STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2017AP002087-CR
Eau Claire County Case 2015CF000486

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY C. LOKKEN,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Order Denying Postconviction Relief, Entered in Eau Claire County Circuit Court, Honorable Jon M. Theisen, Presiding

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DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF AND APPENDIX

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ISSUES

1. Did the court impose an unlawful sentence when it placed Lokken on probation for 10 years with a stayed prison term (five years each of confinement and supervision), but further ordered that the stay be lifted 4.5 years into the probation unless Lokken, on a joint and several basis with the co-defendant, pays $688,334.04 in restitution, while he and the co-defendant are in prison on other counts?

The court found the prison sentence to be lawful because the prison term was "imposed and stayed," and, therefore, not "conditional." (80:3, 5, App. 103, 105).The court concluded it gave Lokken an appropriate opportunity to avoid additional incarceration by paying restitution himself or persuading another person or persons to pay after recognizing "...that a gift or financial arrangement [with Lokken or his co-defendant] may actually have been associated with wrongdoing of the defendants." (80:2-3, App. 102-103).

2. Is re-sentencing on all counts necessary?

The circuit court rejected this argument. (80:4, App. 104).

3. Should Lokken be re-sentenced before a different judge?

The court concluded it properly denied Lokken's pre-sentencing motion for disqualification, and rejected the postconviction motion for disqualification. (80:4, App. 104).

4. Does the order denying postconviction relief buttress and add reasons to order re-sentencing on all counts before a different judge?

This issue was not presented to the circuit court.

PUBLICATION AND ORAL ARGUMENT

The legality of the sentence will be a matter of settled law. However, publication may still be warranted under Wis. Stat. §809.23(1)(a)2. (established rule applied to significantly different facts). Sentencing discretion is not boundless: the available dispositions are dictated by law; the durations of dispositions is discretionary.

To further develop the issues, and ramifications of any published decision, Lokken would welcome oral argument, Wis. Stat. § 809.22.

STATEMENT OF THE CASE

Procedural History

Former Eau Claire County Treasurer Larry C. Lokken entered pleas and was convicted of theft and misconduct. Former office manager Kay Onarheim was convicted of similar charges. Her case is not before the court. Both prosecutions charged offenses committed from 2011 through 2013.

The complaint charged both Lokken and Onarheim in the first eleven counts. (1).[1] Each of those counts charged theft

[1] Although the complaint contains the charges against each defendant, Lokken was prosecuted in Eau Claire County Case 2015CF486, Onarheim in case 2015CF487. The cases were handled together at some hearings. (18).

in a business setting of amounts exceeding $10,000.00, class G felonies, contrary to Wis. Stat. §943.20(1)(b) and (3)(c).

Counts 12-14 charged Lokken with misconduct in office, class I felonies, contrary to Wis. Stat. §946.12(2). Counts 15-17 charged Onarheim with violating the same statutes. (1).

Lokken waived his preliminary hearing. (85). On November 2, 2015, before the Honorable Jon M. Theisen, he pleaded no contest to theft-counts one, two, five, six and ten. (89:2, 17). The other six counts of theft were dismissed and read-in. (*Id.*). Lokken also pleaded no contest to the misconduct counts, 12-14. (*Id.* at 12).

On January 21, 2016, Judge Theisen imposed sentences. (92). Lokken filed a notice of intent to pursue postconviction relief, and a motion for postconviction relief. *See*, Wis. Stat. §§809.30(2) (b) and (h). (59, 71). The circuit court denied the motion without a hearing. (80, App. 101-105).

Lokken filed a notice of appeal directed to the judgments and order denying postconviction relief. (82).

Facts

Charges

Lokken was county treasurer for 38 years, retiring in September of 2013, along with Onarheim. (90:83, App. 123). Born June 7, 1947, he was over 68 years old when sentenced on January 21, 2016. (57:1, App. 106; 92:1, App. 115).

According to the complaint, Lokken's successor noted a difference of some $450,000 between the delinquent tax reports of 2013 and those of 2012. The discrepancies arose in reports filed by Onarheim. Investigators attempted to speak

with her. She made numerous appointments, but did not keep them. (1:6).

The complaint alleged a "General Transaction Scheme" and described transactions considered "suspicious" by authors of a forensic audit, covering 2011, 2012, and 2013. "[A]ll of the suspicious transactions were processed using Kay Onarheim's cash drawer." (1:6-7). The alleged scheme involved taxpayers who made payments at the treasurer's office during regular business hours.

A taxpayer would get a receipt, but, after the system generated it, the payment-record would be deleted. It would not be reflected in the daily cash report. On a day the office was closed, the payment would be reapplied in the system so the taxpayer did not get a delinquency notice. Because daily cash reports were only prepared on days the office was open, the imbalances were not detected.

Numerous deposits, in varying sums, were made by Onarheim and Lokken, at multiple area banks. The pattern of voided transactions and deposits observed in 2011, 2012, and 2013, ceased after Lokken and Onarheim retired. (1:9).

The complaint does not describe direct proof of Lokken's activities, except that he was seen at area banks depositing sums, often into accounts held by Onarheim. At sentencing, the court noted that Lokken denied committing the offenses, but told the author of the pre-sentence investigation report he agreed there was sufficient evidence to convict him. (92:82, App. 122).

Pleas

Lokken agreed to plead to theft counts one, two, five, six and ten, as a party to a crime. He also agreed to plead to misconduct counts 12, 13 and 14. (89:2). The other six counts (three, four, seven, eight, nine and eleven) were dismissed and read in. *Id.* at 3.

The State agreed not to issue additional charges against Lokken and not to issue any charges against his spouse. (89:3). The State also agreed to seek 6.5 years of initial confinement and seven years of extended supervision: "The state would agree at disposition to cap its recommendation concurrent on the felony theft counts and concurrent on the misconduct counts but..." to argue that each set of counts be consecutive. (*Id.* at 3-4). The parties agreed to pre-surcharge restitution of $625,758.22, an amount accepted by the court. *Id.*

Revocation of Bail and Motion for Judicial Disqualification

The plea hearing was November 2, 2015. (89:1, App. 132). On December 14, 2015, the court sent the parties a letter stating, "I would like to schedule a hearing to discuss preparation for the upcoming sentencing hearing. I am concerned about timing issues, security, and accommodations." "Accommodations" apparently referred to the large number of people expected at sentencing. (18).

On December 18, 2015, Lokken, his counsel, and Onarheim's counsel went to the courthouse, expecting to attend a meeting in chambers. However, a large group was gathered in the courtroom. Calling the case on the record, the court acknowledged that a "meeting," not a hearing, had been expected. However, because a large audience had formed, the court decided "we should have this one in the courtroom." (90:2).

