STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1337-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ZACHARY S. FRIEDLANDER,

Defendant-Appellant.

On Review of a Decision 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.

RESPONSE BRIEF OF DEFENDANT-APPELLANT

MARK R. THOMPSON
Assistant State Public Defender
State Bar No. 1107841

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
thompsonm@opd.wi.gov

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

POSITION ON ORAL ARGUMENT AND PUBLICATION.....2

STATEMENT OF THE CASE AND FACTS.....3

ARGUMENT 11

I. Because a Convicted Defendant Who Is at Liberty From a Court's Confinement Order Through No Fault of His Own Could Be Charged with Escape for Unlawfully Leaving That Status, *Riske* and *Dentici* Are Consistent with Wis. Stat. § 973.155 and the Definition of "In Custody" Provided in *Magnuson*..... 11

A. Introduction and standard of review 11

B. Under *Magnuson*, an offender is "in custody" for sentence credit purposes if he could be charged with escape for leaving his status..... 13

C. *Riske* and *Dentici* are consistent with Wis. Stat. § 973.155 and *Magnuson's* definition of "in custody" 16

D. A probationer who is subject to an order of confinement and released through no fault of their own is neither "free" nor merely on probation for custody purposes 22

1. A probationer need not be in "actual custody" to receive sentence credit 22

2. Dentici and Friedlander could have been charged with escape had they unlawfully left their statuses 26

II. Friedlander Is Entitled to the Credit Ordered by the Court of Appeals Based on Equitable Principles 27

A. Introduction and legal principles 27

B. Friedlander is entitled to credit under the equitable doctrine providing day-for-day credit for time erroneously spent at liberty 31

C. Friedlander does not seek exoneration of his sentence on the grounds that his due process rights were violated. 35

III. Friedlander Was Not at Fault for the Time He Was Erroneously at Liberty from the Jail 37

CONCLUSION 42

CASES CITED

Clark v. Floyd,
80 F.3d 371 (9th Cir. 1996)..... 31, 32

Dunne v. Keohane,
14 F.3d 335 (7th Cir. 1994)..... 31, 32

Green v. Christiansen,
732 F.2d 1397 (9th Cir. 1984)..... 41

In re Crow: Habeas Corpus,
60 Wis. 349, 19 N.W. 713 (1884) 18

Klimas v. State,
75 Wis. 2d 244,
249 N.W.2d 285 (1977) 28

Piper v. Estelle,
485 F.2d 245 (5th Cir. 1973)..... 36

State ex rel Kalal v. Circuit Court for Dane Cnty.,
2004 WI 58, 271 Wis. 2d 633,
681 N.W.2d 110..... 12

State v. Beets,
124 Wis. 2d 372,
369 N.W.2d 382 (1985) 29, 35

State v. Carter,
2010 WI 77, 327 Wis. 2d 1,
785 N.W.2d 516..... 18

State v. Dentici,
2002 WI App 77, 251 Wis. 2d 426,
643 N.W.2d 180.....1, passim

State v. Gilbert,
115 Wis. 2d 371, 340 N.W.2d 511 (1983)..... 13

State v. Johnson,
2007 WI 107, 304 Wis. 2d 318,
735 N.W.2d 505..... 13, 29

State v. Magnuson,
2000 WI 19, 233 Wis. 2d 40,
606 N.W.2d 536.....1, passim

State v. Mares,
149 Wis. 2d. 519,
439 N.W.2d 146 (Ct. App. 1989)..... 17

State v. McAlister,
2018 WI 34, 380 Wis. 2d 684,
911 N.W.2d 77..... 17

State v. Obriecht,
2015 WI 66, 363 Wis. 2d 816,
867 N.W.2d 387..... 12

State v. Riske,
152 Wis. 2d 260,
448 N.W.2d 260 (Ct. App. 1989).....1, passim

State v. Roach,
150 Wash. 2d 29,
74 P.3d 134 (2003)..... 31, 32, 36

State v. Robinson,
2014 WI 35, 354 Wis. 2d 351,
847 N.W.2d 35..... 34

State v. Rosenburg,
208 Wis. 2d 191, 560 N.W.2d 266 ..... 12, 25, 26

State v. Schaller,
70 Wis. 2d 107, 233 N.W.2d 416 (1975).... 24, 25

U.S. v. Martinez,
837 F.2d 861 (9th Cir. 1988).....18, passim

United States v. Merritt,
478 F. Supp. 804 (D.D.C. 1979)..... 36

White v. Pearlman,
42 F.2d 788 (10th Cir. 1930).....16, passim

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Amendment XIV 28

United States Code

18 U.S.C.A., Section 3568..... 28

Wisconsin Statutes

301.038(2)(am) 14

301.046 14

301.046(1) 14

301.046(5) 14

301.046(6) 14

301.048(5) 15

302.048 14

302.425(3) 15

302.425(6) 15

303.068 ..... 20, 21

937.155 21

946.41(1)(a)..... 14

946.42 .....12, passim

946.42 (1973–74) 24

946.42(1)(a).....10, passim

946.42(1)(a)1.f. 20, 21, 34

946.42(1)(a)1.h 22, 23, 26

946.42(1)(a)2..... 22

946.42(1)(b)..... 24

946.42(1)(2) (1995–96) 25

946.42(2) 23

946.42(3) 23

946.42(3)(a)..... 21, 24

973.09(4) .....23, passim

973.15 20

973.15(7) 20, 33, 34

973.155 .....1, passim

973.155(1)(a)..... 13

2007 Wisconsin Act 226

Section 115 25

Wisconsin Jury Instructions

WIS-JI CRIM 1774 ..... 24, 26, 27

OTHER AUTHORITIES CITED

Gabriel J. Chin, *Getting Out of Jail Free: Sentence Credit For Periods of Mistaken Liberty*, 45 Cath. U. L. Rev. 403, 404 (1996) 30, 36

Andrew T. Winkler, *Implicit in the Concept of Erroneous Liberty: The Need to Ensure Proper Sentence Credit in the Fourth Circuit*, 35 N.C. Cent. L. Rev. 1, 12 (2012)..... 30

ISSUES PRESENTED

1. *Riske* and *Dentici*[1] held that an individual who is convicted, ordered to confinement, and prematurely released from that confinement through no fault of his own is entitled to sentence credit for the time he is "at liberty."[2] *Magnuson*[3]—which was decided after *Riske* and did not overrule that case—held that, to be "in custody" for sentence credit purposes, a defendant must be "subject to an escape charge" for leaving his status. Does a defendant who is at liberty from court-ordered custody through no fault of his own but remains subject to a confinement order meet the definition of custody provided in *Magnuson*?

   The circuit court did not address this question.

The court of appeals found that there was no conflict between the *Riske* and *Dentici* holdings and the definition of "in custody" provided in *Magnuson*.

---

[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 426, 643 N.W.2d 180.

[2] "At liberty" is a term of art used in relevant case law to describe individuals who (1) have been convicted and ordered into confinement as a result of that conviction, (2) were prematurely released from that confinement, and (3) nonetheless remained subject to that court order for confinement after their release. *See Riske*, 152 Wis. 2d at 264; *Dentici*, 251 Wis. 2d 436, ¶9.

[3] *State v. Magnuson,* 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536.

2. If an offender is not "in custody" under Wis. Stat. § 973.155, is he nonetheless entitled to credit based on the equitable doctrine of credit against a term of confinement for time spent at liberty through no fault of his own?

The circuit court did not address this issue.

The court of appeals did not address this issue.

