State of Wisconsin: **Circuit Court:** **Milwaukee County:**

State of Wisconsin,

Plaintiff,

v.

Case No. 2010CF000487

Luis Gamboa,

Defendant.

Defendant's Sentencing Memorandum

Background

On February 8, 2010, the defendant, Luis Gamboa (hereinafter "Gamboa") was charged in an original information with (1) child abuse causing great bodily harm; and, (2) child neglect causing great bodily harm. The neglect charge was alleged to have taken place from November 25, 2009 to January 20, 2010. Gamboa waived his preliminary hearing, and then entered a not guilty plea.

On May 20, 2010, the State, over Gamboa's objection, was permitted to file an amended information which alleged two additional counts of child neglect (counts four and six) causing great bodily harm. Count four alleges the neglect involved was for the child's "failure to thrive" from August 6, 2009 to January 20, 2010. Count six alleges that it was for failing to disclose "abuse/shaking of the baby" to hospital authorities. This count was alleged to have occurred between November 25, 2009 and January 20, 2010. These charges exposed Gamboa to a total of 62.5 years of initial confinement. [1]

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1. 1. Child abuse, intentional 25+15

2. Neglect, great harm 7.5+4.5

3. Neglect,great harm 7.5+4.5

4. Neglect, great harm 7.5+4.5

62.5+28.5

The matter proceeded to trial on June 28, 2010. On count one, the jury found Gamboa guilty of the lesser-included offense of child abuse (*recklessly* causing bodily harm); regarding count two, the jury found Gamboa guilty; on count three, the jury found Gamboa guilty of the lesser-included offense of neglect (causing bodily harm); and Gambo was found not guilty of count four. Gamboa's maximum exposure now is 15.5 years.[2]

As will be set forth in more detail below, the court should sentence Gamboa to four years initial confinement, four years extended supervision, imposed and stayed, with four years probation.

Discussion

Generally

A sentencing judge abuses his sentencing discretion if he approaches the process with a "foresworn inflexibility". *See State v. Varnell,* 153 Wis.2d 334, 339, 450 N.W.2d 524, 526 (Ct. App. 1989). Likewise, the court must not use a mechanistic, preconceived sentencing policy which excludes other sentencing alternatives. See *State v. Martin,* 100 Wis.2d 326, 327, 302 N.W.2d 58, 59 (Ct. App. 1981).

Rather, the Wisconsin Supreme Court has reminded the lower courts numerous times that the court must impose the minimum amount of confinement which is consistent with the protection of the public, the gravity of the offense, and the defendant's rehabilitative needs. *McCleary v. State,* 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). A circuit court also should consider the defendant's prior record, attitude, and capacity for rehabilitation, and the rehabilitative goals to be accomplished by

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2. 1. Child abuse, reckless: 5+5

2. Neglect, great harm 7.5 + 4.5

3. Neglect, harm 3 + 3

4. Not guilty

15.5+12.5

reconfinement for the time period in question in relation to the time left on the defendant's original sentence.

> Likewise, not new to our sentencing jurisprudence is the concept that probation should be considered as the first alternative. In *Bastian v. State*, 54 Wis. 2d 240, 248-49, n.1, 194 N.W.2d 687 (1972), this court expressly adopted Standard 1.3 of the ABA Standards Relating to Probation. That standard provides in part that, "Probation should be the sentence unless the sentencing court finds that:
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> (i) confinement is necessary to protect the public from further criminal activity by the offender; or
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> (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or
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> (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed."

State v. Gallion, 2004 WI 42, P25 (Wis. 2004)

There is no need in this case to "protect the public"

Although "protection of the public" is a proper sentencing consideration, the court is limited to, "[T]he amount of incarceration necessary to protect the *public* from the risk of further criminal activity, *taking into account the defendant's conduct . . . " State v. Walker,* 2008 WI 34, P17 (Wis. 2008) .

Here, Gamboa has no criminal record.[3] The present case is his first criminal conviction. Thus, Gamboa has not demonstrated himself to be a repeat offender who, unless he is confined, is likely to continue to commit crimes.

Even more significant, though, is the fact that Gamboa's crime in this case was not committed against the public (in the sense that the choice of victim was random, as it is in armed robbery, for example). Rather, the victim of the crime was Gamboa's son, Eliel. It was a situational crime that was limited to the specific circumstance of

3. According to CCAP. Counsel ran Gamboa's name, and there were no prior convictions.

Gamboa's parental relationship. This, of course, does not necessarily mitigate the seriousness of the offense. It does, though, demonstrate that Gamboa does not pose a threat to the community at large. There are steps, short of confinement in prison, that would adequately protect Eliel.

These steps have already been taken. Eliel was removed from Gamboa's home and there currently is a CHIPS case pending in children's court. The orders of the Children's Court are sufficient to protect Eliel (and Gamboa's other child) from further harm.

Thus, there is literally no need to imprison Gamboa in order to protect the public.

Gamboa is not in need of correctional treatment that can most effectively be provided in a prison setting

Gamboa is plainly in need of correctional treatment. According to the jury's verdict, Gamboa's parenting skills are criminal deficient. But, given the fact that the present crimes are Gamboa's only criminal activity, it is safe to conclude that his need for correctional treatment is limited to training in parenting skills.

