STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

CASE NOS. 2019002206 AND 2019002207

STATE OF WISCONSIN,

Plaintiff-Respondent,

VS.

WAR N. MARION,

Defendant-Appellant.

REPLY BRIEF OF WAR N. MARION

WAR N. MARION # 264201

RACINE CORRECTIONAL INSTITUTION-KENOSHA WEST

P.O. BOX 900

STURTEVANT, EISCONSIN 53177

TO: WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

MADISON, WI. 53701-1688

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Marion leaves this up to the court's discretion.

STATEMENT OF THE CASE

WIS. STAT.§ 809.19(1)(D)

Marion filed an independant motion with the circuit court for a motion for time served, with circuit judge Frederick c. Rosa on October 1,2019. That court denied Marion's motion on October 9, 2019. Marion now appeals.

STATEMENT OF THE ISSUES PRESENTED BY THE RESPONDENTS, AND ARGUMENTS.

I. Adressing the respondents brief as to:

Was War Marion's October 1,2019 motion procedurally Barred? Marion's reponse: NO, because:1) Marion did address his issues with the circuit court in his first motion (Amended) for clarity dated October 15,2019, which was also submitted to all parties, then was the circuit court and the court of appeals dated October 21,2019. Further the state claims again that Marion did not raise these issues with appellate counsel Heather L. Johnson, on his first appeal as of right.Marion did address these issues with that counselwhom only addressed issues by Marion that she assumed might have validity to change the outcome of this appeal, but again she failed to address other issuesthat had merit, and failed to address this issue, for which we are on appeal for now. This issue was also brought to her attention because it was an issue being challenged in Marion's administrative proceedings in which attorney johnson told marion she would help Marion resolve that issue because she specialize in revocation appeals and that she would do both cases, then changed her position after her and Marion was at odds about her representation. This attorney then responded by telling marion that she had found 17 issues, in which she explained that she had awork load of [illegible] cases, she was on vacations, and abunch of other minor excuses for her not being there to represent marion. This could be verified with a machner hearing putting atty. johnson under oath. Right after this hearing this attorney filed for the No-Merit process. In turn Marion then wrote to her supervisor

Andrea taylor Cornwall about atty. johnson's representation, whereas she had to write atty. johnson twice, in the second letter she had to threaten atty. johnson to respond with atty. rules and new representation. Also, this supervisor told Marion that she could not assist marion on both cases. As stated, Marion did present this issue to attorney johnson on his first appeal as of right, in which marion cannot be held for counsel's ineffectiveness, and the fact that she didn't present this issue or issues in her no-merit report. Second, this appellate counsel di not explain why each of Mario's issues has no-merit. This stillwould be ineffective because counsel Marion has a first appeal as of right to have all of his issues addressed which would prevent the respondent's current argument of Marion being barred.(See exhibit #20).

II. Next, the respondent argues that Marion should be barred because Marion's sentencing credit was not raised in his habeas corpus petition case no.18CV002855. It should be clear that this court of appeals can confirm that this issue and a multitude of other issues were raised in which then this court refused to address staying with circuit court's argument of no verifcation. (Respondent's brief at P.14,3). As to the clarity of the record in which Marion addressed these issues were appeal no.2018AP977, and that this court of appeal did not make any decision, or address this issue. This is also Marion's reason for bringing these issues to the circuit court, because they were not addressed, not that they were not raised. Further, the respondent recognizes that Marion's arguments were raised prior to the October 1,2019, circuit court case. So it would be clear

that the respondent's argument would be contradictory, and not new claims from this petitioner.

ADDRESSING THE RESPONDENT'S ARGUMENT AT II. P.18, OF THE PLAINTIFF-RESPONDENT'S BRIEF.

EVEN IF THE MOTION WAS NOT BARRED THE ISSUES OF SENTENCING CREDIT IS NOT PROPERLY BEFORE THIS COURT, BECAUSE MARION DID NOT RAISE IT IN THE OCTOBER 1,2019, MOTION.

MARION'S RESPONSE: As this court of appeals should recognize by the case number, that this is a separate appeal pro se, andnot connected to Marion's no-merit case, but in still marion did present these issues to the appellate counsel whom failed to put them in her no-merit report as required.Also, Attorney johnson received the circuit court transcripts in 2015, not at or around february 22,2019, as stated by respondent.(See circuit court entries at page 5 of 5,bottom). by the appellate counsel filing her no-merir 3 years later on April 9th,2018, should confirm Marion's claim of ineffectiveness on first appeal as of right. This would also show that appellate counsel abandoned marion for the majority of her representation for marion. Sentencing credit was also addressed with appellate counsel.