3. Was Friedlander at liberty through no fault of his own, as required under *Riske* and *Dentici* or the equitable doctrine?

The circuit court concluded that Friedlander was not at liberty through no fault of his own and denied sentence credit.

The court of appeals reversed, holding that Friedlander was "at liberty between the date that he was released . . . not through any fault of his own but through the fault of government officials" and granted him credit for his time at liberty.[4]

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case is scheduled for oral argument on December 11, 2018, at 1:30 p.m. Publication is customary for cases decided by this court.

---

[4] *State v. Friedlander*, No. 2017AP1337, unpublished slip op., 2018 WL 1779384 (WI App. April 12, 2018). (Pet'r's App. 105–12).

STATEMENT OF THE CASE AND FACTS

Plea and Sentencing

Friedlander pleaded no contest to one count of felony bail jumping in accordance with a negotiated plea agreement. (40:1; 70:8). The parties jointly recommended a withheld sentence, three years of probation, and eight months in jail as a condition of probation. (36:1, 70:9–13). At the time he entered his plea, Friedlander was serving a prison sentence on an unrelated conviction, and the parties recommended that Friedlander's conditional jail term run concurrent to his prison sentence. (70:9).

The court sentenced Friedlander immediately after his plea. (70:9). During its sentencing argument, the state explained to the court that Friedlander was expected to be released from prison prior to the completion of his conditional jail term, which would "extend [his] release date by about . . . 60 to 75 days." (70:9). The court inquired about the manner in which Friedlander would serve the remainder of his conditional jail time following the expiration of his prison confinement time. (70:13). Friedlander's counsel explained that he expected Friedlander would serve all of his conditional jail time in prison. (70:13). The state explained that "one of two things" would likely happen: (1) Friedlander would serve the remainder of his conditional jail time in prison; or (2) "[the prison] will just send him to jail to finish it." (70:13).

Based on the uncertainty of the parties with respect to where Friedlander would serve his conditional jail term, the court questioned whether

Friedlander wanted to go forward with his plea. (70:14). Specifically, the court told Friedlander that "in all likelihood . . . you may have to go from prison to spending some time in county jail before you're done with any incarceration." (70:14). The court further explained that "it may not be that you're able to spend all of this time in prison before being released to extended supervision and concurrent probation." (70:14-15). Friedlander affirmed his desire to continue with his plea. (70:14).

The court adopted the parties' joint recommendation, withheld sentence, and ordered that Mr. Friedlander start serving his conditional jail time immediately, concurrent to his prison sentence. (40:1–2; 70:19–20). While pronouncing its sentence, the court returned to the issue of Friedlander's conditional jail time, stating:

> [D]espite this court's understanding, if the Department of Corrections interprets this as a sentence, such that it should be served in the prison system, you're not going to see the court take exception to that, and in many ways I think that would make a lot of sense, but I have stated what I believe the Court's legal conclusion to be, which is that because this is conditional jail time, it's not a sentence and so the incarceration may, because it does not meet the definition of a sentence, be interpreted similarly by the Department of Corrections, and so they may say when you're done serving your sentence. . . on the case that you're in prison for, it may be that you're going to have to come here and then spend some time because this eight months jail the Court is ordering begins today.

(70:20–21).

Friedlander's release from prison

After sentencing, Friedlander returned to prison and jail personnel presented a detainer for Friedlander with the department of corrections. (71:16). Friedlander was released from prison on September 27, 2016, and officials at the prison did not notify Jefferson County of his release or make arrangements to transfer him to the jail. (71:9, 16). Upon release, Friedlander met with his probation agent, who did not tell him he needed to report to jail. (71:27). Friedlander's agent did not contact the court to request clarification on his conditional jail term.

On November 11, 2016, a captain with the Jefferson County Sheriff's Office was contacted by the county child support agency and learned that Friedlander had been released from prison. (41). On the same day, a sergeant contacted Friedlander's probation agent. (41). Friedlander's agent then spoke with him and told him to contact the sheriff's office. (41). Friedlander promptly contacted the captain and said that a social worker at the prison told him that his conditional jail time was completed prior to his release from prison. (41). The sergeant spoke to a staff person from the department of corrections' records office, who said that "Friedlander should have been picked up by his probation agent to come to the jail to complete his sentence in September." (41).

On November 23, 2016, the captain wrote the circuit court. (41). He explained that Friedlander was "sentenced" for felony bail jumping on April 15, 2016,

and that the court ordered Friedlander "to serve an 8 month jail sentence forthwith." He summarized the events of November 11, 2016, and asked the court for "direction for [Friedlander's] Probation Agent and the jail as to what should be done with Mr. Friedlander: should he report for the remainder of the time until his original release date on the 8 month sentence 12/11/2016? And what should be done with the days he was not in jail." (41). No warrant was issued for Friedlander's arrest, and he was not ordered to report to jail.

The December 1, 2016, hearing

The circuit court held a hearing in response to the captain's letter on December 1, 2016. Friedlander appeared voluntarily and with counsel. (71:2–3).

The court found, and the parties agreed, that Friedlander was released from prison on September 27, 2016, that he had served "165 days of the eight-month jail sentence" upon his release from prison. (71:9). The court found that Friedlander had 75 days left to serve when he was released from prison. (71:22).

A sheriff's deputy testified about Friedlander's case. (71:14-20). She explained that on November 11, 2016, the jail first learned that Friedlander was released from prison on September 27, 2016. (71:15-16). She further explained that Friedlander appeared in court for his plea and sentencing on April 15, 2016, on a "writ from [Oshkosh Correctional Institution]" and that he was sent back to prison on April 16, 2016, with a detainer. (71:16). She believed that the prison would contact the sheriff's office when

Friedlander's prison sentence was over so that he could "serve the remainder of this jail sentence in our county." (71:16). She explained that the prison "never contacted us to pick [Friedlander] up." (71:17). She said it is generally the prison's responsibility to notify a jail when an inmate is available to be transported back on a detainer; if a prison does not notify the jail of an inmate's release, then "we just assume he [is] still in prison." (71:18). She clarified that it is not an inmate's responsibility to arrange transport to jail after completing a prison sentence. (71:18 – 19).

The deputy confirmed that Friedlander contacted the sheriff's office on November 11, 2016. (71:19). She explained that the sheriff's office believed Friedlander needed to complete his conditional jail time, but "we weren't going to put out a warrant or anything like that." (71:19).

Friedlander testified that, prior to his release from prison, he spoke with his social worker and a staff member in the records office. (71:26). He testified that the social worker told him "the detainer could not be in place" because his prison sentence would "eat up" his eight-month conditional jail term. (71:27). Friedlander called his probation agent twice before his release. During the first call she addressed the detainer and said that "it was not up to her whatsoever; that it was up to the judge." (71:28–29). During the second call, Friedlander's agent spoke with him about where he was going to live upon his release from prison. (71:29). Upon his release from prison, Friedlander met with his probation agent and

was again told that whether or not he had any time left to serve on his conditional jail term was up to the judge and out of her control. (71:29–30).

Neither Friedlander's probation agent nor anyone at the Jefferson County Sheriff's Office ever directed him to report to jail between September 27, 2016, and December 1, 2016. (71:32, 33). Whenever the detainer came up in conversations with his probation agent, he told her that "all they needed to do was call [him]" if he had to serve additional jail time, and he would voluntarily turn himself in. (71:32). He testified that his agent relayed this information to the sheriff's office. *See* (71:32). While speaking with the captain, he said he would voluntarily turn himself in if he needed to serve additional jail time. (71:33).

