STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

Case No. 2017AP2206

State ex rel.
DRAZEN MARKOVIC,

Petitioner-Respondent,

v.

JON E. LITSCHER,

Respondent-Appellant.

APPEAL FROM AN ORDER GRANTING A WRIT OF CERTIORARI ENTERED BY THE HONORABLE FRANK D. REMINGTON, DANE COUNTY CIRCUIT COURT

# RESPONDENT-APPELLANT'S BRIEF

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## INTRODUCTION

The Wisconsin Department of Corrections (DOC) has broad authority to collect unpaid restitution from prisoners. Under Wis. Stat. § 303.01(8)(b), DOC "may distribute earnings [of an inmate or resident] for . . . obligations . . . which have been reduced to judgment that may be satisfied according to law." And under Wis. Stat. § 301.32(1), DOC may use money given to it for a prisoner's account for "the benefit of the prisoner."

Both provisions allowed DOC to collect unpaid restitution that petitioner-respondent Drazen Markovic, a prisoner, owed on a 1995 theft conviction. The circuit court erroneously reversed DOC's decision, holding that DOC lost its collection authority when Markovic—who remained incarcerated on a separate conviction—completed the prison term on his 1995 theft conviction. Neither Wis. Stat. §§ 303.01(8)(b) nor 301.32(1) retracts DOC's right to collect restitution when a prisoner completes a prison term but has not fulfilled his restitution obligation. DOC's decision should be affirmed, accordingly.

Even if DOC's decision is not affirmed, the circuit court also erred by ordering DOC to pay back the money DOC collected for the unpaid restitution. When an agency's decision is challenged through certiorari, a circuit court may only affirm, reverse, or in limited circumstances not present here, remand. It is well established that a certiorari court cannot order an agency to pay money. That does not mean Markovic would have no way to recover improperly collected restitution—he could petition the state claims board—but a monetary remedy is unavailable in this certiorari action. The circuit court's decision on this point should be reversed.

## ISSUES PRESENTED

1. Do Wis. Stat. §§ 303.01(8)(b) and 301.32(1) allow DOC to collect restitution owed on a conviction for which a prisoner's sentence has ended, when the prisoner remains incarcerated on a different conviction?

DOC answered yes, and this Court should affirm.

2. If DOC cannot collect unpaid restitution in these circumstances, can a court considering a certiorari petition order DOC to repay to a prisoner the unpaid restitution DOC had collected?

DOC's decision did not address this issue, but this Court should answer no.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because no published decisions have addressed DOC's authority to collect restitution under these circumstances, publication would clarify this issue of state-wide concern. DOC anticipates that the parties' briefs will render oral argument unnecessary.

## STATEMENT OF THE CASE

### I. Statutory scheme.

The statutes discussed here (and others) implement the Wisconsin Constitution's demand that Wisconsin "shall ensure that crime victims have . . . the . . . privilege[ ] and protection[ ] . . . [of] restitution." Wis. Const. art. I, § 9m.

Persons convicted of a crime in Wisconsin must pay restitution to their victims. "When imposing sentence or ordering probation for any crime . . . the court . . . shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing." Wis. Stat. § 973.20(1r). "The court may require that

restitution be paid immediately, within a specified period or in specified installments. If the defendant is placed on probation or sentenced to imprisonment, the end of a specified period shall not be later than the end of any period of probation, extended supervision or parole." Wis. Stat. § 973.20(10)(a).

DOC has a significant role in administering restitution. When a defendant is placed under DOC supervision, the "restitution order shall require the defendant to deliver the amount of money or property due as restitution to [DOC] for transfer to the victim." Wis. Stat. § 973.20(11)(a). DOC must "establish a separate account for each person in its custody or under its supervision ordered to make restitution for the collection and disbursement of funds." Wis. Stat. § 973.20(11)(b).[1]

While a person is incarcerated, DOC "may distribute earnings [of the inmate or resident] for . . . obligations . . . which have been reduced to judgment that may be satisfied according to law." Wis. Stat. § 303.01(8)(b). Likewise, under Wis. Stat. § 301.32(1), DOC may use money transferred to DOC for a prisoner's account for "the benefit of the prisoner."

