STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case Nos. 2019AP224–226-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES A. JONES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MARK J. MCGINNIS, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Does Defendant-Appellant James A. Jones have standing to challenge the distribution of bail/bond monies that he did not pay?

The circuit court did not address this question.

This Court should answer: No.

2. Did the circuit court properly interpret the interplay of Wis. Stat. §§ 969.03(4)–(5) and 973.20, to permit the use of bail/bond monies—posted on Jones's behalf in cases ordered dismissed but read-in as part of a plea agreement—to pay restitution in this case?

The circuit court denied Jones's postconviction motion.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent State of Wisconsin does not request oral argument.

Because the issue of whether a restitution order may be paid using funds from bail/bond monies posted to charges that a defendant agreed to have dismissed but read-in has not been directly addressed in a published opinion, the State agrees with Jones that publication is warranted.

INTRODUCTION

Jones seeks to reverse the circuit court's order denying his postconviction motion for return of bail/bond monies that were posted in cases he agreed to have dismissed but read-in as part of a global plea agreement.

Jones contends that the circuit court (and county clerk) lacked statutory authority to use bail/bond monies from the dismissed but read-in cases to pay restitution owed in the cases to which Jones pled guilty. He claims that the monies

should be returned in full to the persons (not him) who posted it.

Jones's claim fails for two independent reasons:

First, this Court should conclude that Jones does not have standing to raise this issue on appeal. Jones did not pay the bail/bond monies he wants returned. Because he did not pay those deposits, he does not have a personal stake in how they are used. Thus, this Court should dismiss this appeal without consideration of the merits.

Second, if this Court chooses to address the merits, it should conclude that the circuit court properly interpreted and applied Wis. Stat. §§ 969.03(4)–(5) and 973.20. The Legislature amended Wis. Stat. § 969.03(4) in 2005 to give circuit courts the statutory authority to order the use of bail/bond monies, paid by a third party, to pay restitution orders like Jones's.

Further, this Court should interpret the term "prosecution" in Wis. Stat. § 969.03(4) to encompass all of the cases that Jones elected to have resolved at once. This interpretation is correct because it takes into account the reality of Jones's global plea agreement. It also honors the language in the bail/bond forms, to which the third parties all agreed to be bound, that explicitly said the monies could be used to pay "any restitution."

Finally, the circuit court's interpretation is also supported by Wisconsin's restitution statute, Wis. Stat. § 973.20, and case law interpreting that statute to allow maximum recovery of restitution by victims of crime. Indeed, Wis. Stat. § 973.20(1g)(a) specifically directs circuit courts to consider read-in crimes when determining restitution. *Id.*

This Court should therefore affirm.

STATEMENT OF THE CASE

Jones commits a series of thefts. In 2016, Jones committed a string of various thefts throughout Outagamie County.

All told, Jones:

- stole four trail cameras from TRS Reelshot in Grand Chute (R. 2:2[1]);
- broke into Spin Fresh Laundry in Appleton and pried open some gambling machines to steal the money contained inside (2019AP225, R. 2:2–5);
- stole an electrician's multi-meter and two empty radio scanner boxes from the Appleton Radio Shack (R. 32:3–4);
- was found in possession of burglarious tools and stolen goods from the Appleton Radio Shack, behind Chester's Pub in Appleton (R. 32:4), and;
- stole a 2008 Ford Explorer from a man who had started the car to warm it up (2019AP226, R. 2:2–3).

In the case involving Chester's Pub, Jones's mother posted $2,500 bail for him. (R. 43:1.) In the case involving theft from Radio Shack, a person with the initials V.U. posted $200 bail for Jones. (R. 45:1.)

Both bail forms contained the same language, including a warning that "[a]ny restitution . . . or costs imposed against the defendant shall be paid out of the bail/bond without further notice." (R. 43:1; 45:1.)

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[1] All citations are to the record in 2019AP224-CR unless otherwise noted.

Jones pleads guilty pursuant to a global plea bargain to resolve all pending charges against him. On October 5, 2017, Jones decided to plead guilty pursuant to a plea bargain with the State. (R. 64:2.)

The agreement was global and comprehensive: it resolved Jones's pending charges for the crimes listed above, which spanned across six pending cases in Outagamie County. (R. 28:1–2; 64:2–4.) The agreement called for:

- the Radio Shack theft charged to be dismissed but read in;
- the possession of burglarious tools and stolen goods from Radio Shack behind Chester's pub to be dismissed but read in;
- Jones to plead guilty to the retail theft charge in the TRS Reel shot case but without the repeater enhancer;
- Jones to plead guilty to three reduced charges in the case involving Spin Fresh Laundry, and;
- Jones to plead guilty to a yet-to-be-filed operating without owner consent charge in the case involving the 2008 Ford Explorer, with the State recommending—on that charge—a sentence concurrent to any time served on the above charges.

