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STATE OF WISCONSIN

I N S U P R E M E C O U R T

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

STATE OF WISCONSIN,

Petitioner-Appellant-Petitioner,

v.

RICHARD H. HARRISON JR.,

Defendant-Respondent-Cross-
Petitioner.

On Review from a Decision of the Court of Appeals,
District IV, Reversing and Remanding With
Directions, an Order Granting Sentence Credit,
Entered in the Clark County Circuit Court,
the Honorable Nicholas J. Brazeau, Jr., Presiding

BRIEF OF DEFENDANT-RESPONDENT-
CROSS-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 addressed this issue.

This Court should exercise its broad discretionary authority to summarily reverse and vacate the court of appeals decision in this case because, as a result of a new factual event, there is no live controversy concerning the issues upon which this Court granted review.

2. Whether Harrison is judicially estopped from now taking the position that the court of appeals' decision should be reversed and the cases should 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 addressed this issue.

This Court should hold that Harrison may not be judicially estopped from conceding he is no longer entitled to the sentence credit he received in the circuit court or the advancement of his sentences

ordered by the court of appeals because the elements necessary to invoke the doctrine have not been met and the evils the doctrine is designed to protect against are not present in this case.

3. Whether Harrison is entitled to sentence credit against his 2007 and 2008 sentences for the extra three years he spent in prison serving no other lawfully imposed sentence?

The circuit court granted Harrison's request for sentence credit based on the fact that Harrison's previously imposed consecutive sentences in his 2010 and 2011 cases no longer existed.

The court of appeals reversed the circuit court's order granting sentence credit after concluding that the time Harrison spent in prison was not "factually connected" to the course of conduct for which sentence was imposed in the 2007 and 2008 cases.

After this Court granted review of this issue, Harrison was resentenced in the previously vacated 2011 case. As a result, the underlying factual basis for Harrison's legal claim for credit no longer exists. Therefore, Harrison is now forced to concede that he is no longer entitled to the sentence credit in the 2007 and 2008 cases he previously sought. As a result, this Court should summarily reverse the court of appeals decision and remand this case to the circuit court with directions to deny Harrison's motion for sentence credit.

4. Whether the court of appeals erred when it ignored Wis. Stat. § 973.04 and, after denying Harrison sentence credit under Wis. Stat. § 973.155, ordered the circuit court to order the Wisconsin Department of Corrections to “advance the commencement of the valid extended supervision periods in [the 2007 and 2008] cases in which the conviction was not vacated, so that these extended supervision periods begin on the dates on which Harrison completed serving the initial confinement portions of his sentences in each case in which the conviction was not vacated.”

The circuit court did not address this issue. The court of appeals based its order on the persuasive authority cited by Harrison, which relied on the undisputed principle, explained by this Court in *State v. Lamar*, that a vacated judgment is treated “as if there had been no judgment.”¹

This Court should summarily reverse the court of appeals’ decision and order concerning the “advance the commencement of valid sentences concept” because the underlying factual and legal bases for the that decision no longer exists as a result of Harrison’s resentencing in the 2011 case.

¹ *State v. Lamar*, 2011 WI 50, ¶39, fn.10, 334 Wis. 2d 536, 799 N.W.2d 758.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases accepted by this court.

INTRODUCTION

Harrison agrees with the State that this is a sentence credit appeal from Harrison's 2007 and 2008 cases. Harrison also agrees with the state that he is not entitled to the sentence credit he sought and received from the circuit court or the "advancement of the valid sentence" relief ordered by the court of appeals. While the parties disagree about *why* Harrison is not entitled to the relief he received from either the circuit court or the court of appeals, there is no live controversy concerning the application of the law to the facts at issue before this Court.

Harrison's brief will address the issues upon which this Court granted review and the additional issues this Court ordered the parties to brief. However, unlike the state, Harrison will analyze the issues presented based on the record now before this Court, not as the record existed in the circuit court or the court of appeals. To do otherwise, Harrison would have to argue his position based on a hypothetical set of facts that differs significantly from the record now before this Court.

