STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP001541-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAWN T. WISKERCHEN,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming a Restitution Order and Amended Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Faye M. Flancher, Presiding.

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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ISSUE PRESENTED

> Shawn T. Wiskerchen was charged with and pled no contest to a single burglary that he committed on May 8, 2015. The victim sought restitution related to burglaries she alleged Wiskerchen committed prior to May 8. The circuit court ordered restitution and the court of appeals upheld the restitution order. Pursuant to Wis. Stat. § 973.20, may a circuit court order restitution based on a victim's losses caused by alleged prior crimes that are (1) not crimes for which the defendant was convicted and (2) not read-in crimes?

The circuit court ordered Wiskerchen to pay $8,487.41 in restitution after stating that the court had considered information regarding Wiskerchen's alleged prior burglaries at sentencing and after determining that there was a "nexus between Mr. Wiskerchen's conduct and the victim's loss."

The court of appeals affirmed. Relying heavily on ***State v. Queever***,[1] the court of appeals held that Wiskerchen's alleged "prior burglaries were 'part of a single course of criminal conduct' related to the May 8 burglary and subject to restitution."[2]

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[1] ***State v. Queever***, 2016 WI App 87, 372 Wis. 2d 388, 887 N.W.2d 912.

[2] ***State v. Wiskerchen***, unpublished slip op., No. 2016AP1541, ¶13, 2017 WL 5030837 (Ct. App. Nov. 1, 2017) (quoting ***State v. Queever***, 372 Wis. 2d 388, ¶22). (App. 113-134).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given this Court's grant of review, oral argument and publication are warranted.

STATEMENT OF THE CASE AND FACTS

The charges

On May 8, 2015, at approximately 12:05 p.m., police responded to a report of a home burglary. (1:2). The victim, N.E.D., stated that she came home and saw that the cabinets in her bathroom had been opened. (1:2). She then heard someone walking upstairs. (1:2). She went upstairs and it looked like someone had gone through her bedroom. (1:2). She noticed that the back bedroom door was closed. (1:2). She opened the door and saw Wiskerchen, who was her next door neighbor. (1:2-3). A struggle ensued and Wiskerchen eventually got past N.E.D. and exited the house. (1:2).

In speaking with police, N.E.D. reported that she had sustained injuries during the struggle. (1:2). She further indicated that several items were missing from her home. (1:2). However, the complaint did not identify any missing items. (1:2).

On May 22, 2015, the state charged Wiskerchen with the following offenses:

- Count 1: Misdemeanor battery as a repeater;
- Count 2: Possession of burglarious tools as a repeater;
- Count 3: Burglary of a building or dwelling as a repeater; and

- Count 4: Second degree recklessly endangering safety as a repeater.

(1:1-2).

The plea and sentencing

On September 8, 2015, Wiskerchen pled no contest to count three, burglary, without the repeater enhancement. (33:2-12). Pursuant to the plea agreement, counts one, two, and four were dismissed and read-in at sentencing. (14:2, 33:2). Further, the state agreed not to issue any additional charges in the case. (14:2, 33:2, 34:10).

During the plea colloquy, the circuit court confirmed that counts one, two, and four would be dismissed and read-in. (33:10). The court informed Wiskerchen that it could consider those charges for the purpose of sentencing. (33:10). Further, the court stated that Wiskerchen might be required to pay restitution to any victim of those charges. (33:10). The court never mentioned that Wiskerchen might be required to pay restitution for any uncharged offenses. (33).

Sentencing took place on November 25, 2015. (34). N.E.D. spoke at sentencing and alleged that Wiskerchen gained access to her home by entering through a storm window in her basement. (34:5). N.E.D. stated that Wiskerchen "used my home as a flop" and he "created a nest in the back bedroom in the closet." (34:5). N.E.D. stated that Wiskerchen "very possibly was in that house - - in my house in that room while I was in the house also at different times." (34:5-6). N.E.D. stated that Wiskerchen "had taken alcohol into that closet so he could sit up there and drink and do whatever he chose to do." (34:6). N.E.D. further stated that she considered these prior incidents "multiple breaking and

entering." (34:6). Finally, N.E.D. stated that Wiskerchen's mother told her that "he had been into my house on numerous occasions, because he had my medication." (34:6).

The state requested $21,496 in restitution for N.E.D., $13,791.59 for her insurance company, and $355.75 for the crime victim compensation program. (34:10). In response, Wiskerchen requested a contested restitution hearing. (34:11). Further, Wiskerchen noted that N.E.D.'s allegations that he used her home as a "flop" and that he repeatedly burglarized her home were unsupported by the evidence and that N.E.D.'s statement was "her opinion of what she thinks happened." (34:17-18).

As relevant here, the court noted Wiskerchen's denial, of a statement attributed to him in the presentence investigation (PSI), that he claimed to have burglarized 100 to 200 homes. (34:26). The court also noted that Wiskerchen must have taken "some time" and "a lot of planning" to conceal his point of entry into N.E.D.'s home. (34:27). The court further noted N.E.D.'s claim that Wiskerchen created a "nest" in her back bedroom closet. (34:27-28).

The circuit court then sentenced Wiskerchen to nine years of imprisonment, consisting of five years of initial confinement and four years of extended supervision. (34:35; App. 110-112). As requested, the court scheduled a contested restitution hearing. (34:36).