(R. 64:2–4.)

As part of the global agreement, Jones agreed to pay restitution. (R. 28:2; 64:4–5.) The plea questionnaire/waiver of rights form Jones signed clarified that Jones "may be required to pay restitution on any read-in charges." (R. 28:2.)

Before accepting his plea, the circuit court, the Honorable Mark J. McGinnis, presiding, engaged Jones in a plea colloquy. (R. 64:5–15.)

As part of the colloquy, the circuit court secured assurances from Jones that he understood that "the agreement requires that [he] enter a plea of either no contest or guilty to four different criminal offenses." (R. 64:5.) The court also inquired whether Jones had read and understood the entire plea questionnaire/waiver of rights form he signed. (R. 64:12.) Jones said he had read it and that he did understand it. (R. 64:12.)

Jones is sentenced. On January 5, 2018, the circuit court sentenced Jones. (R. 65:1.)

At the outset of the hearing, the parties discussed Jones's guilty plea to the operating without owner consent charge involving the 2008 Ford Explorer. (R. 65:2–4.) The State explained that, as part of the agreement, it would dismiss a companion traffic charge. (R. 65:2–3.) The circuit court asked, "Dismissed and read in?" (R. 65:2.) The State responded that, no, the traffic charge would just be "dismiss[ed]." (R. 65:3.)

The court then asked if the parties anticipated "taking the plea [on the charges involving the 2008 Ford Explorer] and then sentencing on all of the cases?" (R. 65:3; *see also* 65:9.) Both said yes. (R. 65:3.)

The court heard the parties' sentencing arguments and a statement from Jones, before proceeding to sentencing. (R. 65:12–36.)

As relevant here, the circuit court imposed $1,999.96 of restitution to Reel Shot for the stolen trail cameras. (R. 65:23.) It also imposed $1,200 of restitution toward the owner of the 2008 Ford Explorer. (R. 65:11, 36.) All told, including surcharges, the court imposed $2,199.96 of restitution. (R. 65:36.)

Jones's postconviction motion. On November 9, 2018, Jones filed a motion for postconviction relief. (R. 39.) As relevant here, the motion sought to "correct the distribution and application of the monies posted for bond." (R. 39:1.)

On January 2, 2019, Jones filed a supplement to his postconviction motion, which included the bail/bond forms that declared that "[a]ny restitution . . . or costs imposed against the defendant shall be paid out of the bail/bond without further notice." (R. 43:1; 45:1.)

The crux of Jones's postconviction argument was that the clerk "applied bond monies posted on dismissed and read-in cases to amounts owed for restitution and costs on the cases Jones was convicted of." (R. 39:2.) According to Jones, no statutory authority permits the clerk to use the bail/bond monies from the dismissed but read in counts—involving possession of burglarious tools behind Chester's Pub and thefts from Radio Shack—to pay his restitution obligations in the Reel Shot and Ford Explorer counts because Wis. Stat. § 969.03(4)–(5) did not authorize it. (R. 39:2–3.)

Jones's motion pointed to Wis. Stat. § 969.03(4)'s language which says, "a judgment of conviction is entered in a prosecution in which a deposit has been made," (R. 39:2), "the balance of the deposit . . . shall be applied first to the payment of any restitution . . . [and then] to payment of the judgment," Wis. Stat. § 969.03(4). To Jones, because there was no judgment of conviction entered on the charges that were dismissed but read in, Wis. Stat. § 969.03(4)'s requirement, that the restitution order be satisfied first, did not apply. (R. 39:2–3.)

Instead, Jones's motion read Wis. Stat. § 969.03(5) to prohibit any use of the bail/bond monies toward restitution for his convictions, (R. 39:2), because the statute says, "[i]f the

complaint against the defendant has been dismissed or if the defendant has been acquitted, the entire sum deposited shall be returned . . . . to the person who made the deposit . . . subject to [Wis. Stat. § 969.03(4)]," Wis. Stat. § 969.03(5). In Jones's view, because the charges involving Chester's Pub and theft from Radio Shack were dismissed but read in, Wis. Stat. § 969.03(5) required that the entire sum be returned to Jones's mother and V.U. (R. 39:6.)