For most of the hearing, the court and counsel discussed logistical issues. At page 21, the court asked Lokken whether his "unfiled motion scheduled about going to Florida" had become a nonissue and defense counsel said that was correct. Apropos of nothing under discussion, the court stated, "Okay. I don't like the tension. I don't like the threats. And it's my sense that this just gets worse the closer we get. So I'm revoking bond on—on both Mr. Lokken and Ms. Onarheim

effective immediately. I want him taken into custody. I want her picked up. I think any— They're safer as individuals incarcerated. I don't want the public involved. I mean, get involved in a sense of this threat thing. I don't want law enforcement to have to respond to situations. I— This whole travel thing has bothered me. And I have not heard anything that says people were using the opportunity of being out on bond to earnestly come up with finances to—to make the restitution. I think whatever is being done can continue to be done from—from jail." The court conceded that Lokken had not violated bail. *Id.* at 26-28.

Both defendants moved for judicial recusal based on the circumstances under which bail was revoked. (19, 20). The judge denied the request by written decision. (21). The defense reiterated its arguments in a petition to reinstate bail. (22, 23). The State wrote the court asking that it address "both the subjective and objective standards" of due process that apply to determining recusal issues." (24:1). "The State has concerns that if these issues, as well as other recusal bases are not addressed by the Court via the making of a complete record, the cases could be subject to reversal on appeal." *Id.* at 1-2. The court issued additional decisions explaining its denial of the recusal and bail requests. (25-27).

The court held another pre-sentence hearing on January 11, 2016. The last page of the hearing transcript reflects that, having earlier alleged that the judge may have alerted members of the public or press prior to the hearing at which bail was revoked, defense counsel was withdrawing that allegation. (91:35).

The postconviction motion filed for Lokken by undersigned counsel noted trial counsel's allegation that the judge may have alerted others to the hearing. (71:21-22). The postconviction court correctly noted that the postconviction motion failed to acknowledge that the allegation had been withdrawn. (80:4, App. 104).

At the January 11, 2016, hearing, the court suggested that revoking bail without notice was appropriate because, "…if you give somebody notice that we have a security issue, you kind of give away. Do you get what I'm saying?" However, the court also stated it had not required Onarheim's presence "in large part because I had not made that decision until the very hearing." (91:32-34).

Sentencing

At the outset of sentencing, noting public and press interest, the court stated, "…We have more people than we usually have. 152 years ago Abraham Lincoln traveled to Gettysburg, Pennsylvania, for the dedication of a national cemetery at the site of a Civil War battle. …" *Id.* at 3.

The State made the agreed-upon recommendation of 6.5 years of initial confinement and seven years of extended supervision. The defense submitted a privately-prepared report, and recommended lengthy probation with a year in jail as a condition. (92:73-74). The pre-sentence investigation report broadly recommended 5-10 years of confinement on the thefts and consecutive probation on the misconduct charges. (*Id.* at 79, App. 119).

The court found that the thefts were serious, but "more irreparable damage" was done by Lokken's misconduct in public office. *Id.* at 82, App. 122.

The court imposed maximum, consecutive sentences on count one (theft), and counts 12, 13, and 14 (misconduct in office). These sentences total 9.5 years of initial confinement and 11 years of extended supervision. (92:85, App. 125; 92:87, App. 127).

On theft-counts five, six and ten, the court explained, in response to questions from counsel, that it was placing Lokken on probation and withholding sentences. (92:90, App. 130; 57:1, App. 106).

On count two, the court "put conditional jail time of five years initial confinement, five years extended supervision consecutive to count one, which, again, is consecutive to the others, imposed but stayed." *Id.* After listing other conditions, the court stated: "The stay on the conditional jail on the probation, conditional prison actually, will be lifted unless restitution joint and several [2] is paid in full within four-and-a-half years." *Id.* at 88, App. 128. The court told Lokken that, "while you're in prison [the probation would provide] the option or opportunity for you to make arrangements that the victim is made whole thereby alleviating you of an additional five years of incarceration, five years of extended supervision." *Id.* at 89, App. 129.

Initially, the court stated that the probationary terms on theft counts two, five, six and ten would run consecutively to the prison sentences. However, the court corrected itself, stating, "This probation starts today" and the terms are "concurrent." (92:87, App. 127).

The prosecutor asked whether 10 years of probation was permissible. The court explained it telephoned someone at the Department of Corrections and so confirmed. *Id.* Next, the prosecutor asked if the court ordered "an imposed and stayed sentence" on count two. *Id.* The court said, "That's probably the best way to do it, is to call it count two, but—but I was told that you can stack the probation, as long as you get five years on count two, and then one year for every felony, which is eight, so it could be up to 13." *Id.* at 90, App. 130. Thus, rather than clarifying whether it was imposing and staying a sentence, the court apparently was still focused on the permissible duration of probation.

Finally, the prosecutor stated, "But so the record is clear, there's no imposed and stayed sentence on counts five,

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[2] The court accepted a stipulation of restitution in the sum of $625,758.22. *Id.* at 86. The court noted that a 10% surcharge would be added. *Id.* at 77. With the surcharge, Lokken would owe $688,334.04.

six or ten." The court responded, "No." Defense counsel asked, "But what—what is the sentence as to those? ..." The court responded, "Well, he could be revoked from probation and come back for sentencing." *Id.*

The court explained that Lokken would be imprisoned for 9.5 years on other counts while serving the 10-year probationary terms, and, while the court supposed he could nevertheless violate probation, the court's "focus is to try to give [Lokken] an opportunity to shift some monies around and get that taken care of and maybe possibly avoid that—and then possibly avoid that extra sentence." *Id.* at 90-91, App. 130-131.

Postconviction Litigation

Lokken's postconviction motion asked that the motion be assigned to a different judge and for re-sentencing, also before a different judge. (71:1).

Lokken alleged that the sentence on count two was unlawful because it imposed an unreasonable condition and because the court impermissibly mandated that the probationary term be prematurely revoked, shortened or replaced with a prison terms. (71:7-12). He alleged that the sentences on all counts were inadequately explained. (71:12-15). He moved for re-sentencing before a different judge. (71:15-25). The State filed a response. (72).

A hearing was scheduled. Two days before it was to take place, the court wrote the parties to cancel it and order further briefs. Specifically, the court wanted briefs on the legality of its sentence in count two. (73).

The parties filed briefs as directed. (77, 78). The court issued a decision without holding a hearing. (80, App. 101-105). Lokken filed an "Offer of Proof" summarizing evidence, as to his ability to pay, that he would have presented at the

expected hearing. (81). The offer of proof included a settlement statement regarding the sale of Lokken's home; it was consistent with claims in the postconviction motion that, despite hope at sentencing that the sale would generate funds, it did not. (71:10).