III. ASSUMING OTHER BARS DID NOT EXIST, MARION IS NOT ENTITLED TO RELIEF BECAUSE THE ISSUE HE RAISES IS WITHOUT MERIT.

MARION ADDRESSES THE RESPONDENT'S ARGUMENT AS FOLLOWS:

The respondent's argument with reference to marion's original criminal conviction case no.01CF000818, is irrelevant to this decision of marion's misdemeanor case, and that the respondent only uses this statement because she was the prosecuting attorney in this case, in which marion knew this appeal might be a conflict of interest, and that this respondent only uses this statement for position, whereas this should be held as prejudicial.

In addressing the respondent's argument as to the bifurcated sentence of Marion's prior case being irrelevant to the misdemeanor in which Marion was not yet being revoked, this would be relevant because it would apply to the sentencing credit and to the clear fact that the trial court in this case waived and/or dismissed all of the penalty enhancers, fines, and fees except the surcharge. With this stated the trial court, in her discretion, ruled against putting Marion on any type of supervision. Second, the trial court did not order Marion to serve his misdemeanor in prison at the outset, which is required by law. State v. Lasanski, 2014 WI.App.26;: " The court must add the enhancer at the outset and not under Wis. Stat.§973.01(2)(C) as with felonies because Wis Stat.§ (2)(C) refers to confinement in prison, and misdemeanors do not become punishable by prison until after the the enhancer is added. Absent the inclusion of the penalty enhancer at the outset under Wis.Stat.§ (2)(A), there is no bifurcated sentence from which to arrive at a maximum term of confinement in prison under Wis. Stat.§ 973.01(2)(C)10. Thus, Wis. Stat.§973.01(2)(C)1, is inapplicable to misdemeanor cases; any attempt to apply Wis.Stat.§ 973.01(2)(C) to a misdemeanor

bifurcated sentence would be to apply the penalty enhancer twice. (See also, State v. Betters, 2013 WI.App.85;)

The respondent confirmss that Marion would not be applicable for a prison sentence by citing Wis.Stat.§ 973.01 because the respondent knew that this statute applies to bifurcated sentences, in which Marion do not apply due to lack of penalty enhancers, whereash at the end of Marion's total length of his court ordered amended Maximum Discharge date of 2/10/2018, in which the department would lose all jurisdiction over Marion, and would have had the county come transport Marion to the House of Correction by statute Wis. Stat.§ 973.14.

The repondent would be wrong to suggest that just because Marion was on extended survision at the time he was in the process of his revocation, not yet revoked, this would give the department grounds to continue to hold Marion after the total length of the expiration of his court ordered sentence and Maximum Discharge date of 2/10/2018. Wis. Stat.§302.113(3)(C) clearly states:" No extension of a term of confinement in prison under this subsection may require an inmate to serve more days in prison than the total legth of a bifurcated sentence imposed under s. 973.01.

With this stated, the trial court did not have the the lawful, and/or exceeded it's authority, to order the misdemeanor sentence to be ran consecutive to the total length of Marion's felony sentence, 01CF000818. In Drinkwater, that court concluded that the authority given to a trial judge is statutory only and that, under the statutes, a trial judge has no authority to revoke probation and impose a sentence to commence consecutive to another prison term. The court also

stated: " A trial court has no inherent power to defer the execution of a sentence in a criminal case". That question was discussed in Drewniak v. State ex Rel. Jacquest(1942),239 Wis. 475,484, 1 N.W. 2d 899, wherein the court stated:"*66... Courts have no inherent power to stay execution of a sentence in a criminal case in the absent of statutory authority except for the limited purpose of affording relief against the sentence itself." (See Ex Parte United States(1916),242 U.S.27,37 Sup. Ct.72,61 L.Ed.129;).

Though the respondent argues the same or simular argument in drinkwater, whereas rhis court disagreed with the state's theory citing Wis. Stat§ 973.10(2), which is to be applied and still is in use of today's revocation proceedings. Other cases support the Drinkwater decision such as:
Guyton v. state,69 Wis.2d 663(S.Ct.of Wis.1975).
Bruneau v. State,77 Wis.2d 166 (S.Ct. of Wis.1977);
Donaldson v. State,93 Wis.2d 306 (S.Ct. of Wis.1979).

