6 you to deny that. Finally, as to --

7 THE COURT: Just so the record's clear
8 before I forget and just in case I don't say it, I
9 will make that finding.

10 MR. KAISER: Thank you. I appreciate
11 that.

12 THE COURT: I find that Mr. Dunay today
13 failed to waive his attorney-client privilege and he
14 did so in my opinion intentionally, understanding
15 the disadvantages of that, and he did it
16 strategically so he could accomplish exactly what he
17 thought he accomplished this morning.

18 THE DEFENDANT: I wanted to go pro se.
19 You refused to let me go pro se.

20 MR. KAISER: That's what happened.

21 THE COURT: Based upon that, I will then
22 elaborate on that when I make my decision.

23 MR. KAISER: I appreciate that. Thank
24 you, judge. Finally, judge, on the restitution
25 matter, as I cited in my letter, 973.20(14)(d) does



1 allow -- It's not mandatory; but it does say, as I
2 indicate in my letter, the Court may waive the rules
3 of practice, procedure, pleading or evidence; and
4 we're asking you to do that. We're asking you to do
5 that because in the case that I will spell -- It's
6 *Wiskerchen*, W-I-S-K-E-R-C-H-E-N, 385 Wis. 2d 120
7 (2019), the Court looked directly at 973.20 and
8 found as follows.

9 The primary purpose of restitution is to
10 compensate the victim. 973.20 reflects a strong --
11 this is paragraph 22 -- reflects a strong equitable
12 public policy that victims should not have to bear
13 the burden of losses if the defendant is capable of
14 making restitution. Wisconsin Courts have
15 repeatedly held that restitution is the rule and not
16 the exception and should be ordered whenever
17 warranted. The Court should construe the
18 restitution statute broadly and liberally in order
19 to allow victims to recover their losses as a result
20 of the defendant's criminal conduct.

21 As I pointed out in my cover letter and as
22 she says in her affidavit, Ms. [REDACTED] has suffered
23 continuous losses as a consequence of this
24 defendant's behavior even since the sentencing until
25 the very day that she wrote her affidavit. She's



1 not asking for any of that. We are simply asking
2 the Court to continue the order which was already
3 entered at the sentencing for the amounts that she
4 already presented bills for at the time of
5 sentencing.

6 And in the liberal and broad ruling on
7 (14), sub.(14)(d), we believe the affidavit is
8 enough to sustain the Court's previously entered
9 order; and I found ludicrous the suggestion that I
10 would have to bring in the victim herself to testify
11 about her losses when it's her mother's insurance
12 that has had to be responsible for what has gone on
13 here.

14 I think that statement demonstrates that
15 what actually was being sought at this restitution
16 hearing wasn't to not have to pay \$19,000. It was
17 to get those people in here so that they had to sit
18 here in the same room with him. I think that's an
19 abhorrent abuse of the restitution statute. I ask
20 you to allow the order to stand. Thank you.

21 THE COURT: All right. I appreciate the
22 arguments. Here is what we are going to do. My
23 staff will come out. We will get Debbie out, and we
24 are going to schedule a hearing for a decision.
25 Mr. Dunay will appear from wherever he's in custody.

1 There's no reason to bring him back.

2 MR. KAISER: Correct.

3 THE COURT: Unless you think there is,
4 Mr. O'Connell.

5 MR. O'CONNELL: Not if it's just -- as
6 long as there's not any evidence being presented.

7 THE COURT: My other thought is I think
8 that the mother should be here at this next hearing.
9 So it would be both a decision hearing and
10 potentially a restitution hearing. I have concerns
11 with your last comment, Mr. Kaiser, that some of
12 this may be Mr. Dunay attempting to revictimize or
13 intimidate or do all of the nonsense that he's been
14 doing today. And to us we deal with it in most days
15 with people like Mr. Dunay, but I don't want to
16 subject Ms. ██████ -- that's her name, right, the
17 mom?

18 MR. KAISER: Yes.

19 THE COURT: -- to any of it. I don't
20 think she should be -- she should have to listen to
21 Mr. Dunay in the way that he carries on or the
22 facial expressions or the way that he's been acting
23 all morning. I just -- I don't. I don't think he
24 should be entitled to that benefit. I don't think
25 she should be burdened to have to spend one minute

1 looking at the guy.

2 THE DEFENDANT: Who would want to be in
3 the circus court with you?

4 THE COURT: The same type of conduct that
5 he keeps doing.

6 THE DEFENDANT: I can't wait until you
7 lose your job for judicial misconduct.

8 THE COURT: It would be nice if we could
9 have him appear if we do have that hearing. So I
10 would like her to be available because I haven't
11 ruled on it; but I think what I am -- where I am
12 leaning is we should bring her in and allow
13 questioning by you, Mr. O'Connell, not by Mr. Dunay,
14 about those issues that you said -- how does this
15 relate to the offense? What does she get paid per
16 hour -- so we can make some determinations.

17 MR. O'CONNELL: Your Honor, two things.
18 First, again, this is just -- I guess our position
19 is if there is going -- if there is going to be
20 evidence, if the Court does make a finding which
21 it's not doing today but if it does make a finding
22 that we are entitled to a restitution hearing
23 because then there would be evidence submitted, it's
24 our position that under the law, which I don't -- I
25 can't cite to it right now; but it's my

1 understanding that if there is evidence being
2 presented that the defendant would have a right to
3 be here unless he's forfeited that right to do so or
4 if there's some other reason; but otherwise he would
5 have his right to be here.

6 MR. KAISER: Judge, could I ask this? I
7 would ask that we be allowed to work with your court
8 to schedule a hearing convenient for counsel, and I
9 would ask the Court to review the affidavit because
10 I believe it answers all of the questions the
11 defense has raised. If at the time the Court
12 decides that a sworn affidavit isn't sufficient to
13 answer those questions, that we be given an
14 opportunity to see what Ms. ██████████ position is on
15 it. As the Court knows --

16 THE COURT: I have read the affidavit.

17 MR. KAISER: -- I am honest about
18 everything, judge. I will tell you that if we
19 were -- if counsel -- And counsel is correct. If
20 evidence is taken and therefore the defendant has to
21 be here, my grave concern is that this woman for all
22 that she's been through, as I say, until today --

23 THE DEFENDANT: Oh, God.

24 MR. KAISER: -- may choose to forego this.

25 THE COURT: What about her appearing by

1 phone?

2 MR. KAISER: Oh, I can probably -- We
3 could probably make that happen; and that would be
4 much more acceptable, your Honor.

5 THE COURT: Okay. I don't know. The
6 other nice thing is with Mr. Dunay we can have him
7 appear from prison eventually at the decision
8 hearing so he's not disruptive and just have him
9 muted so we can't hear what he says and he can talk
10 to the wall or the middle of the room that he's
11 in --

12 THE DEFENDANT: That's inappropriate.

13 THE COURT: -- be cussing and swearing.

14 THE DEFENDANT: That's inappropriate.

15 THE COURT: And it's not going to disrupt
16 the process. He can hear and see what we are doing,
17 but we don't have to listen to his nonsense.

18 MR. KAISER: If she could appear by phone,
19 it would make it easier for her in terms of just her
20 ability to be here on a certain day as well.

21 THE COURT: Right. Mr. O'Connell, what
22 about her appearing by phone at a restitution
23 hearing?

24 MR. O'CONNELL: I -- I guess I -- I mean
25 our -- Our position is we prefer her to be here.

1 THE COURT: Understood.

2 MR. O'CONNELL: I don't think there's any
3 requirement. I would like the opportunity.

4 THE COURT: There isn't. So we are going
5 to allow her to appear by phone.

6 THE DEFENDANT: I demand to be here. I
7 don't waive that right. Do you hear me?

8 THE COURT: He can be here at the
9 restitution hearing.

10 THE DEFENDANT: No. I will be here at the
11 other hearings as well.

12 THE COURT: Not necessarily. We will
13 schedule that. Debbie, if we can set aside an hour
14 and a half at some point out, I know you have a
15 trial, Mr. Kaiser. So the next three weeks don't
16 work.

17 MR. KAISER: I've got some things going
18 on, but I would become available again the week of
19 July 15. We're off the record?

20 THE COURT: We're still on the record. We
21 will be on the record with everything.

22 MR. KAISER: I'm sorry.

23 JUDICIAL ASSISTANT: July 19, 8:30?

24 MR. KAISER: Can you make it a little
25 later?

1 THE COURT: How much time do we have that
2 morning?

3 MR. KAISER: I'll be here at 8:30. That's
4 fine. I will make that happen.

5 THE COURT: Otherwise what do you have?

6 JUDICIAL ASSISTANT: July 29, 9:30?

7 THE COURT: The 29th would be better for
8 me.

9 MR. KAISER: Yes. That would be great,
10 9:30 on the 29th.

11 MR. O'CONNELL: I'm sorry. That doesn't
12 work for me. I have a 9:15 in Brown County.

13 MR. KAISER: I can -- I can make the 19th
14 work if you can, judge.

15 THE COURT: Do we have later on that day?

16 JUDICIAL ASSISTANT: 1:15?

17 MR. KAISER: That would be awesome.

18 MR. O'CONNELL: On the 29th?

19 JUDICIAL ASSISTANT: Yes.

20 MR. KAISER: Oh, on the 29th or the 19th?

21 THE COURT: The 29th.

22 MR. KAISER: That's fine.

23 MR. O'CONNELL: That's fine for me.

24 THE COURT: We will schedule it at 1:15
25 with the idea that we will start with that

1 restitution hearing unless you would hear something
2 different from me after I review it. Once we get
3 done with the questioning of Ms. [REDACTED], we would
4 disconnect with her and Mr. Dunay will be here in
5 person for that. He has a right to be here because
6 it's an evidentiary hearing, and I may or may not
7 make the decision hearing at that time.

8 My preference would be that I don't want
9 to be interrupted as I am making the decision and
10 deal with the way Mr. Dunay has interacted. So my
11 preference for a decision hearing would be just to
12 have him appear from prison. Like we said, we can
13 mute him so he can sit and shout at the walls.

14 THE DEFENDANT: I object. I object.

15 THE COURT: You don't have a right to be
16 here at the hearing, Mr. Dunay. You have the record
17 indicating that. Your conduct -- there's no -- not
18 a lot of fun finding you in contempt and having you
19 continue to be disrespectful. Your conduct --

20 THE DEFENDANT: Your conduct --

21 THE COURT: We will prepare for both.
22 That may be what happens.

23 THE DEFENDANT: You should have recused
24 yourself from the whole case. I object to the whole
25 hearing since the beginning.

1 THE COURT: Mr. O'Connell, anything else?

2 MR. O'CONNELL: Just one last thing. You

3 had -- The Court had asked me --

4 THE DEFENDANT: You smart ass.

5 THE COURT: So you just said smart ass

6 again?

7 THE DEFENDANT: Yeah.

8 THE COURT: Mr. Dunay --

9 THE DEFENDANT: Yeah, yeah.

10 MR. O'CONNELL: Regarding.

11 THE DEFENDANT: You will lose your job.

12 Don't worry. You already lost your job as a truancy

13 judge. I will see to it you lose this job too.

14 THE COURT: Okay.

15 THE DEFENDANT: I promise you.

16 THE COURT: All right.

17 MR. KAISER: Judge, just for reference

18 since the defendant is so familiar with the law, for

19 you 971.04(1) sets forth the times when the

20 defendant has to be present. It does say at any

21 evidentiary hearing but it doesn't say at any ruling

22 by the Court.

23 THE COURT: Right, right.

24 THE DEFENDANT: It doesn't say I can't be

25 here either.

1 MR. O'CONNELL: Judge, you had also asked
2 while the State was making its argument for me to go
3 through the sentencing transcript. If the Court
4 would like, I mean I can do -- A control finding
5 would go a lot quicker.

6 THE COURT: No reason to. Forget the
7 request.

8 MR. O'CONNELL: Okay.

9 THE COURT: Are you good with that?

10 MR. O'CONNELL: That's fine.

11 THE COURT: I appreciate your work,
12 Mr. O'Connell, today on this. I understand the
13 position you are in, and I feel bad for you. I
14 appreciate your work in handling it.

15 THE DEFENDANT: He should, my attorney
16 should, never have allowed this to go forward today.
17 I would like that on the record.

18 THE COURT: Anything else, Mr. Kaiser?

19 MR. KAISER: No, your Honor. Thank you.

20 THE COURT: We're adjourned.

21

22 (Proceedings concluded at 1:04 p.m.)

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STATE OF WISCONSIN)

) SS:

OUTAGAMIE COUNTY)

I, TERRA OTIS, RPR, RMR, CRR, CRC, do hereby certify that I reported the foregoing matter and that the foregoing transcript, consisting of 215 pages, has been carefully compared by me with my stenographic notes as taken by me in machine shorthand and by me thereafter transcribed and it is a true and correct transcript of proceedings had in said matter to the best of my knowledge.

Dated this 15th day of July, 2019.

(Electronically signed by Terra Otis)
TERRA OTIS, RPR, RMR, CRR, CRC
Official Reporter

1 STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY
2 BRANCH I

3 -----

4 STATE OF WISCONSIN, Transcript of:
5 Plaintiff, RESTITUTION HEARING

6 -vs-

7 KEVIN R. DUNAY, Case No. 15-CF-470
8 Defendant.

9 -----

10 HONORABLE MARK J. MCGINNIS
11 JUDGE PRESIDING

12
13
14

15 APPEARANCES:

16 ROBERT J. KAISER, JR., Wisconsin Department of
17 Justice, 17 West Main Street, PO Box 7857, Madison,
18 Wisconsin 53707-7857, appearing on behalf of the State of
19 Wisconsin.

20 TIMOTHY T. O'CONNELL, O'Connell Law Office, 403
21 South Jefferson Street, PO Box 1625, Green Bay, Wisconsin
22 54305-1625, appearing on behalf of the defendant.

23 The Defendant appeared in person.

24
25

Date of proceedings: July 29, 2019

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1 THE COURT: And is she on the phone? So
2 the clerk will put her into the system.

3 MR. KAISER: Thank you.

4 THE COURT: All right. Good morning. Who
5 do we have on the phone?

6 [REDACTED]

7 THE COURT: Okay. Ms. [REDACTED], my name is
8 Mark McGinnis. I'm one of the judges here in
9 Outagamie County, and we are in the courtroom on the
10 record for this hearing. And Attorney Kaiser is
11 present, representing the State of Wisconsin; and
12 Attorney Tempelis, who is the district attorney here
13 in Outagamie County, is sitting in the back of the
14 courtroom; and then Mr. Dunay is present with his
15 attorney, Attorney O'Connell.

16 [REDACTED]: Okay.

17 THE COURT: It's your opportunity to
18 testify. Are you prepared to do that?

19 [REDACTED]: Yes.

20 THE COURT: All right. So I am going to
21 ask if you could raise your right hand.

22 [REDACTED]: Okay.

23 THE COURT: Is it raised?

24 [REDACTED]: Yes.

