STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

Case No. 2017AP2206

State ex rel.
DRAZEN MARKOVIC,
Petitioner-Respondent,

v.

JON E. LITSCHER,
Respondent-Appellant.

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OF WISCONSIN

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

PETITIONER-RESPONDENT'S BRIEF

Drazen Markovic
Petitioner-Respondent, Pro Se

Stanley Correctional Institution
100 Corrections Drive
Stanley, Wisconsin 54768

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the briefs fully set forth the facts and the legal authorities governing this court's review of the certiorari court's decision of reversing the final administrative decision and order of Respondent-Appellant. Markovic believes that publication is appropriate in this case because this court's decision is likely to have an impact on other prisoners who are in the same situation as Markovic is in.

STATEMENT OF THE CASE

This appeal by the DOC arises from the certiorari court's ruling that the DOC had no legal statutory authority to withhold and be a debt collector for unpaid restitution on a completed and discharged sentence pursuant to Wis. Stat. §973.20(1r).

Markovic agrees that the statutes discussed in the state's brief implements the Wisconsin Constitution's demand that Wisconsin "shall ensure that crime victims have...the... privilege [] and protection []...[of] restitution," Wis. Const. art. I, §9m. However, the DOC failed to enforce these statutes while Markovic was incarcerated under the Judgment of Conviction (JOC) in Case #95CF57. Because Markovic completed and discharged from this sentence in December of 2002, the DOC lost that privilege and protection by the Wisconsin Constitution and statutes. The DOC does not have the liberty to enforce something that the victim did not do after the completion and discharge of this sentence to protect their interest.

The circuit court in the certiorari review properly ruled that Wis. Stats. §§302.01(8)(b) and 301.32(1) does not give the DOC the legal statutory right to withhold and be a debt collector on unpaid restitution on a completed and discharged sentence, even if Markovic is still incarcerated under a different JOC. The DOC has no authority over a person or any

debts he might still have once he has discharged from his DOC. The DOC only has authority over a person and his debts he might still have if that person is still actively under a DOC and has not discharged yet from that DOC.

In addition, the DOC did not consider withholding and collecting the unpaid restitution on this completed and discharged sentence until the implementation of Act 355 and Wis. Stat. §973.20(11)(c). (R.10:4-7.) The state claims on page 3 of their brief (footnote), that Act 355 and Wis. Stat. §973.20(11)(c) was not in effect when the DOC started collecting unpaid restitution on this completed and discharged sentence. That is unequivocally false. Act 355, which deals with the restitution statute, and Wis. Stat. §973.20(11)(c), which was added to the restitution statute was enacted on April 11, 2016, and went into effect on July 1, 2016. Soon after it went into effect, along with the new implementation of the Wisconsin Intergrated Corrections System (WICS) program, the DOC started collecting unpaid restitution on a sentence Markovic completed and discharged from in 2002, beginning on November 1, 2016. Act 355, Wis. Stat. §973.20(11)(c) and the new (WICS) database was the main reason the DOC started collecting unpaid restitution on a completed and discharged sentence from Markovic and many other inmates in the DOC system.

STATEMENT OF FACTS

On December 20, 1995, Markovic was convicted of theft by fraud in Waukesha County case no. 95CF57. (R.10:2.) He received a sentence of seven years of incarceration and was ordered to pay $4,214.20 in restitution, $70 in victim/witness surcharge and $20 in court costs. (R.10:2.)
Markovic completed and discharged from this case in December of 2002. He is still in prison on another sentence, Milwaukee County Circuit Court case no. 94CF4720 which ran concurrent to 95CF57. (R.10:2.)

In November 2016, the DOC started to withdraw and collect 50% of Markovic's prison wages and gift money for the unpaid

restitution owed in case no. 85CF57. Markovic wrote several letters to the business office at Stanley Correctional Institution ("SCI") contesting the withdrawals. (R.10:22-29.) On November 14, 2016, Ms. Hauser, Financial Program Supervisor, wrote back to Markovic, explaining that Corrections was authorized to use prisoner's funds to pay restitution and obligations reduced to judgment. (R.10:31.) She also said she had verified there was no civil judgment filed in this case. (R.10:32.)

