STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP0001968-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DION LASHAY BYRD,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in Milwaukee County Circuit Court,
the Honorable Dennis R. Cimpl, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the circuit court violate Mr. Byrd's Fifth Amendment Privilege against self-incrimination at sentencing when the court repeatedly demanded that Mr. Byrd admit guilt and explain why he committed the crime and, when he would not do so, concluded that prison was necessary because he showed "absolutely no remorse?"

2. Did the circuit court erroneously exercise its discretion at sentencing when it concluded that a maximum sentence was warranted for Mr. Byrd based not on the particular facts of this case, but on the court's disagreement with the statutory maximum penalty for the offense set by the legislature?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is not warranted as this case, which involves the application of well-settled law to a unique set of facts.

While undersigned counsel anticipates the parties' briefs will sufficiently address the issues raised, the opportunity to present oral argument is welcomed if this court would find it helpful.

STATEMENT OF THE CASE AND FACTS

Mr. Byrd was convicted of one count of bomb scare in violation of Wis. Stat. §947.015. The charge arose when Mr. Byrd made a phone call to the local Fox6 News station stating that there was a bomb in the building. The phone call was

easily traced to Mr. Byrd, who was living with his mother. (R. 1).

Despite the iron-clad case against Mr. Byrd, he insisted on a trial. The trial was brief. At sentencing the State, noting the need for general and specific deterrence in this kind of case and the possibility that Mr. Byrd had mental health issues, recommended "a period of incarceration . . . coupled with some sort of supervision."(R. 77: 10-11). Defense counsel recommended probation.

Mr. Byrd's attorney opined: "I think a case like this screams something else is going on here." (R. 77: 16). He advised the court that Mr. Byrd had told him that he had been diagnosed with schizophrenia and bipolar disorder. The court inquired, "Did you check that out?" Defense counsel responded, "I did not check that out because I just learned of it today." (R: 77: 16). The court asked, "So all we have is his word for it?" Defense counsel responded, "Absolutely." Counsel then repeated that "on a case like this something else must be going on." (R. 77: 16).

At trial, no evidence was presented suggesting Mr. Byrd had any particular animosity toward Fox6News or any possible motive for the offense. At sentencing, defense counsel advised the court that Mr. Byrd would not be explaining why he committed the offense, as Mr. Byrd intended to appeal his conviction and counsel had instructed him not to comment on the offense in order to preserve his appellate rights. (R. 77: 11). Nonetheless, when Mr. Byrd commenced his allocution, he spoke only two sentences before the court interrupted, demanding to know why he had committed the crime. The exchange was as follows:

> DEFENDANT: Yes. I want to let you know that I am not a terrorist to society. I am not a threat to society.

THE COURT: Then why did you do this?

(R. 77: 17). Defense counsel attempted to intervene, but the court continued to question Mr. Byrd:

MR. MEYER: Your Honor –

THE COURT: Wait a second. He has the right to talk. If he exercises that right, I got the right to ask questions. Why did you do this?

DEFENDANT: Your Honor, actually, I really can't answer it, sir.

THE COURT: What do you mean you can't answer it? I mean, what you told the cops is that you butt-dialed, and there must of been a television program on that made the bomb threat. We know that is false because of what Ms. Simonovich testified to. She got the phone call and she was told there is a bomb in the building. She said, excuse me? And it was repeated. There is a bomb in the building. Who is this? Hang up. You know damn well that it wasn't a butt-dial. It wasn't somebody on TV. It was a real live human being that made this call. The jury found beyond a reasonable doubt that you are the guy that made the call. I want to know, the people in authority of Channel Six want to know, the district attorney wants to know why the hell would you do this?

(R. 77: 17-18). In the following exchange, Mr. Byrd referred to defense counsel's instructions that he not discuss the offense, and commented that the offense was not in his character:

DEFENDANT: Your Honor, actually, to really be honest with you –

THE COURT: I hope so.

DEFENDANT: My attorney mentioned with you, a little bit too much to lose to even engage into

THE COURT: Okay.

DEFENDANT: You know, to engage into anything. You know, that is really not my character.

THE COURT: Fine. What do you want to say?

DEFENDANT: That is really not me, your Honor.