The restitution hearing

The restitution hearing took place on March 23, 2016. (35). N.E.D. sought restitution for the full amount of her alleged losses, totaling $32,138.43. (35:6-7; 39:1).[3]

At the hearing, N.E.D. testified that she did not notice any missing property before May 8, 2015. (35:10). N.E.D. stated that after the incident she went through her home and made a list of items she believed to be missing. (35:9-10). She offered exhibit 1: a document that she prepared for her insurer that detailed the purportedly missing items and their values. (35:5-6; 39). The document claimed missing items such as a computer printer, a microwave, an electric lawn edger, multiple men's and women's jackets, an air hammer and chisel set, and a PlayStation 3. (39). Notably, N.E.D. admitted that she did not know when any of the items went missing. (35:7).

With respect to the missing items, the following exchange ensued between defense counsel and N.E.D.:

> Defense: Going through this list, which items were taken on May 8 when this incident happened?
>
> N.E.D.: I have no idea which were taken on May 8 and which were taken the other times that he entered my home illegally.
>
> Defense: When you saw him on May 8 did he have anything in his hands?
>
> N.E.D.: No, he had a backpack.

[3] N.E.D.'s insurer depreciated N.E.D.'s claimed losses to $22,279.91 and then reimbursed N.E.D. up to her policy limit of $13,791.59. (35:7; 39:1).

Defense: Do you know what was in the backpack?

N.E.D.: I presume it was my stuff.

Defense: Do you know what was in the backpack?

N.E.D.: No.

Defense: Do you know if the police searched his residence – Mr. Wiskerchen's residence at some point in time during the investigation?

N.E.D.: I believe they did, but I was at the hospital at that point.

Defense: Okay, there were some items recovered, correct?

N.E.D.: I haven't seen anything yet.

Defense: Okay, did you see the police reports in this matter?

N.E.D.: I don't think I did.

Defense: Okay, so you don't know if the police recovered any items? They didn't tell you that they did?

N.E.D.: I think they recovered a couple of earrings that they found in his home.

Defense: And a necklace?

N.E.D.: A necklace with a butterfly on it.

Defense: And those aren't things that you claimed in your claim?

N.E.D.: No, they are not.

***

> Defense: Do you think he could have fit all of these items you listed to the insurance company in the backpack?
>
> N.E.D.: Not on that day. It was many days that he was in my house. His mother admitted that during the other hearing that we had.

(35:7-9, 11).

Based on N.E.D.'s testimony, the state argued that she was entitled to roughly $18,227—the difference between her total alleged losses and the amount her insurer had already reimbursed. (35:17). Wiskerchen contended that (1) restitution must be based on the crimes considered at sentencing; (2) the only crimes considered at sentencing took place on May 8, 2015; and (3) N.E.D.'s testimony failed to establish which, if any, of the listed missing items were stolen on May 8. (35:19-23, 24).

The state then requested and the circuit court ordered briefing. (35:23-24). In its brief, the state maintained its position that Wiskerchen was responsible for the full amount of restitution, less the amount paid by N.E.D.'s insurer. (25:2). It further contended that Wiskerchen could be ordered to pay restitution for items allegedly taken during burglaries that were not charged. (25:1-2). The state suggested that the alleged prior crimes were read-in at sentencing as part of the plea agreement and proper bases for restitution. (25:1-2).

In his reply brief, Wiskerchen argued that the alleged prior burglaries were not read-in crimes subject to restitution. (26:1-2). He noted that pursuant to the plea agreement the only read-in charges were count one (battery); count two (possession of burglarious tools); and count four (second degree recklessly endangering safety). (26:2, 20-26). He further clarified that he never agreed to have the

court consider N.E.D.'s allegations of prior burglaries at sentencing and that the only crimes that were uncharged pursuant to the plea agreement concerned allegations that he dissuaded witnesses from cooperating with the state. (26:1-2, 20-26). Therefore, he maintained that the court lacked the authority to order restitution for losses caused by burglaries allegedly committed prior to May 8, 2015. (26:2).

The court's oral ruling on restitution

The circuit court issued its oral ruling on restitution on April 6, 2016. (36). The court acknowledged that it was N.E.D.'s burden to show that she sustained a loss as a result of a crime considered at sentencing. (36:4; App. 103). The court then recited the terms of the parties' plea agreement: plead to count three; counts one, two, and four would be dismissed and read-in; and the state would not issue further charges in the case. (36:4; App. 103). The court clarified that the charges that the state agreed not to file concerned only allegations that Wiskerchen dissuaded potential witnesses. (36:4-5, 26:20-26; App. 103-104).

The circuit court proceeded to recount N.E.D.'s testimony from the restitution hearing. (36:5-6; App. 104-105). Specifically, the court noted that N.E.D. "could not say what items the defendant took on May 8th of 2015, or which items would have been taken at other times." (36:6; App. 105).

The court then focused on various statements contained in the presentence investigation report. (36:6-7; App. 105-106). In particular, it highlighted Wiskerchen's purported statement that he had "burglarized between one hundred to two hundred homes and had never been caught."

(36:6; App. 105).[4] The court also referenced N.E.D.'s statement that Wiskerchen had been in her home before May 8, 2015 (according to Wiskerchen's mother). (36:6-7; App. 105-106). Moreover, the court credited N.E.D.'s belief that Wiskerchen would hide out at her house while she was at work. (36:7; App.106).

The circuit court then stated: "so all of this information was considered by me at sentencing. Based on the record, I find that there is a nexus between Mr. Wiskerchen's conduct and the victim's loss, and I find that the victim has met her burden of proof." (36:7; App. 106). As a result, the court ordered restitution in the amount of $8,487.41, the difference between the depreciated value of the missing items and the amount N.E.D. had been reimbursed by her insurer. (36:7-8; App. 106-107).

