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STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2017AP2440-CR & 2017AP2441-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

RICHARD H. HARRISON, JR.,

Defendant-Respondent-Cross Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AND REMANDING WITH DIRECTIONS THE CIRCUIT COURT'S ORDER GRANTING A MOTION FOR SENTENCE CREDIT, ENTERED IN THE CLARK COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS J. BRAZEAU, JR., PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-APPELLANT-PETITIONER

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ISSUES PRESENTED

1. Whether this Court may or should summarily reverse or vacate a court of appeals' decision due to a change in position by one party or due to the fact that both parties now appear to have a similar position as to a legal issue addressed in the court of appeals' decision?

Neither the circuit court nor the court of appeals answered this question.

Although this Court has the authority to summarily reverse or vacate a court of appeals' decision, it should not exercise that authority here.

2. Whether the defendant-respondent is judicially estopped from now taking the position that the court of appeals' decision should be reversed and the cases be remanded to the circuit court with directions to deny his motion for sentence credit, including whether the fact of the intervening sentencing in Ashland County Case No. 2011CF82 renders the doctrine of judicial estoppel inapplicable?

Neither the circuit court nor the court of appeals answered this question.

Although the State does not condone Harrison's behavior in this case, it does not ask this Court to exercise its discretion to estop Harrison from seeking reversal.

3. The Legislature developed a comprehensive scheme outlining when a person is entitled to sentence credit. The scheme provides a "convicted offender" with "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." Wis. Stat. § 973.155.

Applying section 973.155, is Harrison entitled to have sentence credit for the time he spent in confinement on his

vacated 2010 and 2011 sentences applied to the periods of extended supervision remaining on his unrelated 2007 and 2008 sentences?

The circuit court answered, "Yes."

The court of appeals answered, "No."

This Court should answer, "No."

4. The Legislature's scheme also governs credit for time spent in confinement on a later vacated conviction: "When a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department shall credit the defendant with confinement previously served." Wis. Stat. § 973.04.

Did the court of appeals err when it ignored section 973.04 and effectively awarded Harrison sentence credit under a new "advance-the-commencement-of-valid-sentences concept"?

The circuit court did not address this question because it awarded Harrison sentence credit under Wis. Stat. § 973.155.

The court of appeals did not address Wis. Stat. § 973.04 and instead effectively awarded Harrison sentence credit via a new "advance-the-commencement-of-valid-sentences concept."

This Court should answer, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this Court's review, oral argument and publication of the Court's decision are warranted.

INTRODUCTION

This is a sentence credit appeal where Harrison sought sentence credit in his 2007 and 2008 cases from his separate convictions in his 2010 and 2011 cases. A court sentenced Harrison in his 2007 and 2008 cases to concurrent sentences, and later, a court sentenced Harrison in his 2010 and 2011 cases to consecutive sentences. When the initial confinement portions of the 2007 and 2008 cases ended, the initial confinement portions for the 2010 case and later the 2011 case began. Harrison successfully appealed both his 2010 and 2011 cases.

Below, Harrison asked the circuit court and the court of appeals to credit the time he spent in confinement on his 2010 and 2011 sentences to his outstanding periods of supervision on his 2007 and 2008 sentences. Stated differently, Harrison sought to convert initial confinement time to extended supervision time in unrelated cases.

Both courts ruled in Harrison's favor, but they applied different rationales. The circuit court ruled in Harrison's favor on sentence credit grounds, and the court of appeals ruled in his favor by applying a new advancement concept.

The law supports neither rationale.

First, Wis. Stat. § 973.155 does not authorize sentence credit here. Under that statute, sentence credit can be applied to the term to which the defendant was sentenced only when the necessary factual connection is present. And Harrison presented no evidence of a factual connection between his custody in his 2010 and 2011 cases and his sentences in his 2007 and 2008 cases. Because Harrison failed to meet the connection requirement, he failed to establish entitlement to credit under section 973.155.

Second, Wis. Stat. § 973.04 does not authorize sentence credit here. Under that statute, sentence credit can

be applied to a sentence only when the original sentence was "vacated and a new sentence [was] imposed upon the defendant for the same crime." Wis. Stat. § 973.04. Harrison is not entitled to credit on his 2007 and 2008 cases for the time he spent in confinement serving his 2010 case's sentence because no "new sentence" was imposed in the 2010 case. Harrison is not entitled to credit on his 2007 and 2008 cases for the time he spent in confinement serving his 2011 case's sentence because the new 2011 sentence was not imposed for the "same crime[s]" as the 2007 and 2008 cases.

Third, there is no good reason for this Court to adopt an advancement concept. Adoption of such a concept would undermine the Legislature's sentence credit scheme and lead to troublesome consequences.

In this Court, Harrison has changed course. Before briefing, Harrison filed a motion for summary reversal, conceding that he is not entitled to sentence credit or advancement in the cases now before this Court. Harrison asserted that his concession stemmed from the "now undisputed fact" that he was "recently re-sentenced" in the 2011 case.

Harrison's concession prompted this Court to order the parties to address two additional issues, one relating to summary disposition and one relating to judicial estoppel. This Court has the discretion to summarily dispose of a case and to invoke judicial estoppel.

This Court should not summarily dispose of this case. Precedent shows that party agreement has not precluded this Court from issuing an authored decision or from granting summary disposition while issuing a substantive per curiam decision. Given the important issues raised in the petition and cross-petition for review, this Court should issue an authored opinion or at least a substantive per

curiam decision that resolves the sentence-credit issues raised.

This Court should not invoke judicial estoppel. Although Harrison is manipulating the judicial system, it is not clear that the three elements for judicial estoppel are met. And setting aside the elements, the State does not request that this Court exercise its discretion to estop Harrison from seeking reversal. The State, too, seeks reversal in this case, so it is disinclined to argue that Harrison should be estopped from confessing error, even if his motivations are suspect.

In the end, this Court should reverse.

STATEMENT OF THE CASE

A. Harrison's separate cases from 2007, 2008, 2010, and 2011.

Harrison's four separate convictions from 2007, 2008, 2010, and 2011 will be discussed below.[1]

1. Harrison's 2007 and 2008 Clark County cases.

In March 2009, Harrison accepted a global plea agreement for two Clark County Cases: Clark County Case No. 2007CF115 (the 2007 case) and Clark County Case No. 2008CF129 (the 2008 case). (R. 94:2–3.) Per the agreement, Harrison pled no contest to theft–business setting in the 2007 case. (R. 94:19–20.) He then pled no contest to fraud/rendering income tax return in the 2008 case. (R. 94:19–20.)

[1] Unless otherwise indicated, all record citations are to the record in Case No. 2017AP2440-CR.

At sentencing, the circuit court withheld sentence in both cases and placed Harrison on concurrent terms of probation.[2] (R. 60; 2017AP2441-CR, 6.) Less than three years later, the Department of Corrections revoked Harrison's probation in both cases. (R. 70; 2017AP2441-CR, 13.)

On December 21, 2011, the circuit court sentenced Harrison to six years of imprisonment, consisting of three years of initial confinement and three years of extended supervision in each case. (R. 70; 2017AP2441-CR, 13; Pet-App. 118–21). The court ordered the sentences to run concurrently. (R. 70; 2017AP2441-CR, 13.) In the 2007 case, the circuit court awarded 462 days of sentence credit. (R. 70.) In the 2008 case, the court awarded 119 days of credit. (R. 2017AP2441-CR, 13.)

2. Harrison's 2010 Clark County case.

Meanwhile, in July 2010, the State filed charges against Harrison in Clark County Case No. 2010CF88 (the 2010 case). (R. 80:4.) A jury found Harrison guilty of burglary of a building or dwelling, resisting or obstructing an officer, and theft of movable property, all as a repeater. (R. 80:7; 103:2; Pet-App. 123–25).