In addition it would be relevant where and whether Marion served his misdemeanor without penalty enhancers, in prison at the total length of his sentence, which has been expired, because of jurisdiction matters, and that if the departmet would have followed the amended court order, rather than taking it upon themselves in exceeding the amended order, Marion's misdemeanor would have been served in total. This is without any credit given at all by the department. This is why it is relevant, and now they have violated Marion's 8th and 14th amended rights since 2018, and making it a stall issue rather than following the law. If Marion were to have been revoked as did, he then could have only been revoked up to the full amended Maximum discharge date of 2/10/2018, the DOC's

administrative Maximum Discharge date of 12/24/2019, was imposed without authority, and in violation of constitutional protections and disregard of Marion's rights. Bartus v.DHSS,176 Wis.2d 1063 (1993); State v. Stefanovic, 215 Wis.2d 310 (Ct.APP.of Wis.1997).

The department would have had to obtain and recommend to the court by showing of cause that Marion's Maximum discharge date needed to be extended for a specified reason, which had to be done 90 days prior to Marion's court ordered amended Maximum discharge date of 2/10/2018, the department failed to do.

In stefanovic, the court stated: " Wis.Stat.§973.09(3)(A) allowed a trial court to extend probation for cause if such action was taken prior to the expiration of the original probation period. No such extension was sought. Absent such extension, the department properly issued a certificate of discharge to the defendant. An unfulfilled condition did not automatically extent the probation period, rather, an extention had to be obtained." Here in Marion's case, the department fails to comply with the law and statutory authority, and the constitution, intentionally and knowingly refuse to take NO ACTION in contacting the court, where they have seen the court ordered amended Maximum discharge date, and recognises that Marion's amended court order was (7) seven months before his final revocation hearing, and if he were revoked as did, Marion could not be revoked for no more than the amended court order date of 2/10/2018, by law. This would be relevant to the misdemeanor because it would have an accurate starting date in which Marion would be transfered to the HOC to do his misdemeanor sentence. Since Marion has completed Both, he should be legally discharged. Russell v. Lazar,300 F.Supp. 2d 716 (2004).

AS TO THE RESPONDENT'S ALLEGATION OF IF MARION WAS NOT REVOKED, MARION WOULD HAVE BEGUN SERVING THE MISDEMEANOR SENTENCE UPON HIS DISCHARGE FROM THE FELONY SENTENCE. (IN PRISON)

First, Marion responds by stating, if Marion did not have the vop hold and would have sustained the revocation, Marion would have returned back to extended supervision. If Marion would have sustained the revocation but then found guilty of the misdemeanor, Marion would then have been transfered to the HOC, as originally did before Marion was revoked. The court still would not have had the authority to run the misdemeanor consecutive to Marion's supervision, because there would not be anything holding or preventing marion from completing the misdemeanor sentence in the HOC. The respondent is again wrong to assume that if Marion's supervision had not been revoked, the misdemeanor sentence would have gone on the end of the felony Maximum discharge date. That would mean that marion would then be free in the public back on extended supervision until the completion of his felony sentence, which would be the full discharge of 2/10/2018, which the department would lose all jurisdiction over Marion and Marion would then have to turn himself in to the county jail to be transfered to the HOC anyway. This would not be reasonable. Also, this would be relevant with regard to sentencing credit because Marion would not have been revoked, Marion would have been entitled to the misdemeanor sentencing credit, as originally given. Further, relevancy is concerned in this case,because Marion was sentenced on the misdemeanor before he was revoked, and thus entitled to

Both credits due to the courts decision in State v. Presley, 2006 WI.App.82; this court held that in Presley, he was entitled to sentencing credit on the new charge from the date of his arrest until the date of sentecing on both charges because while his extended supervision was revoked, his resentencing had not yet occured. Wis.Stat.§ 973.155(1)!a). In Marion's case, he was not yet revoked but only in the process of the revocation, so Marion would be entitled to both credits, which would not result in dual credit.(See also, State v. Hintz, 2007 WI.APP.113.

With this stated, as to the administrative credit under Wis.Stat.§ 973.155(1)(b), the resondent confirms Marion's argument to the department, in which the respondent describes clearly what Marion told to the department that they should have done.(P.20 and 21 of the respondents brief). Marion is still being denied this credit and/or any credit that he is due. Wis. Stat.§304.072.

