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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2020AP1394 - CR

VICTOR ORTIZ, JR.,

Petitioner-Respondent,

v.

KEVIN A. CARR,

Respondent-Appellant.

Appeal From a Final Order of the
Dane County Circuit Court, the
Honorable Peter C. Anderson, Presiding.

REPLACEMENT BRIEF OF RESPONDENT

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POSITION ON ORAL ARGUMENT AND PUBLICATION

Respondent agrees with the DOC that publication is necessary and proper. This case will provide guidance regarding the circuit court's authority to order collection for restitution out of an inmate trust fund at a given rate and from specific sources of income, and it will provide clarification regarding clerical changes on judgments and orders in matters that constitution a "judicial decision" without direction from the court.

Although the briefs fully present the issues on appeal and fully develop the theories and legal authorities, Respondent does not oppose oral argument if the court believes that it would not be of such marginal value that it does not justify the added expenditure of court time.

STATEMENT OF THE CASE AND FACTS

On September 2, 2010, Victor Ortiz, Jr. was sentenced to 20 years of initial confinement in Milwaukee County Case 2009CF5507. (R. 9:8, 10). He will remain in custody until his mandatory release date of November 22, 2044.[1] Ortiz owes $43,777 in restitution. (R. 7:21-24). He works forty hours a week at an average

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[1] *See* Department of Corrections, Offender Locator, https://appsdoc.wi.gov/lop/detail.do

rate of pay of 19.5 cents per hour. (R. 3:1-2). Half of his money goes to the payment of child support. (*Id.*). Nevertheless, the Department seeks to divert half of his wages and gifted funds for the payment of restitution. Ortiz was sentenced on September 2, 2010. (R. 9:8, 10). Ortiz's original restitution order, issued at the time of sentencing on September 2, 2010, did not limit the rate at which his funds should be redirected and did not specify whether the money should come exclusively from his earnings or if it should also come out of his gifted funds. (*Id.*).

Nearly six years after his sentencing, 2015 Wisconsin Act 355 (hereafter "Act 355"), relating to restitution owed to victims of crime, was enacted on April 11, 2016, and took effect on July 1, 2016. *See* 2015 Wisconsin Act 355. Act 355 amended the statute addressing property delivered to a prison "for the benefit of a prisoner" by adding "victim restitution" as one of the purposes for which the "property may be used." Wis. Stat. § 301.32(1).[2] In addition, Act 355 added several paragraphs to the subsection of the restitution statute dealing with prison inmates including the following paragraph:

> If a defendant who is in a state prison or who is sentenced to a state prison is ordered to pay

[2] Comparing the 2013-14 biennial version of the statute to the version amended by Act 355.

> restitution, the court order shall require the defendant to authorize the department to collect, from the defendant's wages and from other moneys held in the defendant's prison's account, an amount or a percentage the department determines is reasonable for payment to victims.

Wis. Stat. § 973.20(11)(c).

On December 15, 2016, the circuit court issued an amended judgment of conviction stating that "Court ordered restitution [was] to be paid from 25% of prison wages and as a condition of Extended Supervision." (R. 9:12, 14).

Notwithstanding the judgment of conviction, the Department increased diversions from Ortiz's prison funds from 25% to 50%, as it did from all funds (including gifted money), where it had previously deducted only from his wages. (R. 27:2). On October 15, 2017, the Department's Division of Adult Institutions issued Policy 309.45.02, which sought to "develop and maintain a consistent system for deductions from monies received and/or disbursed by the facility for the benefit of the inmate" including "assessing and remitting funds to be applied to court imposed financial obligations." (R. 9:30).

Ortiz wrote to the business office before filing a formal complaint. Ortiz's complaint was received by the Department on April 17, 2018. (R. 9:50). He complained that the Department was taking "50% of all [his] monies

for restitution" even though he was "convicted and sentenced … before the enactment of Act 355" and Act 355 "does not run retroactively." (*Id.*). He complained that his "Judgment of Conviction states that … only 25% is to be taken from wages to pay [] restitution and other obligations." (*Id.*).

