STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No.16-AP-1284-CR

RICARDO L. CONCEPCION.

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND DENIAL OF POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE ANTHONY G. MILISAUSKAS, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Defendant-Appellant, by counsel and pursuant to section 809.19(1), Stats., hereby submits the following brief and appendix in support of his appeal to this court:

ISSUES PRESENTED

I

Did the off-duty policeman's hunt for and seizure of missing or stolen materials, penetration of locked containers, and playing of a DVD out of suspicion that it contained child pornography, constitute a law enforcement search such that the Fourth Amendment applies?

The circuit court answered NO.

II

Did the sentencing court err by failing to consider individual mitigating factors and giving undue weight to unexceptional or generic aggravating factors, or by rendering a sentence that was inexplicably harsh in relative terms?

The circuit court answered NO.

III

Did the circuit court err by failing to consider arguments that trial counsel was ineffective at sentencing when she failed to supply the court with mitigating information, place the run-of-the-mine severity of the offense or the otherwise sterling character of the defendant in any relative perspective, or seek to address potential errors by the judge at sentencing?

The circuit court impliedly answered NO.

STATEMENT ON ARGUMENT AND PUBLICATION

Argument is not requested. The limited Wisconsin case law concerning off-duty officer searches makes this case a strong candidate for publication.

STATEMENT OF THE CASE

Before this case, Rick Concepcion was known as a hero, and not merely as a reflex to his having served in the military or police. He was special forces (R28:6), and a decorated law enforcement officer (R28.:6-7), with a legacy of founding units: the Winthop Harbor SWAT team, Disaster Services unit, and Mountain Bike Patrol. (R28:7). For eight years he was lead Tactical Flight Officer for the Law Enforcement Aviation Coalition. (R28:7.) He actually was one of the founders of that group. (R60:22-23; R66:14; R68:11) He personally helped save about 1500 lives when his team was one of the first rescue units responding to Hurricane Katrina. (R66:14-15[1])

[1] At one point, Concepcion was inverted in a rescue harness being lowered down to rescue a young boy when they came under fire from citizens angry that they had not yet been rescued. Marissa Alter, “"Katrina, 5 years later: local rescuers reflect" WREX News (Aug 27, 2010) (available at http://www.whpd.org/leac/news/2010_08-28_WREX_13_Rockford.pdf.) He was among a select group honored by name by the City of Chicago for his services. II J. Proc. City Council City Chi. Ill. 56355-56 (Sept. 14, 2005) (available at https://chicityclerk.com/legislation-records/journals-and-reports/journals-proceedings).

Then in 2011, Rick Concepcion was charged with possession of child pornography (R1) after his friend and fellow Illinois police officer Dan Bitton found graphic videos while visiting his getaway in Kenosha. (See details below.) This discovery led to a warrant and the subsequent finding of more child pornography in Concepcion's Illinois home as well. (R28:3;R66:7.) The charges ultimately included 17 counts (R22.) Concepcion moved to suppress the Wisconsin evidence as the product of an illegal search. (R23.) After the court ruled that officer Bitton was acting as a private citizen and denied the motion, (R62:16-17), Concepcion pled to ten counts (R26; R63). Concepcion received an aggregate sentence of nine years initial confinement plus six years supervision. (R30; Appx. 101-04; R66:28-29.) He filed a timely postconviction motion raising all the issues in this appeal. (R44; see below.) The postconviction court granted a *Machner*[2] hearing on the ineffective assistance issue only, (R67:3; R68:3.) after which it left the conviction and sentence intact (R49; Appx. 105; R70:10;Appx. 115).

This appeal followed (R54), charging error in the denial of the suppression motion, and rejection of Concepcion's sentencing contentions – in particular that his heroism was ignored and the relative severity of the offense inflated. The statement of the case divides organically into facts related to the particular issues:

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[2] *See State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The Search

Officer Bitton testified at the suppression hearing that he was a 12-or-13-year Winthrop Harbor, Illinois police officer. (R60:7.) He was deputized in Wisconsin as a "police search and rescue helicopter unit commander." (Id.) This afforded no arrest powers. (Id.) It did allow use of police sirens and uniform insignia. (Id.; R60:28.) The court adopted roughly these facts. (R62:14.)

Officer Bitton said he considered Concepcion his dearest friend, inexpressibly close. (R60:8-9.) They did not socialize extensively. (R60:9.) But Concepcion had saved Bitton's life. (R60:17.) Officer Bitton said their shared combat experience gave them a special share-everything relationship. (R60:16.) The court relied only on a finding that they had a "pretty close relationship…they're not strangers." (R62:14.)

On January 18, 2011, he came to a mobile home that Concepcion maintained a few blocks from the Kenosha airport, to sleep before a scheduled morning flight. (R60:9-10; R62:15.) He said he had permission. (R60:16.) At the time, he was off duty. (R60:11; R62:16.) He was not armed or in uniform, nor driving a police vehicle. (R60:25-26.) He was accompanied by his girlfriend. (R60:22,27; R62:15-16.)

It was unresolved whether the next day's flight was civilian or law enforcement: Officer Bitton thought it civilian so far as he could remember. (R60:18-19; R61:5-6.) The court generally did not allow Defense to impeach Officer Bitton by

use of his prior inconsistent statements unless they later appeared in an affidavit, (See, e.g., R61:9,11.) His statement that he was in Kenosha for a law enforcement flight was part of the warrant affidavit. (R61:5-6.) The court stated no conclusion until five years after the motion hearing, opining that Bitton was on "vacation." (R70:2; Appx.107.)

Upon entering, Officer Bitton said that he immediately saw in plain view what he recognized as the box for a type of helicopter headset, several of which here missing from the law enforcement aviation group he commanded. (R60:10-11.) These were expensive items. (R60:13.) He said he gave Concepcion the benefit of the doubt that he had them to clean or repair them. (R60:11.) He also told the police that they were potentially stolen. (R61:6-8.) In the next room he found more. (R60:12.) He said the boxes contained headsets, but also that he didn't open them; he did pick them up. (Id.; R60:22.) He intended to collect them and take them back to the hangar. (R60:13.). It may be inferred that he understood the boxes still contained headsets by feeling their weight and stability in his hand.

Officer Bitton spotted some containers and started searching through them for more headsets. (R60:12-13.) He gave no indication that he found anything in the first two, but the court, making an obvious error of fact, misunderstood the record to say Bitton found more headsets in these containers, even relying on this to explain why Officer Bitton went on to the third container. (R62:15.) The third container was locked,

but Bitton had disturbed a key when he was grabbing up headsets, so he tried the key on the container. (R60:12-13, 22.)

