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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2019AP691-CR & 2019AP692-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CESAR ANTONIO LIRA,

Defendant-Appellant.

APPEAL FROM ORDERS DENYING MOTIONS FOR SENTENCE CREDIT AND RECONSIDERATION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE FREDERICK C. ROSA, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Lira organizes his brief to correspond with three claims for credit he presented in his postconviction motions. One of his claims (claim two) mixes requests for credit under two different credit statutes, Wis. Stat. §§ 973.15(5) and 973.155.

The State organizes its brief by statutory claim. Section I addresses Lira's claims under Wis. Stat. § 973.15(5), which authorizes credit for custody in another jurisdiction. Section II addresses Lira's requests for credit under Wis. Stat. § 973.155, the general sentence credit statute. The State therefore re-frames the issues as follows:

1. Lira requests credit for all custody in Oklahoma from April 2004 until June 2017, under Wis. Stat. § 973.15(5). Is Lira entitled to credit for this time?

The circuit court answered no.

This Court should answer no.

2. Lira sought credit under Wis. Stat. § 973.155 for certain custody in Oklahoma in 2004, and for custody in Wisconsin from 2005 to 2006. The circuit court declined to address the merits of these claims because Lira did not raise them in a petition to the Department of Corrections (DOC), pursuant to Wis. Stat. § 973.155(5).

a. Did the circuit court correctly determine that Wis. Stat. § 973.155(5) requires persons to petition DOC for credit after sentencing before bringing a credit claim in the circuit court, and may the court's decision be affirmed on this basis?

This Court should answer yes.

b. Alternatively, on the merits, is Lira entitled to credit for this time under Wis. Stat. § 973.155(5)?

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted to clarify two issues.

First, Lira's request for over 4600 days of credit for custody in another jurisdiction under Wis. Stat. § 973.15(5) turns on whether his Wisconsin sentences had commenced when he was "made available" to that jurisdiction. Neither section 973.15(5) nor the two prior cases addressing the statute directly answer this question. This Court's decision should provide guidance on that issue. The State alternatively asserts that this Court misread section 973.15(5) in *Brown*, and that *Brown* conflicts with a prior case, *Rohl*, which should govern and would result in no credit under the statute. Publication would also be warranted if the Court reaches the State's alternative argument.

Second, the circuit court declined to address the merits of some of Lira's credit claims on the ground Lira failed to first petition the DOC for this credit pursuant to Wis. Stat. § 973.155(5). On three occasions, the Wisconsin Supreme Court has indicated that this statute requires persons requesting credit after sentencing to petition DOC before filing a credit claim in the circuit court. But, as Lira notes, few recent cases have addressed section 973.155(5), or the three supreme court cases interpreting the statute. Publication would reinforce that postsentencing credit claims must be presented to DOC before being brought in the circuit court.

Oral argument is not requested.

INTRODUCTION

On April 15, 2004, Lira escaped the custody of Milwaukee County, where he was being held on probation and parole holds. The next day, DOC issued a revocation order and warrant, subjecting him to imprisonment on two sentences. That same day, Lira was arrested in Oklahoma after

committing several new crimes, including murder. Except for a return to Wisconsin to face new charges, Lira remained in Oklahoma custody while his cases were being adjudicated, and for the duration of his Oklahoma sentences. Upon completing his Oklahoma sentences in June 2017, Lira was returned to Wisconsin to serve his Wisconsin sentences.

Lira requests credit against these Wisconsin sentences for his custody in Oklahoma from April 2004 to June 2017 under Wis. Stat. § 973.15(5). He also requests credit under Wis. Stat. § 973.155 for two shorter periods of custody.

Wisconsin Stat. § 973.15(5) ensures that, when a defendant serving a Wisconsin sentence is extradited or otherwise sent from Wisconsin custody to another state during that sentence, his Wisconsin sentence continues running. Here, Lira is not entitled to credit for any time in Oklahoma under Wis. Stat. § 973.15(5) because his Wisconsin sentences were not running when he was ostensibly "made available" to Oklahoma authorities upon his April 16, 2004, arrest. His credit claim also fails because he was not "made available" to Oklahoma in a "lawful manner," as required by the statute, when he escaped Wisconsin custody and was arrested by Oklahoma officers.