The postconviction court stated that Lokken "mischaracterize[d] the imposed and stayed sentence on Count 2 as conditional incarceration." (80:5, App. 105). However, the court confirmed it had "confusingly [referred] to the 10-year sentence as conditional,." The court found it had "ultimately clarified" it was ordering an "imposed and stayed" sentence. *Id.* The postconviction order does not dispute that:

- The prison term is only stayed for 4.5 years of the 10-year probationary term.

- The court ordered the stay be lifted automatically upon failure to pay restitution, as opposed to being dissolved only as the culmination of an administrative revocation proceeding during which all potential grounds for revoking, continuing, modifying, or extending probation would be duly considered.

- Relatedly, the lifting of the stay is judicially mandated upon failure to make restitution for any reason; the decision whether to lift it is not left to the executive branch/Department of Corrections, or governed by the statutes and rules the department would normally apply.

The postconviction court confirmed it "...imposed the more lengthy sentence—approximately 15 years—then stayed a portion of that sentence allowing the defendants[3] the opportunity to pay the restitution." (80:3, App. 103)

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[3] The plural refers to the court having imposed a similar "stayed" prison term for one count of Onarheim's sentence.

The court rejected Lokken's claim that it imposed an unreasonable condition of probation. As a threshold matter, the court found that "the record reflects" Lokken and Onarheim stole "over one million dollars," so that $688,000.00 was "only a portion of the amount of the theft," and requiring Lokken to pay the full "portion" was "not an unreasonable burden." (80:1, App. 101).

The postconviction order does not indicate where the record reflects that Lokken is guilty of stealing over one million dollars. When Lokken gave up his rights and entered his pleas, the State indicated that "during the years 2011, 2012, and 2013, in excess of $600,000 was determined to be missing from the treasurer's office." (89:133, App. 133).

While the court, postconviction, assumed Mr. Lokken to be guilty of stealing "over one million dollars," the court itself had agreed that the sum was considerably lower—the actual theft was $625,758.22, and the restitution amount grew to $688,334.04 only because of the statutorily assessed surcharge of ten percent. (92:77, 92:86, App. 117, 126; 89:3-4; 57:8, App 113).

The postconviction motion alleged that Lokken was unable to pay more than a small amount of restitution. (71:9-10). After the postconviction court denied relief without a hearing, Lokken submitted an offer of proof with documentary evidence showing the sale of his home did not produce significant funds. (81).

After stating it ordered a not-unreasonable "portion" of restitution, the postconviction court explained it never expected Lokken or Onarheim to "earn $688,000 while serving prison sentences." (80:3, App. 103). Rather, the court surmised that "some people associated with" Lokken or Onarheim might pay restitution to help them avoid incarceration: they "may come to recognize that a gift or financial arrangement may actually have been associated with

wrongdoing of the defendants." (*Id.* at 2-3, App. 102-103). As with the "over one million dollars" assumption, the court did not cite the record showing what persons might recognize they received ill-gotten gains, or why they might pay restitution. The court cited no legal authority authorizing incarceration unless a defendant can obtain funds from others.

The court denied Lokken's recusal request. The request was based on claims that (1) the unlawful and impermissibly coercive sentence contributed to the appearance of a lack of impartiality (71:18-20, 23-25); and (2) the appearance of a lack of impartiality had been created by the circumstances under which the court revoked bail (71:20-23).

As to the bail issue, as noted, the court correctly criticized undersigned counsel for citing allegations by trial counsel that were withdrawn. (80:4, App. 104). The postconviction order does not dispute the other circumstances, such as the fact that the parties had been notified of a meeting, not a hearing, and not a bail hearing.

The postconviction order does not dispute that the court revoked bail abruptly, in the absence of a request by the state or an allegation that Lokken violated bail conditions. ((71:22) (motion allegations); (90:21) (bail revocation)). The postconviction order noted the court's discretion to revoke bail, and concluded it was appropriate and did not create an appearance of a lack of impartiality. (80:4, App. 104).

The postconviction motion alleged the court revoked bail to punish Lokken for failing to gather more restitution in the 46 days between the plea hearing and the hearing. Lokken sold a car and paid the proceeds; the court did not explain what more he should have been able to accomplish, "suggest[ing] a lack of impartiality, elevating a desire to coerce payment over an interest in fair, rational treatment." (71:22, fn.9).

The postconviction order concluded Lokken had had sufficient time to raise funds for restitution, and had lead the

court to believe he was doing so; bail was revoked after the court concluded Lokken was unlikely to make additional payments, and after the court sensed security issues. (80:4, App. 104).

The postconviction court concluded that the sentencing decision in and of itself did not compromise the appearance of impartiality. The sentence "appropriately offer[ed] Defendant Lokken an opportunity to avoid incarceration by arranging to pay restitution." (80:4, App. 104).

ARGUMENT

I. The Court Imposed an Unlawful Sentence When it Placed Mr. Lokken on Probation But Ordered it to be Terminated Less Than Halfway Through, Unless, for any Reason, Mr. Lokken failed to pay $688,334.04 in Restitution.

A. The sentence is not presumed reasonable: its legality is independently reviewed on appeal.

Discretion is erroneously exercised when it rests upon an incorrect legal standard. *See*, ***State v. Raczka***, 2018 WI App 3, ¶7, 379 Wis. 2d 720, 906 N.W.2d 722. Reviewing courts independently review conclusions of law, even when they underlie discretionary decisions, ***State v. Loutsch***, 2003 WI App 16, ¶20, 259 Wis. 2d 901, 656 N.W.2d 781, *overruled in part on other grounds*, ***State v. Fernandez***, 2009 WI 29, ¶5, 316 Wis. 2d 598, 764 N.W.2d 509. The meaning of a statute is a question of law, decided independently on review. ***Loutsch***, ¶20.

Where only documentary evidence is involved, review is de novo and not for an erroneous exercise of discretion, ***State ex rel. Sieloff v. Golz***, 80 Wis. 2d 225, 241-42, 258 N.W.2d 700 (1977). Therefore, this court independently determines the

legal import of the oral pronouncement of the sentence and the resulting judgment.[4]

Finally, while sentencing courts have discretion to order conditions of probation, the conditions are subject to review to ensure they are reasonable and appropriate as required by Wis. Stat. §973.09(1)(a). *See*, ***State v. Martel***, 2003 WI 70, 262 Wis. 2d 483, 664 N.W.2d 69.

B. The sentencing court imposed a prison/probation hybrid that is unlawful because it is not authorized by statute and contravenes case law.

"The fashioning of a criminal disposition is not an exercise of broad inherent court powers.... Thus, if the authority to impose a particular sentence exists, it must derive from the statutes." ***State v. Torpen***, 2001 WI App 273, ¶7, 248 Wis. 2d 951, 637 N.W.2d 481, *citing* ***Grobarchik v. State***, 102 Wis. 2d 461, 467, 307 N.W.2d 170 (1981).

