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.

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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I. Mr. Williams' Challenge to Restitution is Not A Proper Sentencing Consideration

The State argues that Mr. Williams' "failure to contribute voluntarily to R.W.'s funeral expenses" is a valid sentencing consideration. (State's Response Br. at 23). Their framing of the issue, however, is incomplete. As Mr. Williams argued in the opening brief, the issue is broader: Whether the circuit court should have been permitted to rely on Mr. Williams' valid invocation of his right to contest the proposed restitution order as a basis to sentence him more harshly—despite also finding that, as a matter of law, Mr. Williams did not owe restitution.

That is, Mr. Williams' decision to "not contribute voluntarily" to R.W.'s funeral expenses cannot be divorced from the broader legal issues at play—Mr. Williams' statutory right to contest a proposed restitution order. As Mr. Williams has argued, his statutory challenge to restitution is also bound up with important procedural due process concerns. (Williams Initial Br. at 13).

The State forthrightly admits that Mr. Williams cannot be punished "for exercising a constitutional right." (State's Response Br. at 16). They also agree that the "sentencing court may not punish a defendant for doing 'what the law plainly allows him to do.'" (State's Response Br. at 26, quoting ***State v. Church***, 2003 WI 74, ¶28, 262 Wis.2d 678, 665 N.W.2d 141). The State nonetheless believes that reliance on Mr. Williams' exercise of his right to contest a proposed restitution order was a proper basis for the court's exercise of sentencing discretion. (State's Response Br. at 26). In so

doing, they argue for a very fine distinction—that while the court cannot punish the defendant for the exercise of his rights, it can nevertheless 'look through' the underlying invocation in order to evaluate some other relevant characteristic such as the defendant's lack of remorse. (State's Br. at 26).

As a starting point, the State's position is difficult to apply in all but the clearest, most factually salient, cases. It also entails legitimate concerns as to the erosion of fundamental legal guarantees. The Seventh Circuit has acknowledged the tension in this proffered approach with respect to reliance on a defendant's invocation of his Fifth Amendment rights:

> The Fifth Amendment protects an accused's right to remain silent at trial and sentencing. ***Mitchell v. United States***, 526 U.S. 314, 326-27, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999). That right, of course, would mean little if a judge could punish a defendant for invoking it. ***United States v. Turner***, 864 F.2d 1394, 1405 (7th Cir.1989). Nevertheless, silence can be consistent not only with exercising one's constitutional right, but also with a lack of remorse. The latter is properly considered at sentencing because it speaks to traditional penological interests such as rehabilitation (an indifferent criminal isn't ready to reform) and deterrence (a remorseful criminal is less likely to return to his old ways). *See* ***Bergmann v. McCaughtry***, 65 F.3d 1372, 1379 (7th Cir.1995). The line between the legitimate and the illegitimate, however, is a fine one. As we have recognized, "sometimes it is difficult to distinguish between punishing a defendant for remaining silent and properly considering a defendant's failure to show remorse in setting a sentence." ***Bergmann***, 65 F.3d at 1379 (citing ***United States v. Johnson***, 903 F.2d 1084, 1090 (7th Cir.1990)).

Burr v. Pollard, 546 F.3d 828, 832 (7th Cir. 2008).

Notwithstanding the inherent doctrinal tension, the State is correct that reviewing courts have occasionally permitted a sentencing court to use the defendant's invocation of a legal right as indicia of other characteristics relevant to the sentencing decision. Courts have only been willing to do so, however, in unique factual cases—those presenting highly relevant and immediately apparent inferences which can be drawn from the defendant's conduct aside from the mere fact that he is choosing to invoke his legal rights. Two cases cited by the State are relevant—but distinguishable—examples:

Kubart v. State, 70 Wis.2d 94, 99-100, 233 N.W.2d 404 (1975) presents a unique fact pattern revolving around the defendant's exercise of his right to trial. In that case, the defendant asserted at sentencing that he had been rehabilitated and, as proof, pointed to significant cooperation with the authorities. ***Id***. This Court held that it was entirely proper for the court to consider that this rehabilitative "cooperation" had only occurred *after* the defendant had lost at trial. ***Id***. While it would be improper to use the defendant's exercise of his right to a trial against him, there was nothing improper about relying on the case's procedural history when that history appeared to rebut the defendant's sentencing argument. ***Id***. Here, there was nothing about the legal argument against restitution which in any way rebutted or undermined Mr. Williams' expressions of remorse.