When he opened that container, he found "sexual aids" and "DVD type tapes" (R60:13.) The DVDs were labeled in Concepcion's distinctive calligraphy with female names followed by numbers between six and twelve.[3] (R60:13-14.) He "assumed" the media contained child pornography. (R60:14.) The Court, in another error, garbles this account and locates the handwritten names and numbers on the outside of the still-unopened box. (R62:16.) Officer Bitton played some of the media, confirming they had sexually explicit material of children of various ages and also older women – because he was "disturbed" and opposed to child pornography. (R60:14.) He then called police in Kenosha and Illinois. (R60:15.)

The Court's Exercise of Sentencing Discretion

The state charged Concepcion with possessing seven .jpg image files, titled C17, C19, C20, and so on. (R22:1-4.) Most were created during a 7-second interval on May 25, 2004. (R1:2.) All had been deleted within a few weeks of creation and had not been accessed since that May or early June. (R1:1-3.) When found, the computer was non-

[3] While the description is rife with suggestion, it might be noted that the record does not indicate any specific names. If the labels were "April 10." "May 6," and "June 12," this would also be consistent with the record.

functioning and missing components. (R66:10-11.) Ten videos were charged; the last seven dismissed. (R22:4ff.) Concepcion's computer had 66 more images of "nudity" or "child erotica", not necessarily all illegal.

The pictures ranged from two of sexually posed nudes to two with digital penetration. (R1:1-3.) Two of the undismissed videos depict actual or simulated sex acts between a man and a girl. (R1:3.) One is not described in the record. The dismissed videos depict roughly half sex acts, half genital display. (R1:3ff.) Overall the images seem "somewhat faked" (R66:13.) The youngest subjects looked 4-7 years old. (R66:25.) The record did not indicate depictions of torture, humiliation or violence.

Nothing in the record suggested Concepcion produced, traded, or distributed child pornography, belonged to an online or other circle of offenders, or ever contemplated a contact offense.

His PSI evaluation was generally positive. (R28.) Concepcion was remorseful (R28:9;R66:11-12), and assessed to be at a low risk of reoffending (R28:9.)

At sentencing, the state sought 10 years initial confinement. (R66:4-5.) The defense recommended 3-4 years followed by probation with stayed sentences for remaining counts. (R66:16.) The total sentence of nine years initial confinement plus six years extended supervision (R66:28-29.) was within the range recommended by the DOC (R28:10).

The court stated it would "take everything into consideration." (R66:26.) The sentence objective was general deterrence: the court referred three times to sending a message (R66:27-28) While it once referred to the "need to protect the public because these crimes exist because of people like you" (R66:27), it even related community protection to deterrence: the "best interests of this community is [*sic*] that you pay a price…'cause it sends a message: Whoever you are, if you have child pornography, you go to prison…" (R66:27.)

The court recounted of the subject matter of the pornographic images charged, noting they were "disgusting" (R66:25,27), and generally discussed the harms associated with the offense of possession of child pornography, (R66:24-26).

The court gave a fairly brief, *pro forma* consideration of other sentencing factors. (R66:26-27.) This included notes that Concepcion had no prior record, but pending counts for child pornography in Illinois[4] (R66:26), and that "your employment, it's outstanding…. I give you credit for that. I don't hold you to a higher standard. I just mention for the record that you have a good employment history" (R66:26-27).

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[4] On October 26, 2012, three months after his Wisconsin sentencing, Defendant pled to one count in Illinois' 17th Judicial Circuit (Winnebago County, Case No. 2011-CF-452) and received a suspended sentence. See http://fce.wincoil.us/fullcourtweb/courtCase.do?CourtCaseId=181055430&PartyId=1653484.

The court rejected any probation or exception to the presumptive minimum penalty because the offense was a Class D felony, and there were ten counts pled. (R66:27.) Ultimately, "all the mitigating circumstances I went through," along with the Defendant's having pled guilty, were the reason the court gave concurrent sentences. (R66:28.) The court said, however, that the consecutive sentences it ordered were appropriate "because they are separate felonies, separate offenses. (R66:28.) The court opted for the period of confinement recommended by the Department of Corrections because their considerations were more comprehensive than the parties." (R66:27-28.)

Defendant's postconviction motion (R44) challenged the sentence arguing *inter alia* (1) that the court had erroneously exercised its discretion by giving excessive weight to sentence severity which was commonplace for this kind of offense, while ignoring mitigators and virtually stating that Concpcion's character did not matter; and (2) that the sentence was unduly harsh.

The Defendant indicated he believed that most of the facts in his postconviction motion were legislative facts requiring no proof. (R67:4.)[5] Hence, only a *Machner* hearing was ordered, not a general hearing on the motion. Defendant offered to provide documents or other proof as the court required. (R68:26.)

[5] The court reporter rendered "non-adjudicative" facts as "non-adjudicated" and "Brandeis briefing" as "brandized (sic) briefing."

Ultimately, the court simply stated that it could consider and weigh factors as it considered just (R70:5;Appx.107); and reiterated the basis for its sentence (R70:5-9;Appx.110-14), finding it had not erred (R70:9-10;Appx.114-15), and denying relief (R70:10;Appx.115).

Effectiveness of Sentencing Counsel

Concepcion's counsel was shocked at the recommendation of the DOC because she had understood that probation would be recommended (R68:6-7) and because Concepcion had a "zero risk of re-offending" and had been "very heroic" (R68:7). Yet she did *not* do any of the following (See generally R66 and indicated pages of R68):

- She did not tell the court that apart from the offense conduct, Concepcion's character was "beyond compare," virtually "faultless" or "the best character of anybody I've ever represented that was convicted of a felony" though this is what she thought. (R68:10-11, 18.) The reason was not strategic with regard to Concepcion's case but was looking ahead to future clients. (R68:18.)

- She did not anticipate the state would draw attention to the number of images. (R68:13.) She did not point out that this was in the "lower range" relatively speaking, though she felt in retrospect she "should have." (R68:12.) This would also have shown he was not sharing the images. (R68:11.)

There was no strategic reason for the omission. (R68:13.)

- She did not point out that the character of the images in this case, while all child pornography is extremely disgusting (R68:12), "wasn't the worst" (R68:14). That most were just posing. (R68:15.) She did mention their fake appearance.

- She did not point out the images were all deleted long ago. (R68:15-16). There was no strategic reason for the omission. (R68:16.) She did mention the computer was old and broken.

- She did not contrast Concepcion with the supposedly typical child pornographer who commits contact offenses; did not note that this was absolutely not the case with Concepcion, or note that the recommendations for Concepcion's sentence were twice as harsh as the actual sentence of an earlier client of hers who was known child molester. (R68:8-9, 17-18.) Nor did she cite other cases where the court had given less time for more serious offenses. The thought she would have emphasized the lack of contact offenses (R68:17) and believed she should have contrasted this with the presumed typical offender (R68:18).