On January 3, 2019, the circuit court held a hearing on Jones' motion. (R. 66.) The circuit court explained that Wis. Stat. § 969.03(5) does not "answer[ ] what happens in dismissed and read in cases clearly" because that statute only mentions dismissed cases, not dismissed but read-in cases. (R. 66:26.)

The court rejected Jones's argument that the word "prosecution" in Wis. Stat. § 969.03(4) refers only to a single case in a situation such as this, where multiple cases were tied together by global plea agreement and set for sentencing all at once. (R. 66:28–29.) As the court noted, Jones's plea agreement resolved six pending cases against him at once, all of which were prosecuted by the same assistant district attorney and defended by the same defense attorney. (R. 66:37–38.)

In addition, the court noted how the parties outright dismissed a count (rather than dismissing but reading it in) before sentencing. (R. 66:38–40.) As the court explained, the companion criminal traffic count was "dismissed outright, and it wasn't mentioned again in the rest of the case." (R. 66:40.)

The court contrasted this outright dismissal to the discussion of the dismissed but read in count involving Radio Shack. (R. 66:40.) In the court's view, "there was a clear

understanding by Mr. Jones and by the attorneys and by [the court] that even though it was sort of a different makeup we were putting on a new case." (R. 66:40.)

As the court explained, the counts charging possession of burglarious tools and thefts from Radio Shack "were neither dismissed [n]or acquitted. There were not acquittals in those cases. The case was not dismissed similar to the [companion criminal traffic count]." (R. 66:42.)

The court agreed with the State that Wis. Stat. § 969.03(5) specifically mentioned only two types of cases, (R. 66:43): those that are "dismissed" and those of which "the defendant has been acquitted." Wis. Stat. § 969.03(5). Thus, in the court's view, "the fact that the legislative branch did not include dismissed and read in in 969.03(5) may be indicative that it was not their intention to include dismissed but read in with that statute." (R. 66:43.)

The court then looked to Wis. Stat. § 973.20, Wisconsin's restitution statute. (R. 66:44.) The court noted that the restitution statute specifically included "a crime considered at sentencing" to include "any crime for which the defendant was convicted *and any read-in crime*." (R. 66:44 (emphasis added).)

Because the possession of burglarious tools and Radio Shack theft counts were dismissed but read in "for purposes of [Wis. Stat.] 973.20(1g)," the court concluded that it was "appropriate to consider [them] for purposes of restitution." (R. 66:45.)

Thus, it was "appropriate and lawful and within the statute to allow restitution to be paid from a case where Mr. Jones had it dismissed and read in and that that case was part of a package deal that involved cases that led to

convictions with restitution amounts due and owing." (R. 66:47.)

Jones appeals this decision. (R. 51.)

STANDARDS OF REVIEW

"A determination of standing presents a question of law" that an appellate court reviews de novo. *State v. Popenhagen*, 2008 WI 55, ¶ 23, 309 Wis. 2d 601, 749 N.W.2d 611.

"Statutory interpretation and the application of a statute to a given set of facts are questions of law" that this Court reviews de novo, while benefiting from the circuit court's analysis. *State v. Wiskerchen*, 2019 WI 1, ¶ 16, 385 Wis. 2d 120, 921 N.W.2d 730 (citation omitted).

ARGUMENT

I. Jones does not have standing to challenge how Outagamie County allocates bail/bond monies posted by another person.

A. Applicable legal principles

This Court may affirm a circuit court's decision on alternative grounds. *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985), *superseded on other grounds by statute* ("It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed."). Here the issue of standing is not raised below, but this Court may still affirm on that basis. *Id.*

"[T]he essence of the determination of standing" has three components. *Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n*, Inc., 2011 WI 36, ¶ 40, 333 Wis. 2d 402, 797 N.W.2d 789. Standing depends on "(1) whether the party

whose standing is challenged has a personal interest in the controversy . . . (2) whether the interest of the party whose standing is challenged will be injured," and "(3) whether judicial policy calls for protecting the interest of the party whose standing is challenged." *Id.* ¶ 40.

B. Jones lacks standing to challenge the clerk's distribution of bail/bond monies he did not pay.

Jones challenges the Outagamie County clerk's allocation of bail/bond monies paid by his mother and V.U. toward his restitution order. (Jones's Br. 2–4.)

But because Jones did not post the bail/bond monies at the heart of this appeal, he (1) does not have a "personal interest" in their return, (2) was not injured by the circuit court's decision denying his postconviction motion on the issue, and (3) has no interest that this Court need protect. *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 40. For these reasons, Jones does not have standing.