The Court of Appeals decision

The court of appeals affirmed the circuit court's restitution order. ***State v. Wiskerchen***, No. 2016AP1541, ¶13, unpublished slip op., 2017 WL 5030837 (Ct. App. Nov. 1, 2017). (App. 113-134). The majority opinion concluded that the circuit court did not err in finding a causal nexus between Wiskerchen's "entire course of conduct" and the victim's alleged losses and that ordering Wiskerchen to pay restitution for losses "incurred as a result of prior uncharged burglaries was proper under this court's decision in ***Queever***." ***Id.***, ¶10. (App. 118).

The dissent argued the restitution award was legally impermissible because Wiskerchen's alleged prior crimes were not "crimes considered at sentencing," as defined in

[4] At sentencing, Wiskerchen denied making this statement to the PSI writer. (34:3).

Wis. Stat. § 973.20. ***Id.***, ¶15 (Hagedorn, J., dissenting). (App. 121). The dissent also concluded that the circuit court erroneously exercised its discretion in finding that Wiskerchen's "May 8, 2015, burglary caused losses resulting from prior burglaries." ***Id.*** (App. 121). More generally, the dissent argued that the majority opinion erred "by substituting the heart behind our cases for their holdings and by making the noble policy underlying the restitution statute supreme to the statute itself." ***Id.***, ¶46. (App. 134).

ARGUMENT

I. This Court Should Hold That a Circuit Court Erroneously Exercises Its Discretion When It Orders Restitution Caused by Alleged Prior Crimes for Which the Defendant Was Not Convicted and Did Not Agree to Have Read-in at Sentencing.

This case concerns the interpretation and application of a clear and unambiguous statute, Wis. Stat. § 973.20. Well-established case law confirms that "the restitution statute should be interpreted liberally in order to allow victims to recover losses caused by a defendant's criminal conduct," ***State v. Gibson***, 2012 WI App 103, ¶10, 344 Wis. 2d 220, 822 N.W.2d 500. However, the statute the legislature enacted places limits on the restitution a court may order and those statutory limits control the outcome of this case.

If Wiskerchen had been convicted of or agreed to have the alleged prior burglaries read-in at sentencing, there likely would have been no challenge to the restitution order and this case would not be before this Court. However, because the statute and well-established case law do not authorize it, the circuit court's restitution order must be vacated. Further, because the only basis for the court of appeals decision in this

case is ***State v. Queever***, which created a path to restitution that is not tied to the statutory text or consistent with well-established precedent, the court of appeals decision must be reversed and ***Queever*** should be overturned. Moreover, even if this Court were to very narrowly interpret ***Queever***, to the extent that it need not be overturned, the court of appeals decision must still be reversed because the restitution order goes beyond what even ***Queever*** authorizes.

A. General legal principles and standard of review.

Criminal restitution is governed by Wis. Stat. § 973.20. A circuit court is authorized to order the defendant to make full or partial restitution to "any victim of a crime considered at sentencing" if "a crime considered at sentencing resulted in damage to or loss or destruction of property." Wis. Stat. §§ 973.20(1r) & (2). A "crime considered at sentencing" is statutorily defined as "any crime for which the defendant was convicted and any read-in crime." Wis. Stat. § 973.20(1g)(a). Thus, the statute provides for two legal bases upon which a circuit court may order restitution.

First, restitution may be based upon "any crime for which the defendant was convicted." Wis. Stat. § 973.20(1g)(a). In this regard, a "crime" encompasses "all facts and reasonable inferences concerning the defendant's activity related to the crime for which the defendant was convicted, not just those facts necessary to support the elements of the specific charge." ***State v. Canady***, 2000 WI App 87, ¶10, 234 Wis. 2d 261, 610 N.W.2d 147 (quoting ***State v. Rodriguez***, 205 Wis. 2d 620, 627, 556 N.W.2d 140 (Ct. App. 1996)).

Second, restitution may be based on a "read-in crime." Wis. Stat. § 973.20(1g)(a). A "read-in crime" is:

> any crime that is uncharged or that is dismissed as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing, and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted.

Wis. Stat. § 973.20(1g)(b). As the statute indicates, a circuit court may not consider uncharged or dismissed crimes for the purpose of restitution unless the defendant first acknowledges those crimes as true. *See* ***State v. Frey***, 2012 WI 99, ¶¶42-43, 343 Wis. 2d 358, 817 N.W.2d 436.[5]

The main purpose of the restitution statute "is not to punish the defendant, but to compensate the victim." ***State v. Canady***, 2000 WI App 87, ¶8, 234 Wis. 2d 261, 610 N.W.2d 147. While the statute is to be construed liberally and broadly to allow victims to recover their losses, those losses must still be shown to be caused "*as a result of a defendant's criminal conduct*." ***State v. Tarlo***, 2016 WI App 81, ¶7, 372 Wis. 2d 333, 887 N.W.2d 898 (emphasis in original, internal quotations and citations omitted).

Restitution orders are reviewed under the erroneous exercise of discretion standard of review. ***State v. Lee***, 2008 WI App 185, ¶7, 314 Wis. 2d 764, 762 N.W.2d 431. "A trial court 'erroneously exercises its discretion when its decision is

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[5]By contrast, a circuit court may consider uncharged or dismissed crimes for the purpose of sentencing irrespective of whether the defendant first acknowledges those crimes as true. ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436. This is due to the court's obligation to discern a defendant's character in fashioning an appropriate sentence. ***Id.***

based on an error of law.'" ***Id.*** A circuit court's discretionary decision may be reversed where the decision is not grounded on a "logical interpretation of the facts." ***Canady***, 234 Wis. 2d at 266. "Whether the trial court is authorized to order restitution pursuant to Wis. Stat. § 973.20 under a certain set of facts presents a question of law that [an appellate court] reviews de novo." ***Lee***, 314 Wis. 2d 764, ¶7.

