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STATE OF WISCONSIN

IN THE SUPREME COURT

Case No. 2013 AP 1345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW M. OBRIECHT,

Defendant-Appellant-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

IN SUPPORT OF PETITION FOR REVIEW

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IN SUPPORT OF ANDREW M. OBRIECHT'S POSITION

ARGUMENT

When an Offender's Parole is Revoked, Constitutional Principles and Wis. Stat. §§ 302.11 (7)(Am), 304.072, and 973.155 (1), Require the Department of Corrections to Apply any Credit that has been Granted as a Result of Time Spent in Presentence Custody to Reduce the Duration of the Offender's Period of Reincarceration, Instead of Applying it to Reduce a Subsequent Period of Supervision.

The Wisconsin Association of Criminal Defense Lawyers ("WACDL"), submits this non-party brief in support of Andrew Obriecht's position, asserting that the Court of Appeals misconstrued Wis. Stat. §§ 302.11 (7)(Am), 304.072 and 973.155 (1), in allowing credit for time in custody to be ignored in calculating the post-revocation period of custody and instead applied to reduce a subsequent period of parole. Such a practice both violates state statutes and is unconstitutional.

A. Sentences Often Need to be Corrected.

The sentence credit statute, Wis. Stat. § 973.155(1)(a), provides for sentence credit for "all days spent in custody in connection with

the course of conduct for which sentence was imposed." In *State v. Carter*, 2010 WI 77, ¶ 2, 785 N.W.2d 516, a case in which this Court clarified an aspect of sentence credit, this Court noted that Wis. Stat. § 973.155(1)(a) was meant to provide "a simpler, more equitable system ...." This was a laudable goal, but one that apparently has yet to realized.

What happened to Andrew Obriecht is not an isolated incident. In a perfect world, defense counsel and prosecutor would confer in advance of sentencing and would be able to inform the judge at sentencing the correct number of days of presentence custody for which a defendant should be credited and, in the case of sentencing for multiple counts, to which sentence such credit should apply. Unfortunately, ours is not a perfect world, and often the issue of credit for presentence incarceration is not resolved at sentencing, or it is resolved incorrectly.

Sentencing, especially when multiple offenses are involved, is complicated, and sometimes, despite their best efforts, judges get it wrong. This happens more often than one would think. Four years

ago, the Department of Corrections Supervisor of Central Records, Debra Haley, testified that it was necessary for her office, which is required to review judgments of convictions for legality, to ask judges to correct some 25 to 30 illegal sentences each week.[1] She was joined in this assessment by Sheri Hicks, Offender Records Supervisor, who testified that approximately one in ten of the sentences that cross her desk are unlawful in some respect and as a result, thousands of sentences have needed to be corrected.[2]

Against this backdrop, where it is a given that errors will inevitably be made at sentencing, it is critical that the post-sentencing error-correcting process be carried out in a manner that comports with both statutory mandates and constitutional principles.

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[1] *Cogger v. Haley, et al.*, Case 09-CV-267, Western District of Wisconsin, deposition of Debra Haley, pp 25, lines 19-25; 26, lines 1–4; 31, lines 3 – 8; 33, lines 4-16.
[2] *Cogger v. Haley, et al.*, Case 09-CV-267, Western District of Wisconsin, deposition of Sheri Hicks, p 17, lines 2-24.

B. Applying Credit that is Due as a Result of Time Spent in Custody Prior to Sentencing Merely to Reduce Time on Parole Increases the Punitive Aspect of a Sentence.

It is unrealistic to say, as the decision of the Court of Appeals implies, that the entire sentence constitutes punishment, and that therefore, the allocation of the amount of time to be served in prison as against the amount of time to be served in the community on supervision is irrelevant as long as the total of both does not exceed the term of the sentence.

Time in custody and time on supervision are not fungible. If they were, there would be little point in revoking parole when an offender commits a violation. Time spent in custody is more punitive.

In *Young v. Harper*, 520 U.S. 143 (1997), Justice Thomas, writing for a unanimous Supreme Court, affirmed a decision from the Tenth Circuit Court of Appeals which held that a liberty interest was created by an inmate's parole status that permitted him to live and work outside the prison. The Tenth Circuit explained the

distinction between serving time in custody and serving time on parole:

> The liberty associated with a life outside the walls of a penal facility dwarfs that available to an inmate. It is the freedom to be gainfully employed, to be with family and friends, and to form other enduring attachments of normal life. It is the ability to reside in a home of one's own, without bars or fences or bonds, beyond the immediate authority or guards or wardens. The passage outside the walls of a prison does not simply alter the degree of confinement; rather it works a fundamental change in the kind of confinement, a transformation that signals the existence of an inherent liberty interest.

Harper v. Young, 64 F.3d 563, 566 (10th Cir. 1995) (internal citations and quotations omitted).

Thus, from a constitutional perspective, transforming credit that was granted as a result of time already served in custody (which would, absent an error in the process have been routinely applied to reduce an inmate’s in-custody sentence) into credit to be applied merely to reduce time on supervision increases the punishment imposed by the sentence as a whole. That it does so for

no penological purpose raises issues of separation of powers as well as violation of the Eighth Amendment.

