

STATE OF WISCONSIN

CIRCUIT COURT
Branch 4

DANE COUNTY

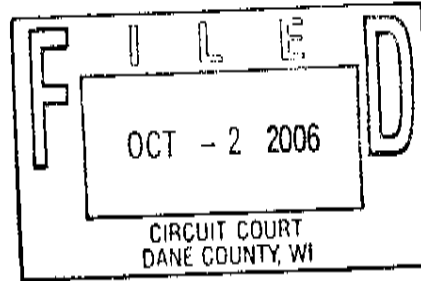
STATE OF WISCONSIN,

Plaintiff

vs.

SCOTT R. JENSEN,
STEVEN M. FOTI
SHERRY L. SCHULTZ

Defendants



cp

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02CF2455 ✓

**STATE'S SUBMISSION TO ARBITRATOR – RESERVE JUDGE GERALD C. NICHOL
FOR FINDINGS SUPPORTING ORDERS FOR RESTITUTION**

The State of Wisconsin, by and through its attorneys, Dane County District Attorney Brian W. Blanchard, and Dane County Special District Attorney Roy R. Korte, respectfully submits this filing, with its attachments, to both Arbitrator – Reserve Judge Gerald C. Nichol and also to the trial court assigned these criminal cases, as the basis for proposed orders of restitution for defendants Scott Jensen, Steven Foti, and Sherry Schultz.

Introduction

It is not necessary to summarize at length for this experienced trial court familiar Wisconsin law that *requires* orders of restitution in cases in which the court has before it proof of special damages to any victim or victims of the crime of conviction, pursuant to § 973.20, Wis. Stats. See *State v. Evans*, 2000 WI App. 178, ¶13, 238 Wis. 2d 411. "A sentence that fails to provide for restitution is unlawful and is subject to amendment." *State v. Ziegler*, 2005 WI App. 69, ¶11, 280 Wis. 2d 860; see also *State v. Canady*, 2000 WI App 87, ¶ 6, 12, 234 Wis. 2d 261 (presumption that restitution will be ordered

in a criminal case). A restitution hearing is not the occasion for a second trial of the facts. The restitution statute is to be interpreted broadly to allow recovery. *Id.*

This is not the typical case in which restitution is owed to an individual victim. Yet it is no less essential under the applicable law that the state's taxpayers, as represented by the Assembly Chief Clerk, be made whole to the same degree as any other victim as a result of the defendants' intentional, long running, and sophisticated thefts from every taxpayer in the state of Wisconsin. As Judge Ebert summarized the case at Jensen's sentencing:

There is no doubt in my mind that you were acutely aware of your dishonest conduct in these regards. I believe the evidence. That evidence showed that you took great pains to conceal the unlawful political campaign work which was done under your guidance and pursuant to your direction. And, again, you did so for the basest of reasons and that was to keep your group in power, regardless of the means that were necessary to accomplish that end. Rather than serving the best interests of the people, you have placed personal ambition and political greed ahead of your oath of office to faithfully discharge the duties of your office.

* * *

The gravity of the offense is the perversion of the legislative process. It was the blatant disregard and the blatant contempt for playing on a fair and level field. I believe the evidence supports the finding that **what occurred was a little more than common thievery** which was elevated to a higher plain for one purpose and that was for pushing your agenda. I think that represented the degradation of the Wisconsin ideal of democracy and that's something that the State has proudly been recognized for.

* * *

... I'm talking about your **secretive but highly organized and structured theft from the public weal**. You ensured that all **Wisconsin taxpayers indirectly supported your candidates for the Wisconsin Assembly and you gave your candidates the resources and the benefit that they didn't have to pay for and were not entitled to**.

(emphasis added)

This arbitrator is free to review the entire public court record of the case, including the complete trial transcript, or any portions thereof, whether referenced here or not. The state in this filing identifies key points from that record establishing the amount of restitution owed. The state does not anticipate at this time presenting any live testimony to this arbitrator, since the objections raised by the defendants to Judge Ebert regarding the proposed restitution orders submitted by the state have not suggested the need for any additional evidence. The relevant facts were the subject of extensive direct and cross-examination at trial, and completely support the conservative restitution requests of the state. Additional submissions would be redundant.