United States v. Kennedy, 499 F.3d 547 (6th Cir. 2007) involved a defendant—a distributor of child pornography—who refused to participate in a psychosexual examination prior to sentencing. The sentencing court believed that the psychosexual examination was an important tool for assessing the defendant's risk to reoffend. ***Id***. at 550-

51. The sentencing court felt hamstrung without that information and therefore viewed unwillingness to participate in testing as indicia of future dangerousness. ***Id***. at 552. The Sixth Circuit Court of Appeals rejected the defendant's Fifth Amendment claim and asserted that willingness to participate in the testing at issue was relevant to required sentencing considerations. ***Id***. By not participating in the evaluation, the defendant had deprived the sentencing court of needed information. ***Id***. It was therefore proper to note that fact in the sentencing explication. ***Id***. Here, Mr. Williams' decision to contest restitution is clearly not possessed of the same intuitive linkage.

If the general rule is that sentencing courts may not punish a defendant for doing what the law plainly allows him to do, (State's Response Br. at 26), then these cases demonstrate two *fact-dependent* exceptions to that rule. In each case, the defendant's actions in context of the invocation of the right were otherwise directly relevant and material to the court's sentencing decision. It is Mr. Williams' position that this connection will not be present in many, if not most cases, involving a decision to contest restitution. The decision to contest restitution is not inextricably intertwined with questions of responsibility—unlike the actions of the defendants discussed above. As Mr. Williams pointed out in his opening brief, 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 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).

Thus, Mr. Williams' position is not "that the circuit court can never consider a defendant's lawful conduct as part of its sentencing." (State's Response Br. at 29). Clearly, under settled authorities, they can in certain specific, fact-dependent scenarios. However, Mr. Williams believes that there will seldom, if ever, be a legitimate connection between a defendant's decision to contest restitution and valid sentencing considerations. There certainly is no such link in this case and, despite all of the State's argument, they have not sufficiently alleged why they believe the generic legal argument at issue is in anyway constitutive of "callous indifference to the victim's plight." (State's Br. at 29). Here, Mr. Williams allocuted and expressed remorse. (73:18-19). His lawyer made a straightforward, purely legal, objection to the proposed restitution. (73:17-18). The circuit court agreed with Mr. Williams. (73:26). Mr. Williams' decision not to stipulate is entirely dissimilar to the actions of the defendants in the cases discussed by the State.

The State also cites a number of cases that they believe support its analysis under the first ***Alexander*** factor. However, those cases are not relevant to the issue at hand.

In ***Holmes v. State***, 76 Wis.2d 259, 251 N.W.2d 56 (1977), this Court flatly held that there was no improper sentencing factor because there was no technical Fifth Amendment violation. ***Id***. at 275. ("No constitutional right was infringed upon."). Thus, the court was not improperly relying on the defendant's exercise of a constitutional right; rather, it was relying on his unprotected silence. ***Id***. Holmes is therefore analogous to ***State v. Dalton***, No. 2016AP2483-CR, unpublished slip op. (Wis. Ct. App. July 19, 2017) (petition for review granted). (App. 101-125). In that case, the Court of Appeals held that the circuit court did not improperly rely on a defendant's invocation of his constitutional rights because

the defendant's invocation was invalid—he had no right to refuse a search and thus, there was nothing improper about using that improper invocation against him. These cases do not apply to Mr. Williams, however, because there has been no argument that he was acting improperly by contesting the restitution; rather, the law plainly empowered him to make the legal argument at issue.