B. The circuit court erred when it ordered restitution caused by alleged prior burglaries that were not crimes considered at sentencing.

As explained above, Wis. Stat. § 973.20(1g) sets forth two potential legal bases for criminal restitution: (1) losses caused by a "crime for which the defendant was convicted" and (2) "any read-in crime." First, Wiskerchen was not convicted of the alleged prior burglaries and under well-established case law they were not part of Wiskerchen's "course of conduct" related to the single burglary for which he was convicted. Second, the alleged prior burglaries were not "read-in crimes" because they were not uncharged as part of a plea agreement and Wiskerchen did not agree to have them considered by the court at sentencing.

i. The alleged prior burglaries were not crimes for which Wiskerchen was convicted.

Relying heavily on its recent decision in ***Queever***, the court of appeals affirmed the circuit court's restitution order after determining that "the evidence was sufficient to find a causal nexus demonstrating that the prior burglaries were 'part of a single course of criminal conduct' related to the May 8, burglary." ***State v. Wiskerchen***, No. 2016AP1541, ¶13 (quoting ***Qveever***, 2016 WI App 87, ¶22, 372 Wis. 2d 388, 887 N.W.2d 912). (App. 120).

As the dissenting opinion in the court of appeals aptly argued, the restitution order and the majority opinion are not supported by the plain text of the restitution statute. ***State v. Wiskerchen***, No. 2016AP1541, ¶¶24-26 (Hagedorn, J., dissenting). (App. 125-126). Rather, the decision below rests upon a misapplication of the relevant case law that is not connected to the statutory text. ***Id.***, ¶¶26-40. (App. 126-132). Because neither the plain text of the restitution statute nor well-established case law interpreting the statutory phrase "any crime for which the defendant was convicted" support it, the circuit court's restitution order must be vacated.

Based upon the clear statutory text and well-established case law, this Court should hold that ***Queever*** was wrongly decided and must be overturned because it transforms the statutory language "crime for which the defendant was convicted" into alleged prior crimes that are factually similar to the crime for which the defendant was convicted. Further, but for ***Queever***, there is no legal basis to conclude that Wiskerchen's prior alleged burglaries were crimes considered at sentencing or part of Wiskerchen's course of criminal conduct related to the crime for which he was convicted. Therefore, this Court must vacate the circuit court's restitution order because it is not authorized by the restitution statute or established precedent.

Should this Court conclude that ***Queever*** need not be overturned, the only potential justification for ***Queever*** is that the victim's losses were directly related to costs expended by the victim to apprehend Queever in the crime for which he was convicted—and therefore, was compensable damage resulting from the burglary for which Queever was convicted. Limited to these unique facts and circumstances, ***Queever*** cannot support the restitution order or the court of appeals decision in this case.

As noted above, Wis. Stat. § 973.20(1g)(a) defines a "crime considered at sentencing" to include "any crime for which the defendant is convicted." In determining whether restitution may be ordered, a court may consider a defendant's entire course of criminal conduct. *See* ***State v. Rodriguez***, 205 Wis. 2d 620, 624, 556 N.W.2d 140 (1996). More specifically, "the 'crime' encompasses 'all facts and reasonable inferences concerning the defendant's activity *related to* the 'crime' for which the defendant was convicted, not just those facts *necessary* to support the elements of the specific charge of which the defendant was convicted." ***Canady***, 234 Wis. 2d 261, ¶10. (Emphasis in original).

The above language can only be properly understood by examining the context in which these cases were decided. Specifically, the cases discussed below make clear that when a circuit court considers a defendant's "entire course of conduct," for the purposes of restitution, the court is to consider the entire course of conduct associated with the particular crime of conviction, not a defendant's alleged course of conduct related to other alleged distinct, but factually similar crimes. *See* ***State v. Wiskerchen***, No. 2016AP1541, ¶¶31-35 (Hagedorn, J., dissenting). (App. 128-130).

In ***State v. Rodriguez***, 205 Wis. 2d at 624-25, the defendant fled the scene of an accident at which a bicyclist was killed. He later pled no contest to hit a run causing death. ***Id***. at 625. Rodriguez argued that because there was no causal link between his *criminal* conduct (fleeing the scene of an accident) and the death of the bicyclist, he could not be held responsible for restitution related to the death. ***Id.*** In rejecting this argument, the court relied upon the plain text of the restitution statute to hold that "restitution may be ordered once a defendant has been convicted of a *crime*," and that the

"restitution statute does not empower the court to break down the defendant's conduct into its constituent parts and ascertain whether one or more parts were a cause of the victim's damages." ***Id***. at 626-27. (Emphasis in original). Rather, the restitution statute requires the sentencing court to take "a defendant's entire course of conduct into consideration." ***Id.*** at 627. Accordingly, the court explained that by entering a plea and upon conviction of the crime of hit and run causing death, Rodriguez could be ordered to pay restitution for the damages resulting from that crime. ***Id.*** at 627-29.

Hence, ***Rodriguez*** stands for the straightforward proposition that restitution may be ordered based upon the defendant's entire course of conduct related to the commission of the crime of conviction. *See* ***State v. Wiskerchen***, No. 2016AP1541, ¶28 (Hagedorn, J., dissenting). (App. 127). In other words, the court is not permitted break down the a defendant's course of conduct related to the crime considered at sentencing to determine whether specific elements of the crime caused the victim's losses (as Rodriguez argued). *See* ***Rodriguez***, 205 Wis. 2d at 625-26.