Alternatively, credit would not be available because this Court's interpretation of section 973.15(5) in *Brown*, on which Lira's claim depends, is incorrect. *Brown* conflicts with a prior case, *Rohl*, which should govern here.

As to his two credit requests under Wis. Stat. § 973.155(1), the standard sentence credit statute, this Court should affirm the circuit court's order declining to address these requests on the merits. The court determined that Lira failed to petition DOC for this credit before seeking relief in the circuit court, as required by Wis. Stat. § 973.155(5). The Wisconsin Supreme Court has read this statute to require

persons to petition DOC for credit before filing postsentencing requests for credit in the circuit court.

If this Court addresses these two claims on the merits, it should conclude credit is unavailable under section 973.155. Neither of these periods of custody was factually connected to his Wisconsin offenses.

Accordingly, this Court should affirm the circuit court's orders.

STATEMENT OF THE CASE

Factual Background

The convictions in 1992CF1195 and 1999CF163. In 1992, Lira was convicted of possession of cocaine in Milwaukee County case number 1992CF1195 and sentenced to an indeterminate term of up to 10 years' imprisonment. (R1. 52:10–11, R2. 39:10–11, A-App. 138–39.) In 1996, Lira was released to parole supervision. (R1. 52:12, R2. 39:12, A-App. 140.)

In January 1999, Lira was charged in Milwaukee County case number 1999CF163 with multiple offenses, including, among others, conspiracy to deliver cocaine (Count 1 of the complaint) and possession of a firearm as a repeater (Count 4). (R2. 1:1.) As a result, Lira's parole in case number 1992CF1195 was revoked in February 1999, and he was ordered reconfined. (R1. 52:13, R2. 39:13, A-App. 141.)

In December 1999, Lira was convicted in case number 1999CF163 upon guilty pleas of Count 1 (delivery of cocaine) and Count 4 (firearm possession). (R2. 20:1; 21:1–2, A-App. 102, 104–05.) On Count 1, the court imposed and stayed a sentence of up to 16 years' imprisonment, and ordered him placed on probation for 12 years. (R2. 21:1, A-App. 102.) On Count 4, the court sentenced Lira to up to 2 years' imprisonment. (R2. 20:1, A-App. 104.)

In January 2001, Lira was released from DOC custody to probation and parole supervision. (R1. 52:12, R2. 39:12, A-App. 140.)

In November 2002, Lira absconded when his probation agent attempted to take him into custody for rules violations.[1] (R1. 52:12, R2. 39:12, A-App. 140.) Lira remained at large until January 2004, when he was arrested by Wisconsin Department of Justice agents. (R1. 52:12, R2. 39:12, A-App. 140.)

Escape to Oklahoma*, *revocation of probation and parole in 1992CF1195 and 1999CF163*, *and adjudication of Oklahoma charges. The Department of Corrections (DOC) placed a probation hold on Lira in both 1992CF1195 and 1999CF163. From January 2004 to mid-April 2004, Lira was in custody at Milwaukee Secure Detention Facility. (R1. 52:19, R2. 39:19, A-App. 147.) The State also charged Lira with a new offense, endangering safety with use of a dangerous weapon in Milwaukee County case number 2004CM1010. (R1. 68:2, R2. 55:2, A-App. 199.)

On April 15, 2004, Lira escaped custody of law enforcement after arriving at a local hospital for a medical appointment.[2] (R1. 52:20, R2. 39:20, A-App. 148; R1. 64:4; R2. 51:4.) As a result, Lira was charged with escape in Milwaukee

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[1] These included unauthorized out-of-state travel and "possessing approximately $55,000 in cash." (R1. 52:12, R2. 39:12, A-App. 140.) When the agent tried to take him into custody, Lira fled the agent's office and drove off, nearly running over a police officer. (R1. 52:12, R2. 39:12, A-App. 140.)

[2] According to the State's brief opposing reconsideration, "while arriving at [a medical] appointment[ ] on April 16, 2004, the defendant fled from officers into his girlfriend's awaiting vehicle." (R1. 64:4; R2. 55:4.) A print-out Lira provided from DOC's offender search web site indicates this incident occurred on April 15, not April 16. (R1. 52:20, R2. 39:20, A-App. 148.)

County case number 2004CF2092. (R1. 68:2, R2. 55:2, A-App. 199.)