The State also cites two Seventh Circuit cases which do not seriously analyze the improper factor issue on its face. In ***Burr,*** a federal habeas case involving a deferential standard of review, the Seventh Circuit concluded that an alleged comment on the defendant's failure to allocute was a "mere slip of the tongue" in context of broader, legitimate observations about the comparative remorse shown by the codefendants. ***Id***. at 832. While the Court was critical of the sentencing court ("the judge could have chosen better words") the Court nonetheless held that the underlying Wisconsin Court of Appeals decision was not "an unreasonable application of federal law." ***Id***. Due to its procedural posture, the Seventh Circuit obviously did not apply Wisconsin's improper factor test—the legal rubric at issue in this case.

The State also places considerable weight on ***United States v. Mikos***, 539 F.3d 706 (7th Cir. 2008), asserting that the Seventh Circuit "held" that failure to voluntarily pay burial expenses is a legitimate sentencing consideration. (State's Response Br. at 26). However, the actual issue under consideration in that case involved the prosecutor's alleged comments on the defendant's silence during his closing argument in the penalty phase of a death penalty trial. ***Id.*** at 718. The defendant also argued that the evidence was insufficient to support a finding of non-remorse (an aggravating factor). ***Id***. The Seventh Circuit discussed the

prosecutor's closing argument, which focused on the defendant's failure to "reduce or redress the hurt his crimes had caused"—not contributing to the costs of his victim's funeral, for example—while continuing to engage in ongoing criminality. ***Id***. The Seventh Circuit did not specifically address the legal significance of the "burial expenses" argument; in fact, that portion of the facts appears to be non-dispositive to the (unrelated) legal issue at play. Instead, the Court brushed aside the defendant's claims of error, asserting that "If error occurred in this penalty proceeding, it was harmless." ***Id***. Setting aside any arguments about remorse, there were ample aggravating circumstances to support the imposition of the death penalty. ***Id***. This case is also easily distinguished because the reference to burial expenses in that case was not connected to the underlying assertion of a legal right—unlike Mr. Williams' challenge to restitution in this case.

The State has also ignored Mr. Williams' policy concerns. The State appears to believe that a rule which permits sentencing courts to use a defendant's legitimate challenge to restitution against him is not cause for concern. However, the rule in question will chill legitimate challenges to restitution, leading to unjust and onerous financial burdens being assessed against criminal defendants—especially when one considers that the most relevant consideration at many restitution hearings involving indigent defendants will be ability to pay.

Finally, the State asserts that Mr. Williams is mistaken when he analogizes the decision to contest restitution to other disputed, but non-central, issues at the sentencing hearing such as earned release program eligibility. (State's Response Br. at 30). While the State argues that dry legal arguments about the restitution statute should be fodder for harsh

judgments about remorse and contrition, (State's Response Br. at 29), they apparently believe that these other important sentencing considerations are different in kind. However, the State does not explain why its rule would only reach restitution and not those other discretionary parts of the sentence discussed. Their failure to explain why the restitution decision is somehow special is a telling signal which should not be ignored by this Court.

Accordingly, Mr. Williams has satisfied the first prong of the improper factor analysis.

II. The Sentencing Court Actually Relied on Mr. William's Challenge to Restitution.

The State appears to have retracted its concession in the Court of Appeals, arguing that the circuit court did not "actually rely" on Mr. Williams' decision to contest restitution. (State's Response Br. at 24). As a threshold matter, there appears to be an inconsistency in this new position. If Mr. Williams' conduct was suggestive of a lack of remorse and the circuit court used that lack of remorse to arrive at a sentencing decision, how is this *not* "reliance?"