On May 21, 2018, the Secretary dismissed Ortiz's complaint based on the following rationale:

> The attached Corrections Complaint Examiner's recommendation to DISMISS this appeal is accepted as the decision of the Secretary. The 2nd page of the JOC specifically states: "If the defendant is in or is sentenced to state prison and is ordered to pay restitution, IT IS ORDERED that the defendant authorize the department to collect, from the defendant's wages and from other monies held in the defendant's inmate account, an amount or percentage which the department determines is reasonable for restitution to victims."
>
> The Court's order is consistent with DAI policy 309.45.02, deferring to DOC's discretion to assess and remit the inmate's funds towards restitution.

(R. 9:80, A. App. 110).

On August 2, 2018, Ortiz filed a timely petition for writ of certiorari. (R. 7). On July 23, 2020, the Dane County Circuit Court, the Honorable Peter C. Anderson presiding, reversed the Secretary's decision and remanded for further review consistent with this decision and order. (R. 27). The Department appealed. (R. 29).

Appellant filed its initial brief on December 1, 2020. Respondent filed his brief on January 25, 2021, but on May 24, 2021, this court joined this appeal and Case No. 2020AP1601 and ordered the coordinator for the pro bono program of the State Bar of Wisconsin Appellate Practice Section to name a pro bono attorney to represent the Respondents and to file a substitute Respondent's brief. On June 23, 2021, undersigned counsel filed a notice of appearance and consent to representation form. Counsel was ordered by this court to file a substitute Respondent's brief. This brief follows.

ARGUMENT

I. The Department did not act within its authority when it removed a larger percentage of funds from Ortiz's inmate trust account than the judgment of conviction allowed.

A. Legal principles.

1. Standard of certiorari review.

On certiorari review, this court reviews the decision of the agency, not the decision of the trial court. *State ex rel. Marlovic v. Litscher*, 2018 WI App 44, , ¶ 9, 383 Wis. 2d 576, 916 N.W.2d 202. "Certiorari is limited to review of the record brought up by the writ … ." *State ex rel. Richards v. Leili*, 175 Wis. 2d 446, 455, 499

N.W.2d 276 (Ct. App. 1993) (citation omitted). On review, this Court may only consider whether: (1) the agency stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive or unreasonable, and represented the agency's will and not its judgment, and (4) the evidence was such that the agency might reasonably make the determination in question. *State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶ 36, 353 Wis. 2d 307, 845 N.W.2d 373. Whether the agency kept within its jurisdiction and acted according to law are questions that this Court reviews de novo, without deference to the agency or the circuit court. *Id.*; *State ex rel. Curtis v. Litscher*, 2002 WI App 172, ¶ 10, 256 Wis. 2d 787, 650 N.W.2d 43.

2. The amendments of Act 355 do not apply to Ortiz's case.

Both parties agree that the Secretary's decision does not rely on the amendments of Act 355. (Appellant's Br. at 8, n. 3). Rather, Appellant claims that the statutory amendment is irrelevant because it merely codified the holdings of *Greene*[3] and *Baker*[4] "by specifically authorizing the Department to take restitution from an

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[3] *State v. Greene*, 2008 WI App 100, 313 Wis. 2d 211, 756 N.W.2d 411.

[4] *State v. Baker*, 2001 WI App 100, 243 Wis. 2d 77, 626 N.W.2d 862.

inmate's account at 'an amount or a percentage the Department determines is reasonable for payment to victims.'" (*Id.* (*quoting State v. Williams*, 2018 WI App 20, ¶ 2, 380 Wis. 2d 440, 442, 909 N.W.2d 17)(internal quotations omitted)). Ortiz disagrees with the Department's interpretation but agrees that the Secretary's decision did not rely on Act 355.

