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

REPLY BRIEF OF DEFENDANT-APPELLANT

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REPLY BRIEF OF DEFENDANT-APPELLANT

Defendant-Appellant, by counsel and pursuant to section 809.19(4), Stats., hereby submits the following reply brief in support of his appeal to this court:

ARGUMENT

I. Officer Bitton's police search.

A. Status of the Law Enforcement Aviation Coalition

The state argies that the Law Enforcement Aviation Coalition is not government, merely a private "organization that assists law enforcement." (State Brief at 16.) It notes that LEAC does not have arrest powers and its members are not paid or covered by state insurance. (Id. at 12.) The state cites as authoritative the website of LEAC, when later called "Air-One" (Id. at 3, citing *www.airsupport.org*.)[1]

According to the site, LEAC began when a helicopter was made available to the Winthrop Harbor Police Department "for law enforcement operations." The Winthrop Harbor Mayor's Office and Village Board approved a program to share it. A staff came together "from various Police and Sheriff Departments." They responded to "call-outs" from the police "for air support, including…assisting with felonies in progress."

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[1] The site changed recently reflecting LEAC's further transmutation into a "public agency", but Concepcion attaches the complete text of the "Our History" section as it then appeared. *See also* Sheryl DeVore, "AIR-ONE moves to Lake County", LAKE COUNTY JOURNAL (Jan. 16, 2013) (available at http://www.lakecountyjournal.com/ 2013/01/11/air-one-moves-to-lake-county/apjjmao/).

In 2005, the organization became a non-profit. It helped law enforcement agencies procure helicopters from the U.S. Defense Logistics Agency's military surplus acquisitions program, codified at 10 U.S.C. § 2576a, which it equipped, refurbished, and used. These acquisitions are overseen by the Illinois Law Enforcement Support Office, part of the Department of Central Management Services. *See* 2017-2018 ILLINOIS BLUEBOOK at 188 (https://www.cyberdriveillinois.com/publications/illinois_bluebook/deptsagencies.pdf.)

LEAC also stated on its website that it relied on assistance from the "Illinois Law Enforcement Alarm System" (ILEAS), whose website (https://www.ileas.org/about-ileas), identifies it as a state entity, established pursuant to the Illinois Constitution (Art. VII, sec. 10), Illinois Intergovernmental Cooperation Act (5 ILCS 220/1 et seq.), and other laws. Local agencies representing 95 percent of Illinois law enforcement personnel have affiliated with the program.

Fourth Amendment application to private searches is guided by its limitation to state action. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). In determining state action, an entity's technical private status is not determinative. There are at least two major cases where a private entity can engage in state action. One is where the private entity performs functions that are traditionally the responsibility of the state. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974). Like responding to felonies in progress. The other

case is when the state has placed itself in such "a position of interdependence" with a private actor "that it must be recognized as a joint participant" with the state. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961); *see also Evans v. Newton*, 382 U.S. 296, 299 (1966).

LEAC drew its membership exclusively from law enforcement, and used equipment under lease to, or later owned by, the government, with the formal sanction of public officials. It worked hand in glove with law enforcement, with deputation to assist state functions, including apprehending felons. It is no wonder that LEAC had "Law Enforcement" in its name. LEAC and local law enforcement were and are basically inseparable.

Like the original "Siamese Twins" Chang and Eng Bunker, LEAC and the police were joined at the sternum. It's

silly to say that law enforcement was uninvolved because Bitton was acting for LEAC. LEAC has one mission: to support law enforcement, whether by rescues or chasing criminals. It doesn't matter whether he was acting as Chang or as Eng. If Chang was conducting an illegal search, Eng wasn't back at Mount Airy entertaining. When LEAC acts, the state is implicated.

B. Curiosity and Disgust are not Private Purposes.

These are feelings that can motivate public or private functions. As an independent non-public purpose for Bitton's actions, they fail because they are fundamentally non-distinctive.