As will be fully developed below, the significant change in circumstances that occurred *after* this Court granted the state's petition for review and Harrison's cross-petition for review, is that Harrison

was resentenced in the previously vacated 2011 Ashland County case. (*See* Pet-App. 126-131, 149-183). This event is significant because the factual basis upon which Harrison's legal claim for sentence credit and the court of appeals' decision and order concerning the "advancement of the valid sentence concept were based was the fact that Harrison's 2010 and 2011 sentences had been vacated *and* no new sentences had been imposed. Harrison would have never sought, and he would have never received, either form of relief granted by the lower courts in this case had a sentence existed to lawfully account for the roughly three extra years Harrison spent in prison after serving the valid terms of initial confinement in the 2007 and 2008 cases. Further, Harrison does not "seek to concede" (*See* State's Br. at 17), he must. To do otherwise would be frivolous, not because no basis existed for his position prior to the resentencing in the 2011 case, but because the factual and legal bases for Harrison's position were fundamentally altered when he was resentenced in the 2011 case.

STATEMENT OF THE CASE AND FACTS

Harrison will not repeat the statement of the case and facts set forth in the state's opening brief. (State's Br. at 5-12). Harrison does, however, need to provide the following clarifications necessary for this Court to properly consider the issues presented.

First and foremost, the state attempts to ignore the timing and downplay the significance of Harrison's resentencing in the 2011 case. (*See* State's Br. at 8, 12 in which the state disconnects Harrison's

resentencing in the 2011 case from his subsequent motion for summary reversal).

From January 6, 2017, when the United States District Court for the Western District of Wisconsin granted Harrison's petition for a writ of habeas corpus related to the 2011 case, until Harrison was resentenced in that case on August 19, 2019, the parties and each court that addressed Harrison's sentence credit claim based its decision and order on the dispositive fact that no new sentence had been imposed in the 2011 case. (*See* Pet-App. 101-117, 132-242). And rightly so. Our case law is clear that a defendant may not be denied sentence credit, to which they are entitled, because they *might* receive the credit in a different case at a later time. (*See* Pet-App. 224 (citing *State v. Brown*, 2010 WI App 43, ¶10, 324 Wis. 2d 336; *State v. Wolfe*, 2001 WI App 66, ¶¶1, 7, 242 Wis. 2d 426, 625 N.W.2d 655)). On the other hand, when an event occurs that alters the facts relevant to a litigant's claims, that litigant may be forced to reevaluate, withdraw, or concede claims they no longer have the requisite factual and legal basis to support.

When Harrison was resentenced in the 2011 case after this Court granted review in this case, he was forced to concede that he is no longer entitled to sentence credit in the 2007 and 2008 cases because the entire basis for the credit he sought evaporated. Harrison can no longer argue that the roughly three extra years he spent in prison is connected no other lawfully imposed sentence because that time is now clearly connected to the 2011 case, in which Harrison has been resentenced.

Second, again downplaying the significance of Harrison's resentencing in the 2011 case, the state all but ignores the fundamental aspect of both the state's petition for review and Harrison's cross-petition for review. Both petitions relied upon the fact that the decisions and orders of the lower courts in this case were contingent on the fact that Harrison had not, and may not have ever, been resentenced in the 2011 case. (Pet-App. 101-117). Stated differently, in order to downplay the basis for Harrison's motion for summary reversal, filed after this Court granted review *and* after Harrison was resentenced in the 2011 case, the state attempts to frame the issue presented in its petition for review as entirely independent and unrelated to whether Harrison was ever resentenced in the 2011 case. The state's position is difficult to understand because Harrison would never have sought or received either form of relief he obtained in the lower courts had the 2010 and 2011 convictions and sentences never been vacated in the first place. Further, had the 2010 or 2011 sentences been vacated and immediately reimposed, Harrison would have had no basis to seek or receive any relief in the 2007 or 2008 cases.

ARGUMENT

As did the state, Harrison will first address the issues this Court ordered the parties to address and then proceed to address the original issues raised by the parties.

A. This Should Exercise Its Discretion To Summarily Dispose Of This Case.

The parties agree that this Court has seemingly unlimited discretion to summarily dispose of an appeal. (*See State's Br.* at 12-13). *See also* Wis. Stat. § (Rule) 809.21(1) (“The court upon its own motion or upon the motion of a party may dispose of an appeal summarily.”). More importantly, this Court should summarily dispose of this appeal for the following reasons.