25 [REDACTED], having been called as a

1 witness, having been first duly sworn on oath, was
2 examined and testified as follows:

3 THE WITNESS: I do.

4 THE COURT: Okay. And if you could, state
5 your full name and spell your first name and your
6 last name, please.

7 THE WITNESS: Sure. [REDACTED], [REDACTED],
8 [REDACTED], [REDACTED].

9 THE COURT: So, Ms. [REDACTED] the attorneys
10 are going to now have an opportunity to ask you
11 questions. Keep speaking the way that you are
12 speaking because you are coming through clear and we
13 can hear you.

14 THE WITNESS: Okay.

15 THE COURT: Then if for some reason you
16 don't hear something from us, just let us know, you
17 know, based on whatever is happening with the
18 technology. Okay?

19 THE WITNESS: Okay.

20 THE COURT: Go ahead, Mr. Kaiser.

21 MR. KAISER: Thank you.

22 DIRECT EXAMINATION

23 BY MR. KAISER:

24 Q Ms. [REDACTED] you are the mother of the daughter in --

25 You are the mother of the victim in this case; is

1 that correct?

2 A That's correct.

3 Q Would you state your daughter's name for the record,
4 please?

5 A ██████████

6 Q And how do you spell her first name?

7 A ██████████.

8 Q Was -- Who, if anyone, was responsible for the
9 health-related bills which came about as a
10 consequence of this case?

11 A Do you mean who was the person that hurt her?

12 Q No. I'm sorry. You are right. That was exactly --
13 That would be another answer to my question so I
14 apologize for a bad question. Were you or your
15 daughter responsible for paying the medical bills
16 that resulted from this case?

17 A Oh, yes, I was. I am.

18 Q And do you stand by the bills that you forwarded to
19 the district attorney's office at or around the time
20 of sentencing?

21 A I do.

22 Q Do you stand by the affidavit that you filed on or
23 about June 20 of this year with the Court?

24 A I do.

25 MR. KAISER: No further questions.

1 THE COURT: Mr. O'Connell?

2 CROSS-EXAMINATION

3 BY MR. O'CONNELL:

4 Q Ms. ██████, this is Attorney Tim O'Connell. Can you
5 hear me okay?

6 A Yes.

7 Q You had submitted a document that indicated you had
8 15 and a half days of work that you had to take off;
9 is that correct?

10 A Correct. That's correct.

11 Q And what specific days did you have to take off and
12 what did you do on those days?

13 A Well, I can't tell you the days offhand because I
14 don't have that information in front of me; but
15 the -- The days I had to take off was because I had
16 to spend time with my daughter related to this case
17 in the hospital doing meetings, visitations, you
18 know, planning for her to come home and follow-up
19 care.

20 Q In this document that you also had provided it
21 indicates that you are making on some days \$25.50 an
22 hour and some days \$26.71 an hour, Sundays \$30 an
23 hour. What kind of work do you do?

24 A I am a registered nurse.

25 Q What's the reason for the discrepancy in the -- in

1 the hourly salary?

2 A Because with so many days missed from my job I had
3 to find different employment to care for my family
4 through different employers.

5 Q So was it a matter of you were working for different
6 employers?

7 A Yes.

8 Q Now, I'd like to go through the bills with you. Do
9 you have the bills in front of you?

10 A I do not.

11 Q Do you -- Is there any way that you could get access
12 to these bills?

13 A I cannot on short notice. I am sorry.

14 MR. O'CONNELL: Your Honor, I guess I
15 don't know. That's one of the benefits of having
16 her in here right now. I was going to go through
17 these bills. I was going to ask her -- I was going
18 to ask her about them. I guess it's hard for me to
19 do this.

20 THE COURT: Let's just start off and keep
21 it simple. You are looking at something. What are
22 you looking at?

23 MR. O'CONNELL: Okay. I am looking at
24 right now -- this was a -- It was a \$12,660 bill.

25 THE COURT: Yeah. Let me be just maybe

1 more general. Is that part of the affidavit?

2 MR. O'CONNELL: This was part of -- It was
3 the restitution. It likely was. It was part of the
4 restitution summary that I was provided.

5 THE COURT: You are looking at the
6 restitution summary and the attachments?

7 MR. O'CONNELL: Yes.

8 THE COURT: What day was that filed?

9 MR. O'CONNELL: It's got on here
10 December 12, 2017.

11 THE COURT: Okay. So you are looking at
12 the restitution summary that was filed back in
13 December, specifically on December 12, 2017?

14 MR. O'CONNELL: I believe so.

15 THE COURT: Okay. And we can potentially
16 fax it to her if that would help or is there any --
17 I am having trouble understanding. Can't you just
18 say there's an expense listed as this? Can you
19 explain to me what that is, Ms. [REDACTED]?

20 MR. O'CONNELL: Sure.

21 THE WITNESS: Okay.

22 MR. O'CONNELL: I will do my best perhaps
23 if we could get through it that way. If not I ask
24 that the documents get faxed to Ms. [REDACTED].

25 THE COURT: Okay.

1 BY MR. O'CONNELL:

2 Q Okay. Ms. ██████████, the first bill that I am looking
3 at -- It looks like there's dates of service
4 April 12, 2016, to April 19, 2016; and it's on here.
5 It has employee benefit plan, ThedaCare. Provider
6 is St. Elizabeth Hospital. Total bill was
7 \$12,660.42.

8 A Okay.

9 Q Actually before I -- Before I get into that bill, I
10 want to ask you a few questions regarding your
11 insurance. What is your deductible?

12 A I don't know that offhand. My company has switched
13 insurance companies.

14 Q Is there any way that you could get access to what
15 your deductible is?

16 A I would have to call my employer and have them give
17 you that information from back from both years.

18 MR. O'CONNELL: Your Honor, what my
19 concern is is the victim's mother here doesn't know
20 what the deductible is. That is going to be part of
21 our argument.

22 THE COURT: Okay. Can I just ask a couple
23 questions, Mr. O'Connell? Can I take a look at
24 whatever that document was that you were just
25 referencing because I'm looking at the electronic

1 file and there's a restitution summary filed on
2 January 26, 2018, but it's actually dated
3 December 12, 2017? So is that the same one?

4 MR. O'CONNELL: I believe so.

5 THE COURT: Okay. So it was filed on
6 January 26. It should be in the upper right. It's
7 not. You are dealing with something other than the
8 original copy?

9 MR. O'CONNELL: Yeah. I think I have a
10 copy.

11 THE COURT: Okay.

12 MR. O'CONNELL: I am fairly confident it's
13 probably identical to what you are looking at.

14 THE COURT: I am not sure but the total
15 restitution amount is \$19,232.06.

16 MR. O'CONNELL: Yes.

17 THE COURT: We don't have to talk about
18 the surcharge, right?

19 MR. O'CONNELL: Correct.

20 THE COURT: Okay. And then as we look at
21 this I guess the one that's on the electronic
22 version is just one page. So you are looking at the
23 attachments to it somehow?

24 MR. O'CONNELL: Yes.

25 THE COURT: Okay. And can't we just break

1 it down and ask questions?

2 MR. O'CONNELL: That's what I was planning
3 on doing. I was going to go through. I believe
4 there's five different bills --

5 THE COURT: Okay.

6 MR. O'CONNELL: -- that -- that equal
7 the -- Well, it actually equals \$13,947.17.

8 THE COURT: All right.

9 MR. O'CONNELL: Then there was another
10 \$3,500 for lost wages.

11 THE COURT: Okay. Is there any reason not
12 to mark that as an exhibit since you are referencing
13 it?

14 MR. O'CONNELL: I was going to, but I
15 believe it's already in the record.

16 THE COURT: It's not from what I can tell
17 so I am just asking. I would like to have -- I know
18 Mr. Dunay is going to appeal this. So we are
19 sitting here talking about some document that you
20 are looking at that doesn't have a file stamp on it;
21 and I trust you, Mr. O'Connell, but why don't we
22 just mark it so that the record's clear?

23 MR. O'CONNELL: Sure, if I may.

24 THE COURT: Okay. This will be
25 Exhibit No. 1 from today's hearing.

1 (Exhibit No. 1 marked for identification.)

2 THE COURT: Do you have that even,

3 Mr. Kaiser? Do you know what he's talking about?

4 MR. KAISER: Well, I am trying to follow
5 along. Did he ask me to stipulate to what the
6 deductible was? And now that he's pointed out to me
7 what it is he's looking at and now that the Court
8 has the document, the Court can see from the
9 document that the deductibles have already been
10 applied and the portion that is the patient's
11 responsibility is noted on the right side. And,
12 finally, I object to the relevance of what her
13 current status would be in terms of what her
14 deductible is because obviously what she has
15 indicated to us is that she has changed jobs and one
16 can see from the various pages that --

17 THE COURT: The objection on the current
18 deductible is sustained unless you think there's
19 some relevance to that, Mr. O'Connell.

20 MR. O'CONNELL: The reason why I am
21 interested in knowing -- Well, yeah, I agree.

22 THE COURT: Okay.

23 MR. O'CONNELL: I'm not interested in her
24 current deductible.

25 THE COURT: I don't have Exhibit 1 in

1 front of me. I would like to look at
2 Mr. O'Connell's copy.

3 MR. KAISER: If that's his other copy,
4 judge, let me make sure he and I have the same
5 pages; and I will give it to you, judge, just so the
6 Court has the copy of what I submitted to the Court,
7 which was simply a repetition of what had originally
8 been filed at the time of sentencing.

9 THE COURT: So, Mr. O'Connell, do you
10 agree that what was just handed to me was Exhibit 1?

11 MR. O'CONNELL: That's correct.

12 THE COURT: Exhibit 1 appears to be the
13 restitution summary dated December 12, 2017, and
14 then is there eight other pages of material?
15 Whether it's front and back, it's eight total pages
16 other than that cover page.

17 MR. O'CONNELL: I have nine and that
18 includes everything.

19 THE COURT: Okay. So let's just walk
20 through it so we are all talking the same thing,
21 Mr. O'Connell. You have the restitution summary?

22 MR. O'CONNELL: Correct.

23 THE COURT: On the back of that there's
24 some handwritten amounts?

25 MR. O'CONNELL: Yes.

1 THE COURT: Then there's a page that looks
2 like it's from the office of victim witness
3 advocacy. There's an address down at the bottom in
4 New Jersey?

5 MR. O'CONNELL: Yes.

6 THE COURT: And then on the back of that
7 there's employee benefit plan at ThedaCare?

8 MR. O'CONNELL: Yeah. There's the one for
9 \$12,660.

10 THE COURT: Correct. And then there's a
11 separate page that has up on the top notes. That's
12 kind of the first in bold and it just looks like a
13 normal policy or something.

14 MR. O'CONNELL: Yes.

15 THE COURT: Okay. On the back of that is
16 employee benefit plan for ThedaCare.

17 MR. O'CONNELL: Yes. On that one, just to
18 get very specific, the patient responsibility is
19 \$23.06.

20 THE COURT: Good. And then there's
21 another page for employee benefit plan and the
22 patient responsibility is \$675.61?

23 MR. O'CONNELL: Yes.

24 THE COURT: On the back of that is an
25 employee benefit plan and the patient responsibility

1 is \$388.08?

2 MR. O'CONNELL: Yes.

3 THE COURT: And then there's a page
4 dealing with employee benefit plan, patient
5 responsibility. It says \$200?

6 MR. O'CONNELL: Yes.

7 THE COURT: Okay.

8 MR. O'CONNELL: That's it.

9 THE COURT: That's what I have then. So
10 we can go ahead and just frame your question. You
11 have questions regarding those documents?

12 MR. O'CONNELL: Yes.

13 THE COURT: Okay. Why don't you just ask
14 them and see if she can answer them for you.

15 BY MR. O'CONNELL:

16 Q Ms. ██████ so you don't know what your deductible
17 was at that time; is that correct?

18 A That is correct.

19 Q Do you know what your total out of pocket was at
20 that time?

21 A I don't offhand. I am sorry.

22 Q Do you know what your coinsurance was at that time?

23 A I don't. I am sorry.

24 THE COURT: I am not -- I am just looking
25 at these documents. Doesn't it say the deductible

1 on these pages?

2 MR. O'CONNELL: That's what I was asking
3 the State. If they are willing to stipulate, I
4 would be willing to go along with that. I believe
5 it looks like the individual deductible is \$600. I
6 do not know what the total out of pocket is.

7 THE COURT: No. But isn't -- isn't -- I
8 am looking at these documents. Doesn't it say the
9 individual deductible is \$600 and the family
10 deductible is \$1,200?

11 MR. O'CONNELL: That's what it looks like
12 to me.

13 THE COURT: Do you agree, Mr. Kaiser?

14 MR. KAISER: Yes. Even though one hasn't
15 been moved in, I am not objecting to the Court
16 receiving it as an exhibit.

17 THE COURT: Okay. Exhibit 1 is received.

18 MR. KAISER: Thank you.

19 (Exhibit No. 1 received.)

20 BY MR. O'CONNELL:

21 Q Okay. Ms. ██████████, I want to start with the
22 \$12,660.42 bill.

23 A Okay.

24 Q What was at -- Okay. The date of service for that
25 was April 12 to April 19, 2016.

1 A Okay.

2 Q What was that service for?

3 A And what facility was that for?

4 Q St. Elizabeth Hospital.

5 A If it was St. Elizabeth's Hospital, it would have
6 been an inpatient hospitalization.

7 Q And what was the inpatient for?

8 A Well, it could have been either her -- one of her
9 several suicide attempts or self-harming,
10 self-destructive, attempting to stab herself. There
11 has been multiple reasons she's been inpatient.

12 Q Were you in the room during any of those, during
13 those appointments? I'm sorry. Were you in the
14 room or were you at the facility while your daughter
15 was there?

16 A I was there as much as I could and for any planning
17 and -- and discharge information.

18 Q Were you there for any of the treatment that she was
19 receiving?

20 A Not direct treatment. I wasn't there when the
21 doctor was with her, but I had multiple visits with
22 care management and other participants of the
23 hospital.

24 Q I want to move on to the next bill.

25 THE COURT: Let me just ask a question as

1 you are on that bill. Ms. ██████ this is Judge
2 McGinnis; and I just want to be sure I understand
3 what the testimony was.

4 THE WITNESS: Okay.

5 THE COURT: But there was this bill that
6 has been referenced from Attorney O'Connell in
7 April of 2016 as it relates to St. Elizabeth
8 Hospital. I understand your answer meaning that she
9 was inpatient and it's your testimony today that
10 that's a result of the conduct by Mr. Dunay?

11 THE WITNESS: That is correct.

12 THE COURT: Okay. And on here and even
13 though you didn't -- you weren't part of doctor
14 meetings necessarily you were involved in your
15 daughter's life and in the medical treatment and the
16 follow-up treatment and it's your position today
17 that that was caused by Mr. Dunay's actions?

18 THE WITNESS: That is correct.

19 THE COURT: Now --

20 MR. O'CONNELL: Your Honor, apologize.
21 The defendant in my ear -- I wasn't able to hear the
22 last question you had asked.

23 THE COURT: Okay.

24 MR. O'CONNELL: I wasn't able to hear the
25 response.

1 THE COURT: I think I asked several of
2 them. He's been in your ear. I have noticed that.

3 THE DEFENDANT: I object.

4 THE COURT: Basically what she testified
5 to was that the stay at St. Elizabeth Hospital was a
6 result of Mr. Dunay's conduct; and even though she
7 wasn't in every meeting, she had communications with
8 her daughter and the doctors and that's her
9 understanding, as well as the follow-up treatment.
10 Is that what you had testified to, Ms. [REDACTED]?

