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**Branch 4**

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STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 02 CF 2453

SCOTT R. JENSEN,

Defendant.

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**RESPONSE TO THE STATE'S MOTION FOR AN ORDER REQUIRING  
REIMBURSEMENT OF LEGAL FEES TO THE STATE AS A CONDITION OF  
SUPERVISION**

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Scott R. Jensen has consistently acknowledged that he is contractually obligated to repay the State Assembly for all monies advanced to him for the defense in the above-captioned case in the event his conviction is sustained on appeal. Mr. Jensen stated this in the proceedings before the Arbitrator appointed by the Court to determine restitution, and Mr. Jensen reiterates that acknowledgement here. By these judicial admissions, Mr. Jensen agrees that the State Assembly is entitled to obtain, if necessary, a civil judgment against him for the legal fees when and if those fees ever became due and owing as a result of an ultimate affirmance of his convictions.

Despite the fact that the State Assembly is fully protected with respect to a potential contract claim for these fees, the District Attorney now moves to reopen Mr. Jensen's sentence and to impose reimbursement as a condition of extended supervision.<sup>1</sup> Not only is the State's motion unnecessary, it is also legally incorrect. This Court should deny the motion on jurisdictional grounds and because the motion is improper.

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<sup>1</sup> The moving papers refer to this as a condition of supervised release. Presumably, the State is referring to extended supervision with respect to the sentence imposed on Mr. Jensen.

**I. THE COURT DOES NOT HAVE JURISDICTION TO GRANT THE REQUESTED RELIEF GIVEN THE PENDENCY OF THE APPEAL.**

Section 808.075(4)(g)6., Wis. Stats., allows the Court to modify a sentence while a criminal case is on appeal. Modifications of sentence are governed by § 973.19, Wis. Stats. That provision only allows a modification of a sentence upon a motion of the person sentenced to imprisonment. There is no statutory provision allowing the State to obtain a modification seeking to increase the terms of a sentence while the matter is on appeal.

Mr. Jensen's sentence must be distinguished from the other defendants in the above-captioned case because he has been sentenced to prison. He has not been sentenced to any period of probation. While a case is on appeal, § 808.075(4)(g)5., Wis. Stats., allows the Court to modify a condition of probation, pursuant to § 973.09(3)(a), Wis. Stats. There is no comparable jurisdiction granted to the circuit court authorizing a modification to increase any of the conditions of extended supervision during the pendency of an appeal.<sup>2</sup>

**II. THE MOTION IS IMPROPER.**

Section 302.113(7m)(a), Wis. Stats., specifies that a motion for a modification of a condition of extended supervision is to be brought by either the defendant or the Department of Corrections. The present motion fits neither provision and has no basis in the statutory code.

The State acknowledged at the sentencing proceeding that these attorneys' fees "would not properly be considered restitution . . . ." (*Sentencing Proceeding, 5/16/06, p.37, lines 19-20.*)

Yet, what it seeks to do is to circumvent the statutory limitations on proper restitution by simply

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<sup>2</sup> Although this Court indicated it was "reserving" the issue of attorney's fees, *see, e.g., Sentencing Proceeding 5/16/06, p. 37-38*, there is no statutory or jurisdictional basis to alter conditions of extended supervision while the conviction is on appeal. Accordingly, the court is without jurisdiction to now do so.

attempting to make such payments an independent condition of sentence. That is improper. *See State v. Torpen*, 2001 WI App. 273, ¶¶ 18-19, 248 Wis. 2d 951, 637 N.W.2d 481.

Moreover, even in those limited circumstances in which the statutory code authorizes the court to impose reimbursements as a condition of probation (as opposed to a condition of extended supervision), the code requires that the amount ordered to be reimbursed be governed by the restitution factors contained in § 973.20(13)(a)2-5. *See* § 973.09(1g), Wis. Stats.. Accordingly, the issue of ability to pay would need to be addressed anew.

In the end, however, the request of the State is wholly unnecessary. The reimbursement rights at issue are contractual in nature and, if the appropriate time ever comes, the State Assembly will have the ability to press this claim easily as a result of the judicial admissions of liability made by Mr. Jensen. No additional protections of the State Assembly's financial interests are necessary. These financial consequences of his conviction are clearly understood and admitted by Mr. Jensen.

### **CONCLUSION**

On the basis of the foregoing, this Court should deny the State's Motion for an Order Requiring Reimbursement of Legal Fees to the State as a Condition of Supervision.

Dated at Madison, Wisconsin, this \_\_\_\_\_ day of April, 2007.

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