First, Harrison’s resentencing in the 2011 case occurred after this Court granted the state’s petition and Harrison’s cross-petition for review and the resentencing in the 2011 case significantly alters the relevant facts upon which this Court accepted review. Both the state’s petition for review and Harrison’s cross-petition for review necessarily depended on the fact that Harrison had not been resentenced in the 2011 case. (*See Pet-App.* 214-242).

Specifically, the state sought review of the court of appeals’ order, which would have required the DOC to “advance” the commencement of Harrison’s extended supervision periods in the 2007 and 2008 cases to begin when those supervision periods would have began had no sentence ever been

imposed in the 2010 or 2011 cases. (Pet-App. 103). The underlying basis for the court of appeals' decision was the fact that Harrison had not been resentenced in the 2011 case and that this Court has held that a vacated sentence must be treated as if it never existed. (Pet-App. 109-113 (citing *See State v. Lamar*, 334 Wis. 2d 536, ¶39)). Had Harrison never been resentenced in the 2011 case, then this Court could have addressed whether Harrison was entitled to the relief the court of appeals ordered. However, when Harrison was resentenced in the 2011 case, the factual and legal bases for the court of appeals' decision and order evaporated. Both parties now agree that the relief granted by the court of appeals must be vacated. (*See* Pet-App. 243-247; State's Br. at 26-41).

The state is now asking this Court to issue an advisory opinion based on a hypothetical fact scenario that no longer exists.

However, "this court does not issue advisory opinions on how a statute could be interpreted to different factual scenarios in future cases." *State v. Steffes*, 2013 WI 53, ¶27, 347 Wis. 2d 683, 832 N.W.2d 101 (citing *Grottenrath v. Grottenrath*, 215 Wis. 382, 384, 254 N.W.2d 613 (1934)). Again, in *State v. Grandberry*, 2018 WI 29, ¶31, fn.20, 380 Wis. 2d 541, 910 N.W.2d 214, this Court resisted an "invitation to make broad pronouncements based on hypothetical facts. *Id.* Rather, this Court has made clear that its "job is to adjudicate the dispute in front of [it]." *State v. Steffes*, 347 Wis. 2d 683, ¶27.

To the extent the parties once both disagreed with the relief granted by the court of appeals in this

case, the parties now agree, based on facts that occurred after this Court granted review, that the court of appeals decision and order must be vacated.

Likewise, Harrison's cross-petition for review asked this Court to decide "whether Harrison is entitled to sentence credit against his 2007 and 2008 sentences for the extra three years he spent in prison serving no other lawfully imposed sentence?" (Pet-App. 231). Because Harrison has now been resentenced in the 2011 case, Harrison can no longer argue that the roughly three extra years he spent in prison are connected to no other lawfully imposed sentence. That time is connected to the 2011 case. The parties *may* disagree as to whether Harrison is entitled to sentence credit in the 2011 case based on the "extra time" Harrison spent in prison, but both parties agree that Harrison is *not* entitled to credit for that time against his 2007 and 2008 sentences. Moreover, the parties agree that the issue of whether Harrison is entitled to sentence credit in the 2011 case is not before this Court. (*See* State's brief at 39-40, fn.14).

Thus, any substantive decision from this Court as to the specific issues presented by the parties for review will concern only hypothetical facts that no longer exist and would have to all but ignore Harrison's resentencing in the 2011 case, the lack thereof was the underlying basis for the lower courts' decisions and orders. In other words, answering the issues presented by the parties will be a purely academic exercise and have no effect on an existing controversy because the parties now agree that Harrison, based on the record now before this Court,

is not entitled to either form of relief granted by the lower courts.

Further, to the extent that the state's petition for review sought a decision from this Court on the proper interpretation, application, and scope of Wis. Stat. § 973.04, it is now clear, to the extent there was ever any doubt, that whether Harrison is entitled to credit under section 973.04 is relevant to the 2011 case but not the 2007 and 2008 cases that are presently before this Court. Further, this case has never concerned Wis. Stat. § 973.04. Just as clearly, whether Harrison is entitled to sentence credit under either Wis. Stats. §§ 973.155 or 973.04 in the 2011 case is a potential issue in that case that the parties agree is not before this Court. This Court should not reach out in this case to develop the law on Wis. Stat. § 973.04 when this case does not concern that statute.