If police engaged in a search ever open a door it is because they want to know what lies behind. We call that wanting to know "curiosity." It is at the core of all searches. Every searcher is curious. If mere curiosity were a distinctly private motive, even on-duty police following orders would meet the second prong of the *Payano-Roman* test, rendering it meaningless.

Likewise, one can presume that a great many police join the force because they do not like crime and want to stop it. They pursue a life of crime-fighting because they consider the traditional *malum-in-se* offenses to he hateful. What does Bitton mean when he says he was so disgusted motivated by child pornography he had to watch a tape of it? Presumably that disgust motivated him to confront the offense, by gathering evidence which he reported to police to help get

Concepcion arrested and punished, hence purging revulsion through action. If any time police acted, they could support an "independent" motive by noting their genuine contempt for criminal behavior, it would again nullify that prong of *Payano-Roman*.

These uselessly flimsy motives can probably be asserted in every single case and do not lend themselves to evidentiary testing.

The state likens this case to *U.S. v. Ginglen*, 467 F.3d 1071 (7th Cir. 2006). (Brief at 14-15.) There, a defendant's abode was searched by his three sons, one an off-duty officer. *Id.* at 1073. Note that the Ginglen brothers had already identified their father from surveillance footage of one of the armed robberies at issue, obviating the need for further evidence. *Id.* They went to "confront" their father, not to determine whether he was guilty but to convince him to stop committing dangerous crimes for sake of his safety and others'. *Id.* The purported law enforcement function argued here was his potential arrest, which the brothers would have effected if their father refused to surrender himself. *Id.* They did not search out evidence of a crime: they searched for their father, finding superfluous evidence simply "in the course of" seeking him in an upstairs room. *Id.*

The State argues that Bitton's conduct, methodically searching through rooms and containers, locked and unlocked, was somehow less police-like, less forensic, than looking around the family home for a cornered close relative

to ask him to turn himself in to police peaceably. It considers it critical that Bitton did not arm or armor himself to begin searching a trailer (that he knew was unoccupied) the way the Ginglens had specifically because they planned to face off against a desperate criminal they knew to have arms.

This entirely ignores the context of each situation, as it does the specific factors of the *Payano-Roman* analysis. The Seventh Circuit noted the particular facts about the Ginglens to sustain the District's conclusion that safety was a motivating independent interest. "Curiosity" and "disgust" are nowhere near the same plane as, "my father was doing something really dangerous, and I wanted him to stop before he was hurt, or killed somebody." Bitton did not express a motivation to confront Concepcion. And the only danger Concepcion was in was that of being caught, or perhaps that to his soul, which Bitton also neglected to mention.

C. Direct Responses to Concepcion's Arguments

The State's brief devotes only four paragraphs (at 14-15) to directly responding to what Concepcion argued. It donned blinkers and made only a handful of points. One of these, addressed above, is that LEAC, a.k.a. Eng, only "assists" and is not a *part* of law enforcement, a.k.a. Chang.

Regarding the "investigation for stolen property," the state emphasizes the "benefit of the doubt" Bitton supposedly gave Concepcion that he had taken the headsets home for maintenance, but Bitton also acknowledged they were possibly stolen. (R61:6-8.) The point is that the test for

whether he was engaged in a public function is sensitive to Bitton's professional awareness of crime and criminal procedure. *State v. Bembenek*, 111 Wis.2d 617, 631-32, 331 N.W.2d 616 (Ct. App. 1983). This includes his realization that his search could generate evidence of a crime that he *suspected*, wherever the benefit of his doubt was placed. Concepcion noted that in cases held to have been private searches, the private actor ceased activity and called in law enforcement at the point that the potential discovery of criminal evidence peered over the horizon. Bitton plowed forward.