## II. Statement of facts.

Markovic was convicted of theft in 1995. (R. 10:4.) He was sentenced to seven years of incarceration and ordered to pay $4,214.20 in restitution. (R. 10:4.) This sentence was

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[1] In 2015, the Legislature added a requirement that a defendant must "authorize [DOC] to collect, from the defendant's wages and from other moneys held in the defendant's prisoner's account, an amount or a percentage [DOC] determines is reasonable for payment to victims." Wis. Stat. § 973.20(11)(c). This provision was not in effect when DOC collected the restitution at issue.

discharged[2] in 2002 when the seven-year prison term expired, but Markovic remained incarcerated on another conviction. (R. 10:32.) In November 2016, DOC began colelcting restitution Markovic still owed on the 1995 theft conviction from his prison account. (R. 10:32–34.)

Markovic filed an inmate complaint on December 19, 2016, regarding these collections. (R. 10:47–49.) He argued that DOC had no authority to collect the restitution because his 1995 theft conviction had been discharged. (R. 10:47–49.) The inmate complaint examiner recommended that Markovic's complaint be dismissed; the warden agreed and dismissed the complaint. (R. 10:51, 53, Resp.-Appellant's App. 110, 112.) Markovic appealed, and DOC Secretary Litscher affirmed the decision on January 29, 2017. (R. 10:55–56, 59–60, Resp.-Appellant's App. 114, 115.)

On February 23, 2017, Markovic filed a timely petition for a writ of certiorari challenging DOC's decision. (R. 1.) The circuit court reversed DOC's decision in a September 15, 2017, decision and order. (R. 18, Resp.-Appellant's App. 101–109.) The court concluded that DOC had no authority to collect restitution on Markovic's discharged 1995 theft conviction, and it ordered DOC to pay back the restitution it had collected on that conviction. (R. 18:9, Resp.-Appellant's App. 109.)

DOC filed a timely notice of appeal on November 1, 2017, and an amended notice two days later. (R. 20; 22.) This appeal followed.

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[2] DOC policy defines a "discharged case" as "[t]he completion of one conviction (confinement and extended supervision)." (R. 10:24.) No statutory definition exists.

## STANDARD OF REVIEW

This Court's scope of review in certiorari proceedings is the same as that of the circuit court. *See State ex rel. Palleon v. Musolf*, 117 Wis. 2d 469, 345 N.W.2d 73 (Ct. App. 1984), *aff'd*, 120 Wis. 2d 545, 356 N.W.2d 487 (1984). This Court reviews the agency decision, not the decision of the circuit court. *See Kozich v. Emp. Tr. Funds Bd.*, 203 Wis. 2d 363, 368–69, 553 N.W.2d 830 (Ct. App. 1996).

On certiorari review, the reviewing court is limited to determining: (1) whether the agency kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable, and represented its will and not its judgment; and (4) whether the evidence was sufficient to demonstrate that the agency's decision was reasonable. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978).

Claims alleging the agency acted outside of its jurisdiction or contrary to law are questions of law, which receive de novo review. *State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶ 14, 278 Wis. 2d 24, 692 N.W.2d 219. But the court defers to the agency decision in determining whether the decision was reasonable and supported by sufficient evidence. *Van Ermen*, 84 Wis. 2d at 64.