- Though she argued that Concepcion did not use his position of authority to commit the offense, and it

> should not be used against him, she did not argue that his officer position should be mitigating, either because he had more to lose from a conviction – his entire career and all the respect of the community – or because being an officer is a mark of good character. (R68:20-21.) She presented his commendations and letters of support, but for her failure to argue from them, she had no explanation. (R68:20-21.)

Each of these was demonstrated by the record (R66) and not disputed at the *Machner* hearing (R68). After the sentencing, counsel could not sleep for days, convinced she had done something wrong. (R68:8.) She felt the sentence was "pointless." (R68:8.)

The court reasoned that sentencing counsel was not ineffective because "the only thing the attorney said under oath…she would have done different…was that she would have got a private sentence report" and the court did not know what information that would have included. (R70:3-4;Appx.108-09.)

ARGUMENT

I. Officer Bitton's hunting and poking through Concepcion's home was a police search.

A. Standard of Review

Although the child pornography in this case was seized with the support of a warrant, Defense has argued that the warrant critically relied on information obtained in an illegal search, thus rendering it invalid, such that the evidence should have been suppressed. *See State v. Anderson*, 165 Wis.2d 441, 447-48, 477 N.W.2d 277 (1991). The state did not oppose the view that Officer Bitton's search, if unlawful, would taint the warrant; nor did it argue consent, standing, exigent circumstances or other theories: its sole argument was that Bitton acted in a private capacity. (R24.) Purely private searches do not implicate the Fourth Amendment. *State v. Payano-Roman*, 2006 WI 47, ¶ 17.

This court applies a two-stage inquiry with a mixed standard of review: first, it reviews the circuit court's findings of evidentiary or historical fact for clear error; then it determines independently whether the search was governmental or private. *Id.*, 2006 WI at ¶ 16.

B. The Private-Public Test.

1. The General Case. Three elements are absolutely required for a search to be private: (1) the police may not

initiate, encourage or participate in the private entity's search; (2) the private entity must engage in the activity to further its own ends or purpose; and (3) the private entity must not conduct the search for the purpose of assisting governmental efforts. *Id.*, ¶ 18. Negation of any of these elements is enough to render a search governmental. However, these are not the only factors the court must consider: whether a search is private ultimately relies on a totality of the circumstances. *Id.*, ¶ 21.

Reading elements two and three together implies that a private motive for a search may exist, but the search still be governmental if it also has a governmental purpose. Such was the case in *Payano-Roman*. *Id.*, ¶ 29.

The Defendant bears the ultimate burden of persuasion by a preponderance of the evidence that the search was governmental. *Id.*, ¶ 23. The state has a production burden. *Id.* (Logically, this must include assertion of the private purpose of the search, since otherwise that element would be eviscerated by the requirement that Defendant prove a negative by excluding all possible private motivations.)

There are two overlapping reasons why evidence is not suppressed when gathered by purely private actors: First, without state action, the Fourth Amendment falls silent. *See, e.g., Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (The Fourth Amendment's "origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other

than governmental agencies....”). *See also New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985) (The Fourth Amendment applies to searches conducted by public school officials.); *O’Connor v. Ortega,* 480 U.S. 709, 714-15 (1987) (noting other applications to state functions). Hence one may garner that “Governmental efforts” in the third part of the *Payano-Roman* test is not merely a euphemism for such law enforcement activites as arrest and prosecution, but a phrase broadly signifying functions of the state, the prerequisite for state action.

Second, the exclusionary rule developed in particular response to law enforcement, deterring police because of their knowledge of criminal procedure and interest in procuring convictions of criminals. *State v. Bembenek*, 111 Wis.2d 617, 631-32, 331 N.W.2d 616 (Ct. App. 1983). That reasoning does not apply to police, on-duty or off, who have the requisite knowledge and interest in fighting crime to be deterred. *State v. Jenkins*, 80 Wis.2d 426, 431, 259 N.W.2d 109 (1977). The logic of these cases is that a trained police officer will recognize when they have probable cause to believe that a search will produce evidence of a crime, and recognize that such a search is unreasonable without a warrant; there is therefore a rationale for suppressing what they derive from such a search.

2. The Special Case. It is thus a special case when the alleged “private” actor is a member of law enforcement. The mere fact that one has law enforcement as a primary

occupation does not render the search governmental *per se*: the question is the capacity in which the person acts. *State v. Cole*, 2008 WI App 178, ¶13. Few Wisconsin decisions have considered when an off-duty officer is acting in an official capacity. Some other jurisdictions do have tests, and *Cole* considered some of these, finding them factually inapplicable, but not addressing their legal merit. *E.g., Id.*, ¶20.

Most authorities agree with some version of the idea that an officer who is formally off-duty does not remain truly so when he or she is confronted with a situation and responds as trained as an officer, unless a private citizen would have reason to respond in the same manner out of private interests. *See, e.g., State v. Andrews*, 637 A.2d 787, 790-91, 33 Conn.App. 590 (Conn. App. 1994.)

The *Andrews* court noted the view sometimes taken that an officer is *never* off duty. *Id.*, 637 A.2d at 790 n.7, citing *State v. Wilkerson*, 367 So.2d 319, 321 (La.1979). Officers may be deemed official actors even outside their jurisdiction. *Id.*, citing *People v. Martin*, 225 Cal.App.2d 91, 36 Cal.Rptr. 924 (1964). In practical terms, however, what this really means is that a cop will be treated as being on duty, if they act as they would on duty. It would be absurd to expect that officers responding to a need would stop to put on a uniform or procure the other sigils of their authority when they have been trained to assert police power through their voice and stance. All an officer needs to bring is the skill and knowledge acquired in police training. *See Ex parte Kennedy*,

486 So.2d 493, 495 (Ala. 1986) (use of training implied state action).

In *Cole*, 2008 WI App at ¶21. the Defendant attempted to apply a parallel ruling from a Wisconsin non-search case, *Williams v. State,* 45 Wis.2d 44, 172 N.W.2d 31 (1969), that once the officer there "became aware of the situation and took action he was no longer offduty[sic]" and he was doing "what any officer of the law is supposed to do…." Numerous cases agree that when an off-duty cop "stumbles upon criminal activity" and begins to "collect evidence", he acts as a government agent. *United States v. Ginglen*, 467 F.3d 1071, 1075-76 (7th Cir. 2006) (collecting cases).