Similarly, the discussion surrounding restitution in *State ex rel. Marlovic v. Litscher*, 2018 WI App 44, 383 Wis. 2d 576, 916 N.W.2d 202, relies on the 1995 version of the restitution statute because that was the year Marlovic was sentenced, even though he completed his sentence in 2002 and the case was decided by the court of appeals in 2018. Thus, the text on which this court's opinion must rely are the versions of Wis. Stat. §§ 301.32(1) and 973.20(11) that predate Act 355. *See* Wis. Stat. §§ 301.32(1) and 973.20(11) (2013-2014).[5]

3. The order in the JOC directing the Department to determine the rate of diversion from Ortiz's account is void because it is a judicial decision that was not directed by the court.

The original judgment of conviction, filed shortly after sentencing on September 2, 2010, had only one

[5] All citations to the Wisconsin Statutes will be to the most recent biennial publication, 2019-2020, unless otherwise noted.

order pertaining to restitution and ordered restitution as follows: "$360.00 to Danielle M.; 4400.00 to Evan O.; and $43,017.00 to the Crime Victim Compensation Fund." (R. 9:8, 10). The amended judgment of conviction, filed on December 14, 2016, included the same order listed above and stated, "Court ordered restitution to be paid from 25% of prison wages and as a condition of Extended Supervision. Any amounts of restitution not paid shall be converted to a civil judgment as ordered by the sentencing judge." (R. 9:12, 14).

However, the amended judgment of conviction was printed on a modified version of Form CR-212 that was created in May 2016; this was after Act 355 was enacted but before it went into effect.[6] (*Id.*). The post-Act 355 version of Form CR-212 includes the following boilerplate language on the second page:

> If the defendant is in or is sentenced to state prison and is ordered to pay restitution, IT IS ORDERED that the defendant authorize the department to collect, from the defendant's wages and from other monies held in the defendant's inmate account, an amount or a percentage which the department determines is reasonable for restitution to victims.
>
> If the defendant is placed on probation or released to extended supervision, IT IS ORDERED that the defendant pay supervision fees as determined by the Department of Corrections.

(R. 9:12, 14).

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[6] See the date on the bottom left corner of the form. (9:12, 14).

This language tracks the language of Wis. Stat.§ 973.20 as amended by Act 355, which authorizes the Department "to collect, from the defendant's wages and from other moneys held in the defendant's prisoner's account, an amount or a percentage the department determines is reasonable for payment to victims." Wis. Stat.§ 973.20(11)(c). All parties agree that Act 355 does not apply to this case because Ortiz was sentenced before Act 355 was enacted.

This court addressed a very similar situation in *State v. Justin R. White*, No. 2018AP0154—CR, slip op. (Dec. 26, 2018)(per curiam)(R. App. 101-07).[7] White was sentenced in 2014, before Act 355 was passed. *White*, ¶ 7 (R. App. 104-05). The sentencing court ordered him to pay restitution "from prison funds not to exceed 25%." *White*, ¶ 2 (R. App. 102-03). After a successful appeal, the court of appeals remanded to the circuit court with instructions to enter an amended judgment of conviction. *Id*. In addition to the changes ordered by the court of appeals, the judgment of conviction included language from Wis. Stat. § 973.20(11)(c), which was enacted after his sentencing as part of Act 355:

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[7] This is a one-judge opinion under Wis. Stat. § 752.31(2). It is cited for persuasive rather than precedential value and is not binding on this court; the court "need not distinguish or otherwise discuss" it, and Appellant "has no duty to research or cite it." Wis. Stat. § 809.23(3)(b).

> The amended judgment, however, also contained language not included in prior judgments or orders in this case. Specifically, the amended judgment mandated that White must authorize the Department [of Corrections to collect, from the defendant's wages and from other monies held in the defendant's inmate account, an amount or a percentage which the Department determines is reasonable for restitution to victims.

White, ¶ 3 (R. App. 103)(internal citations omitted).

