

STATE OF WISCONSIN

CIRCUIT COURT  
Branch 14

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

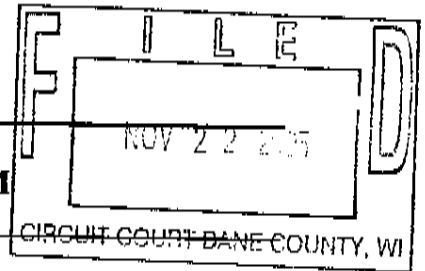
v.

Case No. 02 CF 1476 *do*

BRIAN B. BURKE

Defendant.

STATE'S SENTENCING MEMORANDUM



Now comes the state by and through its attorneys, Dane County District Attorney Brian W. Blanchard and Special Assistant District Attorney Roy R. Korte, and submits the following Sentencing Memorandum in advance of sentencing scheduled for November 30, 2005.

**I. THE CONVICTIONS.**

On Wednesday, October 5, 2005, pursuant to a written plea agreement, the defendant entered pleas of guilty to the following:

(1) Count One of the Criminal Information, alleging Misconduct In Public Office As Party To The Crime in violation of Section 946.12(3) of the Wisconsin Statutes, a Class E Felony carrying a maximum penalty of a fine of not more than \$10,000 and imprisonment not to exceed five years or both; and

(2) Count 16 of the Information as amended to a charge of Obstructing An Officer, a violation of Section 946.41 of the Wisconsin Statutes, a Class A misdemeanor, punishable by a fine of not more than \$10,000 and imprisonment of not more than nine months or both.

In addition, the defendant admitted the conduct alleged in Counts 7-14 of the Criminal Complaint as a single dismissed, read-in count of Intentional Misuse of Public Office in violation of §§ 19.45 (2), 19.58(1)(a) of the Wisconsin Statutes, an unclassified misdemeanor punishable by a fine of not less than one hundred dollars nor more than five thousand dollars or imprisonment for not more than one year in the county jail or both.

## II. LAW RELATED TO COURT'S EXERCISE OF SENTENCING DISCRETION.

Under the familiar standards, this court must consider the seriousness of the offenses, the defendant's character, 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 Wis. 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 *Gallion*, 270 Wis. 2d 535, the Supreme Court created a framework for circuit courts to follow in imposing sentence:

- To properly exercise its discretion, this court must provide a rational, explainable basis for the sentences imposed. *Id.* at ¶¶ 22, 39.

- This court must 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.
- This court must identify the general sentencing objectives of greatest importance in this case. *Id.* at ¶ 41.
- This court must 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.
- This court must 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.
- This court must provide an explanation for the general range of the sentence imposed, not for the precise number of years chosen, and it need not explain why it did not impose a lesser sentence. *Id.* at ¶¶ 49-50.

Two additional principles of law deserve separate comment.

First, the rules of evidence and the rules 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). This court may properly consider events that establish the defendant's "history of undesirable behavior patterns," *see Harris*, 119 Wis. 2d at 623, including any read-in criminal offenses. 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 278, 284, 286 N.W.2d 559 (1980).

Second, this court may properly consider the need for punishment, incapacitation and deterrence in imposing sentence. *See generally U.S. v. Brown*, 381 U.S. 437, 458

(1965); *State v. Verstoppen*, 185 Wis. 2d 728, 734, 519 N.W.2d 653 (Ct. App. 1994); *McCleury*, 49 Wis. 2d at 271 (a function of criminal law is to “deter similar acts by the defendant and others and to rehabilitate the individual defendant”). 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 *U.S. v. Frank*, 864 F.2d 992, 1009-10 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095 (1989)). Thus, courts have properly given 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 defendant’s background and lack of prior record, that defendant was religious man with a strong sense of family and had many friends in the community, and that rehabilitation of 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).

### III. THE OFFENSE CONDUCT.

The State relies primarily upon the Amended Criminal Complaint and the plea agreement for descriptions of the offense conduct in this case. In sum, the defendant began during the year 2000, and at an accelerating pace throughout 2001, to use his Senate office to advance his ambition to be Attorney General in ways that were unlawful, hiring and supervising Senate office staff to operate his A.G. campaign. He did this to raise and save large amounts of campaign funds during the critical early phase of that campaign, putting any other person who was running for or considering a run for Attorney General at a considerable, if not insurmountable, disadvantage.

As part of this course of misconduct, the defendant unlawfully directed Senate employee Raghu Devaguptapu to invite lobbyists to the Burke Senate Office, at a time when the defendant was in the very powerful position of Co-Chair of the Joint Finance Committee ("JFC") of the Legislature, in order to solicit campaign contributions in his Senate office. This was an intentional misuse of his powerful position.

Separately, after the opening of a criminal investigation into allegations of misuse of state resources for campaign purposes, the defendant, a former prosecutor and attorney, intentionally sought to obstruct the investigation by withholding from investigators a document that had been subpoenaed through a John Doe subpoena. This obstruction came to light only because of information volunteered by others. Until the time of his plea of guilty, the defendant never acknowledged this crime over the course of more than three years.

