STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1337-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ZACHARY S. FRIEDLANDER,

Defendant-Appellant.

REVIEW OF A DECISION AND ORDER OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AN ORDER DENYING SENTENCE CREDIT ENTERED IN JEFFERSON COUNTY CIRCUIT COURT, THE HONORABLE DAVID J. WAMBACH, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUES PRESENTED

1. To be entitled to sentence credit, an offender must show that he or she was "in custody" during the time in question. Wis. Stat. § 973.155(1). Applying its holdings in *Riske* and *Dentici*,[1] the court of appeals concluded that Friedlander was "in custody" for sentence credit purposes following his mistaken release from confinement because his freedom was through no fault of his own. Should this Court overrule *Riske* and *Dentici* on grounds that an offender who is at liberty cannot be "in custody" under section 973.155?

The circuit court did not address this question.

The court of appeals did not address this question.

This Court should answer yes.

2. If this Court overrules *Riske* and *Dentici* and applies the "in custody" standard of Wis. Stat. § 973.155(1) and *Magnuson*[2] to this sentence credit claim, was Friedlander "in custody" and thus entitled to sentence credit?

The circuit court concluded that Friedlander was not entitled to credit.

The court of appeals concluded that Friedlander was "in custody" under *Riske* and *Dentici* and entitled to credit.

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[1] *State v. Riske*, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989); *State v. Dentici*, 2002 WI App 77, 251 Wis. 2d 436, 643 N.W.2d 180.

[2] *State v. Magnuson*, 2000 WI 19, ¶¶ 25, 31, 47, 233 Wis. 2d 40, 606 N.W.2d 536 (holding that an offender is "in custody" within the meaning of Wis. Stat. § 973.155(1) when he or she would be subject to an escape charge for leaving his or her current status).

This Court should answer no.

3. If this Court declines to overrule *Riske* and *Dentici*, was Friedlander, in fact, at liberty "through no fault of his own" and thus "in custody" under *Riske* and *Dentici*?

The circuit court concluded that Friedlander was not entitled to credit.

The court of appeals answered yes.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case is set for oral argument on December 11, 2018, at 1:30 p.m. This Court publishes its opinions.

INTRODUCTION

Zachary S. Friedlander was at liberty for 65 days after prison officials mistakenly released him instead of transferring his custody to a county jail to serve conditional jail time. Once local officials discovered the mistake, the circuit court held a hearing at which Friedlander requested 65 days sentence credit against his conditional jail time. The circuit court denied the request and denied Friedlander's request to stay the conditional jail time.

On appeal, the court of appeals reversed and directed the circuit court to amend the judgment of conviction to reflect that Friedlander is entitled to 65 days' credit in the event his probation is revoked and he is sentenced. In so concluding, the court followed its prior decisions in *Riske* and *Dentici*, which hold that an offender who is at liberty through no fault of his or her own is "in custody" under Wis. Stat. § 973.155(1) and thus entitled to credit.

This Court should overrule *Riske* and *Dentici* because their definition of "custody" cannot be squared with Wis. Stat. § 973.155(1) and *Magnuson*, which holds that an offender's status constitutes "custody" for purposes of section 973.155(1) when he or she would be subject to an escape charge for leaving that status. Because a person at liberty cannot be charged with escape for leaving that status—"escape from freedom," after all, "is not yet a crime"[3]—the definition of "custody" in *Riske* and *Dentici* is contrary to the definition in section 973.155(1) and *Magnuson*.

Applying Wis. Stat. § 973.155(1) and *Magnuson* to Friedlander's sentence-credit claim, this Court should conclude that Friedlander was not "in custody" when he was at liberty following his mistaken release from confinement and thus is not entitled to sentence credit. If this Court concludes that *Riske* and *Dentici* remain good law, it should nonetheless reverse under the *Riske* and *Dentici* standard because Friedlander's 65 days at liberty were not, in fact, through no fault of his own.

This Court should therefore reverse the court of appeals' decision and order and remand to the circuit court to reinstate its order denying Friedlander's request for sentence credit.

STATEMENT OF THE CASE

On April 15, 2016, Zachary S. Friedlander pleaded no contest to one count of felony bail jumping pursuant to a plea bargain and was sentenced. *Friedlander*, No. 2017AP1337-CR, 2018 WL 1779384, ¶ 2 (Wis. Ct. App. April 12, 2018) (unpublished). (Pet-App. 102; R. 40:2.) At the time, Friedlander was serving a prison sentence in Oshkosh

[3] *Dentici*, 251 Wis. 2d 436, ¶ 15 (Fine, J., dissenting).

Correctional Institution on a prior drug conviction in *State v. Zachary S. Friedlander*, Jefferson County case number 2014CF212. *Id.* (R. 70:9, Pet-App. 122; 71:4, Pet-App. 146.) Under the plea agreement, the parties jointly recommended a withheld sentence and three years' probation to run concurrent with the existing prison sentence. (R. 70:9, Pet-App. 122.) The joint recommendation also included eight months' jail time as a condition of probation. *Friedlander*, 2018 WL 1779384, ¶ 2. (Pet-App. 102; R. 70:9, Pet-App. 122.)