Friedlander acknowledged that he was ordered to serve eight months of conditional jail time. (71:34–35). At the time of his plea and sentencing hearing, Friedlander believed that he would have to return to county jail to complete his conditional jail term. (71:39–40). However, he testified that he was told by prison staff that good time would be applied to his jail term, and, upon his release from prison, no one directed him or took him to jail. (71:37–38). Based on those circumstances and his probation agent's representations, he believed his conditional jail term was completed. (71:37–38).

Based upon the evidence and the record before the court, Friedlander's counsel argued that, in accordance with *State v. Riske*, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989), and *State v. Dentici*,

2002 WI App 77, 251 Wis. 2d 436, 643 N.W.2d 180, he was entitled to have his conditional jail term continue running while he was at liberty through no fault of his own. (71:22–23, 42–45). Defense counsel argued that the 65 days Friedlander spent at liberty should be subtracted from the 75 days remaining on his conditional jail term, and acknowledged that Friedlander would be required to serve the 10 days remaining on this conditional jail term. *See* (71:45). The state made no argument. (71:45).

The court distinguished Friedlander's case from *Dentici* and *Riske*, and faulted Friedlander for not proactively returning to the jail or the court to inquire about serving the remainder of his sentence. (71:45–47). The court then remanded Friedlander to jail to serve 75 days of his conditional jail term. (71:47; 48).

Friedlander appealed. (64).

The court of appeals decision

The court of appeals reversed the circuit court's order and remanded the case "with directions to amend Friedlander's judgment of conviction to reflect an additional sixty-five days to be credited in the event that his probation is revoked." *State v. Friedlander*, No. 2017AP1337, ¶28, unpublished slip op., 2018 WL 1779384 (WI App. April 12, 2018). (Pet'r's App. 112).

The court of appeals held that Friedlander was, like Riske and Dentici, at liberty through no fault of his own. Specifically, the court noted that:

> [T]he record reveals that prison officials intentionally and unambiguously authorized Friedlander's liberty when they released him from prison, failed to take any steps to arrange for him to report to the jail, and affirmatively and actively (at a minimum, through the actions of the probation agent) led him to believe that he had no further obligation regarding confinement.

Id., ¶24 (Pet'r's App. 110–11). The court further held that Friedlander "did nothing but follow directions as they were provided to him," and noted that finding he was at fault would "place on defendants the burden of administering their own sentences when government officials charged with that responsibility fail to do so . . ." *Id.*, ¶23 (Pet'r's App. 110).

With respect to whether Friedlander was "in custody," the court of appeals explained that the court in *Magnuson* "'[did] not limit the inquiry to the definition of custody contained only in Wis. Stat. § 946.42(1)(a).'" *Id.*, ¶26 (Pet'r's App. 111) (citing *State v. Magnuson*, 2000 WI 19, ¶26, 233 Wis. 2d 40, 606 N.W.2d 536). The court also noted that *Magnuson* was decided after *Riske*, and nothing in that decision "suggest[ed] that it was intended to modify, overrule, or otherwise abrogate . . . the 'broader principle' in *Riske*, that a defendant is 'in custody' when he is at liberty through no fault of his own . . . ." *Id.*, ¶27 (Pet'r's App. 111–12) (citing *Riske*, 152 Wis. 2d at 265).

ARGUMENT

I. Because a Convicted Defendant Who Is at Liberty From a Court's Confinement Order Through No Fault of His Own Could Be Charged with Escape for Unlawfully Leaving That Status, *Riske* and *Dentici* Are Consistent with Wis. Stat. § 973.155 and the Definition of "In Custody" Provided in *Magnuson*.

A. Introduction and standard of review

The principle of credit for time erroneously spent "at liberty"[5] first recognized in *Riske* has been good law for nearly 30 years in Wisconsin. This principle survived *State v. Magnuson*, 2000 WI 19, ¶6, 233 Wis. 2d 40, 606 N.W.2d 536, in which this court determined that a defendant is "in custody" for sentence credit purposes when he could be charged with escape for leaving his status. *Id.*, ¶¶25, 31, 47. Following *Magnuson*, *Dentici* affirmed the broad principle in *Riske* and further harmonized that principle within the context of *Magnuson*. Accordingly, *Dentici* already addressed any apparent conflict between *Riske* and *Magnuson* and correctly

[5] "At liberty" is a term of art used by case law relevant to the issues in this case. *Supra* n.2. Although this section describes Riske, Dentici, or Freidlander as "at liberty" throughout, they were not, in fact at liberty—or completely free from government control—as the term is commonly understood. They remained subject to a court's confinement order upon their mistaken releases from jail and could have been charged with escape for leaving their statuses without lawful authority, thereby complying with Wis. Stat. § 973.155 and the definition of "in custody" provided in *Magnuson*.

found that there is no conflict between the principle of credit for time spent at liberty through no fault of the defendant and section 973.155, as interpreted by *Magnuson*.

The state nonetheless advances that this court should overturn *Riske* and *Dentici* because they cannot be reconciled with the definition of custody provided in *Magnuson*. The state's argument is based on an overly-narrow reading of the holding in *Magnuson* and the escape statue, Wis. Stat. § 946.42, and an oversimplification of Riske's, Dentici's, and Friedlander's statuses once they were released from confinement through no fault of their own. Because the holdings in *Riske* and *Dentici* are consistent with the holding in *Magnuson*, this court need not overturn those cases.

This case involves the interpretation and application of the sentence credit statute, Wis. Stat. § 973.155. Determining the amount of sentence credit to which a defendant is entitled requires statutory interpretation and application, which presents a question of law that this court reviews "independently while benefitting from prior decisions of other courts." *State v. Obriecht*, 2015 WI 66, ¶21, 363 Wis. 2d 816, 867 N.W.2d 387.

The "cardinal rule in statutory interpretation is to discern the intent of the legislature." *State v. Rosenburg*, 208 Wis. 2d 191, ¶6, 560 N.W.2d 266. Statutory interpretation generally begins with the language of the statute. *See State ex rel Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271

Wis. 2d 633, 681 N.W.2d 110. This court further noted that:

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes . . . .

Id., ¶46.

B. Under *Magnuson*, an offender is "in custody" for sentence credit purposes if he could be charged with escape for leaving his status.

The sentence credit statute provides that a convicted defendant is entitled to credit towards the service of his sentence when he is (1) in custody, and (2) that custody is "in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a); *Marcus Johnson*, 304 Wis. 2d 318, ¶27. A defendant is entitled to sentence credit for time spent in custody as a condition of probation. *State v. Gilbert*, 115 Wis. 2d 371, 379–80, 340 N.W.2d 511 (1983). The issue in this case is limited to whether or not a person who is at liberty from court-ordered confinement through no fault of their own is "in custody" under section 973.155.

The sentence credit statute does not expressly define what it means to be "in custody." *Magnuson*, 233 Wis. 2d 40, ¶13. However, in *Magnuson*, this court analyzed Wis. Stat. § 973.155 and determined that "for sentence credit purposes an offender's status

constitutes custody whenever the offender is subject to an escape charge for leaving that status." *Id.*, ¶¶25, 31, 47.

Magnuson sought credit for time spent on house arrest with electronic home monitoring, ordered as conditions of bond so that he could prepare for trial with his attorney. *Id.*, ¶¶3–6. This court determined that Magnuson's release on bond did not meet the definition of custody in the escape statute, Wis. Stat. § 946.42(1)(a). *See id*, ¶¶40–41. Although Magnuson did not meet the definition of custody provided in the escape statute, this court acknowledged that the definition of custody provided in Wis. Stat. § 946.41(1)(a) was nonexclusive, and that it was important to read statues "in pari materia." *Id.*, ¶21.