Background Information

Following the filing of criminal complaint in 2002 and a preliminary hearing resulting in bind over before the Honorable Daniel Moeser, the facts were presented in great detail at a jury trial, in part through voluminous exhibits. The trial before Judge Ebert occurred between February 22 and March 11, 2006, resulting in verdicts of guilty on each count. **Attachment 1** is a copy of the criminal complaint, which was proven beyond a reasonable doubt at trial. The jury effectively found that each defendant's criminal activity caused very substantial losses to the State of Wisconsin. The amounts of restitution owed by each defendant are readily discernable.

Defendant Foti agreed on the record at the time he entered a change of plea that the loss to the state from the scheme to use Schultz as a covert campaign operative on state time was approximately \$300,000 (see **Attachment 2**, written plea agreement entered into by defendant Foti). The Foti plea agreement contained the following, under the heading "Restitution":

15. In addition to the maximum penalties given above, the parties further recognize that a restitution order may be ordered by the court, which will require the defendant to cause payment to the State of Wisconsin for losses suffered by the State as a result of the offense, **and in fact such an order is contemplated. Restitution that will be due to the State of Wisconsin consists of the estimated value of the public funds expended by the state for the salary and benefits of Sherry Schultz between January 1998 and October 2001.**

16. **The parties stipulate that based on Schultz's wages and benefits for the time period of January 1998 to October 2001, the restitution would constitute approximately \$300,000.** The parties agree that the defendant will provide the state and the court with information regarding his ability to pay restitution. In addition, the parties agree that any restitution ordered would be ordered jointly and severally with any other responsible party.

(emphasis added)

Foti cannot now reasonably contest entry of a restitution order in that amount given his concession at the time of his plea that restitution in that amount could be ordered, a concession that is in any case based on proven facts that Jensen and Schultz also cannot now avoid.

The evidence at trial revealed details of two closely related sets of fraud schemes. In the first, Jensen and Foti hired Schultz in 1998 to work, in name only, on the staff of the Capitol office of then-Representative Foti. In that purported capacity, Schultz was paid a full salary and benefits, increasing each year, as a state employee. In fact, however, the defendants agreed that Schultz would act as a covert campaign operative, working exclusively for candidates identified by defendant Jensen. Her assignment involved the core campaign activity of assisting in the financing of races for Assembly seats, and accounting for that fundraising in campaign finance reports.

The defendants placed Schultz in the offices of the Assembly Republican Caucus (ARC), which was state office space, with a full complement of state computers, phones, and other equipment and supplies. During the charged time period, defendant Schultz did virtually nothing in that space but raise and keep track of money for candidates for the Wisconsin State Assembly, using state resources. Some of the candidates she assisted were incumbents, and some were not. As Judge Ebert noted, the jury heard extensive evidence that this covert scheme of the defendants involved explicit steps to keep secret the actual daily activities of defendant Schultz.

After reporters for the *Wisconsin State Journal* began asking questions in late 2000 and then began publishing in May 2001 articles about covert campaign activity using state employees and state resources, the defendants moved Schultz out of the ARC, into the Capitol, and then arranged to place her in the work space where she always should have been: at the state party headquarters, in Madison, supported and paid by the state party, not the taxpayers. Schultz remained working at the party throughout most of the pendency of this criminal case (see **Attachment 3**, Trial Exhibit 175, Schultz employment timeline).

The evidence at trial also proved the allegation in the complaint that defendant Jensen, in a separate but closely related scheme, used multiple state employees to both work on his own private campaign, Taxpayers for Jensen, and also on campaigns of various candidates for the Wisconsin Assembly, in part through the activities of the Republican Assembly Campaign Committee. The private campaign committee called the Republican Assembly Campaign Committee was run largely out of the state offices at the ARC (the same state office space in which Schultz worked on campaigns) by

persons who included Ray Carey and Jason Kratochwill, directors of the ARC. This second set of schemes was overseen by defendant Jensen on a very large scale at great public expense, as demonstrated at trial (see **Attachment 4** – Trial Exhibit 173, ARC staff list with salaries 1997 & 1998; **Attachment 5** – Trial Exhibit 174, ARC staff list with salaries 1999 & 2000).