On January 4, 2012, the circuit court sentenced Harrison to a total of 20 years of imprisonment, consisting of 13 years of initial confinement followed by seven years of

[2] In the 2007 case, the circuit court placed Harrison on probation for six years. (R. 60:1.) In the 2008 case, the court placed Harrison on probation for three years. (R. 2017AP2441-CR, 6.)

extended supervision.[3] (R. 103:2.) The court ordered the three individual sentences to run consecutively to each other and to any other sentence. (R. 103:3.)

On January 22, 2015, this Court concluded that Harrison's statutory right to judicial substitution had been violated. *State v. Harrison*, 2015 WI 5, 360 Wis. 2d 246, ¶¶ 93–94, 858 N.W.2d 372. It thus affirmed the court of appeals' decision to remand Harrison's case for a new trial. (R. 80:9); *Harrison*, 360 Wis. 2d 246, ¶ 1. The case was dismissed on the prosecutor's motion on June 23, 2015. (R. 103:1, Pet-App. 122).

3. Harrison's 2011 Ashland County case.

In September 2011, the State charged Harrison with repeated sexual assault of a child in Ashland County Case No. 2011CF82 (the 2011 case). (R. 100.) A jury found Harrison guilty, and on March 13, 2013, the circuit court sentenced Harrison to 40 years of imprisonment, consisting of 30 years of initial confinement followed by 10 years of extended supervision. (R. 97:1; Pet-App. 126–28). The court ordered the sentence to run consecutively to any other sentence. (R. 97:1.)

On January 6, 2017, the United States District Court for the Western District of Wisconsin granted Harrison's federal petition for a writ of habeas corpus and directed the

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[3] Specifically, for the burglary charge, the court sentenced Harrison to 16 years of imprisonment, consisting of 11 years of initial confinement followed by five years of extended supervision. (R. 103:2.) The court awarded 221 days of sentence credit on the burglary charge. (R. 103:2.) For both the obstruction charge and the theft charge, the court sentenced Harrison to two years of imprisonment, consisting of one year of initial confinement followed by one year of extended supervision. (R. 103:2.)

State to release or retry Harrison. (R. 80:9); *Harrison v. Tegels*, 216 F. Supp. 3d 956 (W.D. Wis. 2016). The court concluded that the state courts unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), when they ruled against Harrison on his ineffective assistance of counsel claims. *Harrison*, 216 F. Supp. 3d at 974.

Pursuant to a plea agreement, Harrison pled no contest to causing mental harm to a child on January 11, 2019. (R. 98, Pet-App. 129–31; 101:4–12) On August 19, 2019, the circuit court imposed a consecutive sentence of eight years of imprisonment, consisting of six years of initial confinement followed by two years of extended supervision. (R. 99:1; 102:17.) The court ordered the Department of Corrections to calculate Harrison's sentence credit per Wis. Stat. § 973.04.[4] (R. 99:1.)

B. Harrison seeks sentence credit in his 2007 and 2008 cases from his 2010 and 2011 cases.

1. Harrison moves for sentence credit.

In August 2017, Harrison moved for sentence credit. (R. 80; Pet-App. 132–88). He requested that the time he spent in confinement on the sentences in his 2010 and 2011 cases be applied to the extended supervision time he had remaining in his 2007 and 2008 cases. (R. 80.) In his motion, Harrison calculated this time to be 2304 days of credit on his 2007 case and 1961 days of credit on his 2008 case. (R. 80:5.)

[4] At sentencing, Harrison's attorney expressed, "If the Court follows the recommendation, we think he has, actually, a fairly substantial amount of time credited." (R. 102:11.)

Due to the consecutive nature of the sentences in his 2010 and 2011 cases, Harrison never began his extended supervision in his 2007 and 2008 cases. Instead, when the initial confinement portions of the 2007 and 2008 cases ended, the initial confinement portions for the 2010 case and later the 2011 case began. *See* Wis. Stat. § 973.15(2m)(b)2. ("If a court provides that a determinate sentence is to run consecutive to another determinate sentence, the person sentenced shall serve the periods of confinement in prison under the sentences consecutively and the terms of extended supervision under the sentences consecutively and in the order in which the sentences have been pronounced.").

Specifically, Harrison completed his initial confinement in his 2007 case on September 9, 2013. Because he later received sentence adjustment under Wis. Stat. § 973.155, he completed his initial confinement in his 2008 case on February 20, 2014. (R. 18.) Harrison thus began serving his initial confinement for his 2010 case on that same day, February 20, 2014. He stopped serving that sentence when the 2010 case was remanded for a new trial on January 22, 2015. The State's position is that Harrison started serving his initial confinement for his 2011 case that same day, January 22, 2015. Harrison stopped serving that confinement when it was vacated on January 6, 2017.

2. The circuit court awards Harrison sentence credit.

The circuit court granted Harrison's motion for sentence credit.[5] (R. 85.) Believing it was "silly to view the incarceration as simply wasted, dead time," the court ruled

[5] A copy of the circuit court's decision is included in the petitioner's appendix at 114–17.

that Harrison could "at least receive credit[,] which [would] extinguish [the 2007 and 2008] sentences." (R. 85:3.) Seeing its decision as "fundamentally fair," the court accomplished it by backdating the service of Harrison's extended supervision on the 2007 and 2008 cases. (R. 85:2–4 (citing *Tucker v. Peyton*, 357 F.2d 115 (4th Cir. 1966).)

The State appealed, arguing that the circuit court erred when it failed to apply Wisconsin's sentence credit statutes, Wis. Stat. §§ 973.155 and 973.04, and misapplied the case law.

3. The court of appeals effectively awards Harrison sentence credit via a new advancement concept.

In an unpublished but authored (and therefore citable) opinion, the court of appeals agreed that Harrison was not entitled to sentence credit under section 973.155. *State v. Harrison*, Nos. 2017AP2440-CR & 2017AP2441-CR, 2019 WL 1284825, ¶ 2 (Wis. Ct. App. Mar. 21, 2019) (unpublished).[6] It explained, "This case d[id] not involve sentence credit, because the courses of conduct were different between the cases with the ultimately vacated convictions and the cases with the never vacated convictions." *Id.* ¶ 2.

Nevertheless, the court of appeals effectively awarded Harrison sentence credit through application of a new "advance-the-commencement-of-valid-sentences concept." *Harrison*, 2019 WL 1284825, ¶ 3. Under that concept, the court said the "invalid sentence time [was] ignored, which ha[d] the effect of advancing to an earlier point on the

[6] A copy of the court of appeals' decision is included in the petitioner's appendix at 101–13.

timeline the commencement of all valid sentences." *Id.* Applying that concept, Harrison's extended supervision for his 2007 case started September 9, 2013, and his extended supervision for his 2008 case started February 20, 2014.

The court of appeals relied on two nonbinding cases to support its advancement concept. *Harrison*, 2019 WL 1284825, ¶¶ 15–24 (citing *Tucker*, 357 F.2d 115; *State v. Zastrow*, No. 2015AP2182-CRAC, 2017 WL 2782225 (Wis. Ct. App. June 27, 2017) (unpublished)).[7] The court rejected the State's argument that those nonbinding cases were limited by a binding case. *Harrison*, 2019 WL 1284825, ¶¶ 21–24 (rejecting *State v. Allison*, 99 Wis. 2d 391, 299 N.W.2d 286 (Ct. App. 1980)).

The court of appeals further concluded that "in the event Harrison is sentenced in a revived 2011 case," he "should be credited with all sentence credit in the 2011 case to which he is entitled under Wis. Stat. § 973.155." *Harrison*, 2019 WL 1284825, ¶ 10 n.2.

Despite briefing on the application of section 973.04, the court of appeals did not reference the statute in its opinion.