Wis. Stat. §973.09(4)(a) restricts the duration of custody a court may impose as a condition of probation. "The court may ... require as a condition of probation that the probationer be confined during such period of the probation as the court prescribes, *but not to exceed one year*." (Emphasis added.) Therefore, the court lacked authority to impose "conditional jail" or "conditional prison" of five years' each of confinement and supervision. *See*, 92:88, App. 128. Indeed, the statutes are devoid of authorization to impose extended supervision as a condition of probation.

Neither the oral pronouncement of the sentence nor the written judgment refers to probation on count two being "revoked" at the 4.5-year mark of the 10-year probationary term. However, the amended judgment states: "Count 2, 5

[4] The oral pronouncement controls vis-à-vis the written judgment. ***State v. Perry***, 136 Wis. 2d 92, 115, 401 N.W.2d 748 (1987). The judgment cannot be amended in a manner that is inconsistent with the oral pronouncement. ***State v. Phihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857.

years Prison Imposed and Stayed—Stay to be lifted if restitution joint and several not paid in full within 4.5 years." (57:8, App. 113).

The postconviction court concluded it did not impose conditional time. It accused Lokken of "mischaracteriz[ing] the imposed sentence on Count 2 as conditional incarceration." However, the court acknowledged it had "…confusingly [referred] to the 10-year sentence as conditional," but ultimately clarified its sentence. (80:5, App. 105) *See*, 92:88, App. 128.

"[A] good sentence is one which can be reasonably explained." ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971) (quoted source omitted). The court at least partially admitted that its sentence was "confusingly" explained.

Despite what the postconviction court considered its clarification, it is entirely reasonable to view the prison term as "conditional." It is "conditional" in the sense it must be served during the 10-year term of probation: custody is triggered at the 4.5 year mark unless full restitution is paid beforehand. While conventional probationary terms involve stayed sentences, this one involves a prison sentence that is both "stayed" and "conditional." Because the prison term was mandated to commence less than halfway through the probationary term, the court imposed more custody as part of the probationary term than the one year authorized by Wis. Stat. §973.09(4)(a). The postconviction court's implication is simply incorrect that the prison term cannot be improperly conditional if it is stayed: it's both.

The court did not "reasonably explain" how its order would be effectuated—whether probation would end by advanced judicial order alone, be deemed revoked, or become terminated or revoked after some unknown process to be triggered in the highly likely event that neither Lokken nor Onarheim pays $688,334,04 within 4.5 years.

The court either mandated early termination or early revocation. Either way, among other statutes, it violated this one:

> Wis. Stat. §973.10 Control and supervision of probationers.
>
> ...
>
> (2) If a probationer violates the conditions of probation, the department of corrections may initiate a proceeding before the division of hearings and appeals in the department of administration. Unless waived by the probationer, a hearing examiner for the division shall conduct an administrative hearing and enter an order either revoking or not revoking probation. Upon request of either party, the administrator of the division shall review the order. If the probationer waives the final administrative hearing, the secretary of corrections shall enter an order either revoking or not revoking probation. ...

In ***State v. Horn***, 226 Wis. 2d 637, 651, 594 N.W.2d 772 (1999), the Wisconsin Supreme Court upheld this statute against a separation-of-powers challenge. It confirmed that the judicial branch may not violate it or usurp the powers it confers on the executive branch:

> ...allowing the executive branch to determine whether a defendant has violated the conditions of his or her probation to such a degree as to warrant revocation does not unduly burden or substantially interfere with either the judiciary's constitutional function to impose criminal penalties or its statutory authority to extend probation or modify its terms prior to the expiration of probation. The judiciary still has authority to sentence the convicted defendant to prison or to impose probation and withhold or stay sentencing." [*Id.* at 651].

The sentence on count two prevents the executive branch from exercising its valid statutory authority to determine whether to initiate revocation. The sentence also excludes Lokken from the protections of the statutory and administrative framework, described in §973.10(2) and other statutes, which are available to all other probationers.

Just as the court could not mandate revocation, it could not set two alternative durations of probation. Under Wis. Stat. §973.09(3)(a), courts may extend probation for cause. But that statute "does not [conversely] grant a circuit court authority to reduce the length of probation." ***State v. Dowdy***, 2012 WI 12, ¶33, 338 Wis. 2d 565, 808 N.W.2d 691.[5]

C. The court imposed an unreasonable and therefore unlawful condition of probation when it ordered probation ended after 4.5 years for failing to pay $688,334.04 in restitution regardless of the reason for the failure or the amount that was paid.

The previous subsection of this argument explains why the sentence-structure is unlawful. This subsection presents an overlapping argument: by deciding in advance what will justify revoking or otherwise prematurely terminating probation, the sentence has the result of imposing a condition—full payment of a massive sum of money while incarcerated, and no matter what—which is unreasonable as a matter of law.

Conditions of probation must be "reasonable and appropriate." Wis. Stat. §973.09(1)(a). Although this determination is discretionary, a decision cannot stand if based upon an erroneous view of the law. ***Torpen***, 248 Wis. 2d at ¶8. *See also*, ***State v. Hoppe***, 2014 WI App 51, ¶8, 354 Wis. 2d 219, 847 N.W.2d 869 (listing examples of conditions found to be unlawful). As discussed above, the court imposed the restitution condition as part of an unlawful sentence.

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[5] In ***Dowdy***, this court held that, assuming without deciding that a circuit court could shorten a term of probation, it could only do so under limited circumstances, such as the showing of a new factor, clear mistake, or that the sentence was unduly harsh and excessive. ***State v. Dowdy***, 2010 WI App 158, ¶31, 330 Wis. 2d 444, 792 N.W.2d 230. The Wisconsin Supreme Court did not disturb that holding. ***State v. Dowdy***, 2012 WI 12, ¶¶23, 43, 338 Wis. 2d 565, 808 N.W.2d 691.

Even an ordered condition that is reasonable and appropriate under a general statute is precluded when it conflicts with another statute. *Id.* Thus, even if the condition was reasonable under Wis. Stat. §973.09 (1)(a), the deadline for meeting the condition, the sanction for failing to meet it, and the process (or lack of process) triggering imposition of the prison term, all violate Wis. Stat. §973.10(2).

The very decision to judicially control on the front end what condition-violation will be sufficient to reduce probation by over 50% (from 10 to 4.5 years) constitutes the imposition of a condition that is neither reasonable nor appropriate within the meaning of Wis. Stat. §973.09(1)(a).

Probation might be merely extended, and not revoked, and that might happen even if "[t]he probationer has *not made a good-faith effort* to discharge court-ordered payment obligations…" Wis. Stat. §973.09(3)(c)1. (emphasis added). While probationers supervised under the statutes applicable to everyone else might be discharged after making incomplete but good-faith efforts, or might have probation extended after making insufficient efforts, and even acting without good faith, the sentencing court excluded Lokken from this legal framework, substituting its own framework.