On December 19, 2016, Markovic filed an inmate complaint through the ICRS alleging Corrections had no authority to collect restitution on a completed and discharged case. (R.10 at 36-38.) the inmate complaint examiner spoke with a Financial Specialist, Ms. Geissler, who contacted the Cashier's Unit. The Cashier's Unit stated that on discharged cases the debt is still owed and will still be collected on as long as the case is "OPEN" in the WICS database. She said inmates need to contact the court if they feel they shouldn't have to pay on the case. The inmate complaint examiner also noted there had not been a civil judgment filed in the criminal case and that money was still owed. Markovic was told to contact the court in regards to the issue. The complaint was recommended to be dismissed. (R.10:40.) The Warden dismissed the complaint on December 29, 2016. (R.10:42.)

Markovic filed an appeal to the corrections complaint examiner. (R.10:44-45.) He claimed that pursuant to Wis. Stat. §973.20(1r), after the case is completed and discharged, the restitution was enforceable in the same manner as a judgment in a civil action. He further claimed that because the victim never commenced a civil action against him to collect the restitution, the restitution order should have been terminated. (R.10:45.) The correction complaint examiner found the institution response had been reasonable and recommended the appeal be dismissed. (R.10:48.) The recommendation to dismiss the appeal was accepted as the decision of the Secretary on January 23, 2017. (R.10:49.).

On February 23, 2017, Markovic filed a timely petition for a writ of certiorari challenging DOC's decision. (R.1.) The circuit court reversed DOC's decision in a September 15, 2017 decision and order. (R.18:1-9.) The State on behalf of the DOC, filed a timely Notice of Appeal on November 1, 2017, and an amended notice two days later. (R.20;21.) The State's brief in this appeal was filed on January 8, 2018. Markovic's Response brief now follows.

ARGUMENT

I. AFTER A DEFENDANT HAS COMPLETED HIS SENTENCE AND STILL HAS UNPAID RESTITUTION, THE RESTITUTION ORDER IS CONVERTED TO A CIVIL JUDGMENT PURSUANT TO WIS. STAT. §973.20(1r)

Despite Markovic completing this sentence in December of 2002 (16 years ago), this case is fundamentally a simple one. The outcome is dictated by answering one question: Is the criminal restitution order entered by the circuit court on December 20, 1995 converted to a civil judgment for any remaining restitution still owed after the completion and discharge of a sentence pursuant to Wis.Stat. §973.20(1r)? If the answer is yes, then the DOC has no legal statutory authority under Wis.Stats. §§303.01(8)(b) and 301.32(1) to withhold and be a debt collector for any of Markovic's money for unpaid restitution on a completed and discharged sentence, even if Markovic is still incarcerated on another JOC. Any remaining restitution converted to a civil judgment can only be enforced by the victim, not the DOC. An analysis of the restitution statute, the case law, and the record commands that this Court affirms the certiorari court's decision and order.

A. Statutory Analysis of Wis. Stat. §973.20(1r) shows that unpaid restitution after the completion of a sentence must be converted to a civil judgment

Statutory interpretation begins with the language of the statute. "If the meaning of the statute is plain, we

ordinarily stop the inquiry." **Olstad v. Microsoft Corp., 2005 WI 121, P18, 700 N.W. 2d 139, 144 (citing Kalal v. Circuit Court for Dane County, 2004 WI 58 P45, 271 Wis. 2d 633, 663, 681 N.W. 2d 110, 124).** The Court assigns the words in the statute their common, ordinary, and accepted meaning. **Id.** The Court also considers the context and structure of the statute. **Id., P46.** The Court interprets statues to avoid absurd or unreasonable results and to give effect to every word in the text. **Id.** Consequently, a statute is not ambiguous simply because it does not say what a party wants it to say. Moreover, "a statute is not ambiguous simply because the parties disagree as to its meaning." **Preston v. Meriter Hosp., Inc., 2005 WI 122, P22, 700 N.W. 2d 158, 166 (2005).**

1. The language of the restitution statute is clear on its face - Markovic's criminal restitution order is converted to a civil judgment after the completion and discharge of a sentence.

"Under the plain meaning rule, courts do not resort to legislative history to uncover ambiguities in a statute clear on its face." **Seider v. O'Connell, 2000 WI 76, P49, 236 Wis. 2d 211, 235, 612 N.W. 2d 659, 671 (2000).** See also, **Kelly Co. v. Marquardt, 172 Wis. 2d 234, 247, 493 N.W. 2d 68, 74 (1992).** Here, the language is clear: Markovic's criminal restitution order is converted to a civil judgment for any remaining unpaid restitution after the completion of a sentence.