## SUMMARY OF ARGUMENT

Wisconsin Stat. § 303.01(8)(b) allowed DOC to collect the unpaid restitution that Markovic owed on his 1995 theft conviction. The circuit court mistakenly distinguished *State v. Baker*, which holds that restitution is an "obligation[ ] . . . reduced to judgment" that DOC can collect under Wis. Stat. § 303.01(8)(b). 2001 WI App 100, ¶ 17, 243 Wis. 2d 77, 626 N.W.2d 862. *Baker*'s holding applies here, even though Markovic—who remained incarcerated—had completed the

prison term derived from his 1995 conviction. The circuit court also erred in relying on Wis. Stat. § 973.20(1r), which allows crime victims to pursue restitution from offenders after a sentence ends. That provision does not create an exclusive method to collect restitution, as the circuit court wrongly assumed. Instead, multiple parties, including DOC, have overlapping authority to collect restitution, a sensible scheme that helps crime victims receive the restitution to which they are entitled.

Wisconsin Stat. § 301.32(1) also allowed DOC to collect the restitution at issue. It benefits prisoners like Markovic for DOC to allocate their funds to paying down outstanding judgments, including unpaid restitution. The circuit court wrongly concluded that DOC's collection did not benefit Markovic, since his victim purportedly could no longer bring a civil action to collect the unpaid restitution. But the crime victim still had time to act, because Wis. Stat. § 973.20(1r) automatically grants crime victims an enforceable judgment for unpaid restitution when an offender's sentence ends. And other entities could still collect unpaid restitution, even if the crime victim could not. It was thus to Markovic's benefit for DOC to collect the restitution at issue.

Separately, even if DOC lacked authority to collect the unpaid restitution here, the circuit court could not order DOC to repay it to Markovic. Courts considering certiorari petitions can only affirm or reverse the agency's decision (or remand in circumstances absent here). Damages are not available in certiorari proceedings, which is effectively what the circuit court ordered. A certiorari decision regarding whether DOC acted properly can only affect DOC's future collection actions, not require it to pay money. Markovic's monetary remedy resides with the state claims board, not this certiorari action.

## ARGUMENT

### I. DOC could collect restitution that Markovic still owed on his discharged 1995 theft conviction.

Two statutes independently provide DOC with authority to collect restitution on discharged cases: Wis. Stat. §§ 303.01(8)(b) and 301.32(1). Since this presents an issue of statutory interpretation, the analysis "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning . . . ." *Id.* Moreover, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46.

Also important here is Wis. Const. art. I, § 9m, which provides that Wisconsin "shall ensure that crime victims have . . . the . . . privilege[] and protection[] . . . [of] restitution." These statutes must be interpreted in a way that maximizes crime victims' ability to recover restitution, a policy choice enshrined in the Wisconsin Constitution.

#### A. Wisconsin Stat. § 303.01(8)(b) allowed DOC to collect restitution on Markovic's discharged conviction.

Wisconsin Stat. § 303.01(8)(b) provides that DOC "may distribute earnings [of an inmate or resident] for . . . obligations . . . which have been reduced to judgment that may be satisfied according to law." In *State v. Baker*, the court held that this provision allows DOC to deduct restitution from prison wages, since "a judgment of conviction including an order to pay restitution is an 'other

obligation[ ] . . . reduced to judgment that may be satisfied according to law.'" 243 Wis. 2d 77, ¶ 17 (quoting Wis. Stat. § 303.01(8)(b)).

This provision allows DOC to collect unpaid restitution derived from any of a prisoner's convictions, even if an accompanying prison term has ended. It is undisputed that Markovic's 1995 theft charge resulted in a judgment of conviction that included an order to pay restitution. (R. 10:4.) Under Wis. Stat. § 303.01(8)(b) and *Baker*, 243 Wis. 2d 77 ¶ 17, DOC could collect on that "obligation[ ] . . . which [had] been reduced to judgment that may be satisfied according to law." Markovic's restitution obligation did not somehow vanish just because he finished the prison term on his 1995 theft conviction. Because Markovic remained incarcerated on another conviction, he remained subject to DOC's authority to collect any unpaid restitution.