(R. 77: 18). The court took this as a denial of guiltand responded this way:

THE COURT: What do you mean it is not you? The jury found it was you. I heard the evidence. I am convinced beyond a reasonable doubt. I am 100 percent certain you made that call. Your mother was 100 percent certain that you made that call when she testified. So it was you. Don't tell me it wasn't me. What else do you want to say?

DEFENDANT: I apologize to the courts.

THE COURT: What are you apologizing for? You didn't do anything wrong.

DEFENDANT: Just for being here and putting, you know, my mother through this situation, and, you know, FOX6 or what not, just having people here, period.

THE COURT:Why would you apologize? You didn't do anything wrong, according to you. You are a good character. You didn't do anything. You didn't do this. So if you didn't do it, then you wouldn't apologize, right? That is logical.

DEFENDANT:I wouldn't of went to trial, your Honor.

THE COURT: You went to trial and lost big time. You know what the jury told me? Why did this go to trial?

> That was the first question the jury asked me. I said because he has a Constitutional Right to a trial. So the jury was 100 percent certain that you did this. What else do you want to say?
>
> DEFENDANT: If I can get a second chance in society, I can prove my worthiness. I can walk up straight and walk right, and that you will not see me back in your courtroom.

(R. 77: 18-20).

The court discussed the financial losses to Fox6 News and the fear that the employees experienced as a result of the offense, which the court connected to the seriousness of the offense and the need to protect the public. (R. 77: 21). The court then moved on to Mr. Byrd's character, saying "I know nothing about you. Your lawyer says that you have had some mental illness. I don't know that. Your mom testified to some of that in the trial." (R. 77: 21). The court discussed Mr. Byrd's previous domestic violence charges, saying "You have gotten off because people don't show up in court. I suspect one of the reasons you took this to trial is you figured nobody would come to court and testify against you. You were wrong." (R. 77: 21).

The judge then opined that it was "shocking" that a bomb scare was only a Class I felony. The court called this "ridiculous," saying that the offense "is one of the most serious felonies that I know of." (R. 77: 21-22). The court discussed the need for general deterrence, particularly given the current prevalence of terrorist threats and acts. (R. 77: 22).

The court then said:

> So, yeah, you're going to prison. You are going to be on extended supervision. It is the only way to get the message out that we, as a community, will not tolerate

> this stuff. Especially from somebody that shows absolutely no remorse.

(R. 77: 22). The court sentenced Mr. Byrd to the maximum prison term. The court found him ineligible for programming "given the terrible nature of this crime." (R. 77: 23).

Regarding the possibility that Mr. Byrd was mentally ill, the court said "we will find out if you got some mental health problems. They will take care of it in prison. Because, obviously, you haven't taken care of it up until now." (R. 77: 23). Mr. Byrd was received at Dodge Correctional Institution and was promptly moved to the Wisconsin Resource Center, which is described on its web site as "a specialized mental health facility established as a prison under s. 406.056, Wisconsin Statutes."[1]

Defense counsel timely filed a Notice of Intent to Pursue Postconviction Relief. Undersigned counsel was appointed to represent Mr. Byrd. In the course of representing Mr. Byrd, undersigned counsel ordered copies of his mental health treatment records. Counsel enlisted the aid of Client Services Specialist, Justin Heim, to review and interpret the records. Mr. Heim prepared a report based on the treatment records indicating that Mr. Byrd has been seriously mentally ill dating back to May 2007, when at age 21 he had his first psychotic break and went to the Milwaukee County Mental Health Complex seeking treatment. Records reflect that Mr. Byrd has been on and off psychotropic medications since that time. (R. 33).

Mr. Byrd filed a motion for postconviction relief on July 14, 2016 arguing that he was entitled to resentencing because the circuit court violated Due Process and his Fifth

[1] This is reflected in the movement records on the Department of Corrections website.

Amendment privilege against self-incrimination during the sentencing by demanding that Mr. Byrd admit and explain his offense and then considering his refusal to do so as an aggravating factor. Mr. Byrd also argued that if the court did not grant resentencing, the new information about his mental health history was a new factor that warranted sentence modification. (R. 31).