Restitution is governed by Wis.Stat. §973.20. **State v. Evans, 2000 WI App. 178.** The language of Wis.Stat. §973.20 is controlling this case.

Wis.Stat. §973.20(1r) states:

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

This language contemplates a civil judgment under §806.10. Section §806.10 is the civil judgment provision of the Wisconsin rules of civil procedure. Wis.Stat. §973.20(1r)

suggests a judgment derived from a restitution order retains its nature as restitution, but that the victim may enforce the judgment by using civil enforcement mechanisms. (e.g. attachment or garnishment) or by seeking remedial sanctions for contempt. So the language of the restitution statute is clear on its face - any restitution for a crime of which Markovic has completed should be transformed into a civil judgment the victim may enforce, not the DOC. How can the DOC collect unpaid restitution after the completion of a criminal judgment and yet maintain criminal jurisdiction over such a judgment and defendant? The two concepts are mutually exclusive. To do so would arguably violate Markovic's due process rights. See also, **Wis.Stat. §973.09(3)(b)** which shows that unpaid restitution must be a civil judgment under Wis. Stat. §806.10. The fact that the legislature did not expressly state that unpaid restitution "becomes" or "is converted" to a civil judgment is of no merit. Indeed, it would have been odd for the legislature to use such language. Not only would such language be imprecise, it would be ambiguous. People would not know what the legal effect of terms like "conversion" or "becomes" would mean as they relate to civil judgments. That is not the vernacular of the law. Wisely, the legislature used language extant in the law: "civil judgment" and "in the same manner as a judgment in a civil action." The legislature also refers readers of the statute to well known rules that govern civil judgments §806.10. The statute references no other "basket" into which the judgment may be put. Thus, the legislature provides readers of the statute clear language to follow. Accordingly, the statute §973.20(1r) tells you all you need to know - unpaid restitution after the completion of a sentence are civil judgments that the victim may enforce, not the DOC.

Similarly, the legislature did not use words to make a judgment derived from §973.20(1r) non-dischargeable or non-negotiable. Legislature omission of such qualifying language shows that the legislature meant to have judgments

derived from unpaid restitution by a civil judgment under §806.10. "It is presumed that the legislature is cognizant of what language to include or omit when it enacts laws." **Town of Sheboygen v. City of Sheboygen, 2001 WI. App. 279, P9, 248 Wis. 2d 904, 910, 637 N.W. 2d 770 774.** The "...legislature's intent is expressed in the statutory language." **Peterson v. Volkswagen of America, Inc., 2005 WI 61, P19, 281 Wis. 2d 39, 51 697 N.W. 2d 61, 66 (citing Kalal, 2004 WI 58, P43).**

2. The context and structure of the statute are clear - Markovic's criminal restitution judgment is converted to a civil judgment after the completion of a sentence.

Section 806.10, entitled, "Judgment and lien docket," states:

> At the time of entry of a judgment directing in whole or in part the payment of money, or a judgment naming a spouse under and upon payment of the exact amount of the fee prescribed in the clerk of circuit court shall enter the judgment in the judgment and lien docket, arranged alphabetically...

The legislature's repeated reference to civil judgments in the statute is bolstered by the legislature's cross reference to a civil statute. Section 973.20 refers the reader to §806.10(1), which is the civil statute governing the enforcement of civil judgments. this cross reference confirms that the judgment described in §973.20(1r) is a civil judgment after the completion of a sentence.

If the legislature had intended for special treatment of civil judgments arising from restitution, it could have done so - it did not. Instead, the legislature counted on the pre-existing civil system. Moreover, §806.10 is silent regarding civil judgments entered for unpaid restitution. Such judgments are treated like any other civil judgment under §806.10. Thus, Markovic's criminal restitution judgment is converted to a civil judgment after the completion of a sentence.

The DOC and the Stanley Correctional Institution claims that they can withhold and collect Markovic's money for unpaid