This court then expanded its inquiry to consider other statutes in order to determine whether Magnuson was in custody. *Id.*, ¶¶23, 26. First, the court considered Wis. Stat. § 301.046, which provides that "prisoners" placed in community residential confinement with electronic home monitoring may be charged with escape for unauthorized flight. *Id.*, ¶28 (citing Wis. Stat. § 301.046(1), (5) & (6)). Next, the court considered Wis. Stat. § 302.048, which governs the intensive sanctions program,[6] and similarly provides that failure to comply with the conditions

[6] A person is only eligible for the intensive sanctions program if he "has been *convicted of* a felony . . . ." Wis. Stat. § 301.038(2)(am) (emphasis added). This court also noted that "[a] circuit court may no longer sentence an offender convicted of a felony occurring on or after December 31, 1999, to intensive sanctions." *Magnuson*, 233 Wis. 2d 40, ¶29 n.4.

of the intensive sanctions program subjects the participant to a charge of escape. *Id.*, ¶29 (citing Wis. Stat. § 301.048(5)). Finally, the court considered Wis. Stat. § 302.425(6), which provides that a person placed in home detention by "the sheriff, the . . . correctional institution, or the DOC" may be placed in home detention, and that failure to remain in that detention qualifies as an escape. *Id.*, ¶30 (citing Wis. Stat. § 302.425(3) & (6)).

Based on a review of the above statutes, this court ultimately concluded that pre-conviction release on bond with house arrest for "trial preparation purposes" did not constitute custody for under Wis. Stat. § 973.155. *Id.*, ¶¶41, 48. Specifically, the court noted that Magnuson was not placed in community confinement or home detention by the DOC or sheriff, and he was not sentenced and placed in the intensive sanctions program. *Id.*, ¶¶33, 34. The court further noted that Magnuson would have been subject to a charge of felony bail jumping—not escape—for violating his conditions of bond. *Id.*, ¶45.

In summation, Magnuson failed to meet the "in custody" requirement announced by this court because he was in pre-conviction confinement as a condition of bail. *Id.*, ¶46. Had he violated those conditions, he could have been charged with bail jumping, which directly contrasted with the rule announced by this court. *See id.*

Unlike Magnuson, Riske, Dentici, and Friedlander were already convicted and ordered into confinement by the court. Subsequent to that order, they were released from actual custody through

no fault of their own. Thus, the operative question in this case is whether individuals in those circumstances could be subject to an escape charge for leaving their statuses.

C. *Riske* and *Dentici* are consistent with Wis. Stat. § 973.155 and *Magnuson's* definition of "in custody".

In *Riske*, the court of appeals recognized that "where a prisoner is discharged from a penal institution, without any contributing fault on his part and without violations of the conditions of parole, . . . his sentence continues to run while he is at liberty." *Riske*, 152 Wis. 2d at 264 (quoting *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930)). The court in *Riske* concluded that a defendant in those circumstances is therefore entitled to credit for time served. *Id.* at 264.

The defendant in *Riske* was sentenced to a year in jail. *Id.* at 262. Riske surrendered to the jailer but was told that the jail could not accommodate him and that he should report back in 26 days. *Id*. Riske failed to report back to the jail until he was arrested over a year later. *Id.* The circuit court then ordered him to serve the full one-year jail sentence. *Id.* On appeal,

the state conceded and the court agreed[7] that Riske was entitled to credit against his sentence to account for the 26 days he was out of custody at the direction of the jail. *Id*. at 263–65. The court explained that:

> This is so because Riske was out of jail through no fault of his. Sentences are continuous, unless interrupted by escape, violation of parole, or some fault of the prisoner, and "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."

Id. at 264. (quoting *Pearlman*, 42 F.2d at 789).

---

[7] The state argues that its concession in *Riske* was made in error. (State's Br. 14, n. 8). The state correctly notes that appellate courts are not bound by the state's concessions of law. *See State v. Mares*, 149 Wis. 2d. 519, 530 n.4, 439 N.W.2d 146 (Ct. App. 1989) (rejecting the state's concession that there was "probable" error in the underlying trial court ruling); *State v. McAlister*, 2018 WI 34, ¶36, 380 Wis. 2d 684, 911 N.W.2d 77 (rejecting the state's concession that McAlister met the requirements of his newly discovered evidence claim). But the state's position overlooks the fact that the court of appeals in *Riske* nonetheless agreed with the issue conceded by the state and incorporated that analysis into its opinion. *See Riske*, 152 Wis. 2d at 264–65. This court should not, as the state seems to assert, completely disregard the *Riske* court's adoption of the conceded issue solely because the state questions that concession nearly 30 years later.

The court in *Riske* noted that many other jurisdictions recognize the principle[8] and that this Court has previously recognized it by way of *dictum*,[9] as has the Wisconsin Attorney General.[10] *Id.* at 264–65. Accordingly, the court granted Riske 26 days of credit for his time spent at liberty through no fault of

---

[8] Citing numerous federal and state courts. Especially notable is *U.S. v. Martinez*, 837 F.2d 861 (9th Cir. 1988). Martinez was erroneously never required to report to prison because of a clerical error. 837 F.2d at 862 When asked whether Martinez could be required to start serving his sentence upon the government's realization of its mistake, the court noted: "Under the doctrine of credit for time at liberty, a convicted person is entitled to credit against his sentence for the time he was erroneously at liberty provided there is a showing of simple or mere negligence on behalf of the government and provided the delay in execution of sentence was through no fault of his own." *Martinez*, 837 F.2d at 865. Because our sentence credit statute was based upon the federal statute, Wisconsin courts have often looked to federal case law when interpreting Wis. Stat. § 973.155. *See State v. Carter*, 2010 WI 77, ¶¶134-36, 327 Wis. 2d 1, 785 N.W.2d 516.

[9] Citing *In re Crow: Habeas Corpus*, 60 Wis. 349, 370, 19 N.W. 713, 722 (1884) ("There is still another question arising from the cause of the failure of the actual imprisonment during the time or whole term of the sentence, of much importance, and that is, whether a prisoner can be rearrested and imprisoned after such term has expired, *when such failure was not the fault or crime* of the prisoner himself. In *Ex parte Clifford*, *supra*, it is held that recapture after the term can be made only in case of *escape* by the fault of the prisoner or criminal escape.").

[10] Citing 14 Op. Att'y Gen 512 (1925) (prisoner who because of flu epidemic was refused admission to prison on the day his sentence began was entitled to credit on his sentence for period intervening until his admission).

his own. A petition for review by this court was subsequently denied. *State v. Riske*, 449 N.W.2d 276 (1989).

Notably, *Magnuson* was decided 11 years after *Riske*. In *Magnuson*, this court neither commented on nor analyzed the holding in *Riske*. *See Magnuson*, 233 Wis. 2d 40. Because this court thoroughly considered how its definition of custody would affect prior decisions, its silence with respect to *Riske* strongly suggests that the two are not in conflict. *See Magnuson*, 233 Wis. 2d 40, ¶31 n.7 (explaining that prior decisions in which the appellate courts found an individual was subject to an escape charge for leaving their statuses but nonetheless were denied credit were limited by this court's holding in *Magnuson*).