The circuit court held a hearing on December 1, 2016. At that time, the court denied Mr. Byrd's motion for resentencing based on the Fifth Amendment issue, saying:

> I don't find that I violated his right to maintain innocence at sentencing. I acknowledged on a number of occasions, at least twice, that he had the right not to tell me anything. But he then started making statements, and I responded by asking him appropriate questions, which I'm allowed to do. At any time, he could have said I don't want to answer those questions. He didn't. He answered some of them. He answered --he didn't answer them all.

(R. 78: 3). Regarding his consideration of Mr. Byrd's failure to express remorse, the judge said:

> I made a throwaway line at the end that he, in fact, did not express remorse, and he didn't. But I really did not rely on that in my sentence in this case materially in any way. It was something that I mentioned at the end because it was a fact, and I'm allowed to mention that he had no remorse.

(R. 78: 3). There was some confusion over the distinction between resentencing and sentence modification. At the start of the hearing the court said:

> I'm prepared based on your submissions to rule on it. And I'll tip you guys off, I'm going – I'm going to resentence, okay? Mainly, because I think that third

> factor, the mental health, you know, I knew about it, but I didn't know to what extent. And I really think in retrospect what I should of done was put off sentencing and ordered the defense attorney to get the mental health records that Ms. Moorshead got. So on that reason, I'm going to resentence.

(R. 78: 3). When the judge said "I want to set another sentencing," defense counsel explained that the first two issues raised in the postconviction motion requested resentencing as a remedy, and that the court had denied those claims. Defense counsel explained that the third issue, related to the mental health records was "raised as just a motion to modify his sentence." The court acknowledged this but then subsequently announced the next court date "for resentencing." The judge then corrected himself, saying "Not – Well, it's to modify the sentence technically." (R. 78: 7-8).

However, on the next date, the question of resentencing versus sentence modification resurfaced in the following exchange:

> THE COURT: It's here for resentencing because Ms. Moorshead correctly pointed out in the file under seal the number of mental health records which tells me a lot more about Mr. Byrd than I knew when I originally sentenced him on December 10, 2015.
>
> DEFENSE COUNSEL: Your Honor, I'm sorry. Can I interrupt just briefly?
>
> THE COURT: Yeah.
>
> DEFENSE COUNSEL: The last time we were in court we sort of sorted out that the motion I filed had two components, a resentencing request and also a sentence modification request. At that time the Court denied a resentencing and indicated the Court was going to grant the sentence modification.

> THE COURT:I'm sorry. If I did, I misspoke. What I want to do is I want to resentence it now that I know everything. It's basically the same thing, you know, because you can argue for something less than the three and a half years I gave him, which would be a modification because I gave him the maximum, right?
>
> DEFENSE COUNSEL: Right.
>
> THE COURT: So if I didn't give the maximum, I'd agree with you, then it would have been a modification rather than a resentencing, but I think it's just cleaner if we do a resentencing because I gave him the maximum.
>
> DEFENSE COUNSEL: It's probably a distinction without a real difference.
>
> THE COURT: In this case it is.
>
> DEFENSE COUNSEL: Okay.
>
> THE COURT: But in the normal case – because rarely does a defendant get the maximum. All right, so the State's ready to go?

(R.79: 2-3). The State reminded the judge of his belief, expressed at the original sentencing, that the maximum sentence set by the legislature for this offense is "ridiculous." (R. 79: 5; R. 77: 21-22). The State agreed with that assessment and said the original sentence was "consistent with that concern." (R. 79: 5). The State discussed the need for general deterrence and the impact of the crime on the news station. The State asked the court to "leave the sentence as set." (R. 79: 6).

Defense counsel addressed the court's disdain for the maximum penalty set by the legislature, saying "the maximum penalty is what it is," and asserted that the question was whether a maximum sentence was warranted, given what the court now knew about "Mr. Byrd's longstanding struggle

with really serious debilitating mental health problems." (R. 79: 7). Defense counsel said "I just think if this Court had been presented with this information, I just can't believe for a second that the maximum sentence would have happened." (R. 79: 10).

The court invited comment from Mr. Byrd, who said he wished to apologize to the court and indicated that the medication he was taking was working well for him. (R. 79: 10). The judge told Mr. Byrd the date of the offense and then inquired "Do you recall making a phone call then or are you still in denial?" Mr. Byrd responded "I was so hallucinatal (sic) around that time where I just really can't recall that." (R. 79: 11). The judge said "I can understand now why you don't recall it -- okay? – and I was pretty harsh with you in my sentencing remarks because I didn't know the severity of your mental illness."