restitution on a completed sentence. There reasoning is that "WICS" a software program that the DOC created says that Case #95CT57 is "OPEN" and that I "OWE". If open and I owe, they can collect it even after the completion of a sentence. (R.10:42.) If the DOC and Stanley Correctional Institution is correct, then §973.20(1r) is rendered meaningless. If the criminal restitution judgment entered by the circuit court on December 20, 1995 is not converted to a civil judgment for unpaid restitution on a completed and discharged sentence, but ongoing criminal restitution, why does §973.20(1r) exist at all? The Court could simply extend probation or a sentence until the restitution obligation is satisfied. If a criminal restitution judgment for unpaid restitution is not converted to a civil judgment after the completion of a sentence, but held as criminal restitution, why bother with §973.20(1r). Consequently, the statutory maxim that prohibits an interpretation that eliminates the meaning of other statutory language or is absurd shows that the DOC's interpretation that unpaid restitution after the completion of a sentence remains criminal restitution and that they can collect because "WICS" says its "OPEN" and you "OWE" cannot be correct. See **Kalal, 2004 WI 58, P46** (citations omitted). To interpret §973.20(1r) that they can collect on unpaid restitution after the completion of a sentence as the DOC was doing is absurd because it creates a new type of judgment and is inconsistent with other statutory provisions. See **Kalal, 2004 WI 58, P46** (citations omitted)("statutory language in interpreted in the context in which it is used; not in isolation but a part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid unreasonable results.").

Furthermore, when there is doubt as to the meaning of a criminal statute, courts should apply the rule of lenity and interpret the statute in favor of the accused. **State v. Jackson, 2004 WI 29, P12 270 Wis. 2d 113, 120, 676 N.W. 2d 872, 875 (citing State v. Morris, 108 Wis. 2d 282, 289, 322 N.W. 2d 264, 267 (1982); State v. Wilson, 77 Wis. 2d 15, 28,**

252 N.W. 2d 64, 70 (1977). Thus any interpretation of §973.20(1r) that imposes further criminal punishment such as continued restitution after a completed sentence cannot stand.

B. Wisconsin Stats. §§303.01(8)(b) and 301.32(1) does not allow the DOC to withhold and collect restitution on a completed and discharged sentence

Wis. Stat §303.01(8)(b) states in relevant part that the DOC shall distribute an inmate's earnings for statutory surcharges and "for other obligations either acknowledged by the inmate...in writing or which have been reduced to judgment that may be satisfied according to law." The State argues that "other obligations...reduced to judgment encompasses restitution citing **State v. Baker, 2001 WI App 100, 243 Wis. 2d 77, 626 N.W. 2d 862.** The State claims that **Baker** allows the DOC to withhold and collect unpaid restitution on a sentence Markovic has already completed and discharged from in 2002, because he is still incarcerated in the DOC system on a different conviction. If that's the case, the State's reasoning that you can collect on unpaid restitution on a completed and discharged sentence, even if you are now incarcerated on a different DOC gives the DOC unlimited authority to collect any unpaid restitution at anytime even 50 years from now if they chose to do so. That is absolutely absurd!

Under Wis. Stat. §973.20(1r), only the victim and not the DOC has the authority to collect the unpaid restitution after the sentence has been completed and discharged.

As stated on page 5 of this brief, Wis. Stat. §973.20(1r) provides in relevant part:

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

The Wisconsin Supreme Court has interpreted Wis. Stat.

§973.20(1r) to mean that, upon completion of probation, the restitution order becomes a civil judgment. See **Huml v. Vlazny, 293 Wis. 2d 169, 188 (2006).** The Wisconsin Supreme Court in **Huml v. Vlazny** , also concluded the more reasonable interpretation of the phrase "in the same manner as a judgment of conviction in a civil action" in Wis. Stat. §973.20(1r) is that the resulting judgment is a civil judgment.

The DOC's position that they can collect for unpaid restitution after the completion and discharge of a sentence is further undermined by **State v. Davis, 127 Wis. 2d 486, 381 N.W. 2d 333 (1986).** Thelmer Davis was placed on probation for 5 years and ordered to pay restitution for committing welfare fraud. **Id. at 487-88, 381 N.W. 2d 333.** Three times the circuit court extended Davis' probation because restitution remained unpaid. **Id. at 489-91, 381 N.W. 2d 333.** The Wisconsin Supreme Court explained the circuit court's decision to extend Davis' probation was an erroneous exercise of discretion because it effectively transformed the criminal justice system into a collection agency "to collect what eventually became no more than a civil debt." **Id. at 499.** Davis, therefore, stands for the proposition that once the penal and rehabilitative purposes of restitution have been served, only a civil debt remains.

In **Huggett v. State, 83 Wis. 2d 790, 266 N.W. 2d 403 (1978),** the Wisconsin Supreme Court noted that the criminal justice system should not be employed to supplement a civil suit or as a threat to coerce the payment of a civil liability or to perform the functions of a collection agency. **Id. at 803-04 (citing State v. Scherr, 9 Wis. 2d 418, 424, 101 N.W. 2d 77 (1960)).** If the DOC is allowed to collect for unpaid restitution on a completed and discharged sentence, it turns the Wisconsin prisons into both a debtors' prison and collection agency. Debtors' prisons are unlawful in this country, and being a modern-day collection agency is not part of the DOC's charter or part of and rehabilitation mission.