Two years after this court decided *Magnuson*, the court of appeals decided *Dentici*, which applied the same principles espoused in *Riske* and further harmonized those principles with the holding in *Magnuson*. In *Dentici*, the defendant was placed on probation and ordered to serve 60 days in jail as a condition of probation, 251 Wis. 2d 436, ¶2. Upon arrival at the jail, Dentici was told that the jail was overcrowded and that he should return in 25 days. *Id*. Dentici returned as instructed and served his conditional jail term. *Id*. Dentici's probation was revoked the next year and the court sentenced him to two years imprisonment. *Id*., ¶3. In the circuit court, Dentici was denied credit against his sentence for the 25 days he spent out of custody because the jail was overcrowded. *Id*.

On appeal, Dentici sought credit for the 25 days he spent "at liberty from the House of Correction through no fault of his own." *Id.* Unlike in *Riske*, the State contended that Dentici was not "in custody" during the period of time he was "at liberty through no fault of his own." *Id.*, ¶5.

The court disagreed with the state and concluded that "Dentici's leave from the House of Correction corresponded with the definition of custody provided in Wis. Stat. §§ 946.42, and 973.15. *Id.*[11] Further, the court found that Dentici's circumstances were consistent with the definition of custody provided in *Magnuson* because he could have been charged with escape. *Id.*, ¶12. In so holding, the court followed the analytical framework employed in *Magnuson*. *See id.,* ¶¶7–13. Specifically, the court concluded Dentici was subject to "proposed conditions of leave" and was restricted to the confines of the state, akin to the requirements of Wis. Stat. § 303.068, which is listed in the "custody" definition in the escape statute, Wis. Stat. § 946.42(1)(a)1.f. *Id.*, ¶12. The court noted that, had Dentici violated any of those conditions, he could have been charged with escape. *Id.*

The court concluded that Dentici was in custody because he was "temporarily outside the institution whether for the purposes of work, school,

---

[11] Wis. Stat. § 973.15(7) reads: "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." Wis. Stat. § 946.42(1)(a) sets forth a list of types of custody which subject an offender to a criminal escape charge.

medical care, a leave granted under s. 303.068, a temporary leave or furlough . . . *or otherwise*," and therefore entitled to credit for his time spent at liberty through no fault of his own. *Id.*, ¶12 (citing Wis. Stat. § 946.42(1)(a)1.f.). Notably, the state did not petition this court for review.

Judge Fine dissented and opined that Dentici was not "in custody" or entitled to credit under Wis. Stat. § 937.155 because:

> 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 (Fine, J. dissenting).

The dissent mischaracterized the majority's holding in *Dentici*. The majority appropriately applied the standard from *Magnuson* to conclude that *Dentici* fit one of the definitions of custody provided under Wis. Stat. § 946.42(1)(a), and concluded that he could been charged with escape under Wis. Stat. § 946.42 for leaving his status. *Id.*, ¶12. Because Dentici's status comported with the definition of custody under Wis. Stat. § 946.42(1)(a), he could have been charged with escape under subsection (3) of that statute as a person in custody pursuant to a conviction for a crime. *See* Wis. Stat. § 946.42(3)(a).

The dissent further mischaracterized Dentici's status as "free." *Dentici*, 251 Wis. 2d 436, ¶15 (Fine, J. dissenting). As the majority noted, Dentici was subject to conditions during his time away from the

jail: he was ordered to report back on a specific date, and he was restricted to the confines of the state. *Id.*, ¶12. Had he violated those conditions by leaving the state and/or not returning to the jail as ordered, he could have been charged with escape for violating the conditions placed upon him while he was at liberty through no fault of his own. *Id.*, ¶12. As the majority properly found, this analysis was consistent with *Magnuson* and Wis. Stat. § 973.155.

D. A probationer who is subject to an order of confinement and released through no fault of their own is neither "free" nor merely on probation for custody purposes.

Convicted probationers subject to conditional jail time—like Friedlander and Dentici—are subject to escape charges for all times they are subject to a court's confinement order. *See* Wis. Stat. § 946.42(1)(a)1.h. The state argues that probationers who are convicted, immediately ordered to serve a conditional jail term, and then erroneously released from confinement through no fault of their own are merely probationers in constructive custody. (Pet'r's Br. at 18–19) (citing Wis. Stat. § 946.42(1)(a)2., which states that "'[c]ustody' does not include the constructive custody of a probationer"). Like the dissent in *Dentici*, this argument mischaracterizes the status of probationers in Dentici's or Friedlander's situation.

1. A probationer need not be in "actual custody" to receive sentence credit.

Convicted probationers subject to conditional jail time—like Friedlander and Dentici—are subject to escape charges for all times they are subject to a court's confinement order. *See* Wis. Stat. § 946.42(1)(a)1.h. The state nonetheless appears to argue that a probationer is only subject to an escape charge, and thereby entitled to sentence credit under Wis. Stat. § 973.155, if they are in "actual custody." That argument is not supported by the language of the statute, or cases interpreting that statute.

The escape statute, Wis. Stat. § 946.42, divides escape offenses into two classifications: those punishable as misdemeanors under subsection (2), and those punishable as felonies under subsection (3). *See* Wis. Stat. § 946.42(2) & (3). Notably, under subsection (3), it is a felony if an offender who escapes from custody when he is "lawful[ly] arrest[ed] for, lawfully charged with or convicted of or sentenced for a crime." Subsection (1) of the escape statute provides that custody "includes *without limitation*": (1) "actual custody" of an institution, peace office, institution guard, or correctional officer; (2) "constructive custody" of "prisoners . . . temporarily outside the institution" for work, medical care, furlough, or other authorized purpose; and (3) "custody of a person subject to a confinement order under s. 973.09(4)."[12] Wis. Stat. § 946.42(1)(a) (emphasis added).

[12] Wis. Stat. § 973.09(4) provides "the court may . . . require as a condition of probation that the probationer be confined during such period of the term of probation as the court prescribes, but not to exceed one year."

Based on those provisions, an escape charge for a person ordered to confinement is comprised of four elements. *See* Wis. Stat. § 946.42; WIS-JI CRIM 1774. First, the defendant must be "in custody," meaning he was either in physical control of a person by an institution or peace officer *or* temporarily outside the institution for the purpose of working, receiving medical care, or other authorized purpose. WIS-JI CRIM 1774. Second, the custody must be the result of being convicted of or sentenced for a crime. *Id.* Third, the defendant must escape from that custody, meaning he "left in any manner without lawful permission or authority." *Id.,* n.8 (citing Wis. Stat. § 946.42(1)(b)). Finally, the escape must be intentional. WIS-JI 1774.

The escape statute does not distinguish between escapes from court-ordered confinement in a jail or a prison; the primary question is whether or not the custody is caused by sentence or conviction. *See* Wis. Stat. § 946.42(3)(a).

Prior versions of the escape statute provided limited circumstances in which a probationer would be entitled to credit. In *State v. Schaller*, 70 Wis. 2d 107, 110–11, 233 N.W.2d 416 (1975), this court held a probationer was not subject to an escape charge when he was confined to jail as a condition of probation and failed to return to jail from work release. The court's holding was based on an older version of the escape statute,[13] which expressly stated that "[custody] does not include the custody of a probationer or parolee by the department of social services or a probation or

[13] Wis. Stat. § 946.42 (1973–74).

parole officer *unless the probationer is in actual custody*." *Schaller*, 70 Wis. 2d at 110.

