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STATE OF WISCONSIN,

Plaintiff,

v.

Case No's. 02-CF-2453 and  
02-CF-2455

SCOTT JENSEN AND  
SHERRY SCHULTZ,

Defendants.

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**STATE'S SENTENCING MEMORANDUM: SCOTT JENSEN, SHERRY SCHULTZ**

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The State of Wisconsin ("State"), by its attorneys, Dane County District Attorney Brian W. Blanchard and Special Assistant District Attorney Roy R. Korte, respectfully submits this memorandum in advance of sentencing of defendants Scott Jensen and Sherry Schultz on May 16, 2006.<sup>1</sup> Because the court plans to determine appropriate amounts of restitution at a separate, later proceeding, the state seeks at this time only a finding that restitution should be paid by each defendant, and the setting of a date and time for a hearing to resolve the specific amounts owed by each defendant to the Chief Clerk of the Wisconsin State Assembly, owed jointly and severally as appropriate, at which time the state will tender proposed restitution orders. The state submits that the court heard extensive evidence at trial to appreciate the large scope of the losses to the public created by the criminal conduct of the defendants, which is sufficient for all

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<sup>1</sup> Defendant Bonnie Ladwig is in different position from defendants Jensen and Schultz in many respects. The state will address her sentencing orally at the time of sentencing, consistent with the terms of the written plea agreement between the state and Ladwig already on file with the court.

sentencing purposes other than the court's determination of the precise amounts of restitution owed. Payments owed would include state money used for legal representation in this case.

### **Background**

Defendant Jensen is 45, and the married father of young children. He was 37 at the time he commenced the criminal conduct at issue in this case. He does not have any prior criminal history. He was an elected state representative between January 1992 and his forced resignation following his conviction in this case. He became Speaker of the State Assembly in November 1997. Between 1992 and his resignation, Jensen was elected to two-year terms of office in the Assembly and received an annual salary from the State, on top of per diem payments, and enjoyed broad discretion to hire, direct, and supervise public employees of the Assembly.

Jensen was found guilty at trial on each charged count: three felony counts of Misconduct in Public Office, and one misdemeanor count of Using A Public Position for An Unlawful Advantage. As the court is well aware from the detailed evidence presented at trial, between 1997 and 2001 Jensen covertly directed the activities of many state employees, including his own taxpayer-paid Capitol staff and defendant Schultz, to engage in campaign activity while those persons were employed by the state of Wisconsin and/or while using state resources. Count Three involved Jensen's misuse of state employees and resources at the Assembly Republican Caucus between February 1997 to 2001, Count Four involved Jensen's misuse of state employees and resources at his own Capitol office from 1997 to November 2000, and Count Five involved Jensen's misuse of state employees and resources for the operation of the Republican Assembly Campaign Committee, January 1997 - May 2001.

Defendant Schultz is 54, and as the state understands it she is a family member who has taken responsibility for caring for an elderly, ill mother. She was 45 when she commenced the

criminal conduct at issue here. She does not have any criminal history. Schultz took the “cover” of a legislative position in the Foti Capitol office in January 1998—while in fact she headed up fundraising for individual legislators while working at the Assembly Republican Caucus--after working in the Office of the Wisconsin Lt. Governor. Once the nature of her covert activities were publicly revealed in May 2001, defendant Jensen over the course of that summer moved Schultz out of the ARC space to other space in the Capitol, and then arranged for her to be hired at a similar salary doing similar work, only now at the Republican Party of Wisconsin, where Schultz continued to work in campaign fundraising until recently. Defendant Schultz was convicted of one count of Misconduct In Public Office for running campaign finance operations out of her state office while being paid as a state employee, at the primary direction of defendant Jensen (Count One, defendant Jensen; Count Two, defendant Schultz).

#### **I. PRINCIPLES OF LAW GOVERNING A COURT’S EXERCISE OF SENTENCING DISCRETION.**

Under the familiar sentencing standard, this court must consider the seriousness of the offenses, the character of each defendant, and the need for public protection. *See State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, ¶¶ 22-23, 678 N.W.2d 197; *McCleary v. State*, 49 Wis. 2d 263, 274-75, 182 N.W.2d 512 (1971). This court may also consider other relevant factors, including:

the vicious and aggravated nature of the crime; the past record of criminal offenses; any history of undesirable behavior patterns; the defendant’s personality, character and social traits; the results of a presentence investigation; the degree of the defendant’s culpability; the defendant’s demeanor at trial; the defendant’s age, educational background and employment record; the defendant’s remorse, repentance, and cooperativeness; the defendant’s need for rehabilitative control; the right of the public; and the length of pretrial detention.

*State v. Harris*, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984).

The weight to be given each factor is within this court's discretion. *State v. Stenzel*, 2004 WI App 181, 276 Wis. 2d 224, ¶ 9, 688 N.W.2d 20. In other words, imposition of a sentence may be based on one or more of the three primary factors after all relevant factors have been considered. *State v. Spears*, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). The trial court need not specifically address secondary factors on the record. *Id.*, 227 Wis. 2d at 507.

Under the *Gallion* framework, this court is required to:

- Provide a rational, explainable basis for each sentence imposed. *Id.* at ¶¶ 22, 39.
- Specify the objectives of the sentences on the record, which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *Id.* at ¶ 40.
- Identify the general sentencing objectives of greatest importance in this case. *Id.* at ¶ 41.
- Identify the facts of record relevant to the general sentencing objectives and explain, in light of those facts, why the particular component parts of the sentences imposed advance those objectives. *Id.* at ¶ 42.
- Identify the factors that were considered in arriving at the sentences imposed and explain how those factors fit the objectives and influence the sentencing decision. *Id.* at ¶ 43.
- Explain the general range of the sentence imposed, although not necessarily the precise number of years chosen, and need not explain why it did not impose a lesser sentence. *Id.* at ¶¶ 49-50.

## II. ANALYSIS OF SENTENCING CRITERIA

The State will address the *McCleary* factors for both defendants, distinguishing their conduct from each other as necessary, then provide separate recommendations for each defendant. The analysis is simplified by the fact that Jensen and Schultz conspired to commit the only offense of conviction for Schultz. Moreover, this shared conduct of Jensen and Schultz was

similar in kind to the additional criminal conduct of Jensen. Further, even beyond her own daily campaign finance work at Jensen's direction, Schultz participated in the unlawful operation of the ARC, and encouraged and oversaw others in doing so. Her secret job description was *purely* campaign-related, which was exceptional even among those working in the campaign-oriented Assembly Republican Caucus offices.

**A. Seriousness, Or Gravity, Of The Offenses.**

A crime can be aggravated even though it involves no violence. *State v. Wickstrom*, 118 Wis. 2d 339, 356, 348 N.W.2d 183 (Ct. App. 1984). Significantly for this case, a defendant's belief that he or she is above the reach of the law is also a factor that a court can consider in sentencing. *Wickstrom*, 118 Wis. 2d at 357.