4. This Court grants review.

The State filed a petition, and Harrison filed a cross-petition for review to this Court. This Court granted both the petition and the cross-petition.

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[7] A copy of the decision is included in the petitioner's appendix at 267–75.

C. Harrison moves for summary reversal.

After this Court granted review, Harrison moved for summary reversal. (Pet-App. 243–48.) Given "the now undisputed fact" that he was "recently re-sentenced" in the 2011 case, Harrison said he was "no longer entitled to" sentence credit or advancement "in the cases now before the Court." (Pet-App. 243–44.) The State opposed Harrison's motion. (Pet-App. 249–59.)

This Court denied Harrison's motion for summary reversal. (Pet-App. 260–61.) It further directed the parties to address two new issues, one relating to summary disposition and one relating to judicial estoppel. (Pet-App. 261.)

ARGUMENT

The State will address the issues ordered by this Court first and the issues raised by the parties second. In the end, the State asks this Court to issue an authored decision, discussing the important sentence-credit issues raised in the petition and cross-petition for review and reversing the court of appeals' decision.

I. This Court has the power to summarily dispose of a case, but it should not exercise that power here.

A. Standard of review

Whether to summarily dispose of a case appears to be a matter for this Court's discretion. *See generally State v. Lord*, 2006 WI 122, 297 Wis. 2d 592, 723 N.W.2d 425.

B. A court may summarily dispose of an appeal.

Under Wis. Stat. § (Rule) 809.21(1), "[t]he court upon its own motion or upon the motion of a party, may dispose of

an appeal summarily." The term "court," "means the court of appeals or, if the appeal or other proceeding is in the supreme court, the supreme court." Wis. Stat. § (Rule) 809.01(4). Thus, this Court may summarily reverse or vacate (i.e., dispose of) a decision from the court of appeals.

This Court treats motions for summary disposition differently depending on the circumstances of the cases. In some cases, this Court has granted a motion for summary reversal and issued a per curiam decision with a brief discussion of the law.

Lord and *Keister* provide two examples of that approach. *Lord*, 297 Wis. 2d 592; *State v. Keister*, 2019 WI 26, 385 Wis. 2d 739, 924 N.W.2d 203.

In *Lord*, this Court granted the defendant's petition for review "to address whether law enforcement officers may stop an automobile on the sole ground that the automobile has a temporary license plate." *Lord*, 297 Wis. 2d 592, ¶ 2. In the circuit court and court of appeals, the State had argued that a temporary plate on an automobile alone created reasonable suspicion, and those courts had agreed. *See Lord*, 297 Wis. 2d 592, ¶ 4. After this Court granted review, the State confessed error and moved for summary reversal. *Id.* ¶ 5.

This Court granted the motion for summary reversal. *Lord*, 297 Wis. 2d 592, ¶ 8. Even though this Court accepted the State's concession "without further briefing or argument" because the law conceded was "well-settled" and required "no extensive research or explanation," it still offered a brief explanation of the law. *Id.* ¶ 7.

In *Keister*, this Court granted the State's petition for review to address two constitutional law issues related to drug-treatment court. *Keister*, 385 Wis. 2d 739, ¶ 1. In his response brief, Keister agreed that the circuit court erred

and conceded the petitioned-for issues. *Id.* At oral argument, the State recommended that this Court summarily reverse the circuit court's declaratory judgment order.[8]

This Court summarily reversed the circuit court's order. *Keister*, 385 Wis. 2d 739, ¶ 12. Even though this Court "agree[d] with the parties' concessions," it still offered an explanation of the law. *Id.* ¶¶ 8–12.

By contrast, this Court has summarily disposed of some cases without a substantive discussion of the law. For example, in *State v. Frazier*, No. 2017AP1249-CR (order dated Feb. 27, 2019), this Court summarily vacated the court of appeals' opinion in an order granting the State's petition for review. (Pet-App. 262–64.)[9] It did so because the parties agreed "that the court of appeals made an error with law developing potential," "that there would be little merit in full briefing and argument," and "that it would be more efficient for this court to correct the legal error and allow the case to proceed." (Pet-App. 262.)

The chief justice dissented, concluding that the case still presented "an interesting issue" related to video evidence. (Pet-App. 264.) The chief justice emphasized, "Hard work of appellate judging remains to be done in this case. The court should not use a decision avoidance device to

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[8] A recording of the argument can be found at the following link: https://wiseye.org/2019/01/18/supreme-court-oral-argument-state-v-michael-a-keister/. The State requested summary reversal at 2:02–2:09.

[9] Should it need to, this Court can take judicial notice of its orders, as they are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Wis. Stat. § 902.01(2)(b).

step away from a significant issue simply because both parties requested that result." (Pet-App. 264.)

Different still, this Court has denied a party's request for summary reversal and instead issued an authored opinion. For example, in *Scott*, this Court granted bypass to consider issues related to the involuntary medication of an inmate during postconviction proceedings. *State v. Scott*, 2018 WI 74, ¶¶ 1–2, 382 Wis. 2d 476, 914 N.W.2d 141. Before briefing in this Court, the State confessed error and moved for summary vacatur. (Pet-App. 266.) This Court denied the State's motion and directed it to answer the petitioned-for issues. (Pet-App. 265–66.) After full briefing and argument, this Court issued an authored opinion. *Scott*, 382 Wis. 2d 476.

C. This Court should issue a substantive opinion addressing these important legal issues.

As in *Scott*, this Court should issue an authored opinion addressing the important legal issues raised in the petition and cross-petition for review. Alternatively, this Court should, at a minimum, issue a per curiam opinion addressing the legal issues, like it did in *Lord* and *Keister*.

As shown above, party agreement has not precluded this Court from denying summary disposition and issuing an authored decision or from granting summary disposition and issuing a substantive per curiam. Given the important issues presented in this case, a substantive decision addressing the issues is warranted and needed.

II. This Court should not estop Harrison from seeking reversal.

A. Standard of review

Whether the elements of judicial estoppel are met is a question of law, which is reviewed de novo; whether to apply the doctrine if the elements are met, is a matter for the court's discretion. *See State v. Ryan*, 2012 WI 16, ¶ 30, 338 Wis. 2d 695, 809 N.W.2d 37.

B. Judicial estoppel is an equitable remedy invoked at the Court's discretion to prevent a party from abusing the judicial system.

"Judicial estoppel is an equitable doctrine invoked at the court's discretion to preclude a party from abusing the court system." *State v. Steinhardt*, 2017 WI 62, ¶ 18 n.14, 375 Wis. 2d 712, 896 N.W.2d 700. Specifically, it prohibits "a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." *CED Prop., LLC v. City of Oshkosh*, 2018 WI 24, ¶ 31 n.14, 380 Wis. 2d 399, 909 N.W.2d 136 (citation omitted). Given its abuse focus, the doctrine looks for "cold manipulation," not "unthinking or confused blunder[s]" or assertions "based on fraud, inadvertence, or mistake." *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996).

For judicial estoppel to apply, three conditions must be met. *Ryan*, 338 Wis. 2d 695, ¶ 33. First, the party's later position must be "clearly inconsistent" with its earlier position. *Id.* Second, "the facts at issue should be the same in both cases." *Id.* Third, "the party to be estopped must have convinced the first court to adopt its position." *Id.*

C. Although the State does not condone Harrison's behavior, it does not ask this Court to exercise its discretion and estop Harrison from seeking reversal.

Here, Harrison is manipulating the court system. Harrison seeks to concede that "he is no longer entitled to" sentence credit or advancement "in the cases now before the Court" so he can seek sentence credit on his new period of confinement for causing mental harm to a child in the 2011 case. (Pet-App. 244.) (Recall that Harrison has effectively received sentence credit toward a period of extended supervision.) Now that Harrison has a period of confinement to serve, he wants to attach sentence credit to it, not his extended supervision.