11 THE WITNESS: Yes.

12 THE COURT: Okay. On this document which
13 has been marked as Exhibit 1, for that stay it
14 indicates that the total charges were \$12,660.42 and
15 the patient responsibility was that same amount,
16 \$12,660.42. So then it also says on here that there
17 was no payment made by the plan. Do you remember
18 that?

19 THE WITNESS: I know that there's several
20 bills that were not covered by the plan because they
21 were out of network completely and that was, you
22 know, because I work for ThedaCare and that's
23 St. E's. That was part of the reason why some of
24 the bills weren't paid.

25 THE COURT: Okay. So do you owe this

1 \$12,660.42?

2 THE WITNESS: Currently I have paid off
3 all of -- every single penny of what the bills were.

4 THE COURT: Okay. So your testimony today
5 is that this amount would have been paid in full by
6 you?

7 THE WITNESS: Yes. I believe that's part
8 of the amount that's been paid already.

9 MR. O'CONNELL: Your Honor, I can't
10 represent this defendant. He's constantly talking.

11 THE DEFENDANT: I'm allowed to communicate
12 with my attorney.

13 THE COURT: Mr. Dunay --

14 THE DEFENDANT: That's absurdity.

15 THE COURT: Mr. Dunay, I was hoping to
16 avoid this today but Mr. O'Connell needs to pay
17 attention and I know I -- Let me just finish. You
18 are shaking your head --

19 THE DEFENDANT: Of course I am.

20 THE COURT: -- in disagreement.

21 THE DEFENDANT: I object to you leading
22 the witness.

23 THE COURT: You can object all you want.

24 THE DEFENDANT: I was trying to object.

25 THE COURT: I note that and I appreciate

1 your objection. It's overruled; and then here is
2 the thing, Mr. Dunay. This is going to be real easy
3 today. Based on your conduct at the last hearing
4 and your conduct so far this hearing, which has been
5 better but it's starting. You have been sighing and
6 disagreeing and shaking your head violently, and I
7 just ignored it.

8 THE DEFENDANT: You should have recused
9 yourself prior.

10 THE COURT: I know.

11 THE DEFENDANT: I have already written you
12 up.

13 THE COURT: The bottom line is you are
14 going to be removed from this courtroom momentarily
15 if you continue to interrupt and not allow these
16 proceedings to go forward. I will just tell you --
17 See, you are trying to interrupt me right now but I
18 don't want to do that. I am not threatening you.

19 THE DEFENDANT: Yes, you are threatening
20 me.

21 THE COURT: I am telling you the reality.
22 My preference is that that not happen. I am not
23 going to warn you again. There's going to be a
24 point in time where you are interrupting so much and
25 not allowing this proceeding to go forward that you

1 are going to be removed and we're going to continue
2 this hearing without you being present and
3 Mr. O'Connell can then do his job representing.

4 THE DEFENDANT: He's been adversarial to
5 me since the postconviction hearing, even at the
6 postconviction hearing.

7 THE COURT: It's not your turn to talk,
8 Mr. Dunay. If you continue to talk, I will invoke
9 it.

10 THE DEFENDANT: I have an opportunity. I
11 have the right to speak.

12 THE COURT: Right now isn't your time.

13 THE DEFENDANT: I have a right to speak.

14 THE COURT: You don't.

15 THE DEFENDANT: Yes, I do.

16 THE COURT: No, you don't.

17 THE DEFENDANT: I would like one thing put
18 on the record.

19 THE COURT: No. We're going to go
20 forward.

21 THE DEFENDANT: No. The victim should be
22 here to answer some of these questions.

23 THE COURT: All right.

24 THE DEFENDANT: You should not be leading
25 and you should not be leading the witness that's on

1 the phone.

2 THE COURT: Ms. ██████ my understanding is
3 that --

4 THE DEFENDANT: I object.

5 THE COURT: -- based on what you have said
6 that you have paid this in full?

7 THE WITNESS: I have paid. I don't know
8 that direct bill right in front of you, but I have
9 paid almost every penny of what all of those bills
10 total.

11 THE COURT: And what you put in your
12 affidavit you have paid?

13 THE WITNESS: Yes.

14 THE COURT: And I just want to be sure
15 that none of those amounts are -- were paid by an
16 insurance company.

17 THE WITNESS: No.

18 THE COURT: And you weren't reimbursed by
19 an insurance company for those amounts?

20 THE WITNESS: No.

21 THE COURT: Those are out-of-pocket
22 expenses that you incurred and that you paid?

23 THE WITNESS: Correct.

24 THE COURT: And you're attributing all of
25 that to the conduct and the criminal conduct of

1 Mr. Dunay?

2 THE WITNESS: Correct.

3 THE COURT: Okay.

4 THE DEFENDANT: He's leading the witness.

5 THE COURT: Go ahead, Mr. O'Connell.

6 BY MR. O'CONNELL:

7 Q Ms. ████████, it appears looking at the bill here that
8 none of this amount was applied towards the
9 deductible. What was the reason why it wasn't
10 applied to the deductible? Do you know?

11 A Again, I don't know. Like, I don't have the bills
12 in front of me and I don't have the insurance plan
13 from several years ago in front of me; but I know
14 that there was several bills that were not covered
15 because of the out of network, you know, the
16 situation of them being out of network. You know,
17 then there was another bill that was not covered
18 because she had actually lost or against medical
19 advice because she was too distraught to continue a
20 program. So, again, I don't know which one
21 100 percent that you are talking about; but I am
22 pretty sure you are talking about the inpatient one.

23 Q Okay. I will move on to the second bill.

24 (Discussion off the record between the
25 defendant and Mr. O'Connell.)

1 THE COURT: Mr. O'Connell, is he
2 continuing to disrupt you?

3 THE DEFENDANT: I'm allowed to speak with
4 my attorney.

5 MR. O'CONNELL: He is.

6 THE COURT: He is?

7 THE DEFENDANT: I'm allowed to speak with
8 my attorney.

9 MR. O'CONNELL: He is.

10 THE DEFENDANT: Are you -- are you -- Do
11 you work for me? Really?

12 THE COURT: Mr. O'Connell, you can
13 continue. Go ahead asking your questions. Again,
14 Mr. Dunay, you are going to be removed.

15 THE DEFENDANT: My attorney is supposed to
16 work for me.

17 THE COURT: He's asking questions and you
18 are disrupting him and not allowing him to do that.

19 THE DEFENDANT: I asked him --

20 THE COURT: Mr. O'Connell.

21 THE DEFENDANT: I asked him to ask a
22 couple of questions.

23 THE COURT: It's not your turn to talk.

24 THE DEFENDANT: When is my turn to talk?

25 THE COURT: It's not your turn. We will

1 let you know. Go ahead, Mr. O'Connell.

2 THE DEFENDANT: This is an absurdity.

3 THE COURT: Mr. O'Connell.

4 THE DEFENDANT: This is a circus court.

5 You are a clown. Go smirk up there.

6 THE COURT: All right. Mr. Dunay, you are

7 removed. I will find that under the case law that

8 your conduct has become so disruptive.

9 THE DEFENDANT: I am allowed to.

10 THE COURT: You are gone.

11 THE DEFENDANT: I object.

12 THE COURT: We will check with you in a

13 few minutes.

14 THE DEFENDANT: I object. I object.

15 THE COURT: Okay. So the record should

16 indicate that Mr. Dunay is removed.

17 THE DEFENDANT: You are a clown. You are

18 a clown. I have already written you up -- you

19 wait -- for misconduct, for violation of Wisconsin

20 Stats 757.81, misconduct.

21 THE COURT: Mr. Dunay --

22 THE DEFENDANT: Son of a bitch.

23 THE COURT: -- has been removed. I just

24 want to make a record of it. His conduct,

25 Mr. O'Connell, is not allowing you to ask questions.

1 I understand your frustration. He's not doing
2 anything productive in my sense. For example,
3 calling me a clown and a circus I can tolerate; but
4 it's not allowing the proceedings to be followed.
5 We will check with him momentarily and see if he's
6 calmed down and wants to participate in it. I think
7 given the circumstances we are trying to get
8 testimony out of Ms. [REDACTED]. He's become so
9 disruptive that we can't proceed in an orderly
10 manner. We have just wasted the last 15 or
11 20 minutes dealing with him so go ahead.

12 Mr. O'Connell, do you agree with all of that?

13 MR. O'CONNELL: Yes, your Honor.

14 THE COURT: Okay. I mean you agree that
15 his conduct was disruptive enough to interfere with
16 your ability to ask questions and do your job today?

17 MR. O'CONNELL: I was having a difficult
18 time doing my job.

19 THE COURT: Mr. Kaiser, anything you want
20 to say?

21 MR. KAISER: No, your Honor. Thank you.

22 THE COURT: Go ahead, Mr. O'Connell.

23 BY MR. O'CONNELL:

24 Q Ms. [REDACTED], the second bill that I am looking at --
25 The date of service is April 13, 2016. It looks

1 like it was a medical plan for John M. Oestreicher.
2 I am not sure if I am pronouncing that name
3 correctly. The patient responsibility -- It looks
4 like the charge was \$262; and the patient
5 responsibility ended up being \$23.06. Are you
6 familiar with that, with that bill?

7 A I can't recall that bill, what it is.

8 Q So other than the -- other than providing us with a
9 generalization of what it could be, you are not --
10 You are not sure what specifically that service was
11 for?

12 A So was that dated just a few days after the
13 hospitalization or was that dated during the
14 hospitalization?

15 Q I am looking right now.

16 A Okay.

17 Q All I see on my document -- it looks like -- The
18 only thing I see on my document is it was processed.
19 I'm not sure what this means; but I see in the
20 middle of the document it says processed on
21 February 10, 2017. So that would have been about
22 approximately ten minutes later. I also see a print
23 date at the very top right indicating February 10,
24 2017.

25 MR. KAISER: Judge, I hate to interrupt

1 and it's sort of an objection. Her question was to
2 give her a better idea that what the service was
3 that was provided was the service provided during
4 the time of the hospitalization. The first page,
5 which was the hospitalization at \$12,000, has a
6 hospitalization from April 12 to April 19. This
7 page has services provided by John Oestreicher,
8 O-E-S-T-R-E-I-C-H-ER, services provided on April 13,
9 2016. So to actually answer her question the answer
10 is it appears by the date of April 13, 2016, that
11 that would have been during the hospitalization.

12 THE COURT: Right. We can take it a step
13 further that the next page, which is Deborah
14 Scuglik, S-C-U-G-L-I-K, has dates of service during
15 that same inpatient time, April 13 to April 19. The
16 next page is Dean Smith with dates of service of
17 April 16 and April 17 of 2016. So that would be in
18 that same inpatient time in April of 2016, and then
19 the last page would be outside the service. It's
20 St. Elizabeth Hospital for dates of service of
21 November 16 of 2016. So I think I agree with you,
22 Mr. Kaiser. Just so you understand, Ms. ██████,
23 these bills all seem to be for that April timeframe
24 of 2016 other than the St. Elizabeth bill that you
25 paid \$200 for from dates of service in November of

1 2016.

2 THE WITNESS: Okay.

3 MR. O'CONNELL: Okay.

4 THE COURT: Do you agree with that,
5 Mr. O'Connell?

6 MR. O'CONNELL: I agree that the dates
7 were that. I -- I guess I don't want to stipulate.
8 I would let Ms. [REDACTED] answer that if she knows but I
9 don't know whether this work was done for these, for
10 these three. I'm not sure if they are doctors or
11 whomever they are. I'm not sure if they were done
12 at that facility or if they were done at a different
13 facility where -- where [REDACTED] daughter was
14 transferred to within the plan. I guess I don't
15 know that.

16 THE COURT: Do you know?

17 MR. KAISER: I object to the relevance.

18 THE COURT: Do you know, Ms. [REDACTED]?

19 THE WITNESS: So if they were done during
20 the dates she was in inpatient, which it sounds like
21 they were, then all of that was most likely done
22 through ThedaCare or whatever, however they contract
23 out to; or it has to do with being inpatient at
24 St. E's.

25 MR. O'CONNELL: Okay.

1 BY MR. O'CONNELL:

2 Q And, Ms. ██████ would your -- Just, I guess, to kind
3 of save time here, I know the first bill that I
4 asked you about regarding the \$12,000 bill, you had
5 indicated that you weren't entirely sure but you
6 believed it was likely work that would have been
7 done inpatient?

8 A Uh-huh.

9 Q And that you weren't there specifically for the
10 treatment. Is that the same thing that you would
11 also say the same, I guess, the same answers you
12 would be providing if I asked those questions on
13 these additional three bills?

14 A Yes.

15 Q Okay. Then I'm going to move on to this last one,
16 which was the date of service November 16, 2016.
17 The total bill there or I'm sorry. The patient
18 responsibility there was \$200, and it doesn't appear
19 that any of that amount was applied towards your
20 deductible. Do you know why that wasn't applied
21 towards your deductible?

22 A I do not.

23 Q Is that same -- Again, I'm trying to save here. For
24 any of these bills, they weren't applied toward the
25 deductible. You wouldn't know why they were not

1 applied?

2 A No, not offhand.

3 MR. O'CONNELL: I don't have any further
4 questions for this witness.

5 THE COURT: Mr. Kaiser?

6 REDIRECT EXAMINATION

7 BY MR. KAISER:

8 Q If you recall, Ms. ██████ the November 16 of 2016
9 services were provided for St. Elizabeth's Hospital.
10 It appears it was for one day. There was -- Do you
11 recall what the services were that were provided on
12 that day in November of 2016?

13 A I don't recall exactly but I know there's been --
14 there's been times that she's been inpatient.
15 However, she initially -- You initially go to
16 St. Elizabeth's for an assessment and to be
17 medically cleared. So you sit in the emergency
18 room, do that and then and you said it was just for
19 completely, like, a \$200 flat fee?

20 Q No. It was total charges of \$724.62.

21 A Oh.

22 Q Then there was some application to the copay. So
23 eventually the plan paid \$437.67 and you were
24 responsible for \$200.

25 A Okay.

1 Q My general question is as you stated in the
2 affidavit were the costs that you incurred and have
3 now paid -- Were they incurred after you learned of
4 the defendant's online relationship with your
5 daughter?

6 A Yes.

7 Q And when you say you paid all of the bills that you
8 two years ago asked to be paid by the defendant, you
9 paid those out of your pocket; is that correct?

10 A That is correct.

11 MR. KAISER: No further questions.

12 THE COURT: Mr. O'Connell?

13 MR. O'CONNELL: I just have one or two.

14 RE CROSS EXAMINATION

15 BY MR. O'CONNELL:

16 Q I'm not sure, [REDACTED], if you were the one who
17 provided this or if it was your daughter. I recall
18 in the PSI someone had indicated that -- I just want
19 to get confirmation if you are aware of this or not;
20 but someone had indicated that your daughter had
21 received treatment for -- I believe it was treatment
22 for at the very least depression, if not suicidal
23 issues. This was before Ms. [REDACTED] had been in
24 contact with Mr. Dunay. Are you aware of that at
25 all?