The circuit court adopted the parties' sentencing recommendation and ordered that the conditional jail time start immediately and run concurrently with the existing sentence. *Friedlander*, 2018 WL 1779384, ¶ 2. (Pet-App. 102; R. 70:20–21, Pet-App. 33–34.) The court and parties agreed on the record that the eight months' conditional jail time would extend beyond the time remaining on Friedlander's existing sentence. (R. 70:9, 13–15, 20–21, Pet-App. 122, 126–28, 133–34.) The court then informed Friedlander that "in all likelihood" he would "have to go from prison to spending some time in the county jail" before he would be released from confinement. (R. 70:14, Pet-App. 127.) Friedlander indicated that he understood and still wished to plead guilty. (R. 70:14, Pet-App. 127.)

Friedlander was returned to prison, and county jail personnel lodged a detainer for Friedlander with the Wisconsin Department of Corrections. *Friedlander*, 2018 WL 1779384, ¶ 3. (Pet-App. 103; R. 71:16, Pet-App. 158.) On September 27, 2016, Friedlander completed his prison sentence, and officials at Oshkosh Correctional Institution released him. *Friedlander*, 2018 WL 1779384, ¶ 3. (Pet-App. 103; R. 71:9, 16, Pet-App. 151, 158.) Despite the detainer, Oshkosh officials did not notify Jefferson County officials of Friedlander's impending release or arrange to have him transferred to the jail. *Friedlander*, 2018 WL 1779384, ¶ 3.

(Pet-App. 103; R. 71:17, Pet-App. 159.) Friedlander met with his probation agent immediately upon his release and once more before November 11, 2016. (R. 71:28–29, Pet-App. 170–71.) His agent did not tell him to report to jail. *Friedlander*, 2018 WL 1779384, ¶ 3. (Pet-App. 103; R. 71:27, Pet-App. 169.)

On November 11, 2016, the Jefferson County Sheriff's Office became aware that Friedlander was no longer in Oshkosh's custody. *Friedlander*, 2018 WL 1779384, ¶ 4. (Pet-App. 103; R.71:15–16, Pet-App. 157–58.) The sheriff's office contacted Friedlander's probation agent, who told Friedlander to contact Captain Duane Scott in the sheriff's office. *Id.* (71:19, 31–33, R-App. 161, 173–75.) Friedlander did so. *Id.* Captain Scott sent a letter dated November 23, 2016, to the circuit court, asking whether Friedlander should report to serve the remainder of his conditional jail time, and, if so, "what should be done with the days he was not in jail[?]" *Id.* (R. 41; 71:2, Pet-App. 144.)

The circuit court held a hearing on December 1, 2016. *Friedlander*, 2018 WL 1779384, ¶ 5. (Pet-App. 103; R. 71:2, Pet-App. 144.) The court determined that Friedlander had served 165 days of the eight months (240 days) of conditional confinement time, leaving 75 days of conditional confinement time remaining. *Id.* (R. 71:22, Pet-App. 164.)

Friedlander asserted he was entitled to credit for the 65 days he spent at liberty because, he argued, his absence from custody was through no fault of his own, citing *Riske* and *Dentici*. *Friedlander*, 2018 WL 1779384, ¶ 6. (Pet-App. 104; (R. 71:22–23, 42–45, Pet-App. 164–65, 184–87.) After taking testimony from a deputy at the county jail and Friedlander (R. 71:15–20, 24–41, Pet-App. 157–62, 166–83), the circuit court held that Friedlander was not entitled to sentence credit against his conditional confinement time for

the 65 days he claimed. *Id.* (R. 48, Pet-App. 113; 71:45–47, Pet-App. 187–89.)

In so holding, the circuit court distinguished *Riske* and *Dentici*, in which the offenders reported to the jail before being turned away due to jail overcrowding. (R. 71:45–46, Pet-App. 187–88.) Based on Friedlander's testimony, the court found that Friedlander was aware that he had more time to serve in the jail. (R. 71:46, Pet-App. 188.) The court determined that Friedlander, like Riske and Dentici, should have reported to the jail to serve his conditional jail time, or at least sought clarification from the court. (R. 71:45–47, Pet-App. 187–89.) Because he did neither, the circuit court concluded that Friedlander was not entitled to credit for the time he was at liberty following his mistaken release. (R. 71:45–47, Pet-App. 187–89.)

The court ordered Friedlander to begin serving the remainder of his confinement time. *Friedlander*, 2018 WL 1779384, ¶ 6. (Pet-App. 104; R. 48, Pet-App. 113; 71:47, Pet-App. 189.) Friedlander filed a motion for a stay of his confinement pending appellate review of the sentence-credit determination, which the circuit court denied. (R. 42; 49.) Friedlander filed a petition for leave to appeal this order, which the court of appeals denied. *State v. Friedlander*, No. 2016AP2520-CRLV (Wis. Ct. App. Jan. 10, 2017) (unpublished) (R. 55:1.)