The judge acknowledged Mr. Byrd's "serious mental illness." The judge said, "but the question is does that outweigh all the other things I said to you back in 2015 when I sentenced you?" (R. 79: at 11). The court listed the three principal sentencing factors, and then noted:

> I didn't have your character component when I sentenced you. I've got it now. But everything I said about the serious nature of the crime and the need to protect the public still goes. I read my sentencing transcript. *I adopt every word that I said*.

(R. 79: 11-12) (emphasis added). The judge reiterated that he was "shocked" that the crime did not carry a stiffer penalty. (R. 79: 12). The judge then re-imposed the maximum sentence. (R. 79: 13).

The court entered a new judgment of conviction on December 15, 2016, (R. 50) and amended the judgment to

correct a clerical error on December 16, 2016. (R. 52). Mr. Byrd filed a notice of appeal (R. 54), but determined that a postconviction motion seeking resentencing was again necessary to preserve the appellate issues. Mr. Byrd voluntarily dismissed the appeal, and this Court granted him an extension of time to file another postconviction motion. (R. 60).

In the new postconviction motion, Mr. Byrd again argued that the court had violated his Fifth Amendment privilege by demanding that he admit guilt at sentencing and that the violation was not remedied by the nominal "resentencing" hearing the court had held. He also argued that the court erroneously exercised its discretion at the "Resentencing" when he imposed the maximum prison sentence based on his belief that the statutory maximum set by the legislature was inadequate to address bomb scare offenses. (R. 60). The circuit court denied that motion the day after it was filed. (R. 61).

This appeal follows.

ARGUMENT

I. The Sentencing Court Violated Mr. Byrd's Constitutional Right to Due Process and His Fifth Amendment Privilege Against Self-Incrimination When It Demanded that Mr. Byrd Admit To and Explain the Offense and, When He Would Not Do So, Concluded that Prison Was Necessary Because He Showed "Absolutely No Remorse."

It is improper for a sentencing court to impose a harsher sentence because after a finding of guilt, the defendant refuses to admit guilt. ***Scales v. State***, 64 Wis. 2d 485, 495, 219 N.W.2d 286 (1974), citing ***Finger v. State,*** 40 Wis.2d 103, 161 N.W.2d 272 (1968), ***Gregory v. State,*** 63 Wis. 2d 754, 218 N.W.2d 319 (1974). After Mr. Byrd was found guilty, he had the right to appeal and could not constitutionally be compelled to admit guilt or be punished for refusing to do so***.*** ***Scales***, 64 Wis. 2d at 495-96***,*** citing ***Thomas v. United States***, 368 F.2d 941 (5th Cir. 1966). In other words, he could not be compelled to pay a judicially imposed penalty for exercising his constitutionally guaranteed Fifth Amendment privilege against self-incrimination. ***Id***.

In ***Scales***, the sentencing court told the defendant that until he acknowledged responsibility for his crime, probation was not in order, and efforts at rehabilitation would "come to naught." The court concluded that for this reason it could "do nothing but order [Scales'] incarceration." ***Id***. at 495. The Wisconsin Supreme Court found that the sentencing judge failed to exercise proper discretion, as the court's reliance on the defendant's refusal to admit guilt was "coercive and in derogation of Scales' Fifth Amendment rights." ***Id.***, at 495-96.

As in ***Scales***, here the sentencing court similarly abridged Mr. Byrd's Fifth Amendment rights by improperly relying on his refusal to admit guilt. At Mr. Byrd's original sentencing, defense counsel expressly told the court that Mr. Byrd would not explain the offense because counsel had advised against discussing the crime in order to preserve Mr. Byrd's right to appeal. The court, however, believed that Mr. Byrd's exercise of his right to allocution entitled it to attempt to coerce an admission of guilt from him. ("He has the right to talk. If he exercises that right, I got the right to ask questions. Why did you do this?"). (R. 77: 17). This was incorrect. The court repeatedly demanded that Mr. Byrd explain why he committed the crime, which would necessarily have required him to admit guilt. Then, when he refused to do so, the court concluded that prison was necessary, largely because Mr. Byrd showed "absolutely no remorse." (R. 77: 22). This was improper.