In ***Huggett v. State***, 83 Wis. 2d 790, 799, 266 N.W.2d 403 (1978), the court held that even extending probation would be inappropriate if the probationer made good-faith efforts pay restitution. ***Huggett*** is cited with approval in ***Fernandez***, 316 Wis. 2d,¶23: "…[C]onditioning probation on the satisfaction of requirements which are beyond the probationer's control undermines the probationer's sense of responsibility." *Id.*, citing ***Huggett***, 83 Wis. 2d at 798-99.

Unpaid restitution amounts may be converted to civil judgments. ***Fernandez***, 316 Wis. 2d, ¶2. Punishing failure to pay by tying it directly to additional incarceration runs contrary to this holding.

The validity of conditions is determined "by how well they serve the dual goals of probation: rehabilitation and protection of the community." ***State v. Nienhardt***, 196 Wis. 2d 161, 167, 537 N.W.2d 123 (Ct. App. 1995). Arbitrary conditions do not foster these goals.

The postconviction court confirmed that an unfounded legal theory gave rise to its order. It admitted Lokken himself would not earn enough money during 4.5 years in prison to pay significant restitution. Yet it concluded it was appropriate to order full payment on pain of automatic additional imprisonment. The court reasoned that its sentence gave Lokken incentive to reveal previously undisclosed assets, or to persuade others to pay restitution for him. Others might "recognize" they obtained money from Lokken's and/or Onarheim's crimes, and that, so recognizing, they might pay restitution in time to save Lokken from serving additional prison. (80: 2-3, App. 102-103).

Huggett and other cases permit courts to order *defendants* to pay restitution. There is no legal authority permitting courts to coerce defendants to persuade *others* to pay it. The existence and identity of available third-party payers is speculative.

The oddity of the sentence structure results, ultimately, in a failure by the court to properly consider Lokken's ability to pay. At sentencing, ability to pay was necessarily considered in the context of the legal framework available to all offenders: consistently with ***Fernandez***, the sentencing court could properly consider what Lokken could pay in the course of all confinement and supervision.

The law allows the circuit court to "articulate a basis for the sentence on the record and then require[s] the defendant to attack that basis by showing it to be unreasonable or unjustifiable." ***State v. Echols***, 175 Wis. 2d 653, 683, 499 N.W.2d 631 (1993).

Lokken's postconviction motion addressed his ability to pay within the framework established by the sentence. Lokken's postconviction motion alleged he was unable to pay even a small portion of the restitution amount at the time of sentencing or subsequently. (71:9-10) (summarizing his income and explaining that he did not have even the modest amount of equity in his home he believed he had at the time of sentencing). When the court denied postconviction relief without a hearing, Lokken submitted an offer of proof with documentary evidence showing the sale of his home did not produce significant funds. (81).

The postconviction motion alleged as follows. Lokken's financial circumstances were even worse than at sentencing. His wife, innocent of wrongdoing, was living on his pension and a monthly social security payment of about $550.00. Lokken was incarcerated and, when able to work, earned less than $.50 per hour. His incarceration prevented him from receiving social security. There was no likelihood he would pay substantial restitution while incarcerated. (71:9-10).

Lokken had not suggested at sentencing that he would be able to pay significant restitution, though he argued he could pay more if he was placed on probation and released after a year of conditional time: once he was out of custody, he would earn social security. (92:66-67).

Neither the State nor the court—at the plea hearing or at sentencing—accused Lokken of having undisclosed sums, much less $688,334.04. Even the postconviction order does not conclude that Lokken has ready access to monies. Yet it partially justifies the restitution order on speculation that Lokken or others might pay significant funds within 4.5 years. Premising a condition on this speculation is unreasonable.

D. The unusual sentence-structure disrupts the orderly administration of justice and its harshness adds to the appearance of a lack of impartiality.

Unusual sentences like this one are difficult to execute. Furthermore, because this sentence is both unusual and unusually punitive, it raises the concern that the sentencing judge fashioned it for the very purpose of treating the defendant and co-defendant in these high-profile cases more harshly. A dispassionate observer would question whether the judge, a member of the local power structure, acted upon pressure or incentive to cater unduly to public outcry.

Courts erroneously exercise their discretion when they "...impos[e] probation conditions on convicted individuals that reflect only their own idiosyncrasies." ***State v. Oakley***, 2001 WI 103, ¶13, 245 Wis. 2d 447, 629 N.W.2d 200. Imposing idiosyncratic sentences in a high-profile case creates reasonable suspicion of a lack of impartiality.

Novel sentence structures create headaches at the time of sentencing, during their execution, and on review. While sentences are executed, the Department of Corrections should have clarity as to mandatory release and maximum discharge dates. The sentencing court did not identify or devise a mechanism through with the mandatory release and maximum discharge dates would each be increased by five years if full restitution is not paid within 4.5 years. How and when will the Department be informed and the changes made?

If revoked through the statutes applicable to all others, Lokken would be entitled to an administrative appeal and then to petition the circuit court for a writ of certiorari. In the absence of those opportunities, it is easy to envision a motion challenging the termination of probation when it occurs. Arguably, only then, would it be possible to fully gauge the fairness of revoking or ending probation for a man of Lokken's age in whatever health condition he is in. It might only then be possible to gauge the full extent of his efforts to

pay and whether he should have done more as he sat in prison. Because the circuit court devised its own sentence structure, determining the means and forum in which to challenge the termination of probation would be procedurally difficult if not impossible.

Sentencing courts may not modify sentences based solely on reflection, ***State v. Grindemann***, 2002 WI App 106, ¶21, 255 Wis. 632, 648 N.W.2d 507. But it seems unfair and unworkable to subject Lokken to legal requirements like that when the sentence deprived him of other legal provisions, such as those permitting modification or extension of probation. Thus, the circuit court that fashioned an ostensibly rigid framework might well be appropriately asked to reconsider it. New calendar assignments or other developments might send such motions to a different judge, to be resolved outside the statutes applicable to other sentence- and probation-structures.

Existing law provides a better way to proceed than the circuit court's unique framework. As to each count, courts should determine, explain and impose a disposition allowed by statute. No disposition should require novel processes, such as determining who would direct the Department of Corrections to lift a stay of a prison sentence, with what form or order, and with what right of administrative or judicial review. The statutes and established precedents give sentencing courts plenty of flexibility without the havoc invited by the rogue determinations.