The court applied the same reasoning in ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104 . Madlock was charged with operating a vehicle without the owner's consent after he was observed driving a vehicle less than one week after the vehicle was stolen. ***Id.*** at 326-27. Madlock denied stealing the vehicle and the state never charged him with that crime. ***Id.*** Based upon information alleged in the PSI, the circuit court ordered Madlock to pay restitution based on alleged damage to the victim's vehicle. ***Id.*** at 327.

When Madlock challenged the restitution order on appeal, the court agreed with the state's assertion that the

restitution statute is "properly understood as encompassing all facts and reasonable inferences concerning the defendant's activity *related to* the 'crime' for which the defendant was convicted, not just those facts *necessary* to support the elements of the specific charge of which the defendant was convicted." ***Id.*** at 333. (emphasis in original, internal quotations omitted). Relying on ***Rodriguez***, however, the ***Madlock*** court vacated the restitution order because there was an insufficient nexus between the criminal conduct for which Madlock was convicted and the claimed damages. ***Id.*** at 334. In so holding, the court examined the entire restitution statute, including Wis. Stat. §§ 973.20(2), (13)(a), and (5)(a), to distinguish the course of conduct related to the "crime considered at sentencing" and other alleged conduct. ***Id.*** The court held that the defendant's conduct must be the precipitating cause of the injury," and the harm must flow as a "natural consequence" of the defendant's conduct. ***Id.*** at 333.

Next, in ***Canady***, the defendant was charged, related to a single incident, with burglary, possession of burglarious tools, criminal damage to property, and resisting arrest. 234 Wis. 2d 261, ¶3. After receiving a call about a suspected burglary, an officer attempted to arrest Canady in an apartment building. ***Id.***, ¶2. Canady resisted the officer's attempt to handcuff him. ***Id.*** While Canady was resisting arrest, the officer observed a pry bar inside of Canady's jacket and, in order to prevent Canady from using the pry bar as a weapon against him, the officer pulled the pry bar from Canady's jacket and tossed it out of reach. ***Id.*** Upon being thrown by the officer, the pry bar struck the rear exit door of the building and cracked the glass door frame. ***Id.*** Canady pled no contest to all charges. ***Id.***, ¶3. The state sought restitution to replace the rear exit door. ***Id.***, ¶4.

The circuit court ordered the restitution requested by the state and the court of appeals affirmed. ***Id.***, ¶¶4-5. The court reiterated what it had said in ***Rodriguez*** and ***Madlock***: that, as contemplated by the restitution statute, the "crime considered at sentencing" is defined in broad terms. ***Id.***, ¶10. The crime considered at sentencing encompasses "all facts and reasonable inferences concerning the defendant's activity *related to* the 'crime' for which the defendant was convicted." ***Id.*** (Emphasis in original, internal quotations omitted). Thus, the court affirmed the restitution award after determining that Canady's crime, resisting an officer, was a substantial factor in causing the damage to the door – "but for" Canady's actions related to a crime of conviction, the damage would not have occurred. ***Id.***, ¶12.

Consistent with the above cases, and with respect to the statutory phrase "any crime for which the defendant is convicted," a defendant's "entire course of conduct" includes actions taken by the defendant related to the specific crime for which the defendant was convicted. *See* ***State v. Wiskerchen***, No. 2016AP1541, ¶31 (Hagedorn, J., dissenting). (App. 128-129).

It is within this context and based upon the above cases that the court of appeals decided ***State v. Queever***, 372 Wis. 2d 388.

In ***Queever***, the victim's home was repeatedly burglarized, and in an attempt to determine who the thief was, the victim's son and then the police installed video cameras inside the victim's home. ***Id.***, ¶¶2-3. After subsequent burglaries, neither the victim nor the police were able to identify the man caught on the video camera footage. ***Id.***, ¶¶3-4. The victim then paid $2,495 to have a security system installed in her home. ***Id.***, ¶5. Around midnight on August 5,

2014, the victim's security system was activated by a man who approached the victim's sliding glass door, tampered with the security camera, and attempted to open the door. ***Id.***, ¶6. An officer reviewed the security system footage and recognized the man as Queever. ***Id.*** Queever later admitted that he was the man depicted in still photographs from the security system footage. ***Id.***

As a result of the August 5, 2014, attempted break-in, the state charged Queever with one count of attempted burglary as a repeater. ***Id.***, ¶7. Pursuant to a plea agreement, Queever pled no contest to the charged offense, without the repeater enhancement. ***Id.*** Prior to sentencing, the victim requested restitution to cover the cost of the security system that was used to identify Queever. ***Id.***, ¶8. At sentencing, the circuit court rejected Queever's objection and ordered restitution as requested by the victim for the cost of the security system. ***Id.***, ¶¶8-9.

In affirming the restitution order, the court of appeals noted that the circuit court found by a preponderance of the evidence that Queever had broken into the victim's home multiple times prior to the August 5, 2014, attempted burglary for which he was convicted and sentenced. ***Id.***, ¶14. The court noted that at sentencing the state introduced video footage and still photographs that enabled the circuit court to find, by a preponderance of the evidence, that Queever committed the prior alleged burglaries and the attempted burglary to which he pled. ***Id.***, ¶15. The court further noted the similarities between the prior alleged burglaries and the attempted burglary to which Queever pled: the sliding glass door was the same point of entry or attempted entry, each incident occurred around midnight, and that money stopped disappearing from the victim's purse after Queever was

arrested. ***Id.***, ¶16. The court also noted that Queever's alleged prior burglaries caused the victim to install the security system used to apprehend Queever.. ***Id.***, ¶¶17-18.