The offenses are serious. Over the course of years they unlawfully used the public's money to consolidate their own personal power. Their culpability is to the highest degree, and the amounts lost to taxpayers reaches easily into the hundreds of thousands of dollars. They intentionally put their personal interests and those of their closest political associates beyond any other interests, private or public, disregarding the clear legal duties they knew they had to avoid. They took maximum unlawful advantage of their unique positions in state government—Jensen as Speaker of the Assembly, and Schultz as an Assembly employee with the privileges and authority of a state employee working solely at the direction of the Speaker—to secretly spend vast amounts of public resources in the operation of private political campaigns. This was a calculated abuse of their positions of public trust, misusing their positions not only to commit these continuing, long running offenses but also to conceal the offenses.

Their crimes are aggravated, because the crimes involved intentionally creating an unfair advantage for incumbents and challengers of the defendants' choosing, distorting the democratic

process over the course of years of abuse. These crimes had the natural and foreseeable consequence of producing deep cynicism and apathy on the part of potential office seekers and ultimately on the part of voters. It is impossible to calculate the resulting losses to the vitality of our democracy. These crimes have more than five million victims, each citizen of the state. Some citizens are more conscious at this time of their victimization than are other citizens, but this court has the obligation to consider the impact of the offenses demonstrated in the record.

After allegations of their misconduct were highlighted in some detail on newspaper front pages starting in May 2001, the defendants tried to cover up details regarding the crimes, in part by moving Schultz to a private political party without any attempt to account for or publicly disclose the nature of her work on the taxpayer dollar and, in Jensen's case, brazenly lying to law enforcement. Later, even with the benefit of highly experienced legal counsel and years to prepare to give truthful testimony that would put himself in the best possible light, Jensen provided convoluted and misleading testimony at trial in an attempt to misdirect the jury into returning verdicts inconsistent with the relevant facts under the law.

Schultz did not actively obstruct the investigation and did not testify falsely at trial, and so stands in a different position from Jensen in this area, as in some other areas noted below. Nonetheless, Schultz "cleaned out" her state workspace at the ARC after the nature of her job duties was revealed to the public, and has never, to date, made the slightest attempt to accept any responsibility for her corrupt actions.

The conduct of the defendants was theft from the public. It was the diversion of taxpayer-funded offices, equipment, and salaries for what the public believed to be the routine policy work of the legislature. As theft, the crimes merit meaningful punishment. The state would very likely have lost millions of dollars in additional diverted funds between 2001 and

today if the Wisconsin State Journal had not decided to focus on this issue in 2000-2001, and left legislative leadership of both parties with no alternative but to legislate changes in this area to make committing this form of fraud more difficult.

Yet the crimes are more significant than the theft involved in diverting money that could have been used for productive state business. This was theft for the *explicit purpose* of distorting the democratic process. The defendants substituted taxpayer dollars for the dollars that otherwise would have to have been raised by campaigns, following strict campaign finance rules. Thus while the first crime was theft, the second crime was using that money to favor candidates selected by the defendants and their close associates who would, as members of the assembly, be indebted to those who selected them for taxpayer-funded favors. That was the scheme of the defendants.

The court will recall trial testimony that candidates favored by leadership for taxpayer paid assistance were asked to agree that, once elected, they would pony up with campaign money to other candidates favored by leadership in order to pay back the front end assistance offered from "Madison." To a new campaign treasurer such as Stacy Ascher-Knowlton, Sherry Schultz was an "angel," as Ascher-Knowlton testified at trial, which would have been fine if Schultz were providing this critical help using her own time and resources. But Schultz was not an angel. She was participating in a self-serving scheme of insiders, by insiders, for insiders. Scott Jensen used taxpayer funds to create a group of "insiders' insiders," those owing their elected positions to him as an individual, and owing campaign funds to those selected for future campaign assistance, repeating the cycle of allegiance to Jensen as an individual.

One of the series of lies told by Jensen at trial was the following. Jensen was asked on cross-examination whether candidates for whom he helped raise money would “at the very least owe you a debt of gratitude, right?” Jensen responded as follows,

I wasn't so worried about what they owed me. I wanted to elect more members. I was comfortable in my position as Speaker. I won by a large margin. I wasn't worried about losing. I was worried about getting more members, so I was trying to help people. I gave a lot of contributions to races that didn't stand a chance of winning, but I was thankful people actually put their name on the ballot.

Jensen testified that it was “good enough” for him that Republicans held the majority; gratitude did not matter in the least to him. *See* Draft Trial Transcript, March 7, 2006, Morning Session (hereafter AM Trans.), at 150.<sup>2</sup> This was in all probability an ineffective lie, because it was so obviously untrue, but it was a lie told with a purpose. Jensen was trying to hide from the jury part of his motivation to commit the charged offenses.

The defendants' motives for committing these crimes were entirely selfish. They converted state funds in form of paychecks and money supporting the operation of large state offices for the purpose of maintaining their valuable state positions, and to expand their authority and influence. Jensen wanted to hold onto the many benefits of incumbency and the power of the Speaker's position, and also to obtain the campaign funds that Jensen believed “necessary” to become Governor. Jensen wanted to continue to receive his salary, benefits, per diems, etc. as a legislator and also to continue to oversee a relatively large office staff (one large enough to include a full-time state employee with the title “scheduler”) and other perquisites of office, some of which do not have any equivalent outside government.

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<sup>2</sup> At the time of the filing of this memorandum, the court reporter had not yet completed a final transcript for all of the Jensen testimony, but the state files this memorandum now to give the defense and the court more than a few days to review this submission in advance of sentencing. All portions of the draft transcript quoted here appear accurate to counsel for the state.

The defendants knew this was a distortion of democracy in part because they well knew that campaign money is critical to win campaigns for the legislature. AM Trans. at 146 (Jensen: \$60,000 - \$100,000 to run a “hot race” for an Assembly seat). In their covert system, it was legislative leadership, and not the electorate, that helped dictate who represents the interests of the well over 50,000 citizens in each assembly district, using taxpayer dollars to make these selections.

These two veteran political insiders were among the most knowledgeable people in the entire state of Wisconsin regarding the value created for an election for the state Assembly when there is a “money lady” in Madison, and an entire office of skilled state-paid campaigners creating and/or distributing campaign literature, polling, advertising, and voter lists, and raising, tracking, and accounting for the campaign funds that are in fact lawfully reported in campaign finance reports (putting aside the dollars hidden through the scheme of these defendants). Jensen was Director of Government Relations for Wisconsin Manufacturers and Commerce, 1984 – 1987, a private sector position that gave him a close view and a working relationship with state officials, and all the more perspective on what is permitted and not permitted conduct by legislators.

Jensen’s testimony regarding graphic artist Eric Grant was revealing. Jensen testified that he considered Grant to have “the best brochures in the state, and I took note of that and after he loses the primary, he had quit his job to do this, so he didn’t have any work, I called him up . . . and said how would you like to do some campaign brochures for us.” (AM Trans. at 98) “The best brochures in the state” have great value in winning elections, and Jensen well knew it. *See also* AM Trans. at 145 (Jensen: “I don’t think it’s that difficult [to raise money for political

campaigns]. It's like mowing the lawn; it's got to get done. I don't think it's that difficult to raise money.”)