In sum, as Judge Ebert noted at the time of sentencing:

The jury found as a fact, that Sherry Schultz corruptly acted as a full-time money-generating and collecting machine under the direction of you, Scott Jensen, and that verdict is supported by evidence that was presented and found to be true.

The jury also believed that you hired and supervised Ray Carey and Jason Kratochwill in their efforts, their acts to recruit and assist Republican candidates for political office while they were compensated as State employees and used State resources. The jury believed the evidence that you hired and supervised other State employees who were using State resources in your office and who worked on Taxpayers for Jensen, all of which obtained a dishonest advantage.

And I don't find one single fault with the jury's verdicts.

Specific Additional Evidence

All three defendants owe the state for the salary and benefits that Schultz was paid as a state employee but did not earn.

In addition, defendant Jensen alone owes the state, as additional restitution, salary and benefits paid to the following persons, whose roles are detailed in the complaint and were detailed at trial, as state employees during periods of consistent, daily campaign activity, so that they clearly did not earn their state salary or benefits and in fact those salaries and benefits were used to the dishonest advantage of campaigns favored by Scott Jensen: Ray Carey (ARC Director); Jason Kratochwill (ARC Director);

Lee Riedesel (ARC graphic artist); Eric Grant (ARC graphic artist); Kacy Hack (ARC graphic artist); Leigh Himebauch Searl (Jensen Capitol office / ARC employee); and Carrie Hoepfer Richard (Jensen Capitol office employee). Each of these persons testified at trial and each was also the subject of documentary evidence introduced at trial.

Kevin Kennedy, Executive Director of the State Elections Board, testified at trial that under Wisconsin's campaign finance system, no public money is given to organizations such as the Republican Assembly Campaign Committee, Taxpayers for Jensen, or individual campaigns of candidates for the State Assembly to operate campaigns (see **Attachment 6**, Kennedy testimony, pp. 40-43). As Mr. Kennedy explained, the legislature specifically provided in §11.501(2) Wis. Stats., that the perquisites of elected office such as employee time, office space, copiers, fax machines, and computers belonging to the state may not be used for campaign purposes such as raising and tracking campaign money and creating campaign literature (**Attachment 6**, pp. 44-51); *See also State v. Jensen, Foti, Schultz*, 272 Wis. 2d 707, 681 N.W. 2d 230 (Ct. App. 2004) (hiring and directing state employees to work on political campaigns on state time with state resources constitutes misconduct in office), affirmed, 2005 WI 31, 279 Wis. 2d 220 (2005).

There was never any question raised at trial about the fact that the hiring and supervision of all the state employees at issue here was the responsibility of elected legislators, in this case Jensen and Foti (see **Attachment 7** – Fuller testimony, pp. 134-137). More specifically, Foti was the hiring authority for Schultz. Foti testified that

Jensen and Schultz decided how Schultz would spend her time as a campaign operative.

It had to be all but pried out of him at trial, but Foti admitted under oath that he and Jensen agreed that Schultz would work not in Foti's office but instead at the ARC, which Foti knew was a state office wrongfully used entirely for campaign activity during the nine months leading up to an election in the Assembly (even numbered years) (see **Attachment 8** – Foti testimony, pp. 55 – 60). Foti testified that early in 1998, Jensen announced that Schultz would be in charge of fundraising for individuals running for the State Assembly (**Attachment 8**, pp. 66, 68).

When he was ARC Director working under Jensen's supervision, Ray Carey spent much of his time on campaign duties (see **Attachment 9**, pp. 190-197). It was part of the duties Jensen assigned Carey that he was to keep Jensen updated on all this campaign work (pp. 263-264). Carey suggested to Jensen in 1996 that Jensen "create staff position of fundraiser," which the jury could reasonably have surmised was a recommendation that bore fruit with Jensen's hiring of Sherry Schultz onto the state payroll to raise money for candidates in 1998 (p. 200-202). This campaign work for Jensen involved overseeing the production of hundreds of pieces of campaign literature using state resources, which would be reproduced millions of times to influence elections (p. 208-209).