In response to Queever's argument that the circuit court interpreted the statutory term "crime considered at sentencing" too broadly, the court of appeals stated that a circuit court "should take a defendant's entire course of conduct in to consideration" and noted that courts are not empowered "to break down the defendant's conduct into its constituent parts." ***Id.***, ¶¶19-21 (quoting ***Madlock***, 230 Wis. 2d at 333 and ***Rodriguez***, 205 Wis. 2d at 627) (internal quotations omitted). The court then concluded that Queever's alleged prior burglaries and Queever's attempted burglary were part of a "single course of criminal conduct" because each burglary involved the same home, the same victim, the same time of offense, and the same mode of entry into the victim's home. ***Id.***, ¶22.

In closing, the ***Queever*** court provided the caveat that its holding "should not be interpreted to mean that costs incurred by a victim before the occurrence of the specific criminal acts underlying the offense of conviction and any read-in offense will always be recoverable under the restitution statute." ***Id.***, ¶26. Rather, the court held that "when such costs are requested as restitution, they are recoverable if a causal nexus is established between the costs and the entire course of the defendant's criminal conduct considered at sentencing." ***Id.***

a. ***Queever*** should be overturned because it conflicts with well-established precedent interpreting the statutory phrase "crime for which the defendant was convicted" and expands criminal restitution beyond the scope established by the legislature.

The restitution order in this case is not authorized by statute nor can it be justified by well-established case law. *See* Wis. Stat. § 973.20(1g); ***Rodriguez***, 205 Wis. 2d 620; ***Madlock***, 230 Wis. 2d 324; ***Canady***, 234 Wis. 2d 261. The only basis for the court of appeals decision affirming the circuit court's restitution order is ***Queever***, 372 Wis. 2d 88. Because ***Queever*** was wrongly decided and without it the restitution order in this case cannot stand, this Court should overturn ***Queever*** and vacate the restitution order below.

Neither ***Queever*** nor the court of appeals decision below is justified by the statutory language. Instead, in each case, the court of appeals extended language from prior case law to order restitution for a victim's losses caused by alleged crimes for which the defendant was not convicted. Further, by interpreting the phrase "entire course of conduct" to include conduct related to prior alleged but separate and distinct crimes, the court of appeals has in each case taken language from well-established precedent out of context and created a path to restitution that is unmoored from the statutory text. *See* ***Rodriguez***, 205 Wis. 2d 620; ***Madlock***, 230 Wis. 2d 324; ***Canady***, 234 Wis. 2d 261.

As noted above, the phrase "entire course of conduct" is found nowhere in the restitution statute. Rather, that phrase appeared first in ***Rodriguez*** in response to the defendant's

argument that a specific element of the offense for which he was convicted was not, in and of itself, a "criminal act" upon which restitution may be ordered. 205 Wis. 2d at 625-29. Likewise, in ***Madlock***, the court used the same term when it vacated a restitution order where there was insufficient evidence to link Madlock's criminal conduct (operating a stolen vehicle) with the damage to the vehicle for which restitution was sought. 230 Wis. 2d at 333-34 ("Nor can we agree with the trial court's reasoning on this question. It appears that the court believed that because Madlock's crime involved the vehicle and because the victim was entitled to be made whole, Madlock was ipso facto responsible for restitution."). Again in ***Canady***, the court used the phrase "entire course of conduct" to clarify that so long as the defendant's criminal conduct "related to the 'crime' for which the defendant was convicted" is a "but for" cause of the victim's losses, the circuit court is authorized to order restitution. 234 Wis. 2d 261, ¶¶9-12.

Prior to ***Queever***, there are no decisions extending the term "entire course of conduct" to include conduct related to other alleged and distinct crimes that are factually similar to the crime for which the defendant was convicted. This is unsurprising because there is no statutory or other basis to do so. Accordingly, ***Queever*** was wrongly decided and should be overturned.

Moreover, without ***Queever*** the circuit court's restitution order in this case cannot be justified. Wiskerchen was charged with and eventually pled no contest to a single burglary that occurred on May 8, 2015. The circuit court ordered restitution in the amount of $8,487.41 and the court of appeals affirmed the circuit court's restitution order after concluding there was a sufficient nexus between Wiskerchen's May 8, burglary and the victim's losses

because the alleged prior burglaries were "related to" the crime of conviction "as they involved the same home, the same victim, the same entry point, and the same time of day." ***State v. Wiskerchen***, No. 2016AP1541, ¶12. (App. 119-120). As explained above, neither the statutory text or well-established case law support the court of appeals willingness to extent the statutory term "crime considered at sentencing" to include a defendant's alleged course of conduct related to crimes that are factually similar, but are not the "crime for which the defendant was convicted." *See* Wis. Stat. § 973.20(1g); ***Rodriguez***, 205 Wis. 2d 620; ***Madlock***, 230 Wis. 2d 324; ***Canady***, 234 Wis. 2d 261.

Moreover, there are strong practical and policy concerns should ***Queever*** not be overruled. First, restitution hearings could turn into minitrials regarding uncharged alleged crimes. Defendants would presumably attempt to contest allegations that they committed other crimes. How would such hearings proceed, where Wis. Stat. § 973.20(14)(d) does not allow for criminal discovery "except for good cause," and where restitution hearings are "informal?" *See* ***Madlock***, 230 Wis. 2d at 335-36 (noting that pursuant to Wis. Stat. § 973.20(14)(d) the rules of evidence do not apply and the normal rules of practice, procedure, and pleading are waived).