In *White*, the parties conceded that the language at issue was not part of White's sentence was derived from Wis. Stat. § 973.20(11)(c); the state conceded that Wis. Stat. § 973.20(11)(c) "applies at sentencing" and was therefore inapplicable to White. *Id.*, ¶ 8 (R. App. 105). The court held that the mandate in question was a change that could be characterized as a judicial decision and could not be added by the clerk. Id., ¶ 7 (R. App. 104-05)(citing *State v. Prihoda*, 2000 WI 123, ¶ 22, 239 Wis. 2d 244, 618 N.W.2d 857). The court then remanded to the circuit court "with directions to correct the amended judgment either by removing the language derived from Wis. Stat. § 973.20(11)(c), or, alternatively, by directing the office of the clerk of circuit court to remove the language." *White*, ¶ 9 (R. App. 106)(citing *Prihoda*, 239 Wis. 2d 244, ¶ 49).

In *Prihoda*, the Court reaffirmed the principle that "a clerk of circuit court may not change a written judgment of conviction when the change can be

characterized as a 'judicial decision.'" *Prihoda*, 212 Wis. 2d 859, ¶ 22. A judicial decision, though not strictly defined in the case law, is "a decision for a court rather than for a clerk." *Id.* Moreover, "a judicial decision includes the correction of a clerical error in the sentence portion of a written judgment of conviction." *Id.*, ¶ 23. When a change is made to a judgment or order by a clerk and the change is not directed by any judge, the change is void. *Id.*, ¶ 22.

The order directing the defendant to "authorize the department to collect, from the defendant's wages and from other monies held in the defendant's inmate account, an amount or a percentage which the department determines is reasonable for restitution to victims" is void. (R. 9:12, 14). The Secretary was wrong to rely on that portion of the judgment of conviction while disregarding the circuit court's express order to collect restitution "from 25% of prison wages and as a condition of Extended Supervision." (*Id.*).

The decision to add the mandate to the defendant to authorize the department to collect from his wages was not made by the court; it was a decision made by the clerk, either intentionally or unintentionally as a consequence of the newly printed post-Act 355 court Form CR-212. The controlling order is the one directing the Department to withdraw restitution payments "from

25% of prison wages and as a condition of Extended Supervision." (R. 9:12, 14).

4. The judgment of conviction ordered the Department to pay Ortiz's restitution obligation using no more than 25% of his wages and no gifted funds.

Appellant claims that the two orders on the judgment of conviction are not in conflict. Appellant argues that Respondent's "amended judgment of conviction directs the Department to deduct 25 percent of his prison wages to pay down his $43,777 restitution obligation and does not set that percentage as a cap." (Appellant's Br. at 7). Appellant asks this court to affirm the Secretary's decision because "the Department's deduction of all funds from his inmate trust account at a rate of 50 percent complies with the court order and is otherwise lawful." (*Id.*).

The reading of the restitution order proposed by Appellant borders on the absurd. Act 355 increased the power of the Department to divert inmate funds toward the payment of restitution. The court could not have intended its order to be a floor rather a ceiling as Appellant contends; that would have been an unnecessary order since that was already the rate at

which the funds were being deducted from Ortiz's inmate trust account.

Moreover, Appellant's interpretation of the circuit court's order is grammatically suspect. The judgment of conviction says that restitution is to be paid "from" 25% of prison wages. The word "from" limits the pool of available funds to "prison wages" generally and "25% of prison wages" specifically. This language clearly implies a ceiling. It cannot be read otherwise in good faith. The Department cannot deduct 50% of Ortiz's prison wages "from 25% of prison wages" because 50 is larger than 25.

The amended judgment of conviction limits the Department's power to divert Ortiz's funds for the payment of restitution. According to the judgment of conviction, the Department can use only 25% of Ortiz's prison wages—and no gifted funds—to pay restitution.

B. This court must reverse the Secretary's dismissal of Ortiz's complaint.

1. The Department exceeded its jurisdiction when it disregarded the circuit court's order regarding restitution.

Questions pertaining to the reach of the agency's jurisdiction require the court to engage in statutory interpretation, which the court reviews independently

but benefitting from the analysis of the trial court. *State ex rel. Rupinski v. Smith*, 2007 WI App 4, ¶ 13, 297 Wis. 2d 749, 728 N.W.2d 1 (internal citation omitted). Statutory interpretation begins with the language of the statute itself. *Id.*, ¶ 14; see generally *Kalal v. Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.

a. Statutory authority of the Department.