Jason Kratochwill testified that, at Jensen's direction, his primary function as director of the ARC was to oversee campaign activity, and that this was his sole focus during campaign seasons, with daily contact with Jensen (see **Attachment 10** – Kratochwill testimony Vol. II, 71-72, 103, Vol. I, 19, 49-53). Jensen provided Kratochwill

with only state resources to handle all this campaign activity, and ran this campaign activity out of the Speaker's Capitol office and the ARC, in part using documents he inherited from former ARC Director Ray Carey, who filled the same role for Jensen (Vol. II, 68-70, 80, Vol. I, 117). This included such tasks as working with Deputy ARC Director Mark Jefferson, another state employee working at the ARC, to coordinate requests for proposals for media services to Republican candidates for the Assembly (Vol. II, 10-11), meeting with media representatives in state offices (Vol. II, p. 11), scheduling photo shoots for campaign purposes (Vol. II, p. 12). It also included Jensen's detailed directions about having state employees be sent out into the campaign "field," with some campaign money spent to maintain "appearances." (Vol. I, p. 123-124).

Completely consistent with Kratochwill's testimony, graphic artist Lee Riedesel testified that during campaign season "did campaign work pretty much the whole day," (See **Attachment 11** – Riedesel testimony, p. 34-35), ARC graphic artist Eric Grant testified that "virtually a hundred percent" of his time at the ARC during election years from June 1 to the election in November was spent on campaign-related tasks. It was not necessary for Grant to work long hours outside this campaign season (see **Attachment 12** – Grant testimony, p. 251), and graphic artist Kacy Hack testified that 80% of her work during campaign season was campaign related, sitting at her state computer (see **Attachment 13** – Hack testimony p. 107).

When the then college-aged Leigh Himebaugh Searl worked in the Jensen Capitol office, about 50% of her time was devoted to campaign activity. Then, between May and November 2000, after Searl was assigned to work at the Republican Party on

Taxpayers for Jensen, 100% of her time, all paid by the state, was devoted to campaign work (see **Attachment 14** – Searl testimony, pp. 77-79, and **Attachment 15** – Trial Exhibit 18, Searl's employment records).

Carrie Hoeper Richard testified that during her first six months as a state employee in the Jensen Capitol office, a little less than 50% of her time was devoted to fundraising for Taxpayers for Jensen. This campaign activity escalated as Jensen considered raising the kind of money he thought was necessary to run for Governor. The percentage of campaign work went from 50-50 to the point where "almost all of my time" was on Taxpayers for Jensen (see **Attachment 16** – Richard testimony pp. 247-248, and **Attachment 17** – Richard's payment history from the Assembly Chief Clerk).

Proposed Orders Of Restitution

There is a single victim in this case, the State of Wisconsin, as represented by the Chief Clerk of the State Assembly. Throughout the relevant time period, the Office of the Chief Clerk issued checks for salary and benefits for each of the state employees at issue, based on the premise that each person was performing legitimate state work, and not acting as a campaign operative who would otherwise need to be paid by a campaign. Restitution by each defendant can be made to the Chief Clerk's office agency on monthly schedules determined appropriate by the court or the Department of Corrections.

The defendants have been and continue to remain free to submit any relevant information regarding their ability to pay the restitution debt they owe. Once the amount of restitution is calculated, the defendants each have the burden to establish that payment of the full amount that each owes as a result of his or her conviction would

create an "undue hardship" for that defendant. § 973.20(1r). The primary purpose of restitution is to compensate victims, and total restitution figures should be calculated and then reduced only by that amount necessary to avoid "undue hardship." See *Huml v. Vlazny*, 2006 WI 87 ¶¶ 7, 20, 716 N.W.2d 807. To date, only defendant Foti has provided any financial information, and his information was a single, uncorroborated submission of his own in a family court case.

All Three Defendants

The following are State salary and benefits paid to Schultz that the trial record clearly demonstrates were made as part of the scheme of all three defendants to operate private political campaigns using state taxpayer funds through the daily activities of Schultz while she was paid by the state. The following closely tracks Trial Exhibit 175. The Chief Clerk of the State Assembly provided this data, and in submissions and arguments to Judge Ebert, no defendant has ever raised any objection to their accuracy.