This court has remarked that, if established standards are abandoned to uphold searches of private homes, "...we may as well grab a toboggan and start sliding because the revered privacy of an individual in his/her own home will become a slippery hill." ***State v. Rodriguez***, 2001 WI App 206, ¶23, 247 Wis.2d 734, 634 N.W.2d 844. If the home-search portion of Fourth Amendment jurisprudence is a legal hill, sentencing is a mountain. This court will invite a chaotic slide down the mountain if it authorizes individual sentencing

courts to devise structures unknown to the statutes and the cases explicating those statutes.

II. This Court Should Order Re-sentencing on all Counts.

The question whether re-sentencing is necessary on all counts, or whether one count can be excised, with or without adjustments to the sentences on other counts, implicates the principle that appellate courts do not curtail trial courts' discretion by substituting their judgment. Discretion is exercised by trial courts, not appellate courts. ***State v. Margaret H.***, 2000 WI 42, ¶38, 234 Wis. 2d 606, 610 N.W.2d 475 (termination-of-parental rights case discussing review for erroneous exercise of discretion). Thus, it has long been the general rule that when a sentence is overturned on appeal, re-sentencing is the appropriate remedy. *See*, ***Grobarchik***, 102 Wis. 2d at 470, and ***State v. Holloway***, 202 Wis. 2d 694, 551 N.W.2d 841 (Ct. App. 1996).

McCleary, otherwise valuable, contains a quirk. It appears to have been discarded for reasons that seem understandable, but it may serve as a cautionary tale.

The circuit court imposed a sentence of 10 years, later reducing to 9.5 years. ***McCleary***, 49 Wis. 2d at 271. The supreme court, invoking its statutory power to reverse in the interest of justice, concluded it had the power "to remand for resentencing or *to modify a sentence*." 49 Wis. 2d 263, 273 (emphasis added). Sentencing should be the result of "collective judgment" shared in by a "collegial [appellate] court. *Id.* at 279. "…[H]arassed and overworked trial judge[s]" were being deprived of the opportunity to have their "judgment[s] and discretion tested on a statewide basis…" *Id.*

With these principles in mind, the supreme court imposed a lower sentence—five years. *Id.* at 290. Oddly, while it emphasized the minimum-custody standard earlier in its opinion, *id.* at 276 (discussed below), the court did not

follow that standard when it decided the sentence that would replace the sentence imposed by the circuit court. Presumably, that is because the supreme court was attempting to fashion a "collective" judgment, on a "collegial" basis with the circuit court. The result was a garbled standard:

> ...In imposing the term of five years in this case, we do so in deference to the judgment of the trial judge and impose what we consider to be the maximum sentence that reasonably ought to be imposed in light of the facts revealed in the record and the trial judge's partial appraisal of these facts. [*Id.*]

In ***State v. Gallion***, 2004 WI 42, ¶4, 270 Wis. 2d 535, 678 N.W.2d 197, the supreme court "reinvigorate[d] the ***McCleary*** directive that the exercise of discretion must be set forth on the record." However, neither ***Gallion*** nor any other case, to Lokken's knowledge, has endorsed ***McCleary's*** use of statutory power to reverse a sentence in the interest of justice and replace it with one chosen by an appellate court.

Obviously, the parties should be heard if this court contemplates undertaking a determination of the sentence. Would this court directly determine the minimum-necessary custody, or, like the ***McCleary*** court, would it attempt to honor some portion of the circuit court's stated intentions and goals? It seems clear that a circuit court, equipped for all aspects of sentencing, not a reviewing court, should make a plenary determination.

Sentencing courts may impose a sentence for each count of conviction and make them concurrent or consecutive to one another or prior sentences. Wis. Stat. §973.15(2)(a). Reviewing courts examine sentencing explanations as a whole. ***See, State v. Berggren***, 2009 WI App 82, ¶45, 320 Wis. 2d 209, 769 N.W. 2d 110 (sentencing courts not required to separately explain decision to impose consecutive sentences). Once this court concludes that the sentence on count two is unlawful, it will confront the sentence as a whole. Unless this court wants to participate in a shared, collective exercise of discretion, it cannot change the sentence on just one count or

independently determine the correct sentence on that count or others, without altering the total custody and supervision to be imposed.

"[T]he sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of ***Gallion***, 270 Wis. 2d 535 at ¶23, *quoting* ***McCleary***, 49 Wis. 2d at 276. The minimum-custody standard is the very reason courts "should consider probation as the first alternative" before ordering incarceration. *See*, ***Gallion***, 270 Wis. 2d at ¶44.

A sentence must be imposed upon a rational and explainable basis. ***Gallion***, 270 Wis. 2d, ¶¶1-3. Surely that includes an explanation why the sentence comports with the minimum custody standard. Unfortunately, the postconviction order confirms that the prison/probation hybrid sentence renders unclear that amount of custody that the circuit could rationally and lawfully have found necessary.

At sentencing, the court was not clear as to whether it believed it was giving Lokken a meaningful chance to avoid the last 5 years each of the confinement and supervision imposed in count two. The court said Lokken could "maybe, possibly" avoid the "extra sentence" imposed in count two, but did not say why the court thought so or the extent to which the court thought it was likely. (92: 90-91, App. 130-131).

The postconviction order suggests that, at sentencing, the court concluded that a total sentence of "nearly 15 years" was acceptable. (80:3, App. 103). The court did not cite or analyze the minimum custody standard, either at sentencing or in its postconviction order.

The postconviction explanation is not rational and explainable within the meaning of ***Gallion***. Far from stating it concluded that the extra prison represented by count two would comport with the minimum custody standard, the

postconviction court stated only that it "strongly considered" imposing it but wanted "to give the defendants consideration in the event that they were able to make the victim whole." (*Id.*).

Assuming the court did not intend to impose an illusory "opportunity" to pay restitution, it nevertheless failed to provide a rational and explainable basis for concluding that the opportunity was meaningful.

The postconviction court confirmed that, to recoup restitution, it was willing to impose a "more lengthy sentence." (80:3, App. 103). Re-sentencing on all counts is required because there is no assurance that that willingness was confined to the features of count two. Instead of tying its decision to the minimum custody standard, the court emphasized the importance of restitution and offered the speculation discussed above that either Lokken, his co-defendant, or unidentified third parties might pay significant funds.

It is not possible from the sentencing explanation or the postconviction order to determine what durations of confinement and supervision, within a rational and understandable framework, were found by the court to constitute the minimum necessary amount of custody and control. Compliance cannot be assumed. It should not even be inferred: "What has previously been satisfied with implied rationale must now be set forth on the record." *Gallion*, 270 Wis. 2d, ¶38.

III. This Court Should Order Re-Sentencing Before a Different Judge to Protect the Appearance of Impartiality and Ensure Mr. Lokken's Bargained-For Sentencing Recommendations are Considered Under All Applicable Standards.

After a judge has denied a request for recusal, a renewed request is "an unwelcome and delicate one to [the judge's]

associates." ***State v. American TV and Appliance***, 151 Wis. 2d 175, 192 443 N.W. 2d 662 (1989) (quoted source omitted).