On April 16, 2004, DOC entered a revocation order and warrant revoking Lira's parole in case number 1992CF1195 and probation in case number 1999CF163. (R1. 52:19, R2. 39:19, A-App. 147.) The order indicated Lira was due 97 days' credit, for his January 9 to April 15 custody on the probation hold. (R1. 52:19, R2. 39:19, A-App. 147.)

That day, April 16, 2004, Lira was arrested in Oklahoma after committing new offenses. (R1. 52:20, R2. 39:20, A-App. 148.) Wisconsin placed an interstate detainer on Lira that day.[3] (R1. 52:20, R2. 39:20, A-App. 148.)

Oklahoma charged Lira with second-degree murder, eluding a police officer, running a road block, child neglect, and being a fugitive from justice, for his criminal conduct on April 16.[4] (R1. 64:18; R2. 55:4.) On September 30, 2004, Lira pled guilty to these charges and was sentenced to a total of 20 years' imprisonment. (R1. 52:21–22, R2. 39:21–22, A-App. 149–50; R1. 64:21; R2. 55:5.) It is undisputed that Lira remained in Oklahoma custody from April 16, 2004, until he began serving his Oklahoma sentences. (R1. 64:3; R2. 39:3.)

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[3] A detainer is "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." *State v. Onheiber*, 2009 WI App 180, ¶ 9, 322 Wis. 2d 708, 777 N.W.2d 682 (citations omitted).

[4] The State's brief opposing reconsideration states that Lira led Oklahoma officers on a high-speed chase, which ended when he ran a road block and caused his vehicle to roll over. (R1. 64:2, R2. 51:2.) Lira's girlfriend and their six-year-old daughter were riding in the vehicle. (R1. 64:2, R2. 51:2.) His girlfriend was killed in the crash. (R1. 64:2, R2. 51:2.)

May 2005 return to Wisconsin, mistaken release, April 2006 return to Oklahoma. On or about May 22, 2005, Oklahoma returned Lira to Wisconsin to face the endangering safety and escape charges in case numbers 2004CM1010 and 2004CF2092, respectively. (R1. 68:2, R2. 55:2, A-App. 199.) Lira was held in the custody of the Milwaukee County Sheriff's Department from May 22 to mid-June 2005. (R1. 52:28–34, R2. 39:28–34, A-App. 156–62.)

On June 15, 2005, Lira was mistakenly released after he posted bail in case numbers 2004CM1010 and 2004CF2092. (R1. 68:2, R2. 55:2, A-App. 199.) Lira then missed a court date and was arrested on December 13, 2005, in San Antonio, Texas. (R1. 68:2, R2. 55:2, A-App. 199; Lira's Br. 9.) Lira was subsequently charged with bail jumping in Milwaukee County case number 2005CF6953. (R1. 68:2, R2. 55:2, A-App. 199.)

On January 11, 2006, Lira was returned to Wisconsin to face charges in case numbers 2004CM1010, 2004CF2092, and now 2005CF6953. (R1. 52:28, R2. 39:28, A-App. 156.) On March 17, 2006, all three cases were resolved by a plea agreement. (R1. 68:2, R2. 55:2, A-App. 199.) The circuit court imposed a total sentence of three years' initial confinement and three years' extended supervision, to be served consecutive to his Oklahoma sentence. (R1. 68:2, R2. 55:2, A-App. 199.)

On April 5, 2006, Lira was returned to Oklahoma. (R1. 68:2, R2. 55:2, A-App. 199.) He completed his Oklahoma sentences on June 9, 2017. (R1. 68:2, R2. 55:2, A-App. 199.)

June 2017 return to Wisconsin, recent DOC amendments to revocation order regarding credit. Lira waived extradition and was returned to Wisconsin. (R1. 64:4, R2. 51:4.) Lira returned to Wisconsin DOC custody on June 16, 2017. (R1. 52:20, R2. 39:20, A-App. 148.)

DOC determined that Lira began serving his 2004 revocation sentences on June 9, 2017, the date he was released from Oklahoma custody upon completion of his Oklahoma sentences. (R1. 68:2–3, R2. 55:2–3, A-App. 199–200.) In August 2017, DOC amended the April 2004 revocation order to award an additional 172 days of credit for custody from his April 16, 2004, arrest to the October 5, 2014, sentencing in his Oklahoma cases. (R1. 52:39, R2. 39:39, A-App. 167.) In March 2018, DOC removed this credit in a second amended revocation order. (R1. 56:17, R2. 43:17, A-App. 190.)

Motions for sentence credit

First pro se motion. In September 2017, Lira filed a *pro se* motion for credit. (R1. 35:1, R2. 22:1.) Lira requested credit under Wis. Stat. § 973.15(5) and *State v. Brown*, 2006 WI App 41, 289 Wis. 2d 823, 711 N.W.2d 708, "for all days spent in custody in the state of Oklahoma—between the dates of April 16, 2004, thru June 9, 2017."[5] (R1. 35:1–2, R2. 22:1–2.)

The circuit court, the Honorable Carl Ashley presiding, denied the motion "without deciding the merits," because Lira had not shown that he had first asked DOC to award him the credit. (R1. 36:1, R2. 23:1, A-App. 110.) The court observed that, under Wis. Stat. § 973.155(2), DOC was responsible for determining the availability of credit in the revocation order. (R1. 36:1, R2. 23:1, A-App. 110.) Lira, the court explained, should "submit his request for credit to [DOC]. If [DOC]

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[5] Lira also appeared to argue that he should be credited with service of his revocation sentences under the sentence credit statute, Wis. Stat. § 973.155(1), because "his confinement in Oklahoma was related . . . to the revocation in the present case." (R1. 35:1, R2. 22:1.) Lira, by appointed counsel, abandoned this argument in his later motions.

denies his request, he may petition the court for credit under section 973.155(5), Stats." (R1. 36:1, R2. 23:1, A-App. 110.)

Second pro se motion. In January 2018, Lira renewed his credit request. (R1. 37:1, R2. 24:1, A-App. 111.) Lira provided several documents with this request. Among these were DOC's computation of his sentences (R1. 37:11, R2. 24:11, A-App. 121), and the following documents:

- An undated letter to parole agent Amy Pucilowski. There, Lira asked why DOC had not credited him with service of his 2004 revocation sentences. He asserted that he was entitled to credit "after 10-05-04" because (1) the Oklahoma sentences were concurrent with the revocation sentences; and (2) it was authorized by Wis. Stat. § 973.15(5). (R1. 37:2, R2. 24:2, A-App. 112.)

- A December 5, 2017, letter addressed to the records office at Fox Lake Correctional; the Division of Hearings and Appeals; and Niel Thoreson, Region Three Chief of DOC's Division of Community Corrections. (R1. 37:3, R2. 24:3, A-App. 113.) Lira again asserted that the Oklahoma sentences were concurrent with his revocation sentences. (R1. 37:3, R2. 24:3, A-App. 113.) Without mentioning Wis. Stat. § 973.15(5) or *Brown*, Lira also requested sentence credit against his revocation sentences for his custody (1) from his April 16, 2004, arrest in Oklahoma until his mistaken release on bail by Wisconsin authorities in June 2005; and (2) from his arrest in San Antonio, Texas, in November 2005 until his release from Oklahoma custody on June 9, 2017. (R1. 37:3, R2. 24:3, A-App. 113.)

- An August 22 to 23, 2017, email discussion among DOC staff about whether Lira is entitled to additional credit. (R1. 37:4, R2. 24:4, A-App. 114.) In the last exchange,

Assistant Regional Chief Donna Harris states: "The records office and I have reviewed this case due to a letter from the offender." (R1. 37:4, R2. 24:4, A-App. 114.) Harris explained that Lira "believes he should get credit for time spent in prison in another state. He does not get that credit." (R1. 37:4, R2. 24:4, A-App. 114.) Harris determined, however, that Lira was entitled to credit from his Oklahoma arrest on April 16, 2004, until his Oklahoma sentencing in October 2004, and directed that the revocation order be amended to reflect the award of this time. (R1. 37:4, R2. 24:4, A-App. 114.)

- A December 15, 2017, letter from Regional Chief Niel Thoreson, responding to Lira's letter. (R1. 37:5, R2. 24:5, A-App. 115.) Thoreson stated that he agreed with Donna Harris's determination that Lira was not entitled to additional credit, except for the 2004 pre-disposition custody in Oklahoma. (R1. 37:5, R2. 24:5, A-App. 115.)

In a January 9, 2017, letter, the court asked Lira to provide a copy of the revocation order, and Lira did so. (R1. 38; 39; R2. 25; 26.)