Also revealing was Jensen's trial testimony that, while he ran the ARC during the 1988 campaign season, he rescued a candidate in Green Bay from campaign finance chaos. Jensen testified that he was horrified to learn that this candidate had only a jumbled shoebox of papers to represent the candidate's campaign finance efforts. Jensen saw it as his job to fix the mess. (AM Trans. at 43-44) This testimony vividly illustrated the defendant's keen awareness, as long ago as 1988, of the decisive role that a knowledgeable campaign aide can play in an assembly race. Jensen and Schultz knew that their illegal conduct was not merely providing random, possibly irrelevant campaign help from the sidelines. They intended that their unlawful activities would help decide who would sit in the legislature.

While this memorandum equates Jensen and Schultz for some purposes, it is significant that Jensen could have decided to limit his criminal activity to directing only Schultz's illegal campaign activities, without also misdirecting Ray Carey, Jason Kratchowill, and the rest of the ARC staff, or without misusing his own Capitol office staff, or the staff of the Ladwig office, all of which he did with every opportunity he had. The scope of Jensen's misconduct, while contemporaneous with that of Schultz, was much broader than that of Schultz.

Moreover, Jensen was Schultz's boss. Any sentence Jensen receives should be more severe than any sentence she receives. Jensen committed multiple, related felonies involving dishonesty, as part of a pattern of activity, resulting in losses far beyond that attributable to Schultz's approximately \$300,000 in salary and benefits.

Yet while Schultz's illegal conduct and her motivations were smaller scale than Jensen's, Schultz's criminal conduct was no less constant than Jensen's criminal conduct during the

relevant time period. Schultz accepted a relatively large, and steadily increasing, state paycheck and state benefits in exchange for doing nothing but raising and tracking campaign money, and did so knowing exactly what the value of such work is to a campaign. Schultz also did this while knowingly working in a state office given over almost entirely to campaign activity during every other year. The court will recall the many witnesses, some of them very reluctant, who described Schultz as a leader of campaign activity at the ARC, to the point of attempting to “groom” another state employee to join her in the same space to commit the same misconduct. Schultz knew that Jensen, who had vast authority over the use of state resources, was misusing that authority to direct her activities and those of her colleagues at the ARC. There was no hint in the testimony of any witness or document at trial that Schultz was anything but an enthusiastic participant in the illegal conduct. Schultz admitted to others that she knew her conduct would probably land her in jail. Schultz also made statements to others, prior to the negative media reports surfacing, that indicated her knowledge of the illegality of her conduct. She told others that she kept *nothing* legitimate in her state office.

Courts regularly punish criminal conduct more harshly when it involves intentional abuse of a position of trust, for example by the embezzling bank vice president or the physically abusive babysitter. Courts recognize that such abuses represent social harms and difficulties in detection beyond that committed by someone who commits an equivalent crime without abusing a position of trust. As the old adage has it, the easiest way to rob from a bank is to work for it. The easiest way to steal from the taxpayers is to hold public office.

Here, two veteran state government “insiders” decided they could get away with taking advantage of the public as a whole. This was not the product of one or two bad decisions during one day or even one month, as some crime is. Jensen, and to a lesser degree Schultz, had wide

discretion over how to use the valuable state resources at their disposal. Instead of making a lawful set of choices, they used those resources to violate a clear duty through a series of conscious and deliberate choices. The degree of authority vested in Jensen, and to a lesser extent vested in Schultz, was large. It would have been very easy for Jensen to follow the law. Yet he decided not to, without anyone forcing him to do so. While Schultz was an employee, not an elected official, she was a mature woman with vast experience in state government. She could have ceased her illegal conduct at any time. The defendants made repeated decisions to abuse their positions and engage in unlawful conduct. In regard to defendant Jensen, the evidence clearly indicates that his decisions were part of a well-orchestrated plan. This is vividly reflected in various RACC memos introduced at trial in which the hiring of a second graphic artist for campaign work and the hiring of a fundraiser (the position Schultz would fill) were proposed before Jensen became Speaker. Jensen then made these changes, shifting large amounts of taxpayer dollars directly into the campaigns of his choosing.

The defendants' wrongdoing was difficult to detect for reasons that were evident at trial. Persons close to the defendants, whether lobbyists or long time employees, were very reluctant or in some cases even at trial completely unwilling to break the code followed by these defendants of hiding the campaign work that was the focus of ARC activity and to a large degree the Jensen Capitol office. Those efforts at concealment are factors in aggravation, all the more so because what was being concealed was the misuse of public money.

It bears noting that by lying and failing to accept responsibility for his actions, Jensen put the employees of his office and the ARC in the difficult position of having to decide whether to cooperate truthfully in the investigation of these matters, or to lie. The gravity of the offense involves not only Jensen's initial decisions to increase the rate and scope of illegal activity for,

by example, hiring a second graphic artist to do nothing with his or her state computer but to crank out campaign literature for most of every campaign year. It also involves his unwillingness simply to accept responsibility for his actions for doing so.

Finally, on the issue of the gravity of the offenses, it is highly significant that the public had no choice but to rely on the integrity of Jensen and Schultz to refrain from stealing in the manner that they did, and also in avoiding hiding the facts when confronted on the topic by law enforcement. Our democracy is fragile to the extent that it depends on the honesty of public officials and employees because of the unavoidable vagaries of both official regulation and enforcement, and also of public attention and journalistic scrutiny. Jensen calculated that no person or institution with authority to regulate his conduct would do so, or if caught that this form of crime could be dismissed as “politics” in a legislature in which those in power decide what the rules are, regardless of what the statutes say. He thought the law applied only to others.

For all these reasons, the state submits that these were very serious offenses.

#### **B. The Character Of Each Defendant.**

A sentencing court has the responsibility to "acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." *Elias v. State*, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980). This allows a court to determine the need for incarceration and rehabilitation of a defendant. *State v. McQuay*, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990). Therefore, a sentencing court must determine whether the crime "is an isolated act or a pattern of conduct." *McQuay*, 154 Wis. 2d at 126; *State v. Von Loh*, 157 Wis. 2d 91, 95, 458 N.W.2d 556 (Ct. App. 1990). The rules of evidence relating to other acts, Wis. Stat. §§ 904.04 and 904.03, do not apply at sentencing. *See* Wis. Stat. § 911.01(4)(c); *see also State v. Mosley*, 201 Wis. 2d 36, 45, 547 N.W.2d 806 (Ct App. 1996). In making this determination, a court can consider offenses that

are uncharged, unproven or dismissed. *Elias v. State*, 93 Wis. 2d at 284; *McQuay*, 154 Wis. 2d at 126; *Von Loh*, 157 Wis. 2d at 95. It may even consider conduct for which the defendant has been acquitted. *State v. Bobbitt*, 178 Wis. 2d 11, 503 N.W.2d 11 (Ct. App. 1993); *United States v. Watts*, 519 U.S. 148, 117 S. Ct. 633 (1997). This court may not sentence the defendant for committing the other acts, but it may consider them in deciding whether the offenses of conviction were isolated occurrences or part of a pattern of conduct. They may provide insight into the defendant's character, and ultimately to his potential for rehabilitation, and are appropriate considerations at sentencing. See *Elias v. State*, 93 Wis. 2d at 284.