The circuit erred by holding that DOC lost authority to collect the unpaid restitution when Markovic completed his prison term on the 1995 conviction. First, this misreads *Baker*. *Baker* held simply that "a judgment of conviction including an order to pay restitution is an 'other obligation[ ] . . . reduced to judgment that may be satisfied according to law.'" *Baker*, 243 Wis. 2d 77, ¶ 17 (quoting Wis. Stat. § 303.01(8)(b). Nothing in that holding turned on whether the prisoner has completed the prison term for that particular judgment of conviction. Therefore, *Baker* allowed DOC to collect the restitution at issue here, which ends the analysis.

The circuit court reasoned that *Baker* does not apply here because, in its view, "when an inmate completes the sentence, any unpaid restitution has to be reduced to a judgment in order for a victim to collect." (R. 18:6, Resp.-Appellant's App. 106.) To support that proposition, the circuit court cited Wis. Stat. § 973.20(1r), which provides a

civil mechanism for crime victims to recover unpaid restitution:

> After the termination of probation, extended supervision, or parole, or if the defendant is not placed on probation, extended supervision, or parole, restitution ordered under this section is enforceable in the same manner as a judgment in a civil action by the victim named in the order to receive restitution or enforced under ch. 785.

The circuit court went wrong by assuming that this statute, which creates a collections procedure specific to crime victims, limits DOC's independent collection authority under Wis. Stat. § 303.01(8)(b).

Nothing in Wis. Stat. § 973.20(1r) indicates that it has anything to do with DOC's own authority to collect "obligations . . . which have been reduced to judgment that may be satisfied according to law." Wis. Stat. § 303.01(8)(b). It just provides a collection remedy for crime victims, who otherwise would have no express right to civilly enforce restitution ordered in a judgment of conviction. And nothing in Wis. Stat. § 973.20(1r) indicates that it provides the *exclusive* means for collecting unpaid restitution when a sentence ends. Instead, Wis. Stat. §§ 973.20(1r) and 303.01(8)(b) *both* provide ways to collect unpaid restitution, at least when the offender remains in prison.

Other statutes show that multiple entities may pursue unpaid restitution concurrently with the crime victim. For example, Wis. Stat. § 973.20(10) allows DOC to certify a restitution obligation to the Department of Revenue (DOR) when an offender's probation, parole, or extended supervision ends. DOR may then intercept the offender's tax refund or use other tools available to collect unpaid taxes, such as wage attachment orders and bank levies. *See* Wis. Stat. § 71.93(8)(b). Likewise, Wis. Stat § 973.20(1r) allows the contempt tools in Wis. Stat. ch. 785 to be used to enforce an unsatisfied restitution order. The prosecuting

district attorney can use Chapter 785 to obtain a contempt order when restitution remains unpaid after the offender's payment deadline. Since DOR and district attorneys can collect unpaid restitution in these ways, post-discharge collection necessarily is not limited to crime victims.

Therefore, once Markovic's 1995 conviction was discharged in 2002, at least four options existed to collect unpaid restitution: (1) DOC could directly collect it under Wis. Stat. § 303.01(8)(b)—the option it chose here; (2) DOC could certify the obligation to DOR under Wis. Stat. § 973.20(10)(b); (3) the district attorney could pursue contempt proceedings under Wis. Stat. § 973.20(1r) and Wis. Stat. ch. 785; or (4) a victim could collect in a civil action under Wis. Stat. § 973.20(1r). These options were not mutually exclusive, a conclusion reinforced by the constitutional demand that Wisconsin "shall ensure that crime victims have . . . the . . . privilege[ ] and protection[ ] . . . [of] restitution." Wis. Const. art. I, § 9m. The more methods that exist to collect unpaid restitution, the more likely it is that a victim will obtain it.