Appellant claims that the Department's jurisdiction over prisoner funds extends from the powers granted to it in Wis. Stat. § 301.32(1), which orders the Department to place into a trust account all money received by the institution for the benefit of the prisoner. The statute also restricts the purposes for which the money can be used and says it "may be used only under the direction and with the approval of the superintendent or warden." *Id.* The statute does not grant exclusive control over the money to the Department, nor does it say what the Department is to do if the Department's policies conflict with the court's judgment of conviction on any given case.

Appellant also points to Wis. Stat. § 301.31, which allows the Department to "provide for assistance of prisoners on their discharge; for the support of their families while the prisoners are in confinement; or for the payment, either in full or ratably, of their obligations."

Wis. Stat. § 301.31. The statute continues: "the funds arising from the wages shall be under the control of the officer in charge of the institution and shall be used for the benefit of the prisoner, the prisoner's family and other obligations specified in this section." *Id*. The term, "the benefit of the prisoner" includes the payment of restitution because "defendants benefit from being required to contribute toward making their victims whole." (Appellant's Br. at 10-11 (quoting *Marlovic*, 383 Wis. 2d 576, ¶ 32)(internal quotation marks omitted)).

However, the *distribution* of the earnings is governed by three subsections, to wit, Wis. Stat. §§ 303.01(4) and (8) and 303.06(2). The first, Wis. Stat. § 303.01(4), directs that inmate wages should be "based on the productivity of the [inmates'] work" and allows the Department to pay "an incentive wage based on productivity," but the Department's power to set wages is limited; it is not allowed to change the rate schedule without the approval of the prison industries board. Wis. Stat. § 303.01(4). Even here, the Department does not have exclusive control over inmate wages.

Next, Wis. Stat. § 303.01(8)(a) grants the Department full control over how an inmate's earnings are spent "*within the confines* of the prison or institution." *Id*. (emphasis added). If the legislature intended to give the Department absolute control over an inmate's earnings, it would not have limited the

Department's power to the confines of the prison. Also of note, Wis. Stat. § 303.01(8)(b) states that the Department "may" distribute earnings for obligations "which have been reduced to judgment." Wis. Stat. § 303.01(8)(b) and (d).[8] Restitution is an "obligation reduced to judgment" under Wis. Stat. § 303.01(8)(b) and (d). *Baker*, 243 Wis. 2d 77, ¶ 17 (holding that Wis. Stat. § 303.01(8)(b) gives the trial court the authority to order restitution be disbursed from prison wages because a judgment of conviction including an order to pay restitution is an obligation reduced to judgment that may be satisfied according to law). This grant of power paves the way for the Department to use Respondent's wages to pay his restitution debt but does not grant exclusive power to the Department to decide the rate at which the debt must be paid.

Finally, Wis. Stat. § 303.06(2) order the Department to "collect not less than 5 percent nor more than 20 percent of the gross wages of inmates" to be credited to the Crime Victim Compensation Fund under Wis. Stat. § 20.455(5)(i). This section applies only to inmates employed under Wis. Stat. § 303.01(2)(em), and it has no bearing on the issue before this court.

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[8] Although sub. (8)(b) excludes inmates or residents employed under sub. (2)(em), sub. (8)(d) makes the provision applicable to them as well. Wis. Stat. § 303.01(2)(em), (8)(b), and (d).

In sum, Wis. Stat. § 301.32(1) orders the Department to place an inmate's money in a trust account which can only be disbursed "under the direction and with the approval of the superintendent or warden" and only for the specific purposes enumerated in the statute. The money in this account includes prison wages, also called "earnings," that may only be disbursed for the "benefit of the prisoner" and for the payment of an inmate's "obligations," including restitution. Wis. Stat. § 301.31; see also *Marlovic*, 383 Wis. 2d 576, ¶ 32. In addition, an inmate's earnings may be distributed by the Department for the payment of an obligation that has been reduced to judgment, including restitution. Wis. Stat. § 303.01(8)(b) and (d); see also *Baker*, 243 Wis. 2d 77, ¶ 17. Appellant claims that "none of these aforementioned statutes imposes *any limit* on the amount or percentage rate that the Department can apply to collect funds from an inmate's trust account to pay court-ordered financial obligations, including restitution." (Appellant's Br. at 11)(emphasis added). "Thus," Appellant continues, "the Department has broad authority to deduct funds at any reasonable rate." (*Id.*).

b. Statutory limitations on the Department.