"Restitution serves the dual purposes of making the victim whole and rehabilitating the defendant." **Huml v. Vlazny, 2006 WI 87, ¶38, 293 Wis. 2d 169, 190, 716 N.W. 2d 807, 817 citing State v. Sweat, 208 Wis. 2d 409, 561 N.W. 2d 695 (1997).** However, "once the penal and rehabilitative purposes of restitution have been served, only a civil debt remains." **Id. at ¶43, citing State v. Davis, 127 Wis. 2d 486, 381 N.W. 2d 333 (1986)** and **Huggett v. State, 83, Wis. 2d 790, 206 N.W. 2d 403 (1978).**

Moreover, "restitution in a criminal case is a remedy that belongs to the state, not to the victim." **Id. at ¶44.** "termination of probation, however, signals the state's disavowal of any penal or rehabilitative interests." **Id.** Thereafter, only the goal of compensating the victim remains. This is an objective adequately accomplished by entry of a civil judgment, which can be enforced through civil enforcement mechanisms.

The certiorari court noted that in **Baker,** an inmate was incarcerated under a Judgment of Conviction ("JOC") that was at issue in that case. Here, Markovic served the sentence in Case #95CF57. Therefore, he is not incarcerated under the JOC in Case #95CF57. However, he is still in prison under a JOC in another case.

Baker should not be read to mean that an order to pay restitution, as part of a JOC, is a judgment of conviction. As long as an inmate is incarcerated under the JOC, the DOC has authority to collect restitution that is ordered as part of that JOC. However, when an inmate completes and discharges from a sentence, any unpaid restitution has to be reduced to a civil judgment in order for a victim to collect. If this court would read **Baker** to mean that an order for restitution in the JOC is a judgment for restitution, there would be no need to reduce an unpaid restitution to a civil judgment under Wis. Stat. §973.20(1r) after the sentence is completed because the victim would be able to collect on the JOC. Moreover,

the certiorari court noted that the JOC in this case states that restitution is a condition of the sentence. (R.10 at 2.) Any condition expires when the sentence is served. Thus, this is another reason why any unpaid restitution had to be reduced to a civil judgment.

The certiorari court did not rely on **Baker** as the controlling case that the DOC does not have legal statutory authority to withhold and collect unpaid restitution on a completed and discharged sentence. The certiorari court only wanted to distinguish **Baker** with Markovic's case. **Baker** was still incarcerated under a JOC that was at issue in that case. Here, however, Markovic already completed and discharged from the sentence in Case #95CF57 that is at issue here. The controlling case in the certiorari court's decision that the DOC has no legal statutory authority to collect on unpaid restitution on a completed and discharged sentence is clearly stated in **Huml v. Vlazny.** This is the controlling case that the certiorari court relied upon and that this court should be legally obligated to conform to.

In addition, the DOC argues that Wis. Stat. §301.32(1) provides authority to collect restitution in discharged cases. Wis. Stat. §301.32(1) states that prisoner's money can be used to pay the applicable surcharges or "for the benefit of the prisoner." DOC argues that paying down an inmate's legal debt/restitution is "for the benefit of the prisoner." This section does not directly address the DOC's authority to collect unpaid restitution on a discharged sentence. Moreover, the certiorari court and Markovic question whether payment of an uncollectible debt is for the benefit of an inmate. Payments for an uncollectible civil debt under Wis. Stat. §301.32(1) is not for the benefit of an inmate. It is undisputed that Markovic served his seven year sentence in Case #95CF57, and that there was no civil judgment entered in this case. (R.10:32,50.) Wis. Stat. §301.32(1) is not being utilized properly. It's only being utilized when it's in

the best interest of the DOC, not the victim, because if the DOC had the concern of the victim, they would have collected the unpaid restitution years ago when they had the legal statutory authority.

The DOC waited until November of 2016 to start collecting unpaid restitution that was ordered by the sentencing court back in December of 1995. (R.10:2.) The DOC did not consider this unpaid restitution that was owed in this case until the enactment of Act 355, the added provision of Wis. Stat. §973.20(11)(c), which went into effect on July 1, 2016 and the DOC's implementation of the new WICS software system. Once the new software system went into effect, the DOC realized that they dropped the ball and messed up in not collecting unpaid restitution on this discharged sentence and other discharged sentences.