The contrary circumstance is represented by cases in which an officer opted either not to shift roles, or to limit his or her officious action as much as possible, instead alerting on-duty law enforcement as soon as possible to take the reins. Both *Andrews*, n.7, and *Cole*, ¶20, collect these cases. *Cole* itself, though the court did not explicity analyze it so, was such a case. There, an off-duty detective was mistakenly sent a letter by which the Defendant hoped to tamper with witnesses. *Cole*, ¶5. The critical consideration was that the detective had no reason to suspect criminal activity when opening the letter. *Id.*, ¶20. What is unsaid but critical is that between realizing the significance of the letter and handing it off, there was no intervening search, investigation, or police activity by the detective. Otherwise, the court's reasoning

could not logically apply and she may not have retained her private-actor status.

The other Wisconsin case with some utility here is *State v. Berggren*, 2009 WI App 82. There a twelve-year-old girl discovered a memory stick containing child pornography. *Id.*, ¶2. She gave the item to her father, a police lieutenant, on Thanksgiving without explaining the contents, and his sole action before calling police was to open and view two photos from it, to see what they were. *Id.,* ¶¶4-5. He first attempted to view them unsuccessfully, in view of other children, bolstering his account that he had no inkling of what the photos actually were or that they might be evidence of a crime; this contributed to proving his actions private. *Id.,* ¶¶16-17.

C. Application.

It is useful at this point to consider Officer Bitton's actions in stages.

1. Entry. First came his consensual entry into Concepcion's home, where he spotted headset boxes in plain view. A state actor here would not have been violating the Fourth Amendment at this initial stage. Here at square one, was Bitton a private or a state actor?

The circuit court noted only that Officer Bitton was out of his primary jurisdiction and had no arrest powers in Kenosha. But that was not the question. The court displayed no interest in whether Bitton was in Kenosha *for a state*

purpose. No inferences can be made from the court's reasoning as to it having made any conclusion on the matter. But the only reasonable conclusion is that he was.

Concepcion kept his mobile home practically adjacent to the Kenosha airfield from which his Law Enforcement Aviation Coalition made its flights. Its whole presence was to facilitate a law enforcement function for which Bitton was duly deputized. The State received a warrant for the location after its affiant swore to the magistrate that Bitton was present there because he had a law enforcement flight the next day. Having chosen to accentuate Bitton's law enforcement credentials in order to receive the warrant, it would be unfair to let the state press the opposite position when it wants to clothe the search in the garb of a private action. *Cf. State v. Ryan*, 2012 WI 16, ¶¶ 32–33, 338 Wis.2d 695, 809 N.W.2d 37 (judicial estoppel).

Hence the entire episode began steeped in police purpose from the outset. Bitton was not in Kenosha for the shopping. Off duty or not, he came for the purpose of being well-rested for flights of the law enforcement unit that he commanded and for which he was deputized. His entire presence, like that of Concepcion's mobile home, was thus to aid law enforcement.

2. Recovery of Headsets. Once Bitton encountered the headsets that he knew might be stolen property, his next step was to seize it to bring it back to law enforcement. Again the court made no specific findings, but these facts are

undisputed. Recovering evidence of a crime looks objectively like a police function taken to aid potential prosecution. With more than a decade as a policeman, Bitton knew at this point that he had probable cause and that the proper next step was to obtain a warrant. He did not contact law on-duty police at this point, but proceeded to execute seizures on his own.

Moreover, the standard is not so high as whether he was seeking to aid prosecution or law enforcement, but merely whether he was acting to aid a government function. Had he been a teacher at a private school seeking to return missing textbooks, he would have been acting in a private capacity. But here he was a deputy of a law enforcement agency, commanding a unit that thus enjoyed state powers and operated alongside official police agencies. Just wanting to return property to its owner in this case meant supporting a public, not a private function. He was not acting out of a private interest, but that of a corps of public deputies, of recovering its property.

3. Prying into Hidden Places. Bitton's third action was to scour through Concepcion's home, looking through locked and unlocked containers ostensibly in search of more headsets. As he pushes forward, the plausibility of any non-state rationale for the searching diminishes. The only reason Bitton offered in his testimony was essentially useless in distinguishing any private motive. He said the headsets were expensive. So? If he had testified that he had intended to steal them and sell them on the helicopter accessory black market,

that would have been a private motive. But stating their value when he intended to return that value to the public only reinforces a public motive.

The circuit court convinced itself that Bitton was proceeding because the search was fruitful, because that would have at least seemed more reasonable than the unrtestrained intrusion that Bitton testified to. This is in fact a point critical to the public-private analysis: In contrast to the private actors in *Berggren* and *Cole*, Bitton is not performing the minimum required as a private citizen before handing off the matter to local police. Rather, he is plunging into full investigative mode, unstacking and opening containers and trying out keys in locks.

4. Inspecting the DVDs. Finally, Bitton encounters what he has reason to believe might be a trove of child pornography. Even though he now assumes that is what it is, he still does not call local police. Instead, he engages in a further search of the contents of the media he finds, putting at least one DVD in a player and watching. Again he offers no explanation that would identify a personal, as opposed to a professional, motive for doing this. He says it is against what he believes in. So what do we infer? That he therefore wants to see Concepcion prosecuted and convicted?

In short, Bitton came to Kenosha to support his law enforcement function, and inside Concepcion's home he progressively acted more and more as though impelled to uncover evidence, never stopping until he had fully

incriminated Concepcion. A comparison with other cases puts this one way on the state-action end of the spectrum. Having any public purpose is enough to establish a non-private search under *Payano-Roman*. Here we have layers of public purpose, and not once a hint of a genuine goal in Bitton's head that was not in some way for support of law enforcement.

II. The court erred by focusing on unremarkable aspects of the offense while overlooking Concepcion's *bona fide* heroism and other mitigators, so that the sentence was disproportionately harsh.

A. Standard of Review

Sentencing is committed to the sound discretion of the circuit court. *State v. Jackson*, 110 Wis.2d 548, 552, 329 N.W.2d 182, 185 (1983). Discretion is abused[6] when not exercised. *State v. Wickstrom*, 118 Wis.2d 339, 354-55, 348 N.W.2d 183 (Ct.App.1984); *see also State v. Melone*, 2001 WI App 13, ¶6, 240 Wis. 2d 451, 623 N.W.2d 179 (application of uniform rule does not fulfill exercise of discretion).

Its exercise is erroneous when not supported by "explained judicial reasoning." *Id.* (citation omitted); *See also*

[6] Contemporary parlance has replaced "abused" with "erroneously exercised" but it is unclear that discretion "not exercised" can be said to be "exercised erroneously."

generally State v. Gallion, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197; *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). *Gallion* rejected a "mechanical form" of sentencing, ¶26, where the court allowed its reasoning to be largely "implied," ¶¶38, 50. Instead, the court must explain on the record the objectives of the sentence, ¶40, and describe the facts in terms of their relevance to these objectives, ¶42. The facts apply via "factors" that the court should explain that it considered. ¶43. Some must be considered, while most are optional and "assist the court." ¶¶43, 47.

