STATE OF WISCONSIN, COURT OF APPEALS, DISTRICT I

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STATE OF WISCONSIN) ex rel. **GREGORY S. GORAK,**) Petitioner / Appellant,) **v.**)) **MICHAEL MEISNER,** Warden,) Respondent / Respondent.)	**PETITIONER / APPELLANT'S REPLY BRIEF** Last Case No. 2016-CV-7924 **Appeal No. 2017-AP-0039-CV**

APPEAL FROM THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE STEPHANIE G. ROTHSTEIN, PRESIDING OF THE 10/24/2016, 12/05/2016, & 12/22/2016 DECISIONS AND ORDERS DENYING THE PETITION FOR WRIT OF HABEAS CORPUS, MOTION FOR RECONSIDERATION OF THE DENIAL OF THE PETITION, AND MOTION TO VACATE THE PREVIOUS DECISIONS AND ORDERS.

REPLY BRIEF OF THE PETITIONER/APPELLANT GREGORY S. GORAK

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September 18, 2017

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Summary

It is the position of the respondent that every claim within Gorak's petition is procedurally barred because they were either raised or could have been previously raised [Resp. Br. 9]. That is an oversimplification of the facts and ignores the argument posited by Gorak that, while some issues admittedly may have been previously raised, the merits of the claims were never addressed by the court in which they were raised. Therefore, they were not '*finally adjudicated*' such that they would be procedurally barred.

Further, respondent's assertion in the introduction that Gorak's claims against Warden Meisner focusing on the '*administration*' of his sentence as opposed to the legality of the sentence constitute "artful pleading" is a weak attempt to undermine the crux of Gorak's case. It is also bellied by our statutes which clarify and distinguish between attacks upon the legality of a sentence imposed and attacks upon the legality of the execution of a sentence and the venues in which they are to be raised.[1]

While truly there must be an end to litigation, it cannot be fairly said that our system of jurisprudence intended that a pro se defendant might never have the merits of a claim addressed merely because he presented it in an incorrect forum that refused to consider the claim and redirected him to raise it in another more proper venue. This is Gorak's situation in a nutshell and justice demands proper consideration of his claims on remand.

Petitioner / Appellant's Response to Respondent's Brief

1) The circuit court lacked jurisdiction to decide appellant's habeas corpus petition.

As an initial threshold and arguably dispositive matter, respondent's brief failed to address or rebut petitioner Gorak's primary argument[2] that

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[1] See Wis. Stat. §§ 801.50(4)(a) and (4)(b) outlining venues for the differing claims.

[2] Respondent's mention of the motion in a page 11 footnote does not constitute a rebuttal.

the circuit court lacked competency and jurisdiction to decide the petition for writ of habeas corpus and the subsequent motion for reconsideration, and that therefore, these decisions were void *ab initio* [Pet. Br. 14-16].

This Court must now consider Gorak's argument as admitted by respondent. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.* 90 Wis. 2d 97, 105 (Ct. App. 1979)("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute. *SXR Blank v. Gramling*, 219 Wis. 196, 199 (1935)").

The habeas decisions, issued while the underlying criminal record was out on appeal, contrary to Wis. Stat. § 808.075(3), must be vacated pursuant to Wis. Stat. § 806.07(1) (d), which provides for relief from a void civil judgment. This specific, substantive argument was raised in Gorak's brief with case law and statutory support [Pet. Br. 14-16]. Therefore, proper resolution requires that the decisions of the circuit court must be vacated and/or expunged forthwith. A decision in favor of Gorak on this issue would be the most expeditious conclusion of this appeal and alleviate the need to address any of the other issues presented.

Petitioner / Appellant's Response to Respondent's Supplemental Statement of the Case

2) The factual background at pages 3-4, respondent indicates,

> "In the original judgment of conviction, the sentences for the burglary and Molotov cocktail charges were ordered 'consecutive to any other sentence.'(See R. 4:27.)"

While accurate, it misleads this Court, because the initial 06/11/07 judgment was erroneous. The judgment was quickly corrected on 06/25/07 to reflect the sentence the court actually imposed; the burglary count (Count Four) was imposed to be served "concurrent with any other sentence." [R. 4:34]. This was clearly explained at page 4, n.5 of Gorak's brief.

However, this is a momentous and decisive fact in the convoluted history of the case. First, it is significant because even though Gorak's State sentences were listed as consecutive to any other sentence, which included the previously imposed federal sentence, he was sent to D.C.I. to serve his State sentences rather than being remanded to Federal custody to commence that sentence. This means that even though at that time **both** State sentences were designated as consecutive to the federal sentence, Gorak was required to serve each of them **before** the federal sentence.