In *State v. Rosenburg*, 208 Wis. 2d 191, 560 N.W.2d 266 (1997), this court reaffirmed the holding in *Schaller* as it applied to the 1994 version of Wis. Stat. § 946.42, which again included language that "custody" was limited to probationers who were in "actual custody." However, this court noted in *Rosenburg* that 1996 amendments to Wis. Stat, 946.42, specifically the last sentence of subsection (1)(a), which provided that "custody" included a probationer who was "in actual custody or subject to a confinement order under s. 973.09(4)." Wis. Sta. § 946.42(1)(2) (1995–96). This court cited the following analysis from the legislative reference bureau as "clear expression of legislative intent to change the escape statute" via the 1996 amendments:

> This bill makes various changes relating to persons who are confined in a jail or similar facility as a condition of probation:
>
> . . .
>
> 2. Current law provides penalties for persons who escape from custody. The prohibitions apply to a person on probation only when the person is in actual custody, such as in custody in a jail. This bill makes *a probationer subject to the escape law at all times when he or she is subject to an order of confinement as a condition of probation*.

Id. at 199.

Notably, the 1996 version of the escape statute was revised even further. *See* 2007 Wis. Act 226,

§ 115. The current version of the escape statute uses "custody" instead of "actual custody," and it retains the "subject to a confinement order under s. 973.09(4)" language from the 1996 amendments. Wis. Stat. § 946.42(1)(a)1.h.. As the *Rosenburg* court observed, a probationer could accordingly be charged under the escape statute "at all times" he is subject to that court order. 208 Wis. 2d at 199.

2. Dentici and Friedlander could have been charged with escape had they unlawfully left their statuses.

The state's characterization of Dentici and Friedlander as "free" or merely "on probation" is overly reductive. (State's Br. at 18, 19). While it is true that Dentici and Friedlander were, in fact, outside of jail that they were ordered to be confined in, they were nonetheless subject to a confinement order under Wis. Stat. § 973.09(4) and were most certainly not "free." *See* Wis. Stat. § 946.42(1)(a)1.h.

The *Dentici* court explained that Dentici was still subject to conditions attendant to his return to prison in 25 days. Had Dentici left the state, or failed to return to the prison, the state could have concluded that: (1) he was authorized by a government actor to be "temporarily outside the institution"; (2) his custody was the result of being convicted of a crime; and (3) he left that status without lawful permission or authority. *See* WIS-JI CRIM 1774. These circumstances and conclusions would be sufficient for an escape charge, and Dentici's custody status therefore comports with *Magnuson*.

Similarly, had Friedlander left the state or failed to respond to inquiries from his probation agent or law enforcement concerning his court-ordered confinement, he similarly could have been charged with escape. Like Dentici, the state authorized his temporary release from a conditional jail term for which he had already served 165 days. (71:9). He remained subject to a confinement order under Wis. Stat. § 973.09(4) as a result of his conviction for approximately 75 days after his release from prison on September 27, 2016. (71:22, 29). Had Friedlander failed to promptly respond to, or comply with directives of law enforcement or the court, he was subject to an escape charge for failing to comply with the confinement order. *See* WIS-JI CRIM 1774.

The holdings *Riske* and *Dentici* do not conflict with Wis. Stat. § 973.155 and the definition of "in custody" provided in *Magnuson*. Because Riske, Dentici and Friedlander could have been charged with escape had they intentionally escaped from their time spent at liberty from a court's confinement order through no fault of their own, they were entitled to credit for that time. Thus, this court should uphold *Riske* and *Dentici*.

II. Friedlander Is Entitled to the Credit Ordered by the Court of Appeals Based on Equitable Principles.

A. Introduction and legal principles

If this court determines that *Riske* and *Dentici* are inconsistent with *Magnuson*, it should still uphold *Riske* and *Dentici* on the grounds that basic fairness and equity require that a defendant receive

credit for time spent "at liberty"[14] through no fault of his own. A convicted individual who is ordered by the court into confinement for a specific period of time has an expectation of finality and closure upon the date he is to be released, and the state should not be allowed to extend that date and on account of its own errors. Accordingly, an individual should receive credit when he is convicted, ordered to confinement, and then released from that confinement and at liberty through no fault of his own. If this court determines that *Riske* and *Dentici* are consistent with *Magnuson*, then this court need not decide this issue.

In *Klimas v. State*, 75 Wis. 2d 244, 249 N.W.2d 285 (1977), this court held that the Fourteenth Amendment of the United States Constitution compels the award of sentence credit.[15] Based on that holding, this court called upon the legislature to examine the federal sentence credit statute, 18 U.S.C.A., sec. 3568, which required credit to be given to any person "toward the service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." *Id.* at 251. The legislature responded by enacting Wis. Stat. § 973.155, the purpose of which

---

[14] "At liberty" is a term of art used by case law relevant to the issues in this case. *Supra* nn.2 & 5. Although Friedlander's circumstances are described using that term in this section, he was not, in fact, free from his order of confinement and the state's control.

[15] This court's decision in *Klimas* specifically dealt with presentence custody based on the financial inability to post bail, but the court noted that the federal credit statute "has much to recommend it. It is simple and just." *Klimas*, 75 Wis. 2d at 251.

was to "bring the law of Wisconsin into conformity with the broad federal statute." *See State v. Johnson*, 2007 WI 107, ¶¶35–36, 304 Wis. 2d 318, 735 N.W.2d 505.

Sentence credit is designed to afford fairness and to "prevent a defendant from serving more time than his sentence or sentences call for." *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985). The principle granting credit for time spent erroneously at liberty is rooted in the same fairness principles expressed in *Beets*. In *White v. Pearlman*, the leading case on the doctrine of credit for time erroneously at liberty, the Tenth Circuit wrote:

> A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Certainly a prisoner should have his chance to re-establish himself and live down his past. Denying credit in this situation would be to permit serious abuses: "[A] prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on ad libitum, with the result that he is left without even a hope of beating his way back.

42 F.2d 788 (10th Cir. 1930). Implicit in the *Pearlman* court's holding is the idea that a convicted defendant carries a legitimate expectation of finality and closure when he is ordered into confinement by a court. Wisconsin courts have long recognized the importance of the finality in "the fair administration of justice." *State v. Henley*, 2010 WI 97, ¶75, 328 Wis. 2d 544, 787 N.W.2d 350.

These equitable principles expressed in *Pearlman* were expressly recognized by the court of appeals in *Riske*, 152 Wis. 2d at 264. Furthermore, this principle has since been recognized by 10 federal circuits[16] and adopted in at least 23 state courts.[17]

Courts that have analyzed *Pearlman* have identified two bases for granting relief for time spent at liberty through no fault of the defendant: equity and due process. The analysis in *Riske* was rooted in the former. The state appears to conflate these two bases as one standard requiring a totality of the circumstances analysis. (Pet'r's Br. 19–21). As explained below, the equity and due process arguments impose wholly different standards and relief. Friedlander asserts only an equitable claim to

---

[16] *See* Andrew T. Winkler, *Implicit in the Concept of Erroneous Liberty: The Need to Ensure Proper Sentence Credit in the Fourth Circuit*, 35 N.C. CENT. L. REV. 1, 12 (2012) ("[T]he First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all recognized the 'rule' or 'doctrine' of credit for time spent at liberty . . . .") (internal citations omitted).

[17] *See* Gabriel J. Chin, *Getting Out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, 45 Cath. U. L. Rev. 403, 406–10 (1996) (collecting cases from state courts in District of Columbia, Alabama, Arizona, Colorado, Florida, Georgia, Louisiana, Massachusetts, New Jersey, New York, Oklahoma, Pennsylvania, Tennessee, Texas, California, Iowa, Mississippi, Missouri, New Hampshire and Ohio that have recognized doctrine of credit for time at liberty). Chin also identifies cases in which the United States Department of Justice and authorities in Delaware, Nevada, and Wisconsin (citing to *Riske*, 152 Wis. 2d at 263–65) granted credit for time spent at liberty without litigating the issue. *See id.* at 410, nn.45-48.

credit for time spent at liberty through no fault of his own; he does not seek exoneration from his sentence on due process grounds.