Finally, the defendant stole from the state by consciously avoiding determining the truth of whether he was in the Capitol on particular days when he claimed per diem

payments, cynically enriching himself at public expense. This was a separate and additional abuse of his position of trust.

#### **IV. ADDITIONAL INFORMATION.**

##### **A. Repayment of Legal Fees.**

It is the understanding of the state that the defendant has recently begun making monthly payments toward reimbursement of the \$9,497 in public money used to fund part of his legal defense in this case. It is agreed by the parties that complete repayment may be a condition of probation.

##### **B. Additional Restitution Amounts.**

It is also the understanding of the state that the defendant has repaid the \$880 that was paid to him for the false per diem vouchers. This should be ordered as restitution, and satisfied with proof of payment.

Separately, the restitution owed by the defendant as a result of his conduct described in Count One must be estimated, because the defendant did not require any sort of time-keeping records for employees of the Office of Senator Brian Burke. The parties disagree as to the best estimate, but in order to avoid uncertainty and in the interests of judicial economy, the parties have agreed and stipulate that the court may order restitution in the amount of \$75,000, to be paid to the state of Wisconsin representing the public money paid in salary and benefits to state employees during times they were actively working for Friends of Brian Burke at the direction of the defendant, knowing that this was a misuse of his office. As discussed below, while the defendant proposes that these funds be paid from a campaign account and reserves the opportunity to litigate the precise amount of restitution if the campaign account may not be used, the state takes

no position on that issue. The parties have agreed that the court's restitution order regarding Count One would constitute a final disposition in this criminal case of any responsibility on the part of Burke or his campaign committee for reimbursing the state with respect to the conduct on which Count One is based.

To give the court context for acceptance of an amount of \$75,000, in addition to the information alleged in the Criminal Complaint, the state does not claim that all work by all staff members of the Burke senate office during the charged time period was campaign-related. To greater and lesser degrees, senate office staffers did legitimate senate work during 2000-2001. The 2001 salary of Raghu Devaguptapu in the Burke senate office was \$32,179, and the salary of Tanya Bjork was \$70,980. A benefits multiplier of approximately 35% would apply.

**C. Use of Campaign Funds To Pay Restitution.**

**1. Legality Of The Use Of Campaign Funds As Restitution As A Matter Of Campaign Finance Law.**

The staff of the State Elections Board has issued an informal opinion stating that, as a matter of law, the defendant's use of the Friends of Brian Burke campaign account to pay restitution in this case would not be a violation of Chapter 11 of the Wisconsin Statutes, pursuant to §§ 11.01(16), 11.01(7), 11.05, stats. The state has no reason to question the validity of that opinion as a matter of campaign finance law.

**2. Appropriateness Of Use Of Campaign Funds For Restitution In This Case.**

There appears to be no statutory standard under § 937.20, stats., and related statutes such as § 778.30, stats., addressing the propriety of use of campaign accounts to pay restitution in a case such as this, in which a campaign committee was the immediate

beneficiary of criminal wrongdoing. The state was also unable to locate any case law addressing the authority of the court in this area in particular. The primary purpose of ordering restitution is to make the victim, in this case the State of Wisconsin, whole. There is case law addressing the potential rehabilitative and beneficial effect on a defendant of having to pay restitution, but it is not clear that those standards apply in this case. For these reasons, the state takes no position regarding the source of restitution payments.

**D. Professor Dennis Dresang.**

The state intends to call as a witness at the sentencing hearing Prof. Dennis Dresang, Professor of Political Science and Public Affairs and Director of the Center on State, Local, and Tribal Governance. He is also founding Director of the La Follette School of Public Affairs. His research focuses on state politics, public personnel management, and community issues.

Prof. Dresang is prepared to share relevant opinions, which include the following, and take any questions from the court. Use of state resources to operate private campaign committees severely disadvantages competing candidates and discourages other potentially qualified candidates from even running for public office. For at least approximately the last 15 years, races for state-wide office in Wisconsin, which includes Attorney General, are won by those who collect the most campaign money, and so the ability to collect "early" campaign money on a large scale using state resources can essentially dictate victory for officer holders who violate the law in this way. In addition, incumbents' abuse of the perquisites of office directly feeds public cynicism that the

government is not "my government," but instead is a government that is run on the public dollar but by insiders for the benefit of insiders.

## **V. RECOMMENDATIONS.**

### **A. Mitigating Factors.**

First, the defendant has no history of criminal convictions, and no prior history of criminal conduct to the knowledge of the state.

Second, the defendant had a long history of consistent public service before 2000 that, to the knowledge of the state, did not involve criminal activity.

Third, the degree to which the defendant directly, personally profited from his crimes in this case is limited to the false per diem vouchers. As discussed below, the defendant's conduct described in Count One was fraud on the state for the defendant's own personal benefit in misusing the resources of his senate office, but this case is not an example of the most extreme form of political corruption in which a public official uses his or her office to systematically steal money from the public treasury directly for his or her own use for spending on personal items.

Fourth, the state cannot prove any direct quid pro quo sale of the defendant's office. As discussed below, the defendant misused his office to advance his own career and at a time when he held an extremely powerful position, but the state has no evidence of a specific decision by the defendant to take or promise official action in exchange for a monetary contribution to the defendant or to any organization with which he was associated.