First, Jones did not pay the bail/bond monies, so he is seeking to vindicate the right of other persons not party to this appeal. Thus, by definition, Jones does not have a "personal stake" in the controversy. *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 40.

Second, for the same reason, Jones was not adversely affected by the clerk's use of the bail/bond monies to pay his restitution orders. *See Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 40. Indeed, if anything, Jones actually *benefited* from the circuit court's denial of his motion because it means the bail/bond monies posted by others goes toward his restitution obligations, thereby lessening his own obligations.

Finally, judicial policy does not favor Jones's claim. *See Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 40. Jones is not the individual who should be seeking return of the bail bond monies. Instead, if anyone has a meritorious claim regarding the distribution of the bail/bond monies, it is the persons who posted them, who are now deprived of their money.

Thus, rather than attempting to graft those individuals claims onto a postconviction motion in Jones's direct appeal from his criminal convictions, the better policy would be for the aggrieved individuals themselves to seek redress before the Outagamie circuit courts through a replevin or small claims action. *See e.g.*, Wis. Stat. § 799.01(1)(c) (small claims procedure applicable to replevin actions under $10,000).

This Court should conclude that Jones does not have standing to challenge the allocation of bail/bond monies that were not actually paid by him. It should reject Jones's appeal without further consideration on the merits for that reason.

II. The circuit court properly interpreted and applied Wis. Stat. §§ 969.03(4)–(5) (bail monies) and 973.20 (restitution) to Jones.

A. Applicable legal principles and statutes

Statutory interpretation and application. Statutory interpretation begins with the language of the statute. *Wiskerchen*, 385 Wis. 2d 120, ¶ 20 (citing *State ex. rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Id.*

"If the words chosen for the statute exhibit a 'plain, clear statutory meaning,' without ambiguity, the statute is applied according to the plain meaning of the statutory terms." *Wiskerchen*, 385 Wis. 2d 120, ¶ 20 (citation omitted). A reviewing court "assume[s] that the legislature's intent is expressed in the statutory language." *Kalal*, 271 Wis. 2d 633, ¶ 44.

"Statutory purpose is important in discerning the plain meaning of a statute." *Westmas v. Creekside Tree Service, Inc.*, 2018 WI 12, ¶ 19, 379 Wis. 2d 471, 907 N.W.2d 68 (citing *Kalal*, 271 Wis. 2d 633, ¶ 48). "[S]tatutory 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." *Kalal*, 271 Wis. 2d 633, ¶ 46. Therefore, in construing a statute, an appellate court "favor[s] a construction that fulfills the purpose of the statute over one that defeats statutory purpose." *Westmas*, 379 Wis. 2d 471, ¶ 19.

Finally, another important rule of statutory construction is that, "where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed." *State v. Welkos*, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961).

Relevant bail/bond statutes. Wisconsin Stat. § 969.03(1) addresses the pre-trial release of a person charged with a felony. *Id.* The statute offers a circuit court with several options, including "requiring the execution of an appearance bond . . . which will assure appearance for trial." *Id.* To that end, under Wis. Stat. § 969.03(1)(d), a court may

"[r]equire the execution of an appearance bond with sufficient solvent sureties, or the deposit of cash in lieu of sureties."

"If the judge requires a deposit of cash in lieu of sureties, the person making the cash deposit shall be given written notice of the requirements of [969.03](4)." Wis. Stat. § 969.03(1)(d).

Under Wis. Stat. § 969.03(4),

> If a judgment of conviction is entered in a prosecution in which a deposit had been made in accordance with [969.03](1)(d), the balance of the deposit, after deduction of the bond costs, shall be applied first to the payment of any restitution ordered under s. 973.20 and then, if ordered restitution is satisfied in full, to the payment of the judgment.

However, under Wis. Stat. § 969.03(5), "[i]f the complaint against the defendant has been dismissed or if the defendant has been acquitted, the entire sum deposited shall be returned. A deposit under [969.03(1)(d)] shall be returned to the person who made the deposit, his or her heirs or assigns, subject to [969.03](4)." *Id.* Thus, if a defendant's complaint is dismissed or he or she is acquitted of the charges, the cash bail is returned to the person who posted it in full.

Though Wis. Stat. § 969.03(4) uses the term "prosecution," that term is not defined in the statute, or in any related statutes that might clarify the word's meaning.