The Wisconsin Supreme Court has explained:

> We have, on numerous occasions, held that a posttrial confession of guilt and an expression of remorse may be considered in mitigation of a sentence. ***State v. Tew*** (1972), 54 Wis.2d 361, 195 N.W.2d 615; ***McCleary v. State*** (1971), 49 Wis.2d 263, 182 N.W.2d 512. From these cases, the state argues that, if remorse may be used in mitigation, lack of remorse may properly be considered in sentencing. We do not agree. The rights against self-incrimination discussed in ***Thomas*** are based upon the founding fathers' fear of governmental coercion. The Bill of Rights confers no rights upon the state, but limits the power of the state. The exercise of the right against self-incrimination is a one-way street. If the defendant exercises that right, he may not be penalized for it, even after a jury's determination of guilt. On the other hand, in the expectation of leniency, he may waive that right and acknowledge his guilt and express his contrition and remorse. A trial judge may,

> but he need not, take into consideration such expressions as indicative of the likelihood that the rehabilitory process hoped for in the criminal law has commenced; but where, as here, the defendant refuses to admit his guilt, that fact alone cannot be used to justify incarceration rather than probation.

Scales, 64 Wis. 2d at 496.

Subsequent to ***Scales***, the Wisconsin Supreme Court decided the case of ***Williams v. State***, 79 Wis. 2d 235, 255 N.W.2d 504 (1977). There, the Court found no violation where the sentencing judge stated the fact of Williams' lack of remorse, repentance and cooperation, and there was no evidence that this fact materially influenced the judge's sentencing decision. ***Id.*** at 239-40. Then, in ***State v. Baldwin***, 101 Wis. 2d 441, 304 N.W.2d 742 (1981), the Court was called upon to determine whether the sentencing in that case was "proper under the rationale of ***Williams*** or improper under ***Scales***." ***Id.*** at 457. The Court in ***Baldwin*** distinguished ***Scales*** and ***Thomas*** based on the fact that the defendants in those cases, unlike ***Baldwin***, had received maximum sentences. Further, the Court noted that in ***Baldwin***, unlike ***Scales*** and ***Thomas***, the defendant's lack of remorse was merely one among many factors the sentencing court considered. Also of note was the Court's consideration of whether the sentencing court's remarks could be seen as an attempt to coerce a confession. ***Id.*** at 458. The Court explained:

> The rationale of ***Scales*** and ***Thomas*** is simply that a defendant must not be subject to greater penalties for having exercised his right against self-incrimination. There is a distinction, however, between the evil which ***Scales*** seeks to avoid and the trial court's obligation to consider factors such as the defendant's demeanor, his need for rehabilitation, and the extent to which the public might be endangered by his being at large. *See:*

> ***Coleman v. State, Ind***., 409 N.E.2d 647, 651 (Ct.App.1980). A defendant's attitude toward the crime may well be relevant in considering these things. In this case we believe the trial court considered a variety of factors, giving no undue or overwhelming weight to any one in particular. The sentence imposed was well within the maximum for which the defendant might have been sentenced, and while it is evident that the defendant's failure to admit his guilt and his lack of remorse were factors in the sentencing decision, we do not believe it was improper or an abuse of discretion.

Baldwin, 101 Wis. 2d at 458-59.

Mr. Byrd's case is more like ***Scales*** than ***Baldwin***. Here, the court's remarks were undeniably coercive, for example, "I want to know, the people in authority of Channel Six wants to know, the district attorney wants to know why the hell would you do this?" (R. 77: 17-18). Further, the court gave undue and overwhelming consideration to Mr. Byrd's refusal to explain his motivations. The court's displeasure with Mr. Byrd for refusing to admit guilt (and even for having gone to trial) is palpable and dominates the court's remarks at sentencing. Finally, Mr. Byrd, like ***Scales***, received the maximum possible prison sentence. This is more noteworthy given that the State, while requesting a "period of incarceration," was not affirmatively seeking a *prison* sentence at all.