It is undisputed that neither Jensen nor Schultz has a prior criminal record, and each has been employed as a public official or employee over a number of years, involving some work that was not unlawful and presumably productive. It also appears that each has been responsible and supportive to loved ones and friends. It is necessary for the court to acknowledge backgrounds of these two defendants that differ in favorable ways from those of some defendants in criminal cases, who come before the court without having shown much good character in any area of their lives. A defendant's lack of criminal history is always given great weight in our system of criminal justice.

At the same time, however, the state submits that the defendants' highly stable backgrounds are, separately, an aggravating factor. A defendant's laudable background can be considered an aggravating factor for purposes of sentencing. *State v. Thompson*, 172 Wis. 2d 257, 265-67, 493 N.W.2d 729 (Ct. App. 1992). In that case the court upheld the trial court in considering the defendant's education and work history as an aggravating factor in the following terms, "There is an old adage that, 'To whom much is given much is expected.'" *Thompson*, 172 Wis. 2d at 265.

Jensen is a college graduate who holds an MBA from Harvard. He sought and was given the opportunity to be a leader of the state's political leaders. He had the privilege of working with

state leaders for years before he decided to commit these offenses. He received the benefit of political and legal counsel over the years from some of the most prominent politicians and attorneys in the state, many of whom he could have turned to at any stage of the evolution of his crimes, his obstruction, and his false trial testimony.

Schultz's resume is more modest. She took her direction from Jensen. Yet she also had the privilege of working in professional positions with state leaders for years before deciding to commit the offense of conviction. The trial testimony revealed that she knew exactly how unlawful her conduct was during the years she committed these offenses. She had the opportunity, every single work day between January 1998 and the summer of 2001, simply to stop running a large campaign finance operation out of her state office, and to ask for work related to the operation of the legislature. She could have done campaign work at home in the evenings and on weekends, and come to her state office to focus on the work of the legislature.

If either Jensen or Schultz were more inspired by running political campaigns than by serving the public, they could have sought work within political parties, lobbying organizations, or public relations firms. These options were open to them.

Jensen in particular cannot argue that anything other than his own blind ambition drove him to commit these offenses, since the Speaker is by definition a leader. Jensen led others, including Steve Foti, Sherry Schultz, Bonnie Ladwig, and host of Jensen Capitol office and ARC employees, to commit crime on a routine basis, not to refrain from it. To read the memos that became exhibits at trial, it is clear that Jensen did not show the slightest respect for the fundamental point that state employees are paid and state offices are maintained by all of the citizens of the state, even though Jensen was well aware of the rules requiring separation between campaigns and legislative work.

Jensen and Schultz were neither political neophytes nor overwhelmed public servants. Neither stumbled into inadvertent criminal conduct, nor failed to appreciate the consequences of their courses of criminal conduct. Despite attempts at trial by the defense to suggest through questioning and argument that the defendants worked in a wildly hectic environment--one in which distinctions between lawful and unlawful activities are impossible to make--the testimony actually produced at trial demonstrated that working conditions for each of the defendants were not unduly stressful or difficult, and that the distinctions at issue were not at all difficult to make. Jensen himself testified that he was needed only one day a week in the office during campaign season and that only “three, four days a week” was “typical” during legislative sessions. (AM Trans. at 79) Jensen and Schultz both had an opportunity much of the time, and certainly during the months of the slow “campaign season,” to work at the pace of their choice, which is a luxury not available to all state officials who might be tempted to violate the law. The only deadlines anyone gave Schultz to follow, and the only dates that mattered to her as she defined her job, involved dates on the private campaign finance reporting calendar.

As a public office holder, in Jensen’s case, and as a long time state employee, in Schultz’s case, it is reasonable to hold them to higher standards. Jensen started working on political campaigns in 1982, before attending the Kennedy School of Government, and has worked as a chief of staff to the Governor of Wisconsin, a major executive branch position. He was in the state legislature for 14 years, becoming Majority Leader after his reelection in 1994. He ran President Bush’s reelection campaign in Wisconsin in 1992. He worked in the Senate Republican Caucus and ended up heading the Assembly Republican Caucus. Schultz is a long-time state employee, including a long stint in the office of the Lt. Governor. A higher standard is particularly appropriate where their criminal conduct directly involved their taxpayer-funded activities. This not a case in

which the court has to weigh the fairness of sentencing a state official to a harsher sentence for criminal conduct unrelated to his position because of his position of prominence and responsibility.

A particularly important factor in evaluating the character of Jensen, as well as the need to protect the public through deterrence of repeated misconduct, involves assessment of his acceptance of remorse, repentance, and cooperativeness. In this area, the court may not sanction a defendant for exercising his or her right to trial. At the same time, the defendant's right to trial and right personally to testify or to call others to testify on his behalf does not include the right to mislead, give false testimony, or commit perjury or suborn others to commit perjury. A court may not add to the defendant's sentence based on such conduct. However, the defendant's demeanor and veracity at trial are relevant considerations in the exercise of sentencing discretion. *Lange v. State*, 54 Wis. 2d 569, 575-77, 196 N.W.2d 569 (1972); *United States v. Grayson*, 438 U.S. 41, 50 (1978). Said another way, consideration of a defendant's truthfulness allows a court to rationally exercise its sentencing discretion when it evaluates the defendant's personality and prospects for rehabilitation. *United States v. Grayson*, 438 U.S. 41 (1978). A sentencing court has the authority to evaluate a defendant's testimony, determine if it contained "willful and material falsehoods," and assess it in light of all other knowledge gained about the defendant. *Id.*, 438 U.S. at 55. More recently, the Supreme Court has stated that enhancement of a sentence for reasons of a defendant's false testimony at trial:

further legitimate sentencing goals relating to the principal crime, including the goals of retribution and incapacitation. . . . It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. The perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests that the need for incapacitation and retribution is heightened as compared with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury.

*United States v. Dunnigan*, 113 S. Ct. 1111, 1118 (1993) (citations omitted).

The following are either false or misleading pieces of testimony offered by Jensen at trial, none of them gray or reasonably subject to dispute:

(1) JENSEN: Those working on Assembly campaigns would obtain voter lists from legislative offices pursuant to Public Records requests after the lists were created by state employees for “newsletters and other [mailings] to constituents.” (AM Trans. at 45-46) RESPONSE: **Documents and testimony at trial demonstrated that it was part of the unlawful operation of the ARC, well known to Jensen and Schultz, that while some lists were created for legitimate purposes, others were created, and many were manipulated, by state employees in state offices for the explicit purpose of using them in campaigns, and that these were not arms length Public Records production transactions, as Jensen tried to make the jury believe. The point is not a trivial one. The court saw and heard extensive testimony demonstrating that these lists are critical to the operation of a successful, contested campaign, and Jensen asked ARC employee Paul Tessmer to do this work for Jensen’s own campaign. See Exhibit 166.**

(2) JENSEN: Jensen “absolutely” did not call for campaign contributions from his Capitol office (AM Trans. 95) RESPONSE: **This was contradicted by the clear and compelling testimony of Carrie Hooper Richard, corroborated by the documentary evidence showing the volume and scope of the campaign fundraising work that Jensen had Richard and many others perform in the Capitol office. It is obvious that Jensen committed himself in advance of trial to a position that he never made campaign calls from the Capitol office, and calculated that he could get away with perjury on this issue at trial.**

**Jensen’s lie on this topic was calculated and vicious. It placed enormous, unwarranted pressure on Richard at the time of trial. Richard is a former state employee who violated the**

law by following the directions of Jensen, along with others in the Jensen Capitol office, but then decided simply to tell the truth when asked questions by investigators and at trial. By attacking Richard at trial and lying about her testimony, Jensen sought to encourage perjury by others who worked in this office and also sought to disparage the reputation of someone who was subpoenaed to tell the truth about what occurred in his Capitol office. This is not merely shabby treatment of a former employee; it is despicable disparagement of a former employee who was placed in this jeopardy through the actions of Jensen himself.