Turning to the legal standard, the second stage of the improper factor analysis requires this Court to engage in a process of holistic interpretation, in which the sentencing court's words are evaluated in context of the entire sentencing transcript. *See* ***State v. Alexander***, 2015 WI 6, ¶25, 360 Wis.2d 292, 858 N.W.2d 662. However, the State's response does not engage that analytical framework.

Rather, the State's close reading of the text offers only a hyper-technical dissection of the transcript's grammatical structure. (State's Response Br. at 24-26). Their intense focus on the meaning of the word "that" ignores the commonsense

inference to be drawn from the court's remark—that it was clearly relying on Mr. William's decision to contest restitution—as well as the broader context of the remark. Here, the decision to contest restitution was invoked almost immediately prior to the court's pronouncement of the sentence. (73:26). In context, Mr. Williams does not believe that his reading of the court's words is somehow clearly erroneous, as the State suggests via its grammatical exercise. (State's Response Br. at 25-26).

Above all else, the State's hyper-technical argument ignores the broader, interpretive task that this Court must engage in. Rather than searching for magic words, *see* ***State v. Travis***, 2013 WI 38, ¶30, 347 Wis.2d 142, 832 N.W.2d 491, this Court needs to consider the "linkage" between the sentencing court's words and the resulting sentence. *See* ***State v. Alexander***, 2015 WI 6, ¶25, 360 Wis.2d 292, 858 N.W.2d 662. As Mr. Williams has argued, that linkage is straightforward and intuitive in this case.

Moreover, the State's argument ignores a problem highlighted by Mr. Williams. This Court should not permit an evasion of the rules regarding a proper exercise of sentencing discretion by allowing the sentencing court to paper over what is objectionable and problematic via the rote incantation of generically acceptable sentencing considerations. As Mr. Williams has argued, a sentencing court should not be permitted to insulate their reliance on an improper factor from appellate review simply by linking it with some other appropriate sentencing consideration. The State's position appears to encourage such evasion and should therefore not be adopted by this Court.

Accordingly, Mr. Williams has satisfied the second prong of the improper factor test and the burden should now shift to the state to prove harmlessness.

III. Reliance on This Improper Factor Was Not Harmless.

Importantly, it is the State's burden of proving that this error was harmless. (State's Br. at 18). They have not carried their burden in this case. The State includes a lengthy defense of the sentencing court's actions in order to demonstrate that the sentencing court relied on otherwise proper factors in handing down the sentence. (State's Br. at 19-23). However, that analysis ignores the damaging impact of the improper sentencing factor at issue.

The State believes that there was "overwhelming evidence" which supports a finding of remorselessness—even when the decision to contest restitution is excluded. (State's Response Br. at 31). However, that analysis ignores the contested nature of the remorse question. At the sentencing hearing, there was actually competing information regarding Mr. Williams' level of remorse: While both the State and the PSI writer believed that Mr. Williams lacked remorse, his lawyer specifically attacked that characterization and Mr. Williams openly told the court he was sorry for what he had done. (31; 73:6; 73:13-14; 73:18-19).

Accordingly, resolving the "remorse" question was a relevant, and highly subjective, judgment that the circuit court needed to make. To the extent that consideration of an improper factor impacts that subtle calculus, this harms Mr. Williams. While the State faults Mr. Williams for not putting forth textual support for his argument that the improper factor was a deciding factor, the fact remains that the State has the burden of proving that the improper factor did not contribute to this sentence. However, they cannot satisfy that burden

given the significant nature of this piece of evidence in the calculus. If it is removed, the State cannot prove beyond a reasonable doubt that the result would have been the same.

Accordingly, this Court should hold that this Court has failed to carry its burden, therefore finding in favor of Mr. Williams' that his sentence was the product of an erroneous exercise of sentencing discretion.

CONCLUSION

For the reasons stated above, Mr. Williams ask that this Court affirm the Court of Appeals and remand for further proceedings consistent with that opinion.

Dated this 17th day of January, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) 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 2,918 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 17th day of January, 2018.

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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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