In continuing, the respondent argues that when the trial court amended Marion's JOC on 4/20/2015, it regave Marion credit for that case no.01CF000818, whereas Marion agrees that he was not suppose to receive credit in that case again because this credit was already given and served back in 2001, with this respondent as the prosecuting attorney. However, Marion has argued this issue with the department as well to correct this error, but they have chosen to take no action. Marion has also explained that if he is denied one of the credits, he would he entitled to the other by law. Since the court had already ruled against Marion on the misdemeanor credit without addressing the facts, Marion would be entitled to the administrative credit which encompasses the misdemeanor credit which also the

respondent recognizes, as well as the department which is why they refuse togive Marion the credit he is entitled to. State v. Gilbert,115 Wis.2d 371,340 N.W. 2d 511 (1983).

THE RESPONDENT ARGUES

WIS. STAT.§ 973.03(2)

Marion does agree with the statute, however the respondent relies on the bifurcated sentence and extended supervision argument that does not apply to 1) misdemeanors without penalty enhancers and 2)Offenders who have completed the total length of there sentences, whereas the department must obtain jurisdiction. State v. Stefanovic,215 Wis. 2d 310 (Ct.App. of Wis.1997).

The department does not have the authority to bifurcate a sentence, without penalty enhancers, and place county defendant's in state custody. The trial court is the only one that has that authority, and if the court does this it has to be at the outset of the sentencing. State v. Lasanski,2014, WI.App.26; State v. Larson, 2003 WI.App.235.

further, Marion could not do his misdemeanor in prison because it would deny him access to huber privileges he is entitled to, State v. Davis,299 Wis.2d784, 2007 WI.App.34.

Also, Marion has been minimum custody since 2017, and the department has been arbitrarily holding Marion in medium custody because of his legal cases, and to the point that they are waiting to see the outcome of Marion's legal claims against them, which is prejudicial and violative of Marion's constitutional rights. In the attorney generals Opinion notes, for the statutory law Wis. Stat.§973.03(2), the attorney general states: " A criminal defendant who receives consecutive sentences that in the aggregate exceed one year, but

individually are all less than one year, should be incarcerated in a county jail rather than the wisconsin prison system". OAG 9-89,1989 Wis. AG LEXIS 9. this was stated in the 2017-18 legislative session.

ADDRESSING THE RESPONDENTS ARGUMENT
AS TO THE TRIAL COURT DID NOT RELY
ON THE DISPOSITION OF CASE NO. 18CV002855
IN DENYING MARIONS MOTION.

In this regard, the respondent's argument is contradictory by stating:" It simply referenced the existence of the case.".

second, Marion did not misread the courts order. if the trial court referenced to the habeas corpus case mentioning: "Raising claims against the department of correction", when Marion's motion did not reference to the habeas corpus, it is as exactly as Marion stated. further, Marion did address his issues with the trial court whereas the trial court in its discretion, was to apply the correct title to the motion and set a hearing date. AMEK BIN-RILLA V. ISRAEL,113 Wis.2d 514 (S.Ct. of Wis.1983).

ADRESSING RESPONENT's argument
AS REQUESTING THE COURT TO DISREGARD
FACTUAL EVIDENCE PRESENTED BY MARION

Marion explains that the responden's argument would serve no purpose for this appeal because Marion's pro se motion was meant to be seperate from his criminal appeal, in which this respondent continues to attach this case to

claiming "bared by escalona-naranjo,185 wis.2d 168(1994)", when this was not or is not an appeal dealing with no-merit, and/or the criminal appeal process. Marion did though present this issue of sentencing credit as one of his no-merit issues, but as stated appellate counsel failed to place this argument in her no-merit report as requested, whereas Marion does have merit on this ground. Despite appelate counsel ineffectiveness, and the fact that this court of appeals did not take Marion's arguments serious, and biasly ruled disregarding Marion's first appeal as of right on all of Marion's issues presented,as well as appellate counsel's prejudicial no- merit arguments after she first told Marion that she found 17 issues, then changed her position after marion had addressed her ineffectiveness to her personally. She only then requested a no-merit finding to releive herself from Marion's case.

As to this appeal, which shows that it was intended to be seperate from the criminal appeal, the trial court also did not look upon Marion's motion as it were connected to the criminal appeal, but clearly a habeas corpus. Marion does not know how or why this was connected to his criminal appeal, maybe an eror by the circuit court clerk, either way, this court should look upon this appeal as an independentappeal seperate from the criminal appeal,if it chooses to review and proceed on the issues.