Second, if ***Queever*** stands, where should court's draw the line with respect to the phrase "entire course of conduct?" What if the prior or other alleged crimes are somewhat different than the crime for which the defendant is convicted? What if the alleged prior crimes go back years? What if the other alleged crimes occur after, not before, the crime of conviction? There are no obvious answers to these questions and ***Queever's*** logic and expansive reading of the statute and prior case law would allow for restitution orders

unimaginable to the drafters of the restitution statute. *See e.g.,* ***State v. Wiskerchen***, No. 2016AP1541, ¶38 (Hagedorn, J., dissenting). (App. 131).

Third, ***Queever*** unnecessarily creates uncertainty regarding the validity of a defendant's plea where restitution is ordered based on allegations of crimes that were not charged or agreed to be read-in at sentencing. Further, since there is no obvious outer boundary of facts to which ***Queever*** could apply, to what extent must defense counsel advise their clients regarding what allegations could result in restitution?

For all of these reasons, this Court should overturn ***Queever*** and vacate the restitution order entered in this case.

b. Even under ***Queever***, the circuit court's restitution order must be vacated.

Should this Court conclude that ***Queever*** need not be overturned, the relevant facts in ***Queever*** are unique and distinguishable from the present case. In ***Queever***, the circuit court ordered the defendant to pay restitution for the cost of the security system used to apprehend him. 372 Wis. 2d 388, ¶1. ***Queever*** did not concern restitution ordered for the property allegedly stolen during alleged prior burglaries. ***Id.***

Further, near-conclusive evidence supported the circuit court's finding that Queever repeatedly burglarized the victim's home using the same *modus operandi*, and Queever's prior burglaries caused the victim to pay to install the security system that resulted in Queever's apprehension. ***Id.***, ¶¶17-18. Even under ***Queever's*** broad reading of the restitution statute, the facts and circumstances in this case are distinguishable.

Here, the circuit court did not find by a preponderance of the evidence that Wiskerchen committed any burglary prior to May 8, 2015. Rather, based upon the state's argument that those alleged prior burglaries were uncharged as part of the plea agreement, and thus "read-in crimes" for the purposes of restitution (25:1-2), the circuit court concluded that "all of this information was considered by me at sentencing" and that "there is a nexus between Mr. Wiskerchen's conduct and the victim's loss." (36:7).

Moreover, compared to ***Queever***, the evidence relied upon by the circuit court to make its restitution finding is scant. The victim claimed restitution related to 74 items that she believed Wiskerchen took from her home, but she did not know whether any of the items were taken from her home on May 8, 2015. (35:7-10).

Additionally, the circuit court relied upon various statements in the presentence investigation (PSI) that do not establish by a preponderance of the evidence that Wiskerchen committed the alleged prior burglaries or that he stole any of the 74 items submitted by the victim. The court noted that the victim claimed that Wiskerchen had been in her home before May 8, because Wiskerchen's mother said he had,[6] and that Wiskerchen admitted to committing one hundred to two hundred burglaries without being caught.[7] Thus, even if it could be said that the circuit court effectively found that Wiskerchen committed the burglaries that the victim alleged he committed prior to May 8, 2015, there is insufficient evidence to support that finding. And, under ***Queever***, the evidence must be strong enough for the circuit court to

[6] This hearsay statement was not corroborated with any other evidence. (34:6, 16:3)

[7] At sentencing, Wiskerchen denied making this statement to the PSI writer. (34:3).

conclude that the defendant's alleged prior crimes are sufficiently similar to constitute a single course of conduct. ***Queever***, 372 Wis. 2d 388, ¶¶21-22.

Furthermore, the court of appeals applied ***Queever*** even beyond ***Queever's*** own expansive reading of prior case law. Whereas the ***Queever*** court upheld a restitution order that concerned the cost expended by the victim on a security system used to apprehend a repeat burglar, the court of appeals in this case upheld a restitution order based upon alleged losses cause by alleged prior burglaries.

Thus, even if ***Queever*** is not overruled, its unique facts and circumstances make it distinguishable from the present case.

ii. The alleged prior burglaries were not "read-in crimes."

As noted above, a "crime considered at sentencing" is defined to include "any read-in crime" and a read-in crime is defined as a crime that is uncharged or dismissed "as part of a plea agreement, that the defendant agrees to be considered by the court at the time of sentencing and that the court considers at the time of sentencing the defendant for the crime for which the defendant was convicted." Wis. Stat. §§ 973.20(1g)(a) & (b). Thus, to be a "read-in crime" for restitution purposes, a crime must be (1) either uncharged or dismissed, (2) pursuant to a plea agreement, and (3) agreed, by the defendant, to be considered by the court at sentencing. As the state conceded on appeal, the prior alleged burglaries upon which the restitution order is based were not read-in crimes. (State's br. at 9). *See also* ***State v. Wiskerchen***, No. 2016AP1541, ¶¶11, 23 (Hagedorn, J., dissenting). (App. 118, 125).