However, Appellant's broad interpretation of the Department's powers is overly optimistic. The statutory

scheme is replete with limitations of the Department's power. The term "rate" is scarcely mentioned throughout, but when it is, it is used to place limits on the Department's powers, not to give them carte blanche over the inmates' wages. For instance, the Department may not set wages "at a rate such as to cause a deficit on operations." Wis. Stat. § 303.01(4). In addition, it may not change the rate schedule without pre-approval by the prison industries board. *Id*.

Moreover, the Department is granted exclusive control over "how much, if any, of the earnings of an inmate may be spent and for what purposes they may be spent," but the Department's exclusive control applies only "*within the confines* of the prison or institution." Wis. Stat. § 303.01(8)(a) (emphasis added). The statute's grant of exclusive power *within* the institution presupposes that the Department does not have this same level of power over funds *outside* the confines of the institution. This is a direct contradiction of Appellant's interpretation, which would grant exclusive control to the Department both within and outside of the institution. If the legislature intended to give the Department this level of unfettered power over the disbursement of inmate trust accounts, it would not have limited this paragraph to the confines of the institution.

In addition, the Department does not have the authority, under Wis. Stat. § 303.01(8)(2013-2014), to

use a defendant's gifted funds to pay restitution absent an order from the court. *Greene*, 313 Wis. 2d 211, ¶ 8. In *Greene*, the circuit court issued an order directing the Department to "collect and distribute restitution ... directly from the defendant's wages, earnings and accounts at a rate of twenty-five percent." *Id.*, ¶ 4 (internal quotation omitted). The court of appeals held that an inmate's gifted funds could be used to pay restitution, not because the Department was authorized to do so under Wis. Stat. § 303.01(8)(b), but because "a circuit court may consider all sources of funds held by a defendant in determining the amount of restitution" and, therefore, "a court may also order a defendant to pay restitution out of all funds held or available to a defendant, including gifted funds." *Id.*, ¶¶ 8, 12. It was the court's power under Wis. Stat. § 973.20 (2013-2014), and not the Department's power under Wis. Stat. § 303.01(8) (2013-2014), that allowed for the collection of restitution from Greene's gifted funds.

c. Statutory authority of the sentencing court to set the rate of diversion for payment of restitution.

The Department's power is not as expansive as Appellant claims. At best, it parried the circuit court's claim that "[a]bsent a clear limitation by the legislature

concerning sentencing courts' authority [to set the collection rate for restitution], the court will not assume there is such a limitation or that a JOC like [defendant's] is facially invalid," and that was not even the circuit court's most compelling point. (R. 27:4-5).

In fact, the circuit court is explicitly given the authority to set the rate at which restitution is paid, "[t]he court may require that restitution be paid immediately, within a specified period or in specified installments." Wis. Stat. § 973.20(10). The circuit court posited that "[i]f courts are authorized to specify restitution be paid in specified installments, it would seem the court necessarily has the authority to specify the amount and timing of each installment." (R. 27:5). The text of Wis. Stat. § 973.20(10) does not distinguish between a court's authority to order restitution when a defendant is placed on probation or sentenced to prison. (*Id.*).

d. The judgment of conviction explicitly limits the diversion of funds from Ortiz's inmate trust account, and the Department is bound by that order.