In regards to the cercuit court's decision dated October 9,2019, Marion did as requested of the trial court and filed a Motion of writ of habeas corpus petition that was granted on March 9,2020, before Honorable Gramling Perez, whereas, Marion presence all of his issues and factual evidence to that court.

CIRCUIT COURT JUDGE FREDERIDK C. ROSA

DID NOT NECCESSARILY HAVE TO DENY

MARION'S MOTION.

The circuit court judge did not neccessarily have to deny Marion's motion due to the court's discretion and the supreme court case, Amek Bin-Rilla, at headnotes:2,4,and 5; construingMarion's motion to it's proper meaning. Further, a motion for time served does not neccessarily refer to awrit of habeas corpus or writ of certiorari, Marion motion could have been a simple request for a sentencing adjustment, as to credit, motion to nodify, or other alternatives to fixing the sentencing credit that was misappropiately denied. Even if that court felt that Marion was raising a habeas corpus claim but refused to address it, it still could have addressed that portion of Marion's motion that did not reference a conclusion to determine a habeas corpus. It is clear from the respondent's arguments that she, karen loebel, the same prosecuting attorney that was envolved with Marion's felony case, and subsequently this case does not want to see Marion seek no relief. This is why Marion stated that their would be a conflict of interest with her on this appeal and anyone she guides with any of my cases.

This district Attorney breached the plea in Marion's original felony conviction, know she brings obsurd arguments in this appeal to prevent Marion from seeking any type of justice he is due. Further, in the respondent's brief at p.14, she recognizes that there is truth to Marion's argument, by stating that they were "factual assertions", rather than calling them " conclusory Assertions". Then this respondent confirms Marion's argument about how the department "should have"

given Marion credit in the administrative proceeding, but still failed to do. Since the tial court denied Marion the sentencing credit he was entiled to, that would mean Marion would be entitled to the administrative credit that encompasses the misdemeanor credit regardless of how the department may think or feel. The department does not have the authority to deny Marion both of his credits. State v. Gilbert, 115 wis.2d371(1983) Wis. Adm. Code DOC § 304.072; Wis. Stat.§ 973.155(1)(B).

In this regard, the respondent's arguments are without stanting. There would be no bar on an independent and timely appeal, that was meant to be seperate from the criminal appeal. also, this issue was raised with appellate counsel at p.20,, as presented to appellate counsel, in the appendix ofthis brief.

CONCLUSION

It would be up to the courts dicretion by either reversing with instructions, or closing this appeal without further argument because of Marionn's current issues being addressed with another court in the form of a petition of writ of habeas corpus, following the circuit courts decision in this case.

FORM AND LENGTH CERTIFICATION

I HEREBY CERTIFY THAT THIS BRIEF CONFORMS TO THE RULES CONTAINED IN § 809.19(8)(B) AND (C) for a brief produced with a monospaced serif font.

The length of this brief is 14 pages.

Signature: Dan Maurer

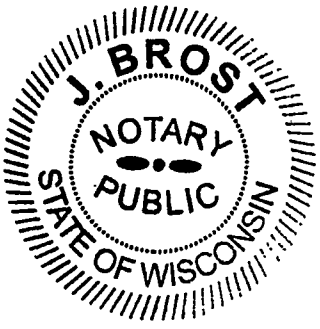
Date: 10/21/2020

NOTARY:

Subscribed and sworn to before me this 21 day of October 2020

J. Brost
Notary Public

My commission expires 09/03/2022



wis stat.§809.19(2)(A)

APPELLANT'S REPLY BRIEF 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 s. 809.19(2)(A) and contains, at a minimum (1) A table of contents; (2) the finding or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues to be raised,including oral argument or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal 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 agency.

I further certify that if the record is required by law to be confidential, the portions of the record including in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with notation thatthe portion of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Subscribed and sworn to before me this
21 day of October 2020

Notary: J. Brost
Notary Public
My commission expires 09/03/2022

Signature: Wan Mawor

Date: 10/21/2020

J. BROST NOTARY PUBLIC STATE OF WISCONSIN

CERTIFICATE OF MAILING

I Certify that this brief or appendix was deposited in the wisconsin racine correctional institution mailbox and/or given to the sargent and/or staff on the kenosha west side of the unit to be mailed by first class mail that is at least expiditious to the court of appeals and all parties concerning this appeal.

Signature: [signature]

Date: 10/21/2020

Notary:

Subscribed and sworn to before me this 21 day of October 2020

[signature]
Notary Public

My commission expires 09/03/2022