(3)/(4) JENSEN: Jensen did not have “any idea” that Leigh Himebauch Searle was a full-time state employee and that she worked full-time for his campaign throughout the summer of 2000 at the Republican Party of Wisconsin. “I assumed . . . that she was part-time in my [Capitol] office and volunteering for the campaign.” (AM Trans. at 97) RESPONSE: **This is not just one lie, but two. The evidence showed that the defendant was keenly eager to use state employee “slots” under his authority, for example by effectively stealing an employee from the Foti office staff to hire an employee without bothering even to inform Foti. The Jensen office was large for its functions, particularly during the slow campaign season, but it was still a single legislative office. Jensen therefore had a limited number of office employees to keep track of, particularly when it comes to what Jensen plainly saw as the *critical* work of raising, tracking, and reporting the campaign money of his own campaign committee, the one he used to explore a race for the governorship. It is beyond belief that Jensen did not know that Searle was employed full-time for the state. The evidence also showed that everyone in the Jensen office knew that Searle was “down at the Party” from May to November 2000, and not in the Jensen Capitol office. Jensen asked Searle, at the end of her state service, to “stay on” to**

**wrap up some of this important campaign work for him. Jensen was not oblivious to her status or vague about her activities, as he testified.**

(5) JENSEN: It was considered “appropriate” at the ARC when Jensen joined that office for the graphic artists to create campaign materials “because it didn’t consume any – there’s no additional bill being sent to state government for it.” AM Trans. at 99; *see also* Trial Transcript, March 7, 2006, Afternoon Session (hereafter PM Trans.) at 39 (“I mean, we thought we were following the rules that had always been, and I didn’t see a State resource being consumed” through campaign work at the ARC) **RESPONSE: There was extensive testimony at trial that this activity was widely considered unlawful, and many steps were taken to conceal this activity for that reason. Jensen’s testimony flies in the face of the extensive testimony by many, including Jensen himself, that employees working “in the field” on campaigns had to at least appear to come off the state payroll to a degree matching their campaign work. Why would it matter whether the state employee were in Wausau or in Madison if the work was campaign-related? In telling this lie, Jensen hoped the jury was not paying attention. It is no less an intentional lie merely because it was poorly conceived and executed.**

(6) JENSEN: Jensen’s interview, with his two attorneys, by the District Attorney and then DCI Bureau Director David Collins on September 18, 2001, was “very confusing” and misrepresented in multiple, fundamental respects in Collins’ report. (AM Trans. 119) Jensen begins with a big lie, another lie with a purpose to mislead. Jensen claims that he believed that the purpose of the interview was for the District Attorney to “bless” a legislative decision to “reform” the caucus system of the legislature, focusing on present and future conduct. (AM Trans. 119) “I did not think the questions were about the past. I thought the question was about the present.” (AM Trans. 137) Jensen informs the jury that he learns only later that the District Attorney “came

obviously with a different agenda,” that “different agenda” being to actually investigate the journalistic allegations for law enforcement purposes.<sup>3</sup> **RESPONSE: These were calculated lies given to a jury that the defendant gambled would be gullible enough to believe them. Jensen was accompanied during the interview by--and prepared for this interview with the benefit of advice from--former Assistant Attorney General and experienced litigator Michael Zaleski and experienced corporate attorney and former chief legal counsel to the Governor Ray Taffora. The interview occurred more than three months after the initiation of a John Doe investigation, which followed the explicit allegation of crimes in the newspaper. During this detailed, three-hour interview, Jensen unambiguously informed law enforcement that he was aware of the rules against misuse of state resources, and would never have violated those rules. One can only conclude that he made the denials to thwart the investigation.**

**During trial, Jensen knew he was testifying before a jury that had heard overwhelming evidence of his knowing misuse of state resources. He decided that he needed to backpedal from the clear firm positions he took with law enforcement in 2001. For example, Jensen said during the interview that the RACC meetings he ran occurred only at places other than his Capitol office, but the jury knew this to be false. His “explanation” is that during the**

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<sup>3</sup> *See also* PM Trans. at 37:

Q. And, again, we’ve talked about this a little bit before as well. But the focus of the interview was the activities of the ARC staff in the 2000 campaign, correct?

A. That’s not what I thought the focus of the interview was.

PM Trans. at 40:

Q. And when you met with Mr. Collins and Mr. Blanchard on September 18, 2001, you told them that you had no knowledge of State employees doing campaign work on State time or with State resources?

interview Jensen was “trying to explain how the new regime is going to work and they are interpreting that apparently as the past.” (AM Trans. 119)

The court heard the Collins testimony and the Jensen testimony. There is no chance that Collins would get such fundamental distinctions wrong. Collins was there for the purpose of investigating, which by definition involves past conduct, not predictions of future conduct. Jensen had to admit on cross examination that he was given a warning at the interview that anything he said could be held against him, which is not a warning given at a meeting on “reform.” (AM Trans. 136) Zaleski and Taffora had every incentive to make sure no mistake would be made on such fundamental points, and Jensen did not seek to call either of these persons as witnesses to rebut the testimony of Collins.

Jensen testified that his attorneys said following the interview that the interview had been “fantastic” (AM Trans. 120). This is not surprising, because the attorneys had just heard, from the mouth of their own client, that there was absolutely nothing to worry about, nothing to investigate. Their client had assured law enforcement that Jensen had always known well the rules against use of state resources to run campaigns, and had followed those rules carefully. The attorneys did not then realize how literally “fantastic” Jensen’s flat and complete denials had been.

(7) JENSEN: During the September 2001 law enforcement interview, the conversation was confused because Collins and the District Attorney did not understand the difference between the ARC, called “the caucus,” and the group of Republican members of the Assembly, as “the caucus.” (AM Trans. 120) RESPONSE: **This lie is evident to the court, with an unemotional**

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A. That was a present tense question. It had been many, many months since anything like that had occurred. So they asked me—I assumed it was part of the effort to talk about the new rules and said I was unaware of that.