It's not clear, though, whether Harrison satisfies the three elements for judicial estoppel.

Harrison satisfies the first element because his positions are clearly inconsistent. In the circuit court, the court of appeals, and his cross-petition for review, Harrison argued that the time he spent in initial confinement on his 2010 and 2011 sentences should be credited toward his outstanding periods of extended supervision in his 2007 and 2008 cases. Then, in his motion for summary reversal, he conceded that he is not entitled to that credit.

It is unclear whether Harrison satisfies the second element because the facts at issue may not be the same. Judicial estoppel normally applies easily to a "trial and appeal of the same action," but Harrison's sentence for causing mental harm to a child adds a potential wrinkle. *See Harrison v. Labor & Indus. Review Comm'n*, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994).

On the one hand, Harrison's sentence in the 2011 case is not new. When Harrison moved for sentence credit, he was

being retried. When the State filed its brief in the court of appeals, it noted that Harrison's case was set for retrial. When the court of appeals issued its decision, it noted that Harrison had pled in the 2011 case. When the State filed its petition for review, it noted that Harrison was awaiting sentencing. That Harrison was finally sentenced in a case that had been pending throughout the entirety of this case should have surprised no one.

Furthermore, Harrison has not suggested that the specific sentence structure mattered. All Harrison has said is that based on "the now undisputed fact that Harrison was recently re-sentenced in Ashland County Case Co. 11-CF-82," it is his "position that he is no longer entitled to" sentence credit or advancement "in the cases now before the Court." (Pet-App. 243–44.)

On the other hand, the circuit court re-sentenced Harrison in the 2011 case four days after this Court granted review, so the facts have changed. The "more uncertain we are that the two judicial actions concern the same factual issues or propositions, the more hesitant we should be in applying judicial estoppel." *Harrison*, 187 Wis. 2d at 497.

Harrison arguably satisfies the third element for judicial estoppel. Harrison convinced the "first court," the circuit court, to award sentence credit from his 2010 and 2011 cases to his 2007 and 2008 cases. And although Harrison did not convince the court of appeals to award sentence credit, that court did rely on the cases cited in Harrison's brief to create its advancement concept.

Setting aside the elements of judicial estoppel, this doctrine is an equitable remedy exercised at a court's discretion. Although the State does not condone Harrison's behavior, it does not ask this Court to exercise its discretion to estop Harrison from seeking reversal. The State, too,

seeks reversal in this case, so it is disinclined to argue that Harrison should be estopped from confessing error, even if his motives are suspect.

III. Under Wis. Stat. § 973.155, Harrison is not entitled to have sentence credit for his confinement in his 2010 and 2011 cases applied to the periods of supervision remaining on his unrelated 2007 and 2008 cases.

A. Standard of Review

"Statutory interpretation is a question of law [this Court] review[s] de novo." *State v. Hager*, 2018 WI 40, ¶ 18, 381 Wis. 2d 74, 911 N.W.2d 17.

Whether a defendant is entitled to sentence credit is also a question of law that this Court reviews de novo. *State v. Marcus Johnson*, 2007 WI 107, ¶ 27, 304 Wis. 2d 318, 735 N.W.2d 505.

B. Statutory interpretation focuses on the language of the statute.

The purpose of statutory interpretation is "to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. It is the "solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning." *Id.* "Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute." *Id.*

To that end, "statutory interpretation 'begins with the language of the statute.'" *Kalal*, 271 Wis. 2d 633, ¶ 45 (citation omitted). A court cannot "disregard the plain, clear

words of the statute" when construing a statute. *Id.* ¶ 46 (citation omitted).

Statutory language is thus "given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Kalal*, 271 Wis. 2d 633, ¶ 45. "If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.* (citation omitted).

"Context and structure of a statute" are also "important to the meaning of the statute." *State v. Quintana*, 2008 WI 33, ¶ 14, 308 Wis. 2d 615, 748 N.W.2d 447. A statute is therefore "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; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46.

C. To obtain sentence credit, a defendant must satisfy the custody and connection requirements found in section 973.155.

Wisconsin has a statute that governs when a defendant is entitled to sentence credit: Wis. Stat. § 973.155.[10] Section 973.155 "reflect[s] the legislature's policy determination with respect to sentence credit determinations." *State v. Friedlander*, 2019 WI 22, ¶ 19, 385 Wis. 2d 633, 923 N.W.2d 849.

Wisconsin Stat. § 973.155(1)(a) tells a court when an offender is entitled to sentence credit: "A convicted offender shall be given credit toward the service of his or her sentence

[10] The federal statutory analog to Wis. Stat. § 973.155 is 18 U.S.C.A. § 3585 (Calculation of a term of imprisonment).

for all days spent in custody in connection with the course of conduct for which sentence was imposed."

Subsection (1)(a) also provides that "'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" "[w]hile the offender is awaiting trial," "[w]hile the offender is being tried," and "[w]hile the offender is awaiting imposition of the sentence after trial." Wis. Stat. § 973.155(1)(a)1.–3.

The text of section 973.155 "reflects" a "legislative determination" that a defendant must show (1) that he was "in custody" and (2) that his custody was "in connection with the course of conduct for which the sentence was imposed" to receive sentence credit. *Friedlander*, 385 Wis. 2d 633, ¶ 23 (citations omitted). If the defendant satisfies those showings, then "[c]redit is given for custody while awaiting trial, while being tried, and while awaiting sentencing after trial." *Marcus Johnson*, 304 Wis. 2d 318, ¶ 4 n.2; *see also State v. Beets*, 124 Wis. 2d 372, 377, 369 N.W.2d 382 (1985).

In general, section 973.155 "is designed to prevent a defendant from serving more time than his sentence or his sentences call for." *State v. Elandis Johnson*, 2009 WI 57, ¶ 31, 318 Wis. 2d 21, 767 N.W.2d 207. Accordingly, the "clear intent" of section 973.155 "is to grant credit for each day in custody regardless of the basis for the confinement *as long as it is connected to the offense for which sentence is imposed*." *Id.* (citation omitted).

The law places the burden of demonstrating both requirements for credit on the defendant. *State v. Villalobos*, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995).

D. Harrison does not meet both requirements for sentence credit.

Harrison is not entitled to sentence credit under section 973.155 for the extended supervision time left on his 2007 and 2008 cases' sentences. He meets that statute's custody requirement, but he fails its connection requirement.

1. Harrison was in custody.

"'Custody' means a detention status for which a defendant is subject to an escape charge if he leaves the place of detention." *State v. Obriecht*, 2015 WI 66, ¶ 25, 363 Wis. 2d 816, 867 N.W.2d 387 (citing *State v. Magnuson*, 2000 WI 19, ¶ 25, 233 Wis. 2d 40, 606 N.W.2d 536).

Here, there is no dispute that Harrison satisfied the first prerequisite; he was "in custody." At all relevant times, Harrison was imprisoned and subject to an escape charge in his 2010 and 2011 cases.

Thus, the central issue in this case is whether Harrison satisfied the second prerequisite, the connection requirement. That is, the issue is whether Harrison's custody in his 2010 and 2011 cases was connected to the conduct that led to his sentences in his 2007 and 2008 cases. It was not.

2. Harrison's custody was not connected to the conduct that led to his sentences.

To satisfy the connection requirement, the defendant's custody must be "factually connected with the course of conduct for which the sentence was imposed." *Elandis Johnson*, 318 Wis. 2d 21, ¶ 3. "[A] mere procedural connection will not suffice." *Id.* ¶ 33.