In its oral ruling denying this portion of Mr. Byrd's motion on December 1, 2016, the court disavowed reliance on Mr. Byrd's refusal to admit guilt and what the judge saw as Mr. Byrd's lack of remorse. The court referred to its comment on the subject as a "throwaway line." (R. 78: 3). In the context of inaccurate information at sentencing, the Wisconsin Supreme Court has said that a circuit court's after-the-fact assertion of non-reliance is not dispositive of the

issue of actual reliance**.** ***State v. Travis***, 2013 WI 38, ¶ 48, 347 Wis. 2d 142, 164, 832 N.W.2d 491, 502. The same should be true in this context. Assuming that it is really possible for a judge to deliver a "throwaway line" while imposing a sentence, this is not an example of that:

> So, yeah, you're going to prison. You are going to be on extended supervision. It is the only way to get the message out that we, as a community, will not tolerate this stuff. Especially from somebody that shows absolutely no remorse.

(R. 77: 22).

The court attempted to coerce an admission from Mr. Byrd and gave undue and overwhelming consideration to Mr. Byrd's refusal to admit guilt by explaining his motive. This was an erroneous exercise of discretion and a violation of Mr. Byrd's constitutional right to due process and his Fifth Amendment privilege against self-incrimination. Re-sentencing is necessary.

II. The Resentencing Hearing That the Court Conducted Did Not Remedy the Violation of Mr. Byrd's Fifth Amendment Privilege.

The quirky procedural history of this case complicates review. During Mr. Byrd's original sentencing, the court repeatedly demanded that Mr. Byrd admit guilt, in violation of his Fifth Amendment privilege against self-incrimination. In his postconviction motion, Mr. Byrd sought resentencing as a remedy for this violation. The Court denied that it had violated Mr. Byrd's Fifth Amendment privilege and scheduled the case "to modify the sentence" based only upon the distinct issue of the additional mental health information provided. (R. 79: 7-8). However, the Court did not modify the sentence. Without prior notice to Mr. Byrd, the Court

converted the hearing to a resentencing. This was improper. *See*, ***State v. Wood,*** 2007 WI App 190, ¶ 1, 305 Wis. 2d 133, 137, 738 N.W.2d 81, 82. However, given this strange procedural history, Mr. Byrd acknowledges that it is arguable that he has received the remedy he sought – resentencing – for the Fifth Amendment violation.

It is Mr. Byrd's position that the resentencing hearing that the Court conducted did not remedy the Fifth Amendment violation. The resentencing could not remedy the violation when the Court never acknowledged that the violation occurred. A resentencing by the same judge is no remedy when the judge has not acknowledged that there was anything wrong with the original sentencing hearing. Far from acknowledging that demanding an admission from Mr. Byrd at the original sentencing had been improper, the Court said:

> I don't find that I violated his right to maintain innocence at sentencing. I acknowledged on a number of occasions, at least twice, that he had the right no to tell me anything. But he then started making statements, and I responded by asking him appropriate questions, which I'm allowed to do. At any time, he could have said I don't want to answer those questions. He didn't. He answered some of them. He answered --he didn't answer them all.

(R. 78: 3). Regarding his consideration of Mr. Byrd's failure to express remorse, the judge said:

> I made a throwaway line at the end that he, in fact, did not express remorse, and he didn't. But I really did not rely on that in my sentence in this case materially in any way." It was something that I mentioned at the end because it was a fact, and I'm allowed to mention that he had no remorse.

(R. 78: 3).

Nor had the Court's opinion on this subject altered by the time of the "resentencing." The Court returned to the inquiry into Mr. Byrd's willingness to admit his offense, asking "Do you recall making a phone call then or are you still in denial?" Mr. Byrd responded "I was so hallucinatal (sic) around that time where I just really can't recall that." (R. 79: 11).

The judge acknowledged Mr. Byrd's "serious mental illness." However, the judge framed the issue for resentencing this way: "but the question is does that [the mental illness] outweigh all the other things I said to you back in 2015 when I sentenced you?" (R. 79: 11). The Court ultimately concluded that it did not.

The court expressly denied Mr. Byrd's motion for resentencing based on the Fifth Amendment violation. The resentencing hearing that the court held was never intended to remedy that violation. The fact that a resentencing occurred does not dispose of Mr. Byrd's Fifth Amendment claim. A resentencing at which the judge did not acknowledge anything wrong with the original sentencing, but asked only whether Mr. Byrd's mental illness outweighed all of the judge's conclusions at the original sentencing was no remedy for constitutional errors at the original sentencing.