As Wis. Stat. § 969.03(4) expressly contemplates, restitution toward crime victims is given priority over all other payments. "[T]he balance of the deposit . . . shall be applied first to the payment of any restitution . . . and then, if order restitution is satisfied in full, to the payment of the judgment." *Id.*

Wisconsin's restitution statute and crimes where restitution may be ordered. The primary purpose of Wis. Stat. § 973.20, Wisconsin's restitution statute, is "to compensate the victim." *State v. Madlock*, 230 Wis. 2d 324, 332, 602 N.W.2d 104 (Ct. App. 1999). The statute "reflects a strong equitable public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution." *State v. Canady*, 2000 WI App 87, ¶ 8, 234 Wis. 2d 261, 610 N.W.2d 147 (citing *Madlock*, 230 Wis. 2d at 332). For this reason, Wisconsin courts have repeatedly held that "restitution is the rule and not the exception," and "should be ordered whenever warranted." *Id.* (citation omitted).

In light of this important public policy, courts should "construe the restitution statute 'broadly and liberally in order to allow victims to recover their losses as a result of a defendant's criminal conduct.'" *Madlock*, 230 Wis. 2d at 332 (citation omitted).

Thus, Wis. Stat. § 973.20(1r) requires that the sentencing court order the defendant to pay restitution to any victim of a crime considered at sentencing . . . unless the court finds substantial reason not to do so and states the reason on the record." If a crime considered at sentencing resulted in a loss of property, courts are authorized to pay the victim either the replacement cost or the property's value. Wis. Stat. § 973.20(2)(b).

A "crime considered at sentencing" means the crime of conviction "*and* any read-in crime." Wis. Stat. § 973.20(1g)(a) (emphasis added). A "read-in crime" is a crime that meets three criteria: (1) it is uncharged or is "dismissed as part of a plea agreement"; (2) the defendant agrees that it will be

considered at sentencing, and; (3) the court considers it at the time of sentencing. Wis. Stat. § 973.20(1g)(b).

Under Wis. Stat. § 973.20, "there is a distinction between dismissed charges that the defendant agrees to have read in (read-ins) and dismissed charges that are not read in (dismissed charges)." *State v. Frey*, 2012 WI 99, ¶ 43, 343 Wis. 2d 358, 817 N.W.2d 436.

"Read-in charges are acknowledged as true and are subject to restitution. They may not be prosecuted separately in the future." *Frey*, 343 Wis. 2d 358, ¶ 43. "Dismissed charges may be considered by the court in sentencing, but they are not subject to restitution." *Id.* "Thus, when the State and a defendant agree that charges will be read in, those charges are expected to be considered in sentencing." *Id.* ¶ 68.

B. The circuit court properly interpreted Wis. Stat. §§ 969.03(4)–(5) and 973.20 in rejecting Jones's claims.

Jones argues that Wis. Stat. § 969.03(4) and (5) do not provide statutory authority to allocate bail/bond monies paid on dismissed but read-in charges toward restitution ordered under another charge resulting in conviction. (Jones's Br. 10.)

But Jones's argument ignores the amendments made to Wis. Stat. § 969.03(4), which were created with the express purpose of adding that ability while clarifying that restitution towards victims comes before any other payment or repayment. Wisconsin Stat. § 969.03(4), as it was amended in 2005, is consistent with both the other relevant statutes and specific warnings in the bail/bond forms and plea questionnaire/wavier of rights form signed by Jones. (*See* R. 28:2; 43:1; 45:1.)

Jones's argument further hinges on his interpretation of Wis. Stat. § 969.03(4)–(5). He contends that, because the counts for which restitution was ordered were dismissed but read in, the language of Wis. Stat. § 969.03(5) controls. (*See id.* ("If the complaint . . . has been dismissed or if the defendant has been acquitted, the entire sum deposited shall be returned.")). According to Jones, Wis. Stat. § 969.03(4) does not apply here because a judgment of conviction was not entered for the charges that were dismissed but read in. (Jones's Br. 10–13.) Jones wrongly asserts that the term "prosecution" in Wis. Stat. § 969.03(4) means only a single case or count, even though all of his charges were resolved via a global plea agreement and proceeded to sentencing as a singular entity. (Jones's Br. 14–18.) Jones's argument fails for multiple reasons.

1. The revision to Wis. Stat. § 969.03(4) following this Court's decision in *Cetnarowski* supports an interpretation of "prosecution" that includes read-in offenses.

a. Old Wis. Stat. § 969.03(4) and this Court's interpretation of it in *Cetnarowski*

Before the enactment of 2005 Wis. Act 447 and amendment of Wis. Stat. § 969.03(4) to its current form, this Court addressed the issue of whether a circuit court possessed the statutory authority to use bail/bond monies not paid by the defendant to pay the defendant's restitution order. *State v. Cetnarowski*, 166 Wis. 2d 700, 710, 480 N.W.2d 790 (Ct. App. 1992).