In July 2017, Friedlander filed a notice of appeal without seeking additional review in the circuit court. (R. 64:1.) In the court of appeals, Friedlander conceded that "[n]ormally, a defendant must be 'in custody' to be entitled to sentence credit under Wis. Stat. § 973.155." (Friedlander's COA Br. 9.) But, Friedlander maintained, "time spent 'at liberty' satisfies the in custody requirement because he was released from custody through no fault of his own" under *Riske* and *Dentici*. (Friedlander's COA Br. 9–14.) *Friedlander*,

2018 WL 1779384, ¶ 16. (Pet-App. 107.) Friedlander then argued that, because his time at liberty was due to the prison's administrative mistake and not any fault of his own, he was entitled to credit for this time under *Riske* and *Dentici*. (Friedlander's COA Br. 9–14.) *Id.*

The court of appeals agreed. After summarizing the *Riske* and *Dentici* decisions, the court held as follows: "Here, as in *Riske* and *Dentici*, Friedlander was at liberty between the date that he was released from prison and the date he was remanded to jail, not through any fault of his own but through the fault of government officials." *Friedlander*, 2018 WL 1779384, ¶ 19. (Pet-App. 109.) "Accordingly, under *Riske* and *Dentici*, we conclude that Friedlander earned sentence credit for those sixty-five days of liberty." *Id.* (Pet-App. 109.) The court remanded with directions for the circuit court to amend the judgment of conviction to reflect an additional 65 days of credit, to be applied in the event Friedlander's probation is revoked and he is sentenced. Id. ¶ 1. (Pet-App. 101–02.)

The court also rejected the State's arguments against application of *Riske* and *Dentici*. The State maintained that: (1) unlike Riske and Dentici, who reported to jail but were turned away, Friedlander knew that he had time to serve but did not report to jail, and this failure supports a finding that his liberty was not "through no fault of his own"; and (2) Friedlander was not "in custody" under Wis. Stat. § 973.155 and *Magnuson* when he was at liberty, and thus was not entitled to credit, no matter the holdings of *Riske* and *Dentici*. (State's COA Br. 9–12.) *Friedlander*, 2018 WL 1779384, ¶¶ 23, 25–27. (Pet-App. 110–112.)

Addressing the first argument, the court held that it would be unfair to Friedlander to hold him responsible for being absent from custody: "To conclude that Friedlander was at fault for his liberty, as the State suggests, would be to place on defendants the burden of administrating their own

sentences when government officials charged with that responsibility fail to do so, contrary to the reasoning of *Riske* and *Dentici*." *Friedlander*, 2018 WL 1779384, ¶ 23. (Pet-App. 110.)

As to the second argument, the court faulted the State for "selectively quot[ing]" *Magnuson* in arguing that Friedlander was not in custody—i.e., not subject to an escape charge for leaving his status under *Magnuson*—at the time. *Friedlander*, 2018 WL 1779384, ¶ 26. (Pet-App. 111.) The State relied on Wis. Stat. § 946.42(1)(a)2. and (2), which provide that a person on probation or extended supervision—Friedlander's statuses at the time—is not in "constructive custody" and may not be subject to an escape charge. (State's COA Br. 9–11.) *Id.* The court suggested that the State should not have relied on the definition of custody in Wis. Stat. § 946.42(1)(a) because *Magnuson* indicated that the custody inquiry was not limited to that statute. *Id.* The court did so without explaining which other statutes, if any, might also be relevant to whether a person on extended supervision may be charged with escape. *Id.*[4]

[4] The court also summarily rejected the State's arguments that: (1) credit was not available because sentence credit is only available against "sentences," Wis. Stat. § 973.155(1), and Friedlander's conditional jail time was not a sentence; and (2) the sentence-credit issue is moot because Friedlander has served all of his conditional jail time, and thus there is no active custody to apply the credit to. *Friedlander*, 2018 WL 1779384, ¶¶ 9–12. (Pet-App. 105–106.) The State does not renew these arguments here. It observes, however, that the court of appeals erred in disposing of the State's first argument on forfeiture grounds, in part. *Id.* ¶ 10. (Pet-App. 105.) *See State v. Holt*, 128 Wis. 2d 110, 124–26, 382 N.W.2d 679 (Ct. App. 1985) (respondent may raise alternative grounds to affirm that were not presented in the circuit court).

Finally, the court said that it was bound by *Riske* and *Dentici*'s "through-no-fault-of-one's-own" rule because "*Magnuson* was decided after *Riske* and did not suggest that it was intended to modify, overrule, or otherwise abrogate the holding in *Riske*." *Friedlander*, 2018 WL 1779384, ¶ 27. (Pet-App. 111.) The court added that, in *State v. Dentici*, 2002 WI App 77, ¶ 13, 251 Wis. 2d 436, 643 N.W.2d 180, it rejected an argument that *Riske* did not survive *Magnuson*, and indicated that it was bound by this conclusion as well. *Friedlander,* 2018 WL 1779384, ¶ 27. (Pet-App. 111–12.)