A sentencing court "misuses its discretion when it… gives too much weight to one factor in the face of other contravening factors." *State v. Steele*, 2001 WI App 160, ¶ 10, 246 Wis. 2d 744, 632 N.W.2d 112; *Ocanas v. State*, 70 Wis.2d 179, 187, 233 N.W.2d 457 (1975).

Discretion also does not extend to a sentence that is unduly harsh, *i.e.*, so disproportionate as to shock public sentiment. *State v. Killory*, 73 Wis.2d 400, 408, 243 N.W.2d 475, 481 (1976).

The general remedy for misapplication of discretion is resentencing. *State v. Fuerst*, 181 Wis. 2d 903, 916, 512 N.W.2d 243 (Ct. App. 1994).

B. Misweighing of Factors

This case provides an unusually stark example of extreme misallocation of weight to primary sentencing

factors. Not all sentencing factors are created equal. Gravity of the offense, character of the offender, and need to protect the public are "primary." *Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). Here character, which was exceptional, got short shrift, while the court focused on aggravators that were apparitions with no substance. There were other mitigators that the court should have considered but ignored.

1. Character. Concepcion was not perfect. He had a pornography addiction and extramarital affairs. But he was also a person who, when the call came, dropped everything to rescue strangers in need. Hundreds, possibly thousands or people owe their lives to him. He has spent nearly his whole life serving the public good.

The law does not just *suggest* that be considered in his favor. *Individual* sentencing is a fundamental right. *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330; 78 L. Ed. 674 (1934). Particularly *individualized* sentencing is a cornerstone to Wisconsin's criminal justice jurisprudence." *Gallion*, 2004 WI at ¶48. Our ideal is to regard all aspects of an offender's life. *See State v. Skaff*, 152 Wis.2d 48, 53, 447 N.W.2d 84 (Ct. App. 1989). A sentencing court may not employ a sentencing policy that is "closed to individual mitigating factors," *State v. Ogden*, 199 Wis. 2d 566, 571-72, 544 N.W.2d 574 (1996). A sentence that fits the crime, and not the criminal, is improper. *Id.*

The court did not even attain the inadequate pre-*Gallion* minimum of reciting "magic words": it did not use the word "character" or any synonymous term in explaining the sentence.

Nor was Concepcion's heroism considered. A corollary of the requirement that discretion be exercised on the record is that whether a particular fact or factor "formed part of the basis for the sentence" is demonstrated by whether a court gave "explicit attention" or "specific consideration" to the issue. *See State v. Tiepelman*, 2006 WI 66, ¶14, 291 Wis. 2d 179, 717 N.W.2d 1. It was silent on his saving lives or founding a group that saves lives to this day.

The Court mentioned Concepcion's "outstanding" employment, and gave "credit" for his service, but it was also equivocal. It stated that was not using that against him, only "mention[ing it] for the record." (R66:26-27.) This was immediately followed by a literal "but" as the court indicated this was all outweighed by the serious charges.

The court seemed to repeatedly disregard Concepcion as an individual and talk about offenders as a class. The court rejected probation because it only considered two messages that he could send to the public: "Whoever you are….you go to prison" or "Have all the child pornography you want…" (R66:27.) This false all-or-nobody dichotomy left no room for character. This was after it said the crime persists because of "people like you." (Id.) Most perpetrators are not like Concepcion, unless his character is entirely ignored. The

court explained that the crime persists because of people who pay for child pornography. (R66:25.) He didn't pay for it. The court replaced his character with the character of other offenders.

The court's message, that it did not care who Concepcion was or what his character was like, because that it had to send a message that everyone would be sentenced alike, was peculiar, because on one hand it thumbed its nose at the legal obligation to consider character, and on the other, disregarded its own sentencing history, as noted below.

2. Offense Severity. This was not a severe offense in relative terms. Of course, possessing child pornography is a serious felony by definition, but compared to other instances of the same offense, Concepcion's offense conduct fits somewhere between mild and unremarkable.

According to research based on offenders in the federal prisons, *typical* child pornography offenders possess hundreds or thousands of unlawful images. United States Sentencing Commission, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES, vii-viii (2012) (available at http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses) (hereinafter "REPORT TO CONGRESS") Offenders often amass tens or hundreds of thousands of images. Id. at 80. Collections into the millions

have been reported. Id. at 80 n.46.[7] In the most recent reported data (2010), 96.9 percent of offenders had at least ten images, and 69.6 percent had at least 600. Id. at 141.

In comparison. Concepcion was a dabbler. The court was told there were 73 illicit items, plus more in Illinois. But there was no reliable support for the number of items in Illinois, or the proportion of the 73 images that were actually illegal, save the actual items charged. *See State v. Mosley*, 201 Wis. 2d 36, 44, 547 N.W.2d 806 (Ct. App. 1996) ("To protect the integrity of the sentencing process, the court must base its decision on reliable information"). In terms of quantity, Concepcion was probably in the lowest decile or two.

The same federal report notes that "virtually all" offenders have pictures of prepubescent minors. REPORT TO CONGRESS at 138-39. Children aged 6-12 appear in 86% of offenders' collections, and 3-to-5-year-olds in about half. Id at 87. Most known victims of child pornography appear in images with some form of sexual penetration. Id. at 90. The vast majority of collections contain such images. Id. at 85. The majority of offenders have "images depicting sadistic or masochis[tic] conduct or other depictions of violence." Id. at 139. These often include "images depicting violence,

[7] In addition, Wisconsin recently had a million-plus image case. Jeffrey Feldman received a ten-year sentence for collecting and distributing. *See* http://www.justice.gov/usao-edwi/pr/milwaukee-man-sentenced-10-years-prison-receiving-child-pornography.

humiliation, bondage, and bestiality." Id. at 80-81. Most have some videos in their collections. Id. at 86.

This means that Concepcion having prepubescents in his collection is simply the norm among offenders. Even if the youngest estimates of age are credited, he still ranks about average. But unlike most offenders, Concepcion did not have violent or sadistic images or bondage or animals.

A sizable fraction participate in communities of collectors, a phenomenon which functions as a true aggravator because this conduct helps encourage other offenders and ultimately promote contact offenses by those supplying content to the informal child pornography market. REPORT TO CONGRESS at vii, 80, 97ff.

Concepcion was not in this group. In fact, nothing distinguishes this offense as unusually severe. As terrible as it may sound, this is a slightly less severe than average set of facts.

3. Other factors. The sentencing court repeatedly spoke of the need to protect the public, suggesting it was an aggravating factor. But Concepcion presented unusually low risk of reoffending. So how does that make any sense?