III. The Circuit Court's Conclusion that a Maximum Sentence Was Warranted for Mr. Byrd Was Improperly Driven By the Court's Disagreement With the Statutory Maximum Penalty for the Offense.

At the original sentencing, the court expressed its disagreement with the maximum penalty set by the legislature for Mr. Byrd's offense. The Court opined that it was "shocking" that a bomb scare was only a Class I felony. The court called this "ridiculous," saying hyperbolically that the

offense "is one of the *most serious felonies* that I know of." (R. 77: 21-22) (emphasis added).

The court sentenced Mr. Byrd to the maximum prison term. The court found him ineligible for early release programming "given the terrible nature of this crime." (R. 77: 23). It is apparent that the court's decision at the original sentencing to impose a maximum prison term was driven largely, if not entirely, by the court's belief that the crime deserved a higher ranking in the criminal hierarchy than the legislature had assigned to it.

In case the court forgot this by the time of the resentencing, the prosecutor reminded the court of its belief that the maximum sentence set by the legislature for this offense was "ridiculous." (R. 79: 5). The State agreed with that assessment and said the original sentence was "consistent with that concern." (R. 79: 5). The court took up this theme during its remarks at the resentencing, saying:

> And [the prosecutor] is right. It's a general deterrence case. A message needs to be sent to people that you can't call in bomb scares to the television stations, to radio stations, to courts, to schools without some consequences. And this day, a year later, I'm still shocked that this is only the minor felony that it is, a year and a half and two years.

(R. 79: 12).

Under no reasonable view is Mr. Byrd's crime "one of the most serious felonies" in Wisconsin's criminal code. Sentencing Mr. Byrd to the maximum penalty based on its belief that the legislature provided an inadequate punishment for the crime was not a proper exercise of sentencing discretion. The Wisconsin Supreme Court has said:

> [The legislature concluded that all criminals convicted of a particular crime were not to be treated alike in respect to sentencing. Some were to be sentenced to probation, some were to be sentenced to short terms, and some to the maximum. *Since it is the role of the courts to find rationality in legislative enactments where possible, we must conclude that the legislature intended that maximum sentences were to be reserved for a more aggravated breach of the statutes, and probation or lighter sentences were to be used in cases where the protection of society and the rehabilitation of the criminal did not require a maximum or near maximum sentence.* The legislature intended that individual criminals, though guilty of the same statutory offense, were not necessarily to be treated the same but were to be sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy.

McCleary v. State, 49 Wis. 2d 263, 275, 182 N.W.2d 512, (1971) (emphasis added). The duty to exercise sentencing discretion as contemplated by ***McCleary*** is not satisfied by concluding that the maximum sentence is warranted, not because of the characteristics of the defendant or the individual offense, but simply because in the court's opinion *any* violation of the statute is so serious that it calls for the maximum. The sentencing court's conclusion that this case called for the maximum was based on its opinion about the seriousness of the crime in general, not a proper determination that in the universe of bomb scare offenses, Mr. Byrd's bomb scare offense was a particularly aggravated one.

In its decision denying Mr. Byrd's second postconviction motion, the court called its comments about the statutory penalty "general comments," which "did not play any role in the court's decision to impose a maximum sentence." (R. 61: 4-5). Much like its unconvincing dismissal

of its comments on Mr. Byrd's lack of remorse as a "throwaway line," the court dismissed its remarks about the inadequacy of the statutory maximum as a "side dish." (R. 61: 4). The court insisted that it had "tailored its sentencing decision to the individual sentencing factors in this case." (R. 61: 4). The court insisted that despite Mr. Byrd's serious mental illness, "the circumstances of this case nonetheless called for the maximum sentence." (R. 61: 4). How? This case called for the maximum penalty only if one is prepared to say that *all* bomb threats deserve a maximum sentence due to the need for deterrence and protection of the public. There is absolutely nothing about this *particular* case that is aggravated, and there is substantial mitigation in Mr. Byrd's long history of serious mental illness.

Resentencing before a different judge is necessary.

CONCLUSION

For the foregoing reasons, Mr. Byrd requests that this Court order resentencing before a different judge.

Dated this 20th day of December, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,585 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 20th day of December, 2017.

Signed:

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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 s. 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.

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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 20th day of December, 2017.

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