The State filed a petition for review requesting that this Court overrule *Riske* and *Dentici*. (Pet. 9–19.) The State asked this Court to conclude that Friedlander was not entitled to credit for his time at liberty between his release from prison to the start of his conditional jail time because, at the time, he was not "in custody" under Wis. Stat. § 973.155(1) and *Magnuson*. (Pet. 9–19.)

This Court granted review.

STANDARD OF REVIEW

This case involves interpretation of the sentence credit statute, Wis. Stat. 973.155, and review of the court of appeals' precedents interpreting this statute. Statutory interpretation and review of the court of appeals' interpretations of a statute are questions of law that this Court decides independently. *State v. Magnuson*, 2000 WI 19, ¶¶ 11, 233 Wis. 2d 40, 606 N.W.2d 536. This case also requires this Court to determine whether a defendant is entitled to sentence credit under section 973.155 for a particular time period prior to his jail confinement. Application of a set of facts to a legal standard is a question of law that this Court also decides de novo. *Id.*

ARGUMENT

I. This Court should overrule *Riske* and *Dentici* because they cannot be reconciled with Wis. Stat. § 973.155 and *Magnuson*.

A. The "in custody" requirement and the courts of appeals' rule in *Riske* and *Dentici*

1. Under Wis. Stat. § 973.155(1), an offender must be "in custody" to be entitled to sentence credit.

Adopted in 1977, the sentence credit statute, Wis. Stat. § 973.155, provides that credit "shall be given . . . toward the service of [an offender's] sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a)[5]; 1977 Wis. Act 353, § 9. Thus, under section 973.155(1), an offender seeking sentence credit for a period of confinement must prove two things: (1) that he or she was "in custody" within the meaning

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[5] Wisconsin Stat. § 973.155(1)(a) provides as follows:

> A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
>
> 1. While the offender is awaiting trial;
>
> 2. While the offender is being tried; and
>
> 3. While the offender is awaiting imposition of sentence after trial.

of section 973.155(1); and (2) that the custody was "in connection with the course of conduct for which sentence was imposed." *State v. Elandis Johnson*, 2009 WI 57, ¶ 27, 318 Wis. 2d 21, 767 N.W.2d 207; *Dentici*, 251 Wis. 2d 436, ¶ 5.

2. *Magnuson* holds that an offender is "in custody" under Wis. Stat. § 973.155 when he or she could be charged with escape for leaving his or her status.

In *Magnuson*, a defendant convicted of multiple counts of securities fraud sought sentence credit for six months he was released on signature bond to home detention with electronic monitoring. 233 Wis. 2d 40, ¶¶ 1, 8–9. The issue in Magnuson was whether the defendant's status of release to home detention with electronic monitoring constituted "custody" under Wis. Stat. § 973.155. *Id.* ¶ 1.

After surveying the various definitions of "custody" adopted by the Wisconsin appellate courts, *Magnuson*, 233 Wis. 2d 40, ¶¶ 13–18, this Court adopted a bright-line rule for determining when an offender is "in custody" under Wis. Stat. § 973.155. *Magnuson*, 233 Wis. 2d 40, ¶¶ 22, 47. It held that "an offender's status constitutes custody for sentence credit purposes when the offender is subject to an escape charge for leaving that status." *Id.* ¶¶ 25, 31, 47.

The general escape statute, Wis. Stat. § 946.42(1)(a)2., provides that "[c]ustody does not include the constructive custody of a probationer, parolee or a person on extended supervision by the department of corrections . . . ."[6] This Court noted in *Magnuson* that the definition of custody in Wis. Stat.

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[6] Except when the department places a probationer or supervisee in "actual custody" or exerts "authorized physical control" over him or her. Wis. Stat. § 946.42(1)(a)1.c. On those occasions, the probationer or supervisee is "in custody" under the escape statute. *Id.*

§ 946.42(1)(a) is not the exclusive definition for purposes of determining sentence credit. *Magnuson*, 233 Wis. 2d 40, ¶ 26. Certain statuses have their own statutory provisions that address whether an escape charge will lie for leaving that status. *Id.* ¶¶ 28–30 (citing, e.g., Wis. Stat. § 301.046(6) (persons under electronic monitoring who are placed in community residential confinement may be charged with escape for unauthorized flight); Wis. Stat. § 302.425(6) (persons on home detention with electronic monitoring may be charged with escape for leaving the limits of their detention)).

3. In *Riske* and *Dentici*, the court of appeals adopted a *per se* rule that an offender is entitled to credit for time spent at liberty through no fault of his or her own.

a. Riske

Edward Riske was sentenced to one year in the county jail upon a conviction for sexual intercourse with a minor. *State v. Riske*, 152 Wis. 2d 260, 262, 448 N.W.2d 260 (Ct. App. 1989). Riske reported to jail to serve his sentence on April 6, 1987. *Id.* But the jail was full, and the sheriff told Riske to report back on May 1, 1987. *Id.* Riske did not return on the appointed date, and he remained at large until April 1988. *Id.*

Riske moved to vacate his sentence on grounds that the sentence had completely run by the time he was arrested, and the circuit court denied the motion and ordered him to serve his full sentence. *Riske*, 152 Wis. 2d at 263. Riske appealed, and the court of appeals reversed in part. *Id.* The court awarded Riske credit for the days in April and May 1987 that the sheriff authorized him to be at liberty, but ordered that he serve the approximately 11 months remaining on his sentence after he failed to report back to the jail. *Id.* at 263–64.