Secondly, it is significant because, pursuant to Wis. Stat. § 973.15 (2m) (b) 2, State sentences are served in the order imposed. That means that count two was the first sentence to commence. That is precisely why, upon his reception at D.C.I., the DOC computed his controlling consecutive count two sentence as commencing upon its imposition [R. 4:205; 210].

Since count four was initially incorrectly indicated as being imposed consecutive to any other sentence, this merely meant that he would serve count four after count two, just as the DOC originally computed [Id]. The judgment being corrected to reflect count four as concurrent did not alter the fact of count two's service having commenced. Count four was simply then also being served as the DOC affirmed repeatedly [R. 4:202-206].

3) Gorak also takes exception to the procedural background at page 5, n.3, where respondent indicates a disingenuous assertion of fact stating;

> "Also during Gorak's state confinement, federal officials retroactively approved Gorak's service of his federal sentence concurrent with his Count Four confinement, whereby he would receive credit against his federal sentence for time served in state custody on Count Four. (See R. 4:62, 63.)"

This is misleading because the Federal award of retroactive credit was for all of the time spent in Wisconsin confinement. There was no such restrictive endorsement regarding application to only Count Four. In fact, it was made clear to the Federal sentencing court that the 3-year Molotov

cocktail term had been imposed consecutive to the Federal sentence, though the sentence date was incorrectly listed [R. 4:16; 20].

Also, respondent disregards the undisputable fact that at that time, prior to the 2011 amendment, the DOC was then administering Count Four as being served concurrently with Count Two just as imposed [R. 4:205]. Thus, the Federal sentence was then running concurrently with both State terms. Respondent's attempt to obfuscate this significant fact fails.

Also in the procedural background, respondent recounts at page 5 the May 2011 sentence structure "clarification" of successor Judge Cimpl. Gorak advises this Court that the proffered "*remedy*" from the circuit court was actually determined to be of no effect as found by the 2015 successor court of Judge Pocan. His determination was that Count Four remained "*effectively concurrent*" with count two following the Cimpl amendment and he therefore failed to "*perceive the split*" sentence argument [R. 4:106-107].

Further, at the 06/25/2015 evidentiary hearing, the R.G.C.I. Records Supervisor testified that the 05/06/2011 amendment order was essentially of no effect, that the DOC had been administering Gorak's State sentences concurrently upon receipt of the 06/25/2007 judgment, and that they continued to do so after the order [Id].[3]

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[3] MR. GRIFFIN: You are aware of an order from May 6, 2011, in which Judge Cimpl at some point said, I am going to strike the words concurrent from the sentencing order in this case. Are you familiar with that order?
MS. KUSSMAN: I have the Judgment of Conviction...
MR. GRIFFIN: And it is your understanding that while Judge Cimpl struck the words concurrent, he did not enter the words consecutive, correct?
MS. KUSSMAN: He did not.
MR. GRIFFIN: So, the D.O.C. then had two (2) sentences which are neither pronounced by the Judge to be concurrent or consecutive and you, therefore, treat them as concurrent; is that correct?
MS. KUSSMAN: Correct. The silence is treated as concurrent.
MR. GRIFFIN: So, it would be fair to say from your perspective that [the order], in terms of how it affected Mr. Gorak's sentence, it affected it in no way at all; is that fair to say?
MS. KUSSMAN: It had no bearing based on the change that was done [in 2007], when they were pronounced concurrent.

Petitioner / Appellant's Response to Respondent's Argument I

I. Gorak's current petition is NOT procedurally barred because his claims either were NOT raised or could NOT have been raised in previous postconviction proceedings [Resp. Br. 9]**.**

A. Governing Law. --- 1. Procedural Bars.

Respondent cites to *State v. Witkowski*, 163 Wis. 2d 985, 990 (Ct. App. 1991), for the proposition that issues previously *litigated* in postconviction proceedings may not be relitigated "no matter how artfully the defendant may rephrase the issue." [Resp. Br. 9]. Gorak does understand this rule, but contends that it is not applicable to the bulk of his issues.

For an issue to be subject to the *Witkowski* bar, it must have been "previously litigated." Legally, what constitutes previously litigated? If a pro se defendant raises an issue before a circuit court and that circuit court refuses to address the issue stating that it lacks the authority to do so or that the circuit court is not the proper venue to address that issue, has that issue now been "previously litigated" with the preclusive bar of *Witkowski*? Gorak asserts and asks this Court to find that in such a circumstance as the above, the previously litigated bar does not apply.