Name	Year	Salary	Benefits *	Total
Sherry Schultz	1998	\$53,215.00	\$18,513.50	\$71,728.50
	1999	\$58,568.00	\$18,549.22	\$77,117.22
	2000	\$60,732.00	\$17,363.28	\$78,095.28
	2001	\$48,789.00	\$13,948.78	\$62,737.78
Total Salary & Benefits for Sherry Schultz				\$289,678.78

* NOTE: The Chief Clerk reports that the following benefits were applied to salaries of legislative employees: 1997 – 1999, 34.79%; 1999 – 2001, 28.59%

The total amount should be ordered paid by each of the defendants, Jensen, Foti, and Schultz, jointly and severally. If paid equally, each defendant would pay \$96,559.59.

Additional Amendment for Defendant Jensen Only

In addition, the following are additional dollar amounts, listed by state employee, that should be ordered paid by defendant Jensen only, based on clear evidence presented at trial. These are very conservative figures, covering only salaries and benefits for employees performing illegal campaign work clearly demonstrated at trial as having occurred with Jensen's knowledge.

Name	Position During Relevant Period	Relevant Employmt. Dates	Salary	Benefits	Total
Ray Carey	ARC director	June – Nov '98	\$27,550.00	\$9,584.65	\$37,134.65
Jason Kratochwill	ARC director	June – Nov '00	\$25,935.00	\$7,414.82	\$33,349.82
Lee Riedesel	Graphic artist	June – Nov '00	\$11,281.00	\$3,225.24	\$14,506.24
Eric Grant	Graphic artist	June – Nov '98 June – Nov '00	\$31,600.00	\$9,911.43	\$41,511.43
Kacy Hack*	Graphic artist	June – Nov '00	\$11,144.00	\$3,186.07	\$14,330.07
Leigh Himebauch Searl	Research Asst.	May '00 – Nov '00	\$17,049.57	\$4,874.47	\$21,924.04
Carrie Hoepfer Richard	Legislative Asst.	Jan '98 – Oct '99	\$60,340.65	\$20,324.61	\$80,665.26
Total Salary & Benefits for Jensen Staff					\$243,421.51

**NOTE: Hack salary reflected here discounted to 80% to reflect her testimony as to 20% state work during relevant time period, as noted above.*

The above restitution amounts identified are conservative, and not an attempt to recover for the taxpayers any more than was shown without question at trial, in part to

avoid wasting judicial (now arbitrator) resources and to bring a conclusion to a far too long delayed prosecution. The state has not sought, although this arbitrator is free to consider, completely foreseeable costs to the state that include the following:

1. The costs, either direct or as prorated over time, of paper, equipment (computers, facsimile machines), office space, and maintenance of equipment and office space attributable to the defendants using the ARC, and the Jensen Capitol office, as campaign offices. If the defendants had acted lawfully, the state employees acting wrongfully on campaign activities would have had to rely on the state party and/or individual campaigns to pay for all these things, which are not trivial expenses. The typical candidate for a county-wide or even many legislative offices typically runs a campaign from his or her kitchen table, unable to raise the funds necessary for office space, equipment, and paper in large quantities. These would have been significant expenses if individual campaigns had had to purchase them.

2. Campaign work done by state employees on state time not during the "campaign season." In each case, the state has included only these time periods in which the state presented the strongest evidence that the state employee focused on campaign tasks to the exclusion of legitimate state work. In order to present completely supported figures, the state has not included periods in which witnesses testified they performed some state work and some campaign work while in the office. This gives defendant Jensen the benefit of every possible doubt. In addition, the salary and benefits for additional ARC employees and Jensen office employees proven at trial to have performed campaign work on state time is not included to simplify the calculations,

and also because the amounts that are obvious and beyond dispute are already very significant for an individual to pay.