C. Separation of Powers Precludes the DOC from Transforming the Credit from Custodial Credit to Noncustodial Credit.

It is well accepted that each branch of government has exclusive core constitutional powers upon which no other branch may intrude. *In re Complaint against Grady*, 118 Wis.2d 762, 778, 348 N.W.2d 559 (1984). Some powers are not, however, exclusively committed to one of the branches, but are shared powers, and as to those shared powers "there should be such generous co-operation as will tend to keep the law responsive to the needs of society." *Demmith v. Wisconsin Judicial Conference*, 166 Wis.2d 649, 663, 480 N.W.2d 502 (1992).

Sentencing a defendant is an area of shared responsibility that requires each of the three branches of government to exercise a core power. *State v. Borrell*, 167 Wis.2d 749, 767, 482 N.W.2d 883 (1992).

> The legislature prescribes the penalty and the manner of its enforcement; the courts impose the penalty, **and the**

> **executive branch carries out the court-imposed sentence**.

Id. (emphasis added.)

If, at sentencing, the court were to have found that Mr. Obriecht had spent those 170 days in custody in connection with the case, it would not, and could not, have ordered that he be awarded 170 days credit applied in such a way as to reduce only the parole portion, not the incarceration portion, of his sentence. *State v. Wolfe*, 2001 WI App 66, ¶ 7, 242 Wis.2d 426, 625 N.W.2d 655 (credit must be applied to incarceration term, not consecutive stayed sentence). And yet that is what the Department of Corrections has done, and by so doing, it has increased the amount of Mr. Obriecht's punishment for his offenses beyond that which the sentencing judge intended. The role of an administrative agency of the executive branch is to give effect to the sentence handed down by the judiciary, not to modify its terms to make it more punitive. By transforming credit for time in custody to credit against time on

supervision, the DOC has unwittingly usurped the power of the judiciary to determine the appropriate sentence for each offender.

Wis. Stat. § 302.11(7)(am) provides that DHA may return a parolee to prison "up to the remainder of the sentence" for a violation of the conditions of parole. The remainder of the sentence "is the entire sentence less time served in custody prior to parole." Time spent in custody prior to sentencing is certainly part of "time served in custody prior to parole." Thus there is no difficulty in reconciling Obriecht's position with the language of Wis. Stat. §302.11(7)(b) that requires an inmate who is returned to prison after revocation "shall be incarcerated for the entire period of time determined by the reviewing authority," if one simply includes the belatedly granted custodial credit as part of the "entire period of time" of incarceration. Not only does it make simple logical sense and comport with principles of statutory construction to read "custody" as including pre-sentencing custody, but any other reading runs afoul of the constitutional imperative that requires the

executive branch to carry out the sentence imposed by the judicial branch, rather than to revise the judicially imposed sentence.

D. The Eighth Amendment is Violated When an Inmate is Required to Serve Time that is not Penologically Justified.

The Eighth Amendment prohibits the infliction of "cruel and unusual" punishment on those who have been convicted of a crime. The phrase "cruel and unusual" punishment has been held to include punishment that is "totally without penological justification." *Rhodes v. Chapman,* 452 U.S. 337, 346 (1981); *Gregg v. Georgia,* 428 U.S. 153, 183 (1976). Incarceration beyond the term imposed by a judge is not penologically justified. *Campbell v. Peters,* 256 F.3d 695, 700 (7th Cir. 2001); *Russell v. Lazar,* 300 F.Supp.2d 716, 720 (E.D.Wis. 2004). As a result, such incarceration has been held to violate the Eighth Amendment. *Campbell,* 256 F.3d at 700.

It is well established that the sentencing judge would not have, and could not have, at sentencing, found that presentence credit was due but applied that credit to time on parole rather than

to time in custody. It is the analysis of each sentencing judge that determines the penological components of each sentence imposed. Where implementation of a given sentence results in an inmate serving more time in prison and less time on parole than the judge, correctly apprised of the offender's entitlement to sentence credit, would have ordered, such implementation falls outside the penological justification for the sentence, and it violates the Eighth Amendment.

The cases that determine when presentence credit must be given recognize this distinction. "[C]redit is to be given on the eventual sentence for all periods of custody: from arrest to trial, the trial itself, and from the date of conviction to sentence." *State v. Beets,* 124 Wis.2d 372, 377, 369 N.W.2d 382 (1985). This Court adopted as its definition of custody: "an offender's status constitutes custody whenever the offender is subject to an escape charge for leaving that status." *State v. Magnuson*, 2000 WI 19, ¶ 31, 233 Wis.2d 40, 606 N.W.2d 536.

In *Beets,* this Court ruled that one who has committed a crime and been placed on parole for it and then commits a second crime and has his parole from the first conviction revoked as a consequence, is, upon his reincarceration, serving time "in connection with" the first crime only. *Beets*, 124 Wis.2d at 378, 369 N.W.2d 382, 384.

The only factor in Olbriecht's case that is not identical to that of *Beets* is that the recognition that credit was due to him was delayed. It ignores the reality of the punitive nature of incarceration to determine that his credit need not be applied to his reincarceration time.

CONCLUSION

For these reasons, therefore, WACDL urges the Court to adopt the rationale provided by Andrew Obriecht in his brief and rule that where days of incarceration served prior to sentencing are belatedly credited to an inmate after he has served the initial period of incarceration to which he was sentenced, has been paroled or placed

on extended supervision, and is in the process of having his supervision revoked, that credit must be applied to reincarceration time, rather than to the period of supervision that will follow the reincarceration.

Dated this January 22, 2015

Respectfully submitted,

On Behalf of Wisconsin Association of Criminal Defense Lawyers

As Amicus Curiae

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 1,957 words.

____
Jeff Scott Olson

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

____
Jeff Scott Olson