This Court should summarily dispose of this appeal because there is no current dispute as to whether Harrison is entitled to either form of relief granted by the circuit court or the court of appeals. The parties agree he is not. Thus, a decision by this Court that addresses whether Harrison *was or was not* entitled to the relief he obtained in the lower courts, based on facts not presently before this Court, would be purely advisory.

For these reasons, this Court should summarily dispose of this appeal by reversing the court of appeals' decision and order and remanding this case to the circuit court with directions to enter a final order denying Harrison's original motion for sentence credit.

B. The Doctrine Of Judicial Estoppel Does Not Apply To This Case.

The equitable doctrine of judicial estoppel is invoked at a court's discretion to prevent a party from abusing the court system. *State v. Steinhardt*, 2017 WI 62, ¶18, fn.14, 375 Wis. 2d 712, 896 N.W.2d 700. Before a court can invoke the doctrine of judicial estoppel, however, three elements must be satisfied:

- (1) The later position must be clearly inconsistent with the earlier position;
- (2) The facts at issue should be the same in both cases;
- (3) The party to be estopped must have convinced the first court to adopt its position.

State v. Ryan, 2012 WI 16, ¶33, 338 Wis. 2d 695, 809 N.W.2d 37.

Judicial estoppel has no application to this case. Harrison is neither abusing, manipulating, or playing "fast and loose" with the court system. See *State v. Petty*, 201 Wis. 2d 337, 347, 548 Wis. 2d 817 (1996). Harrison merely sought and received sentence credit, to which he was entitled, in the circuit court based upon a specific set of facts. (Pet-App. 114-117). When those facts changed, he was forced to concede that he is no longer entitled to the credit he previously sought. (Pet-App. 243-248). Thus, neither the first or second necessary elements necessary to

invoke judicial estoppel against Harrison are met in this case.²

The state's argument that Harrison's current position is "clearly inconsistent" with his earlier position is a vast oversimplification of the facts and law at issue in this case. (See State's Br. at 17). Harrison's original position, that he was entitled to sentence credit, was wholly contingent on the fact that he had not been resentenced in either the 2010 or 2011 case. Further, that position was based on the law applicable to a vacated sentence. See *State v. Lamar*, 334 Wis. 2d 536, ¶39. (See also Pet-App. 199-209). The fact that Harrison's legal position was forced to change based on a significant change in the relevant facts is proof that the positions, while different, are not "clearly inconsistent." If, alternatively, Harrison would have conceded that he was never entitled to the credit he sought and received, then the state would be correct that Harrison's positions would be "clearly inconsistent." Harrison has not and will not do so.

Next, the state only half-heartedly argues that the facts are the same now as they were when Harrison sought and received sentence credit in the circuit court. (See State's Br. at 17-18). In fact, the state explicitly admits that "the facts have changed"

² While the state appears to concede that the third element necessary for this Court to invoke judicial estoppel is not met, Harrison did "convince[] the first court (the circuit court) to adopt his position." (See Pet-App. 114-117). Nevertheless, this final element is inextricably linked with the first two elements and even if this third element is satisfied, this Court may not estop Harrison unless all three elements are satisfied.

because Harrison's resentencing in the 2011 case occurred after this Court granted the parties petitions for review and that it wasn't until after that resentencing occurred that Harrison conceded he is no longer entitled to sentence credit. (See State's Br. at 18). The facts are clearly not the same so as to allow this Court to invoke judicial estoppel.

Finally, even if the elements of judicial estoppel were somehow met in this case, it is unclear how or why this Court would estop Harrison from conceding that he is not entitled to sentence credit in this appeal. Would the Court force Harrison to argue that he *is* entitled to sentence credit? Could the Court grant Harrison credit he is not entitled to? In any case, this Court cannot invoke the doctrine of judicial estoppel because the required elements are not met. Further, no purpose or principle would be served if the Court were to exercise its discretion to estop Harrison from conceding he is not entitled to sentence credit in this appeal.³

³ On a last note, the state continues, as it did in response to Harrison's motion for summary reversal, impugn Harrison's "motives," question Harrison's "behavior," and assert that Harrison is "manipulating the court system" (State's Br. at 17-19), because he concedes he is no longer entitled to the credit he previously sought in the 2007 and 2008 cases at issue in this appeal. To the extent that Harrison may "seek" sentence credit to which he is entitled in the 2011 case while he concedes that he is no longer entitled to the credit in this appeal, the state does not explain how or why that course of action would be manipulative. To the extent that Harrison, because he is no longer entitled to the credit in the 2007 and 2008 cases, seeks credit in the 2011 case to account for the time he spent in prison originally as a result of that case, and where he received a new consecutive sentence of six years initial confinement, he would simply be seeking to obtain the relief to