While Gorak has been unable to locate a precise definition for this preclusive term within Wisconsin case law authorities or statutes, one of the underlying cases upon which *Witkowski* was based, (*Commonwealth v. Curtin*, 365 Pa. Super. 424, 529 A. 2d 1130, 1132 (Pa. Superior Court 1987)), does specifically address and define the phrase "finally litigated."

Witkowski at 163 Wis. 2d 985, 990, cites to *Curtin* at 529 A. 2d 1132 for the premise that "a finally litigated ground for relief may not be relitigated

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MR. GRIFFIN: Right. So, in other words, the sentences from your perspective were and always have been and still are concurrent?
MS. KUSSMAN: From [ ] 6/25/07 forward...
THE COURT: All right. So, it has been concurrent in the way you interpret it since June 25th of '07?
MS. KUSSMAN: Correct.

every time a new theory is advanced." Immediately preceding that statement within *Curtin* is the following in relevant part.

> "In 42 Pa.C.S. § 9544, the legislature set forth the circumstances when a petitioner's claim would be considered to have been finally litigated. That section provides, (a) An issue is finally litigated if:
>
> (1) It has been raised in the trial court, the trial court has ruled on the merits of the issue and the petitioner has knowingly and understandingly failed to appeal the trial court's ruling."

Both State and Federal courts agree, "It [is] a rule of practice, based on sound policy, [that] once an issue is litigated and decided, that should be the end of the matter." *Monfils v. Taylor*, 165 F.3d 511, 519 (7th Cir. 1998), citing See *Castro v. United States*, 540 US 375, 384, 124 S. Ct. 786 (2003).

What about cases where the merits of the issues have not been addressed? *Muth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005), held:

> "Adjudication on the merits "is perhaps best understood by stating what it is not: it is not the resolution of a claim on procedural grounds." See *Sellen v. Kuhlman*, 261 F.3d 303, 311 (2nd Cir. 2001)("'Adjudicated on the merits' has a well settled meaning: a decision finally resolving the parties claims, with *res judicata* effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.")."
>
> "If a state court specifically identifies a claim it must identify and review the correct claim...It stands to reason that a petitioner is subject to AEDPA's standards of review only when [he] has had **his** claim reviewed by a state court. If a court considers another claim, it has not considered **his** claim." *Muth*, 412 F.3d at 815, n 5.

In light of the aforementioned and because the *Witkowski* procedural bar is essentially a variation of the law of the case doctrine, it follows that to apply with preclusive effect, the previously litigated issue must have been addressed and decided by the court in which the issue was raised. It is with that understanding Gorak asserts his claims should not be so barred.

Respondent next cites to *State v. Romero-Georgana*, 2014 WI 83, ¶35, 360 Wis. 2d 522, in support of the rule of *State v. Escalona-Naranjo*, 185 Wis. 2d 169, 178 (1994), that a defendant is barred from asserting a claim that he could have raised previously "unless he shows a sufficient reason for not making the claim earlier." [Resp. Br. 9].

Respondent discusses the procedural bar with regard to an attack upon a defendant's conviction and explains that Wis. Stat. § 974.06 was "designed to replace habeas corpus as the primary method in which a defendant can attack the conviction after the time to appeal has expired." [Resp. Br. 10].

Respondent then clarifies that habeas corpus is not available in postconviction proceedings when "(1) the petitioner raises claims that he could have asserted in a prior appeal, without establishing a sufficient reason for not raising the claims then; or (2) the petitioner attempts to re-litigate claims that were decided on a previous appeal or postconviction motion." [Id].

Gorak is well versed in the *Escalona-Naranjo* and *Witkowski* rules of law, whose procedural bars serve a judicial gate-keeping function. However, as stated in his brief, he believes that one if not more of his claims fall within the exceptions and deserves to be adjudicated on the merits at least once before he is consigned to these previous litigation bars.

Based upon the circuit court's previous decisions and respondent's arguments, it would appear that there is no possible way Gorak could have had his claims addressed outside of the sentencing court short of an appeal. The less stringent pro se litigant standard apparently does not apply here where Gorak, who was not advised of his appeal rights after the amendment / re-sentencing, followed the advice of L.A.I.P. and the requirement of sec. 974.06(8) Stats., and moved to first vacate the amendment within the circuit court immediately after the May 2011 order prior to using habeas corpus.