B. Friedlander is entitled to credit under the equitable doctrine providing day-for-day credit for time erroneously spent at liberty

Under the equitable doctrine of credit for time erroneously spent at liberty, courts grant day-for-day credit for time spent at liberty when the government mistakenly releases a prisoner from confinement through inadvertence or negligence. *See, e.g.*, *Martinez*, 837 F.2d at 865 ("it is immaterial whether the convicted person has served one day or ten years of his sentence; if he is erroneously released thereafter, he is entitled to full day-for-day credit for the time he was at liberty"); *Clark v. Floyd*, 80 F.3d 371, 374 (9th Cir. 1996) (finding that Clark should be given day-for-day credit when he was released from a Montana prison rather than a federal prison due to "inadvertence" of government agents); *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) ("punishment on the installment plan is forbidden").

Illustrative of this principle is *State v. Roach*, 150 Wash. 2d 29, 74 P.3d 134 (2003). The defendant in *Roach* was sentenced in the State of Washington to concurrent 13 and 31 month sentences. *Id.* at 31. Upon completion of his 13-month sentence, he was mistakenly released from custody. *Id.* The state recognized this error within ten days of Roach's release, but was unable to locate him until approximately three years later. *Id.* Roach was then

taken into custody and returned to jail to begin serving the 18 months remaining on his 31-month sentence. *See id.* at 32.

After his requests for relief were denied in the trial court and court of appeals, Roach petitioned the Supreme Court of Washington to determine "[w]hether to adopt the equitable doctrine of credit for time at liberty." *Id.* at 33. After reviewing an array of federal and state cases, the court in *Roach* concluded that courts have "moved away from a strict application of the traditional rule requiring a released prisoner to serve his full sentence no matter the circumstances of his release . . . and have granted erroneously released prisoner relief based on the principles of equity and fairness." *Id.* (citing *Pearlman*, 42 F.2d at 739, *Martinez*, 837 F.2d at 865; *Clark*, 80 F.3d at 374; and *Dunne*, 14 F.3d at 336).

The state argued against the equitable doctrine on the basis that the equitable doctrine conflicted with the "the laws of Washington," which "authorize[d] the State to reincarcerate Roach . . . ." *Id.* at 36. The court in *Roach* agreed that the state's laws authorized reincarceration, but found that:

> Fairness and equity require this court to join the federal courts and sister states that have answered [the question presented to the court] in the affirmative. We, therefore hold that a convicted person is entitled to credit for time spent erroneously at liberty due to the State's negligence, provided that the convicted person has not contributed to his release, has not absconded from legal obligations, has not absconded while at liberty, and has had no further criminal convictions.

Id. at 37.[18]

If this court finds that *Riske* and *Dentici* conflict with *Magnuson*, then it should still uphold those cases under the equitable doctrine of day-for-day credit for time spent at liberty from court-ordered confinement through no fault of the defendant. The state concedes that government actors were responsible for Friedlander's mistaken release and interruption of his conditional jail term, (Pet'r's Br. at 23), and, as argued in the following section, the record shows that Friedlander was not at fault for his time erroneously spent at liberty. (*See infra* Resp. Br. at 37–42).

The equitable principle discussed in this section was already recognized by Wisconsin law. The court in *Riske* discussed this equitable principle, and found statutory support for it. 152 Wis. 2d at 265. Specifically, the court held that Wis. Stat. § 973.15(7), which provides that "if a convicted

[18] A concurring opinion urged the adoption of limiting principles, namely that the equitable doctrine only applies when: (1) Time in custody begins and is interrupted by erroneous release; (2) The prisoner remains law abiding while at liberty; and (3) The prisoner did not have knowledge of the mistake and fail to act. *Id.* at 38–40. The concurrence pointed to *Pearlman*, in which the prisoner raised his concerns about a potential erroneous release but was ignored and "ejected" from the prison, then voluntarily returned to the prison when directed to do so. *Id.* at 39. The concurrence argued that "[j]ust as society is entitled to have the debt paid, the prisoner is entitled to pay his or her debt to society, 're-establish himself and live down his past.'" *Id.* at 39 (citing *Pearlman*, 42 F.2d at 789). Even under this modified equitable doctrine, Friedlander would be entitled to the credit ordered by the court of appeals.

offender escapes, the time during which he or she is unlawfully at large after escape shall not be computed as service of the sentence," was consistent with the equitable principle identified in *Pearlman*. *Id.* *Dentici* similarly relied on this established principle. *See* 251 Wis. 2d 436, ¶8, 13. The state acknowledges the plain meaning of this rule, but disputes the logical corollary upon which *Riske* and *Dentici* relied: if a convicted offender *does not* escape, then the time during which he or she was *lawfully* (due to mistake or error by the state) at large (or at liberty) *shall* be computed as service of the sentence. *See* Wis. Stat. § 973.15(7); *Riske*, 152 Wis. 2d at 265; *Dentici*, 251 Wis. 2d at 443.

The state argues that Friedlander should be denied the relief sought because the equitable relief first identified in *Pearlman* and recognized by the court of appeals in *Riske* only applies to sentences, and not conditional jail time. (State's Br. at 19–20 n.12). But the escape statute defines "custody" to include a person subject to an order for conditional jail time under Wis. Stat. § 973.09(4). Wis. Stat. § 946.42(1)(a)1.f. Additionally, the state's argument fails to account for the fact that Friedlander only seeks this credit in the event that he is revoked and sentenced to prison or jail—he is not seeking credit against an outstanding conditional jail term.

Wisconsin courts routinely recognize the "interests that the State, crime victims, and others have in the finality of cases," *State ex rel. Brown v. Bradley*, 2003 WI 14, ¶25, 259 Wis. 2d 630, 658 N.W.2d 427, and those interests extend to defendants as well. *See State v. Robinson*, 2014 WI 35, ¶38, 354

Wis. 2d 351, 847 N.W.2d 35.; *Riske*, 152 Wis. 2d at 264 (*citing Pearlman*, 42 F.2d at 789). Friedlander's plea and sentencing occurred on April 15, 2016, and the court ordered that he serve 240 days in jail as a condition of probation. (40:1–2; 70:19–20; 71:22). Based on this order, he had a reasonable expectation that he would be subject to the government's control until a date certain: December 11, 2016. However, due to the government's errors, he remained subject to that control for an additional 65 days, and he remained subject to that control until approximately February 14, 2017.

A defendant should not bear the cost of the government's errors. Friedlander was not at fault for his time at liberty and, despite the state's assertions, he was not "free" upon his release from prison. Basic fairness and equity dictate that he should not be punished for the state's error. *See Beets*, 124 Wis. 2d at 379 (stating sentence credit is designed to afford fairness by a defendant from serving more time than he is ordered to serve).

C. Friedlander does not seek exoneration of his sentence on the grounds that his due process rights were violated.

The state's argument with respect to constitutional principles focuses almost entirely on cases in which relief for time erroneously spent at liberty was sought on due process grounds. (State's Br. 19 – 21). Friedlander does not advocate for the relief sought on due process grounds, so the court need not address this issue. This section will

nonetheless briefly explain this line of analysis and identify why it is not at issue in this case.

