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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP000883-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JAMAL L. WILLIAMS,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I, Affirming a Judgment of Conviction Entered in the Milwaukee County Circuit Court, the Honorable Timothy G. Dugan Presiding, and the Order Denying Postconviction Relief, the Honorable Ellen R. Brostrom Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
augustc@opd.wi.gov
Attorney for Defendant-Appellant-Petitioner

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ISSUE PRESENTED

At his sentencing hearing for a single charge of attempted armed robbery as a party to the crime, Mr. Williams was given an opportunity to stipulate to the restitution in accordance with Wis. Stat. § 973.20(13)(c). (73:17). Counsel for Mr. Williams declined to stipulate and instead argued that the proposed restitution was not legally proper under the circumstances. (73:17). The circuit court agreed with Mr. Williams' legal argument and found that he was not liable for restitution. (73:26); (App. 149). However, the court asserted that his refusal to "join in on that also reflects your lack of remorse under the circumstances, and I'm certainly considering that." (73:26); (App. 149).

This case presents three questions:

1) Is a defendant's challenge to a proposed restitution order an improper sentencing factor?

2) If so, did the sentencing court actually rely on Mr. Williams' decision to challenge the restitution order in imposing a sentence?

3) If the sentencing court improperly relied on Mr. Williams' decision to challenge the restitution, has the State met their burden of proving that this error was harmless?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has deemed both oral argument and publication to be appropriate.

STATEMENT OF FACTS

Underlying Offense and Law Enforcement Investigation

On April 25, 2013, R.W and B.P. were on the move in R.W.'s car, looking to sell some marijuana. (2:2). In addition to R.W. and B.P., R.W.'s three-year old child was also in the car. (2:2). R.W. was driving. (2:2). B.P. was on the phone, trying to nail down a location with their potential buyer, later identified as Mr. Williams. (2:2). R.W. ultimately parked in the area of 13th and Nash, on Milwaukee's north side. (2:2). Shortly after arriving at the meeting point, B.P. got out of the car and placed a scale on the residential sidewalk so that he could begin measuring out a sale-size quantity of marijuana. (2:2).

Apparently unknown to B.P. and R.W., Mr. Williams had not come alone. (2:2). Rather, he was accompanied by his brother, Tousani Tatum, who had very different plans. (2:2). Mr. Tatum was armed with a handgun. (2:2). While they were waiting for B.P. to arrive, Mr. Tatum told Mr. Williams that he planned to turn the drug deal into an armed robbery. (2:2). Before Mr. Williams could talk his brother out of it, B.P. arrived on the scene. (2:2). Mr. Tatum then got out of the car and approached B.P. with his gun in hand. (2:2). Mr. Williams also got out and began walking toward B.P. (2:2).

Mr. Tatum apparently reached B.P. first and put his gun to B.P.'s neck, demanding drugs and money. (2:2). B.P. broke away from Mr. Tatum and began running. (2:2). While B.P. was running, Mr. Tatum demanded that he stop and give him the pair of designer glasses B.P. was wearing. (2:2).

Shots rang out. (2:2). The sound of a crashing vehicle followed. (2:2). B.P. ran back in the direction of R.W.'s car. (2:2). R.W., who had been fatally wounded, had crashed the

car. (2:2). He died shortly after help arrived. (2:1-2). His daughter was unharmed and was removed from the scene by a "Good Samaritan." (2:2).

Following an investigation, Milwaukee police arrested Mr. Williams. (2:2). He admitted that he had arranged to buy marijuana from B.P. and that he was present during the armed robbery. (2:2). Mr. Williams told police that he helped Mr. Tatum flee the scene after his brother shot B.P. (2:2). He also told police that Mr. Tatum said he fired the gun because B.P. ran. (2:2).

As a result, Mr. Williams was charged with felony murder. (2:1). An amended information was later filed that amended the charge to party to a crime of first-degree reckless homicide while armed and attempted armed robbery. (19).

Plea and Sentencing

Mr. Williams ultimately resolved this matter by pleading guilty to attempted armed robbery as a party to the crime. (72:2; 72:7). In exchange for his plea, the State agreed to recommend substantial prison time with the length left to the sentencing court's discretion. (72:4). With respect to restitution, the State ultimately asserted at the sentencing hearing "and I don't know, we're going to have a little battle over restitution, but the defendant, if there is restitution, has to agree to pay that if it's reasonable." (73:3).

The parties adjourned the sentencing so that a presentence investigation (PSI) could be prepared. (72:15). The presentence writer's "Assessment and Impression" statement faulted Mr. Williams for a perceived lack of remorse and self-centeredness. (31). The writer recommended

between 10 to 12.5 years of initial confinement followed by 7.5 to 10 years of extended supervision. (31).

At sentencing, the State followed through on the agreement and recommended a substantial prison sentence. (73:10). As a basis for its sentencing recommendation, the State referenced the PSI writer's belief that Mr. Williams was not remorseful. (73:6). The State, on behalf of R.W.'s family, also requested $794 in restitution for R.W.'s burial expenses. (73:9).[1]

Defense counsel asked the court to consider imposing a prison term of three years initial confinement and three years extended supervision. (73:17). Counsel disputed the prosecutor and PSI writer's view that Mr. Williams lacked remorse:

> I just want to take a minute to disagree strongly with both the prosecutor as well as the conclusion of the PSI writer regarding my client's, as the PSI writer says, atrocious lack of remorse.
>
> I think that is completely wrong in this case. My client throughout this case has expressed to me remorse for everyone involved, and I – I guess I take issue that because he is thinking about his brother has thrown away his adult life, his mother and his son that somehow that does not reflect his remorse also for [R.W.'s fiancée], [R.W.'s] father and for [R.W.'s] daughter, and, in fact, on page four of the PSI the writer states, "He did have remorse thinking about the little girl who saw her father die [and] [R.W's] father who no longer has a son," […].