In *Cetnarowski*, the circuit court ordered that bail/bond monies posted by the defendant's grandmother could be used to pay the defendant's restitution obligations. *Cetnarowski*, 166 Wis. 2d at 704–05. The circuit court reasoned that, because restitution is an equitable action, it "should be examined in light of who has the best equitable position among the defendant, innocent victims, and the person who has posted bail." *Id.* at 705. In the circuit court's view, "the innocent victims [were] in the best equitable position because they sustained losses and [the defendant's] grandmother could seek reimbursement from [the defendant] himself." *Id.* At the time, then-Wis. Stat. § 969.03(1)(d) contained no mention of restitution. *Id.*

This Court reversed the circuit court's order. *Cetnarowski*, 166 Wis. 2d at 705. It concluded that the circuit court's order was "without reference to authority." *Id.* This Court discussed the text of then-Wis. Stat. § 969.03(1)(d), which stated only that "[i]f a judgment for a fine or costs or both is entered, any deposit of cash shall be applied to the payment of the judgment." *Id.* at 710 (emphasis omitted).

As this Court noted, "[i]n drafting chs. 969 and 973, the legislature had the opportunity to include restitution, together with fines and costs, as expenses that would reduce the amount of a bail refund; however, it did not." *Cetnarowski*, 166 Wis. 2d at 710. Thus, this Court "deem[ed] such an omission as an intentional exclusion of the use of bail as restitution." *Id.* As this Court wrote, "[t]he legislature . . . did not explicitly enable a sentencing court to order cash bail to be applied to restitution in its comprehensive statutory restitution provisions." *Id.*

b. Changes to the statutory language in Wis. Stat. § 969.03(4) after *Cetnarowski*

In 2005, the Legislature amended the statutory language in Wis. Stat. § 969.03(4) to give circuit courts the authority to use bail/bond monies to pay a defendant's restitution obligations. 2005 Wis. Act 447; (R-App. 101–02.)

2005 Wisconsin Act 447 amended Wis. Stat. § 969.03(4) to read: "the balance of the deposit . . shall be applied *first* to the payment of *any restitution* order under s. 973.20 and then, if ordered restitution is satisfied in full, to the payment of the judgment." *Id.* (emphasis added).

Therefore, since June 6, 2006, when 2005 Wisconsin Act 447 went into effect, Wis. Stat. § 969.03(4) specifically authorizes using bail/bond monies to pay *any restitution orders first*, before any other costs.

Following this change by the Legislature in 2005, not only is payment of a defendant's restitution obligations from bail/bond monies posted by someone else explicitly authorized by statute, but that use is the first obligation that must be satisfied. *See* Wis. Stat. § 969.03(4).

Further, the Legislature specifically selected the phrase "any restitution" in amending the bond statute, so the statutory language contemplates that bail/bond monies be used to pay any restitution orders incurred by a defendant without limitation. *Cf. Westmas*, 379 Wis. 2d 471, ¶ 19 (citation omitted) ("Statutory purpose is important in discerning the plain meaning of a statute").

Moreover, the Legislature's use of the word "any restitution order" reflects a legislative judgment that bail/bond monies may be paid toward any restitution order in

a broader resolution, not just those to which a defendant like Jones specifically pleaded guilty.

2. The Legislature's use of the word "prosecution," as opposed to "case," supports an interpretation of "prosecution" that includes read-in offenses.

The Legislature's use of the word "cases" in Wis. Stat. § 969.03(2) also supports the circuit court's interpretation. Wis. Stat. § 969.03(2) says that, "[a]s a condition of release in all cases, a person released under this section shall not commit any crime."

The Legislature's choice of the plural word "cases" in Wis. Stat. § 969.03(2) so near to the term "prosecution" in Wis. Stat. § 969.03(4) ("[I]f a judgment of conviction is entered in a *prosecution* in which a deposit has been made . . ." (emphasis added)) is telling. It demonstrates that the Legislature intended the term "prosecution" in Wis. Stat. § 969.03(5) to be read more broadly than a single case. The import of Wis. Stat. § 969.03 ("Release of defendants charged with felonies") is to instruct circuit courts on what they may do with a defendant charged with *felonies*, not a single case. Wis. Stat. § 969.03; *accord. Welkos*, 14 Wis. 2d at 192 ("[W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.").