The court of appeals' conclusion that credit was available for the time Riske was absent at the sheriff's direction was based first on federal common law. Quoting *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930), the *Riske* court held that "where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, . . . his sentence continues to run while he is at liberty." *Riske*, 152 Wis. 2d at 264 (quoting *White,* 42 F.2d 788).

The court also stated, without discussion, that this Court had "recognize[d] th[is] principle . . . by way of dictum," citing *In re Crow: Habeas Corpus*, 60 Wis. 349, 370, 19 N.W. 713 (1884).[7] *Riske*, 152 Wis. 2d at 264. The court further noted that an early attorney general opinion, 14 Op. Att'y Gen. 512 (1925), was also in agreement. *Id.* There, the attorney general expressed the view that an offender who was turned away from prison was entitled to credit for the days he was at liberty until his admission. *Id.* (discussing 14 Op. Att'y Gen. 512).

The court also interpreted Wis. Stat. § 973.15(7)—not to be confused with the sentence credit statute, Wis. Stat. § 973.155—to support this view. That statute provides (and provided) that "[i]f a convicted offender escapes, the time during which he or she is unlawfully at large after escape

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[7] In *In re Crow: Habeas Corpus*, 60 Wis. 349, 362–63, 19 N.W. 713 (1884), this Court recognized that a court commissioner had jurisdiction to grant a prisoner's petition for a writ of habeas corpus, and that this Court lacked jurisdiction to review the order granting the petition except by certiorari. In dicta—"we do not pretend to decide the question, as in our view we have no right to decide it on this writ"—this Court opined that an offender who "the sheriff had voluntarily allowed . . . to run at large during the whole of the aggregate term of the sentences" could not be made to later serve those sentences. *Id.* at 368.

shall not be computed as service of the sentence." Wis. Stat. § 973.15(7). Although this statute does not address whether or when an offender who is "lawfully" at large is entitled to credit, *Riske* held that section 973.15(7) "*codifies* the broader principle that a person's sentence for a crime will be credited for the time he was at liberty through no fault of the person." *Riske*, 152 Wis. 2d at 265 (emphasis added).

The court of appeals did not address whether Riske was "in custody" under Wis. Stat. § 973.155(1) during the time that he was away from the jail with the sheriff's authorization. *See Riske*, 152 Wis. 2d at 260–65. Indeed, the court did not mention the sentence credit statute, section 973.155, in determining that Riske was entitled to credit.[8]

b. Dentici

In *Dentici*, a probationer reported to jail to serve his conditional jail time but, like Riske, he was turned away and asked to return at a later date because the jail was full. *Dentici*, 251 Wis. 2d 436, ¶ 2. Unlike *Riske*, Dentici returned on the appointed date. *Id.* Later, when his probation was revoked, Dentici sought credit on his sentence for the time he was at liberty at the jailer's direction. *Id.* ¶ 3. The circuit court denied the request, and Dentici appealed. *Id.*

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[8] The State conceded in *Riske* that credit was available for the time Riske was absent at the sheriff's direction, and the court's conclusion was based in part on this concession. *Riske*, 152 Wis. 2d at 263–64. Nearly 30 years later, the State believes that this concession was made in error. At any rate, the State's prior concession did not bind the court of appeals then. *State v. Mares*, 149 Wis. 2d 519, 530 n.4, 439 N.W.2d 146 (Ct. App. 1989) (court of appeals is not bound by State's confessions of error on matters of law). And it should have no effect on this Court's review now. *Cf. State v. McAlister*, 2018 WI 34, ¶ 36, 380 Wis. 2d 684, 911 N.W.2d 77 (rejecting State's concession).

This time, the State defended the circuit court's denial of credit, maintaining that, when Dentici was at liberty at the jailer's direction, he was not "in custody" under Wis. Stat. § 973.155(1) and *Magnuson*, which was issued after *Riske*. A majority of the *Dentici* panel disagreed, and concluded that Dentici was entitled to credit for this time because, like Riske, he was absent from jail through no fault of his own. *Dentici*, 251 Wis. 2d 436, ¶ 1. The *Dentici* majority noted that *Riske* had interpreted Wis. Stat. § 973.15(7) to "establish[] that offenders, who report for sentencing but are turned away due to overcrowding, are in custody and will be granted sentence credit for the time they were at liberty through no fault of their own." *Dentici*, 251 Wis. 2d 436, ¶ 8.