(73:13-14).

[1] *See* Wis. Stat. § 973.20(13)(b).

In his allocution, Mr. Williams told the court:

> First of all, I take full responsibility for my actions and what took place April 25th. I apologize to the family even if they don't want to accept it. I apologize for the little girl, [L.W.], that was her father. I know seeing her father die in front of her at that age did somethin' to her, and I take full responsibility for everything I've done, and then I apologize to the mother and the father for losing their son.
>
> I wish that I just – It was never supposed to happen like that. I ain't – I ain't sugarcoating or taking it off my participation, but I do take full responsibility.
>
> I feel bad. I've been feelin' bad for this whole year. For something over a drug deal, somebody lost their life, somebody lost their father, somebody lost their son and somebody lost their grandson. I ain't trying to make myself sound better even though I'm – I'm going to prison, losing my son too, but she lost her father forever. So I just want to apologize to her and her family and the mother and father. I feel remorce [sic] for everything I've done. Thank you.

(73:18-19).

Defense counsel, consistent with the State's remark at the outset of sentencing, disputed the State's restitution request, arguing:

> Well, again my client pled guilty to attempted armed robbery of [B.P.]. Again I don't believe that the shooting was foreseeable by him, and I would argue that it's a separate transaction and he should not be held accountable for that – that $794. I think that should be borne by his brother solely.

(73:17-18).[2]

The circuit court, the Honorable Timothy Dugan presiding, sentenced Mr. Williams to a ten-year initial confinement term, followed by seven-and-a-half years of extended supervision. (73:28); (App. 152). The court found the offense very serious, given "the nature of the crime, the outcome in this particular instance and [Mr. Williams'] involvement." (73:20); (App. 144). The court noted that Mr. Williams had set up the drug deal and knew that Mr. Tatum had brought a gun along. (73:20); (App. 144). Instead of calling the whole thing off, however, he assisted in the robbery by "call[ing] over to [B.P.]" (73:20); (App. 144). The court also noted that after the shooting, Mr. Williams did not seek help but instead drove away with Mr. Tatum. (73:20-21); (App. 144-145). With regard to Mr. Williams' character, the court found that his acceptance of responsibility via a guilty plea "was certainly strategic." (73:21); (App. 145). The court noted that Mr. Williams had numerous prior contacts with the juvenile and criminal justice systems. (73:21-23) (App. 145-147). The court also noted the PSI writer's belief that Mr. Williams was not remorseful:

> The agent's assessment – She's somebody who has worked with you, was hopefully thinking that you were turning your life around – notes that you aren't remorseful, that your focus is upon you, your family, your brother.

(73:25); (App. 149). On the positive side, the court noted that Mr. Williams had a high school diploma, read at a nine-and-a-half grade level, and had taken some college classes. (73:24); (App. 148).

[2] According to the PSI, Mr. Tatum had already been ordered to pay an identical restitution amount. (31).

The court reasoned that given all these factors, probation would unduly depreciate the seriousness of the offense. (73:25); (App. 149). It also concluded that Mr. Williams had rehabilitative needs that could only be addressed in a structured, confined setting. (73:25); (App. 149). The court then proceeded to impose conditions of extended supervision and addressed the restitution issue. (73:26-28); (App. 150-152). Regarding restitution, the court agreed with defense counsel that Mr. Williams was not legally responsible for R.W.'s funeral expenses. (73:26); (App. 150). However, the court also concluded that his refusal to stipulate to the restitution claim indicated a lack of remorse. (73:26); (App. 150). In this regard, the court stated:

> I don't think I have authority to order the restitution. Had you been convicted of the felony murder, party to a crime, certainly yes, but the nature of itself, the nature of the attempt armed robbery doesn't justify the restitution or give me authority, and I think the fact that you're not willing to join in on that also reflects your lack of remorse under the circumstances, and I'm certainly considering that.

(73:26); (App. 150). Shortly after this statement, the court imposed a sentence of ten years of initial confinement and seven-and-a-half years of extended supervision. (73:28); (App. 152).

Postconviction Proceedings

Postconviction, Mr. Williams sought resentencing on the grounds that the court improperly considered his "refusal" to stipulate to restitution which he did not legally owe. (47:1, 12-14). On August 4, 2015, the circuit court, the Honorable Ellen R. Brostrom now presiding, issued a written decision and order denying resentencing, finding that the sentencing court's remarks regarding Mr. Williams' refusal to stipulate

to the restitution claim simply "reflected the lack of remorse that the court was already considering." (53:7); (App. 140). The postconviction court thus concluded that "[t]he court did not rely on [Mr. Williams'] failure to stipulate to restitution when imposing sentence." (53:7); (App. 140). The court also held that even if the sentencing court had relied on Mr. Williams' failure to stipulate to restitution, any error would be harmless, as "the court had more than an ample basis to conclude that [Williams] was not remorseful." (53:7); (App. 140).

Proceedings in the Court of Appeals

Mr. Williams pursued his resentencing claim in the Court of Appeals, arguing that he was entitled to resentencing as a result of the circuit court's reliance on an improper sentencing factor. In response, the State conceded that the circuit court had in fact relied on Mr. Williams' unwillingness to stipulate to restitution in its sentencing explication. (State's COA Response Br. at 8). The State asserted, however, that using "unwillingness to pay restitution as an indication of [Mr. Williams'] lack of remorse" was not improper, and that, even if the circuit court improperly relied on that fact, the error was harmless. (State's COA Response Br. at 2; 10).