Several other factors should have been mitigating, which the court ignored: Concepcion cooperated, pled guilty, accepted responsibility and was remorseful, all unmentioned by the court, and all mitigating. *See Gallion*, 2004 WI at ¶43n.11; Wisconsin Sentencing Commission, Wisconsin

Sentencing Guidelines Notes 7 (2003) (hereinafter "Sentencing Notes"); *cf.* USSG §3E, (2011).

This was especially important because the illicit material was last accessed outside the limitations period, mostly deleted, and found on a broken device in a mobile home on the border that could easily leave the venue. Had he not provided details, proving that he knowingly continued to possess these materials in the venue and during the limitations period may have been challenging.

One factor that sentencing courts are encouraged to consider is "whether collateral punishment, for example, job loss, public humiliation, and/or long-lasting financial consequences, mitigates the sentence." Sentencing Notes at 8. *See also Gallion*, 2004 WI at ¶43n.11 (length of pretrial detention); *State v. Kelly*, 39 Wis.2d 171, 190, 158 N.W.2d 554 (1968) (professional discipline).

Concepcion was a 49-year-old family man with a career in law enforcement and lost everything. He will never have another law enforcement job, his reputation is ruined, and his family and friends almost completely gone. Google "Rick Concepcion Rockford" and the first hit (as of August 20, 2017) is a news story on his arrest in this case, naming him in the lede.[8] As a convicted felon and sex offender, he will wear a mark for the rest of his life, subject to a battery of collateral consequences that seem to worsen every year.

[8] WIFR.com," Rockford Man Arrested on Child Porn Charges" (Feb 22, 2011).

The court also should have considered issues of marginal deterrence and consistency: these are addressed in Part II.C, below.

4. Consecutive Sentences. The court's decision to structure the sentence in three consecutive sets was also an erroneous exercise of discretion. This too is addressed in Part II.C, below.

This is almost a paradigm instance of a case where the court exceeded its discretion in emphasizing one factor (sentence severity, which was unexceptional) over more important countervailing factors (particularly character), even going so far as to treat character as a non-factor. Resentencing is required.

C. Harshness

1. The sentence was shocking given the relevant factors. An unduly harsh sentence is one "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis.2d 632, 648 N.W.2d 507.

It perhaps would not shock everyone, considering some in the public would happily see sex offenders executed. No other type of charge produces greater prejudice than sexual exploitation of children. *See United States v. Ham,* 998 F.2d 1247, 1252 (4th Cir. 1993). Such offenses are the subject

of a "moral panic" – a firestorm of popular reaction to an evil which is itself not new. Jeffrey S. Victor, "Moral panics and the social construction of deviant behavior: a theory and application to the case of ritual child abuse." *Sociological Perspectives* (Fall 1998).

But that is not the test – "the judgment of reasonable people" elicits the sober reflection expected to follow after passions abate. The steadying hand of the magistrate is at its paramount importance here, because crimes that "excite and agitate the passions of men" demand "a deliberate and temperate inquiry." *Ex Parte Bollman*, 4 Cranch (8 U.S.) 75, 125 (1807) (Marshall). "[I]n times of popular passion and excitement it is the duty of the courts to set their faces like flint against" trampling the rights of the most despised. *Bridges v. United States*, 184 F.2d 881 (9th Cir. 1950).

This sentence was shocking to undersigned's postconviction co-counsel, Mr. Burch, to predecessor counsel, and to the defendant.

The assessment of harshness must also take care to disregard illicit factors. A court erroneously exercises its discretion a sentence is based on improper factors. *Gallion*, ¶17. It should be remembered that child pornography is not outside constitutional protection because of its power to offend, but because of its effects on its subjects. *New York v. Ferber*, 458 U.S. 747, 764 , 102 S.Ct. 3348; 73 L.Ed.2d 1113 (1982). One has the freedom to acquire content that is "disgusting," *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877,

884 (9th Cir. 1988), "loathsome," *Lac du Flambeau v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F.Supp. 1339, 1354 (W.D.Wis.1991), and "vile," *id*. The "disgusting" nature of an offender's expressions may be considered, but only as they relate to the harm of the offense. *See Fuerst*, 181 Wis. 2d at 912-13 (sentencing consideration of rights exercise requires nexus to offense).

The undue harshness inquiry does not regard offense severity in isolation. The court should also consider the character of the offender and any other applicable factors. *See, e.g.*, *State v. Rivas*, 337 Wis. 2d 558, 806 N.W.2d 269 (unpublished no. 2010-AP-2777-CR) (citing character as a factor in concluding sentence not unduly harsh) (Appx. 120-21, esp. ¶16). *McCleary*, 49 Wis. 2d at 274, quoted with approval The American Bar Association Approved Standards on Appellate Review of Sentences 7 (1968), that one purpose of sentence review was "to correct the sentence which is excessive in length, having regard to the nature of the offense, *the character of the offender*, and the protection of the public interest" (emphasis added).

2. It was disproportionate and inconsistent. The range of sentences given to others charged with similar conduct is a relevant factor in assessing undue harshness. Wisconsin abides by the principle that "[s]imilarly situated offenders should receive similar sentences." *State v. Ralph*, 456 N.W.2d 657, 660, 156 Wis.2d 433 (Ct. App. 1990).

The *McCleary* court noted that transparent sentencing was designed to preserve the wisdom of judges, *id.* at 280, and "to promote the development and application of criteria for sentencing," *id*. at 275. Uniformity was a goal of national sentencing reform with benefits of fairness, efficiency, and improved general deterrence, and *McCleary* has been read as aligning Wisconsin with national disparity-reducing goals, implicitly suggesting "a sentencing judge might reference her own prior cases, as well as similar cases sentenced in the same county or reported in the published case law or in the media." *See* Michael M. O'Hear, "Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences," 93 MARQ. L. REV. 751, 760-62, 770 (2009) (available at: http://scholarship.law.marquette.edu/mulr/vol93/iss2/15).

Clearly, a court may consider as relevant the sentences given to other offenders, especially co-defendants, who are most likely to be "similarly situated." *State v. Giebel*, 198 Wis.2d 207, 220–21, 541 N.W.2d 815 (Ct.App.1995). *See also State v. Reynolds*, 2002 WI App 15, ¶¶16,24, 249 Wis. 2d 798, 643 N.W.2d 165 (Fine, J., concurring) (calling on judges to work against "random" and "inconsistent" sentencing and toward a system that produces "similar sentences for defendants with similar levels of culpability and recidivism potential.")