Attempting to reconcile *Riske* with Wis. Stat. § 973.155(1) and *Magnuson*, the *Dentici* majority further concluded that Dentici was "in custody" under section 973.155(1) when he was at liberty because he was in "constructive custody" under Wis. Stat. § 946.42(1)(a) at the time. That is, the court concluded that Dentici was "temporarily outside of the institution whether for the purpose of work, school, medical care . . . *or otherwise*." *Dentici*, 251 Wis. 2d 436, ¶ 12 (citing Wis. Stat. § 946.42(1)(a) (emphasis added)). Thus, the majority averred, he could have been charged with escape had he left the status he was in when he was turned away from the jail. *Id.* Based on this formulation, the majority concluded that "the *Riske* definition of custody coexists with the *Magnuson* definition," and that Dentici was "in custody" for purposes of Wis. Stat. § 973.155(1) during the time in question and was entitled to credit for this period. *Dentici*, 251 Wis. 2d 436, ¶ 13.[9]

In dissent, Judge Ralph Adam Fine argued that Dentici was not entitled to sentence credit for the time spent at liberty

[9] The State did not file a petition for review in *Dentici*.

because he was not "in custody" under Wis. Stat. § 973.155 and *Magnuson*, i.e., he was not subject to an escape charge for leaving his status at the time. *Dentici*, 251 Wis. 2d 436, ¶¶ 14–16 (Fine, J. dissenting). Judge Fine wrote: "The Majority does not tell us under what provision of law, or under what circumstances, Dentici could have been guilty of 'escape' before the date he had to report to the House of Correction, and I am aware of none; he was free – 'escape from freedom' is not yet a crime." *Id.* ¶ 15.

Judge Fine added that *Riske* was distinguishable because Dentici's confinement was conditional jail time, whereas Riske's was a sentence. Thus, his confinement was not mandated under Wis. Stat. § 973.15(1) to begin at noon on the day of sentencing. *Dentici*, 251 Wis. 2d 436, ¶ 16 (Fine, J. dissenting). It could be served at any time during the probation. And regardless, Judge Fine observed, *Magnuson* established a new bright-line rule for determining when an offender is "in custody" that supplanted *Riske*'s definition of custody. *Id.*

B. *Riske* and *Dentici* are contrary to the "in custody" requirement of Wis. Stat. § 973.155(1) and *Magnuson* and should be overruled.

Sentence credit law in Wisconsin is statutory. It consists of Wis. Stat. § 973.155 and case law interpreting the statute. Under section 973.155, a defendant who requests credit for a period of confinement must show under section 973.155(1) that (1) he or she was "in custody" during that time; and (2) the confinement was "in connection with the course of conduct for which sentence was imposed."

Without regard to this statutory framework, the court of appeals in *Riske* adopted a *per se* rule based primarily on federal common law, holding that sentence credit is available

whenever an offender is absent from custody through no fault of his or her own. *Riske*, 152 Wis. 2d at 264 (citing *White*, 42 F.2d at 789). Then, in *Dentici*, the court of appeals recast *Riske* within the context of Wis. Stat. § 973.155(1), concluding that an offender who is at liberty through no fault of his or her own is "in custody" for purposes of section 973.155(1) and *Magnuson*. *See Dentici*, 251 Wis. 2d 436, ¶¶ 12–13.

Bound by *Riske* and *Dentici*, the court of appeals concluded that Friedlander was "in custody" under Wis. Stat. § 973.155(1) for his time at liberty between his no-fault-of-his-own release from prison on September 27, 2016, and his first day of conditional jail time, December 1, 2016. *Friedlander*, 2018 WL 1779384, ¶ 1. (Pet-App. 101–02.) This Court, of course, is not bound by these decisions. It should overrule *Riske* and *Dentici* because, as developed below, these cases cannot be reconciled with section 973.155 and this Court's interpretation of section 973.155 in *Magnuson*.

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. Here, the meaning of "custody" within Wis. Stat. § 973.155(1) is at issue. "Custody" is not defined in the statute. But, in *Magnuson*, 233 Wis. 2d 40, ¶¶ 25, 31, 47, this Court adopted a clear definition of custody for purposes of section 973.155(1), holding that a defendant's status constitutes custody under the statute when he or she could be charged with escape for leaving that status.

The court of appeals' rule in *Riske* and *Dentici*—that an offender who is at liberty through no fault of his or her own is "in custody" under Wis. Stat. § 973.155(1)—cannot be squared with *Magnuson*'s definition of custody. An offender who is at liberty, whether through no fault of his or her own or not, cannot be subject to an escape charge for leaving that status. As Judge Fine wrote of Dentici's time at liberty, Dentici "could

not have been guilty of 'escape'" before he reported to jail; "he was free" and "'escape from freedom' is not yet a crime." *Dentici*, 251 Wis. 2d 436, ¶ 15 (Fine, J., dissenting).