For example, in *Beiersdorf*, the circuit court issued Beiersdorf a personal recognizance bond for his sexual assault case. *State v. Beiersdorf*, 208 Wis. 2d 492, 494, 561 N.W.2d 749 (Ct. App. 1997); *see Elandis Johnson*, 318 Wis. 2d 21, ¶¶ 34–35 (citing approvingly to *Beiersdorf*). The State arrested and charged Beiersdorf with bail jumping after he violated the conditions of his bond. *Elandis Johnson*, 318 Wis. 2d 21, ¶ 34. After pleading guilty and being sentenced on both charges, *Beiersdorf* requested that his presentence custody from the bail jumping charge be applied to the sentence he received for his sexual assault charge. *Id.*

The court of appeals denied his request because *Beiersdorf* failed to satisfy section 973.155's connection requirement. *Elandis Johnson*, 318 Wis. 2d 21, ¶ 35. The court reasoned: "Because the sentence imposed was 'in connection with' the sexual assault charge, but the presentence custody was 'in connection with' the bail jumping charge, there was no factual connection between the presentence custody and the sentence imposed." *Id.* "This was true despite the obvious procedural connection between the bail jumping charge and the original sexual assault charge: *i.e.*, without the sexual assault charge there would have been no personal recognizance bond, and thus, no bail jumping." *Id.*

Here too, there is no factual connection between Harrison's custody in his 2010 and 2011 cases and his sentences in his 2007 and 2008 cases. Indeed, timeline wise, it would be difficult for Harrison's custody in his 2010 and 2011 cases to be factually related to sentences he received years earlier.

Importantly, Harrison has presented no evidence that his 2007 and 2008 sentences were—in any way—factually connected to his 2010 and 2011 custody. *See Villalobos*, 196

Wis. 2d at 148 (placing the burden of proving the statutory prerequisites for sentence credit on the defendant).

In the circuit court, Harrison never even asserted, much less demonstrated, that his crimes were factually connected. Nor did the circuit court find that there was a factual connection. (R. 85 (failing to cite or discuss section 973.155).)

Before the court of appeals, Harrison made two vague assertions that there was some connection:

- "To deny Harrison this credit would deny him credit against his 2007 and 2008 sentences for time served in custody that was factually connected to the course of conduct for which sentence was imposed." (Pet-App. 206);
- "From December 21, 2011, through January 6, 2017, Harrison was confined in prison based on the course of conduct for which sentences were imposed in the 2007 and 2008 cases. There was no other legal basis for Harrison's confinement." (Pet-App. 206).

Neither assertion demonstrates a *factual* connection between his custody in his 2010 and 2011 cases and his sentences in his 2007 and 2008 cases.

At best, Harrison claimed a *procedural* connection. Harrison asserted that because his 2010 and 2011 sentences were vacated and therefore void, he was actually confined for conduct related to his 2007 and 2008 cases, as those were the only legally valid sentences. (Pet-App. 206.) Sure, once Harrison's 2010 and 2011 sentences were vacated, they were "no longer in effect." *State v. Lamar*, 2011 WI 50, ¶ 40, 334 Wis. 2d 536, 799 N.W.2d 758. But those once-lawful sentences existed and were in effect until then, and to assert otherwise is legal fiction.

Here, the consecutive sentences in the 2010 and 2011 cases effectively paused completion of Harrison's 2007 and 2008 cases' sentences. This is because Wis. Stat. § 973.15(2m)(b)2. states that when a "court provides that a determinate sentence is to run consecutive to another determinate sentence, the person sentenced shall serve the period of confinement in prison under the sentences consecutively and the terms of extended supervision under the sentences consecutively and in the order in which the sentences have been pronounced."

Under this rule, the later consecutive sentence does not begin at noon on the day of sentence; it begins when the first sentence expires. *See State v. Collins*, 2008 WI App 163, ¶ 9, 314 Wis. 2d 653, 760 N.W.2d 438 (noting that "consecutive sentences run in the order imposed" and that "the aggregate terms of confinement and extended supervision in consecutive sentences are treated as single continuous terms"). Accordingly, the temporary pauses created by Harrison's 2010 and 2011 cases' consecutive sentences were lifted when those sentences were vacated.

The bottom line is Harrison has not carried his burden of showing that his custody in his 2010 and 2011 cases was connected to the conduct that led to his 2007 and 2008 cases' sentences. Consequently, he is not entitled to sentence credit under section 973.155.

IV. Under Wis. Stat. § 973.04, Harrison is not entitled to have sentence credit for his confinement on his 2010 and 2011 cases' sentences applied to the periods of supervision remaining on his unrelated 2007 and 2008 cases' sentences.

A. Section 973.04 provides credit when a conviction is vacated, and the defendant is later sentenced for the "same crime."

Wisconsin has a statute that governs when a person is entitled to sentence credit for a vacated sentence: Wis. Stat. § 973.04.[11] It is titled "Credit for imprisonment under earlier sentence for the same crime." Wis. Stat. § 973.04; *see State v. Grandberry*, 2018 WI 29, ¶ 21 n.13, 380 Wis. 2d 541, 910 N.W.2d 214 ("Although titles are not part of statutes, Wis. Stat. § 990.001(6), they may be helpful in interpretation." (citation omitted)). The statute's broad title demonstrates its reach—it governs confinement credit for the same crime.

In full, section 973.04 provides, "When a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department shall credit the defendant with confinement time previously served." By its plain terms, the statute authorizes credit when three prerequisites are met: (1) a sentence is vacated, (2) a new sentence is imposed, and (3) the new sentence imposed is for the same crime. Wis. Stat. § 973.04.

"Under the doctrine of *expression unius est exclusion alterius*, 'the express mention of one matter excludes other similar matters [that are] not mentioned.'" *FAS LLC, v. Town of Bass Lake*, 2007 WI 73, ¶ 27, 301 Wis. 2d 321, 733

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[11] There appears to be no federal statutory analog to Wisconsin's section 973.04.

N.W.2d 287 (citation omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107–11 (2012) (Negative-Implication Canon) ("The expression of one thing implies the exclusion of others (*expression unius est exclusion alterius*)"), ("When a car dealer promises a low financing rate to 'purchasers with good credit,' it is entirely clear that the rate is *not* available to purchasers with spotty credit."). Accordingly, by negative implication, section 973.04 authorizes no credit when no new sentence is imposed or when the new sentence imposed is not for the same crime.

Section 973.04 does not define the term "same crime." This Court should clarify that "same crime" means same in law and fact.

1. The history of section 973.04.

In a 1946 case, this Court expressed concern that a defendant may not receive credit for time spent on a vacated sentence when later sentenced again for the same crime—there, murder:

> We think the following facts should here be stated: When the petitioner is remanded to the custody of the sheriff of Marinette county pursuant to the mandate of this court, he may be re-arraigned and held for trial if he pleads "not guilty." If he is tried on the present information he may be convicted of murder in the first degree. If so convicted, the trial court would have no discretion but to sentence him to State's prison for life, although the prisoner has served eleven years of his sentence and shortly will be entitled to apply for parole. The trial court upon re-sentence could not take the fact of his eleven years imprisonment into consideration. The petitioner then would have to commence another life sentence. Because of the peculiar circumstances we have no means of avoiding such result. We can only point out that if he should be prosecuted for and

> convicted of murder in the first degree, the matter of how much of his term he should justly serve will be a matter for the consideration of the governor in case he applies for pardon.

State ex rel. Drankovich v. Murphy, 248 Wis. 433, 439–40, 22 N.W.2d 540 (1946). The Legislature responded with Wis. Stat. § 958.06(3)(b) and (c), which authorized credit for time previously served on a vacated sentence. Excerpts from 1963 Wis. Laws ch. 22; Drafting file for 1963 Wis. Laws ch. 22, Wis. Legis. Reference Bureau, Madison, Wis. (Pet-App. 276–77.)