Compared to state or federal sentences for the same or similar offense, this case is an outlier. In 21, the average

sentence in the federal system for possessing 600 mor more images of child pornography, including images of preadolescents and scenes of humiliation and torture has an initial confinement component of 52 months, less than half what the defendant received. No comprehensive source covers all state cases, but Defendant's review tells the same story:Instances of shorter sentences include *State v. Juedes*, Winnebago County, 08-CF-849 (7 counts): probation, 3+10 years stayed; *State v. Hogenkamp*, Lacrosse County, 09-CF-176 (2 counts): probation; *State v. Hoak*, Waukesha County, 05-CF-302 (2011 resentencing) (3 counts), 3¼ +3 years; *State v. Becker*, Racine County, 09-CF-47 (child porn counts dropped in plea to child sexual assault) 3+5 years; *State v. Wang*, Vilas County, 11-CF-75 (2 counts), 3+5 years; *State v. Sobczak,* Washington County, 09-CF-297, 3+3 years; *State v. Switalski*, Marathon County 14-CF-241 (10 counts), 3+5 years; *State v. Takach*, Lacrosse County 05-CF-802, probation; *State v. Dillon*, St.Croix County 05-CF-630 (2 counts), probation.

One case that stands out is *State v. Andrade*, Kenosha County case number 12-CF-72. In September 2016, after sentencing Concepcion but before hearing his postconviction motion, Judge Milisauskas sentenced Andrade for five years in, five years out, for repeated sexual assault of the same child. It appears fortunate for Andrade that he merely raped a child over and over as opposed to acquiring images over the internet.

In contrast, other cases where sentences were comparable or greater than those issued to the defendant involve notable aggravators. *State v. Beasley*, Milwaukee County 07-CF-1965 resulted in a sentence of 9+9 years, but that defendant already had a felony sex offense record (Milwaukee County 01-CF-4981). *State v. Zocco,* Milwaukee County 13-CF-4798 ended in an aggregate sentence of over 25 years initial confinement, but Zocco also had drug charges and was a homicide suspect.

Among federal cases, ten-year sentences, barely greater than the confinement time given the Defendant, have gone to David Roehl (13-CR-62, W.D. Wis.), where it was a mandatory minimum because of a prior offense, and "one of the more disturbing cases" to have come before that court, (See http://www.doj.state.wi.us/sites/default/files/in-the-news/watertown-man-sentenced-10-years-possessing-child-pornography-20131022.pdf) and Jeffrey Feldman (13-CR-155, E.D. Wis.), where the defendant exchanged files from a personal collection of over a million images. (*See* http://www.justice.gov/usao-edwi/pr/milwaukee-man-sentenced-10-years-prison-receiving-child-pornography.)

Keeping sentences proportionate and consistent is part of court policy for good reasons that go beyond violating rights of offenders. Consistent sentences are more likely to be seen as legitimate and form a more effective deterrent. Moreover, excessive sentences for a crime eliminate the marginal deterrence from committing the next greater crime.

Punishing child pornography, a D Felony, more severely than sexual assault of a child under section 948.02, a B or C felony, sends a message that one with a sexual interest in children should choose to commit the greater crime, because the punishment will be less. Research shows that there are indeed perpetrators for whom these are substitutable offenses: in several countries where child pornography was legalized, reports of contact offenses dropped. M. Diamond, E. Jozifkova & P. Weiss. "Pornography and sex crimes in the Czech Republic." 40 ARCH. OF SEXUAL BEHAV. 1037-43 (No. 5, Oct. 2010). Pushing the sentences for the two offenses out of alignment thus makes the public less safe.

3. Consecutive Versus Concurrent. Generally speaking, a sentence well within the limits of the maximum sentence is not disproportionate to the offense committed. *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Here, each sentence taken individually was one fifth of the maximum. The aggregate sentence was less than the maximum for one count, and the maximum aggregate sentence would have been 250 years. of which 150 would be served as initial confinement, plus a fine of a million dollars.

However, defendant questions the applicability of the *Daniels* rule to the offense of possessing child pornography. The available penalties in the typical child pornography case are so high that the maximum sentences would usually be so lengthy as to be "meaningless." *See State v. Hall*, 2002 WI App 108, ¶18, 255 Wis.2d 662, 648 N.W.2d 41. Possession of

even a single image of child pornography is a D felony, punishable by 15 years initial confinement plus 10 years extended supervision. Wis Stats., §§948.12(1m), 939.50(3)(d), 973.01(2)(b)4. An offender convicted of a mere three counts of possessing child pornography faces a *de facto* life sentence[9]. Most offenders have huge collections of images, and thus face exposure stretching out for millennia or æons, making mere centuries of imprisonment "well within the limits of the maximum" and no sentence unduly harsh regardless of the circumstances.

Defendant has not found, nor can he conceive of, a strong rationale for application of the "well within the limits of the maximum" rubric to such a circumstance. It is apparent that a sufficiently lengthy sentence under sufficiently ameliorating circumstances is not rendered reasonable simply because the legislature sets a maximum penalty far beyond the length of time one could ever serve.

In the federal system, a child pornography defendant theoretically also faces exposure on a geologic time scale, but for the presumption that offenses will be "grouped" so that

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[9] The median age of a child pornography defendant at arraignment is 42 years. Mark Motivans and Tracey Kyckelhahn, "Federal Prosecution of Child Sex Exploitation Offenders, 2006", BUREAU OF JUSTICE STATISTICS BULLETIN (Dec. 2007) (available at http://www.bjs.gov/content/pub/ascii/fpcseo06.txt). The vast majority of offenders (99.5% in 2010) are male. REPORT TO CONGRESS, *supra note* 4, 141-42. Further male life expectancy at that age is 36.62 years. See www.ssa.gov/oact/STATS/table4c6.html.

additional penalties for multiple offenses is additive rather than multiplicative. *See* United States Sentencing Commission, GUIDELINES MANUAL, §§1B1.1(a)(4), 3D1.1, 3D1.2(d), 2G2.2(b)(7) (Nov. 2011).

Wisconsin's alternative to grouping is a somewhat weaker recommendation toward concurrent sentences. In *Hall*, ¶¶13-14, the Court of Appeals criticized a sentencing court for "flying in the face of" national standards that courts sentencing multiple related offenses "ordinarily should designate them to be served concurrently" and when not, provide "a statement of reasons for the selection of consecutive terms." The former expectation conforms with the rule that left unspecified, sentences are presumed to run concurrently. *See State v. Oglesby*, 2006 WI App 95, ¶21, 292 Wis. 2d 716, 715 N.W.2d 727; *State v. Rohl*, 160 Wis.2d 325, 331, 466 N.W.2d 208 (Ct. App. 1991). The latter expectation is consistent with the public explanation expected by *Gallion*.

In this case the circuit court gave no reasonable explanation for its exercise of discretion in favor of some concurrent sentences and some consecutive. The use of consecutive sentences was not necessary to achieve the aggregate length of sentence imposed by the court.