The *Dentici* majority's efforts to comport *Riske*'s categorical rule with Wis. Stat. § 973.155 and *Magnuson* only serve to show that the two standards cannot be reconciled. In declaring that "the *Riske* definition of custody coexists with the *Magnuson* definition," the court concluded that Dentici was in "constructive custody" under a specific provision of the escape statute, Wis. Stat. § 946.42(1)(a)1.f., when he was turned away from the jail. *Dentici*, 251 Wis. 2d 436, ¶¶ 12–13. Quoting section 946.42(1)(a)1.f., the court determined that Dentici was, at this time, "temporarily outside the institution whether for the purpose of work, school, medical care, a leave granted under s. 303.068, a temporary leave or furlough granted to a juvenile *or otherwise*." *Dentici*, 251 Wis. 2d 436, ¶ 12. The court then summarily asserted that, had Dentici attempted to leave this status, he could have been charged with escape under section 946.42(2).

The State doubts that Wis. Stat. § 946.42(1)(a)1.f. provides sufficient notice to an offender who is at liberty due to jail overcrowding or mistaken release that he or she could be charged with escape for leaving that status. At the time, Dentici was not "temporarily outside the institution" on a leave; he, like Friedlander, had yet to be admitted to the institution.

Instead, Dentici's status, like Friedlander's, was that he was on probation.[10] Wisconsin Stat. § 946.42(1)(a)2. provides

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[10] Friedlander was also on extended supervision in case number 2014CF212. *See* Wisconsin Circuit Court Access website, *State v. Zachary S. Friedlander*, Jefferson County Case Number 2014CF212, history and details of charges/sentences www.wscca.wiscourts.gov (accessed September 17, 2018).

that probation (and extended supervision) does not constitute "constructive custody" for purposes of the escape statute. Had Dentici (or Friedlander) failed to report to his probation agent, or committed some other rule violation, he could have been revoked or perhaps charged with a new crime. But, under section 946.42(1)(a)2., he could not have been charged with escape under section 946.42(2) for "leaving" the status of probation.

The *Riske* and *Dentici* definition of custody thus cannot coexist with *Magnuson*'s bright-line definition of the term.[11] Additionally, the *Riske* and *Dentici* definition—an offender who is at liberty through no fault of his or her own is "in custody"—is contrary to any reasonable definition of the term custody. *See* www.thesaurus.com/browse/custody (listing "liberty" as an antonym for "custody") (accessed September 17, 2018).

The *Riske* and *Dentici* definition of custody is also not mandated by constitutional principles. The Tenth Circuit's decision in *White* on which *Riske* relies holds that "where a prisoner is discharged from the penal institution, without any contributing fault on his part . . . his sentence continues to run while he is at liberty."[12] *White*, 42 F.2d at 789. *White* does

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[11] Additionally, *Riske*'s interpretation of the sentencing statue in Wis. Stat. § 973.15(7) is deeply suspect. *Riske* read section 973.15(7) to "codif[y] the . . . principle that a person's sentence for a crime will be credited for the time he was at liberty through no fault of the person." *Riske*, 152 Wis. 2d at 265. Section 973.15(7) does no such thing. It merely provides that an escapee is not entitled to credit for the time he or she is at large. Wis. Stat. § 973.15(7) ("If a convicted offender escapes, the time during which he or she is unlawfully at large after escape shall not be computed as service of the sentence.").

[12] Wisconsin Stat. § 973.15(1), which provides that "all sentences commence at noon on the day of sentence," is not

not mention constitutional principles, although some courts have read it to incorporate due process concerns. *See Derrer v. Anthony*, 463 S.E.2d 690, 693 (Ga. 1995); *State v. Roberts*, 568 So.2d 1017, 1019 (La. 1990).

But due process does not automatically entitle an offender to credit for all days at liberty through no fault of the offender. In general, federal courts look to the circumstances to determine whether an award of credit is required as a matter of fundamental fairness. *See United States v. Martinez*, 837 F.2d 861, 864 (9th Cir. 1988) (whether defendant is entitled to credit for time erroneously at liberty depends on the totality of the circumstances, including whether the situation is fundamentally unfair). A particularly important factor in this analysis is the duration of the offender's liberty following his or her mistaken release. *United States v. Merritt*, 478 F.Supp. 804, 806 (D.D.C. 1979) (credit is available when "the authorities make no attempt over a prolonged period of time to require custody over [the offender])"; *see also Bailey v. Ciccone*, 420 F.Supp. 344, 347 (W.D. Mo. 1976). Some courts require a showing of "gross negligence" to warrant an award of credit for time at liberty after an erroneous release. *Piper v. Estelle*, 485 F.2d 245, 246 (5th Cir. 1973) (the state's action or inaction must be "so grossly negligent that it would be unequivocally inconsistent with 'fundamental principles of liberty and justice' to require a legal sentence to be served in the aftermath of such action

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applicable here because Friedlander's jail time imposed as a condition of probation was not a sentence. *See State v. Yanick*, 2007 WI App 30, ¶ 9, 299 Wis. 2d 456, 728 N.W.2d 365; *see also Dentici*, 251 Wis. 2d 436, ¶ 16 (Fine, J. dissenting). Additionally, even in a case involving an offender at liberty from a sentence, section 973.15(1) does not answer the dispositive question of whether such a person is "in custody" under Wis. Stat. § 973.155(1) and thus entitled to sentence credit.

or inaction."); *see also United States v. Barfield*, 396 F.3d 1144, 1149 (11th Cir. 2005).