Specifically, subsection (3)(b) enabled a court to "deduct" from the new sentence "whatever time" the defendant had previously served "for the acts constituting the offense with which he is charged, so that upon no account may the aggregate term exceed the maximum term provided by the statutes therefor." Wis. Stat. § 958.06(3)(b). Subsection (3)(c) clarified that "any time served in prison under the earlier sentence for the same offense" "counted as time served in establishing parole eligibility." Wis. Stat. § 958.06(3)(c).

Here's the relevant text of section 958.06(3):

> AN ACT to renumber 958.06(3); and to create 958.06(3)(b) and (c) of the statutes, relating to the sentence and eligibility for parole where the defendant was convicted on a new trial and had served time on the original conviction.
>
> . . . .
>
> Section 2. 958.06(3)(b) and (c) of the statutes are created to read:
>
> 958.06(3)(b) If the new trial results in the conviction of the defendant, the trial court shall make allowance for and deduct from sentence imposed whatever time of imprisonment the defendant has served by reason of the acts

> constituting the offense with which he is charged, so that upon no account may the aggregate term exceed the maximum term provided by the statutes therefor.
>
> (c) If a defendant is convicted following a new trial and is sentenced to a term of confinement, any time served in prison under the earlier sentence for the same offense shall be counted as time served in establishing eligibility for parole under s. 57.06(1)(a).

1963 Wis. Laws ch. 22.

In 1967, the Judicial Council established a Criminal Rules Committee, and in 1969, the Committee presented a redraft of the criminal procedure statutes. 1969 Wis. Laws ch. 255. As a result, section 958.06(3) became section 973.04. 1969 Wis. Laws ch. 255 §§ 55, 63.

At that time, section 973.04 read:

> 973.04 CREDIT FOR IMPRISONMENT UNDER EARLIER SENTENCE FOR THE SAME CRIME. When a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department shall credit the defendant with confinement theretofore served and good time, if any, earned by the defendant pursuant to ss. 53.11 and 53.12 while so confined.
>
> NOTE: S. 958.06 (3)(b) is restated to give a defendant credit for imprisonment and good time earned under a vacated sentence.

1969 Wis. Laws ch. 255. Over time, the Legislature removed the portion of the statute governing credit for good time. 1983 Wis. Act 66 § 6; 1983 Wis. Act 528 § 24.

Since 1984, section 973.04 has read as it does today.

2. The phrase "same crime" means the same in law and fact.

Around the time the Wisconsin Legislature created section 973.04, the Supreme Court held "that the constitutional guarantee against multiple punishments for the same offense absolutely require[d] that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 718–19 (1969) (footnote omitted). The Court explained, "If, upon a new trial, the defendant is acquitted, there is no way the years he spent in prison can be returned to him. But if he is reconvicted, those years can and must be returned—by subtracting them from whatever new sentence is imposed." *Id*. at 719.

The offense is the same, the Court said, when it is the same in law and fact:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And . . . there has never been any doubt of (this rule's) entire and complete protection of the party *when a second punishment is proposed in the same court, on the same facts, for the same statutory offense*.

Pearce, 395 U.S. at 717–18 (quoting *Ex parte Lange*, 85 U.S. 163, 168 (1873) (emphasis added)).

Given those underpinnings, this Court should look to double jeopardy principles to determine whether two crimes are the same. *See State v. Davison*, 2003 WI 89, ¶ 33, 263 Wis. 2d 145, 666 N.W.2d 1 (""The same offense' is the sine qua non of double jeopardy." (citation omitted)). And to be the same under double jeopardy, the offenses must be "identical in law and fact." *Id.*

"[T]wo offenses are different in law if each statutory crime required for conviction proof of an element which the

other does not require." *State v. Lechner*, 217 Wis. 2d 392, 405, 576 N.W.2d 912 (1998).

Offenses are different in fact when they are separated in time or place, or they are of a significantly different nature. *See Lechner*, 217 Wis. 2d 392, 414–15; *State v. Multaler*, 2002 WI 35, ¶ 56, 252 Wis. 2d 54, 643 N.W.2d 437 ("The inquiry into whether offenses are identical in fact involves a determination of whether the charged acts are 'separated in time or are of a significantly different nature.'" (citation omitted)).

Two acts are separated in time if "there was sufficient time for reflection between the acts such that the defendant re-committed himself to the criminal conduct." *Multaler,* 252 Wis. 2d 54, ¶ 56. Two acts are different in nature when each "offense requires proof of an additional fact that a conviction for the other offense does not." *State v. Warren*, 229 Wis. 2d 172, 180, 599 N.W.2d 431 (Ct. App. 1999) (citation omitted).

For example, in *Pearce*, the Supreme Court indicated that both defendants were reconvicted of and resentenced on the same statutory offenses for the same factual conduct. *Pearce*, 395 U.S. at 713–14. Under those circumstances, the Court concluded that each defendant needed to be fully credited for his time served on the earlier sentence for the same crime. *Id.* at 717–19.

The same was true in *Lamar*. There, Lamar originally pled guilty and was sentenced for aggravated battery and misdemeanor bail jumping, both as a habitual offender. *Lamar*, 334 Wis. 2d 536 ¶ 2. Lamar later withdrew his original plea and subsequently pled to aggravated battery without the habitual offender enhancer. *Id.*

Although this Court ultimately did not award Lamar credit under section 973.04,[12] it assumed that Lamar's crimes—aggravated battery with the habitual offender enhancer and aggravated battery without the enhancer—were the same. *See Lamar*, 334 Wis. 2d 536, ¶ 59 n.5 (Abrahamson, J., dissenting) ("Although the original sentence for Count 1 was for the aggravated battery conviction with the habitual offender penalty, and the new sentence later imposed was for aggravated battery without the habitual offender penalty, both sentences arose out of the same crime—aggravated battery.").

In sum, the Legislature authorized credit under section 973.04 only when a "new sentence" is imposed for the "same crime." To be the same, the old and new charges must be identical in law and fact. If the charges are identical in law and fact, a circuit court may properly award credit under section 973.04. If not, or if no new sentence is imposed, the Legislature has not authorized credit, so a circuit court may not award it.

B. Harrison does not meet the requirements in section 973.04, so he is not entitled to credit on his 2007 and 2008 cases for the time he spent in confinement serving his 2010 and 2011 cases' sentences.

As a reminder, Harrison sought to have the time he spent in confinement on his 2010 and 2011 cases applied to his remaining supervision time in his 2007 and 2008 cases.

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[12] This Court did not award credit because *Lamar* had been serving a concurrent sentence alongside his vacated sentence. *State v. Lamar*, 2011 WI 50, ¶¶ 35–37, 334 Wis. 2d 536, 799 N.W.2d 758.

Section 973.04 does not authorize credit under those circumstances.

First, Harrison is not entitled to credit on his 2007 and 2008 cases for the time he spent in confinement serving his 2010 case's sentence. Although Harrison's sentence in the 2010 case was vacated, no "new sentence" was imposed since the State dismissed the 2010 case. *See* Wis. Stat. § 973.04 (requiring that a new sentence be imposed). Absent a new sentence, there is nothing any time served can properly attach to. *See, e.g.*, *Pearce*, 395 U.S. at 719 ("If, upon a new trial, the defendant is acquitted, there is no way the years upon a new conviction can be returned to him.").

Second, Harrison is not entitled to credit on his 2007 and 2008 cases for the time he spent in confinement serving his 2011 case's sentence. Although Harrison's original sentence in the 2011 case was vacated and a new sentence imposed, the new sentence was not imposed for the "same crime[s]" as the 2007 and 2008 cases.

The 2007 and 2008 crimes are not the same in fact as the 2011 crime. The crimes are separated in time (by years) and place (Clark County versus Ashland County), and they are significantly different in nature (theft and fraud versus harming a child).