Although Lokken presents the argument that an appearance of a lack of impartiality requires re-sentencing before a different judge, this court should grant the requested relief for a simpler reason. *See*, ***Cholvin v. Wisconsin Dep't of Health and Family Servs.***, 2008 WI App 127, ¶34, 313 Wis. 2d 749, 758 N.W.2d 118 (unnecessary to reach additional issues if resolution of one issue disposes of the appeal).

As explained in the previous section of this argument, the sentencing and postconviction explanations do not adequately explain the circuit court's evaluation of the minimum custody and control that is necessary in light of the facts and sentencing factors. This has implications for subsequent review if the same judge conducts the re-sentencing.

If the same judge conducts re-sentencing, any increased punishment might be presumptively vindictive under ***North Carolina v. Pearce***, 395 U.S.711, 725-26 (1969). While some likelihood of actual vindictiveness might need be shown to obtain protection, ***Alabama v. Smith***, 490 U.S.794, 799 (1989), the courts have reached differing opinions as to the required showing. *See*, ***Plumley v. Austin***, 135 S.Ct. 828 (2015) (Thomas and Scalia, JJ., dissenting from denial of certiorari).

What would constitute an increased punishment? The postconviction order shows the court believed a sentence-structure including the additional confinement and supervision imposed and, to some extent, stayed, in count two deserved "serious" "consideration." Thus, the original sentencing court might conclude that only an initial confinement term in excess of 14.5 years would be deemed an increased sentence, subject to review for potential vindictiveness. If the circuit court so found, the elderly Lokken might have to litigate another postconviction/appellate process to challenge any sentence in excess of 9.5 years, among other challenges. Re-sentencing on

all counts before a different judge would also serve the public's interest in finality and closure.

This court should remand to ensure that the sentence as a whole represents a reasoned analysis of the minimum necessary custody, and to avoid confusion about what different sentence would later be subject to a vindictiveness challenge based on an increased punishment. If relief is not granted on these grounds, Lokken asks that it be granted to protect the appearance of impartiality, as a matter of due process.

Lokken is not necessarily entitled to the sentence the State agreed to recommend, or such lesser sentence as the plea agreement gave him the right to seek. But he plainly is entitled to have his sentence determined in accord with all applicable standards, and to have it imposed and executed under the same statutory scheme governing the sentences of all others convicted in Wisconsin. The structure of the sentence, and the circuit court's rationale, are sufficiently problematic that a new judge should conduct re-sentencing.

"A sentencing constitutes a critical phase of a criminal proceeding. And, in a case involving a plea of guilty, no contest, or an ***Alford*** plea, the sentencing undoubtedly is the most critical phase of the proceeding." ***State v. Anderson***, 222 Wis. 2d 403, 411-12, 588 N.W.2d 75 (Ct. App. 1998). At 70 years old, the critical question for Lokken is whether he will live to a release date.

The defense claim has always been confined to the *appearance* of a lack of impartiality. The appearance was raised by the circumstances of the bail hearing. The decision to revoke bail was sprung on Lokken at a hearing which was itself sprung on him after the court abandoned the scheduled in-chambers meeting and revoked bail before a large audience not anticipated by the defense.

The bail had not been conditioned on payment of restitution before sentencing. Lokken was convicted on

November 2, 2015, and the bail hearing occurred 46 days later. Lokken sold a car and paid the proceeds toward restitution. The court's rationale in revoking bail in response to a perceived lack of diligence in raising restitution is similar to the reasoning built into the sentence on count two, setting an arbitrary term to pay over $688,000.00 to avoid additional prison. Both decisions implicate the appearance of a lack of impartiality, where the desire to coerce payment was arguably elevated over an interest in fair, rational treatment.

Wis. Stat. §757.19(2)(g) requires a judge to self-disqualify upon determining that for any reason, "he or she cannot, or it appears he or she cannot, act in an impartial manner." Although the judge examines both subjective and objective circumstances, this statutory inquiry is largely entrusted to the judge's discretion. Review is limited to assessing whether the judge made a finding that should have prompted self-disqualification but failed to heed that finding. ***American TV & Appliance***, 151 Wis. 2d at 186. The postconviction rationale—that third parties might pay bail and that Lokken should be punished for stealing more money than the court agreed to assume when it accepted his pleas—are findings that should prompt recusal regardless of the circuit court's protestations.

Unlike Wis. Stat. §757.19(2)(g), due process imposes objective standards to be weighed independently by a reviewing court, without deference to the assessment made by the judge who is the subject of the inquiry. *See*, ***Caperton v. A.T. Massey Coal Co.***, 556 U.S. 868 (2009). "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge has no actual bias." ***Rippo v. Baker***, 137 S. Ct. 905, 907 (2017).

The sentencing court blatantly excluded Lokken from the procedures and protections afforded to all other probationers by Wis. Stat. §973.10(2), quoted and discussed above. That statute prescribed a "process" that was "due" to Lokken when he was placed on probation. Other "due" "processes," extended by cases and statutes governing

restitution requirements and appropriate conditions, also described above, were likewise withheld by the sentencing court's unusual decision. Because the sentencing judge deprived Lokken of due process in these dramatic ways, due process must now be vindicated by providing a different judge for re-sentencing.

Fair treatment enhances the rehabilitation of the offender. *See* ***Morrisey v. Brewer***, 480 U.S. 471, 484 (1972).[6] Moreover, instead of appearing to bow to public pressure, courts should expect members of the public, ultimately, to prefer a more orderly process. "[J]ustice must satisfy the appearance of justice." ***Offutt v. United States***, 348 U.S. 11, 14 (1954). The very flexibility entrusted to sentencing courts, in high-profile cases, underscores the need to protect the appearance of impartiality.

When it revoked bail, when it imposed sentence, and when it denied postconviction relief, the court pursued a restitution-related mission. The prison-probation hybrid sentence adumbrates a disproportionate emphasis on coercing payments in a manner that might well be cheered on by Eau Claire County taxpayers and constituents of the judge, but is unlawful. The sentencing court relied on speculation that Lokken might be able, within 4.5 years, to "shift some monies around." (92:90-91, App. 130-131). The court did not even ask the State whether there was reason to so suspect. The State made no such allegation. Basing the sentence on this type of speculation was unwise and unfair. The court was willing to wager what might be the last years Lokken's life that he had or could get, in 4.5 years, not only "some" monies, but the whole vast sum, if only he was sufficiently coerced.

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[6] *See also*, ***McCleary***, 49 Wis. 2d at 274 (meaningful review of a sentence can "facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence" (quoted source omitted).

IV. The Sentencing Court's Order Denying Postconviction Relief Buttresses and Adds Reasons to Order Re-sentencing on all Counts Before a Different Judge.