Lastly, the circuit court wrongly reasoned that DOC could not collect Markovic's unpaid restitution because it was a condition that expired when his 1995 sentence ended in 2002. (R. 18:6, Resp.-Appellant's App. 106.) But the other collection methods discussed above persist after a sentence ends. DOC can still certify unpaid restitution to DOR, even after the sentence and any accompanying conditions expire. Wis. Stat. § 973.20(10)(b). Similarly, district attorneys may also pursue contempt proceedings after a sentence ends. Wis. Stat. § 973.20(1r).

There is no good reason why DOC cannot also collect unpaid restitution under Wis. Stat. § 303.01(8)(b) when the accompanying prison term ends, at least from offenders who remain in prison. Again, *Baker* holds that a restitution order in a judgment of conviction is an "obligation[ ] . . . reduced to

judgment that may be satisfied according to law." 243 Wis. 2d 77, ¶ 17. This distinguishes restitution from typical behavioral conditions, such as submitting to searches and notifying DOC agents of changes in employment or residence. While it makes sense for those kinds of conditions to expire when a sentence ends, restitution is different. Restitution is a money judgment—a continuing financial obligation—that the offender must satisfy even after DOC supervision ends.

Both Wis. Stat. § 303.01(8)(b) and the constitutional policy of ensuring that crime victims obtain restitution support DOC's decision to collect unpaid restitution owed on discharged cases. DOC's decision to collect such restitution from Markovic should be affirmed.

### B. Wisconsin Stat. § 301.32(1) also allowed DOC to collect restitution on Markovic's discharged conviction.

Wisconsin Stat. § 301.32(1) independently authorized DOC to collect restitution from Markovic's prison account. This statute provides that DOC may use money transferred to DOC for a prisoner's account for "the benefit of the prisoner." It benefited Markovic for DOC to pay down the restitution debt he owed on his 1995 theft conviction.[3] Common sense shows that it is beneficial to pay one's debts. Moreover, if Markovic does not pay his outstanding restitution, he could be subject to the collection methods discussed above: contempt proceedings, garnishment actions by DOR, or civil actions by the crime victim. DOC's efficient

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[3] The Wisconsin Legislature codified this interpretation in 2015 WI Act 355, but that amendment was not in effect when DOC withheld the restitution at issue here. *See* Wis. Stat. § 301.32(1) (A prisoner's "property may be used . . . for . . . victim restitution under s. 973.20(11)(c).").

administrative collection of this debt from Markovic's prison account makes it more likely that he will avoid these other more burdensome collection methods.

The circuit court wrongly distinguished Wis. Stat. § 301.32(1), noting that it does "does not directly address the DOC's authority to collect restitution in a discharged case." (R. 18:6, Resp.-Appellant's App. 106.) But the statutory language—for "the benefit of the prisoner"—is broad and encompasses paying down restitution debt, even for a discharged conviction. Avoiding the adverse consequences of burdensome collection actions by DOR, a district attorney, or the crime victim is for "the benefit of the prisoner," even though Markovic's 1995 conviction was discharged.

The circuit court also mistakenly held that collecting restitution could not be for "the benefit of the prisoner" because Markovic's restitution debt to the crime victim was uncollectable, on the theory that the statute of limitation had expired for the victim to pursue a remedy. (R. 18:6–7, Resp.-Appellant's App. 106–07.) This interpretation would prove too much—it would prevent DOC from collecting restitution on behalf of victims in any case where the inmate was currently unable to pay. In any event, the assumption that the unpaid restitution could not be collected was wrong, in two respects.

First, the other restitution collection mechanisms survived, and it remained possible that they might be used in the future. DOR could still collect on restitution debt certified to it under Wis. Stat. § 973.20(10)(b)—that provision contains no time limit. And a district attorney could still pursue Chapter 785 contempt proceedings, which Wis. Stat. § 973.20(1r) allows without a time limit, either. It benefits Markovic to avoid those collection methods, even absent a currently collectable civil debt.