It must be noted that there is no language in Wis. Act 355 which states such newly created amendment to Wis. Stat. §973.20 shall apply retroactively to those that already discharged from their sentence, even if they are still incarcerated on a different sentence, nor could it, because it would violate Due Process and implicate the Double Jeopardy Clause of both the United States and Wisconsin Constitutions. The language in Wis. Stat. §973.20(11)(c) "If a defendant who is in a state prison or who is sentenced to pay restitution...cannot mean that this statute is to apply retroactively to those that already discharged from their sentence because the following words state, "the court order shall require the defendant..." and court orders are issued by the court and not the legislature, and defendants have the legitimate expectation of finality in a sentence, especially in Markovic's case at issue here. Markovic discharged from this sentence in 2002 (16 years ago). It was not a mere coincidence that the DOC decided to collect on this unpaid restitution on this discharged sentence right afte Act 355 and the new provision of Wis. Stat. §973.20(11)(c) was enacted. All this shows is the malicious intent of the

DOC to intentionally misconstrue Act 355 and Wis. Stat. §973.20(11)(c) as a reason why they could collect unpaid restitution on a completed and discharged sentence. (See Act 355 and Wis. Stat. §973.20(11)(c) in R.10:4-7 for this Court's reference).(See also R.1 at 4-6 regarding Act 355).

The DOC also used the new WICS software system in denying Markovic's many complaints that the DOC had no statutory authority to collect on unpaid restitution on a discharged sentence by stating that, as long as WICS says this case is "OPEN" and you still owe, the DOC will continue to collect on this unpaid restitution. (R.10:42) It didn't matter to them that they new Markovic already discharged from this sentence (R.10:33.) The DOC just resurrected there penal and rehabilitative interests on a discharged sentence. The DOC has no power to do that, because, as stated on page 11 of this brief, once you complete and discharge from a sentence, it signals the state's disavowal of any penal or rehabilitative interests.

Also, the State claims that there are other options that exist to collect unpaid restitution such as (1) DOC could certify the obligation to DOR under Wis. Stat. §973.20(10(b); (2) the district attorney could pursue contempt proceedings under Wis. Stat. §973.20(1r) and Wis. Stat. ch. 785 or (3) a victim could collect in a civil action under Wis. Stat. §973.20(1r). This court should not entertain the State's rambling about what ifs' and other possibilities that are not relevant to this case. We are not talking about what the District Attorney, DOR, the victim, or any other department can do. We are talking about what the DOC can and can't do.

Wis. Stat §§303.01(3)(b) and 301.32(1) does not allow the DOC to collect the unpaid restitution on a completed and discharged sentence, even if Markovic is still incarcerated on another JOC. Because the DOC failed to enforce these statutes when Markovic was still under the JOC in Case #95CF57, the DOC lost the constitutional demand to "ensure that crime victims have...the...privilege[] and protection[]...[of] restitution," under Wis. Const. art I, §9. The DOC cannot

withhold and collect unpaid restitution on a completed and discharged sentence because any remaining unpaid restitution is converted to a civil judgment the victim may enforce, not the DOC, pursuant to Wis. Stat. §973.20(1c).

II. IF THE DOC HAD NO LEGAL STATUTORY AUTHORITY TO COLLECT UNPAID RESTITUTON ON MARKOVIC'S DISCHARGED SENTENCE, THE CIRCUIT COURT CAN ORDER THE DOC TO REIMBURSE THE RESTITUTION OF THE CERTIORARI PROCEEDING IN THIS INSTANCE

The Court of Appeals certiorari review generally focuses on the actions of the administrative agency, rather than the decision of the circuit court. See **State ex rel. Whiting v. Kolb, 158 Wis. 2d 226, 233, 461 N.W. 2d 816, 819 (Ct.App.1990).** However, the Court of Appeals de novo review also allows the court to independently determine whether the remedy devised by the circuit court exceeded the scope of its certiorari authority.