The Court of Appeals denied relief. ***State v. Williams***, 2017 WI App 46, 377 Wis.2d 247, 900 N.W.2d 310. (App. 101-131). The Court of Appeals found that the circuit court's remarks did not refer to Mr. Williams' specific failure to stipulate to restitution, but that the court was instead using that example as part of a larger point regarding his overall lack of remorse. ***Id.***, ¶17. (App. 110). The Court of Appeals concluded that Mr. Williams had failed to prove actual reliance because "this factor did not form part of the basis for Williams' sentence." ***Id.***, ¶16. (App. 110). The Court of

Appeals therefore denied the request for resentencing. ***Id***., ¶1. (App. 103).

This Court subsequently granted Mr. Williams' petition for review.[3]

ARGUMENT

I. The Circuit Court Erroneously Exercised its Discretion When It Relied on Mr. Williams' Challenge to a Proposed Restitution Order in Fashioning its Sentence.

A. Legal principles and standard of review.

The Wisconsin legislature has "vested a discretion in the sentencing judge, which must be exercised on a rational and explainable basis." ***McCleary v. State***, 49 Wis.2d 263, 276, 182 N.W.2d 512 (1971). However, that discretion has limits: "It flies in the face of reason and logic, as well as the basic precepts of our American ideals, to conclude that the legislature vested unbridled authority in the judiciary when it so carefully spelled out the duties and obligations of the judges in all other aspects of criminal proceedings." ***Id***. Accordingly, it is a well-settled principle that appellate courts retain the authority to review whether or not discretion has been appropriately exercised. ***Id.***; ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis.2d 685, 786 N.W.2d 409.

"Discretion is erroneously exercised when a sentencing court imposes its sentence based on or in actual reliance upon clearly irrelevant or improper factors. ***Harris***,

[3] This Court also granted the State's petition regarding the DNA surcharge issue, which will be addressed in Mr. Williams' response brief.

2010 WI 79, ¶ 30.[4] An improper sentencing factor is one that is "totally irrelevant or immaterial to the type of decision to be made." ***Elias v. State***, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980).

When a defendant claims that a court relied on an improper factor at sentencing, he must prove by clear and convincing evidence that: (1) the factor was improper; and (2) the court actually relied upon the improper factor. ***Harris***, 2010 WI 79, ¶¶32-34 (citing ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1).

Whether the court "actually relied" on an improper factor at sentencing turns on whether the court gave "explicit attention" or "specific consideration" to the improper factor, such that it "formed part of the basis for the sentence." *See* ***Tiepelman***, 2006 WI 66, ¶14 (quoting ***United States ex rel. Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)).

In determining whether Mr. Williams has carried his burden, this Court conducts an independent review of the record. ***State v. Alexander***, 2015 WI 6, ¶25, 360 Wis.2d 292, 858 N.W.2d 662; ***State v. Travis***, 2013 WI 38, ¶48, 347 Wis.2d 142, 832 N.W.2d 491. Following the case law regarding sentencing based on inaccurate information—a framework this Court relies on in assessing improper factor claims—the circuit court's postconviction statement of non-reliance is not dispositive. ***Travis***, 2013 WI 38, ¶48. ("A

[4] While this Court has been clear that reliance on inaccurate information is a constitutional due process violation, *see* ***State v. Alexander***, 2015 WI 6, ¶18-19, 360 Wis.2d 292, 858 N.W.2d 662, the Court has not been as clear regarding the source of a defendant's right to be protected against a sentencing based on improper factors. While at least some improper factors will impinge upon due process considerations, it is not clear that all factors have that same status. *See* ***Id***.

circuit court's after-the-fact assertion on non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance.").

Independent review is also appropriate here because in this case the postconviction court did not preside over the sentencing proceedings. The postconviction court was thus in no better a position than this Court to determine whether the sentencing court actually relied on an improper factor in sentencing Mr. Williams. As such, any postconviction assertions of non-reliance should not be entitled to deference. *Cf*. ***State v. Tobatto***, 2016 WI App 28, ¶14, 368 Wis. 2d 300, 878 N.W.2d 701 (holding, in the context of an ineffective assistance claim, that when a postconviction court did not preside over the underlying trial, its findings of fact are reviewed *de novo*).

If the Court determines that Mr. Williams has carried his burden, resentencing will be warranted unless the State can prove that the error was harmless. ***Alexander***, 2015 WI 6, ¶18.

B. Mr. Williams' successful challenge to a proposed restitution order is an improper sentencing factor.

1. Mr. Williams had a statutory and constitutional right to challenge the restitution order.

Wisconsin's restitution statute requires the sentencing court to "order the defendant to make full or partial restitution… unless the court finds substantial reason not to do so and states the reason on the record." Wis. Stat. § 973.20(1r). The restitution determination is a component of the general sentencing decision. *See* Wis. Stat. § 973.20(1r);

State v. Pope, 107 Wis.2d 726, 729, 321 N.W.2d 359 (Ct. App. 1982); *see also* ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis.2d 535, 678 N.W.2d 197 . So long as the circuit court has legal authority to order restitution, the ultimate restitution decision is committed to the sound discretion of the circuit court. ***State v. Holmgren***, 229 Wis.2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999).[5]

However, the sentencing court must comply with the statutory framework as a prerequisite to an appropriate exercise of discretion. ***State v. Dzuiba***, 148 Wis.2d 108, 118, 435 N.W.2d 258 (1989) ("When determining the amount of restitution, certain procedures must be followed."); *see also* ***State v. Evans***, 2000 WI App 178, ¶14-15, 238 Wis.2d 411, 617 N.W.2d 220 ("Restitution is a statutory process and where, as was done in this case, a court constructs its own procedure to determine and set restitution—and that procedure is not authorized by the applicable and controlling law—the decision cannot stand.").

The statute therefore gives the defendant two options: either stipulate to a restitution summary or, in the alternative,

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[5] It has been this Court's practice to grant wide latitude to the discretionary determinations of the circuit court with respect to restitution. *See for example* ***State v. Fernandez***, 2009 WI 29, ¶62, 316 Wis.2d 598, 764 N.W.2d 509. In that case, the defendant argued that special findings were required to award restitution to an insurance company under Wis. Stat. § 973.20(5)(d). This Court declined to adopt such a standard, instead upholding restitution because the lower court appeared "to have applied the correct legal standard and to have arrived at a logical interpretation of the facts in ordering restitution" notwithstanding the lack of any specific findings as to whether "justice" required such an award. ***Id***, ¶62; *see also* ***Id***., ¶82 (Bradley, A.W., J., *dissenting*) (faulting the majority for adopting what the dissent views as an overly deferential standard of review).

ask to be heard on the issue of whether or not restitution is legally or equitably warranted. Wis. Stat. § 973.20(13)(c), (14)(d). In challenging restitution under the statute, a defendant may dispute the nature and amount of restitution in myriad ways: (1) the amount of loss claimed by the victim (Wis. Stat. § 973.20(14)(a)); (2) whether restitution is legally permissible under a particular set of circumstances (arguing, for example, that there is no "causal nexus" between the crime considered at sentencing and the restitution request, *See for example* ***State v. Queever***, 2016 WI App 87, 372 Wis.2d 388, 887 N.W.2d 912); (3) assert that "justice does not require" reimbursement to a particular class of victim (e.g., an insurance company) (Wis. Stat. § 973.20(5)(d); (4) present evidence of inability to pay (Wis. Stat. § 973.20(14)(b); (5) raise civil defenses such as "accord and satisfaction or setoff" (***Huml v. Vlazny***, 2006 WI 87, ¶22, 293 Wis.2d 169, 716 N.W.2d 807); or (6), under Wis. Stat. § 973.20(1r), presumably argue that there is some other "substantial reason" that the court should not impose restitution.

Mr. Williams also had a due process right, under the Fourteenth Amendment to the United States Constitution and Article I, section 8 of the Wisconsin Constitution to be protected against a state-sponsored "denial of fundamental procedural fairness." ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶53, 235 Wis.2d 610, 612 N.W.2d 59. Mr. Williams was therefore entitled, as a matter of constitutionally guaranteed procedural due process, to "an opportunity to confront the victim's claim for pecuniary loss and also an opportunity to be heard." ***Pope***, 107 Wis.2d at 730. Following ***Pope***, the procedures outlined in the restitution statute—which allow the defendant to be heard before an order regarding payment of restitution is entered—arguably serve to advance that constitutionally protected right.

2. Mr. Williams' meritorious challenge to the proposed restitution order was granted by the circuit court. Because that order was never appealed, the State has waived any challenge to that order.

In this case, the circuit court followed the proper statutory guidelines, giving Mr. Williams an opportunity to stipulate to restitution. (73:17). Mr. Williams declined to do so, and exercised his right to challenge the imposition of restitution as to him for R.W.'s burial expenses. (73:17).

Defense counsel made a meritorious argument regarding Mr. Williams' legal liability for restitution, asserting that the death of R.W. was not related to a "crime considered at sentencing" for the purposes of Wis. Stat. § 973.20(1g)(a). (73:17). While Mr. Williams was originally charged with felony murder, he ultimately pleaded guilty only to the attempted armed robbery of B.P. (72:2). Under the plain language of the statute, R.W.'s murder —the basis for the restitution request—was not a "crime for which the defendant was convicted," nor did it relate to a "read-in crime." Wis. Stat. § 973.20(1g)(a). Thus, under the statute, the court could not impose restitution for R.W.'s burial expenses on Mr. Williams based on his conviction for attempted armed robbery of B.P. *See* ***State v. Lee***, 2008 WI App 185, ¶11, 314 Wis.2d 764, 762 N.W.2d 431 (defendant charged only with armed robbery and not fleeing or assaulting an officer, was not responsible for costs related to injuries sustained by officer during foot chase following robbery); *see also* ***State v. Wiskerchen***, No. 2016AP1541-CR, unpublished slip op., ¶¶15-46 (Wis. Ct. App. November 1, 2017)

(Hagedorn, J., *dissenting*)[6] (criticizing majority opinion for unduly broadening causal nexus requirement beyond statutory authority because "restitution is only permissible if the crime was the one the defendant was convicted of, or if the crime was "read-in" as defined by WIS. STAT. § 973.20(1g)(b).").[7] (App. 179-200).

The circuit court declined to order Mr. Williams to pay restitution for R.W.'s burial expenses, agreeing that he was not legally responsible for it. (73:26); (App. 150). Because the State never appealed from that order, the circuit court's determination is therefore final and conclusive for purposes of this appeal. *See* ***Washington v. Hicks***, 109 Wis. 2d 10, 13, 325 N.W.2d 68 (Ct. App. 1982) (respondent waived appellate review of adverse issue by failing to cross-appeal); ***Campbell v. Sutliff***, 193 Wis. 370, 378, 214 N.W. 374 (1927) (errors claimed to be prejudicial to appellee or respondent cannot be considered in the absence of separate or cross appeal), *overruled in part on other grounds in* ***Powers v. Allstate Ins. Co.***, 10 Wis. 2d 78, 102 N.W.2d 393 (1960).[8]

3. Mr. Williams' challenge to the restitution claim is irrelevant and immaterial as to whether or not he is "remorseful" for his conduct.

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[6] A copy of that opinion is being attached pursuant to Wis. Stat. § 809.23(3)(c).

[7] www.wscca.wicourts.gov indicates that a petition for review was filed with the Supreme Court on December 1, 2017. That petition was still pending as of the date this brief was submitted.

[8] The Court of Appeals, while questioning the circuit court's legal conclusion, nonetheless properly concluded that "[b]ecause there is no appeal of the court's determination in this regard, however, we do not address it." ***Williams***, 2017 WI App 46, ¶12 n.2.

This Court has defined an improper sentencing factor as one that is "totally irrelevant or immaterial to the type of decision to be made." ***Elias***, 93 Wis. 2d 278 at 282. Mr. Williams' challenge to the State's restitution request was irrelevant and immaterial to the sentence the court should impose for two reasons:

a. Mr. Williams' valid assertion of a legal right cannot be held against him.

A circuit court's determination of sentence cannot be based upon a defendant's exercise of a constitutional right. *See* ***Buckner v. State***, 56 Wis. 2d 539, 550, 202 N.W.2d 406 (1972). Other Wisconsin cases establish that a defendant's exercise of valid legal procedural protections cannot be used against that defendant at sentencing. Thus, ***Scales v. State***, 64 Wis.2d 485, 219 N.W.2d 286 (1974) establishes that the sentencing court relies on an improper factor when it uses a defendant's valid exercise of his Fifth Amendment rights—a refusal to admit guilt at a sentencing after a jury trial loss-against him. And, while ***Alexander*** held that the *use* of compelled statements derived in some other context is an improper sentencing factor, that holding logically extends to a defendant's invocation of his Fifth Amendment rights when asked to make those selfsame statements. *See* ***Alexander***, 2015 WI 6, ¶24.

This Court has also asserted that it is improper to sentence a defendant more harshly "solely because he has availed himself of the important constitutional right of trial by jury." ***Kubart v. State***, 70 Wis. 2d 94, 97, 233 N.W.2d 404 (1975). Finally, while the issue has not been developed through the improper factor test, this Court has also held that it is improper to impose a harsher sentence because a

defendant has successfully exercised their appellate rights. *See* ***State v. Church***, 2003 WI 74, 262 Wis.2d 678, 665 N.W.2d 141.[9]

Here, Mr. Williams elected to exercise his constitutional and statutory right to contest a proposed restitution order. It makes little sense to hold that invocation against him. More to the point, it is bad public policy: Courts should not be in the business of discouraging the exercise of legal rights by those entitled to assert them. While stipulated agreements make sense when all parties are *truly* in agreement—as settlements doubtless encourage judicial efficiency and economy—when there is a dispute, it is usually better for that dispute to be heard. This ensures that a more legally sound outcome will be arrived at after a fair process.[10]

In contrast, a defendant who needlessly (and perhaps maliciously) obstructs the proper administration of justice *may* have that obstruction used against them. For example, ***Brozovich v. State***, 69 Wis.2d 653, 645, 230 N.W.2d 639 (1975), establishes that conscious manipulation—"gimmicking" the system for the sole purpose of causing unwarranted delay—may be a legitimate sentencing consideration. However, Mr. Williams did no such thing;

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[9] Interestingly, ***Church*** frames the issue within the context of a substantive due process violation: "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" ***Church***, 2003 WI 74, ¶28 (quoting ***United States v. Goodwin***, 457 U.S. 368, 372 (1982). However, as the improper sentencing factor issue presented in this case was not argued below as a substantive due process claim, it is not asserted as such in this Court.

[10] This is essentially the same philosophical principle undergirding our state's small claims procedure: Parties are more likely to walk away from the legal system satisfied when their dispute is both efficiently and fairly disposed of.

rather, he made a straightforward and meritorious legal challenge to the restitution request, which the circuit court agreed was valid under governing law.[11]

b. Mr. Williams' challenge to restitution does not meaningfully signal a lack of remorse.

A defendant does not deserve more or less time in prison based on whether he chooses to contest a restitution claim. This is especially true where, as here, a defendant does not legally owe the restitution.[12] Mr. Williams' valid exercise of a procedural protection to which he is entitled has no

[11] Determination of this issue may be impacted by this Court's resolution in another pending case, ***State v. Dalton***, No. 2016AP2483-CR, unpublished slip op. (Wis. Ct. App. July 19, 2017 (petition for review granted November 13, 2017). (App. 154-178). In that case, the Court of Appeals held that a defendant's refusal to consent to an evidentiary test of his blood could be used against him at sentencing, since he had no actual right to refuse: Mr. Dalton had "impede[d] a lawful search" and "unlawfully benefitted from that obstruction." ***Id.***, ¶50. In contrast, here Mr. Williams did not impede or obstruct the administration of justice by asking to be heard on the issue of restitution.

[12] Or, at the very least, has a meritorious argument to that effect. Undersigned counsel therefore retracts the concession in the Court of Appeals brief: "Arguably, a defendant's refusal to stipulate to a restitution claim that he undoubtedly owed *might* be indicative of a lack of remorse." (Defendant-Appellant's Court of Appeals Brief at 13). As a starting point, a large number of defendants who come before the criminal courts in this State are in fact indigent, meaning that many convicted criminals will be entitled to ask this Court, under the restitution statute, to consider their ability to pay in setting a restitution order. Moreover, the fundamental fact remains that the statute has created a burden of proof and a process to ensure fairness; it remains unclear why a person's exercise of procedural protections to which he is entitled should *ever* be a basis for an increased sentence.

intuitive connection with the primary sentencing factors discussed in ***Gallion*** ("protection of the public, the gravity of the offense and the rehabilitative needs of the defendant"), ***Gallion***, 2004 WI 42, ¶23 (quoting ***McCleary***, 49 Wis.2d at 276)**,** or those additional factors discussed in that decision's supplemental footnote. ***Id***., ¶43, n.11.[13]

However, both the circuit court and the Court of Appeals—as well as the State in its Court of Appeals brief—have all suggested that a challenge to restitution is interrelated with remorse. While Mr. Williams concedes that remorse for one's criminal conduct is a valid sentencing consideration, he disputes that his restitution challenge is indicative of a lack of remorse. Any such connection is extraordinarily tenuous and lacks any persuasive appeal, as it is unclear *why* a defendant's use of a relevant statutory framework for determining restitution is in any way salient to evaluating his remorse for his conduct. Restitution is not solely, or even principally, about whether the person admits or denies committing a given offense. Restitution logically comes *after* the defendant has

[13] The footnote reads: These factors include: "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness; (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention." ***Harris v. State***, 75 Wis. 2d 513, 519-20, 250 N.W.2d 7 (1977). Additional factors have been recognized as appropriate considerations (e.g., read-ins, ***Austin v. State***, 49 Wis. 2d 727, 183 N.W.2d 56 (1971), and the effect of the crime on the victim, ***State v. Jones***, 151 Wis. 2d 488, 444 N.W.2d 760 (Ct. App. 1989)). The circuit court need discuss only the relevant factors in each case. *See* ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993).

already pleaded guilty or been convicted after trial. More to the point, many of the defenses to restitution center on issues tangential to, or even totally unrelated to, an acknowledgment of guilt for the underlying crime (e.g., the inability to pay, or the applicability of civil defenses).

Restitution is also highly technical and principally centers on the repayment of financial losses in the abstract. As a result, there are bound to be situations where a defendant may be truly remorseful about what he has done but, under the law, is not legally liable for requested restitution. It goes against all logical understanding to assert that this should be held against the defendant. Such a sentencing scheme is tantamount to the taxation of rational legal actors who know their rights and attempt to prosecute them effectively.

That argument is especially compelling here because *Mr. Williams did not legally owe restitution.* The sentencing court has made that decision, which is binding at this stage of the proceedings. In such a circumstance, there can be no intuitive or rational connection between the determination that Mr. Williams does not in fact legally owe restitution, and the assertion that he should nonetheless be punished for declining to pay that which he does not legally owe. The idea is antithetical to our entire legal framework. While it may be noble of a defendant to agree to pay the costs at issue—to go above and beyond what is required—it still does not mean that the indigent defendant who exercises his legal rights should therefore be legally penalized. Thus, whether or not a defendant agrees with the legal prerequisite to a restitution claim does not meaningfully communicate whether or not they sincerely feel sufficiently "bad" about their underlying offense.

It is also worth noting that the State's position can quickly be disproven by re-casting the factual predicate. In this case, the sentencing decision at issue is restitution. But if the State is right, why stop there? Is a defendant also remorseless and therefore deserving of a harsher sentence if he argues for a shorter sentence than the prosecutor? What if a defendant disagrees with the State regarding his eligibility for early release programming? What if they believe that specific terms of extended release—such as a no contact order—are not legally proper and therefore do not agree to those terms? The same can be said for many other disputed topics at sentencing, including sentence structure, work release, and possibly even sentence credit. Framed in this fashion, the position becomes increasingly untenable.

Accordingly, Mr. Williams has satisfied his burden of proving, by clear and convincing evidence, that his challenge to the restitution request was an improper sentencing factor.

C. The circuit court actually relied Mr. Williams' challenge to the restitution in fashioning a sentence.

1. Actual reliance defined.

The Wisconsin Supreme Court most recently addressed the issue of "reliance" at sentencing in ***Alexander***. This inquiry focuses on the sentencing court's mandated articulation of the "basis for the sentence imposed." ***Alexander***, 2015 WI 6, ¶25 (quoting ***Harris***, 119 Wis.2d at 623). This Court then reviews "the circuit court's articulation of its basis for sentencing in the context of the entire sentencing transcript to determine whether the court gave 'explicit attention' to an improper factor, and whether the improper factor 'formed part of the basis for the sentence.'"

Id. (quoting ***Tiepelman***, 2006 WI 66, ¶14; ***Travis***, 2013 WI 38, ¶¶28&31.

In the Court of Appeals, the State alleged that ***Alexander***'s formulation of the test created doctrinal uncertainty. (State's Court of Appeals Response Br. at 8). It argued that the ***Alexander*** decision appears to incorporate the third prong of the improper factor analysis—whether the error is harmless—into the "actual reliance analysis." (*Id*.)

Mr. Williams believes that ***Alexander*** did not change the law as framed in ***Travis*** and ***Tiepelman***, as ***Alexander*** approvingly quotes the formulation used in those cases, with no explicit claim that the standard was changed. Rather than generating uncertainty, Mr. Williams believes that the Court's discussion of the issue in ***Alexander*** actually brings clarity to the legal process at hand.