The 2007 and 2008 crimes are also not the same in law as the 2011 crime because they require proof of different elements. The crime of theft–business setting (the 2007 case) contains four elements:

1. The defendant had possession of money belonging to another because of his business.

2. The defendant intentionally used the money without the owner's consent and contrary to the defendant's authority.

3. The defendant knew that the use of the money was without the owner's consent and contrary to the defendant's authority.

4. The defendant intended to convert the money to his own use.

See Wis. JI–Criminal 1444 (2019); (R. 94:19).

The crime of fraud/rendering income tax return (the 2008 case) contains three elements:

1. The defendant filed an income tax return.

2. The return filed by the defendant was false.

3. The defendant filed a false income tax return with intent to evade payment or income taxes.

Wis. JI–Criminal 5012 (2010); (R. 94:20).

The crime of causing mental harm to a child (the new 2011 crime) contains five elements:

1. The defendant was exercising temporary or permanent control of the victim.

2. The victim suffered mental harm.

3. The defendant caused the mental harm to the victim.

4. The defendant caused mental harm by conduct which demonstrated substantial disregard for the mental well-being of the victim.

5. The victim had not attained the age of 18 years at the time the alleged harm was caused.

Wis. JI–Criminal 2116 (2009).

Looking only at the first elements, it is indisputable that each crime requires proof of an element the other does not. The crime of theft–business setting required Harrison to possess money that belonged to another person because of

his business. The crime of causing mental harm to a child did not require Harrison to possess money.

The crime of fraud/rendering income tax return required Harrison to file an income tax return. The crime of causing mental harm to a child did not require Harrison to file a tax return.

Finally, the crime of causing mental harm to a child required Harrison to exercise temporary or permanent control of the victim, and neither the crime of theft–business setting nor the crime of fraud/rendering income tax return required Harrison to possess control of the victim.

In sum, because the new sentence in the 2011 case was not imposed for the "same crime[s]" as the 2007 and 2008 cases, Harrison is not entitled to credit on his 2007 and 2008 cases for the time he spent in confinement serving his vacated 2011 case's sentence.

At first blush, it may seem harsh that Harrison cannot use the time he spent in confinement on his 2010 and 2011 cases as credit against other unrelated cases. But the same is true when a defendant remains in jail pretrial and is acquitted after trial. Just as a court would not allow a defendant to carry over as a "line of credit" time from one acquitted case to a later, unrelated conviction, Harrison cannot carry over credit from his unrelated 2010 and 2011 cases to his 2007 and 2008 cases. *Allison*, 99 Wis. 2d at 393 (allowing defendants to "obtain a 'line of credit' for future crimes" would "have the anomalous effect of rewarding the habitual criminal with credit while the person who does not commit a later crime is not similarly compensated").

In addition, it is the Legislature who directed that Harrison cannot receive credit. It "is not the function of this court to rewrite the statutes to avoid [an] unfair result." *See Bank of Commerce v. Waukesha Cnty.*, 89 Wis. 2d 715,

724, 279 N.W.2d 237 (1979). This Court is instead "bound to interpret the statutory language and intent as it is written as [it is] a court of review that cannot fashion remedies contrary to the express dictates of a statutory enactment." *Id.* If the Legislature desires, it can amend or replace section 973.04 and provide for broader credit.[13]

C. This Court should not adopt an advancement concept.

The court of appeals did not follow the Legislature's instruction to award sentence credit pursuant to sections 973.155 and 973.04, the only legal bases for awarding sentence credit. *See Friedlander*, 385 Wis. 2d 633, ¶ 19 ("Wisconsin's statutes reflect the legislature's policy determination with respect to sentence credit determinations."). Instead, the court created an "advance-the-commencement-of-valid-sentences concept" and effectively awarded Harrison credit where the statutes provided for none. *Harrison*, 2019 WL 1284825, ¶ 3; *but see Friedlander*, 385 Wis. 2d 633, ¶ 44 ("Courts, however, should be most hesitant to adopt judicially created remedies when the legislature, the primary policymaker, has statutorily addressed the topic.").

Applying its advancement concept, the court of appeals removed Harrison's invalid initial confinement time on his vacated sentences and began Harrison's extended

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[13] *Compare* Wis. Stat. § 973.155 (using the broad phrase "course of conduct") *with* Wis. Stat. § 973.04 (using the limited phrase "same crime"); *see also Rural v. Pub. Serv. Comm'n of Wis.*, 2000 WI 129, ¶ 39, 239 Wis. 2d 660, 619 N.W.2d 888 ("If a word or words are used in one subsection but are not used in another subsection, we must conclude that the legislature specifically intended a different meaning." (citation omitted)).

supervision time for his 2007 and 2008 cases on the date he completed his confinement time for the 2007 and 2008 cases. *Harrison*, 2019 WL 1284825, ¶ 3. Put simply, it backdated when Harrison began his extended supervision for his 2007 and 2008 cases.

By changing the date Harrison's extended supervision began, the court of appeals applied the same computation principles the Department of Corrections uses to award sentence credit under the statutes. To compute credit, the Department subtracts the amount of credit owed from the actual date of sentencing and then acts as if the sentence began that day. So, for example, if a defendant is entitled to 20 days of sentence credit and was sentenced on June 30, the Department would subtract 20 days from June 30, to create a new sentencing date of June 10. By acting as if the sentence began June 10, the Department takes into account the 20 days of credit.

By using the Department's computation principles to advance Harrison sentence, the court of appeals effectively awarded Harrison sentence credit, in violation of the Legislature's sentence credit scheme. Because the Legislature, the primary policy maker, has statutorily addressed an offender's entitlement to credit, this Court should not permit the court of appeals' new judicial remedy to stand. *See Friedlander*, 385 Wis. 2d 633, ¶ 44.

The court of appeals' new advancement concept is at odds with the law. It conflicts with two well-established rules governing sentence credit, is incompatible with Wisconsin's bifurcated sentence structure, and has led to conflicting decisions in the court of appeals.

First, the court of appeals' new concept allows a court to attach credit to a term of supervision, in violation of the traditional rule that credit can attach only to a term of

confinement. *Obriecht*, 363 Wis. 2d 816, ¶ 49 (Bradley, A.W., J., concurring) ("I agree with the majority that when a defendant's parole is revoked, sentence credit should be applied to reduce the term of re-incarceration and not parole.").

Second, an advancement concept creates situations where courts must forgo application of the law (section 973.04) to avoid awarding impermissible dual credit. *See State v. Jackson*, 2000 WI App 41, ¶ 19, 233 Wis. 2d 231, 607 N.W.2d 338 ("'[D]ual credit is not permitted' where a defendant has already received sentence credit against a sentence which has been, or will be, separately served." (citation omitted)).

That is exactly what happened in *Zastrow*. *Zastrow*, 2017 WL 2782225. Zastrow involved four separate cases: a Winnebago County case, Outagamie County Case No. 2002CF1013, Outagamie County Case No. 2005CF284, and Outagamie County Case No. 2005CF285. *Id.* ¶ 2. Zastrow received four years of imprisonment on the Winnebago County case, and he received consecutive sentences in each of the Outagamie cases. *Id.* Roughly two years into his Winnebago County sentence, the court vacated and re-sentenced Zastrow. *Id.* ¶¶ 2–3 The court of appeals ordered the Department to advance Zastrow's sentence in Outagamie County Case No. 2002CF1013 to the date of sentencing in that case. *Id.* ¶ 7.