1 A I guess I'm not aware. I am not understanding the
2 question.

3 Q My question is are you aware of whether your
4 daughter had received treatment for any sort of
5 depression or mental health issues before your
6 daughter met Mr. Dunay?

7 A Before Mr. Dunay she had been treated for depression
8 for some time and separation anxiety. However, she
9 was not suicidal until after the case that started.
10 She did not participate in self-injurious behaviors
11 until after the situation.

12 Q Okay. I don't plan on going any further than this
13 last question, but did your daughter receive
14 inpatient at all before she met Mr. Dunay?

15 A No.

16 MR. O'CONNELL: I have no further
17 questions.

18 MR. KAISER: Nothing else.

19 THE COURT: Okay. Ms. [REDACTED], the -- Your
20 testimony is over so can we hang up with her?

21 MR. KAISER: I would ask that it be so.

22 MR. O'CONNELL: That's fine.

23 THE COURT: You said yes?

24 MR. O'CONNELL: Yes.

25 THE COURT: Ms. [REDACTED], we will hang up and

1 we appreciate you taking time.

2 THE WITNESS: Can I ask one question?

3 THE COURT: Possibly. I'm not sure if we
4 can answer it.

5 THE WITNESS: I feel a little apprehensive
6 after listening to his -- his, I guess, behavior in
7 there. I just want to make sure that myself and my
8 family is safe.

9 THE COURT: Right. I know
10 Attorney Tempelis is here. You can follow up with
11 her or the victim witness coordinator here in
12 Outagamie County and deal with those issues, if
13 that's okay with you. Ms. Tempelis is shaking her
14 head yes. That should be what you should do.

15 MS. TEMPELIS: Just remind her he's in
16 prison and will go back to prison.

17 THE COURT: Ms. Tempelis just said he is
18 in prison and he's going back to prison.

19 THE WITNESS: Okay. All right. Thank
20 you.

21 THE COURT: Thanks.

22 MR. KAISER: Thank you, judge. Your
23 Honor, you did ask earlier if I had another witness;
24 and I do have another witness. I hope the Court
25 doesn't mind. I am just going to call the detective

1 briefly on the other issue in restitution, which is
2 the defendant's ability to pay.

3 THE COURT: Okay.

4 MR. KAISER: That's usually an argument
5 when they are in prison. If I could call him, I
6 would appreciate it.

7 THE COURT: Sure. Come on up to the
8 witness stand. As he's coming up, we can check with
9 the jail and see if Mr. Dunay wants to be brought
10 back down. The record should indicate it's 12:05.
11 He was removed at 11:52. I heard some commotion in
12 the back room after the jail took him back. I was
13 just told the jail took him up. Do you mind calling
14 up there and see if he wants to come back down? We
15 will give him that opportunity.

16 BRANDON STAHMANN, having been called as a
17 witness, having been first duly sworn on oath, was
18 examined and testified as follows:

19 THE CLERK: Please have a seat. Can you
20 state and spell your name for the record?

21 THE WITNESS: Brandon Stahmann,
22 B-R-A-N-D-O-N, S-T-A-H-M-A-N-N.

23 THE COURT: All right. Your witness,
24 Mr. Kaiser.

25 MR. KAISER: Judge, did you want me to

1 wait in regards to -- -

2 THE COURT: No. I think we keep going.
3 We will see if he even participates. The way that
4 he was being hauled out of here -- He wasn't walking
5 out on his own free will. I don't know if you guys
6 saw that. He was physically being lifted and moved
7 by the deputy.

8 So I doubt that -- We will see what he
9 will do. He could be combative and I don't think we
10 allow his disorderly behavior and disruptive
11 behavior to belabor this or interfere with this
12 anymore, but we at least give him an opportunity to
13 try and come back in. If he wants to, he can but
14 we'll keep going so go ahead.

15 MR. KAISER: Thank you, judge.

16 DIRECT EXAMINATION

17 BY MR. KAISER:

18 Q Would you state your name and spell your first and
19 last names for us? Please speak up so everyone can
20 hear you.

21 A Sure. Do you want me to?

22 THE COURT: You did that already.

23 THE WITNESS: I did that already. Would
24 you like me to do it again?

25 MR. KAISER: No. That's okay.

1 BY MR. KAISER:

2 Q Where do you work?

3 A Fox Valley Metro Police Department.

4 Q Because -- Yeah, thanks. It's --

5 A You're welcome.

6 Q The difference between hearing you and not hearing
7 you is that much to the microphone. What's your job
8 there?

9 A I'm a police officer.

10 Q Have you been involved in the investigation of the
11 case that's the subject of today's restitution
12 hearing?

13 A Yes.

14 Q And were you subsequently involved in the
15 investigation of the pending matter?

16 A Yes.

17 Q During the course of your investigation into the
18 pending matter, did you have occasion to listen to
19 conversations the defendant had with his father
20 regarding what it was he was going to do with the
21 money that he made in prison?

22 A Yes.

23 Q And did you type up those conversations exactly as
24 they appeared on the recording?

25 A I did.

1 THE COURT: You're going to mark that as
2 Exhibit 2?

3 MR. KAISER: If we could.

4 (Exhibit No. 2 marked for identification.)

5 THE COURT: Yes. Mr. O'Connell, you have
6 a copy of it?

7 MR. O'CONNELL: I do.

8 BY MR. KAISER:

9 Q I'm showing you what's been marked as Exhibit 2 for
10 identification, which is identified as pages 43
11 through 46 of 49 pages. Could you tell us if you
12 recognize what those pages are?

13 A I do. It looks like a transcript of some inmate
14 telephone calls from Kevin Dunay.

15 Q That's a transcript that you prepared based on
16 listening to those inmate telephone calls?

17 A That's correct.

18 Q So turning to the top of page 44, what did the
19 defendant say he was, the very first -- top of the
20 second sentence?

21 A I've got nothing to go back to, no job, no career,
22 no family. I am just a ticking time bomb when I get
23 out in nine years. So your answer is ticking time
24 bomb.

25 Q A little bit of the way down what did the defendant

1 say he was going to do when he gets out in nine
2 years, just a little bit above the middle?

3 A He said he was going to fix everything.

4 Q So we're talking here today about money, about the
5 defendant's money. Could you go to what the
6 defendant said; and as far as the bottom paragraph
7 goes, it appears that this was Call No. 23 on
8 June 11 of 2018; is that correct?

9 A That's correct.

10 Q All right. And could you just read that bottom of
11 page 44 to the top of page 45, what the defendant
12 said?

13 A Sure. No. Listen. I already told you. My plans
14 don't include me ever spending a dime when I get
15 out, okay? I don't need the money. I'll make
16 whatever money I need here, hopefully; and then and
17 that's -- I already calculated how much money I need
18 and that's it. That's all I need. I don't need
19 much. I only need a couple thousand to get done
20 what I need to get done. That's it.

21 And I could make that last couple years
22 that I work here a -- I could maybe get a work
23 release for the last year and a half just to make
24 enough money and I'll be good. Yep. I told you I
25 am adamant on that. I am adamant on that. There's

1 nothing you can say or anybody can change my mind,
2 what I'm gonna do when I get out.

3 Q And just -- So that's the quote; but just to
4 summarize the tenor of the remainder of the
5 conversations, what was it he was telling his father
6 consistently over the time of your listening to
7 these phone calls that he was going to do when he
8 got out?

9 A Sure. My belief is when he gets out of prison he
10 wanted to come back and harm people that
11 investigated the case against him.

12 Q Including the district attorney in New Jersey, both
13 district attorneys in New Jersey, the district
14 attorney here, and Judge McGinnis; is that correct?

15 A That is correct.

16 MR. KAISER: No further questions.

17 THE COURT: All right. Attorney
18 O'Connell, cross-examination?

19 MR. O'CONNELL: I don't have any
20 questions.

21 THE COURT: All right. You may step down.
22 Thanks for your testimony. Any other witnesses,
23 Mr. Kaiser?

24 MR. KAISER: No. I just want to make sure
25 Exhibit 2 got admitted, judge.

1 THE COURT: Exhibit 2 will be received and
2 I will take that.

3 (Exhibit No. 2 received.)

4 THE COURT: Any objection to that,
5 Mr. O'Connell?

6 MR. O'CONNELL: No, your Honor.

7 THE COURT: Any other witnesses,
8 Mr. Kaiser?

9 MR. KAISER: No, your Honor. Thank you.

10 THE COURT: Mr. O'Connell, any witnesses?

11 MR. O'CONNELL: No, your Honor.

12 THE COURT: I know the officer -- It's now
13 12:10; and the officer came through to go up to get
14 him a couple minutes ago. We probably all saw that.
15 It seems like we are done for the day.

16 MR. O'CONNELL: Yeah, your Honor. I just
17 have a real brief argument.

18 THE COURT: I would -- Argument that you
19 need to make now? I think what we should do is
20 allow you an opportunity to go to sit down with
21 Mr. Dunay because he met -- missed the last
22 15 minutes. Fill him in and then submit something
23 which takes into consideration your arguments as
24 well as his arguments that you think need to be made
25 or whatever comments that he wanted to make outside

1 of the circus and stuff. The fact that he missed
2 the last 15 minutes -- I want you to have an
3 opportunity to argue after you have a chance to meet
4 with him and consult with him.

5 So we have that hearing. We have a
6 decision hearing scheduled on September 4 at 9:00.
7 Mr. O'Connell, you asked to appear by phone. If
8 that's your preference, I am okay with that.
9 Mr. Dunay will definitely appear by phone from
10 prison so he doesn't have to be transported back.
11 Mr. Kaiser, you can choose what you want to do.
12 Just let us know.

13 MR. KAISER: I will have to think about
14 that, judge. Thank you.

15 THE COURT: When would you like to have
16 the written submissions?

17 (Defendant entering the courtroom.)

18 MR. O'CONNELL: Could we have three weeks?

19 THE COURT: Sure.

20 MR. O'CONNELL: Could we have three weeks?

21 THE COURT: So Mr. Dunay is back in the
22 courtroom with two officers and so three weeks from
23 today, Mr. O'Connell?

24 MR. O'CONNELL: Yes, your Honor.

25 THE COURT: So that puts us at August 19.

1 Is that enough time?

2 MR. O'CONNELL: Yes.

3 THE COURT: Okay.

4 MR. KAISER: Could I have until the 29th,
5 your Honor?

6 THE COURT: Sure.

7 MR. KAISER: Thank you.

8 THE COURT: And then, Mr. O'Connell, if
9 you want to have a reply time, it's cutting it close
10 with the hearing on the 4th but can you -- Labor Day
11 is the 2nd. Can you get me something by Tuesday,
12 the 3rd, at noon?

13 MR. O'CONNELL: Yeah, that's fine.

14 THE COURT: I will plan on having the
15 afternoon of Tuesday to review that, and then the
16 testimony is done. Mr. O'Connell, you will have a
17 chance. Mr. Dunay is now next to you. You can talk
18 with him about the testimony that he missed during
19 the ten or 15 minutes that he was gone.

20 THE DEFENDANT: I would like to say
21 something.

22 THE COURT: This isn't an opportunity for
23 you to talk, Mr. Dunay.

24 THE DEFENDANT: I would like to say
25 something.

1 THE COURT: I get that.

2 THE DEFENDANT: I am allowed to speak.

3 THE COURT: You are not right now.

4 THE DEFENDANT: You will give me the
5 opportunity to speak.

6 THE COURT: Mr. O'Connell, if you want to
7 take that time, meet with him and make whatever
8 arguments that you want by that date. Anything
9 else, Mr. Kaiser?

10 MR. KAISER: No.

11 THE COURT: Anything else, Mr. O'Connell?

12 THE DEFENDANT: The victim should be here.

13 MR. O'CONNELL: No.

14 THE COURT: We are adjourned.

15 THE DEFENDANT: The victim should be here.
16 Please put that on the record. You should recuse
17 yourself. I wrote you up for misconduct.

18

19 (Proceedings concluded at 12:15 p.m.)

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1 STATE OF WISCONSIN)

2) SS:

3 OUTAGAMIE COUNTY)

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I, TERRA OTIS, RPR, RMR, CRR, CRC, do hereby certify that I reported the foregoing matter and that the foregoing transcript, consisting of 47 pages, has been carefully compared by me with my stenographic notes as taken by me in machine shorthand and by me thereafter transcribed and it is a true and correct transcript of proceedings had in said matter to the best of my knowledge.

Dated this 30th day of July, 2019.

(Electronically signed by Terra Otis)
TERRA OTIS, RPR, RMR, CRR, CRC
Official Reporter

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They have to let me out, and I'm waiting for that day. They gave me something to live for. That's for sure. They gave me something to live for.

Later in the conversation:

Kevin: I'll show the system. I'll show the system.

Call #22 06/10/2018 1510 hours to 941-486-8718

Kevin Dunay was telling his father Robert Dunay that he was never going to call his family again:

Kevin: They'll never see me again, neither will she.

Robert: Well we gotta start talking about being able to get up there and spend some time with ya.

Kevin: I don't think anybody is coming here to see me, to be honest with ya. Im not sure I want anybody to come here. Just let me sit my nine years and then I'm gonna do what I'm gonna do when I get out. That's the only thing I'm interested in at this point. Is my future. So.

Robert: Well, I guess...

Kevin: Everyone else fuckin just uh you know abandoned me so, now Im gonna fuckin sit here for fuckin nine more years.

Robert: You put yourself in one hell of a mess Kevin.

Kevin and Robert continued that conversation:

Robert: They were out to get you. And you put yourself in a bad position. And then you were talking a lot and that put you in a worse position.

Kevin: I was pissed off

Robert: I know you were pissed off. But that crucified yourself. You put yourself in a royal position.

Kevin: Well, they underestimated me because I make promises.

Robert: Oh don't promise.

Kevin: I make promises. I got nothing left to go back to when I get out of here, so.

Robert: You've got more than you think.



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Kevin: I've got nothing to go back to. No job, no career, no family. I'm just a ticking time bomb when I get out in nine years.

Robert: Well don't be.

Kevin: I am.

Robert: And you shouldn't be saying anything like that.

Kevin: I didn't say anything. I just said I'm a ticking time bomb when I get out in nine years, that's all. Slow fuse, that's all. Slow fuse.

Robert: Oh Kevin, what a mess.

Kevin: I'll fix it. I'll fix it. When I get out in nine years I'll fix it. I'll fix everything.

Call #23 06/11/2018 1903 hours to 941-486-8718

Kevin Dunay was telling his father Robert Dunay about a letter he received from his last defense attorney, Attorney Bucket:

Kevin: Yeah but he's fuckin, he knows nothin.g about my case. He should be talking to the first public defender that I fired. He's the one he should talk to because he's knows more about my case than this fucker does. This fucker did nothing, Bucket did nothing for my case.

Robert: Well he was only hired to listen to your sentencing.

Kevin: That's the problem. That's all the judge wanted him to do, that's it, so. Oh well. I'll deal with that when I get a chance, when I get outta here. But whatever. Yep.