That inquiry begins with the explication of the sentence—the words the sentencing court said. ***Alexander***, 2015 WI 6, ¶25. Thus, the reviewing court's first duty is to read the sentencing transcript and to then identify whether the court made comments which appear to suggest reliance. Often times, these problematic comments will already be flagged by the appellant, rendering this first task relatively easy. *See for example* ***Harris***, 2010 WI 79, ¶47 (Sentencing court's use of the phrases "you guys", "these women" and "baby mama" were allegedly suggestive of racial stereotyping).

It goes without saying, however, that words are inherently ambiguous and thus, mere reference to offending transcript excerpts will not satisfy the legal standard at issue. Accordingly, there is a second layer of analysis, which is interpretative in nature. In addition to identifying *what* the sentencing court said, this Court places those words in context and asks whether they truly form "part of the basis for

the sentence"—in other words, what they mean with respect to the overall sentencing decision. ***Alexander***, 2015 WI 6, ¶25.

The State is correct that this task of holistic interpretation will, in some very rare cases, bleed over into the harmless error analysis. But that does not mean that the harmless error analysis has been subsumed into the second step of this three-step process. Logically, this identity of outcomes will only occur in the most clear-cut cases: If there is absolutely no arguable way to even suggest reliance, then the error is clearly harmless. However, if reliance is strongly shown—in, for example, a case where the sentencing court explicitly stated something like "I am giving you a harsh sentence because you are [insert racial or ethnic minority]"—then the error could *never* be harmless.

Despite that occasional outcome, this Court has strictly patrolled the border between these two prongs of the overall test and has made clear that it is improper to collapse them within one another. For example, something very close to the two-prong test—in which the harmless error prong is subsumed into the reliance prong—was already rejected in ***Tiepelman*** in the context of an inaccurate information claim. In that case, this Court faulted the Court of Appeals for applying the wrong standard—"prejudicial reliance." ***Tiepelman***, 2006 WI 66, ¶27. That standard created a much higher burden for the defendant, and in at least one case manifested itself as something more akin to the "prejudice" prong of the ineffective assistance of counsel analysis. ***Id***., ¶23.[14]

[14] In the ineffectiveness context, the defendant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). A reasonable

The problem with this higher burden of proof is that it completely eviscerates the three-pronged analysis, and "would effectively eliminate the state's burden of proving that such error was harmless." ***Id***., ¶27. This Court found that result "illogical." ***Id***. Thus, although it did not explicitly say so, this Court obviously believes that the burden-shifting that occurs in the transition from prong two (reliance) to prong three (harmlessness) is important and must be maintained. Accordingly, the State's suggestion that ***Alexander*** suggested a change is contrary to law and, inasmuch as that constitutes an invitation by this Court to re-write the law, it should be rejected for the reasons outlined in ***Tiepelman***.

Thus, the proper test is one that emphasizes the interpretative aspects of the reliance inquiry without reference to harmless error—the test as it was straightforwardly framed in ***Alexander***.

2. The sentencing court actually relied on Mr. Williams' challenge to the restitution claim in determining his sentence.

In this case, the question of reliance is straightforward because the Court did utilize something very close to "but-for" language: Immediately before imposing sentence, the court told Mr. Williams that it was "considering" his challenge to the restitution request. (73:26); (App. 150). Specifically, the court stated:

> I don't think I have authority to order the restitution. Had you been convicted of the felony murder, party to a crime, certainly yes, but the nature of itself, the nature of the attempt armed robbery doesn't justify the restitution or give me authority, and I think the fact that you're not

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probability is defined as "a probability sufficient to undermine confidence in the outcome." ***Id***.

> willing to join in on that also reflects your lack of remorse under the circumstances, and I'm certainly considering that.

(73:26); (App. 150).

This statement establishes actual reliance by the sentencing court, which not only gave "explicit attention" to this factor, but also specifically advised Mr. Williams that it was relying on it in determining his sentence.

However, the Court of Appeals, in a strained reading of the circuit court's remarks, read the term "that" in "I am considering that" to refer to remorse generally, rather than specifically to Mr. Williams' challenge to the restitution request. ***Williams***, 2017 WI App 46, ¶17. (App. 110). Such an interpretation is problematic for two reasons. First, it ignores basic grammatical construction: the "that" in this clause is clearly referencing the earlier "that"—failure to stipulate to restitution—which is the subject of not only the entire sentence but also the surrounding sentences. Second, it ignores context: The sentencing court was making these comments immediately after announcing its ruling on the restitution issue and not in context of any broader commentary about remorse.

More importantly, the Court of Appeals' approach is transparently flawed for another reason: It has tried to justify reliance on an improper factor by burying it within a proper sentencing consideration—lack of remorse. ***Id***. ¶19. (App. 112). However, this approach is problematic for obvious reasons: Even if refusal to stipulate is being used as a means to discuss some appropriate factor, that linkage is still inappropriate and improper. A sentencing court should not be permitted to insulate their reliance on an improper factor from

appellate review by simply linking it with some other appropriate sentencing consideration.