The state's third argument is undeveloped and cites no authority, but it seems as though its conclusion that returning property to a "volunteer, nongovernmental organization" is not a public function again relies on its view that Chang and Eng had different traits. Whether law enforcement pays you to assist them is not the test of whether you are performing a law enforcement function. *See Ginglen* at 1075-76 and cases cited.[2]

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[2] "Our ruling is consistent with … decisions, which have held that an off-duty police officer acts as a government agent, where he or she stumbles upon criminal activity and attempts to collect evidence for law enforcement." *Id., citing Ex Parte Kennedy*, 486 So.2d 493, 495 (Ala.1986) (off-duty officer employed as an exterminator removes leaf from plant he suspects to be marijuana); *State v. Woods*, 790 S.W.2d 253, 259 (Mo.Ct.App.1990) (off-duty officer searches cabin after observing marijuana while employed as caretaker); *Commonwealth v. Eshelman*, 477 Pa. 93, 383 A.2d 838, 842 (1978) (off-duty officer encounters abandoned car while

Finally, the State expresses overblown fear that finding an off-duty officer conducted a state search will undermine *State v. Cole*, 2008 WI App 178, which at ¶13 notes that merely being been conducted by an off-duty cop is not enough to bring a search under the Fourth Amendment. This is a canard. Wisconsin law recognizes that one must make that evaluation using all relevant factors. *Payano-Roman*,¶ 21. One's status as a trained officer has been part of that analysis at least since *Bembenek*, and continues in the body of case law cited in *Ginglen*.

II. Sentencing Error.

A. Consecutive Sentences

The State notes that under *Daniels*, a sentence well below the maximum permitted by the legislature legally is not "shocking," no matter how shocking in real life. (State's Brief at 19.) It then notes that this maximum here after bargained dismissals was 250 years. It contrasts this with *Hall*, where a 304-year sentence was viewed as meaningless. The State emphasizes that in *Hall*, none of the charges carried a life sentence. (Brief at 25.) These pieces of argument fit poorly, like Chang and Eng occupying Jacqueline Kennedy's pink Chanel suit. Concepcion's offenses did not carry a life sentence either, yet the state would accept 250 years as

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looking for friend in the woods, retrieves package he suspects contains marijuana, gives to local sheriff).

meaningful sentencing. Does this mean a life sentence is between 250 and 304 years?

Hall exposed the potential problem with chaining one sentence after another to excessive lengths, noting the solution was sentencing court self-restraint in opting to run sentences consecutively. Concepcion isn't arguing that state sentences can be grouped as the federal sentencing system presumes. Nor that a court's ability to impose consecutive sentences can be capped at some arbitrary length, as our state supreme court rejected in *Paske.* The ABA standard that Concepcion cited was referred to approvingly in *Hall* and is completely consistent with state law: the decision to impose consecutive sentences is not the default but requires a positive exercise of the court's discretion, displayed on the record. This requirement does not directly limit the outcome length of a sentencing court's decision but requires sentences extended through concatenation (to ten years or ten thousand) to be well reasoned and reviewable.

Other than baldly assert that the court's use of consecutive sentences was a product of sound discretion, the State does not attempt to respond to Concepcion's argument that no proper rationale to impose such sentences was offered in this case.

B. Mitigating Factors Unconsidered

The state points out one clear misstatement in Concepcion's brief: that the court had not mentioned the fact that he had pled guilty and accepted responsibility for his offenses. (His Brief at 29.) In fact, the court did mention the guilty plea in its recitation of the case history at the very beginning of announcing the sentence. It also noted that Concepcion had not denied the charges, which is at least somewhat similar to accepting responsibility.

That does not substantially diminish his argument, however. The plea was mentioned only in summarizing case history, not discussed as a mitigator. The court did not state that the plea came early on, freeing the state from having to prepare for trial. Nor his cooperation or remorse at all. And though it stated that he admitted possessing the child pornography, there are many defendants that do say, I did it, but I should be pardoned because of why I did it (research), or how I did it (unknowingly), or when (venue), or where (limitation). Concepcion was in a better position than most to resort to such outs, but did not.

The state argues (Brief at 22-23) that the court was aware of Concepcion's heroic actions and may have considered them, but did not have to do so on the record, because it may have regarded them as irrelevant.