Thus, if the Legislature intended for Wis. Stat. § 969.03 to only apply to individual cases, it would have said so. *Cf. Kalal*, 271 Wis. 2d 633, ¶ 44 (A reviewing court "assume[s] that the legislature's intent is expressed in the statutory language.").

3. The language of—and important purpose behind—the restitution statute also supports an interpretation of "prosecution" that includes read-in offenses.

The plain language of the restitution statute also supports interpreting the bond statute to allow money posted for read-in offenses to be applied to restitution. Wisconsin Stat. § 973.20(1r) empowers a circuit court to impose restitution on any "crime considered at sentencing." The plain language of Wis. Stat. § 973.20(1g)(a), which includes crimes dismissed but reads read-in as "[c]rime[s] considered at sentencing," further supports this use. *Id.*

On top of that, the public policy goal of Wisconsin's restitution statute—to compensate victims—supports interpreting "prosecution" in the bail statute to include charges dismissed and read in pursuant to a global plea agreement. *Madlock*, 230 Wis. 2d at 332 (the primary purpose of Wis. Stat. § 973.20 is to compensate the victim); *see also Canady*, 234 Wis. 2d 261, ¶ 8 ("[V]ictims should not have to bear the burden of losses.). Indeed, Wis. Stat. § 969.03(4) directs that bail/bond monies "shall be applied *first* to the payment of *any restitution order* under s. 973.20 and then, if ordered restitution is satisfied *in full*, to the payment of the judgment." *Id.* (emphasis added).

4. Jones's arguments are inconsistent with both the amended Wis. Stat. § 969.03(4) and with Wis. Stat. § 973.20.

Despite statutory language that specifically contemplates and supports the circuit court's conclusion that the bail/bond monies should be not returned, Jones argues

that there is no statutory authority for the circuit court's conclusion. (Jones's Br. 21.)

To Jones, the term "prosecution" in Wis. Stat. § 969.03(4) refers only to a single case or count. (Jones's Br. 14–18); *see* Wis. Stat. § 969.03(4) ("If a judgment of conviction is entered in a prosecution…"). Under that interpretation, he asserts that he has no judgment of conviction in the dismissed but read-in cases, and instead, under Wis. Stat. § 969.03(5), those cases have been "dismissed." (Jones's Br. 10–13); *see* Wis. Stat. § 969.03(5) ("If a complaint against the defendant has been dismissed or if the defendant has been acquitted . . .").

As the circuit court rightly recognized, however, the dismissed but read-in charges were not dismissed outright, and he was not acquitted of those charges. (R. 66:42) ("Looking at [969.03(5)], we have read what that means, and in this case . . . 16-CF-52 and 16-CM-761 were neither dismissed [n]or acquitted. There were not acquittals in those cases.").

For Jones's interpretation of Wis. Stat. § 969.03(5) to be correct, this Court would have to graft the words "read-in" following "dismissed" onto the statute. *See id.* ("If the complaint . . . has been dismissed or if the defendant has been acquitted, the entire sum deposited shall be returned."). But that reading would contradict the plain meaning of Wis. Stat. § 969.03(5), which by its own terms only guarantees the return of bail/bond monies if charges are dismissed or if a defendant is acquitted. *Cf. Wiskerchen*, 385 Wis. 2d 120, ¶ 20 (citation omitted) ("If the words chosen for the statute exhibit a 'plain, clear statutory meaning,' without ambiguity, the statute is applied according to the plain meaning of the statutory terms.").

Instead, and as Jones understood when he decided to enter into a global plea agreement with the State, the relevant counts were dismissed but read in, not simply dismissed, and Jones could not have been "acquitted" of those charges when he decided to allow the circuit court to consider them at sentencing. (R. 64:2–3.)

Thus, the language in Wis. Stat. § 969.03(5), that "[i]f the complaint . . . has been dismissed or if the defendant has been acquitted," contemplates a fundamentally different fact pattern from read-ins pursuant to a global plea agreement, like Jones's case presents.

To support his narrow interpretation of the word "prosecution," Jones points to an old definition of the word from the 1990 version of Black's Law Dictionary. (Jones's Br. 17–18.) He argues that, because the term "criminal action" is included as part of that definition, the term "prosecution" must refer to the resolution of cases individually. (Jones's Br. 18.)

As an initial matter, Jones's hand-picked dictionary definition cannot and should not trump the case law that instructs reviewing courts to interpret "statutory language . . . in the context in which it is used . . . in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46.

Thus, Black's Law Dictionary's old definition of "prosecution" ought not control how this Court interprets the term "prosecution" in Wis. Stat. § 969.03(4). Rather, a complete analysis of the term includes an understanding and acknowledgment of the legislative purpose of the statute. *See Westmas*, 379 Wis. 2d 471, ¶ 19, ("Statutory purpose is important in discerning the plain meaning of a statute . . .