The Department does not have the authority to void or reverse circuit court judgments. *Bartus v. Wisconsin Dep't of Health & Social Services*, 176 Wis. 2d 1063, 1082, 501 N.W.2d 419 (1993). What's more, the

Department cannot ignore a facially valid judgment of conviction. *State ex rel. Lindell v. Litscher*, 2005 WI App 39, ¶ 20, 280 Wis. 2d 159, 694 N.W.2d 396 (adopting the circuit court's finding that the Department "could not independently determine the propriety of the restitution Order, and they could not reverse the dictates of the original Order absent receipt of a corrective Order"). Thus, "[i]f the DOC believed the circuit court erroneously set the restitution collection rate for Ortiz at 25% from his prison earnings, or that it exceeded its jurisdiction in doing so, the DOC should have sought a corrective order." (R. 27:6).

Nevertheless, the Department did not seek clarification or petition for a corrective order. The Secretary simply ignored the court order that limited the Department's authority, thereby exceeding its jurisdiction. For this reason, the Secretary's order should be reversed.

2. The Secretary's decision should also be overturned because it was in violation of the law, arbitrary, and not a reasonable interpretation of the evidence.

The Department did not act according to the law. Judicial review as to whether an agency acted according to law includes the question of whether due process of

law was afforded. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119, 289 N.W.2d 357 (Ct. App. 1980). Judicial review also looks to whether the agency has followed its own rules governing the decision, for an agency is bound by the procedural regulations which it itself has promulgated. *Id.* Although the Department seems to have followed its own internal guidelines, it violated the law because it did not address the conflicting order in the amended judgment of conviction, thereby depriving Ortiz of his due process rights.

Moreover, the Secretary's decision was arbitrary—it did not rest on a rational basis. See *Sterlingworth Condo. Ass'n, Inc. v. State, Dep't of Nat. Res.*, 205 Wis. 2d 710, 730, 556 N.W.2d 791 (Ct. App. 1996). Here, the Secretary disregarded the circuit court's clear directive to limit the diversion of Ortiz's funds based on the boilerplate language in Form CR-212 (05/2016). (R. 9:80, A. App. 110). The Secretary's decision to dismiss Respondent's complaint was arbitrary because it represented the agency's judgment rather than its will. See *Greer*, 353 Wis. 2d 307, ¶ 36. The Secretary's decision was arbitrary and was not a reasonable interpretation of the evidence.

II. This brief incorporates the arguments Ortiz made in his *pro se* brief.

Ortiz hereby incorporates the argument he made in his first brief to this Court so as to avoid waiver of any of his arguments.

* * *

The Secretary's decision cannot survive review. It is in direct conflict with the amended judgment of conviction, which limits the diversion of funds from Ortiz's inmate trust fund account for the payment of restation to "25% of prison wages." The language on which the Secretary relied is void because adding the mandate in question is a judicial decision that was added to the judgment of conviction by the clerk without direction from the court. By disregarding the valid judgment of conviction, the Department exceeded its jurisdiction, engaged in unlawful conduct, and acted in an arbitrary manner that represented the Department's judgment rather than its will. The Secretary's decision must be reversed.

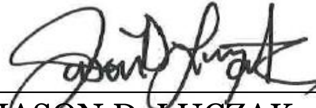
CONCLUSION

For the reasons presented above, Respondent asks this court to affirm the circuit court's decision, reverse the decision of the Secretary of the Department of Corrections, and order the Department to limit its diversion of Ortiz's funds to 25% of his prison wages and 0% of his gifted funds.

Respondent also asks this court to remand the case to the circuit court with instructions to strike the mandate added by the clerk to the amended judgment of conviction without the court's instruction.

Dated this 3rd day of January of 2021.

Respectfully submitted,



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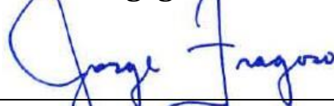

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,989 words.

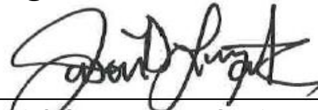
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief 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 on or after this date.

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

Dated this 3rd day of January of 2022.

Signed:



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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

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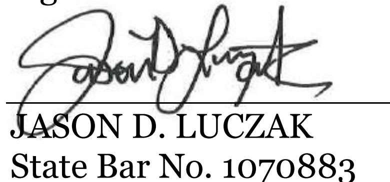

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