It should almost go without saying that the prison system is not better equipped than is the Children's Court system to train Gamboa in parenting skills. In fact, placing Gamboa in prison will not improve his parenting skills in the slightest. Rather, it will only ensure that he cannot meet the conditions of return in Children's Court. This, of course, may ultimately result in the termination of Gamboa's parental rights.

The net effect, then, of confining Gamboa in prison would be to deny him the very correctional treatment that he desperately needs.

The "gravity of the offense" does not require a lengthy prison sentence

Because a child victim was involved, there is a strong, emotional temptation to conclude that this offense is of the utmost seriousness. Eliel Gamboa suffered grievous injuries-- especially to his skull and to his legs. Does this fact, alone, demand a prison sentence for Gamboa, though?

Certainly not. Firstly, it important to emphasize that the jury did not find that Gamboa *intentionally* caused any injuries to Eliel. Rather, as serious as Eliel's injuries were, the

jury found that Gamboa caused injuries through criminal recklessness. "Criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that *risk*. *See,* Sec. 939.24, Stats. This is a far different-- and far less culpable-- form of *mens rea,* than is involved in most other felonies (which require specific intent).

It is one thing to attempt to deter a burglar from committing burglary in the future by imprisoning him for a lengthy period. It is quite another thing to impose a lengthy prison sentence one who has committed a crime of criminal recklessness. After all, the person who commits a crime of recklessness does not actually intend for any harm to be caused. The "deterrent effect" of a prison sentence is much less pronounced in the situation of a crime of recklessness.

The court must not impose consecutive sentences because what occurred here was a continuing offense.

Whether to impose a consecutive, as opposed to a concurrent, sentence is committed to the sound discretion of the trial court. *State v. Ramuta*, 261 Wis. 2d 784, 661 N.W.2d 483 (2003). "In sentencing a defendant to consecutive sentences, the trial court must provide sufficient justification for suchsentences and apply the same factors concerning the length of a sentence to its determination of whether sentences should be served concurrently or consecutively." *State v. Hall*, 255 Wis. 2d 662, 648 N.W.2d 41 (2002).

The behavior alleged in each count is not of a significantly different nature

Counts two and three (both alleging neglect) do not allege behavior that is materially different from each other; that is, counts two and three allege that Gamboa neglected his child over the same period (in one case, the neglect involved medical care; and in the other instance, it involved the failure to disclose information to health care providers). The common meaning of "neglect" is to "fail to do something; leave something undone." In a very real sense, then, *neglect* is not behavior, it is the failure to take action. Here, the information alleges that Gamboa merely continued to fail to take action to care for his child. Thus, there is no material difference in the behavior alleged between counts two and three. There is no additional victim. This is significant because Sec. 948.21, Stats., provides that, "Any person who is responsible

for a childs welfare who, *through his or her actions or failure to take action,* intentionally contributes to the neglect of the child . . ." Thus, under the statute, neglect may occur by action, as well as by inaction. Here, though, the additional counts allege continued inaction on the part of Gamboa (i.e. no materially different form of behavior).

There is no additional volitional act by Gamboa

A related, but slightly different point is that Gamboa's pattern of neglect, shown at trial, required no additional volitional act on his part. As mentioned above, neglect is not an act-- it is the *failure* to act. The failure to act is, by definition, a continuing offense so long as the person continues to fail to act.

Apparently, the State is on the opinion that is a separate violation of Sec. 948.21, Stats., for each thing that should be done for the child, but which the parent leaves undone. That is, the State seeks to file an additional charge for failure to cause the child to thrive, for failing to seek medical attention, and for failing to disclose the shaking/abuse to the medical personnel.

Initially, it should be emphasize that the State utterly fails to explain the difference between failing to seek medical attention, and failing to disclose to medical personnel the true source of the injuries.

Nonetheless, neglect of a child requires the State to prove a negative; that is, that the parent failed to care for his child. If it were a separate violation of the statute for each thing that *should have been done for the child,* but which was left undone, there would literally be no end to the number of charges available under the statute. Under the State's misguided theory, if a parent failed to care for a child (i.e. took no action to parent the child), a separate offense could be charged for each meal the child missed, for each time the child was injured but medical attention was not sought, for each time the parent failed to put the child to bed on time, for each time the parent failed to properly supervision the child. The list of ways in which a child may be neglected is lengthy, but it is not necessary to recite the entire litany. The point is well made. *Child neglect is a continuing offense*. Gamboa ought not face a separate, consecutive sentence for each thing he should have done for his child, but which he left undone.

Conclusion

For all of these reasons, then, the court must place Gamboa on probation. Because Gamboa has no criminal record, and because the crimes involved here are situational,

Gamboa poses no general danger to the community at large. The proceedings in Children's Court can adequately protect the victim, Eliel. Moreover, Gamboa's correctional needs are limited to improving his parenting skills; and the prison system is a singularly poor place to expect Gamboa to improve his parenting skills. Finally, it would not unduly depreciate the seriousness of the offense to place Gamboa on probation. Although Eliel's injuries were serious, the jury's verdict demonstrates that Gamboa did not cause those injuries intentionally. Thus, the deterrent effect of a prison sentence is dubious.

The court should sentence Gamboa to four years of initial confinement, and four years of extended supervision; imposed and stayed, and place Gamboa on probation for a period four years.

Dated at Milwaukee, Wisconsin, this _____ day of July, 2010.

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