3. Extensive testimony and documentary evidence was presented at trial, as this arbitrator will note from the trial record, that persons who included the following performed campaign work using state resources, including but not limited to state salaries during the relevant time period and with the knowledge of Jensen: Paul Tessmer, Mark Jefferson, Heather Smith, Patrick Lanne, Todd Rongstad, Kathy Nickolaus, Chris Tuttle, Rhonda Drachenberg, and Lyndee Wall (ARC employees); Bill Cosh (ARC employee); Brett Healy, Chad Taylor, Brian Dake, Steve Baas, Jodi Tierney (Jensen capitol Office). For example, Jason Kratochwill testified that ARC receptionists/office managers Rhonda Drachenberg and Lyndee Wall had campaign duties all the time when they worked at the ARC. (Vol. II, P. 96) Kratochwill responded "almost none" when asked how much state work Jefferson and Smith did between May 1, 2000, and November 30, 2000, while being paid by the state to work at the ARC. (Vol. II, P. 103) This arbitrator could easily include their salaries and benefits during that time period in a proposed restitution order. Of additional note is Paul Tessmer, who the evidence showed regularly used state computers and assisted others in using state computers to conduct campaign work as part of the unlawful operation of the ARC and the Jensen Capitol office. See, e.g., Kratochwill Trans. at 31-32, 35. Yet given the likely inability of Jensen as an individual to repay the state the additional tens or hundreds of thousands of dollars at issue here, the state does not advocate that the arbitrator delve into these areas unless that appears necessary to the arbitrator. At the same time, these wrongful expenditures of state money only serve to reinforce the

necessity of ordering, at the least, the "core" theft outlined above, regarding the activities of state employees where the trial proof was exceedingly strong.

Summary of Each Defendant's Restitution

Defendant	Sherry Schultz's Salary	Jensen Staff Salaries	Total
Scott R. Jensen	\$289,678.78	\$243,421.51	\$533,100.29
Steven M. Foti	\$289,678.78		\$289,678.78
Sherry L. Schultz	\$289,678.78		\$289,678.78

Attorney's Fees

Separately and finally, the Chief Clerk of the Assembly made the following payments of taxpayer funds to attorneys representing the defendants in these matters: Jensen, \$67,147.40; Foti, \$27,981.75; and Schultz, \$68,629.03. The crimes of conviction represent determinations that the defendants did not act within the scope of their public positions when they defrauded the public. Judge Ebert explicitly postponed consideration of reimbursement of the state-paid attorneys' fees issue at the time of sentencing to be considered as part of the restitution hearing. The state acknowledges as a matter of law that this arbitrator may not address this issue unless the arbitrator were to find that these payments may lawfully be considered to be funds subject to a restitution order. That would not appear to be the case.

The state notes that its recommendation to Judge Ebert, in the event that the arbitrator agrees that this could not be deemed "restitution," will be that each defendant should be ordered as a condition of probation or extended supervision to repay the

State of Wisconsin, separate from and beyond any other form of restitution ordered, all funds expended by the state in the representation of that defendant in connection with this case, given the nature and extent of the public trust that was violated in these cases. This would be particularly appropriate in light of the fact that Jensen and Foti cynically took these public funds as part of their unprecedented efforts to delay resolution of this case, after Jensen had actively obstructed the investigation by lying to sworn law enforcement investigator David Collins. Defendant Foti agreed to do this in paragraph 17 of the written plea agreement he entered into (**Attachment 2**) and so cannot contest it now. The Foti plea agreement contained the following, under the heading "Repayment Of Legal Fees to the State of Wisconsin":

17. Consistent with the position of the Office of the Chief Clerk of the Wisconsin Senate regarding any persons convicted as a result of the investigation resulting in this case, [Foti] agrees as part of this agreement that he shall repay to the State of Wisconsin, separate from and beyond any other fine or restitution ordered or agreed to in this case, **all funds expended by the State of Wisconsin in the representation of the defendant in connection with that investigation of this case.** Repayment shall commence on a set payment plan with at least one payment made in advance of the date of sentencing, and be completed with full payment no later than one year following the date of sentencing.

(emphasis added)

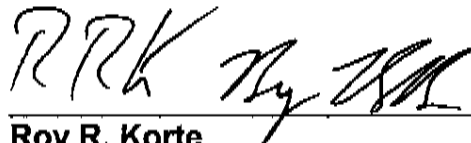
Based on all the evidence adduced at trial, including Jensen's obstruction, that would be an appropriate condition for each defendant. See *State v. Heyn*, 155 Wis. 2d 621, 456 N.W. 2d 157 (Wi. 1990) (Circuit courts have "broad authority to condition probation on satisfaction of any reasonable and appropriate requirement under sec. 973.09(1)(a); approving condition of payment for burglar alarm even though not a proper subject of restitution).

Dated at Madison, Wisconsin, this 2nd day of October, 2006.

Respectfully Submitted,



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