As an example, this Court has expressed "concern" that otherwise neutral and objective actuarial instruments used to measure "risk of recidivism" (which appears to be a proper sentencing factor) may actually be biased against black defendants. ***State v. Loomis***, 2016 WI 68, ¶62-63, 371 Wis.2d 235, 881 N.W.2d 749. If that concern is validated by further research and litigation, then the mere fact that this bias has been smuggled into a proper sentencing consideration should not be sufficient to ward off a legal challenge under the improper factor analysis. The same can be said for many other obvious hypothetical examples—as for example, when stereotypes about particular races are used as a means to discuss a particular defendant's risk to the public or when assumptions about a particular gender are used to assess whether a defendant is amenable to treatment and rehabilitation.[15] In these cases, the court is obviously discussing an appropriate sentencing factor. However, that proper factor is still being linked to something clearly *improper*. That shuffle should not insulate what is an otherwise improper basis for a sentencing court's exercise of sentencing discretion

[15] What if the sentencing court had relied on stereotypes about young black men in order to arrive at a finding of no remorse? If, for example, the sentencing court had concluded that racial traits led to Mr. Williams argued lack of remorse, it is plain that this racialized sentencing should not be excused simply because the bias has been neatly placed within the utterly amorphous "lack of remorse" box.

Accordingly, Mr. Williams has sufficiently proven that the sentencing court "actually relied" on this improper factor.

D. The error is not harmless.

1. Harmlessness defined.

In ***Travis***, the Wisconsin Supreme Court noted three variations of the harmless error test for sentencing:

1. "Errors that do not affect the substantial rights of the adverse party are harmless. ***Travis,*** 2013 WI 38, ¶68 (citing Wis. Stat. § 805.18(1)).

2. "[A] remand [for resentencing] is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the [sentencing] court's selection of the sentence imposed." ***Id***., ¶69 (citing Fed. R. Crim. P. 52(a)).

3. "[A]n error is harmless if it did not contribute to the sentence, that is, if there is no reasonable probability that the error contributed to the outcome." ***Id***., ¶70.

This Court ultimately rejected the State's harmlessness arguments in ***Travis***, holding that the error "permeated" the entire sentencing, depriving the State of its ability to convincingly argue "that the error did not affect the circuit court's selection of sentence; that there is no reasonable probability that the error contributed to the sentence; or that it is clear beyond a reasonable doubt that the same sentence would have been imposed absent the error." ***Id***., ¶85-86.

2. The sentencing court's actual reliance on Mr. Williams' challenge to the restitution order was not harmless.

Regardless of the formulation, the State cannot carry its burden of proof in this case. The sentencing court's reference to Mr. Williams' challenge to the restitution request was not a passing one. Rather, the court stated that it was "certainly considering" Williams' refusal to "join in on" the restitution claim, which it believed reflected his "lack of remorse under the circumstances." (73:26); (App. 150). This statement shows that the court not only considered Mr. Williams' challenge to the restitution claim as part of its determination of what sentence to impose, it treated it as an aggravating factor.

Moreover, the sentencing record strongly suggests that the circuit court treated the restitution issue as a determinative factor in concluding that Mr. Williams lacked remorse. The court directly linked Mr. Williams' challenge to the restitution claim to its conclusion that he was not remorseful. Notably, before remarking on this linkage on the record, the court had not previously indicated that it believed Mr. Williams lacked remorse. And, while the court had previously noted that the PSI writer believed Williams was not remorseful (73:25) (App. 149), that was merely a reference to a third-party opinion, which Mr. Williams strongly disputed. At sentencing, Mr. Williams adamantly expressed remorse for his actions, both personally and through his attorney. (73:13-15, 18-19). And significantly, the sentencing court never rejected Mr. Williams' expressions of remorse, nor did it adopt the PSI writer's opinion as its own, until the court addressed and considered Mr. Williams' challenge to the restitution request, and then linked it to its determination of remorse.

Thus, it is apparent that Mr. Williams' challenge to the restitution request was the deciding factor the court relied on to infer that he lacked remorse for his conduct. Moreover, even if the sentencing court believed that other factors demonstrated some degree of remorselessness, the court's reliance on Mr. Williams' refusal to stipulate to the restitution request was still not harmless. Rather, its reliance on this improper factor would likely have caused it to believe that Mr. Williams was even less remorseful than the record would otherwise suggest. There is thus a reasonable probability that, even if the court believed that other factors indicated some lack of remorse, Mr. Williams' decision to challenge the restitution claim still negatively impacted the sentence he ultimately received. This is a commonsense conclusion, given that the court's comments regarding restitution suggest that it considered Mr. Williams' objection to the restitution claim to be an independent act of remorselessness. After all, a fact finder could not logically conclude that an action reflects a lack of remorse without also concluding that the action itself is a remorseless act. It thus is difficult to imagine that the sentencing court would have concluded that Mr. Williams had engaged in an additional remorseless and coldhearted act during the sentencing proceeding, and then give that conclusion no weight at all in deciding what sentence to impose.

The record thus reflects that Mr. Williams' refusal to stipulate to the State's restitution claim was tied to the sentence the court imposed in this case. This Court should therefore reverse and remand the case to the circuit court for a resentencing hearing.[16]

[16] Because the State bears the burden of proof on this issue, Mr. Williams reserves his right to further reply to the State's arguments in his reply brief.

CONCLUSION

For the reasons stated above, Mr. Williams ask that this Court reverse the Court of Appeals and remand for a resentencing.

Dated this 11th day of December, 2017.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
augustc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,887 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 11th day of December, 2017.

Signed:

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
augustc@opd.wi.gov
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO APPENDIX

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

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

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Dated this 11th day of December, 2017.

Signed:

CHRISTOPHER C. AUGUST
Assistant State Public Defender
State Bar No. 1087502
Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4807
augustc@opd.wi.gov
Attorney for Defendant-Appellant-Petitioner

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