Yet then when Gorak followed the next direction of the circuit court and filed his habeas corpus petition in the appellate court, it was summarily procedurally denied under *Witkowski*. In what world is that justice?

Now, in support of the habeas dismissal, respondent argues that just because an issue was presented it is barred from ever being considered again, even if it was either not considered at all or it was considered and determined to be outside the authority of the court to decide.

Yet, Gorak had unresolved issues remaining. What of those? As our highest Court held in *Kenosha Prof'l Firefighters v. City of Kenosha*, 2009 WI 52, ¶40, 317 Wis.2d 628, where the circuit court order "left at least one matter in litigation unresolved," an order cannot be final and appealable until **all** of the underlying issues are resolved by the court.

> "This holding comports with a purpose underlying the rule that an appeal may be taken as a matter of right only from final judgments or final orders, namely the purpose of ensuring that factual and legal questions come before an appellate court only one time, after the circuit court has resolved all issues." Id @ ¶40 & see n. 31.

In consideration of the facts that **none** of the circuit court decisions have ever cited to a single case law or statute to rebut those cited by Gorak or to support their findings, other than procedural denials, it cannot be fairly said that he has ever had an opportunity for a full and fair adjudication.

In sum, it is Gorak's contention that an issue or claim cannot be considered "litigated" if it is not addressed or decided by the court in which it was raised, or especially if the court in which it was raised, determines that it lacks the authority or jurisdiction to address or decide the issue or claim. If our State system or jurisprudence permits issues to be ignored or disregarded by lower and higher courts and then relegated to a procedurally dead issue, then it is a sad day for the citizens of Wisconsin.

B. Gorak's current petition was improperly dismissed.

All of Gorak's habeas petition claims were undeniably raised in the 2015 sentence modification motions and the subsequent appeal. However, not all of the claims or arguments were raised prior to that litigation and Gorak's brief presented his sufficient reasons for not raising them earlier.

Nonetheless, both the circuit court and the appeals court determined that at the very least, issue Five and, arguably, issue One, were required to be raised through habeas corpus or an action against the DOC.

Where the circuit court and the appellate court determined that they either lacked authority to rule on an issue or that the venue was not appropriate to present the issue, this cannot bar later presentment. It was then an error of law for them to be dismissed without consideration.

Conversely, if their mere presentment in those venues is deemed to constitute a procedural bar pursuant to *Escalona-Naranjo* and *Witkowski*, then any further arguments to the contrary are moot. However, the habeas court's failure to address the motion to vacate, which has nothing to do with these other procedural bars, must be addressed separately by this Court.

1. Gorak's current petition was improperly dismissed.

a. Claim One: All periods of extended supervision should be served after all periods of confinement.

b. Claim Two: All periods of confinement must be served before any period of supervision, regardless of whether the sentences are consecutive or concurrent.

c. Claim Five: Gorak's extended supervision on Count Two will impermissibly run concurrent with his federal supervision, by operation of Wisconsin and federal law.

Respondent contends each of these grounds that were admittedly raised in the 2015 appeal, were disposed of as procedurally barred under *Witkowski*. [Resp. Br. 12-14]. Gorak disagrees. The appellate court broke the appeal into five main issues [App. 18-21]. The first two issues are material to Gorak's claims, but only Issue II relates to the three claims above.

Issue I. Illegally Split Sentence. (Gorak will address Issue I later herein.)

Issue II. Whether the Current Sentence Structure Violates Statutes of Code.

Issues III, IV, and V are not germane to the present discussion.

There was a distinction made by the appellate court that respondent does not wish to give any credence to. Respondent avers that because the Court procedurally barred Gorak's argument that his sentence structure violated State statutes or Codes, all of his claims are now barred. **Not so.**

At ¶ 13 of the appellate decision, [App. 20], the Court held:

> *"To the extent that Gorak is actually challenging the manner in which the Department of Corrections is implementing his sentences, his remedy is an action against the Department, not a motion for sentence modification. See, e.g.* ***State ex rel. Darby v. Litscher****, 2002 WI App 258, ¶ 1, 258 Wis. 2d 270."*

This determination would not have been made unless the Court recognized that there was an obvious distinction between Gorak's attack of the legality of the sentence structure imposed by the circuit court and his attack of the sentence administration by the DOC. It is evident the Court saw the difference between the two types of attacks and wanted Gorak to understand that his intent to assail the administration of his sentence by the DOC was improperly raised in the sentence modification motion.[4]

The procedural history of this case bears out this distinction and what Gorak compares to the notorious "shell game." Each time Gorak made any attempt within a motion to challenge the DOC's computation of his sentence, the circuit court indicated that it had no authority or jurisdiction to tell the DOC how to compute or administer a sentence and directed him to address his computation challenges by habeas corpus [R. 4:76; 86; 100].