Finally, while due process does not mandate an award of credit whenever a defendant is mistakenly released, this constitutional guarantee is sufficient to protect offenders from abuses not present here (or in *Riske* or *Dentici*). For example, courts have held that credit is available on constitutional grounds for time the offender is absent from custody for government officials' unwarranted refusal to take the offender into custody. *See, e.g.*, *Merritt*, 478 F.Supp. at 806–07 and n.6 (fundamental principles of liberty and justice required the award of credit for time at liberty due to officials' refusal to serve a detainer). Likewise, it would likely violate due process to force an offender to serve his sentence piecemeal by design. *See Mobley v. Dugger*, 823 F.2d 1495, 1496 (11th Cir. 1987) (due process protects against "arbitrary and capricious state action"). But requiring an offender like Friedlander (or Riske and Dentici) to serve his full sentence after a limited period at liberty due to mistaken release or jail overcrowding does not run afoul of due process. *See Piper,* 485 F.2d at 246; *Mobley*, 823 F.2d at 1496; *Bailey*, 420 F.Supp. at 347.

Accordingly, the two cases upon which the court of appeals relied in *Friedlander*—*Riske* and *Dentici*—should be overruled. Credit requests for time absent from custody through no fault of the offender—like all sentence-credit claims—should be evaluated under Wis. Stat. § 973.155(1) and *Magnuson*.

II. Under Wis. Stat. § 973.155(1) and *Magnuson*, Friedlander is not entitled to sentence credit because he was not "in custody" at the time he was at liberty following his release.

Applying Wis. Stat. § 973.155(1) and *Magnuson* to the present case, Friedlander is not entitled to credit for the 65 days he spent at liberty following his release.

Friedlander was not "in custody" within the meaning of Wis. Stat. § 973.155(1) and *Magnuson* when he was at liberty between his release from prison on September 27, 2016, and the date he reported to serve his conditional jail time, December 1, 2016. This time at liberty did not constitute custody because Friedlander was merely on probation and extended supervision, and he could not have been charged with escape for leaving those statuses. *See* Wis. Stat. § 946.42(1)(a)2. and (2). Because Friedlander fails to meet the custody requirement of Wis. Stat. § 973.155, he may not receive credit for his time at liberty following release.

Accordingly, the court of appeals' decision and order directing the circuit court to amend the judgment of conviction to reflect the availability of 65 days' sentence credit should be reversed. The circuit court's order denying sentence credit should be reinstated.

III. If this Court declines to overturn *Riske* and *Dentici* in whole or in part, it should nonetheless reverse because Friedlander's time at liberty does not meet the *Riske* and *Dentici* definition of custody.

So far, the factual differences between Friedlander's case and the *Riske* and *Dentici* cases have been irrelevant to the State's argument. But there are significant differences between this case and those cases that counsel against the

award of credit, even if *Riske* and *Dentici* were to remain good law.

The court of appeals treated Friedlander's case as largely indistinguishable from *Riske* and *Dentici*, and it glossed over facts indicating that Friedlander was responsible, at least in part, for his time spent at liberty. Of course, prison officials were responsible for Friedlander's mistaken release, and Friedlander's probation agent did not instruct him to report to jail. *Friedlander*, 2018 WL 1779384, ¶ 3. (Pet-App. 103.) And Friedlander was essentially compliant; he reported to his agent immediately upon his release and called Captain Scott when the agent told him to do so. *Id*. ¶¶ 3–4. (Pet-App. 103.)

But the circuit court found that Friedlander knew while he was at liberty that he had time to serve on his conditional jail sentence (R. 71:46, Pet-App. 188), and he chose not to bring this fact to the attention of the court or the county jail when he was at liberty. Friedlander's knowledge and his choice not to take affirmative steps to end his absence from custody distinguish his case from *Riske* and *Dentici*. There, the offender's absence was, in fact, through *no fault* of his own; Riske and Dentici reported to jail and the jailer turned them away and asked them to return on another day. *Riske*, 152 Wis. 2d at 263; *Dentici*, 251 Wis. 2d 436, ¶ 2. While Friedlander's mistaken release was through no fault of his own, his time spent at liberty in the days that followed was not. It was due, at least in part, to his ongoing choice not to notify the court or the county jail of his status.

Thus, even if this Court declines to overrule *Riske* and *Dentici*, these decisions do not support an award of 65 days of credit because Friedlander was *not* at liberty through no fault of his own. The court of appeals erred in concluding that Friedlander was entitled to credit under *Riske* and *Dentici*.

CONCLUSION

This Court should reverse the court of appeals' decision and order and remand to the circuit court to reinstate its order denying Friedlander's motion for sentence credit.

Dated this 25th day of September, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,635 words.

Dated this 25th day of September, 2018.

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JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of September, 2018.

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JACOB J. WITTWER
Assistant Attorney General

Appendix

State of Wisconsin v. Zachary S. Friedlander

Case No. 2017AP1337-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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JACOB J. WITTWER
Assistant Attorney General

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I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

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