This may indeed have happened, but the court's dismissal of Concepcion's life-saving contributions to society

evoking an unusual stature of character, to send the message that "it doesn't matter who you are" is a virtual paradigm for the court's discretion over the weighting of sentencing factors passing its limit. A sentencing judge is not entitled to simply disregard without comment factors that under Wisconsin law would appear to be highly significant. Nothing matters more than character, and nothing demonstrates character like risking life and limb in service to the public. If cases like *Ocanas* are continue to mean anything, they must apply in a case like this, where the facts are extreme. It is shocking and brings disrepute upon the judiciary to simply ignore – as the court did by dismissing *sub silentio* as irrelevant – the hundreds or thousands of lives Concepcion saved not for pay or recognition but simply because it was right.

C. Comparison of Cases

The state notes (Brief at 24) that even the sentence is given to a similiarly situated *codefendant* does not control the sentence given to a given party. Furthermore, given the highly individualized nature of sentencing, capsule summaries of a small batch of cases cannot by nature demonstrate parity among them. (The state labels this as an "undeveloped" argument it appears to really mean "unsupported."

But look at Concepcion's argument in its entirety. The facts of his case compared with the best available data show that his case manifested low-to-average severity, coupled with essentially zero public risk and A-plus character. Any

proposed comparator case will have unique characteristic and the abundance of confounding variables tends to make direct comparison nearly impossible, but in aggregate, it is easy to show that what Concepcion's attorney said at the *Machner* hearing was right: this sentence is atypically severe for those convicted of similar crimes. This is extremely hard to square with the fact that absolutely nothing that could function as an aggravator in this case went beyond what is typical for those similarly charged. The series of comparator cases merely serve as one additional data point to secure a conclusion that was obvious anyway.

III. Sentencing counsel was ineffective.

The State takes Concepcion to task for stating that his attorney acknowledged there were mitigating facts she should have raised to the court, but failed to mention without strategic reason, responding that his attorney testified that "I still have no idea what I should have done differently." (State Brief at 29, citing Concepcion Brief at 43; R68:13.)

But if one reads Concepcion's argument in connection with the facts to which it refers (Brief at 11-13), it is clear that his attorney equivocated. To note just a few examples, she admitted she should have pointed out that relative to other offenders, Concepcion's collection of child pornography was in the "lower range" (which is putting it mildly). (R68:12.) She also knew she should have emphasized that his lack of any contact victims distinguished him from typical offenders.

(R68:18.) She recognized that she could have praised Concepcion's character much more highly than she did, but she refrained because it might create a contrast for her future clients. (Id.) She was shocked by the sentence, particularly in contrast to one of her own clients who was clearly worse, a child molester, more dangerous, with less character, who received twice the sentence, but said nothing, despite the sentence being unjust and "pointless." (R68:8-9, 17-18.)

Likewise, Concepcion is chastised (State Brief at 30) for not pointing out what information might have appeared in a sentencing memorandum. But that information is obvious if one looks at the *whole* argument. The points Concepcion identified as orally omitted could have been presented equally as well in a memorandum, including those stated just above: (small, unshared collection of child pornography, never having had a contact offense, character the most noble of any felon his attorney had represented, and DOC recommendation grossly disproportionate to the typical sentence given even the typical possessor of child pornography without these mitigating traits).

And the state doesn't address the argument that what sentencing counsel *admits thinking* she should have done differently isn't what matters, but rather what a reasonably proficient attorney *should* have recognized. Otherwise, an attorney would be deemed effective simply for being too unperceptive to recognize what he or she should have done: Ignorance is strength?

The state even ignores itself. It argues Concepcion has not proven that the "court would have imposed a lesser sentence" but for trial counsel errors (Brief at 30), but this is not the standard Concepcion must meet: he need only show a "reasonable probability" of a different outcome (Id. at 27, citing *Strickland*) – not that the sentence "would" have been less.

CONCLUSION

For the reasons stated in both Concepcion's briefs, this court should grant the relief requested.

Dated at Milwaukee, Wisconsin, November 20, 2017.

Respectfully Submitted,

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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 **2970** words.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wisconsin Statutes (Rule) 809.80(4) that on the 20th day of November, 2017, I caused ten copies of the Reply Brief of Defendant-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