The state argues that monetary damages are not available in a certiorari action and that the court can not compel the DOC to perform a specific act, such as reimbursing an inmate citing **Coleman v. Percy, 86 Wis. 2d 336, 341, 272 N.W. 2d 188 (Ct.App. 1978), aff'd, 96 Wis. 2d 578, 292 N.W. 2d 615 (1980) and State ex rel. Richards v. Leik, 175 Wis. 2d 446, 455, 499 N.W. 2d 276, 280 (Ct.App. 1993).**
The **Coleman** court concluded that "[d]amages may not be awarded on certiorari," in part because "[t]he return to a writ of certiorari is merely a certification of the record of the proceedings to be reviewed." **Coleman, 86 Wis. 2d at 341.** The relief requested in **Coleman** was $25 for each day that the inmate spent in prison past his contractually guaranteed parole release date. **Id. at 339.** The relief requested in **Richards** was an order directing the DOC to transfer an inmate to a medium security prison, **Richards, 175 Wis. 2d at 449.** These cases, however, are not on point with Markovic's case. In **Coleman,** no money was actually illegally taken from him by the DOC. He was seeking money damages for pain and

suffering. In **Richards,** no money was actually illegally taken from him either by the DOC. He only requested the court to order the DOC to move him to a medium security prison.

The relief requested by Markovic is quite different from the relief in **Coleman** and **Richards.** Markovic is not asking for money damages/additional damages such as pain and suffering or to be moved to another medium security prison. Markovic is only requesting that he be reimbursed for the money that was illegally taken from his prison account by the DOC, nothing more, nothing less.

The relief requested by Markovic is a direct result of the DOC's unauthorized deductions. Markovic understands that the remedy in certiorari is extremely limited. generally, the remedy should only give you what you would have had if the incident giving rise to the complaint had never happened. A common example is a successful complaint for lost property. You might be entitled to new property, or to be <u>reimbursed</u> for the value of the lost property. But you would <u>not</u> be entitled to additional damages for pain and suffering. Markovic is only asking to reimburse him for what he would have had if the incident giving rise to the complaint had never happened (the illegal taking of Markovic's gift money and prison wages for unpaid restitution on a completed and discharged sentence). That is all Markovic is asking for.

Because the certiorari court found that the DOC did not have authority to withhold and collect money for unpaid restitution on a discharged case, it followed that any deductions made without such authority should be reimbursed. Otherwise, there would be no ramification for the DOC's actions. The DOC could continue to illegally take Markovic's money for unpaid restitution and not worry about any repercussions. That's exactly what the DOC did here.

The people in positions of rule making authority within the DAI and DOC administrations are supposed to be highly competent and found to be fair, efficient and effective. §230.01(1). It appears to Markovic they are anything but!

Under Employee Protection, §230.80 definitions, at (1) states "Abuse of Authority means arbitrary and capricious exercise of power! §230.81/230.82 specifically demands that any employee of an agency who has knowledge of violations has a duty to bring it to their supervisors and they have to investigate it or ask another agency to investigate it. Nobody has stepped up to the plate and demanded an investigation. Further proof is, all these institution ICE investigators haven't done so either. They knew that this case was discharged but continued to illegally collect the unpaid restitution from Markovic's prison wages and gift money coming in from family. No one in this chain of command process from the bottom to the top has taken any steps. They allowed this illegal activity to take place including the Secretary of the DOC. Even the State appealing this on behalf of the DOC, knows that the DOC had no legal statutory authority to collect unpaid restitution on a completed and discharged sentence. The State is only arguing this because they have to because they represent the DOC.

The DOC's role in collecting unpaid restitution on a completed and discharged sentence is absolutely criminal in nature. Each individual involved in this matter, from Ms. Hauser, the financial program supervisor at S.C.I., Jim Schwochert, Administrator of the Division of Adult Institutions, and Jon Litscher, the Secretary of the DOC committed a criminal act ("Theft by Fraud"). Only after Markovic filed a Petition for Writ of Certiorari and exposed the DOC of their illegal activity, did he receive a letter from Ms. Hauser stating that the Division of Adult Institution (DAI) Management has decided the DOC will no longer collect on discharged cases. She told Markovic that his unpaid restitution on Case #95CF57 is closed. However, the DOC refused to reverse any withholdings already collected from November 1, 2016 to March 29, 2017 which came to a total of $615.42. This was not just a mere coincidence that the DOC had decided to stop collecting the unpaid restitution right after the

filing of the Petition for Writ of Certiorari. Why would the DOC at that juncture just stop collecting for unpaid restitution on a discharged sentence if the State and the DOC contends that they have the statutory legal authority to do so? That just would not make any sense whatsoever. The DOC didn't stop because of the kindness of their hearts. They stopped because they knew it was illegal and did not want to get caught deeper in debt with Markovic's money and other money from other inmates they were illegally collecting unpaid restitution on completed and discharged sentences. If Markovic committed this criminal act ("Theft by Fraud") Markovic would have already been charged and convicted for this crime.