[and a reviewing court] favor[s] a construction that fulfills the purpose of the statute over one that defeats statutory purpose.").

In addition, Jones misreads the old definition's language. The definition describes a "criminal action" as opposed to a "civil action," because the definition later explains that the criminal action's purpose is "to determine[e] the guilt or innocence of a person charged with a crime." (Jones's Br. 18.) Thus, the most logical inference is that a "criminal action" is a proceeding in which a person's guilt or innocence is determined, not that such a proceeding must only be a single entity.

The most current version of Black's Law Dictionary confirms the State's reading. Most recently updated in 2014, the term prosecution is now defined as a "criminal proceeding in which an accused person is tried." *Black's Law Dictionary* (10th ed. 2014).

More to point, though, no matter how counts may be charged initially, plea agreements with dismissed but read-in charges resolve as one agreement. Jones's case is a prime example: Even if his charges originated in separate and distinct individual cases, Jones resolved all of his pending theft-related charges in Outagamie County in one single global agreement, in one single proceeding, with one single sentencing hearing. (R. 65:3 ("Are the parties anticipating taking the plea [on the operating without owner consent charge] and then sentencing on all of these cases?" The parties responded: "On all . . . . Yes.").)

This global agreement benefitted Jones. Because some counts were dismissed but read in at sentencing, the State was prohibited from charging those counts against Jones in the future. *See Frey*, 343 Wis. 2d 358, ¶ 43 (explaining that

read-in charges are "acknowledged as true and are subject to restitution. They may not be prosecuted separately in the future.").

The circuit court's interpretation of the interplay between Wis. Stat. §§ 973.20(1r) and 969.03(4)–(5) makes perfect sense. Because Jones elected to resolve together all the pending counts against him from six different cases throughout Outagamie County, he proceeded to a sentencing where all of those counts were considered by the court—including for restitution purposes. (R. 65:2–3.) Thus, all of the charges—for restitution purposes—were part of a "prosecution" under the bond statute.

By specifically including read-in crimes as "[c]rime[s] [that may be] considered at sentencing," Wis. Stat. § 973.20(1g)(a) and directing that "the court . . . shall order the defendant to make . . . restitution . . . to any victim of a crime considered at sentencing," Wis. Stat. 973.20(1r), the Legislature plainly contemplated making a defendant pay restitution obligations for any crime that a circuit court considered at sentencing. Indeed, after 2005 Wisconsin Act 447, the allocation of bail/bond monies toward of "any restitution" incurred by a victim is given priority over all other financial obligations that a defendant might incur at sentencing. Wis. Stat. § 969.03(4).

Adopting Jones's interpretation of Wis. Stat. § 969.03(4)–(5) would therefore undermine the public policy of making victims of crime whole through restitution. It would also contradict the language added by the Legislature to Wis. Stat. § 969.03(4) that specifically prioritizes the payment of restitution from bail/bond monies. Because Jones's interpretation of Wis. Stat. § 969.03(4)–(5) is contrary to the

language the Legislature chose, and the policy that language supports, this Court should reject Jones's interpretation.

Moreover, the circuit court's statutory interpretations would not have been a surprise either to Jones, or to those persons who posted his bond monies. First, Jones's signed plea questionnaire/wavier of rights form explicitly stated that he understood "that if *any* charges are read-in as part of a plea agreement they have the following effects . . . Restitution—[he] may be required to pay restitution on *any* read-in charges." (R. 28:2.) (emphasis added).

Second, the form Jones's mother and V.U. signed made clear that "[a]ny restitution, recompense, fines, forfeitures or costs imposed against the defendant shall be paid out of the bail/bond without further notice." (R. 43:1; 45:1.) Again, this notice uses the same broad phrasing, "any restitution," that the Legislature used in Wis. Stat. § 969.03(4) to describe what should be done with bail/bond monies after sentencing.

Because Wis. Stat. §§ 969.03(4)–(5) and 973.20(1r) authorized broad consideration of a defendant's, like Jones's, charges in ensuring that victims are made whole first before any other payment is secured, this Court should not interpret them as narrowly as Jones suggests.

CONCLUSION

This Court should affirm Jones's judgment of conviction and the order denying his motion for postconviction relief.

Dated this 11th day of July 2019.

Respectfully submitted,

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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 6398 words.

Dated this 11th day of July 2019.

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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 11th day of July 2019.

_____
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