Second, the circuit court erred in reasoning that the crime victim could not collect Markovic's civil debt. The court first noted that no civil judgment had been entered in the case (R. 18:7, Resp.-Appellant's App. 107), but that does not matter. Wisconsin Stat. § 973.20(1r) says that restitution "*is enforceable* in the same manner as a judgment." That is, Markovic's existing restitution order suffices to support a civil collection action—no separate civil judgment is needed. Of course, a civil judgment could be entered on a judgment and lien docket for administrative purposes, but Wis. Stat. § 973.20(1r) operates as a matter of law and does not require one.

This also undermines the circuit court's conclusion that the statute of limitations for a civil action by the victim had expired. The circuit court incorrectly reasoned that the victim's civil action had to be filed within six years of the crime underlying Markovic's 1995 conviction, which took place in 1994. (R. 18:7, Resp.-Appellant's App. 107.) But, under Wis. Stat. § 973.20(1r), the victim obtained an enforceable judgment when Markovic's discharge occurred in 2002. Any civil collections action would need to comply with the 20-year limitations period for actions on a judgment under Wis. Stat. § 893.40, which would give the victim until 2022 to collect.

Markovic remained subject to three collection methods on his unpaid restitution—contempt proceedings, certification to DOR, and a civil action on the existing restitution order. More generally, it benefits prisoners to satisfy outstanding restitution obligations. DOC could thus collect unpaid restitution for "the benefit of the prisoner" under Wis. Stat. § 301.32(1), even though Markovic's 1995 conviction had been discharged. Again, this interpretation aligns with the constitutional demand to "ensure that crime victims have . . . the . . . privilege[] and protection[] . . . [of]

restitution." Wis. Const. art. I, § 9m. DOC's decision should be affirmed for this independent reason.

## II. Even if DOC had no authority to withhold restitution, it could not be ordered to repay the restitution in a certiorari proceeding.

Leaving aside whether DOC could collect restitution on Markovic's discharged case, the circuit court also erred by ordering DOC to repay the unpaid restitution it had collected from Markovic's account. It would be unprecedented to allow monetary recovery from an agency in the context of a certiorari action.

Certiorari is only a "mechanism by which a court may test the validity of a decision rendered by a[n] . . . an administrative agency." *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 34, 332 Wis. 2d 3, 796 N.W.2d 411. "As a general rule, a certiorari court may affirm or reverse the action of the agency, . . . and therefore cannot order the agency to perform a certain act." *State ex rel. Richards v. Leik*, 175 Wis. 2d 446, 455, 499 N.W.2d 276 (Ct. App. 1993) (citing *Snajder v. State*, 74 Wis. 2d 303, 311, 246 N.W.2d 665 (1976)). "A court sitting in certiorari was once bound to either affirm or reverse on review, but certiorari review now permits a remand for limited purposes," none of which are at issue here. *State ex rel. Lomax v. Leik*, 154 Wis. 2d 735, 741, 454 N.W.2d 18 (Ct. App. 1990). Likewise, "[d]amages may not be awarded on certiorari." *Coleman v. Percy*, 86 Wis. 2d 336, 341, 272 N.W.2d 118 (Ct. App. 1978), *aff'd*, 96 Wis. 2d 578, 292 N.W.2d 615 (1980).

Here, Markovic seeks, in part, to resolve whether DOC correctly decided that it could withhold restitution from his prison account. That is the proper subject of a certiorari action, and a court's order may either affirm or reverse DOC's decision. Going forward, DOC would be compelled to act in accordance with that order.

But Markovic seeks more than just a decision about whether DOC acted within the scope of its authority. He also requests an order that DOR pay him money in the amount that it withheld from his prison account. Under both *State ex rel. Richards* and *State ex rel. Lomax*, a certiorari decision may not order such monetary relief, since that would go beyond affirming or reversing DOC's decision. Likewise, such a monetary award would effectively entitle Markovic to damages, which *Coleman* does not permit.[4]

The circuit court erred in distinguishing these two cases. First, it noted that "[t]he court does not need to take any testimony or additional evidence as to the amount withdrawn" because the amount is undisputed. (R. 18:8, Resp.-Appellant's App. 108.) But that is irrelevant to a circuit court's lack of authority on certiorari to order DOC to pay money to Markovic.

The circuit court also wrongly reasoned that, if it did not provide a monetary remedy, "there would be no ramification for the DOC's actions." (R. 18:8, Resp.-Appellant's App. 108.) Markovic would have a remedy if DOC exceeded its authority, just not through this certiorari action.

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[4] The circuit court stated that Markovic's monetary award did not represent "collateral damages." (R. 18:8.) But in *Guerrero v. City of Kenosha Hous. Auth.*, the court rejected a similar effort to distinguish monetary relief from damages. 2011 WI App 138, ¶ 10, 337 Wis. 2d 484, 805 N.W.2d 127. The petitioner sought restoration of a rental subsidy, but the court held that this was no different from an impermissible request for damages on certiorari. *Id.* Markovic cannot dodge this damages bar, either.

Instead, his remedy would lie with the state claims board, as the Wisconsin Court of Appeals held in *State v. Minniecheske*, 223 Wis. 2d 493, 502, 590 N.W.2d 17 (Ct. App. 1998).

There, like here, a prisoner argued that DOC had to repay restitution it had improperly collected from his prison account. *Id.* at 495–96. The court agreed that DOC's collection was improper. But the court concluded that it lacked authority to order a refund:

> [T]he sentencing court lacks competency to issue a money judgment against the State even though the claim arises from improperly seized assets pursuant to [a] restitution order entered in the criminal proceedings. Each of the requests for relief Minniecheske filed are designed for purposes other than obtaining a money judgment against the State.

*Id.* at 497. The prisoner had filed a habeas writ, a Wis. Stat. § 974.06 post-conviction motion, and a motion to modify sentence. Although those procedural vehicles allowed the court to decide that DOC had improperly withheld restitution, they did not "permit obtaining a money judgment against the State." *Id.* at 499. Instead, the court pointed the prisoner to "a claim with the state claims board which is specifically authorized to remedy claims such as those Minniecheske asserts." *Id.* at 502 (citing Wis. Stat. §§ 16.007, 775.01).

The same analysis applies here. Even if, like in *Minniecheske*, DOC lacked authority to withhold restitution, that would not allow the certiorari court to order DOC to repay that money to Markovic. Like sentencing courts considering habeas petitions and post-conviction motions, courts have limited competency when fashioning certiorari

remedies. Courts can only affirm, reverse, or remand (in limited circumstances not present here) when considering certiorari petitions. They cannot order an agency to pay money. Markovic's monetary remedy lies with the state claims board, not with the circuit court considering his certiorari petition.

## CONCLUSION

DOC respectfully requests that the Court affirm DOC's decision to collect restitution owed on Markovic's 1995 theft conviction. Alternatively, if the Court finds that DOC had no authority to collect this unpaid restitution, it should reverse the circuit court's decision to order DOC to repay that money to Markovic.

Dated this 8th day of January, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
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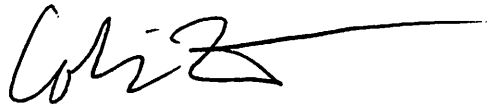

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4587 words.

Dated this 8th day of January, 2018.

COLIN T. ROTH
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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

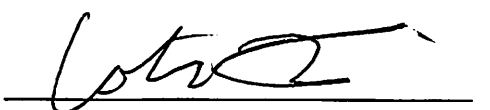
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of January, 2018.



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## APPENDIX CERTIFICATION

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 Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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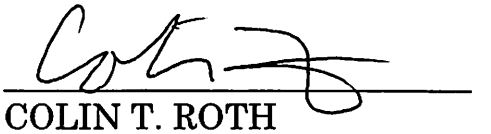

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