The court of appeals further concluded that "[b]ecause Zastrow's new Winnebago County sentence [was] now consecutive to the Outagamie County sentences, Zastrow was not entitled to sentence credit toward his new Winnebago County sentence under Wis. Stat. § 973.04 for the time he served in custody after his sentence in Outagamie County case No. 2002CF1013 began on October 18, 2006." *Zastrow*, 2017 WL 2782225, ¶ 10. The

court so concluded even though "Zastrow was subsequently resentenced for the same crime." *Id.* ¶ 9. The court declined to award credit under section 973.04 because it would result in dual credit—credit on Outagamie County Case No. 2002CF1013 by virtue of advancement and credit under section 973.04 on the Winnebago County sentence. *Id.* ¶ 11.

The court erred when it applied an advancement concept instead of section 973.04, which governed Zastrow's sentence credit. The court of appeals should have started Zastrow's sentence in Outagamie County Case No. 2002CF1013 on the day the sentence in the Winnebago County case was vacated. It then should have ordered the Department to award Zastrow credit for the time he spent on the vacated Winnebago County sentence to the new Winnebago County sentence. Had the court done so, it would not have created a situation where it had to forgo application of the law—section 973.04—to avoid creating impermissible dual credit. Because *Zastrow* muddies application of section 973.04, this Court should decline to follow it.

Harrison's case serves as another example. Relying on an advancement concept, the court of appeals effectively awarded Harrison sentence credit toward the extended supervision left on his 2007 and 2008 cases. But now, Harrison has filed a motion for summary reversal because he has been sentenced for causing mental harm to a child in the 2011 case. Harrison's new position is that the time he spent in confinement for his vacated 2011 sexual-assault conviction should be applied to reduce the time he will spend in confinement on his conviction for causing mental harm to a child.[14] If Harrison is awarded credit toward his extended

[14] Whether Harrison is entitled to sentence credit on his new conviction for causing mental harm to a child due to the time

supervision in his 2007 and 2008 cases under an advancement concept and further awarded credit toward his confinement in his new 2011 sentence for causing mental harm to a child, then he will receive duplicate credit in violation of *Boettcher*.

Separate from sentence credit, the advancement concept also negatively impacts Wisconsin's bifurcated sentencing structure. Under that structure, a circuit court sentences a person to a term of imprisonment, consisting of a period of initial confinement followed by a period of extended supervision. *See* Wis. Stat. § 973.01(1) ("[W]henever a court sentences a person to imprisonment in the Wisconsin state prisons for a felony committed on or after December 31, 1999, or a misdemeanor committed on or after February 1, 2003, the court shall impose a bifurcated sentence under this section.").

Though there may be overlap, confinement and supervision serve unique purposes. The supervision component of the sentence focuses on the rehabilitation of the defendant and the protection of the community. *State v. Miller*, 2005 WI App 114, ¶ 11, 283 Wis. 2d 465, 701 N.W.2d 47 (noting that the "dual goals of supervision" are "rehabilitation of the defendant and the protection of a state or community interest").

Rehabilitation encompasses successful reintegration of the defendant back into the community. Conditions placed on extended supervision, which are tailored to the defendant, help that defendant successfully reintegrate. If, as is the case here, a term of initial confinement is credited

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he spent in confinement on his vacated 2011 sexual-assault conviction is not before this Court.

toward a period of extended supervision, a defendant moves back into the community without any supervision or conditions designed to help him successfully reintegrate. That thwarts the circuit court's intent at sentencing. *State v. Brown*, 150 Wis. 2d 636, 642, 443 N.W.2d 19 (Ct. App. 1989) ("The intent of the sentencing judge controls the determination of the terms of a sentence, and we look to the record as a whole to determine that intent."). And it does nothing to satisfy the dual goals of supervision—rehabilitation of the defendant and the protection of the community.

Finally, advancement has led to conflicting decisions in two court of appeals cases: *Allison* and Harrison's case. Both cases discussed a Fourth Circuit case, *Tucker*, so the State will cover *Tucker* first.

Tucker involved seven sentences from five convictions (1) a 1942 sentence for grand larceny, (2) a 1948 sentence for grand larceny and a recidivist sentence, (3) a 1956 sentence for breaking and entering and a recidivist sentence, (4) a 1957 sentence for escape, and (5) a 1960 sentence for escape. *Tucker*, 357 F.2d at 116–17.

Tucker later attacked his first sentence, the 1942 sentence for grand larceny. *Tucker*, 357 F.2d at 116. By attacking that sentence, Tucker also necessarily attacked the 1956 recidivist sentence, as Tucker would no longer be a third-time offender. *Id*. at 116–17.

The *Tucker* court ruled that if the 1956 recidivist sentence fell, then "service of the first escape sentence must be advanced to the expiration in service of the 1956 sentence for breaking and entering, but not earlier than the date of imposition of the escape sentence," and service of the 1960 escape sentence "would begin after service of the first, but not before the second was imposed." *Tucker*, 357 F.2d at 118.

In *Allison*, the defendant was convicted of rape and sexual perversion in 1971, and he served a roughly 21.5-month sentence. *Allison*, 99 Wis. 2d at 392. In 1975, Allison was again convicted of rape and sexual perversion and was sentenced to a total of 33 years of imprisonment. *Id.* In 1979, Allison's 1971 conviction was overturned. *Id.* Relying on *Tucker*, Allison argued "that the state must credit sentences remaining to be served on a valid conviction with the time served under a voided conviction." *Id.* at 393.

The court of appeals rejected Allison's "interpretation of and reliance on *Tucker*." *Allison*, 99 Wis. 2d at 393. The court said, "The rule set forth in *Tucker* is that when a defendant is sentenced on consecutive sentences for related offenses and the earlier sentence is invalid, the later sentence must be advanced to the date it would have begun but for the intervening invalid sentence." *Id.* After rejecting *Tucker*, the court concluded that "a sentence imposed for the commission of an offense unrelated to the crime for which conviction was voided will not be reduced by the time served under the voided conviction." *Id.* at 393–94.

Despite *Allison*'s clear statement that if advancement applied, it applied only to "consecutive sentences for related offenses," the court of appeals here concluded that the sentences need not be related for advancement to apply. *Harrison*, 2019 WL 1284825, ¶ 23 (citation omitted). The court "assum[ed] as true *Allison*'s description of *Tucker* as addressing *related* cases," but it nevertheless concluded that "no statement in either *Allison* or *Tucker* undermine[d] the logic of advancing the commencement date of a successive valid sentence, the underlying offense of which is *unrelated* to the offense or offenses underlying a vacated conviction and sentence that is earlier in the succession of sentences." *Id.* ¶ 24 (emphasis added).

The court of appeals "question[ed]" *Allison* and commented that if "it was permissible for this Court to withdraw or modify language from a prior published opinion, [it] might do so here." *Harrison*, 2019 WL 1284825, ¶ 23. It ultimately sidestepped *Allison* by concluding that it did not conflict with the court's overall "logic." *Id.* ¶ 24.

In concluding that it could reduce the time Harrison served on his 2007 and 2008 cases by crediting the time served on the unrelated and voided 2010 and 2011 convictions, the court of appeals modified *Allison*. Setting aside the fact that the law forbids the court of appeals from taking such action,[15] its conclusion has now created confusion. One opinion (*Allison*) says the cases would need to be related, and one opinion (*Harrison*) says they need not be related. Advancement is thus doing more harm than good.

At bottom, because section 973.04 governs credit for vacated sentences, and because advancement leads to troublesome consequences, there is no good reason for this Court to adopt it.

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[15] *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997).

CONCLUSION

This Court should reverse the court of appeals' decision and issue an authored opinion addressing the important legal issues presented in this case.

Dated this 8th day of November 2019.

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 10,976 words.

Dated this 8th day of November 2019.

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JENNIFER R. REMINGTON
Assistant Attorney General

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JENNIFER R. REMINGTON
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Richard H. Harrison, Jr.
Case Nos. 2017AP2440-CR, 2017AP2441-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.

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