It is undisputed that the prior alleged burglaries in this case were uncharged. While a read-in crime could be an uncharged crime, the facts here do not satisfy the next two statutory requirements. First, the alleged prior burglaries were not uncharged "as part of a plea agreement." (26:1-2, 6-7, 21-23). Second, Wiskerchen did not, under any circumstances, agree to have the circuit court consider those prior alleged burglaries at sentencing. (33, 24, 25, 26). While the sentencing court was permitted to consider the victim's allegations about prior burglaries for the purposes of sentencing Wiskerchen, it was not authorized to consider those uncharged prior allegations for purposes of determining restitution caused by read-in crimes. *See* ***State v. Frey***, 2012 WI 99, ¶¶42-43, 47, 343 Wis. 2d 358, 817 N.W.2d 436.

C. The circuit court erroneously exercised its discretion by concluding that Wiskerchen's May 8, 2015, burglary caused the victim's losses that resulted from alleged prior burglaries.

Whether the defendant's criminal activity was a substantial factor in causing any expenses for which restitution is claimed is generally a matter left to the circuit court's discretion. ***State v. Johnson***, 2002 WI App 166, ¶7, 256 Wis. 2d 871, 649 N.W.2d 284. An appellate court may reverse a restitution order if the decision is not based on a logical interpretation of the facts. ***Canady***, 234 Wis. 2d 261, ¶6. If authorized by law, restitution is permissible if the crime considered at sentencing was the precipitating cause of the damages. *See* ***State v. Rash***, 2003 WI App 32, ¶7, 260 Wis. 2d 369, 659 N.W.2d 189. "Precipitating cause" means that the defendant's "criminal act set into motion events that resulted

in the damage or injury. ***Id.*** In other words, was the defendant's criminal conduct considered at sentencing a "but for" cause of the victims' loss. ***Id.***

Here, it is not possible, much less a logical interpretation of the facts, that Wiskerchen's May 8, 2015, burglary caused the restitution ordered by the circuit court. The restitution statute does not allow for retrospective causation. *See* ***State v. Tarlo***, 372 Wis. 2d 333, ¶17.

In ***Tarlo***, the court concluded that damages and lost income due to a husband's production of child pornography were not and could not be caused by Tarlo's viewing of those images years later. ***Id.***, ¶9. The court explicitly rejected the notion that a later consumer of child pornography can be said to have "retrospectively encouraged" its creation and distribution. ***Id.***, ¶17. In other words, the result of a crime follows the commission of the crime. ***Id.***, ¶18.

Just as Tarlo's crimes could not logically be said to have caused losses suffered before the commission of the crime considered at sentencing, Wiskerchen's May 8, 2015, burglary cannot logically be said to have caused the losses that resulted from alleged burglaries committed before May 8, 2015. Accordingly, the restitution order must be reversed as an erroneous exercise of discretion.

D. Remand for a new restitution hearing is unnecessary as the circuit court's restitution award is premised on an error of law and upon an illogical interpretation of the facts set forth at a contested restitution hearing.

Based upon the remedy ordered in ***Madlock***, 230 Wis. 2d at 326, the state argued below that if the circuit court's restitution order was "unauthorized by law," the "proper

course of action is to remand for a new restitution hearing." (State's br. at 16).

Madlock, however, does not support the state's remand request. There, the circuit court, despite the defendant's objection, ordered restitution and failed to hold a contested restitution hearing pursuant to Wis. Stat. § 973.20(13)(c). ***Madlock***, 230 Wis. 2d at 327, 335. Thus, the court remanded the case to the circuit court for an evidentiary hearing after holding that "[t]he present record in this case does not sufficiently establish the fact or nature of the damage in the first instance or the nexus between such possible damage and Madlock's conduct." ***Id.*** at 337.

Additionally, this case is more like ***Tarlo*** than ***Madlock***. As discussed above, the ***Tarlo*** court concluded that the restitution order must be vacated because the defendant's criminal conduct could not be said to have caused the losses for which restitution was ordered. 372 Wis. 2d 333, ¶¶9, 17-18. Notably, the state requested in ***Tarlo*** exactly what it requested here: that if the court reverses, to send the case back to the circuit court for a "new restitution hearing." ***Id.***, ¶19, n.9. The ***Tarlo*** court rejected the state's request:

> [A] full and fair restitution hearing has already taken place, in which the [victim] had the unrestricted opportunity to, and in fact did, present evidence of her losses. In addition, she was assisted by the State and court commissioner in the presentation of that testimony. We further note, that '[d]ouble jeopardy protection applies to restitution orders,' *State v. Greene* 2008 WI App 100, ¶15, 313 Wis. 2d 211, 756 N.W.2d 411, and thus, without deciding the question, we observe the legal propriety of a 'do-over,' as Tarlo calls it, is questionable.

Id.

Likewise, in this case the circuit court has already conducted a "full and fair" restitution hearing. (34:35, 35, 36). The state represented the victim at that hearing, and N.E.D. also had an opportunity to speak to the PSI writer and at sentencing. (35:4-14, 34:4-8, 16:3-4). Contrary to ***Madlock*** and similar to ***Tarlo***, the state and the victim in this case have already had a full and fair opportunity to present evidence concerning the victim's alleged losses that resulted from a crime considered at Wiskerchen's sentencing. There is no need, the legal propriety of it is questionable, and it would be a waste of judicial resources to remand this case to the circuit court for a second restitution hearing.

CONCLUSION

The restitution order in this case must be vacated because it is based on an error of law and an illogical interpretation of the facts. For all of the reasons given above, Shawn T. Wiskerchen respectfully requests that this Court reverse the decision of the court of appeals and to remand this case to the circuit court with directions to vacate the restitution order without further proceedings.

Dated this 27th day of April, 2018.

Respectfully submitted,

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,628 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 27th day of April, 2018.

Signed:

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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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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Dated this 27th day of April, 2018.

Signed:

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner