STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2019AP000691-CR & 2019AP000692-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CESAR ANTONIO LIRA,

Defendant-Appellant.

On Appeal from an Order Denying a Motion for Custody Credit and an Order Denying a Motion for Reconsideration in Milwaukee County Circuit Court, the Honorable Frederick C. Rosa Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUES PRESENTED

1. Mr. Lira escaped from Wisconsin custody and was rearrested in Oklahoma. His supervision was revoked and Wisconsin placed a detainer on him. Was he entitled to credit against those revocation cases beginning with the date of his incarceration in Oklahoma?

The circuit court held that Mr. Lira was legally ineligible for sentence credit.

2. Mr. Lira was eventually transported back to Wisconsin before being sent to Oklahoma once more. Was he entitled to credit against his revocation cases once he was transported back to Wisconsin?

The circuit court held that Mr. Lira's claim was procedurally barred based on its reading of Wis. Stat. § 973.155(5).

3. As an additional alternative, was Mr. Lira entitled to credit against his revocation cases from the date he was arrested in Oklahoma until the date he was sentenced in that state?

The circuit court held that Mr. Lira's claim was procedurally barred based on its reading of Wis. Stat. § 973.155(5).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication of this case is warranted. Here, the circuit court has adopted a stringent interpretation of the requirement under Wis. Stat. § 973.155(5) that the defendant first "petition" the Department of Corrections (DOC) for credit before filing a motion in circuit court. There is an absence of recent, citable, legal authority interpreting this statute.[1] Lacking

[1] *See State v. Holstrom*, Appeal No. 2016AP183-CR, unpublished summary disposition (Wis. Ct. App. February 14, 2017) (App. 206); *State ex rel. Singh v. Kemper*, Appeal No. 2014AP1230 unpublished summary disposition (Wis. Ct. App. February 3, 2015) (App. 208); *State v. Pittman*, Appeal No. 2013AP186-CR, unpublished summary disposition (Wis. Ct. App. July 9, 2014) (App. 210); *State v. Gould*, Appeal No. 2013AP1828-CR, unpublished summary disposition (Wis. Ct. App. April 9, 2014) (App. 212); *State v. Spears*, Appeal No. 98-0815, unpublished slip op. (Wis. Ct. App. March 18, 1999) (per curiam) (App. 214); *State v. Ferguson*, Appeal No. 97-0238-CR, unpublished slip op. (Wis. Ct. App. July 9, 1998) (per curiam) (App. 216); *State v. Deveney*, Appeal No. 97-2849-CRNM unpublished slip op. (Wis. Ct. App. March 31, 1998) (per curiam) (App. 218); *State v. Paul*, Appeal No. 9701647-CR, unpublished slip op. (Wis. Ct. App. February 3, 1998) (per curiam) (App. 224); *State v. Moore*, Appeal No. 96-1595-CRNM unpublished slip op. (Wis. Ct. App. May 8, 1997) (per curiam) (App. 226); *State v. Moskonas*, Appeal No. 96-0604-CR, unpublished slip op. (Wis. Ct. App. September 19, 1996) (App. 228); *State v. Bradley*, Appeal No. 94-07080-CR, unpublished slip op. (Wis. Ct. App. February 8, 1996) (per curiam) (App. 232); *State v. Reynolds*, Appeal No. 92-0188-CRNM, unpublished slip op. (Wis. Ct. App. October 6, 1992) (per

(continued)

more precise guidance from the appellate courts, the circuit court has adopted a very deferential review of the agency's legal conclusions, imposing an unwarranted burden on criminal defendants. Clarification is therefore warranted.

Given the complexity of the procedural history, oral argument may be helpful to this Court in resolving the credit dispute.

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curiam) (App. 234); *State v. Ray*, Appeal No. 91-0462-CR, unpublished slip op. (Wis. Ct. App. October 30, 1991) (per curiam) (App. 236); *State ex rel. Quinn v. Kolb*, Appeal No. 88-2210, unpublished slip op. (Wis. Ct. App. September 7, 1989) (App. 238); *State v. Busse*, Appeal No, 84-1446-CR, unpublished slip op. (Wis. Ct. App. May 2, 1985) (App. 242); *State v. Bucaro*, Appeal No. 84-752-CR, unpublished slip op. (Wis. Ct. App. January 23, 1985) (per curiam) (App. 245). Mr. Lira is not citing these cases as precedent or as authority; he merely brings them to the Court's attention only in the context of the publication request. As these are not citable "authorities" counsel has omitted them from his table of authorities. Counsel has included copies of the decisions in his appendix, however, in order to show good faith compliance with Wis. Stat. § 809.23(3)(c).

Counsel identifies one citable, but unpublished case, *State v. Maxey*, Appeal No. 2015AP2137-CR, unpublished slip op. (Wis. Ct. App. April 6, 2016), which references, but does not otherwise explain, the statute in a footnote. (App. 248).

STATEMENT OF THE CASE AND FACTS

Background

On March 25, 1992, Mr. Lira was arrested for possession of cocaine as a second and subsequent offense in Milwaukee County Case No. 1992CF921195. (R1 52:10; R1 1:1; R2 39:10); (App. 138). He pleaded guilty to that offense and was sentenced to ten years of imprisonment on July 21, 1992. (R1 17:1); (App. 101). The circuit court granted 118 days of sentence credit. (R1 17:1); (App. 101). On September 17, 1996, Mr. Lira was released on parole. (R1 52:12; R2 39:12); (App. 140).

On January 11, 1999, Mr. Lira was arrested on new charges. (R2 1:1). He was subsequently charged in Milwaukee County Case No. 1999CF163 with conspiracy to deliver cocaine, obstructing or resisting an officer as a repeater, possession with intent to deliver THC as a party to the crime and as a second and subsequent offense, and possession of a firearm as a repeater. (R2 1:1).

As a result of these new charges, Mr. Lira's parole on 1992CF921195 was revoked on February 5, 1999. (R1 52:13; R2 39:13); (App. 141). The DOC ordered that Mr. Lira be reconfined for a period of four years, nine months, and fifteen days. (R1 52:13;

R2 39:13); (App. 141).[2] Mr. Lira was returned to DOC custody to begin serving that revocation sentence on February 15, 1999. (R1 52:15; R2 39:15); (App. 143).

With respect to 1999CF163, Mr. Lira entered a plea to possession of cocaine with intent to deliver and possession of a firearm by a felon. (R2 12:1). He was sentenced on December 1, 1999 as follows:

- Count One, the cocaine charge, a sixteen year imposed and stayed prison sentence, consecutive. (R2 21:1); (App. 106). The Court further ordered that he be placed on probation for twelve years. (R2 17:1); (App. 102).

- Count Four, felon in possession of a firearm as a habitual criminal, Mr. Lira received a two-year indeterminate prison sentence.[3] (R2 20:1); (App. 105).

Mr. Lira received 29 days of sentence credit, applicable to his prison sentence on Count Four. (R2 20:1); (App. 105). Mr. Lira was eventually released from DOC custody on January 2, 2001 after completing the Challenge Incarceration Program. (R1 52:12; R2 39:12); (App. 140).

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[2] According to DOC records, the total term of available reconfinement was five years, six months, and six days. (R1 52:14; R2 39:14); (App. 142).

[3] Because the JOC is silent on the matter, the sentence was presumably concurrent to the revocation sentence in 1992CF921195.

On November 12, 2002, Mr. Lira's probation agent attempted to take Mr. Lira into custody as a result of alleged rules violations. (R1 52:12; R2 39:12); (App. 140). In response, Mr. Lira fled. (R1 52:12; R2 39:12); (App. 140). Mr. Lira remained in absconder status until he was arrested by agents of the Wisconsin Department of Justice on January 6, 2004. (R1 52:12; R2 39:12); (App. 140). DOC records indicate that a formal violation of probation (VOP) hold pertaining to both cases was placed on Mr. Lira by the DOC on January 9, 2004. (R1 52:19; R2 39:19); (App. 147).[4] Mr. Lira was then transferred to the Milwaukee Secure Detention Facility (MSDF) on January 13, 2004. (R1 68:2; R2 55:2); (App. 199). On January 20, 2004, Mr. Lira was charged with endangering safety with use of a dangerous weapon in Milwaukee County Case No. 2004CM1010. (R1 68:2; R2 55:2); (App. 199).

However, on April 15, 2004, Mr. Lira escaped from custody. (R1 52:20; R2 39:20); (App. 148). A revocation order and warrant (ROW) revoking Mr. Lira's parole on 1992CF921195 and his probation on

[4] The circuit court made a finding of fact that Mr. Lira also had an open bench warrant in connection with Milwaukee County Case. No. 2002CM9589 (R1 68:2; R2 55:2); (App. 199). The circuit court further found, however, that the charge was dismissed without prejudice on January 9, 2004. (R1 68:2; R2 55:2); (App. 199). The court file for this matter was not available to undersigned counsel during postconviction proceedings below; however, counsel has no reason to question the circuit court's finding of fact.

1999CF163 was nonetheless entered on April 16, 2004. (R1 52:19; R2 39:19); (App. 147). Mr. Lira received credit on that ROW from January 9, 2004 until April 15, 2004. (R1 52:19; R2 39:19); (App. 147).

Mr. Lira's freedom from custody was short-lived, however. On April 16, 2004, he was arrested for new criminal conduct in Oklahoma. (R1 68:2; R2 55:2); (App. 199). On the same date, Wisconsin placed an interstate detainer on Mr. Lira. (R1 52:20; R2 39:20); (App. 148).

Mr. Lira remained in custody in Oklahoma and, on September 29, 2004,[5] was convicted of four charges in Oklahoma Case No. BCF-04-79: second degree murder, eluding a police officer, running a roadblock, and child abuse/neglect. (R1 52:21; R2 39:21); (App. 149). Mr. Lira received a global sentence of twenty years. (R1 52:22; R2 39:22); (App. 150).

As a result of his escape from MSDF, Mr. Lira was also charged with escape in Milwaukee County Case No. 2004CF2092. (R1 68:2; R2 55:2); (App. 199). Mr. Lira was therefore returned to Wisconsin on or about May 22, 2005. (R1 68:2; R2 55:2); (App. 199).[6]

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[5] The circuit court made a finding of fact that Mr. Lira was sentenced on September 30, 2004. (R1 68:2; R2 55:2); (App. 199). Based on the documentation provided by undersigned counsel, this would appear to be a clerical error.

[6] The booking records relied on by Mr. Lira in postconviction proceedings indicate that Mr. Lira was "booked" into the Milwaukee County Jail on May 22, 2005. (R1 52:28; R2 (continued)

According to the circuit court's findings of fact, Mr. Lira was then served with an arrest warrant in both 2004CM1010 and 2004CF2092 on May 23, 2005. (R1 68:2; R2 55:2); (App. 199). According to CCAP records, Mr. Lira made appearances on both matters in the Milwaukee County Circuit Court on that same date.[7] Records maintained by the Milwaukee County Sheriff's Department show that he remained in their custody while these matters pended. (R1 52:28; R2 39:28); (App. 156).

On June 15, 2005, Mr. Lira posted bail in Milwaukee and was erroneously released from custody. (R1 68:2; R2 55:2); (App. 199). Mr. Lira remained at liberty until he was arrested in San Antonio, Texas on December 13, 2005. (R1 52:35; R2

39:28); (App. 156). However, the circuit court's findings of fact show that he arrived in Wisconsin custody several days earlier, on May 19, 2005. (R1 68:2; R2 55:2); (App. 199). Other publicly available sources support that conclusion. *See In re Arbitration of a Dispute Between Milwaukee County Sheriff's Association and Milwaukee County,* Case 576 (Issued April 19, 2006) (available online at http://werc.wi.gov/grievance_awards/6972.pdf)

[7] *See* https://wcca.wicourts.gov/caseDetail.html?caseNo=2004CM001010&countyNo=40&index=0&mode=details; https://wcca.wicourts.gov/caseDetail.html?caseNo=2004CF002092&countyNo=40&index=0&mode=details. Mr. Lira asks this Court to take judicial notice of these records pursuant to Wis. Stat. § 902.01. *See Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n. 1, 346 Wis. 2d 635, 829 N.W.2d 522 (Court of Appeals can take judicial notice of CCAP records on appeal).

39:35); (App. 163). The next day, Milwaukee County filed a new criminal case, charging Mr. Lira with a single count of bail jumping in Milwaukee County Case No. 2005CF6953 as a result of a missed court date which occurred after having he was erroneously released. (R1 68:2; R2 55:2); (App. 199).

Mr. Lira returned once more to Milwaukee County on January 11, 2006, where he remained while his open criminal cases wended their way through the circuit court. (R1 52:28; R2 39:28); (App. 156). On March 17, 2006, he resolved all three open Milwaukee County cases in a plea agreement, receiving a global sentence of three years initial confinement and three years of extended supervision, consecutive to his Oklahoma sentence. (R1 68:2; R2 55:2); (App. 199).

Following his plea and sentencing in Wisconsin, Mr. Lira returned to Oklahoma on April 5, 2006, where he remained while serving his Oklahoma sentence. (R1 52:28; R2 39:28); (App. 156). According to the circuit court's findings of fact, Mr. Lira completed that sentence on June 9, 2017. (R1 68:2; R2 55:2); (App. 199).[8] On June 16, 2017, Mr.

[8] In his postconviction motion, counsel for Mr. Lira relied on records from the VINE system, which indicated that the sentence concluded on June 12, 2017. (R1 52:38; R2 39:38); (App. 166). However, the circuit court's findings of facts track with other documents in the record, including Mr. Lira's own averments in his prior *pro se* pleadings. Mr. Lira is therefore not challenging the circuit court's finding on appeal.

Lira returned to DOC custody and was placed at Dodge Correctional Institution. (R1 52:20; R2 39:20); (App. 148). According to DOC records, Mr. Lira was being "returned from escape" despite twice having returned to Wisconsin in the intervening years since that original escape. (R1 52:20; R2 39:20); (App. 148).

Following Mr. Lira's return to Wisconsin, the DOC issued an amended ROW with respect to both 1992CF921195 and 1999CF163 on August 24, 2017. (R1 52:39; R2 39:39); (App. 167). According to that ROW, Mr. Lira was entitled to credit against his revocation cases from April 16, 2004 until October 5, 2004. (R1 52:39; R2 39:39); (App. 167). However, a second amended ROW issued on March 9, 2018 removed this credit. (R1 56:17; R2 43:17); (App. 190). A credit computation issued by the DOC, and relied on by the circuit court in its findings of fact, shows that the DOC believes both sentences are calculated to commence on June 9, 2017, the date of Mr. Lira's apparent release from Oklahoma custody. (R1 68:2-3; R2 55:2-3); (App. 199-200).

Motions for Credit

On September 19, 2017, Mr. Lira filed a *pro se* motion for custody credit, citing both Wis. Stat. § 973.15(5) and *State v. Brown*, 2006 WI App 41, 289 Wis. 2d 823, 711 N.W.2d 708. (R1 35:1; R2 22:1); (App. 108). Mr. Lira asked that he receive credit "for all days of custody he was confined in a different jurisdiction following sentence after revocation in the present case." (R1 35:1; R2 22:1); (App. 108). He

asked for credit from April 16, 2004 until June 9, 2017. (R1 35:2; R2 22:2); (App. 109).

Just two days later, the motion was denied in a written order signed by the Honorable Carl Ashley. (R1 36:1; R2 23:1); (App. 110). The order asserted:

> On September 19, 2017, the defendant filed a pro se motion for custody credit in the above cases for the period of April 16, 2004 to June 9, 2017. This period is after sentencing. Section 973.155(2), Stats., provides that "[i]n the case of revocation of probation, extended supervision or parole, the department [agent], if the hearing is waived, or the division of hearings and appeals . . . , in the case of a hearing, shall make such a finding [of credit] which shall be included in the revocation order." The court does not become involved in credit determinations after sentencing, and therefore, the defendant is obliged to submit his request for credit to the Department of Corrections. If the Department denies his request, he may petition the court for credit under section 973.155(5), Stats.

(R1 36:1; R2 23:1); (App. 110).[9] The motion was denied "without deciding the merits." (R1 36:1; R2 23:1); (App. 110).

On January 8, 2018, Mr. Lira resubmitted his motion for credit. (R1 37:1; R2 24:1); (App. 111). This time, Mr. Lira included several attachments. First,

[9] A procedural footnote has been omitted from the block quote.

Mr. Lira included a letter written to his DOC agent, Ms. Amy Pucilowski, asserting that his sentences should have begun running after the first ROW was issued. (R1 37:2; R2 24:2); (App. 112). Mr. Lira therefore asked for clarification as to why he was not receiving credit after October 5, 2004 in the ROW issued on August 24, 2017. (R1 37:2; R2 24:2); (App. 112). Mr. Lira also pointed out that he had never received credit for the time he spent in the Milwaukee County Jail after having been returned to Wisconsin custody in both 2005 and 2006. (R1 37:2; R2 24:2); (App. 112). Finally, Mr. Lira cited Wis. Stat. § 973.15(5) for the proposition that his Oklahoma sentence should be counted against the two revocation sentences at issue in this appeal. (R1 37:2; R2 24:2); (App. 112).

Mr. Lira also included a copy of a letter addressed to a supervisor at "Fox Lake Correctional Records," the Assistant Administrator for the Division of Hearings and Appeals, and Niel Thoreson, the Regional Chief for Division Three of the DOC Community Corrections division. (R1 37:3; R2 24:3); (App. 113). Mr. Lira again asserted that he should have begun serving his revocation sentences when they were first revoked in April of 2004. (R1 37:3; R2 24:3); (App. 113). He asked for credit from the date of his arrest in Oklahoma until the date of his improper release in Wisconsin in 2005, as well as all credit from the date of his arrest in Texas until his release from Oklahoma custody in 2017. (R1 37:3; R2 24:3); (App. 113).

He also included copies of emails between DOC officials discussing the matter and a copy of a letter from Niel Thoreson concluding that "additional credit was not warranted." (R1 37:4-5; R2 24:4-5); (App. 114-115). Mr. Lira also included a letter from the Assistant Administrator of the Division of Adult Institutions, acknowledging that Mr. Lira had concerns regarding "sentence structure and the application of sentence credit," which directed Mr. Lira to address his concerns with the records office. (R1 37:9; R2 24:9); (App. 119). Mr. Lira included relevant computations, a copy of the amended ROW, and inmate complaint forms as well as other relevant attachments. (R1 35; R2 24); (App. 111).

In a letter dated January 9, 2017, Staff Attorney Michael Grossman requested additional documentation and, in a follow-up letter, Mr. Lira timely responded to that request. (R1 38: R1 39; R2 25; R2 26).

On January 22, 2018, Judge Ashley once again denied the motion—this time on the merits. (R2 40:1; R2 27:1); (App. 128). The circuit court's brief written decision asserts that "The defendant is not entitled to credit for time spent in the service of a sentence in an unrelated matter." (R1 40:1; R1 27:1); (App. 128).

Mr. Lira filed a timely notice of intent to pursue postconviction relief. (R1 41; R2 28). Undersigned counsel was appointed and filed a timely notice of appeal. (R1 46; R2 33). Counsel reviewed the *pro se* submissions and, after concluding

that the circuit court may not have fully appreciated the legal components of Mr. Lira's claim, filed a notice of voluntary dismissal. (R1 49; R2 36).

Counsel then filed a third motion for custody credit on October 12, 2018. (R1 52:1; R2 39:1); (App. 129). The motion included a robust statement of facts and forty-two pages of supporting documentation, including numerous documents which were not made available to the circuit court when it considered the earlier *pro se* motions. (R1 52; R2 39); (App. 129).

Counsel divided the request for sentence credit, presenting the circuit court with three alternatives: First, counsel asked that Mr. Lira receive credit pursuant to *Brown* against both revocation cases from April 16, 2004 onward—the entire block of disputed credit highlighted in Mr. Lira's *pro se* pleadings. (R1 52:5; R2 39:5); (App. 133). Second, counsel asked the Court for credit, pursuant to *Brown*, from the date Mr. Lira was returned to Wisconsin in 2005 onward. (R1 52:6; R2 39:6); (App. 134). Counsel argued that if the Court did not agree that Mr. Lira received the *entire* disputed block of credit, then he was still entitled to a substantial portion of the credit he had asked for in his earlier pleadings under an alternative legal theory. (R1 52:6; R2 39:6); (App. 134). Finally, if the Court did not agree with the preceding two arguments, counsel asserted that Mr. Lira was owed a smaller subset of the requested portion, representing credit from the date of his arrest in Oklahoma until the date he was

sentenced in the Oklahoma matter. (R1 52:7; R2 39:7); (App. 135).

In addition to these requests, which were contemplated by Mr. Lira's earlier pleadings, counsel also identified an additional area of potential credit, arguing that Mr. Lira was entitled to additional credit on 1992CF921195 because he did not receive all appropriate credit at the time of his revocation in 1999. (R1 52:7; R2 39:7); (App. 135).

Three days later, the circuit court once again denied the motion for credit, asserting that it had "insufficient information to decide the defendant's motion for custody credit." (R1 53:2; R2 40:2); (App. 172). It asked counsel to submit additional pieces of information:

- Proof that Mr. Lira had not received credit from April 16, 2004 until October 5, 2004;
- Proof that Mr. Lira had petitioned the DOC for the credit sought in the motion;
- Proof that the DOC had denied the defendant's request(s) for credit;
- Sentence computations.

(R1 53:2; R2 40:2); (App. 172). The circuit court gave Mr. Lira leave to resubmit his request for credit with these pieces of supporting documentation. (R1 53:3; R2 40:3); (App. 173).

On November 30, 2018, counsel filed a motion for reconsideration in light of the circuit court's prior order. (R1 56; R2 43); (App. 174). The motion included another sixteen pages of exhibits in response to the circuit court's request for additional information. (R1 56; R2 43): (App. 174). Counsel argued that Mr. Lira had adequately petitioned the DOC for the periods of credit sought in the motion. (R1 56:1-4; R2 43:1-4); (App. 174-177). Counsel also addressed the circuit court's request for proof that Mr. Lira was not receiving credit from April 16, 2004 until the date of sentencing in Oklahoma, supporting that argument with a copy of an amended revocation order and warrant showing that the credit had been removed. (R1 56:5; R2 43:5); (App. 178). Finally, Mr. Lira conceded that he lacked proof that he had petitioned the DOC with respect to some disputed credit but asked the circuit court to address the issue on the merits, regardless of that fact. (R1 56:5; R2 43:5); (App. 178).

After an exchange of briefs, the circuit court once again denied the motion. (R1 68; R2 55); (App. 198). First, the circuit court ruled that Mr. Lira lost on the merits with respect to his first claim for credit, from April 16, 2004 onward. (R1 68:4; R2 55:4); (App. 201). The circuit court concluded that Mr. Lira had not been lawfully made available to Oklahoma in light of his escape from Wisconsin custody and thus, no credit was warranted. (R1 68:4-5; R2 55:4-5); (App. 201-202).

As to Mr. Lira's alternate requests for credit, the circuit court concluded that because it lacked access to the DOC's legal reasoning in denying credit, Mr. Lira had failed to prove that he had sufficiently petitioned the DOC before litigating the matter in circuit court. (R1 68:6; R2 55:6); (App. 203).

Finally, the circuit court indicated that the DOC provided documents directly to the court which contradicted Mr. Lira's request for credit relating to the revocation of 1992CF921195 in 1999. (R1 68:7; R2 55:7); (App. 204). In light of the documents which the circuit court was able to independently acquire during postconviction proceedings, this claim will not be further renewed in this Court.

This appeal follows. (R1 72; R2 58).

ARGUMENT

I. Mr. Lira is entitled to credit against 1992CF921195 and 1999CF163 from April 16, 2004 until June 9, 2017, not counting the time he was out of custody after his erroneous release.

A. Standard of review.

Because the underlying material facts are undisputed,[10] this Court exercises *de novo* review in determining whether the circuit court erred in denying Mr. Lira's motion for custody credit. *Brown*, 2006 WI App 41, ¶ 9.

B. Mr. Lira's Wisconsin sentences commenced when the revocation order was entered on April 16, 2004.

1. Legal principles.

Pursuant to Wis. Stat. § 973.15(5), "A convicted offender who is made available to another jurisdiction under ch. 976 or in any other lawful manner shall be credited with service of his or her Wisconsin sentence or commitment under the terms of s. 973.155 for the duration of custody in the other jurisdiction."[11]

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[10] In the circuit court, the State agreed with Mr. Lira's statement of facts as presented in his October 12, 2018 motion. (R1 64:1; R2 51:1).

[11] Wis. Stat. § 973.155(1)(a) asserts that "A convicted offender shall be given credit toward the service of his or her (continued)

Wis. Stat. § 973.15(5) was at the center of this Court's 2006 decision in *State v. Brown*, which is the key authority for resolution of Mr. Lira's credit claim. *Brown* involved a defendant who, like Mr. Lira, was initially convicted of drug charges in 1992. *Brown*, 2006 WI App 41, ¶ 2. As a result, he received an imposed and stayed sentence and was placed on probation for four years. *Id.* In 1995, the DOC revoked Brown's probation and ordered him "to serve his sentence at the Dodge Correctional Institution." *Id.*, ¶ 3. However, Brown was not sent to Dodge, but was instead "turned over to federal authorities" in connection with federal drug charges. *Id.* He was incarcerated and remained in the federal system until completing his federal sentences in 2004, at which point he was returned to Wisconsin "sometime in 2004." *Id.*

Brown filed a series of motions in the circuit court, culminating with a § 974.06 motion seeking release from custody in light of his claim that he had already served the underlying revocation sentence while being incarcerated in federal prison. *Id.*, ¶ 5-7. The circuit court denied the motion and Brown appealed. *Id.*

This Court reversed, concluding that under Wis. Stat. § 973.15(5), Brown was "entitled to have his state sentence credited for the time he was

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

serving the federal sentences." *Id.*, ¶ 11. This Court rejected the State's argument that Brown was required to first "enter" a Wisconsin prison in conformity with Wis. Stat. § 973.10(2)(b) before earning credit against his Wisconsin sentence. *Id.* The Court likewise rejected an argument that the time Brown spent in federal custody was not "in connection with the course of conduct" for which the state sentence was imposed under Wis. Stat. § 973.155(5). *Id.*

Instead, this Court clarified that, in a situation like Brown's, the statute imposed two legal requirements: (1) that the defendant was a "convicted offender" (2) at the time he was "made available" to the foreign jurisdiction. *Id.*, ¶ 11. With respect to the first requirement, this Court concluded that the "there can be no argument that Brown was a 'convicted offender' at the time the State made him available to federal courts." *Id.* That requirement was satisfied by the revocation of Brown's probation prior to being turned over to federal custody. *Id.* As to the second requirement, while there was an absence of evidence in the record as to the exact "procedure that led to Brown's being made available to federal authorities" the record was sufficiently clear for this Court to conclude that he had, in fact, been lawfully transferred from one jurisdiction to the other. *Id.* Accordingly, this Court held that Brown was entitled to credit for the "duration of custody in the other jurisdiction." *Id.*

2. Mr. Lira's circumstances entitle to him credit under *Brown*.

Here, there can likewise be no question that Mr. Lira meets the first requirement of *Brown*, as he was a "convicted offender" at the time he was placed in Oklahoma custody. In addition to the judgments of conviction in the record, the record reflects that Mr. Lira's Wisconsin parole and probation were both revoked via the April 16, 2004 ROW. (R1 52:19 R2 39:19); (App. 147).

The substantive dispute, however, centers on *Brown*'s second legal requirement: that Mr. Lira be "made available" to another jurisdiction in a "lawful manner." Wis. Stat. § 973.15(5). Here, this requirement is satisfied by the combined effect of: (1) the signing of the ROW, (2) the issuance of a detainer, and (3) the State of Wisconsin's acquiescence to Mr. Lira's continued custody in Oklahoma. Thus, while Mr. Lira's escape from custody in Wisconsin was the originating event which led to his eventual custody in Oklahoma, the State of Wisconsin fully acquiesced to his detention there, making no effort to secure Mr. Lira's return until after he had been sentenced in Oklahoma. Instead, the State of Wisconsin formally revoked Mr. Lira's supervision and, via the detainer issued upon his arrest in Oklahoma on April 16, 2004, notified the Oklahoma authorities of their interest in Mr. Lira. Once Wisconsin issued the detainer, Mr. Lira was "serving" his Wisconsin sentence—it was not

necessary that he first return to a Wisconsin correctional facility. *Brown*, 2006 WI App 41, ¶ 11.

In denying sentence credit, the circuit court relied on *State v. Nyborg*, 122 Wis. 2d 765, 768, 364 N.W.2d 553 (Ct. App. 1985) for the proposition that a detainer is insufficient to trigger custody credit under Wis. Stat. § 973.155. However, as Mr. Lira argued in his postconviction pleadings, *Nyborg* is distinguishable. *Nyborg* dealt only with whether a detainer was sufficient to trigger credit for the purposes of entitlement to presentence credit under Wis. Stat. § 973.155 ; it did not address whether the filing of a detainer had any significance with respect to whether a defendant had begun serving a sentence pursuant to Wis. Stat. § 973.15(5). As this Court noted in *Brown*, this is a distinct legal inquiry. 2006 WI App 41, ¶ 11.

Accordingly, applying *Brown*, Mr. Lira should have his Wisconsin sentence credited for the time he spent serving the Oklahoma sentence as he was a "convicted offender" who had been lawfully "made available" to another jurisdiction.

3. Mr. Lira is also entitled to sentence credit based upon the ROW's command that he receive credit "until received at the institution."

In addition to the legal analysis outlined above, this Court identified an alternative basis for credit in *Brown*:

> An alternate reason why Brown is entitled to sentencing credit is the wording of the order revoking his probation. The administrative law judge pronounced that:
>
> > It is ordered that the probation of Kevin Brown be revoked, and that he be credited with jail time for 33 days pursuant to court order, from March 25, 1992, to October 22, 1992 (served as a condition of probation), and from April 19, 1995, until his receipt at the institution.
>
> (Emphasis added.) According to the order, Brown was to be given sentencing credit from April 19, 1995, until his receipt at the institution. As a result, all of the time he served on his federal sentences would fall within the sentencing credit time frame.

Brown, 2006 WI App 41, ¶ 11, n.7.[12]

Here, Mr. Lira's ROW contains substantially identical language, indicating that he is entitled to sentence credit until he is "received at the institution." (R1 52:19; R2 39:19); (App. 147).

Accordingly, as in *Brown*, Mr. Lira is therefore be entitled to credit until he was ultimately received at Dodge, following his completion of the Oklahoma sentences.

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[12] *See also State v. Davis*, 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488.

4. Amount of credit to be awarded.

In light of the foregoing arguments, this Court should award Mr. Lira credit beginning with the date of his arrest in Oklahoma, April 16, 2004, until the date he completed that sentence. In calculating the term of applicable credit, however, this Court should *not* count the time for which Mr. Lira was erroneously released from custody, pursuant to the Wisconsin Supreme Court's decision in *State v. Friedlander*, 2019 WI 22, 385 Wis. 2d 612, 923 N.W.2d 849.[13] Accordingly, Mr. Lira is entitled to credit, against both cases, as follows:

- From April 16, 2004 until June 15, 2005 = 426 days of credit
- From December 13, 2005 until June 9, 2017 = 4,197 days of credit.

Thus, Mr. Lira is entitled to 4,623 days of credit, rendering his sentence served in 1992CF921195, and entitling him to mandatory release on 1999CF163. *See* Wis. Stat. § 302.11(1).

[13] This case was being litigated while Mr. Lira's motion was pending and he flagged its potential application in his opening motion.

II. Mr. Lira was entitled to review on the merits of his remaining two claims.

A. Standard of review and legal principles.

This case involves interpretation of a statute, a legal question which this Court reviews *de novo* without deference to the conclusions of the circuit court. *State v. Dorsey*, 2018 WI 10, ¶ 23, 379 Wis. 2d 386, 906 N.W.2d 158.

"Tallying and awarding sentence credit originated as a matter of equal protection." *State v. Obriecht*, 2015 WI 66, ¶ 16, 363 Wis. 2d 816, 867 N.W.2d 387. "Sentence credit is designed to afford fairness so that a person does not serve more time than that to which he or she is sentenced." *Id.* Accordingly, Wis. Stat. § 973.155 governs custody credit in criminal cases and asserts that a defendant "shall" receive credit when legally warranted.

In an original criminal action, the sentence credit finding must be made at the time of sentencing by the circuit court. Wis. Stat. § 973.155(2).[14] If, however, the defendant is revoked, it is the duty of the DOC to apply sentence credit on the revocation order. *Id.*

[14] "The awarding of sentence credit is a judicial function that requires a court to make explicit findings related to the award or denial of sentence credit." *State v. Kitt*, 2015 WI App 9, ¶ 3, 359 Wis. 2d 592, 859 N.W.2d 164.

When credit is omitted in either circumstance, Wis. Stat. § 973.155(5) governs:

> If this section has not been applied at sentencing to any person who is in custody or to any person who is on probation, extended supervision or parole, the person may petition the department to be given credit under this section. Upon proper verification of the facts alleged in the petition, this section shall be applied retroactively to the person. If the department is unable to determine whether credit should be given, or otherwise refuses to award retroactive credit, the person may petition the sentencing court for relief. This subsection applies to any person, regardless of the date he or she was sentenced.

Wis. Stat. § 973.155(5).

B. The circuit court's application of the administrative exhaustion requirement was arbitrary, unreasonable and in tension with other legal authority.

1. Background.

Despite the recurring nature of sentence credit questions in appellate criminal cases, there are scant citable authorities interpreting and applying Wis. Stat. § 973.155(5)'s procedural requirements.

The legal process is obliquely referenced, but never explicitly described, in a series of Supreme Court decisions from the late 1970s and early 1980s:

- In *Larson v. State*, 86 Wis. 2d 187, 200, 271 N.W.2d 647 (1978), the defendant was convicted of "first-degree murder" after a jury trial. *Id*. at 190. The defendant requested "credit for preconviction incarceration" from the circuit court. *Id*. at 200. The Supreme Court declined to address the issue on the merits, asserting that, "If Larson believes he is entitled to such preincarceration credit, his remedy is to now pursue the matter by petition to the department of health & social services as provided in sec. 973.155(5), Stats." *Id*.[15]

- Similarly, in *Clark v. State*, 92 Wis. 2d 617, 286 N.W.2d 344 (1979) the defendant appealed the trial court's denial of his request for "credit on his sentence for the time spent at Winnebago Mental Health Institute as a result of his pre-sentence commitment ordered by the circuit court pursuant to sec. 975.02, Stats." The Supreme Court acknowledged that the defendant was entitled to credit and directed him to therefore petition the Department of Health and Social Services in order to receive it." *Id*. It otherwise affirmed the "judgment and orders" below. *Id*.

[15] The DHS was the precursor to the DOC.

- Finally, the rule was again applied by the Wisconsin Supreme Court in *Haskins v. State*, 97 Wis. 2d 408, 294 Wis. 2d 25 (1980)—yet another direct appeal of a conviction where the defendant sought review of his sentence credit claim and was again told by the Court to seek review from the DOC.

These cases are unusual because they appear to stand for the proposition that, even in context of a direct review of a criminal conviction, sentence credit determinations are within the presumptive domain of the DOC, and not the appellate courts.

And yet, this rule of administrative exhaustion—and the DOC's presumptive fiat over the determination of sentence credit—has been inconsistently invoked in the intervening forty years. Thus, just three years after *Haskins*, the Wisconsin Supreme Court saw no impediment to straightforwardly addressing the sentence credit dispute in *State v. Gilbert*, 115 Wis. 2d 371, 376, 340 N.W.2d 511 (1983), which involved whether probationary jail time could be applied as sentence credit against a later sentence after revocation. *Id.* And, in 1988, the Wisconsin Supreme Court's decision in *State v. Boettcher,* 144 Wis. 2d 86, 423 N.W.2d 533 (1988) made clear that a preserved sentence credit claim could be litigated through an ordinary Rule 809.30 appeal.

For those defendants with unpreserved claims, this Court endorsed direct litigation of sentence credit disputes via postconviction motion and subsequent appeal—without proof of petitioning the DOC—in *State v. Gavigan*, 122 Wis. 2d 389, 391, 362 Wis. 2d 162 (Ct. App. 1984).[16] And, for those defendants outside their Rule 809.30 postconviction deadlines, this Court has also endorsed the straightforward filing of a motion for custody credit in the circuit court, without requiring proof that the inmate has first petitioned the DOC. *See State v. Cobb*, 135 Wis. 2d 181, 182, 400 N.W.2d 9 (Ct. App. 1986). This latter rule would appear to be a logical outgrowth of *Hayes v. State*, which affirmed the circuit court's inherent ability to "correct formal or clerical errors or an illegal or a void sentence at any time." *Hayes v. State*, 46 Wis. 2d 93, 102, 175 N.W.2d 625 (1970).

Thus, despite the circuit court's insistence on the petition requirement for an inmate in Mr. Lira's situation, the case law fails to reflect that same urgency. No published case directly references the petition requirement, save for an oblique reference in *Brown*—that Brown litigated his claim in circuit court after being "unable to administratively secure a credit towards his state sentence." *Brown*, 2006 WI

[16] This same procedure—the filing of a Rule 809.30 motion, and not the initiation of a petition with the DOC—is referenced in countless other decisions of both this Court and the Supreme Court.

App 41, ¶ 5. However, the petition requirement is not seriously discussed by this Court before delving into the merits of the claim.

Meanwhile, the strict statutory authority would appear to apply this petition "requirement" to any and all sentence credit claims not explicitly addressed at sentencing—and yet, that is clearly not what is transpiring, as a cursory review of the sentence credit case law reveals.[17]

Faced with this strange legal landscape—in which the statute prescribes a legal process which has never been adequately explored in any legal source and which has been inconsistently applied by higher courts—the circuit court erred in adopting an arbitrary reading of that statute to bar relief. While the circuit court's arbitrary application of the legal "rule" is itself superficially questionable in light of the foregoing discussion, there are other problems that can also be identified, as identified below.

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[17] *Burke v. Johnston*, 452 F.3d 665 (7th Cir. 2006) is an especially interesting case. In that civil rights action, the plaintiff's attempts to get sentence credit relief via the Wisconsin circuit court were unsuccessful. He then spent roughly two years attempting to obtain the sentence credit from the DOC and, after prevailing, sued in federal court alleging deliberate indifference by DOC officials. The State argued that DOC lacked legal authority to independently modify sentence credit in that circumstance, thereby adopting a position somewhat at odds with the reading of the statute at issue in this case.

2. The circuit court failed to acknowledge that the "requirement" of administrative exhaustion is discretionary and not mandatory.

In its dealings with Mr. Lira, the circuit court acted on what it understood to be an axiomatic principle—the circuit court was powerless to resolve the credit dispute unless and until Mr. Lira adequately exhausted his DOC administrative remedies. That, however, is not the law. The doctrine requiring exhaustion of administrative remedies is not jurisdictional:

> When a party has failed to exhaust his administrative remedies, the circuit court is not automatically divested of jurisdiction to hear the matter. Rather, such failure simply supplies the court with a reason for refusing to hear the suit in appropriate circumstances. Whether such circumstances are present in a given case is a matter of discretion of the court involved.

State v. Dairyland Power Co-op., 52 Wis. 2d 45, 54, 187 N.W.2d 878, 882 (1971).

Here the circuit court did not even acknowledge this discretionary authority in its order, instead repeatedly using its stringent reading of the controlling statute to reject Mr. Lira's claims. The circuit court should have exercised its discretion and decided the issue presented. This case does not involve any disputed facts and instead presents a

pure question of law, one unrelated and unconnected to any agency-specific regulations. Counsel for Mr. Lira submitted copious supporting documentation and both parties, at the circuit court's request, submitted briefs as to the underlying merits of Mr. Lira's claim.

Accordingly, the circuit court not only erred in not acknowledging its ability to hear the case notwithstanding the sufficiency of Mr. Lira's petition to the DOC, it also erred in declining to decide a fact-specific issue that it was adequately suited to resolve.

3. A plain reading of the statute shows that the defendant has the option, but not the obligation, to petition the DOC before filing his motion in circuit court.

In addition to case law showing that administrative exhaustion is not a necessary prerequisite to obtaining relief in circuit court, it is also less than clear that the "requirement" is a strict statutory dictate. Although he fully acknowledges the dated, but controlling case law above, Mr. Lira also raised a reading of the statute in the circuit court that would appear to make a petition optional, and not presumptively mandatory, as discussed above.

That is, the "may" in the statute should be distinguished from "shall"—a permissive, as opposed to mandatory, directive. *Heritage Farms, Inc. v. Market Ins. Co.*, 2012 WI 26, ¶ 32, 339 Wis. 2d 125, 810 N.W.2d 465. Thus, under a plain reading of the

statute, the aggrieved inmate in DOC custody can ask his dispute to be resolved by the DOC. However, the statute does not make that course of action mandatory—it does not evince a clear intent to construct a procedural bar to circuit court litigation.

Moreover, the strict reading of the statute urged by the circuit court would run afoul of other legal authority, including those cases discussing the circuit court's power to correct an illegal or void sentence at any time, *Hayes*, 46 Wis. 2d at 102, and its inherent authority to undertake actions necessary to "fairly administer justice." *State v. Henley*, 2010 WI 97, 73, 328 Wis. 2d 544, 787 N.W.2d 350. Finally, while the circuit court apparently believes the statute should only be applied to defendants in Mr. Lira's unique position, the plain statutory language would seemingly apply this alleged procedural bar to defendants within the Rule 809.30 pipeline—which is inconsistent with those cases demonstrating that a defendant can file a postconviction motion without first petitioning the DOC.

Accordingly, the circuit court erred in construing this petition requirement as a strict bar to relief. It should have therefore considered Mr. Lira's claim on the merits.

C. In any event, Mr. Lira adequately "petitioned" the DOC, which was "unwilling" or "otherwise unable" to grant relief.

1. The petition requirement defined.

Assuming, arguendo, that this Court rejects the foregoing arguments and concludes that Mr. Lira was required to petition the DOC before commencing his circuit court litigation, the record is clear that he has adequately satisfied that "requirement."

It is worth noting that the case law is again devoid of any interpretative assistance in determining what kind of "petition" is required under the statutes. As no formal legal mechanism for the review of sentence credit by the DOC has been specially outlined in either the sentence credit statute or the administrative code, the plain English meaning of the phrase is presumptively controlling. The online, free dictionary "Lexico" (powered by the Oxford University Press) makes clear that "to petition" is to "make an appeal to (a deity or superior.)"[18] Meanwhile, Black's Law Dictionary offers a substantially similar meaning (with respect to the noun form): "A formal written request presented to a court or other official body."[19]

[18] https://www.lexico.com/en/definition/petition

[19] Black's Law Dictionary (11th ed. 2019).

As will be shown below, Mr. Lira repeatedly did just that, writing numerous DOC officials on multiple occasions requesting the credit outlined in his motion.

2. Mr. Lira adequately petitioned the DOC for sentence credit for the period of time from his return to Wisconsin in 2005 until he completed his Oklahoma sentence.

Here, the record is sufficient to conclude that Mr. Lira asked the DOC to award him credit from the date he was returned to Wisconsin in 2005 until the date he completed his Oklahoma sentence, minus any time he spent while at liberty after being erroneously released from custody.[20] Based on the documents in the record, the following timeline emerges:

In the summer of 2017,[21] Mr. Lira wrote his DOC agent, Amy Pucilowski, and requested, in relevant part, the following credit:

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[20] The sentence credit motion filed by counsel admitted that Mr. Lira had not petitioned for credit he might have earned while out on bail but nonetheless flagged the issue in light of the then ongoing proceedings in *Friedlander*. The result of that decision renders that argument moot, however, and Mr. Lira will not further address it in this brief.

[21] While the letter is undated, the email chain which references this letter is dated August 22nd through August 23rd of 2017. (R1 37:4; R2 24:4); (App. 114).

> Second, following the 10-05-04 Oklahoma sentencing I was subsequently turned over to Wisconsin custody in March 2005 and held in the House of Corrections & Milwaukee County Jail awaiting trial and sentencing on case 04-CF-2092. However, it should be noted that the sentence after revocation on cases 92-F-l 195 and 99-CF-163 was still the governing sentence. I remained in custody at the HOC from March 2005 until June 2005 at which time I was mistakenly released on bail (which resulted in me being charged with bail jumping on case 05-CF-6953), it should be noted here that if my Wisconsin custody at this time was ONLY related to case 04-CF2092-escape, then I would never have been charged with bail jumping in case 05-CF6953 for bailing out. Regardless, I still haven't been given any custody credit for this time period from March 2005 thru June 2005.
>
> Thereafter, I was a Wisconsin fugitive until my surrender/arrest in San Antonio Texas in November 2005. At this time I was taken into custody and transferred back to Wisconsin. 1 remained in Wisconsin custody at Milwaukee County Jail from January 2006 thru May 2006. Again, I have never been given any credit for this time period towards any sentence.

(R1 37:2; R2 24:2); (App. 112).

On August 23, 2017, Donna Harris, a DOC administrator, determined that Mr. Lira was not owed credit for "time spent in prison in another state." (R1 37:4 R2 24:4); (App. 114). Ms. Harris asserted that the only credit to which Mr. Lira was

entitled was from April 16, 2004 (the date of his arrest in Oklahoma) until what she understood the date of sentencing to be on the Oklahoma case, October 5, 2004. (R1 37:4 R2 24:4); (App. 114).

On December 5, 2017, Mr. Lira wrote a second letter to the records staff at Fox Lake Correctional Institution, the Assistant Administrator of the Division of Hearings and Appeals, and Niel Thoreson. (R1 37:3; R2 24:3); (App. 113). That letter requested the following credit:

> Therefore, I am requesting that you apply sentence credit as follows: from January 7, 2004 until my revocation and escape on April 15, 2004. Then from my arrest in Oklahoma on April 16, 2004 until the date upon which I was illegally released by the state of Wisconsin authorities in June 2005 (resulting in case 05-CF-6953). Then credit upon my arrest in Texas on November 2005 until my release from Oklahoma on June 9, 2017 at which time I was extradited to Wisconsin.

(R1 37:3; R2 24:3); (App. 113).

Mr. Thoreson responded and asserted that "additional credit was not warranted, beyond an adjustment to add missing credit from 4/16/04 to 10/05/04." (R1 37:5; R2 24:5); (App. 115).

Accordingly, the record adequately demonstrates that Mr. Lira requested the credit at issue in his motion from the DOC and that he was denied, in writing, by at least two DOC officials.

The circuit court reviewed this evidence and concluded that Mr. Lira had sufficiently petitioned the DOC for credit from April 16, 2004 onward. (R1 68:5; R2 55:5); (App. 202). And yet, it found the record lacking with respect to Mr. Lira's alternate claim:

> But the DOC's response did not specifically address the defendant's claim to credit from May 2005, when he was returned to Wisconsin, or from April 2006, when he was ostensibly made available to Oklahoma to serve the remainder of his sentence. Consequently, it is not known to what extent the DOC considered the defendant's credit request for these periods or on what basis the DOC determined that he was not entitled to receive this credit. Under these circumstances, the court finds that it still has insufficient information to reach the merits of the defendant's second and third claims for credit and that, at this point, the onus is upon the defendant to petition the DOC under section 973.155(5), Stats., for a more definitive response to his request.

(68:5-6; R2 55:5-6); (App. 202-203). The circuit court concluded that Mr. Lira was obliged to present the legal arguments in his sentence credit motion to the DOC before first proceeding to circuit court. (R1 68:6 R2 55:6); (App. 203).

The circuit court's ruling is mistaken in several respects. First, as highlighted in section II, B, *supra*, the petition "requirement" it has imposed on Mr. Lira appears to be based on an incomplete reading of the

controlling legal authority. Nothing prevented the circuit court from addressing the claim on the merits and it therefore erred in declining to address Mr. Lira's request.

Second, the circuit court's reasoning is logically inconsistent. In making a finding that Mr. Lira had petitioned the DOC for credit from April 16, 2004 *onward*, it is unclear why that finding does not sweep in the subsidiary claims for credit included in that overall request.

Third, the circuit court ignored the plain record evidence showing that Mr. Lira: (a) requested credit and (b) was told, directly, that additional credit "was not warranted." (R1 37:5; R2 24:5); (App. 115). In light of the plain statutory language, this was sufficient to discharge the petition "requirement," as it clearly represents a written request to DOC authorities which adequately identified the controverted credit. By imposing some alternative standard—that Mr. Lira was required to submit a robust legal argument and then provide proof that the DOC had analyzed those legal claims on the merits—the circuit court imposed an extraneous duty not recognized in the statute. By the simple terms of the controlling statute, Mr. Lira was only required to submit proof that the DOC had "otherwise refuse[d]" to grant his request for credit. Wis. Stat. § 973.15(5).

The documentation in the record satisfies that legal requirement.[22]

Accordingly, the circuit court erred in not addressing Mr. Lira's second claim for sentence credit on the merits.

3. Mr. Lira adequately petitioned the DOC for credit owed from the date of his arrest in Oklahoma until the date of sentencing there.