Markovic informed the Business Office at G.C.I. of the discharged sentence from the get-go in a letter dated November 6, 2015. (P.10 at 22.) However, the DOC continued to illegally collect restitution in Case #95CF57 knowing that the sentence was already discharged. (P.10 at 33.)

In addition, the other cases that the State cites, **Guerrero v. City of Kenosha Hous. Auth., 2011 WI App 138, ¶10, 337 Wis. 2d 484, 805 N.W. 2d 127 and State v. Minniecheske, 223 Wis. 2d 493, 502, 590 N.W. 2d 17 (Ct.App. 1998),** is not on point with Markovic's case either.

In **Guerrero,** the claimant's public housing assistance was terminated. The claimant requested for reinstatement into the Section 8 housing program and restoration of past monthly rental subsidies. No money was ever **illegally** taken from the claimant's own money.

In **Minniecheske,** the claimant filed a Wis. Stat. §974.06 post conviction motion which permits defendants to challenge judgments of conviction when jurisdictional issues are raised or constitutional rights have been violated. By its express language, however, §974.06 only allows the sentencing court to correct the sentence as may appear appropriate. Wis. Stat. §974.06(3)(d). Further, a criminal defendant moving for relief under this section may only move the court which imposed the sentence to vacate, set aside or correct the sentence.

Wis. Stat. §974.06(1). While this statute may be a proper vehicle to remove a restitution order for the judgment of conviction, it does not authorize the trial court to award a money judgment against the State. Here, Markovic did not file a §974.06 post conviction motion to remove a restitution order from his JOC. Markovic filed a Petition for Writ of Certiorari for review of an inmate complaint (final administrative decision) and the remedy he was seeking (reimbursement of money that was illegally taken from him for unpaid restitution on a completed and discharged sentence). In addition, Markovic did not ask for money damages/additional damages as the State claims. He only asked for money that was illegally taken from his own prison account by the DOC. He is only asking for what he would have had if the incident giving rise to the complaint had never happened.

The DOC knew from the get-go that this was illegal, but they did it anyway. When they implemented the new "WICS" database, they noticed that no restitution was ever collected in many discharged cases. They knew they messed up. So, because of their mess-up, they devised bogus, baseless reasons why they could collect on unpaid restitution on discharged cases. (per Act 355, Wis. Stat. §973.20(11)(c), WICS system, §303.01(3)(b), and §301.32(1)). It was malicious, intentional, and criminal what the DOC did. The remedy Markovic is requesting and the remedy devised by the circuit court did not exceed the scope of its certiorari review because the relief is a direct result of the DOC's unauthorized deductions.

The State also claims that the remedy would be with the State Claims Board, not the certiorari court. If that is the case, what happens if the DOC is allowed to arbitrarily continue to take money that they knew was not allowed to be taken, than what remedy would be available to the inmate who doesn't have the means to file a writ of certiorari (such as paying the filing fee or having the legal mind to file a writ of certiorari). You can't just skip the whole process and go directly to the State Claims Board. This is just

another baseless argument by the State.

From day one, Markovic has asked for reimbursement of this illegal activity by the DOC, but they refused and continued to take Markovic's money. They only stopped taking Markovic's money for unpaid restitution on a discharged sentence because Markovic filed a Petition for Writ of Certiorari, which exposed the DOC of their illegal activity. Now, the State and the DOC wants to add more insult to injury stating that the certiorari court cannot order reimbursement of the money that was illegally taken from Markovic. This Court should not allow the DOC to get away with this.

Because the certiorari court ruled that the money taken from Markovic for unpaid restitution was illegal, the certiorari court's devised remedy did not exceed the scope of its certiorari authority.

CONCLUSION

Markovic respectfully requests that this Court affirms the certiorari court's decision that the DOC had no legal satatutory authority to withhold and collect unpaid restitution on a discharged sentence and affirm the certiorari court's order that the DOC reimburse the money that was illegally taken from his prison account.

Dated this 31st day of January, 2019.

Respectfully Submitted,

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CERTIFICATION

Pursuant to section 809.19(8)(d), stats., I certify that this petition conforms to the rules contained in section 809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this brief is 20 pages.

Dražen Marković

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