**C. Harrison Is No Longer Entitled To
The Sentence Credit Previously At
Issue In This Appeal.**

Prior to Harrison's resentencing in the 2011 case, Harrison asked this Court to decide "whether Harrison is entitled to sentence credit against his 2007 and 2008 sentences for the extra three years he spent in prison serving no other lawfully imposed sentence?" Harrison sought review by this Court of that issue because the state's position and the court of appeals' decision are contrary to law and fundamentally unfair. (*See* Pet-App. 214-242).

The court of appeals' decision, by denying Harrison sentence credit for the roughly three extra years of his life he spent in prison serving no other lawfully imposed sentence, would have had the effect of forcing Harrison and the DOC to pretend that Harrison was in the community and on extended supervision when he was in reality in prison. By not granting sentence credit, the court of appeals' decision would have allowed Harrison to be revoked and reconfined for all of the available time on the 2007 and 2008 sentences that Harrison was not "in custody in connection with" those sentences. (*See* Pet-App. 220-240).

The state's position, while couched in terms of fidelity to Wis. Stats. §§ 973.155 and 973.04, is harsh, unreasonable, and inconsistent with the relevant statutes, case law and basic fairness that both

which he is entitled: day-for-day credit to be applied against a term of confinement in prison. *See State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988); *State v. Obriecht*, 2015 WI 66, ¶¶23-25, 363 Wis. 2d 816, 867 N.W.2d 387.

sections 973.155 and 973.04 are designed to protect. Just to be clear, the state's position is that unless Wis. Stat. § 973.04 applies (and it never has and never will to this appeal), a person wrongfully convicted and sentenced in a consecutive case, who spends days, months, or years of his or her life imprisoned, receives no credit against a previously imposed and *unlawfully* interrupted sentence. See Wis. Stats. §§ 973.15(2m)(b)2., 973.15(7).

However, because Harrison was resentenced in the 2011 case after this Court granted the parties' petitions for review, Harrison must now concede that he is no longer entitled to the sentence credit he previously sought and received in the circuit court. While Harrison maintains that he *was* entitled to the credit he previously sought and received *before* he was resentenced in the 2011 case (and in the event that he had never been reconvicted or resentenced in that case), Harrison must apply the present facts to the applicable law and concede that he is not entitled to the credit he previously sought. When the entire foundation for his sentence credit claim changed, in that the extra three years he spent in prison serving no lawfully imposed sentence is now, as it originally was before the 2011 conviction and sentence were vacated, connected to the 2011 case, Harrison was forced to concede that he has no claim for this period of custody against the sentences in the 2007 and 2008 cases at issue in this appeal.

D. Harrison Is Not Entitled To The Relief Granted By The Court Of Appeals.

The court of appeals decision in this case split the proverbial baby when it denied Harrison sentence credit (the only relief Harrison sought), but rejected the state's argument that Wis. Stat. § 973.04, which indisputably entitles Harrison to no relief in the 2007 and 2008 cases, was the only relief available to Harrison to address the fact that spent roughly three years of his life in prison serving two vacated sentences. (*See* Pet-App. 101-113). For differing reasons, neither party requested or advocated for the relief granted by the court of appeals.

Now that Harrison has been resentenced in the 2011 case, the entire basis for the court of appeals' decision has disappeared. Just as Harrison's sentence credit claim evaporated when he was resentenced in the 2011 case, so does the logic and reasoning set forth by the court of appeals to justify the relief granted below. There is no basis to support the court of appeals decision, as applied to the current facts, where the court ordered the DOC to "advance" Harrison's terms of extended supervision in the 2007 and 2008 cases, where Harrison has been resentenced in the 2011 case.

CONCLUSION

For the above reasons, Harrison respectfully requests that this Court summarily dispose of this appeal by reversing the decision of the court of appeals and remanding this case to the circuit court with directions to deny Harrison's original motion for sentence credit.

Dated this 2nd day of December, 2019.

Respectfully submitted,

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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 4,252 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 2nd day of December, 2019

Signed:

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