Later in the conversation, Kevin Dunay asked Robert Dunay if he had spoken with his ex-wife Lucy about changing his retirement account so that she can access it:

Kevin: Did you talk to her again after I talked with you yesterday?

Robert: No, no I didn't. But I'm telling you what I told her.

Kevin: She's gonna have to get it changed. It's not mine, I don't need it, I don't need that money anyway so it doesn't matter. I don't need it, so. I don't want it. I don't need it.

Robert: You'll need it more when you get out.

Kevin: No, listen, I already told you, my plans don't include me ever spending a dime when I get out. Ok? I don't need the money. I'll make whatever money I need here, hopefully, and then, and that's, I already calculated how much money I need, and that's it. That's all I need. I don't need much, I only need a couple thousand to get done what I need to get done, that's it.

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And I could make that last couple years that I work here, uh, I could maybe get a work release for the last year and a half just to make enough money and I'll be good. Yep. I told you I'm adamant on that. I'm adamant on that. There's nothing you can say, or anybody can change my mind what I'm gonna do when I get out.

Robert: Oh well.

Kevin: Yep. Oh well. I'll never see the kids again, so it doesn't matter. You can thank the fuckin piece of shit judge for that, and the prosecutor, and the detectives. You can thank those fuckers for that.

Robert: Kevin. I don't want to hear this please. Please don't talk like that to me. I'm upset now anyways.

Kevin: There's nothing to be upset about.

Robert: The whole thing. This whole thing is...

Kevin: I've accepted my fate. I know the time I'm gonna do and I know what I'm gonna do when I get out.

Robert: Watch your..

Kevin: I'm not saying anything. I said, you know, I planned my future, man. I planned my future. I planned it. I got nine more years to plan for it.

Robert: That's nonsense. That's nonsense.

Later in the conversation:

Kevin: Yeah well, and I'll be rotting here in hell. Just counting the days until they make the mistake to let me out.

Robert: Just don't even say something like that.

Kevin: Well, whatever. I've got nothing left to lose dad. They took everything from me. Fuckers.

Robert: Well you lost it by your fooling around. You lost it. It's like playing cards Kevin. You took a gamble and you lost. And now you're blaming it on someone else.

Kevin: Yeah no I didn't. Right now I'm in check. But wait til I get out. It'll be check mate and I'll clear the board. I'm gonna finish the game. I'll finish the game when I get out.

Robert: I don't like to hear your kind of comments like that.

Kevin: Yeah well. I have nothing left to lose dad, nothing left to lose.

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Robert: Yes you do, you have more than you realize.

Kevin: I have nothing left to lose.

Robert: The only reason you're there for so long is because your attitude got you an extra three or four years.

Kevin: Yeah, whatever. I'll finish the game when I get out. I'll finish the game.

Robert: It's not a goddamn game Kevin.

Kevin: It's a game. Now it's a game for me. It's a game for me.

Robert: You really like to get me upset.

Kevin: I'm not trying to get you upset, it's reality.

Robert: The reality is what you did caused this whole thing.

Kevin: Well they gotta let me out. They have to let me out.

Later in the conversation:

Kevin: My life is already worthless dad. I'm still here for one reason only that's it. No other reason.

Robert: You're there for one reason, don't blame it on the judge.

Kevin: I'm not blaming it on anybody, but I'll finish the game when I get out. I'll finish the game.

Robert: It was a game you started and you lost.

Kevin: No I didn't. I told ya. It'll be check mate when I get out of here. Check mate.

Call #24 06/12/2018 1846 hours to 518-260-8838

Telephone conversation between Kevin Dunay and his friend/co-worker Dave. During the conversation, Kevin Dunay tells Dave that "This nightmare is never gonna be over:

Dave: Not so good, huh?

Kevin: No not so good. You know, nine more years is a long fucking time for this. You know. I mean the judge really fucked me over. The time he gave me, you know, I don't know how he can justify it, you know.

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FILED

08-15-2019

Clerk of Circuit Court
Outagamie County

2015CF000470

STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY

STATE OF WISCONSIN,

Plaintiff

**DEFENDANT'S BRIEF
REGARDS TO RESTITUTION**

-vs-

Case No. 15CF470

Kevin R. Dunay,

Defendant

Law.

Wisconsin statute 973.20 addresses restitution law in this state. As for 973.20(1r), it states:

When imposing sentence or ordering probation for any crime . . . for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing . . . unless the court finds substantial reason not to do so and states the reason on the record.

Wis. Stat. 973.20(1r). Also, of note, Wis. Stat. 973.20(14)(a) indicates the burden by a preponderance of evidence is on the victim to show the loss of the victim as a result of the crime considered at sentencing. Wis. Stat. 973.20((14)(a).

Facts.

Prior to the restitution hearing, a document was filed indicating the victim was seeking \$17, 483.69. In breaking that number down, \$13, 947.17 was for medical bills for the victim, and \$3,536.52 was for lost wages of the mother.

At the restitution hearing, the victim's mother testified. At that time, regarding her lost wages, she was not able to provide dates when she took off work, but said she took off to help her daughter doing things such "meetings, visitations . . . and planning for her to come home and follow-up". She noted she also did not know what her deductible, her coinsurance, or her total out of pocket was.¹ As for the bills themselves, she indicated it was her understanding that her daughter received treatment as a result of conduct from Dunay; however, she was not actually there for the treatment. She also could not give any specifics per bill as to why each bill was not covered by her insurance; in one or more situation(s), she indicated they were out of network, and in one or more situation(s), it was because the victim didn't follow through with treatment.

Argument.

Here, as noted above, the victim has the burden to show by a preponderance of evidence that the defendant's conduct caused the expenses. Here, the victim chose not to testify, and the victim's mother chose to testify by phone. At the restitution hearing, the victim's mother indicated she was not able to provide what days she took off work and what she specifically did on those days, but rather gave generalizations as to what she did when she took off. By not providing any specifics, this court and the defense are unable to learn whether she should be awarded restitution, and if so, for what amount of hours or days. Considering such, it appears the victim has not shown by a preponderance of evidence that she

¹ The court noted though, it appeared the individual deductible appeared to be \$600.

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should be awarded lost wages.

As for the medical bills, the victim has provided medical bills matching the amount she is seeking. However, she indicated she was not in the room during treatment, and she was not able to give certainty that the victim was treated as a result of conduct from Dunay. We do know that the victim had obtained treatment before she met the defendant, that the victim chose to communicate with the defendant by preference and without force or fear, and that treatment occurred approximately a year after her communications with Dunay.

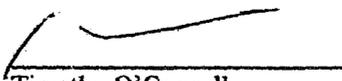
Further, the victim's mother indicated she did not know what the victim's deductible, total out of pocket, or co insurance was. Nonetheless, she paid all of the bills anyways. Here, without knowing the term's policies, the court is unable to know if the victim is even responsible for the requested amount. In response, the Statute was specifically wrote for situations like this. In it, as discussed above, it indicates the court should not order restitution on an amount if there is a substantial reason. Here, we do not know if the victim's mother was even required to pay the amount based upon her policy.

Finally, even if the bills are all for treatment and she was required to pay them consistent with the policy, there is the issue whether it would be just for the defendant to be held accountable for such. At the hearing, when asked why the amount was not covered by insurance, the victim's mother explained in some situations it was because the victim did not complete treatment and some situations where the treatment was out of network. Here, too, the problem is the burden is on the victim and the victim was not able to provide the court with specifics as to what bills were for failing to complete treatment, what bills were for going out of network, and what bills were for something else. The victim also was not able to show why the expenses were not mitigated. It appears the statute was specifically written to address this situation in that it indicates, if there is a substantial reason, the defendant should not be ordered to pay such expenses.

Considering the above, Dunay respectfully requests this court not order restitution.

Date: August 15, 2019

O'Connell Law Office
Attorneys for the Defendant



Timothy O'Connell

State Bar No. 1063957

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Green Bay, WI 54305-1625
(920)-360-1811

their losses as a result of a defendant's criminal conduct." [citations omitted].

State v. Wiskerchen, 2019 WI 1, ¶ 22, 385 Wis. 2d 120, 921 N.W.2d 730.

In this case, to give sufficient weight to the Defendant's complaints about Shelly Casey's testimony to deny her restitution would be to fail to broadly and liberally construe the restitution statute so as to provide her the opportunity to recover the financial losses she has suffered as a result of this criminal's offending against her daughter. The emotional damage to the victim's sense of self-worth and psychological well-being will continue for a long time, possibly forever, and there is no financial compensation that can make up for those deep losses.

First, the Defendant notes that, "Here, the victim chose not to testify, and the victim's mother chose to testify by phone," implying, without saying so, that the victim had not fulfilled her burden to prove her losses by a preponderance of the evidence because she didn't testify. Such an implication ignores a basic statutory underpinning of victim rights law in Wisconsin. Wisconsin Stat. § 950.02(4)(a)2., specifically provides that where the victim of a crime is a child, as in this case, that the "victim" in the case includes the victim's parent. And that makes sense, especially under these circumstances where Shelly Casey, as the child victim's mother, was the one who suffered the financial losses consequent to the Defendant's criminal conduct because, as the child victim's mother, she was the adult responsible for the bills.

Second, it is important to note that the Defendant has not raised inability to pay as a defense to the State's proposed restitution order, pursuant to Wis. Stat. § 973.20(13)(a)2., 3., or 4., and thus has not carried his burden, had he assumed the

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burden, to demonstrate by a preponderance of the evidence that he is unable to pay. Even if he might not ever pay the entire amount ordered, there is no law that says that if he might not pay it all, then he can't be ordered to pay restitution. As is common practice, whatever doesn't get paid by the time his period of supervision is completed can be reduced to a civil judgment. The Defendant's continued incarceration in the Wisconsin State Prison system is no bar to his paying restitution. Wisconsin Stat. § 973.20(11)(c) provides for the Department of Corrections to require that the Defendant authorize the DOC to collect and disburse to the victim restitution owed from the Defendant's wages and from other moneys held in the Defendant's prison account. As the testimony at the hearing demonstrated, the Defendant is planning on making money while in prison and has plans for that money other than making restitution. As he told his father on June 11, 2018,

No, listen, I already told you, my plans don't include me ever spending a dime when I get out OK? I don't need the money. I'll make whatever money I need here, hopefully, and then, and that's, I already calculated how much money I need, and that's it. That's all I need. I don't need much, I only need a couple thousand to get done what I need to get done, that's it.

And I could make that last couple years that I work here, uh, I could maybe get a work release for the last year and a half just to make enough money and I'll be good. . . There's nothing you can say, or anybody can change my mind what I'm gonna do when I get out.

And, of course, as Officer Stahmann testified, much of what the Defendant said on the jail recordings that he was going to do when he got out, was his recounting the revenge he was going to seek against the state actors he believes are responsible for his incarceration. Clearly, the purpose of the restitution statute as described in *Wiskerchen* above can be accomplished by taking the money the Defendant is

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planning on setting aside for revenge and putting it towards the financial burden his criminal conduct placed on his child victim's mother.

Third, the Defendant complains that Ms. Casey could not identify while testifying exactly what dates she had to take off from work to care for her daughter, dates which occurred over three years ago. In the materials attached to the State's letters to the defense of March 25, 2019, and to the Court on May 1, 2019, Ms. Casey delineated how many days were days away from work to care for her daughter that caused her lost salary, which is consistent with the recompense allowed by statute for, "income lost as a result of a crime committed at sentencing." Wis. Stat. § 973.20(3)(c). In a broad and liberal construction of the statute, as required by *Wiskerchen, supra*, nothing else is required to compensate Ms. Casey for those losses.

Fourth, the Defendant complains that Ms. Casey took that time off from work for, "meetings, visitations . . . and planning for her to come home and follow-up," but wasn't specific enough for the Defendant's taste as to what she did on those days so as to require compensation, as if those things would not be things that would require her to be away from work to care for her daughter. And he complains that the record doesn't support finding that the trauma and follow-up care the child victim received, and that Ms. Casey assisted with on her days off, results from this offender's criminal conduct. The argument is patently absurd. Common sense dictates that all the care this mother could give her daughter, whenever she could, was required. As Ms. Casey told the PSI writer, although the child victim had suffered severe anxiety and depression when she was younger, ". . . this was controlled and [she] was able to deal

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with the things she has been through,” *before* “. . . she found . . . a guy who preyed on her vulnerabilities and made her feel like she did not have any option.” (Pre-Sentence Investigation 8, Jan. 9, 2018.) Ms. Casey testified at the hearing, in response to the court’s questions, that all of her out-of-pocket expenses were the result of the Defendant’s conduct and behavior.

Ms. Casey went on to describe to the PSI writer that after the Defendant entered her daughter’s life and his abuse of her was exposed, the child victim

. . . became so depressed that she tried to kill herself a couple times. . . She has also started to cut herself, “To Release the Pain.” She also carved horrible words on her chest or stomach, such as, “whore,” “slut,” and “don’t deserve happiness.” She has been hospitalized a total of 6 times for suicidal thoughts and actions. She has hit an all-time low after this has happened.

(Pre-Sentence Investigation 9, Jan. 9, 2018.) Care for these events in this child victim’s life are exactly the kind of expenses for which restitution is provided under Wis. Stat. § 973.20(3)(a). Neither the statute, nor any case law interpretation of it, requires that either the child victim herself testify regarding her care, or that her mother be present for those counseling sessions and recount on the record what was said in them for the Court to find that the offender ought to compensate the victim for the costs. Not requiring such testimony is the appropriate broad and liberal interpretation of the restitution statute to ensure that its goal and purpose of victims being compensated for their losses is accomplished. Moreover, this goal is accomplished without violating the victim’s privilege of privacy pursuant to Wis. Stat. §§ 905.04(2) and 950.04(1v)(ag).

Fifth, the Defendant complains that Ms. Casey should not be compensated for what this criminal’s offenses have cost her because she, “. . . did not know what her

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deductible, her coinsurance, or her total out of pocket was,” nor, “specifics per bill as to why each bill was not covered by her insurance.” This is the most absurd and insulting of this Defendant’s arguments. The documents provided to the defense attached to the State’s letter of March 25, 2019, and to the Court on May 1, 2019, are from the victim’s insurance company, Employee Benefit Plan ThedaCare, Inc., and specifically delineate those amounts which were “ineligible” for reimbursement, what payments were made by the plan, and what costs were the patient’s responsibility. There cannot be a more accurate delineation of what the Defendant is complaining is deficient in this record than the financial statements from the insurance company itself. Nowhere in Wis. Stat. § 973.20 does it require that the victim who suffered the loss be required to personally explain why her insurance company didn’t cover it. They didn’t. That’s the end of the conversation.

Except that a sort of underlying theme to the Defendant’s argument seems to be that if the insurance company did cover it, then he shouldn’t be liable for it and of course that is not true as a matter of law. Had Employee Benefit Plan ThedaCare, Inc. chosen to make a claim for restitution of the amounts they did pay out, this Court in its discretion could have ordered restitution to the insurance company as well. Wis. Stat. § 973.20(5)(d). The fact that the insurer has not made such a claim to the State to forward to the Court does not relieve the Defendant of his obligation to make restitution to the victim, of the amount she has requested, and which she had already paid, as she testified. To argue that she did not testify to how much she is out of

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pocket flies in the face of her clear testimony that she has paid the entirety of what she has owed for her daughter's care not covered by insurance out of her own pocket.