Yet, when he made his habeas challenge in the appellate court [R. Supp. 101-106], it was procedurally dismissed without addressing the merits, [R. Supp. 107-108], where he included one claim regarding pre-sentence confinement credit that had been raised in the 2008 appeal [App. 24-27]. However, as there was no briefing, he was unable to argue that an intervening change in law entitled him to have that issue addressed.[5]

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[4] This holds truer given the Court implied at ¶ 12, n.8 that the sentence modification motion was in fact a WIS. STAT. § 974.06 motion, which can only be used to challenge constitutional claims in a conviction or sentence, not computation issues [See App.19].

[5] See *Mullen v. Coolong*, 153 Wis. 2d 401, 410. "The law of the case doctrine allows [ ] reconsideration of an appellate order in certain circumstances, for example, if the controlling authority has since made a contrary decision of the law applicable to such issues." Four months after the unpublished 2009 appellate decision affirmed the denial Gorak's pre-sentence credit motion, the published appellate decision of *State v. Brown*,

In any event, when Gorak next filed his sentence computation challenge by habeas corpus in the county of his incarceration as per Wis. Stat. § 801.50(4)(b), surprise, he was re-directed to file that challenge in the county of conviction pursuant to Wis. Stat. § 801.50(4)(a). Then he files the instant petition and, surprise again, no pea under that cup either because he already raised these issues in the circuit and appellate courts who would not rule on the computation issues. Yet Gorak is to blame and lose his only chance to finally have the remaining merits of his claims addressed because he has consistently followed the directions of the courts? This is wrong!

The ¶ 13 holding by the Court, which mimics the direction from the sentence modification circuit court, [R. 4:108], and the above earlier circuit court decisions, is the strongest supportive weapon in Gorak's argument arsenal. Conversely, unbeknownst to him, it may be the death of his claims.

Gorak begs this Court to answer this question once and for all to save future pro se litigants and the courts, years of litigation of unresolved issues under the mistaken belief that the law allows for what the courts say.

> *If a pro se litigant presents an issue before a circuit or an appellate court that admittedly lacks the jurisdiction or authority to consider the issue, either because the motion or action is improperly titled or the venue is improper for any reason, are those issues that cannot or were not considered or ruled upon deemed to be dismissed without preclusive prejudice as Gorak asserts or are they forever barred under either Witkowski or Escalona-Naranjo doctrines?*

2010 WI App 43, 324 Wis.2d 236 reached an opposite conclusion and held: ("Until the other sovereignty has acted on whether to grant credit, the Wisconsin sentence is the only outstanding sentence against which the court can grant credit. Therefore, the question of "double credit" is not ripe. The Wisconsin Court, as the only court this issue is before, should grant [it]... [The defendant] is due the benefit of the credit earned and that credit must be granted in Wisconsin").

a. Claim One was raised in the 2011 vacate motion, the 2012 habeas petition reconsideration motion, and the 2015 sentence modification motion and appeal thereof, but was not specifically addressed in the decisions of the circuit court. The 2016 appellate court ruled that Gorak's statutory arguments were procedurally barred, but advised that his remedy was an action against the Department as to the implementation aspect [App. 20].

b. Claim Two was raised in the 2011 vacate motion, the 2012 habeas petition reconsideration motion, and the 2015 sentence modification motion and appeal thereof, but was not specifically addressed in the decisions of the circuit court. The 2016 appellate court ruled that Gorak's statutory arguments were procedurally barred, but advised that his remedy was an action against the Department as to the implementation aspect [App. 20].

c. Claim Five was raised only in the 2015 sentence modification reconsideration motion and appeal thereof. Gorak could not possibly have raised it any earlier, because he was not apprised of the DOC's intent to disregard the judgment and run the Count Two E.S. term concurrently with the federal supervision term [R. 4:216-223]. The circuit court addressed it in the decision, but only to the extent that it lacked jurisdiction over the question [R. 4:108]. The 2016 appellate court decision did not specifically address this claim, except to advise Gorak his remedy to the sentence "implementation" issue was an action against the Department [App. 20].