Mr. Lira's third claim for sentence credit, another subset of the inclusive request for credit discussed in section I, B, *supra*, involved credit from the date of his arrest in Oklahoma until the date of his sentencing there. (R1 52:7; R2 39:7); (App. 135). In his motion, Mr. Lira argued that, if the circuit court did not accept his arguments under *Brown*, he was at the very least entitled to credit for a smaller portion of the requested period, from the date of

[22] There is no authority for the circuit court's exercise of quasi-appellate review, one that requires it to deferentially review the underlying legal reasoning of DOC employees who may or may not be legal professionals. More to the point, a February 16, 2018 letter from Donna Harris makes clear that the DOC was relying on its interpretation of the *Brown* case to deny credit. (R1 56:20; R2 43:20); (App. 193). Why this was insufficient for the circuit court to reach the merits has never been made clear to Mr. Lira.

arrest in Oklahoma until the date of his sentencing there. (R1 52:7; R2 39:7); (App. 135).[23]

Once again, the circuit court asserted that it was unable to reach the merits of this claim and therefore directed Mr. Lira to file a more definite petition with the DOC. (R1 68:5-6; R2 55:5-6); (App. 202-203). However, the circuit court already made a finding that Mr. Lira submitted an inclusive request for credit including this block of credit from the DOC in its decision and order. (R1 68:5; R2 55:5); (App. 202).

At the same time, the record also makes clear that Mr. Lira did petition the DOC for this credit, as it is included in the documents referenced above. (R1 37:2-3; R2 24:2-3); (App. 111-112). The DOC initially decided that Mr. Lira was entitled to this credit, although it ultimately reversed itself in a letter dated February 16, 2018. (R1 56:20; R2 43:20); (App. 193). An amended revocation order and warrant formally removed that credit. (R1 56:17; R2 43:17); (App. 190).

Accordingly, Mr. Lira made an adequate showing that he requested this credit and the DOC "otherwise refuse[d]" to award it. The circuit court

[23] Mr. Lira also requested some additional credit based on his return to Wisconsin in 2017, an argument which is mooted by evidence in the record demonstrating that he is receiving credit from June 9, 2017 onward. The claim is not being renewed on appeal.

therefore erred in not addressing Mr. Lira's third claim for sentence credit on the merits.

III. A merits review of Mr. Lira's remaining two claims shows that he is entitled to sentence credit as outlined in his motion for credit and motion for reconsideration.

A. This Court should address the issue on the merits rather than remanding for further proceedings.

Because the circuit court refused to address Mr. Lira's second and third claims on the merits, this Court could order a remand. While Mr. Lira would certainly accept that outcome, he asks this Court for a preferred remedy—that this Court address his second and third claims for credit on the merits.

This Court clearly has the ability to reach the merits of Mr. Lira's claim(s) given its inherent power to address meritorious claims in more drastic situations, as when the issue is unpreserved or otherwise waived. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 17, 273 Wis. 2d 76, 681 N.W.2d 190. Given the circumstances of this case, good cause exists to proceed directly to the merits of Mr. Lira's credit claims.

First, this issue involves sentence credit to be applied to sentences which are currently being served. Mr. Lira therefore has an interest in the prompt disposition of his claims and, given his diligent litigation of the issue for the last two years, it

would be unjust to require further time-consuming circuit court proceedings.

Second, determination of the issue on the merits furthers judicial economy and enhances efficient judicial administration. The record is fully developed and the issues sharply defined. Given the posture of the case, it makes little sense to return the case to the circuit court on procedural grounds—a decision that might ultimately engender more appellate litigation if the circuit court is still unwilling to award credit.

Finally, the proceedings to date evince a need for definitive action from this Court. As the record shows, Mr. Lira has been shuttled back and forth between two governmental entities. On the one hand, the DOC has explicitly urged him to seek review in circuit court. (R1 56:20; R2 43:20); (App. 193). The circuit court, meanwhile, has consistently directed Mr. Lira toward the DOC.

The record makes clear, however, that the circuit court has been given multiple opportunities to decide the issue and has consistently avoided doing so. On three separate occasions, the circuit court has denied the motion on procedural grounds, despite Mr. Lira repeatedly adding to and amending the record at the circuit court's explicit request. Moreover, the circuit court has been arbitrary and inconsistent in its application of procedural rules, as argued above.

Given the lengthy procedural history, all parties involved would therefore benefit from a prompt disposition on the merits.

B. Mr. Lira is entitled to credit from the date of his return to Wisconsin until the date he was released on bail; and then from the date of his arrest in Texas until the completion of his sentence in Oklahoma.

Pursuant to the foregoing authorities, Mr. Lira was entitled to credit against his revocation sentences once he was made available to another jurisdiction. Wis. Stat. § 973.15(5). Assuming that this Court does not accept that *Brown* governs the entire portion from April 16, 2004 onward, Mr. Lira should still be entitled to credit for that portion of time after he was returned to Wisconsin from Oklahoma in 2005.

Because he had a pending ROW—and had not yet been transported to Dodge Correctional Institution—Mr. Lira was in the same or similar position as any defendant sitting in a county jail, post-revocation, awaiting their transportation to a DOC institution. *See* Wis. Stat. § 304.072(4). Thus, Mr. Lira would continue accruing credit from the date he was placed in a Milwaukee County Jail—which the circuit court has identified as May 19, 2005—until he was erroneously released from custody on June 15, 2005. That is 28 days of credit.

Mr. Lira would then begin re-accruing credit when he was placed back in custody on December 13, 2005. He continued accruing credit against his revocation cases while he remained at the Milwaukee County Jail until March 17, 2006. That is an additional 94 days of credit.

At that point, the State of Wisconsin lawfully turned Mr. Lira over to Oklahoma authorities. This lawful turnover satisfies the legal prerequisites in *Brown*, entitling Mr. Lira credit from that point forward against his revocation cases. Thus, he is entitled to credit from March 17, 2006 until June 9, 2017. That is 4,102 days of sentence credit.

All told, Mr. Lira is entitled to 4,224 days of sentence credit. Again, that would eliminate any remaining sentence on 1992CF921195 and would make him eligible for mandatory release on 1999CF163.

C. Mr. Lira is entitled to credit from the date of his arrest in Oklahoma until the date he was sentenced in Oklahoma.

Finally, Mr. Lira asks this Court to reinstate the credit that was removed from the amended revocation order and warrant. Once again, Mr. Lira would have been entitled to continue earning credit against his revoked cases once the revocation order and warrant was signed and before he returned to Dodge Correctional Institution to serve that sentence. Assuming, arguendo, that this Court does not accept the argument involving *Brown* discussed at length in

this brief, Mr. Lira would still continue accruing credit until he was actually sentenced on the new matter. *State v. Beets*, 141 Wis. 2d 372, 369 N.W.2d 382 (1985) (sentence credit "connection" is severed when inmate begins serving sentence on unrelated matter).

Accordingly, Mr. Lira is entitled to credit from the date of his arrest in Oklahoma (April 16, 2004) until the date he was sentenced on September 29, 2004. That is 166 days of credit.

CONCLUSION

Mr. Lira therefore requests that this Court reverse the ruling of the circuit court and award credit as outlined herein.

Dated this 30th day of August, 2019.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,430 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 30th day of August, 2019.

Signed:

_____

Christopher P. August
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated this 30th day of August, 2019.

Signed:

Christopher P. August
Assistant State Public Defender

APPENDIX

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TO
APPENDIX

[24] The cover page is omitted from the appendix.

[25] The order was signed on September 21, 2017; however it was not electronically filed until September 22, 2017. Mr. Lira believes the earlier date governs.

[26] The cover page is omitted from the appendix.