Finally, the defense argues that the Defendant should not have to pay restitution because, "The victim also was not able to show why the expenses were not mitigated." Neither the statute, nor any case law interpretation of it, requires that the victim "mitigate" the costs of the care necessitated by the Defendant's criminal actions before the Defendant is made liable for those costs. Nor should the Court choose to deny recompense pursuant to Wis. Stat. § 973.20(1r) because there is not a "*substantial* reason not to do so" (emphasis added). As Ms. Casey testified, given the emotional trauma her daughter experienced from the Defendant, it is understandable that she could not always remain and complete treatment when it was made available to her, and when it was not completed, that cost her. The emotional imbalance which led the child victim to make decisions against medical advice in this case were caused by the Defendant's criminal conduct and thus there is not a *substantial* reason for not making him pay for it financially.

THEREFORE, the State respectfully requests that this Honorable Court overrule the Defendant's objections and enter the restitution order first submitted on January 26, 2018, in the amount of \$17,483.69 to Shelly Casey, with the restitution surcharge for administration pursuant to Wis. Stat. § 973.06(1)(g) of \$1,748.37 to the District Attorney's Office, for a total restitution order of \$19,232.06.

[signature on following page]

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Dated the 21st day of August, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Robert J. Kaiser, Jr.
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Outagamie County

STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY
2015CF000470

STATE OF WISCONSIN,

Plaintiff,

**DEFENDANT'S REPLY BRIEF
REGARDS TO RESTITUTION**

-vs-

Case No. 15CF470

Kevin R. Dunay,

Defendant.

Before getting into argument, it is important to clarify whom has the burden. In reviewing the State's argument, it appears to frame the issue as to whether the court should grant the defendant's motion to dismiss restitution. In response, the restitution at this point should be \$0.00. Furthermore, the amount of restitution should only be something other than \$0.00 if the victim has shown by a preponderance that her loss was a result of the crime considered at sentencing, and if this court does not determine there is a substantial reason not to order such. See Wis. Stat. 973.20(14)(a); 973.20(1r).

Furthermore, the State indicates that Dunay failed to consider the fact the statute was meant to liberally construe the statute to permit victim's to be compensated. In response, Dunay was aware of this in drafting his initial brief. However, Dunay's concerns, as indicated previously (as well as will be discussed later in this brief) are that the victim had the opportunity to provide this court with information to make a determination whether restitution was appropriate but provided too few details.

As for the State's first argument, it indicates it believes Dunay argued in his brief that in all cases a victim must testify – even when they are a minor. In response, Dunay takes no such position.¹ Instead, Dunay's argument was that the burden is on the victim to show the court that restitution is appropriate. Here, that burden has not been overcome since there were not enough information provided for a court to make that determination.

The State also objects to the defense's concern that the victim's mother could not identify what dates she took off from work, nor could she explain what specifically she did on those days. Instead, by testifying that she took off of work to do things to help her daughter such as "meetings, visitations, and planning for her to come home and follow-up" – should be enough. In response, again, the defendant requests this Court consider the victim's carries the burden to convince this court, not the other way around. By not knowing what the victim's mother did specifically and on what day, the court is left with unknowns as to what she did and on what day and whether restitution ought to be awarded.

In addition, the State argues that it should not matter what the deductible, coinsurance or total out of pocket was. It also is irrelevant whether the victim was responsible for all the bills. Ultimately, if she paid the bills, she should be compensated. In response, as Dunay previously stated, the statute states this court should not order restitution on an amount if there is a substantial reason. Here, if she is not responsible for the bills, but chooses to make payments, there is a substantial reason not to require Dunay to compensate the victim for these expenses. Again, though, the problem is we do not know what the deductible, coinsurance, total out of

¹ Interestingly, by the time of the hearing, the victim was 18 years old.

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pocket was, and we also do not know what she was responsible for.

Finally, the State argued the statute does not require the victim to mitigate her expenses. In response, it appears the State is responding to the defendant's last paragraph in his initial brief. In said brief, Dunay addressed whether it would be just for the defendant to be held accountable. In the brief, Dunay explained the problem is the burden is on the victim and the victim was not able to provide the court with specifics as to what bills were for failing to complete treatment, what bills were for going out of network, and what bills were for something else. Thus the concern is the victim simply has not provided an explanation. Furthermore, as for the State's position that its interpretation of statute is that a victim never has to mitigate her expenses, the question arises, what if a victim whom was harmed with a small scratch chose to take an airplane ride to China to have the scratch reviewed. Perhaps the scratch would be healed by the time the Chinese doctor reviewed the scratch. However, should the victim automatically be awarded restitution for the airline ticket and doctor bill? Wisconsin Statute 973.20(1r) addresses this extreme example, and the court could "find a substantial reason not to" award restitution. Here, again, the problem is the lack of information provided to this court.

As has been noted, the victim chose not to testify, and the victim's mother could not provide many details. Here, as for lost wages, the victim's mother could not explain what dates she took off from work, nor could she explain what specifically she did on those days. As for the medical expenses themselves, there was a lack of testimony whether the victim was even treated due to the defendant. Here, we do know that the victim had been getting mental help before she met the defendant, she chose to communicate with the defendant by preference and without force or fear, and the treatment she seeks restitution for occurred approximately a year after her communications with Dunay. Further, we do not even know for certain she received treatment because of Dunay. The victim did not testify, and the victim's mother indicated she was not in the room during treatment. Ultimately, this court is left with a lack of information to make a decision. As a result, it does not appear the victim met her burden.

Considering the above, in conjunction with previous arguments, Dunay respectfully requests this court not order restitution.

Date: August 29, 2019

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1 STATE OF WISCONSIN CIRCUIT COURT OUTAGAMIE COUNTY
 2 BRANCH I

3 -----

4 STATE OF WISCONSIN, Transcript of:
 5 Plaintiff, DECISION

6 -vs-

7 KEVIN R. DUNAY, Case No. 15-CF-470
 8 Defendant.

9 -----

10 HONORABLE MARK J. MCGINNIS
 11 JUDGE PRESIDING

12
 13
 14
 15

16 APPEARANCES:

17 ROBERT J. KAISER, JR., Wisconsin Department of
 18 Justice, 17 West Main Street, PO Box 7857, Madison,
 Wisconsin 53707-7857, appearing on behalf of the State of
 Wisconsin.

19 TIMOTHY T. O'CONNELL, O'Connell Law Office, 403
 20 South Jefferson Street, PO Box 1625, Green Bay, Wisconsin
 54305-1625, appearing telephonically on behalf of the
 21 Defendant.

22 The Defendant appeared telephonically.

23
 24

25 Date of proceedings: September 4, 2019

1 able to take down one person.

2 THE DEFENDANT: I object to that
3 statement.

4 THE COURT: All right. And,
5 Mr. O'Connell, then at the end, Mr. O'Connell, we'll
6 ask you if you have any questions or anything you'd
7 like to say. Any issues with that, Mr. O'Connell?

8 MR. O'CONNELL: No.

9 THE COURT: All right.

10 THE DEFENDANT: I object to your
11 statement.

12 THE COURT: All right. Mr. Dunay, if you
13 speak out again -- We have the volume down minimal;
14 but if you speak out again, you're going to be
15 disconnected and you're going to lose your
16 opportunity to be at this decision hearing. I want
17 the court reporter to take down a transcript of this
18 proceeding and not have you talk over me or anyone
19 else at any time like you've done at other hearings.
20 So this is your last warning. If we hear your voice
21 again before you're asked questions, you will simply
22 be disconnected. I hope you make the decision to
23 stay on the line and listen to the decision without
24 interruption; but, of course, that's your choice and
25 you can do whatever you'd like to do.

1 So Mr. Dunay has filed multiple motions
2 for postconviction relief. The first motion that I
3 will decide is the motion regarding recusal or
4 disqualification. I have made comments and
5 decisions and findings on this issue and other
6 issues at earlier proceedings, and I incorporate all
7 of those findings and decisions into my decision
8 today not only on this issue but with respect to all
9 issues.

10 In looking at that issue that Mr. Dunay
11 has filed, I have reviewed Supreme Court Rule
12 Chapter 60, which is the ethics rule that we are
13 required to follow. I have taken into consideration
14 Wisconsin Statute section 757.19(2) and I have also
15 analyzed it from a due process standpoint that
16 Mr. Dunay has argued. I have taken into
17 consideration the potential for objective bias,
18 subjective bias, actual bias, taking into
19 consideration the rule of the statutes and the cases
20 and then also the appearance of bias again under the
21 ethics rule, the statute, and the cases.

22 I have reviewed again thoroughly the cases
23 that have been cited by both sides, and I have also
24 reread and have used the Wisconsin Supreme Court's
25 most recent decision from 2015 on these issues,

1 which is State v. Herrmann, H-E-R-R-M-A-N-N, at
2 364 Wis. 2d 336. That case from our Wisconsin
3 Supreme Court does a really nice job of summarizing
4 earlier cases in Wisconsin and decisions from the
5 United States Supreme Court which would be
6 applicable with the issue that Mr. Dunay has raised.

7 I think it's important to point out a
8 couple things if they are not already clear in the
9 record. First, I sentenced Mr. Herrmann (sic) on
10 March 8 of 2018. At that time Mr. Herrmann had made
11 threats towards Attorney Tempelis, who was the
12 acting district attorney in this case at that time.
13 Mr. Herrmann had made threats against law
14 enforcement officers including the ones out on the
15 East Coast.

16 MR. KAISER: Your Honor, are you talking
17 about Mr. Dunay?

18 THE COURT: I'm sorry. What did I say?
19 Mr. Herrmann?

20 MR. KAISER: Yes.

21 THE COURT: Thanks for that correction,
22 Mr. Kaiser, Mr. Dunay; and Mr. Dunay had also made
23 comments about me which were threatening,
24 everybody -- as was confirmed by counsel at his
25 testimony at the June 21 hearing. We all knew about

1 those comments. They had been provided to all
2 parties. Mr. Dunay had had an opportunity to review
3 those with his attorney and they had discussed
4 strategically how they wanted to proceed with that
5 issue.

6 Subsequent to the sentencing hearing,
7 sometime in October of 2018, Attorney Kaiser, you
8 filed a new felony case against Mr. Dunay as a
9 result in that or those threats that were made
10 including a charge or two involving me. I
11 represented to both attorneys in this case that I
12 have not had any communication with Attorney Kaiser
13 about that case. I have not had any communication
14 verbally with anyone about that case. I have not
15 submitted any documentation on that case, and I
16 really haven't been involved other than I have
17 received e-mails about scheduling. Those e-mails
18 came, I believe, from somebody in your office,
19 Attorney Kaiser, an assistant; is that right?

20 MR. KAISER: Victim witness advocate.

21 THE COURT: Okay, the victim witness
22 advocate. I have never spoken to her. I responded
23 to e-mails on dates when I would be available and
24 dates that I wouldn't be available for purposes of
25 scheduling.

1 I think it's also fair to point out, as I
2 have done in this case as other times, that
3 Mr. Dunay is not the only person who has made
4 threats towards me or to law enforcement officers
5 while he's in the Outagamie County Jail and his case
6 is pending. So in March of 2018 it was just another
7 individual who was acting out and acting in ways
8 that he probably shouldn't have been acting and
9 making comments or threats which reflected poorly on
10 his character and may have some impact on his risk
11 of reoffending. I don't want to say that that
12 happens every week, but it happens all of the time
13 and it's just something that as a trial judge we
14 deal with.

15 Since that time it has been filed in
16 October of 2018 and we're now ten months removed
17 from that, and I have disclosed my involvement in
18 that new case and Attorney O'Connell and Mr. Dunay
19 have done an accurate job of also representing that
20 all of the judges in Outagamie County including
21 myself recused ourselves from that new case, which
22 is appropriate because I am one of the victims.
23 Attorney Tempelis is one of the victims, and
24 Attorney Tempelis and I are likely to be witnesses.

25 Again, in any case similar to that, which

1 we get frequently where somebody has made a threat
2 against one of our colleagues here in Outagamie
3 County, our policy and our standard is to all recuse
4 from that case and let a judge in a different county
5 handle it. I believe the rationale for that is
6 because in that case there's a potential that
7 Attorney Tempelis and a potential that I will be a
8 witness in that case.

9 In this case I am not a witness. Attorney
10 Tempelis wasn't a witness back at the time. She was
11 just the prosecuting attorney who had been the
12 target of some threats from Mr. Dunay and it's
13 for -- with those facts in mind along with the
14 record that's been established that I find that I do
15 not have a subjective bias towards Mr. Dunay. I
16 have provided Mr. Dunay in my opinion a really
17 liberal opportunity to present his case and to act
18 out and to say what he wants to say.

19 And I also believe that given the case law
20 in the state of Wisconsin that Mr. Dunay was given a
21 fair trial in a fair tribunal with a basic
22 requirement of due process, that my sentencing of
23 Mr. Dunay and my taking of his plea --

24 (Laughter over the phone line.)

25 THE COURT: -- back at the time as well as

1 my handling of these postconviction issues have been
2 fair.

3 (Laughter over the phone line.)

4 THE COURT: And, Mr. Dunay, I hear you
5 giggling. That was a second time although you're
6 smart enough not to say a word. The third time you
7 giggle loud enough that I can hear again you are
8 just going to be disconnected, okay?

9 And again, counsel, Mr. Kaiser, has done a
10 good job of setting forth the law. What I think is
11 important to just put out is, first of all, the
12 Wisconsin Supreme Court indicates that the objective
13 bias -- I am just looking at the Herrmann case, that
14 the objective bias will be something that they
15 review as a question of law and that they review
16 independently.

17 They also indicate in paragraph 26, "In
18 determining whether a defendant's due process right
19 to trial by an impartial and unbiased judge has been
20 violated, Wisconsin Courts have taken both
21 subjective and objective approaches. The Court
22 applies a subjective test based on the judge's own
23 determination of his or her impartiality and an
24 objective test based on whether impartiality can
25 reasonably be questioned."

1 Mr. Kaiser, you make that argument back in
2 the June hearing that I must have made those
3 determinations prior to conducting the sentencing
4 hearing in March of 2018 and you're absolutely
5 correct. For the reasons that I have indicated, I
6 at that time had made a determination that given the
7 information I was provided about Mr. Dunay that I
8 could satisfy both the subjective and objective
9 approaches. Mr. Dunay has indicated, which I think
10 is a fair argument now that there is a felony case
11 pending against him, we should analyze the
12 subjective and objective approach with these
13 additional facts at this point in time, which I have
14 done.

15 "Under the objective approach" -- and I am
16 just reading paragraph 27 of the Herrmann
17 decision -- "Courts have traditionally considered
18 whether there are objective facts demonstrating the
19 trial judge in fact treated the defendant unfairly.
20 In other words, they inquire into whether a
21 reasonable person could conclude that the trial
22 judge failed to give the defendant a fair trial."
23 And that also cites the State v. Rochelt,
24 R-O-C-H-E-L-T, case and the Gudgeon, G-U-D -- I'm
25 sorry -- G-U-D-G-E-O-N, case, 295 Wis. 2d 189.