**and objective consideration of the facts, but the defendant's hope in testifying falsely was that the jury would be easily misled. Even a casual reader of the State Journal series alone--putting aside investigation between June and September 2001 and such simple steps as consulting the Wisconsin Bluebook--understood the difference between the ARC as "the caucus" and the group of legislators as "the caucus." In any case, there can be no doubt that a Harvard MBA with years of state government experience and two highly experienced attorneys each with years of state government experience would have been capable of walking Collins and the District Attorney through this simple distinction if there was the slightest confusion. There was no confusion in fact, and Jensen's attempt to introduce it at trial was a falsehood.**

(8) JENSEN: ARC Director Jason Kratochwill and Jensen did not discuss increasing the amount of campaign work done at the ARC after Kratochwill started as director of the ARC. PM Trans. at 26. ("I don't think I would have told him that we wanted to focus on, more on campaign work. I did probably tell him to focus more on freshmen vulnerable.") RESPONSE: **Kratochwill's contradictory testimony was clear and compelling, and the results of Jensen's directions were laid out in detail throughout the course of the trial in the form of witness testimony and documentary evidence. Jensen made clear to Kratochwill that he was to redirect resources for increased campaign work. Kratochwill had no incentive to do this in the first place, or to testify to it in the second place, if it had not been what his boss told him to do, and it is supported by the documentary evidence.**

(9) JENSEN: When Eric Grant asked for more graphic artist staff following the 1998 elections, this request was "not related to the campaigns." (PM Trans. at 43) RESPONSE: **The testimony of Kratochwill and Grant, corroborated by that of Lee Riedesel and Kacy Hack**

**and stacks of documentary evidence, demonstrates that this is a lie. That includes Exhibit 61, which was a February 17, 1997, memo to Jensen from Ray Carey including the following recommendation: “Eric Grant designed over 300 pieces” during the 1996 campaigns and “We must have two graphic artists working for RACC after the primary.” Jensen told this lie to the jury because it is consistent with his position that he merely did what “everyone always did,” when in fact Jensen knows the truth to be that he took this form of misconduct to an unprecedented level of abuse.**

(10) JENSEN: Jensen had no idea that his Capitol staff of Steve Baas, Jodie Tierney, Leigh Himebauch, and Chad Taylor over the period 1997 – 1999 put together campaign mailings and sent them out from the Jensen Capitol office. He only learned about this envelope stuffing on his behalf by reading the criminal complaint in this case during the fall of 2002 that this activity had occurred. PM Trans. 72-73. **RESPONSE: Under Jensen’s version of events, campaign work on his own campaigns was repeatedly done in his own Capitol office, by his own Capitol office staff, and he never even caught wind of it, not even after he is publicly accused of using legislative employees for campaign work. Again, the falsehood was likely obvious to jurors and therefore self-defeating, but its significance is that Jensen intended that the jury would simply accept it because it was his sworn testimony.**

Ten separate lies, given under oath, by a highly educated person who has had the benefit of experienced legal counsel every step of the way.

Also reflecting significantly on Jensen’s character are the lies he told law enforcement in September 2001, at a time when he had full benefit of counsel and the opportunity to clarify or follow up on any aspect of these matters at any time. Jensen decided to flatly deny any knowledge

of the conduct laid out in create detail at trial, necessitating a large investigation to get to the bottom of the facts, and then compounded this offensive conduct by lying about it at trial.

At the time of the law enforcement interview, Jensen had been participating in the process of moving Schultz first to the Capitol and then out of state service, and he was doing so because of what he knew Schultz spent her time doing. Jensen told law enforcement none of that, in a deliberate attempt to obstruct the investigation. In fact, Collins testified that Jensen specifically told Collins that Jensen had not spoken with Foti or Kratochwill about moving Schultz. This was a significant lie. Jensen knew that if he honestly answered that question, he would then have had to explain more about his knowledge of Schultz's activities and why he was moving her, which would have led to other questions about what else was going on at the ARC, where Schultz was located, how she had come to work on the Foti payroll, and so forth. When confronted with that critical lie at trial, Jensen testified that he could not recall what he had said on the topic to Collins, and was unable to explain the obvious obstruction that he committed in September 2001. PM Trans. at 98-99.

In sum, while Jensen has some favorable character traits, due in part to his apparently strong family ties, when it comes to the matters before the court, Jensen has demonstrated a character of rare and consistent selfishness, arrogance, and deceit, and complete disdain for the rule of law when applied to his own conduct. In this context, he has shown no concern for the public welfare or for the circumstances of the many persons who have, in a number of cases, all too loyally worked for him, while being paid by the public.

Schultz also has redeeming character traits. Moreover, unlike Jensen, it cannot be shown so directly that she actively impeded the investigation of this case. Yet she has also demonstrated, in

connection with the conduct at issue in this case, an instinct to cheat on the largest of scales and a willingness to ignore the most basic requirements of honesty and legal duty.

In sum, the pattern of conduct here demonstrates character marred by deceit and a willingness to flagrantly abuse power, particularly in the case of Jensen, given his calculated lies to Collins and his disingenuous trial testimony.

### **C. Need For Public Protection.**

The purposes of the criminal justice system include rehabilitation, deterrence, punishment and protection of the public. *State v. Verstoppen*, 185 Wis. 2d 728, 734, 519 N.W.2d 653 (Ct. App. 1994). It is generally accepted that both retribution, which focuses on the interests of the victim rather than the status of the defendant, and general deterrence, which focuses on the interests of society at large rather than the status of the defendant, are appropriate societal reasons for imposing sanctions. *State v. Martin*, 191 Wis. 2d 646, 656, 530 N.W.2d 420 (Ct. App. 1995) (quoting *United States v. Frank*, 864 F.2d 992, 1009-10 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989)). Thus, courts properly give great weight to the public interest and general deterrence when imposing a sentence. *Setagord*, 211 Wis. 2d at 421; *Iglesias*, 185 Wis. 2d at 129 (Need to send strong message to deter would-be offenders from similar conduct); *State v. Sarabia*, 118 Wis. 2d 655, 674, 348 N.W.2d 527 (1984) (trial court considered the defendant's background and lack of prior record, that the defendant was a religious man with a strong sense of family and had many friends in the community, and that rehabilitation of the defendant was not a concern but relied heavily on the punitive and deterrent functions of sentencing based on nature of offense); *State v. Perez*, 170 Wis. 2d 130, 143, 487 N.W.2d 630 (Ct. App. 1992) (trial court considered it necessary to send message to the community that defendant's behavior was not going to be treated lightly); *State v. Canadeo*, 168 Wis. 2d 559, 563-65, 484 N.W.2d 340 (Ct. App. 1992) (Court considered the testimony of

defendant's friends and relatives who described defendant as "caring, considerate, compassionate, charitable, [and] thoughtful . . . ." and that the defendant had helped the mentally retarded, the Special Olympians, and nieces and nephews but, in imposing sentence, the court relied heavily on factors of specific and general deterrence).

To punish these defendants for their patterns of conduct, and deter similar behavior by others, substantial sanctions are necessary. The rights of the public, the need for deterrence, and the moral need for punishment in this case weigh in favor of significant sanctions.

Unlike many cases that come before the criminal courts, the public protection afforded by sentences in these cases is not the direct personal safety protection achieved by confining a rapist or spouse abuser, or the protection of property achieved by imprisoning a serial thief. At issue here is the protection of our form of government and the accountability of public servants. Power tends to corrupt. Sentences that are too lenient here will leave the public with insufficient protection against the next generation of incumbency abusers, and those public office holders who seek to place themselves above the law. The risk of future misconduct rises with a perception inside the state Capitol that being caught at misconduct yields little more than critical newspaper headlines and a few months of "home detention," so long as lobbyists and fellow politicians, the only people who matter, remain loyal because of past allegiances and favors done. This case is about favors wrongfully accumulated for the purpose of distorting the democratic process.

Given the nature of a sentencing hearing, at which the state is often not permitted much if any comment to rebut arguments made by defense counsel and/or a defendant, the state offers the following responses to four arguments that will likely be offered by Jensen as purported mitigation: (1) that he stands before the court having lost his position in the legislature, a great personal loss to him; (2) that he has already been subject to much public criticism for the conduct at issue here,

taking a toll not ordinary for criminal defendants; (3) that his crimes began and were completed some years ago now, and that (4) “everybody did it” and no one enforced the rules against it. None of these are strong arguments in mitigation, although the state acknowledges some merit to considering the first and last points as matters of context.

Jensen lost the privilege of serving in the legislature as a direct consequence of his unlawful behavior, not as a distant collateral consequence. If the defendant had admitted openly in 2001 the conduct of which he is now convicted, he would presumably either have been forced from office or likely defeated in an election since then. It is unlikely that an admission that, to cite only one offense, he supervised a full-time state employee to raise, track, and report campaign finance money would have passed muster with the voters of his district. It is only by refusing to accept responsibility for his actions that the defendant remained in the legislature from 2001 to the time of his conviction. He finally lost his public position because he disgraced his public position and was convicted based on overwhelming proof of that conduct, not for any other reason. Having made that point, the state acknowledges that the public protection aspect of Jensen’s sentencing is colored by the fact that he may never again hold office as a felon.

Turning to public criticism, as the state argued in connection with the motion for a change of trial venue or venire, by and large the public criticism of Jensen has been factual, not personally destructive. There have been a few exceptions, primarily in the form of some typically overly dramatic political cartoons, but the defendant testified at trial that he learned from being “attacked on the front pages of the papers” during his first run for office that he knew that assuming public office invites harsh public condemnation. AM Trans. at 51 The defendant testified that he relished the spotlight, and knew that the glare would not always be flattering. It is not mitigating that the

defendant has been criticized publicly for the crimes he committed against the public, particularly in light of his lack of acceptance of responsibility since 2001.

The passage of time since the commission of the crimes is also not a mitigating circumstance. The state acted promptly in investigating and charging these large-scale crimes, with no cooperation from either defendant, and despite affirmative, intentional obstruction by defendant Jensen. All delays since charging in 2002 are attributable to a very expensive and elaborate defense that included rare interlocutory appeals that were given extraordinary attention by the appellate courts over the course of many months. A defendant is entitled to pay for an expensive and elaborate defense, but not to complain of the delays that result.

Finally, defendant Jensen should not be given a lighter sentence because of the existence of a political climate of corruption, by leaders of both major parties, that he actively helped to create.<sup>4</sup> Accepting an “everybody did it” argument as one in mitigation would set up courts to accept the argument that those who commit crimes from Substantial Battery in bar fights to Reckless Driving on country roads deserve mitigated sentences because some undoubtedly “get away with it” on a regular basis. If Jensen was aware of Democratic legislators directing the same sorts of activities, he could have sought enforcement of rules against this and/or called public attention to it. This would not have been a difficult task, given his bully pulpit. Lawful responses on Jensen’s part did not include deciding to “see them one and raise them one.”

Yet while such references by the defense were inappropriate during the pretrial motions and fact-finding stage of these proceedings, the state acknowledges that there is one sense in which these arguments may be relevant for sentencing purposes. The state submits that the court may consider

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<sup>4</sup> Consistent with his other conduct, Jensen ignored the court’s clear pretrial rulings in this area, and repeatedly sought to prejudice the jury with references to his beliefs about the conduct and attitudes of Democrats. (AM Trans. at 109-110, 116)

as relevant context to these sentencings the fact that no other state official or state employee had been charged with this form of misconduct in office in a state court criminal proceeding, or even in a seriously pursued civil enforcement action. The state acknowledges that Jensen's crimes would have been aggravated if he had committed this same conduct after previous enforcement actions in this area, and there was no such prior enforcement. Inadequate attention by the Legislature itself as an institution and also by the State Ethics Board contributed to the climate of malfeasance, as demonstrated by the failure of the Legislature itself or the State Ethics Board to pursue even the first fact regarding this conduct after the front page articles appeared describing it. In sum, it is not a fact in mitigation that some other state officials and employees misused state resources, but it is a fair contextual point that Jensen and Schultz did not operate in a system in which other legislators or state regulators enforced the rules, which would have made their conduct, brazen and outrageous as it was, all the more brazen and outrageous. Even this point is diminished, however, by Jensen's acknowledgement at trial that the topic of misuse of state resources for campaigns had been the subject of occasional journalistic criticisms for "the last 30 years." (AM Trans. at 114)

In addition, the very nature of the conduct at issue alerted anyone of reasonable judgment and intelligence that the conduct was prohibited. As the Court of Appeals stated in addressing the facts of this case:

All the allegations of the criminal complaint describe campaign activity of the most basic type: the preparation and dissemination of campaign literature, political fundraising on behalf of a number of candidates for the Wisconsin Assembly, the delivery and receipt of campaign funds in state offices by lobbyists and state employees, campaign data management on state computers, daily monitoring of campaign progress by all three defendants, development and implementation of campaign strategy and debriefing of an election cycle on state time in state offices. The result: public financing of private campaigns without the public's permission. There is no reasonable argument that this alleged activity serves any legitimate legislative duty or purpose. No statute, rule or policy sanctions this behavior.

*State v. Jensen*, 2004 WI App 89, ¶93, 272 Wis. 2d 707, 755, 681 N.W.2d 230. In light of the numerous laws governing and limiting public officials from using the powers of their office to obtain a political advantage, it is absurd to believe that the defendants lacked such knowledge. Jensen knew precisely how absurd it was, and so told the truth in this regard to David Collins about his knowledge of the rules. Then at trial, Jensen decided his best chance for acquittal was to try to hide the truth.

The defendants were on ample notice, and had actual knowledge that their conduct was unlawful. They had ample notice of the law, not only from their positions and experience but also from notices sent out by the chief clerk and even a prior speaker, as witness after witness testified at trial were widely distributed. Witnesses described various steps taken to hide this activity from the public. The defendants participated in these concealment efforts, even after the allegations were clearly and publicly made.

### **III. STATE'S SENTENCING RECOMMENDATIONS**

For all of these reasons, the state makes the following recommendations. The state believes that this is a TIS I case, since the latest conduct occurred after the effective date of TIS I and before the effective date of TIS II.

#### **A. Defendant Jensen**

**Count One:** Violation of Sections 939.05 and 946.12(3) of the Wisconsin Statutes, a Class E felony; and upon conviction may be fined not more than \$10,000 and imprisoned not more than five (5) years or both (supervising Sherry Schultz activity).

A bifurcated sentence to the Wisconsin State Prison system of five years, within a range of 15-20 months Initial Confinement, followed by 45-40 months Extended Supervision. Given Jensen's lack of criminal history, this case may have merited a withheld sentence, even with the very damaging scope of the misconduct, if the defendant had in 2001 fully acknowledged his

conduct and accepted responsibility, likely requiring him to leave the legislature for other employment at that time. The state respectfully submits, however, that the case became a likely prison case with the defendant's intentional and never-corrected lies to law enforcement of September 2001, and then a near certain prison case with his intentional lies at trial.