Fifth, while he has taken years to accept responsibility, as discussed below, the defendant has at last now admitted his guilt in each of the areas in which he was charged

in this case. Notably, he is the first public official to publicly admit intentional use of state resources for campaign purposes.

Sixth, the defendant dropped out of the A.G. race and is no longer a public official. As a result of this prosecution, his law license is presumably at peril, and his prospects for well paying employment in the near future would appear to be low. In a short period of time, he went from being one of the most powerful persons in government in Wisconsin to being a private citizen subject to intense public criticism. While the defendant brought this situation entirely on himself through his intentional and systematic actions, it is also true that he has had to experience reversals of fortunes that go beyond that suffered by many criminal defendants.

**B. Aggravating Factors.**

First, unlike many crimes that result in convictions, the defendant's crimes were not committed on the spur of the moment or without time for reflection. The crimes were ongoing, and the defendant had the opportunity to deliberate on his actions. The defendant had ample opportunity to make a large range of lawful choices and his unlawful choices involved many conscious decisions. The defendant's unlawful conduct was planned and calculated, as described in the Criminal Complaint. These multiple decisions reflect a high degree of culpability.

Second, the defendant misused a position of public trust to commit each of the crimes of conviction. It was evident that the defendant considered himself beyond the reach of the law because he occupied a position of great authority in state government. Intentionally turning public funds into campaign cash is no different from other forms of embezzlement, and worse than some because of the abuse of public trust and, as Prof.

Dresang explains, directly tears away at the fundamentals of our system of representative government. Moreover, the defendant explicitly picked as the “window of opportunity” for this crime the period in which he could use the leverage of his Joint Finance Committee co-chair position to use Bjork, Devaguptapu, and others to raise money from lobbyists illegally.

Third, the defendant was not, during the years 2000-2002, a young and inexperienced public official. At the time of these offenses the defendant was a long-serving member of the State Legislature with the benefit of a legal education and extensive experience in the criminal justice system. It is the flip side of the defendant’s long history of public service, a mitigating factor, that he had the experience to know much better, an aggravating factor.

Fourth, the defendant was not compelled to take any of the actions at issue against his or her better judgment by any other person. No one had authority to direct, much less compel, the defendant to commit any of these acts. He was driven by his own ambition, and rejected warnings from others to operate within the limits of the law. The defendant intentionally ignored explicit criticisms and reminders from persons close to him that he should stop trying to win the office of Attorney General by misusing state resources

Fifth, while the total amount stolen in per diem money was relatively small, the defendant stole in this way on numerous occasions, and for his own personal enrichment, which goes to his character and the gravity of the offense.

Sixth, turning to the obstructive conduct, judges in Dane County sentence defendants to jail time for obstructive conduct that is isolated in nature and not as serious as that reflected in this case. The nature of the defendant’s obstruction is particularly

troubling because as an attorney and former prosecutor, the defendant well knew the meaning and importance of the use of subpoenas to obtain evidence. The majority of defendants in criminal obstructing cases are ordinary people with few educational and other advantages who decide to lie to or otherwise mislead an officer about their own identity or about who was driving a vehicle in a one-time, relatively fleeting incident, which often involves excessive use of alcohol or drugs. That is a very far cry from a State Senator and former prosecutor reacting as the defendant did to the service of subpoenas and official inquiry over an extended period.

Seventh, the defendant intentionally placed the staff of his office, who were subordinate to him and employed at will, in harms way, first by misusing his office through them and then by obstructing the investigation and refusing to take responsibility for his own conduct. He used others as tools to commit crimes and then refused for years to acknowledge any of his own misconduct, compounding the hardships for others for his own perceived benefit. He also publicly lied about his conduct at a critical time in early 2002 when staff of his office had to decide whether they should tell the truth. This included a false e-mail sent to a newspaper reporter, which the defendant hoped would discourage his staff from telling the truth about these matters.

Eighth, the defendant, who is an attorney, elected to drag out litigation of this case over an extraordinary period of time in multiple courts using an unusually aggressive series of litigation tactics. The defendant shares with all defendants in all criminal cases the absolute right to raise legal issues and protect his rights to the fullest extent of the law. He cannot be punished for that. What is relevant is the defendant's very prolonged failure to accept responsibility for his actions in 2001, 2002, 2003, or 2004, which is a

highly relevant character issue. This course of conduct highlights the significance of his original obstructive conduct in 2001 and early 2002.

**C. Recommendations**

Based on all of the above considerations, both aggravating and mitigating, the state recommends a withheld sentence and a term of probation of two years, with conditions that include the following:

1. Incarceration in jail for a period not to exceed six months. The state does not oppose Huber privileges in the event of a disposition that includes jail time.
2. Restitution in total of \$85,377, as follows:
  - \$75,000 for salary and benefits of senate employees;
  - \$9,497 in legal fees, less whatever has been paid already;
  - \$880 in per diem payments, which can be satisfied with proof of payment, which has apparently already occurred.
3. A fine in the amount of \$2,500.