1 The subjective component is based on the
2 judge's other determination of whether he or she
3 will be able to act impartially, citing the
4 State v. McBride decision. A judge satisfies the
5 subjective recusal test by determining that he or
6 she is impartial, and that is my decision as it
7 relates to subjective or the subjective test. The
8 Court should make a record of its beliefs regarding
9 its ability to act impartially.

10 And to the extent that that record hasn't
11 already been made, I think the sentencing transcript
12 clearly indicates that at the time that I mentioned
13 and referenced the threats that Mr. Dunay had made
14 prior to the sentencing hearing my reference to
15 those threats was done in the context of assessing
16 Mr. Dunay's risk to reoffend, meaning that given his
17 mindset and those comments that I thought he had a
18 higher risk to reoffend; and considering Mr. Dunay's
19 risk to reoffend at the time that he's being
20 sentenced is a legitimate consideration for a
21 sentencing Court to do and it's not indicating any
22 bias or impartiality.

23 Under the objective approach the Courts
24 have traditionally considered, as I indicated,
25 whether there are objective facts demonstrating that

1 the trial judge in fact treated in this case
2 Mr. Dunay unfairly. Objective bias has been found
3 where the appearance of partiality revealed a great
4 risk of actual bias and where the more subtle
5 considerations of psychological tendencies and human
6 weaknesses revealed an appearance of impartiality.
7 The appearance of bias offends constitutional due
8 process principles whenever a reasonable person,
9 taking into consideration human psychological
10 tendencies and weaknesses, concludes that the
11 average judge could not be trusted to hold the
12 balance nice, clear, and true under all of the
13 circumstances.

14 Where a judge was found to be objectively
15 partial, the evidence indicated that the judge had
16 predetermined the outcome of the case before the
17 evidentiary hearing. And specifically in the
18 Gudgeon, G-U-D-G-E-O-N, decision the judge had
19 written on a letter from the defendant's probation
20 agent requesting a change in his sentence, begin
21 quote, "No. I want the defendant's probation
22 extended," end of quote. The appellate Court
23 concluded in that case that the judge was biased
24 because a reasonable person would conclude that the
25 trial Court had already made up its mind to extend

1 the defendant's probation long before the extension
2 hearing.

3 In this case there are no facts and
4 nothing specific indicating anything like that. In
5 the Herrmann decision the judge in that case at the
6 sentencing hearing was found not to be objectively
7 biased even though the judge revealed that her
8 sister had been killed by a drunk driver and that
9 judge was in the middle of sentencing Mr. Herrmann
10 for homicide by intoxicated use of the -- of a
11 vehicle.

12 The Supreme Court found that the judge's
13 statements when viewed in context of the entire
14 sentencing hearing were designed to illustrate the
15 seriousness of the crime and/or the need to deter
16 drunk drivers. They did not express bias against
17 that defendant.

18 In this case Mr. Dunay does not point to
19 any statements that I made when sentencing him or in
20 discussing the existence of the threats. Mr. Dunay
21 simply argues that the fact that he is facing new
22 charges for threatening me, Attorney Tempelis, and
23 others -- that with that just general thing the
24 judge cannot be impartial in hearing his
25 postconviction motions.

1 Mr. Dunay also points to the fact that all
2 judges in this county have recused themselves from
3 hearing the new charges. Mr. Dunay offered or makes
4 an offer of proof, is insufficient to establish that
5 the new charges create an appearance of partiality
6 revealing a great risk of actual bias or that the
7 more subtle considerations of psychological
8 tendencies and human weaknesses reveal an appearance
9 of impartiality. For that reason the motion to
10 recuse is denied.

11 A second issue has to do with restitution.
12 We had a hearing primarily dealing with the
13 restitution issue on July 29 of 2019. At that
14 hearing ██████████ ██████████ provided testimony as well as
15 Brandon Stahmann. There were two exhibits marked
16 and received by the Court as it relates to that
17 restitution issue. Restitution is covered in
18 Wisconsin Statute section 973.20 and the primary
19 purpose of that statute is to compensate the victim
20 or victims of criminal conduct.

21 That statute reflects a strong, equitable
22 public policy that the victims of crimes should not
23 have to bear the burdens of losses if the defendant
24 is capable of making restitution payments.
25 Throughout history Wisconsin Courts have repeatedly

1 held that restitution is the rule and not the
2 exception and should be ordered in cases whenever it
3 is warranted. In light of this important public
4 policy the Wisconsin Supreme Court in State v.
5 Wiskerchen, W-I-S-K-E-R-C-H-E-N, which is a 2019
6 decision, indicated that trial Courts should
7 construe the restitution statute broadly and
8 liberally in order to allow victims to recover their
9 losses as a result of the defendant's criminal
10 conduct.

11 In this case what that means is that as a
12 result of Mr. Dunay's criminal conduct the trial
13 Court, me, should construe Wisconsin Statute
14 section 973.20 broadly and liberally in order to
15 allow the victims of his crime their losses.
16 Attorney Kaiser points out that the victim rights
17 law in Wisconsin, specifically Wisconsin Statute
18 section 950.02(4)(a)(2) specifically provides that
19 where the victim of a crime is a child that the
20 victim in this case also includes the victim's
21 parent.

22 There's been some banter or some
23 disagreement in that and with the fact that the
24 minor child didn't testify at the restitution
25 hearing but instead her mother, ~~XXXXXX~~ ~~XXXXXX~~,

1 testified; and I think it's important to follow the
2 victim rights law and find that in this case the
3 victim of Mr. Dunay's crime, the direct victim, was
4 a minor child. That minor child has a mother by the
5 name of ██████████. There's no dispute to that.
6 Pursuant to 950.02(4)(a)(2), that parent is also a
7 victim in this case.

8 I appreciate Ms. ██████████ taking time and
9 providing testimony at the July 29 hearing. I
10 allowed her to provide testimony telephonically for
11 the reasons that I have indicated on the record. I
12 did not want to subject her to the antics and the
13 disrespect of Mr. Dunay given Mr. Dunay's history at
14 court hearings. I don't think it would have served
15 any benefit; and, quite frankly, I think it would
16 have been very harmful to Ms. ██████████ and her family
17 had they had to come in here and watch Mr. Dunay and
18 listen to Mr. Dunay carry on the --

19 THE DEFENDANT: I object.

20 THE COURT: -- the way that he has
21 historically. Mr. Dunay, you are being
22 disconnected.

23 THE DEFENDANT: You're an idiot.

24 THE COURT: Mr. O'Connell, I will confirm
25 that you are still on the phone in just a minute.

1 Okay. Mr. O'Connell, if you can give us a call
2 back, that's going to be the only way that it works.
3 So we will temporarily disconnect and then call back
4 in, okay? Are you there, Mr. O'Connell?

5 MR. O'CONNELL: I am, your Honor.

6 THE COURT: Okay. Thanks for calling back
7 in. Attorney Kaiser is still here. We have just
8 been sitting here for the minute or two that it took
9 and we haven't said anything. We're still on the
10 record.

11 MR. O'CONNELL: Okay.

12 THE COURT: You heard Mr. Dunay speak out,
13 correct, Mr. O'Connell?

14 MR. O'CONNELL: Yes.

15 THE COURT: Okay. So is there anything
16 you want to say regarding him being disconnected and
17 not allowed to participate in the rest of this
18 hearing?

19 MR. O'CONNELL: I do not.

20 THE COURT: Okay. I forget exactly where
21 I was; but at the end of the day Mr. Dunay, as he
22 just demonstrated, has been unable to control
23 himself or help himself and follow rules. I had
24 concerns about the safety of Ms. ██████, the safety
25 of Ms. ██████ family, and the emotional stress or

1 distress that she would have by coming in. I think
2 Mr. Kaiser, you had expressed that at an earlier
3 hearing.

4 I also didn't feel there was any
5 disadvantage to Mr. Dunay by allowing Ms. ████████ to
6 testify telephonically. We had talked about and all
7 of you had worked out making sure that the documents
8 were the right documents. Ms. ████████ did provide
9 testimony about those medical bills and it maybe
10 took a little extra to explain exactly what page you
11 were on and what item we were talking about, but
12 overall I think it worked out well. There was an
13 opportunity to completely examine her both on direct
14 and cross-examination.

15 Moving on with that issue of restitution,
16 Mr. Dunay has not raised his inability to pay as a
17 defense. I understand that he was an engineer prior
18 to being incarcerated. I understand from what he
19 said there's been a divorce but there's nothing to
20 suggest in the record that he has an inability to
21 pay or once he's released from custody he will have
22 the inability to pay.

23 I thought Mr. Kaiser made a good point
24 that whatever amount of restitution doesn't get paid
25 during the period of extended supervision can be

1 reduced to a civil judgment. I read Attorney
2 Kaiser's brief and I had an opportunity to review
3 Exhibit No. 2 from that July 29 hearing, and I
4 appreciate the argument that Mr. Dunay has a plan to
5 make a certain amount of money while in prison and
6 he has plans to use that money to carry out his
7 mission or his goals when he gets released.

8 Wisconsin Statute section 973.20(11)(c)
9 provides for the Department of Corrections to
10 require that the defendant authorize the DOC to
11 collect and disburse to the victim restitution owed
12 from the defendant's wages and from other monies
13 held in his prison account, and I think that should
14 be treated the same in this case.

15 The third argument that was raised by the
16 defendant is that there was some confusion that
17 Ms. ██████ had about which days she took off. My
18 notes from that hearing and the transcript of that
19 hearing provide that she testified that she had to
20 take off 15 days of work, that it was time being
21 spent with her daughter as a direct result of this
22 case. Given the facts in this case and the
23 allegations in this case and all of the other
24 information that was provided in the presentence
25 report and by Ms. ██████ at other times, I think that

1 amount of time off of work is reasonable. It makes
2 sense for the proper care and supervision of her
3 daughter to try to get her healthy.

4 The defendant also make an argument that
5 those dates weren't specific enough. Again, this is
6 a couple years later. I am satisfied given the
7 credibility of Ms. [REDACTED] that what she described and
8 the amount of time that she took off is reasonable
9 and accurate even if they can't be pinpointed down.
10 I went back and read through the presentence report
11 and Ms. [REDACTED] had told the presentence writer that
12 as a result of Mr. Dunay's crimes her daughter had
13 become so depressed that she tried to kill herself a
14 couple of times. She started cutting herself to
15 release the pain. She carved words on her chest and
16 stomach such as whore, slut, and don't deserve
17 happiness, that she had been hospitalized a number
18 of times for suicidal thoughts and actions and that
19 her daughter had hit an all-time low after
20 Mr. Dunay's conduct.

21 I find that to be credible. It was
22 reported back at the time. It's consistent with the
23 facts of this case, and I don't think it's either
24 fabricated or related to some other situation in the
25 child's life. I also agree with the State's

1 argument about amounts that could be recovered from
2 the victim's insurance company if, in fact, they
3 were making that claim but that doesn't seem to be
4 an issue in this case.

5 Mr. Kaiser, I thought, did a nice job of
6 summarizing that Ms. ████████ does not have the burden
7 or the responsibility to explain why her insurance
8 coverage didn't cover certain expenses or certain
9 amounts. She testified that they didn't cover those
10 amounts, that she was responsible for those amounts,
11 that she paid those amounts, and that those amounts
12 and that medical expense was a result of Mr. Dunay's
13 conduct. That is sufficient.

14 So it's for all of those reasons that I
15 believe that the proper restitution is \$17,483.69,
16 that the surcharge is \$1,748.37, and the total
17 restitution that is ordered which includes the
18 surcharge is \$19,232.06. Mr. O'Connell, do you have
19 any questions regarding the first two issues?

20 MR. O'CONNELL: No, I don't.

21 THE COURT: Mr. Kaiser?

22 MR. KAISER: No, your Honor. Thank you.

23 THE COURT: All right. The last
24 two issues, as I understand it, involve Mr. Dunay
25 had made a motion to withdraw his pleas and also a

1 motion for resentencing. I will start my analysis
2 of those two issues with indicating on June 21 we
3 had a hearing. That hearing took a long time and it
4 was probably the most complicated or challenging
5 postconviction motion that I have ever had an
6 opportunity to be part of, and I think the record
7 speaks for itself.

8 I don't want to fault anyone but our
9 hearing was full of Mr. Dunay wanting to get rid of
10 Attorney O'Connell, Mr. Dunay not wanting to
11 represent himself or waive his right to a lawyer,
12 Mr. Dunay repeatedly saying he wanted to go pro se,
13 Mr. Dunay refusing to cooperate with Attorney
14 O'Connell, interrupting Attorney O'Connell, making
15 it difficult for Mr. O'Connell to do his job,
16 outbursts, and Mr. Dunay being found in contempt a
17 couple of times; and it should have been more than
18 that.

19 And when the substance of the hearing came
20 in, we had four witnesses testify. Mr. Dunay
21 provided testimony. Attorney Melinda Tempelis
22 testified and the two prior attorneys for Mr. Dunay
23 testified, Alan Tarnowski and Robert Buckettt; and I
24 have had a chance to go back and review the
25 testimony from those four individuals as well as the

1 exhibit that was marked that day.

2 I made findings on pages 202 and 203 of
3 that transcript, and I think those are worth at
4 least mentioning today although I don't think it's
5 necessary to; but on page 203, lines 7 through 9, I
6 say, "Just so the record's clear before I forget and
7 just in case I don't say it, I will make that
8 finding." And then on lines 12 through 17 I say, "I
9 find that Mr. Dunay today failed to waive his
10 attorney-client privilege and he did so in my
11 opinion intentionally, understanding the
12 disadvantages of that, and he did it strategically
13 so he could accomplish exactly what he thought he
14 accomplished this morning."

15 And when I said before that that hearing
16 was challenging and complicated, all of that was a
17 result of Mr. Dunay being disrespectful, disruptive,
18 manipulative, conniving to you, Mr. O'Connell, to
19 Mr. Kaiser, to me, and really to the entire process.
20 I really appreciate, Mr. O'Connell, your work on
21 this case and your efforts of representing him and
22 doing it given the circumstances that have existed;
23 and none of it was caused by you, Attorney
24 O'Connell, or by Attorney Kaiser.

25 But at the end of the day I thought your

1 closing argument, Mr. Kaiser, was right on and I
2 could just read it and will read it. I will say
3 this. When I took Mr. Dunay's plea back on the date
4 that it was taken, I can still remember that and I
5 went through an extensive colloquy with Mr. Dunay
6 regarding what he was pleading to, the fact that he
7 was doing it freely, voluntarily, and intelligently,
8 the fact that he had a chance to consult with his
9 attorney; and then he even described the things that
10 he did.

11 And some things either make a record or
12 they don't make a record but in this case and I just
13 had one recently, maybe a month ago, where the
14 defendant wasn't going to take -- plead. He denied
15 certain things. I just refused to take the plea in
16 a sex assault case. In something like this I was
17 convinced that day that Mr. Dunay was freely,
18 voluntarily, knowingly, and intentionally entering
19 his plea to criminal offenses involving this victim
20 that he acknowledged committing; and we were all
21 familiar of the potential criminal charges -- I am
22 sorry -- the potential federal criminal charges. I
23 believe they were mentioned at that plea hearing and
24 that they wouldn't be pursued, I believe. And I
25 wanted to be sure that Mr. Dunay was still not

1 acting for fear of that or under a threat of that.
2 When I took his plea, I was convinced then as I am
3 convinced today that those pleas were freely,
4 voluntarily, intelligently entered.