While the court must consider probation as the first alternative, it would depreciate the seriousness of his offenses and his utter lack of acceptance of responsibility to withhold sentence in this case. In the public protection sphere, a probationary sentence would be a determination that the public needs to be protected only when the poor and the uneducated violate the criminal law, and the public needs no protection from predations of influential persons who travel in the same social circles as attorneys and judges. It would also suggest that when the poor or uneducated lie to police on the street they commit serious crime, but when those with influence lie to police while sitting next to attorneys it is a trivial matter.

The state anticipates a defense argument, which is accurate as far as it goes, that the likelihood of the state recovering even a fraction of the hundreds of thousands of dollars owed by Jensen in restitution decreases with a prison sentence instead of a long probationary disposition. As argued above, however, this is not a civil lawsuit over lost funds, or even a simple theft case. The lost taxpayer dollars are significant, but not the point of this criminal case. The point of this prosecution is the intentional misuse of public office over a number of years to undermine democratic processes, and the deception used to keep it secret.

At the same time, the state submits that a much longer total prison sentence is not necessary, given the defendant's lack of a criminal history, his genuine contributions to society, and other factors referenced above.

There is no sentence credit in this case.

Conditions of ES to include:

1. Full restitution, in an amount to determined at a future proceeding, joint and several defendants Schultz and Foti. Wis. Stat. §973.20 provides that a defendant shall be ordered to pay restitution for a crime considered at sentencing. The restitution statute should be interpreted broadly to allow victims of crime to recover their losses. *State v. Johnson*, 2002 WI App 166, ¶16, 256 Wis. 2d 871, 882, 649 N.W.2d 284. A crime victim is entitled to restitution for “ all special damages, but not general damages, substantiated by evidence in the record, which could be recovered in a civil action against the defendant for his or her conduct in the commission of a crime considered at sentencing.” *Johnson*, ¶16; Wis. Stat. § 973.20(5). It must be shown that the defendant’s criminal activity was a substantial factor in causing the claimed loss. *Id.*

2. May not visit the state Capitol building. This request is consistent with “no contact” or “may not visit” probation conditions that are imposed to protect others and assist in the rehabilitation of offenders in other contexts. The image of defendant Jensen plying the trade of a lobbyist in the halls of the Capitol, or in any other manner counseling or consulting with elected officials, during the years following his sentencing in this case is repugnant. It would depreciate the seriousness of his misconduct and obstruction, and the way in which he sought to avoid responsibility for his actions and placed so many others in harm’s way in multiple respects.

**Count Three:** Violation of Sections 939.05 and 946.12(3) of the Wisconsin Statutes, a Class E felony; and upon conviction may be fined not more than \$10,000 and imprisoned not more than five (5) years or both (ARC operation).

A bifurcated sentence to the Wisconsin State Prison system of five years, within 12 months Initial Confinement, followed by 48 months Extended Supervision, concurrent to Count

One, with the same ES conditions as above. This would provide additional time for the payment of restitution.

**Count Four:** Violation of Sections 939.05 and 946.12(3) of the Wisconsin Statutes, a Class E felony; and upon conviction may be fined not more than \$10,000 and imprisoned not more than five (5) years or both (Jensen Capitol office).

A bifurcated sentence to the Wisconsin State Prison system of five years, within 12 months Initial Confinement, followed by 48 months Extended Supervision, with the same ES conditions as above, concurrent to Count Three.

**Count Five:** Violation of Sections 939.05, 19.45(2) and 19.58(1) of the Wisconsin Statutes, an unclassified misdemeanor; and upon conviction may be fined not less than \$100 nor more than \$5,000 or imprisoned not more than one year in the county jail or both (Operation of RACC).

Withheld sentence, one year probation concurrent to sentences above, restitution as a condition. A fine of at least \$100 is obligatory.

## **B. Defendant Schultz**

**Count Two:** Violation of Sections 939.05 and 946.12(3) of the Wisconsin Statutes, a Class E felony; and upon conviction may be fined not more than \$10,000 and imprisoned not more than five (5) years or both.

A withheld sentence and term of probation of five years, conditions to include:

1. Confinement in the Dane County Jail for a period of 6-9 months, with no limitation on Huber privileges. A longer term is not merited in the main because: Schultz was a state employee, not an elected official; she has reached the age of 54 without any criminal history, and; it cannot be proven that she actively obstructed the investigation, and she did not commit perjury at trial. A period of incarceration as a condition is nevertheless necessary because of the extraordinary scope and duration of her unlawful conduct, and her refusal to accept responsibility. There is no sentence credit in this case.

2. Full restitution, in an amount to be determined at a future proceeding, jointly and severally with Jensen and Foti.

3. May not visit the state Capitol. Much the same considerations as are discussed above regarding Jensen apply to Schultz in this context. She is a long time Capitol insider, who should not be allowed to use Capitol visits to enhance her business of campaign finance, given the seriousness of her crime, during her period of supervision.

The state submits that the proposed sentences are justified based on the applicable sentencing criteria as applied to these defendants. It is true that other defendants charged with similar conduct have received lesser sentences than that proposed for Jensen. Yet those cases, involving Brian Burke (6 months jail), Charles Chvala (9 months jail), and Steven Foti (60 days jail), differ in material respects (putting aside cooperating witnesses who were charged, such as Doug Burnett, Tanya Bjork, and Raghu Devaguptapu, who stand in completely different shoes, because they cooperated with the investigation even in advance of charging).

First, the nature of the conduct those defendants were convicted of differs from these defendants. Brian Burke was convicted of misconduct for directing campaign work from his office that occurred over a time period of less than nine months, one count of obstructing for failing to provide documents in response to a subpoena, and a read-in count related to per diem fraud. Chvala was convicted of one count of misconduct for directing campaign work for the time period of July 1998 through November 1998 and one count of an illegal campaign contribution. In this case, defendant Jensen was convicted of multiple felonies that involved illegal conduct spanning years. This conduct related to not only the use of the Capitol office entrusted to him, but also the hiring and direction of state employees at the ARC to also perform campaign work. Defendant Schultz's conduct also spanned several years, and was to the best

knowledge of the state, the most “pure” abuse of state resources for campaign purposes of any state employee in the history of the state. In regards to Mr. Foti, the evidence was clear that he did not have a major role in the activity for which defendant Jensen was convicted, and was a clear follower of Jensen in this activity.

Second, the other defendants entered guilty pleas and accepted responsibility for their criminal conduct in advance of trial, and did not provide false evidence at any proceeding. In this case, neither defendant has demonstrated any acceptance of responsibility or remorse to date, and any remorse expressed only on the date of sentencing could be considered by the court in setting the point within the range of sentences recommended by the state.

## **CONCLUSION**

The state respectfully requests that this Court impose these sentences for the reasons set forth above. At this time, the state does not anticipate calling any witnesses at sentencing, given the extensive testimony and documentary evidence already available to the court. While the rules of evidence do not apply to sentencing, this court has the benefit of having resolved extensive pretrial motions and then heard and seen voluminous evidence, admitted under the rules of evidence at trial, to support each argument advanced by the state at this time.

Dated this 9<sup>th</sup> day of May, 2006.

Respectfully submitted,

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