Respondent's brief at page 14 claims that "this Court resolved this claim, too, last year." However, respondent does not cite to where the decision "disposes" of Claim Five, because the Court did not. If no other issues survive the procedural bars, this issue alone must be remanded.

Regarding appellate issue I, the Court held that the issue was not barred by *Witkowski*, because the issue raised in the prior 2008 appeal was whether the Count Two sentence was illegally split and the present claim was whether the 2011 amended judgment caused the count four sentence to

become illegally split [App. 18]. This finding by the Court that the issue was not barred was reached even though this specific ground was presented in the 2011 appellate habeas petition that was summarily dismissed based on the *Witkowski* procedural bar [R-Supp. App. 105;107;119]. Gorak's petition did clarify that the count four split sentence argument had not been raised in the previous 2008 appeal [Id]. No briefing was ordered in that case.

Gorak therefore contends that contrary to respondent's position, just because an issue may have been presented to a court, it is not automatically barred, like in a situation such as this where the merits of the claim were never reached. See Wis. Stat. § 974.06(4), in relevant part:

> Any ground finally adjudicated or not so raised, [ ] in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

Here, the Court can overlook or excuse Gorak's either not raising or previously raising his issues by finding he has shown sufficient reason in having done so or in not doing so.

2. Claim Five is "new" and he has shown sufficient reason.

> Even if any claims are deemed "new," Gorak HAS established a "sufficient reason" for not raising those claims in any of his earlier cases [Resp. Br. 14].

Claim Five, as discussed above and at pages 17 and 29 of his initial brief, could **not** have been raised prior to Gorak's return to DOC custody in 2015, because the DOC did not provide him with any documentation indicating that they intended to disregard the judgment of conviction that imposed Count Two consecutive to the Federal sentence, which included a 36-month supervision period, commence his State Count Two supervision upon his release from WI custody in 2018, and run it concurrently with the Federal supervision term [R. 4:10-12; 49; 214; 216; 222].

Therefore, the **Claim Five** issue was never decided, resolved, or disposed of by either the circuit or appellate courts and must be considered.

Appellate Issue II: Respondent's introduction asserts that last year, "Gorak again raised claims in this Court regarding his allegedly 'illegal sentence structure/administration.' Those claims, framed as a 'motion for sentence modification,' were virtually identical to those he raises in his current petition. Last year, this Court held that those claims were procedurally barred. This year, the Court should do the same..." [Resp. @ 1].

This statement is facially erroneous and intentionally misleading, because the Court only found that the argument concerning sentence structure statutory violations was procedurally barred. [APP:19, ¶12]. The Court went on to hold in the very next paragraph that, "To the extent that Gorak is actually challenging the manner in which the [DOC] is implementing his sentences, his remedy is an action against the [DOC], not a motion for sentence modification. See e.g., ***State ex rel. Darby v. Litscher***, 2002 WI App 258, ¶1..." [APP:20, ¶13].

Contrary to respondent's assumption, Gorak does not abandon his split sentence claim on this appeal [Resp. @ 11]. Gorak conceded that he had previously raised the claim that count four was *imposed* as an illegally split sentence, but the 2015 appellate decision did not address his assertion that the DOC should also be prohibited from *administering* a sentence in a split manner. The Appellate Court only decided the "circuit court did not impose a sentence with the prohibited structure described in ***Bagnall***." [APP:18, ¶11]. Gorak is entitled to have his good faith argument for an extension of the ***Bagnall*** and ***Goyer*** doctrines[6] addressing only imposed sentences, additionally applied to the computation of a sentence by the DOC in an impermissibly split manner [See Petitioner Brief at page 32].

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[6] **State v. Bagnall**, 61 Wis.2d 297, 312 (1973); **Goyer v. State**, 26 Wis.2d 244, 249 (1965).

Gorak seeks a specific appellate decision addressing this aspect of his claim. To wit: if a sentencing court cannot impose a split sentence, can the DOC administer a State sentence such that a portion is to be served consecutively and a portion is to be served concurrently with another sentence it was imposed to be served wholly consecutive to?

Conclusion

In consideration of the foregoing, Petitioner / Appellant Gorak moves this Court to remand his petition for writ of habeas corpus back to the circuit court for proper consideration of the surviving issue(s).

Submitted this 18th day of September 2017, by;

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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 font or __X__ proportional serif font.

The length of this brief is ____ pages [if a monospaced font is used] or __2,923__ words [if a proportional font is used].

Dated: September 18, 2017.

Signature: G. S. Gorak

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