5 Mr. Dunay really refused to allow his
6 attorneys to answer questions at the June 21 hearing
7 which I believe would have confirmed exactly what we
8 just said and Mr. Dunay did that, I think, for
9 strategic reasons; and then when Mr. Dunay testified
10 at the hearing on June 21, he has very little
11 credibility. His answers have been self-serving.
12 His answers to questions don't make sense. They are
13 not consistent.

14 And when Mr. Dunay says that he was just
15 lying at that plea hearing or going along and being
16 a yes man, that is not what happened. As Attorney
17 Kaiser pointed out, Mr. Dunay answered questions
18 much more than a yes and signed documents; and he is
19 an educated individual who knew what was going on.

20 So for that reason, again, I will just say
21 for the entire record the motion to withdraw pleas
22 is denied and the motion for resentencing is denied.
23 I don't know if there's anything I missed,
24 Mr. Kaiser. I will say I agreed with your closing
25 argument that day. I would incorporate it all into

1 my decision. I incorporate all of the findings that
2 I have made throughout time. I would think now is
3 the time that this thing would go up to the Court of
4 Appeals and they can review it and see where the
5 chips fall.

6 MR. KAISER: I think you have done a
7 thorough job, judge.

8 THE COURT: Okay. Mr. O'Connell, anything
9 that I missed or that you'd like to have clarified
10 now when we have an opportunity?

11 MR. O'CONNELL: The only -- the only
12 issue -- I also had filed back in April -- It was a
13 brief in support of restitution discovery. I know
14 the Court's already -- Since we've had a restitution
15 hearing, the Court's already denied the motion. I
16 am not sure. I don't have a memory whether the
17 Court had provided its reasoning for that and I
18 guess I don't know if that's something that the
19 Court would like to do or if it has already done so.

20 THE COURT: Yeah. Let me just take a look
21 here at what I have on that. I remember that and I
22 remember the State's response. Do you know what day
23 you filed that?

24 MR. O'CONNELL: Yes. That was April.

25 THE COURT: Yeah. Go ahead.

1 MR. O'CONNELL: April 5.

2 THE COURT: I also see a letter that you
3 sent in on May 1.

4 MR. KAISER: I think that's my letter on
5 May 1. In other words, what happened was --

6 THE COURT: Both of you had a letter
7 May 1.

8 MR. KAISER: Counsel filed his demand. I
9 provided him with copies of what I thought previous
10 counsel had gotten from the district attorney's
11 office containing all of the paperwork which
12 eventually came in at the restitution hearing. I
13 gave him this on, I think, March 25. When he raised
14 the issue again in April, I provided that cover
15 letter that I had sent to him with the attached
16 documents to the Court so that you had it in the
17 file.

18 My position was that those were the
19 documents that demonstrated what was owed because
20 the insurance company wasn't paying what was owed as
21 well as Ms. [REDACTED] delineation of the days off and
22 the fact, and I also supplied an affidavit from
23 Ms. [REDACTED] where she described the fact that the
24 reason for the different salaries on the days that
25 were days off is because every time she had to take

2 1 3

1 time off to go care for her child she had to go get
2 another job or they transferred her within the same
3 company to a different job. That was the answer.
4 He got the answers to his discovery questions in the
5 affidavit as well as the answers supplied to the
6 district attorney's office back in 2017 when the
7 case was first prepared for sentencing.

8 THE COURT: Mr. O'Connell, I hope you
9 heard that. Let me just tell you what I have here.
10 I have these things in front of me. I have a
11 defendant's brief in support of restitution
12 discovery, which was filed on April 5. My note on
13 there is April 12, which means that's when I read
14 it. I have your letter, Attorney O'Connell, dated
15 May 1 and your letter dated May 1 as well, Attorney
16 Kaiser. My notes on both of those letters indicate
17 that I reviewed those the next day on May 2, and
18 then on the letter that Attorney Kaiser filed I
19 wrote on there let parties know that we are all set
20 for the June 21, 2019, hearing and they should be
21 prepared to proceed as planned.

22 That would be a message that I would give
23 to my judicial assistant, and my guess is she called
24 you guys and told you that it would stay on for
25 June 21 and be ready to go. I took that. I forget

1 if we talked about it as well, Mr. O'Connell, but
2 I --

3 MR. O'CONNELL: I think --

4 THE COURT: Well, here is -- Let me just
5 tell you what my mindset was in May. I had read
6 your brief. You were asking for discovery before
7 the restitution hearing and then this May 1 response
8 from Attorney Kaiser provided discovery to the
9 extent that I thought that it was relevant to or
10 potentially relevant to any issues. I didn't know
11 more or if there were more things that you wanted or
12 needed, and I figured that you now had the
13 documents. You would be able to cross-examine
14 Ms. ██████ or ask questions of Ms. ██████ at the
15 hearing of all of the issues that you raised in your
16 initial brief.

17 For example, why is there a salary
18 difference? Did you do an annual examination? Did
19 she have surgery? You know, all of those questions
20 that you raised I figured were fair for
21 cross-examination but I don't know if we ever made a
22 record of that but that was -- I do have those
23 things here. I kind of thought that issue had been
24 resolved given the documents that were provided and
25 given the fact that Ms. ██████ was going to be on the

1 phone testifying. Go ahead, Mr. O'Connell.

2 MR. O'CONNELL: I -- I guess I don't have
3 a whole lot more to add other than that.

4 THE COURT: Okay. Do you have anything
5 else then that you'd like to say regarding this?

6 MR. O'CONNELL: No. That's all I have.

7 THE COURT: Okay.

8 MR. O'CONNELL: Oh, I guess, one last --
9 one last thing. Is that something -- Do you want me
10 to draft the order?

11 MR. KAISER: I will draft the order.

12 THE COURT: Attorney Kaiser just said
13 he'll draft the order.

14 MR. O'CONNELL: Okay.

15 THE COURT: And then are you representing
16 him on appeal or is somebody else?

17 MR. O'CONNELL: Yeah. I'll be
18 representing him on appeal.

19 THE COURT: Okay. Good luck. Anything
20 else, Mr. Kaiser?

21 MR. KAISER: No, your Honor. Thank you.

22 THE COURT: Mr. O'Connell, we will hang up
23 with you. Thanks for everybody's work.

24 MR. O'CONNELL: Thank you.

25 (Proceedings concluded.)

4 2 0 8

1 STATE OF WISCONSIN)

2) SS:

3 OUTAGAMIE COUNTY)

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6 I, TERRA OTIS, RPR, RMR, CRR, CRC, do hereby
 7 certify that I reported the foregoing matter and that the
 8 foregoing transcript, consisting of 31 pages, has been
 9 carefully compared by me with my stenographic notes as
 10 taken by me in machine shorthand and by me thereafter
 11 transcribed and it is a true and correct transcript of
 12 proceedings had in said matter to the best of my
 13 knowledge.

14

15 Dated this 6th day of September, 2019.

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(Electronically signed by Terra Otis)
 TERRA OTIS, RPR, RMR, CRR, CRC
 Official Reporter

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24

25

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 23, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2019AP1884-CR
STATE OF WISCONSIN

Cir. Ct. No. 2015CF470

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEVIN R. DUNAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

No. 2019API884-CR

¶1 PER CURIAM. Kevin Dunay appeals from convictions stemming from sexually explicit communications with a thirteen-year-old girl.¹ Dunay also challenges an order denying postconviction relief. During his criminal case, Dunay repeatedly threatened law enforcement officers, the prosecutor, and the circuit court judge assigned to his case. Dunay argues that the judge was required to recuse himself from this case because of the threats. We affirm.

BACKGROUND

¶2 Dunay communicated with the thirteen-year-old girl online, and they began messaging each other. Dunay lived in New Jersey, and the victim lived in Outagamie County. Dunay told the victim that he was forty years old, but he was actually forty-eight. Dunay initially believed the victim was eighteen years old, but he kept communicating with her after she told him that she was only thirteen. Dunay told her he was divorced but, in fact, he was married and lived with his wife and three teenage sons.

¶3 Dunay asked the victim to show her body to him, and when she was reluctant, Dunay told her it was okay to do so because they were in a relationship and he loved her. The victim eventually sent in excess of fifty images to Dunay over a five-month period of herself stripping, masturbating, and sexually touching herself. Dunay also sent images of himself to her, depicting his genitals and videos of himself masturbating, among other things. They also exchanged many disturbing and explicit statements regarding sexual topics, including anal sex.

¹ Dunay, pro se, has submitted correspondence to this court on numerous occasions during the course of this appeal. Dunay is represented by an attorney. When a litigant is represented by counsel, he or she is not entitled to conduct court proceedings pro se. We will therefore take no action on his correspondence.

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¶4 The victim's mother eventually found two images on the victim's phone depicting the victim's bare breasts. The victim told her mother that she had sent the pictures to "Kevin" and that he called her his girlfriend. The mother then contacted law enforcement.

¶5 The State of Wisconsin charged Dunay with sexual exploitation of a child, child enticement, causing a child to view or listen to sexual activity, and causing a child to expose intimate parts. The State of New Jersey charged Dunay with four felony counts of endangering the welfare of a child. Dunay was arrested and jailed in New Jersey before being extradited to Wisconsin. Dunay pleaded no contest to the four counts in Wisconsin.

¶6 While in the Outagamie County jail, Dunay stated that he would kill the circuit court judge and the district attorney when he was released. After the plea hearing, the State provided the court with copies of nineteen phone calls Dunay had made from jail exhibiting his "vengefulness." In the recordings, Dunay referred to the judge as "the worst" and a "fuckin' piece of shit."

¶7 Outagamie County jail's mental health professional and community liaison met with Dunay at the jail to offer her expert assistance after learning of his frequent angry statements and behavior. During this meeting, Dunay told her that he planned to kill the circuit court judge and other people when he was released from prison and that "I have nine years to plan that."

¶8 At the sentencing hearing, Dunay acknowledged the jail phone recordings showed that he made threats against the judge as well as others, but Dunay claimed he was merely "venting" and would not carry out the actions. The

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court imposed a sentence of twelve years' initial confinement and twenty years' extended supervision.² Following his transfer to Dodge Correctional Institution, Dunay continued to make statements about his plans to kill the judge, police, and prosecutors after his release from prison.

¶9 Dunay had also made death threats against members of the criminal justice system while in New Jersey, stating he wanted to kill two New Jersey detectives for ruining his life. He made threatening statements toward the detectives and prosecutors "every day" and "all day long" while incarcerated in New Jersey. He even sang in the shower about how he was going to kill a New Jersey detective. He also threatened to kill some of his victim's family members.

¶10 Dunay filed postconviction motions seeking to withdraw his pleas on the grounds that he misunderstood information about his possible sentences and about a possible federal prosecution; for resentencing on the grounds that his trial counsel was ineffective by failing to move the circuit court to recuse itself because of Dunay's threats against the court and "the entire judicial system"; and for the court to recuse itself from his case because of the threats. Dunay also subsequently filed a brief in the circuit court arguing he was entitled to discovery prior to any restitution hearing.

¶11 Following three hearings, the circuit court ordered Dunay to pay restitution and it denied his postconviction motions for resentencing, plea withdrawal, recusal, and discovery before the restitution hearing. Dunay now

² The sentencing court imposed twelve years' initial confinement. At the postconviction hearing, the court added two months for contempt of court.

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appeals, arguing that the judge was biased and required to recuse himself due to Dunay's threats.

DISCUSSION

¶12 There is a presumption that a judge is free of bias and prejudice. *State v. Jensen*, 2011 WI App 3, ¶95, 331 Wis. 2d 440, 484, 794 N.W.2d 482 (2010). To overcome the presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased or prejudicial. *Id.*

¶13 Dunay does not argue that the circuit court was subjectively biased. We need only determine, therefore, whether the court was objectively biased. *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Objective bias can exist when a reasonable person could question the court's impartiality based on the court's statements, or when there are objective facts demonstrating the judge in fact treated the defendant unfairly. *Id.*, ¶9.

¶14 Dunay argues the circuit court was objectively biased "under both of the objective tests." His arguments, however, are largely conclusory. As we discern them, he contends his threats to kill the judge caused the court to rule against him on each of the postconviction motions, "as a result of the court's clouded judgment." In turn, Dunay asserts the court's denial of his motions would keep him in prison, thus affecting his ability to carry out his death threats. Dunay therefore contends "there were ample reasons for the court to be bias[ed] and deny the defendant's postconviction arguments."

¶15 Judicial rulings alone almost never constitute a valid basis for a bias or impartiality motion. *OLR v. Nova*, 2018 WI 23, ¶35, 380 Wis. 2d 311, 909 N.W.2d 155. Moreover, threats against judges generally do not require recusal.

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See, e.g., S.E.C. v. Bilzerian, 729 F. Supp. 2d 19, 24 (D.D.C. 2010) (collecting cases). Recusal is required only if a judge's opinions or remarks display a deep-seated antagonism or favoritism that would make fair judgment impossible. *Liteky v. United States*, 510 U.S. 540, 555 (1994). Were the rule otherwise, a defendant could readily manipulate the system, threatening every jurist assigned until the defendant gets a judge he or she prefers. *See United States v. Holland*, 519 F.3d 909, 915 (9th Cir. 2008).

¶16 Dunay points to no statement or other indication by the circuit court that would suggest the type of deep-seated antagonism necessary to demonstrate bias or impartiality. Contrary to Dunay's perception, the court in the present case did not accelerate court procedures with the stated purpose of getting Dunay into prison as soon as possible. Nor does the record on appeal suggest that the court responded to Dunay's repeated threats in a way that would reasonably suggest that the court was biased against Dunay.

¶17 Absent unique and extraordinary circumstances, threats or plots by a criminal defendant against the judge presiding over his or her case do not mandate a judge's recusal—even death threats. *See United States v. Yousef*, 327 F.3d 56, 170 (2d Cir. 2003). Dunay's case is not sufficiently unique or extraordinary to warrant recusal as a matter of law. Indeed, if Dunay's assertions were enough to prove objective bias, recusal could be mandatory in virtually every criminal case where a defendant threatens to kill a judge.

¶18 Moreover, Dunay does not develop an argument that the circuit court's rulings were wrong or unfair regarding his discovery, restitution, plea withdrawal, or resentencing motions. Dunay points to nothing more than the fact that the court ruled against him. Dunay's assertions do not establish objective

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bias, even if we could somehow say the rulings were incorrect. The court did not err in declining to recuse itself from ruling on Dunay's postconviction motions.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2019-20).

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as part of this petition, is an appendix that complies with Wis. Stat. 809.62(2)(f), and that it contains, at a minimum: 1) a table of contents; 2) the decision and opinion of the court of appeals; 3) the findings or opinion of the trial court necessary for an understanding of petition; and, 4) any other portions of the record essential to an understanding of the issues raised.

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

April 7, 2021

Signed: 

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