Courts have found due process violations when "the government's conduct in releasing the prisoner amounted to gross negligence and the prisoner was at liberty for long periods of time." *Roach*, 150 Wash. 2d at 34; *see also United States v. Merritt*, 478 F. Supp. 804, 806 (D.D.C. 1979) (relief is available when "authorities make no attempt over a long period of time to require custody"); *Piper v. Estelle*, 485 F.2d 245, 246–47 (5th Cir. 1973) (holding that the state's error 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 or inaction."). When courts find that a prisoner's due process rights were violated for his extended time spent at liberty, the remedy is a complete exoneration of the remainder of the sentence. *Roach*, 150 Wash. 2d at 34. Gabriel J. Chin, *Getting Out of Jail Free: Sentence Credit For Periods of Mistaken Liberty*, 45 CATH. U. L. REV. 403, 404 (1996).

Friedlander did not assert below, nor does he assert now, that his erroneous release was the product of gross negligence, or that he was at liberty for a period lengthy enough to warrant exoneration of his sentence. He merely seeks the relief granted below: 65 days of credit for time erroneously spent at liberty through no fault of his own, which he will only receive in the event that his probation is revoked and sentence is imposed. (Pet'r's App. 112).

The relief requested by Friedlander in this regard is limited, and it does amount to a windfall. While he was erroneously at liberty through no fault of his own, he remained subject to the court's confinement order for 65 days and, following the circuit court's order on December 1, 2016, he spent an additional 75 days in confinement. He is therefore entitled to credit for that time, be it under the holdings or *Riske* and *Dentici* or the equitable principle discussed in this section.

III. Friedlander Was Not at Fault for the Time He Was Erroneously at Liberty from the Jail.

Friedlander was erroneously at liberty from a court's confinement order through no fault of his own. Under either principle discussed above, the court should affirm the credit granted by the court of appeals.

The state acknowledges that Friedlander was (1) not responsible for his erroneous release and (2) wholly compliant with directives of state actors, but nonetheless argues that Friedlander was at fault for his time spent at liberty following his mistaken release. (Pet'r's Br. at 23). This position ignores the record, which clearly shows that Friedlander was erroneously released from prison *and* at liberty through no fault of his own.

The state relies on the circuit court's statements to advance its argument that Friedlander "knew while he was at liberty that he had time to serve on his conditional jail sentence and was at fault for his time spent at liberty. (Pet'r's Br. at 23). The

circuit court's denial was based on: (1) "significant factual differences" between Friedlander's case and the facts of *Riske* or *Dentici*; and (2) Friedlander's purported credibility and failure to more proactive efforts to resolve his erroneous release from prison. (71:45–47). The state's argument fails because there were no significant differences between this case and either *Riske* or *Dentici*, and the record as a whole reveals that Friedlander was not at fault for his mistaken release or his time at liberty.

The broad principle recognized in *Riske* and *Dentici* is that a defendant is entitled to sentence credit for time spent at liberty through no fault of the defendant. *Riske*, 152 Wis. 2d at 265. Both Riske and Dentici submitted themselves to the custody of the state, and they were subsequently turned away. Similarly, Friedlander submitted to the authority of the state after being ordered to serve eight months of conditional jail time. While in the state's custody, he was released through no fault of his own.

The factual differences between *Riske* and *Dentici* are immaterial. Riske and Dentici were turned away from jail because of overcrowding while Friedlander began serving his conditional jail term in prison and was released early due to miscommunication between the jail and the prison. Riske never returned to the state's actual custody after he was ordered to return. But in this case, like *Dentici*, Friedlander was released from confinement and into the community through no fault of his own and and later voluntarily submitted himself to the actual custody and authority of the state without resistance.

Further, the state's argument and the circuit court's conclusions substantially downplay the lack of certainly at Friedlander's plea and sentencing with regard to how, where, and when Friedlander would serve his conditional jail term. At his plea and sentencing, the parties were uncertain about the logistics of Friedlander's concurrent conditional jail term, and the court informed Friedlander that he *may* have to go from prison to jail:

> [i]f that can be, despite this court's understanding, if the Department of Corrections interprets this as a sentence, such that it can be served in the prison system, *you're not going to see this court take any exception to that*, and it many ways I think it would make a lot of sense . . . .

(70:14, 20–21) (emphasis added). Although the court stated its belief that Friedlander would have to report to jail following prison, it ultimately concluded that the DOC had the final say might reach a different conclusion.

Once Friedlander was back in prison, he was told by multiple staff members at the DOC that his conditional jail time would be fully served by the time he was released from prison. When he reported this information to his probation agent, he was never affirmatively told that he would have to report to jail after release from prison. During his second phone call with his agent prior to his release, his agent even spoke to him about his residence upon release—further suggesting that the information Friedlander received from the DOC was correct. The fact that no transportation had been arranged for his

transportation to jail following his release from prison cemented the misinformation that Friedlander received from the DOC and his probation agent. Faulting Friedlander—rather than the jail, the prison, the DOC, the sheriff, or the state—by denying credit is contrary to the law and would ignore these undisputed facts.

The circuit court's conclusions and the state's argument with respect to Friedlander's responsibility to remedy an error that he did not cause is not supported by the law. No case applying the principle of credit while at liberty requires a defendant to correct or remedy an error committed by a jail, prison, court, or other law enforcement officer.

The record is clear that Friedlander did not escape, evade, or otherwise contribute to his erroneous release or the 65-day delay in his return to the jail. The captain's November 23, 2016, letter and the deputy's testimony at the December 1, 2016, hearing support Friedlander's assertions that he cooperated with his probation officer and any other government actor. When he asked the captain not to issue a warrant, he was not resisting, but instead indicating that he would comply with any directive to report to the jail. The fact that the jail did not issue a warrant prior to the December 1, hearing is further support for the conclusion that Friedlander was wholly compliant and receptive to the state's directives. He was not, as the state asserts, at fault for his time spent at liberty. (Pet'r's Br. at 23). When he was finally given direction as to how to proceed, he voluntarily complied and appeared at the December 1, hearing regarding Captain Scott's letter.

While the circuit court may have been within its discretion to disregard Friedlander's testimony about the circumstances of his erroneous release from prison, the evidence and testimony that the court did not reject ultimately demonstrates that Friedlander was released and at liberty through no fault of his own from September 27, through December 1, 2016.

It was not Friedlander's duty to either correct the state's error, or to dictate to the state where and when he should serve his time. He should not, and cannot, be punished for the state's errors by being denied credit for the time he spent at liberty through no fault of his own. *See Martinez*, 837 F.2d at 865; *Green v. Christiansen*, 732 F.2d 1397, 1400 (9th Cir. 1984). This court should therefore affirm the decision of the court of appeals and hold that Friedlander is entitled to an additional 65 days of credit if revoked from probation for the time he spent at liberty through no fault of his own.

CONCLUSION

For the foregoing reasons, Zachary S. Friedlander respectfully requests that this court affirm the decision of the court of appeals, which reversed the circuit court's denial of Friedlander's credit motion and remanded the case with directions to amend his judgment of conviction to reflect that credit.

Dated this 15th day of October, 2018.

Respectfully submitted,

MARK R. THOMPSON
Assistant State Public Defender
State Bar No. 1107841

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
thompsonm@opd.wi.gov

Attorneys for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,998 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 15th day of October, 2018

Signed:

MARK R. THOMPSON
Assistant State Public Defender
State Bar No. 1107841

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
thompsonm@opd.wi.gov

Attorneys for Defendant-Appellant