Nor does the court's on-the-record explanation that these were "separate" offenses make sense. For one thing, all offenses must be separate in order for them to be separately charged. If this were enough to justify consecutive sentences,

it would effectively reverse the presumption that separate offenses brought in the same case are sentenced concurrently.

Nor is the "separate" nature of the offenses even factually reliable. Though the defendant waived his multiplicity defense with his plea, *State v. Dietzen*, 164 Wis.2d 205, 210, 474 N.W.2d 753 (Ct.App.1991), limits on his exposure created by multiplicity doctrine could have been properly considered at sentencing. In *State v. Multaler*, 2002 WI 35, 252 Wis. 2d 54, 643 N.W.2d 437, the Wisconsin Supreme Court considered multiplicity in the context of downloaded images. It determined that acts of similar type may be uniquely counted where each required "a new volitional departure in the defendant's course of conduct." *Id.*, ¶57. The court found that "[e]ach decision to download more child pornography represented a new volitional departure." *Id.*, ¶58. Defendant notes that the first seven counts here related to images that were part of a common series, and it is not uncommon for several, even hundreds, of separate images to be compressed into a file downloadable with a single click. Here five images were created in a matter of seconds; this could merely reflect the time to download a set of images in response to a single command.

Although the sentence here was well under the legal maximum, it was not less than the maximum that would be expected in practical terms given the practice either of national courts, Wisconsin courts, or even this particular judge. Given the facts, that the offense was not relatively

severe, and that Concepcion's character and other factors were highly mitigating, the sentence really was unduly harsh.

III. Sentencing counsel was ineffective, but the postconviction court failed to consider any of the alleged deficiencies.

A. Standard of review

Whether a defendant received ineffective assistance of counsel is a mixed question of law; factual findings are subject to clear error review while this court applies the law *de novo*. *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis.2d 358, 805 N.W.2d 334

Ineffectiveness is established by showing (1) that Defendant suffered prejudice from some action or omission of counsel, and (2) that the action or omission was deficient. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Simple oversights, unsupported by strategic consideration, are deficient: the requisite level of performance requires deliberateness, caution, and circumspection. *State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). A single innocent, isolated error may establish deficiency if of sufficient magnitude. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Deficiencies should not be examined only piecemeal, but also for their aggregate

prejudicial effect. *State v. Thiel*, 2003 WI 111, 59, 264 Wis. 2d 571, 665 N.W.2d 305.

The test of prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

B. Counsel was ineffective.

Sentencing counsel thought the recommendations of the DOC were so out of line that she was shocked. She knew from her own experience that those recommendations were in excess of what pornography-possessing child molesters received. When they became the order of the court, her sleep was troubled as she wondered how things went so very wrong.

Part of what went wrong was her deficiency. Her presentation to the court included some important highlights: she pointed out his useful skills and low risk of re-offense (which the court ignored). But it was a wholly inadequate plain vanilla response to the state's over-the-top demand for punishment. Her main mistake was not realizing the need to step it up. Counsel performing to a reasonable would have recognized the need to offer something more forceful than the routine response.

She was shocked, yet she had never told the court that the recommendations shocked her, nor provided anything to

the court to show that such recommendations were extreme compared to previous outcomes, which could easily have been done.

She took the defensive, arguing that Concepcion's years of public service should not be held against him, rather than telling the court he was a hero of exemplary character and stature who, if character was to mean anything, should receive the leniency she recommended.

She knew that the collection of child pornography Concepcion had kept, even counting all the materials that had been deleted years before, was small compared to most offenders. But she said nothing.

She testified repeatedly that she should have mentioned things she did not, that she had no strategic reason, or no reason at all, for her omissions. All she could point to was the rush of courtroom adrenaline. (R68:13.)

Had she spoken up, there is every reason to believe that the Court would have paid attention. It followed the DOC recommendation not because counter-arguments were rejected, but because it was based on a more comprehensive set of considerations. So why not give the judge more considerations to factor in?

Had Concepcion received a full-throated defense, pushing hard on the relative un-severity of his offense, his exceptional character and low risk, the need for the court to consider these factors and the court's historical range for

similar offenders, it seems improbable that his sentence would have been so anomalously servere.

C. Postconviction Court Error

At postconviction, the circuit court fixated on trial counsel's statement that she long considered she should have filed an independent sentencing memorandum. (R68:6-7; R70:3-4;Appx.108-09.) The court erred in at least three ways:

First, sentencing counsel did not say that filing her own PSI was the only thing she would have done differently. At the *Machner* hearing she repeatedly acknowledged other things she "should" have done, or did not realize she had omitted. This was clear error on a question of fact.

Second, the court's view that the contents of such a PSI would have been mysterious, repetitious, or unhelpful are ill-founded. An independent sentencing memo could have contained any of the facts or arguments that were available and not raised to the court. At very least it could be expected to avoid the mistakes counsel made because of "adrenalin."

Third and most importantly, the inquiry before the court was not what counsel would have done differently in retrospect. That is actually the least relevant question, because the benefit of hindsight is to be omitted from the analysis. *Strickland*, 466 U.S. at 689-90. The questions are whether effective counsel would have done more; whether omissions stemmed from tactical considerations or simple

mistakes; whether the errors rise to a point of deficiency; and whether they were of the level to potentially affect the outcome.

None of these inquiries limit the analysis to decision to forego an independent PSI. Competent sentencing counsel would know that character and relative severity are among the paramount issues. Competent counsel would have identified the beneficial facts and presented them to the court, absent some strategic counter-indication, which counsel here did not have.

The postconviction court treated it as a prerequisite that sentencing counsel could identify her errors. That is illogical, because it would mean completely incompetent counsel could never do anything wrong, while self-critical counsel with high standards would

CONCLUSION

For the reasons stated above, this Court should vacate the conviction and allow Concepcion to withdraw his plea, with instructions to exclude from any trial the evidence flowing from Officer Bitton's search. In the alternative. Defendant's sentence should be vacated and the matter remanded for resentencing consistent with the court's opinion.

Dated at Milwaukee, Wisconsin, August 22, 2017.

Respectfully Submitted,

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APPENDIX

INDEX TO APPENDIX

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No.16-AP-1284-CR

RICARDO L. CONCEPCION.

Defendant-Appellant.

CERTIFICATION OF FORM AND 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 300 dots per inch, 13 point body text, 12 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is **9530** words.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wisconsin Statutes (Rule) 809.80(4) that on the 22nd day of August, 2017, I caused ten copies of the Brief and Appendix of Respondent-Appellant to be mailed by first class mail, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O.Box 1688, Madison, Wisconsin 53701-1688.

_____
GARY GRASS

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that pursuant to Wisconsin Statutes (Rule) 809.19(12), I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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.

_____
GARY GRASS

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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.

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 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.

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GARY GRASS