Sentencing courts can clarify their decisions in postconviction proceedings. *See, **State v. Fuerst,*** 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). In ***Fuerst,*** the postconviction order did not explain how the sentence was appropriate in light of suggestions the court improperly considered the defendant's lack of religious beliefs. *Id.*

Here, the postconviction court did not deny that its sentence in count two impermissibly supplanted the Department of Corrections' function to execute the probationary term. It did not dispute that it set two alternative durations of probation: 4.5 years and additional prison if full restitution was not paid, or up to 10 years and possible discharge if it was paid.

Far from explaining why the original sentence was lawful, the postconviction order creates additional reasons to reverse. Having implied at sentencing that Lokken might be able to shift monies around, and after being confronted with the postconviction motion's complaint that requiring so much restitution from an incarcerated person would be unfair and irrational, the postconviction order engages in additional speculation by suggesting that third parties might have funds and be willing to pay them based on recognizing they got them as a result of Lokken's or Onarheim's crimes. (80:2-3, App. 101-103).

The postconviction order adds to the concern that the court sought to punish Lokken excessively with respect to restitution. At sentencing, the court stated that "...the restitution figure we have is $625,758.22. (92:86, App. 126). The court and parties had agreed to this figure at the outset of sentencing. (92:7). Nowhere did the sentencing court suggest,

as it did in response to the postconviction motion, that "the record reflects that the defendant and his co-defendant committed theft of over one million dollars." (80:1, App. 101).

The postconviction court emphasized: "The payment of restitution is a significant factor in a theft case." (*Id.* at 3, App. 103). Surely, it is just as important to know how much restitution could justly be attributed.

The prosecutor at sentencing indicated that, in addition to the amounts of the theft, there had been claims regarding the costs of the forensic audit and other expenses. (92:8). Defense counsel remarked, "…Clearly, we're not here today for 1.39, 1.4 million, whatever the figure is, the figure that's been blasted in the news for weeks and weeks and weeks. (*Id.* at 9). The prosecutor and court agreed that the appropriate restitution (before the surcharge, for example) was for "the charged time period here," which was $625,758. (*Id.*). Defense counsel noted that the plea agreement required that restitution figure, and it was tied to the charged time frame of the thefts—2011, 2012, and 2013. (*Id.* at 10-11).

Thus while, there was some question whether non-theft costs of restitution might be ordered, the court accepted, and lead Mr. Lokken to believe it would accept, a restitution-range between $625,000.00 and $681,000.00. (*Id.* at 12).

The prosecutor contended that additional monies were stolen prior to 2011. But he emphasized that he did ***not*** "want the court to make a record that takes into account improper consideration of those amounts." (*Id.* at 34). The postconviction court does exactly what the prosecutor urged it to avoid: it "takes into account improper consideration" of amounts in excess of what it had agreed to consider when it accepted the plea and when it imposed sentence.

This is not to say a sentencing court is always bound to assume the defendant did only what he was convicted of doing. In this case, however, the prosecutor's caution was well-founded. For one thing, it is possible that Onarheim

alone was responsible for thefts committed outside the charging period. The court at sentencing seemed to accept the ground rules for calculating Lokken's liability, limiting it to the charged period and stipulated amount. Unfortunately, after the postconviction motion raised the claims now presented here, the postconviction court reneged: with no opportunity to refute its speculation, such as Lokken could have had if the court had not canceled the postconviction motion hearing at the eleventh hour, the court announced that Lokken was responsible for a loss of over a million dollars. The court thus added to the appearance of a lack of impartiality.

The State's decision to forego additional charges was based on "the strength of the evidence, the information that was available through audit, a review of the records that were available, and the statements of everyone involved..." The State also considered applicable statutes of limitations. (*Id.*).

The postconviction order's unsupported and unfair claim that the record reflected Lokken's theft of over one million dollars is problematic:

- This reasoning is dangerously close to the press speculation defense counsel complained about. (92:8-9). While members of the public might approve of the judge's assumption that Lokken took over a million dollars, it was particularly unfortunate for the court to make that accusation after the prosecutor responsibly urged the court to stick to the agreed figure.

- The court was not entitled to speculate about Lokken's assets, or his ability to raise hundreds of thousands of dollars within 4.5 years, merely because Lokken had not explained his finances to the court's satisfaction. While the court was entitled to and did consider the extent of Lokken's acceptance of responsibility, cooperation and remorse, the court went too far beyond these considerations. In effect, the court provided for

additional prison time as a direct result of Lokken's inability to prove lack of funds or access to them.

- Claiming that it was not unreasonable to threaten an elderly man with five years each of additional prison and supervision, on the theory that $688,334.04 is only a "portion" of the million dollars he stole, creates an appearance of a lack of impartiality. (80:1, App. 101). It suggests a willingness to inflate the restitution figure on the basis of speculation and punish a man based on that speculation, and to punish him with additional imprisonment that might be the difference between dying while in custody or out with his family.

- Citing over a million dollars as the actual restitution, even if that was the case, would not explain why it would be reasonable to require payment of $688,334.04 in 4.5 years. If the actual restitution were $5,000,000.00, without any additional facts, that would not make it easier to meet the condition imposed. It would merely represent a further excuse for vindictively imposing an unmeetable condition.

The sentencing and postconviction decisions assume it is proper to subject an elderly, incarcerated person to yet more prison (beyond the term already greatly in excess of the State's recommendation) unless unidentified third parties voluntarily pay a large sum. Unjustly, the circuit court has effectively given the prison keys to unknown third persons. These judicial decisions create an appearance of callousness and indifference, not only to Lokken personally, but to accepted legal norms.

"It fills us with shame that such reproaches can be uttered and cannot be repelled." Ovid, *Metamorphoses*, Book I, lines 758-59. In our system, they can be repelled. They can be remedied.

CONCLUSION

Larry C. Lokken asks this court to reverse the judgments of conviction and order denying postconviction relief, and remand for resentencing on all counts before a different judge.

Dated at Milwaukee, Wisconsin, April 2, 2018.

Respectfully submitted,

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FORM & LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 9,673 words.

RANDALL E. PAULSON

ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

RANDALL E. PAULSON

CERTIFICATE OF MAILING

Pursuant to WIS. STAT. (RULE) 809.80(4), I hereby certify that on the 2 of ~~March~~ April, 2018, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Larry C. Lokken to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin, 53701-1688. On this date, I also served three copies of the brief, also by U.S. Mail, on the Wisconsin Department of Justice, Criminal Appeals Unit at the addresses on file with this court.

RANDALL E. PAULSON

CERTIFICATION OF THE APPENDIX

I hereby that filed with this brief, either as a separate document or as a part of this brief, is an appendix that

complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed:

RANDALL E. PAULSON

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