In a January 22, 2018, decision and order, Judge Ashley denied Lira's credit request on the merits. (R1. 40:1, R2. 27:1, A-App. 128.) In rejecting Lira's claim, the court concluded that credit was unavailable because Lira's Oklahoma crimes were unrelated to his Wisconsin offenses, citing *State v. Gavigan*, 122 Wis. 2d 389, 393, 362 N.W.2d 162 (Ct. App. 1984). (R1. 40:1, R2. 27:1, A-App. 128.)

Lira appealed by appointed counsel. (R1. 46; R2. 33.) Counsel later filed a notice of voluntary dismissal to relitigate the credit claims in the circuit court. (R1. 49; 50; R2. 36; 37.)

Third motion. In October 2018, Lira, by counsel, filed a third motion for credit on case numbers 1992CF1195 and

1999CF163 with additional materials. (R1. 52:1–42, R2. 39:1–42, A-App. 129–70.) As Lira explains (Lira's Br. 14–15), he divided his requests into three claims:[6]

(1) *Credit from April 16, 2004, to June 2017*. Lira argued that he was entitled to credit from his April 16, 2004, arrest in Oklahoma until completion of his Oklahoma sentences in June 2017, under Wis. Stat. § 973.15(5) and *Brown*. (R1. 52:5–6, R2. 39:5–6, A-App. 133–34.)

(2) *Credit from May 22, 2005, to June 2017*. Alternatively, and additionally, Lira argued that he was entitled to credit from his May 22, 2005, return to Wisconsin to face additional charges, until his 2006 return to Oklahoma to complete his sentences there. (R1. 52:6–7, R2. 39:6–7, A-App. 133–34.) Lira then asserted that he would be entitled to credit under Wis. Stat. § 973.15(5) and *Brown* from his April 2006 return to Oklahoma until the completion of the Oklahoma sentences in June 2017. (R1. 52:6–7, R2. 39:6–7, A-App. 134–35.)

(3) *Credit from April 16, 2004, to September 29, 2004*. Alternatively, and additionally, Lira argued that he was entitled to credit for his time in custody while his Oklahoma cases were pending—from April 16, 2004 (arrest in Oklahoma), to September 29, 2004 (sentencing in Oklahoma). (R1. 52:7, R2. 39:7, A-App. 135.)

In an October 15, 2018, decision and order, the circuit court, the Honorable Frederick C. Rosa presiding, denied

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[6] Unrelated to his time in Oklahoma, Lira also requested 35 days for credit that was never awarded against his 1999 revocation sentence in 1992CF1195, for time spent in jail between his January 11, 1999, revocation and his February 15, 1999, return to prison. (R1. 52:8, R2. 39:8, A-App. 136.) Lira does not renew this request on appeal.

these claims "without prejudice and without deciding the merits." (R1. 53:1–3, R2. 40:1–3, A-App. 171–73.) The court said that it had lacked sufficient information to decide Lira's claims because Lira had not shown that he "has petitioned [DOC] for the additional periods of credit he seeks in his motion, or . . . that [DOC] has denied credit for those periods." (R1. 53:2, R2. 40:2, A-App. 172.) The court also said that no showing had been made that DOC had removed credit previously awarded from April 16, 2004, to October 5, 2004. (R1. 53:2, R2. 40:2, A-App. 172.)

Motion for reconsideration. In response, Lira filed a motion for reconsideration arguing that he had adequately petitioned DOC for the time requested in his motion. (R1. 56:1–7, R2. 43:1–7, A-App. 174–80.) Lira also argued that, regardless, Wis. Stat. § 973.155(5) did not require him to petition DOC for the credit before bringing his claims in the circuit court. (R1. 56:1–7, R2. 43:1–7, A-App. 174–80.) Lira also submitted additional documents, and an amended revocation order showing that DOC had removed credit for the period of April 16, 2004, to October 5, 2004. (R1. 56:8–24, R2. 43:8–24, A-App. 181–97.)

The State filed a brief opposing Lira's claims. (R1. 64:1–8, R2. 51:1–8.) The State argued that Lira was not entitled to credit under Wis. Stat. § 973.15(5) and *Brown* because Lira was not "made available" to Oklahoma in a "lawful manner" when he absconded and was arrested in Oklahoma. (R1. 64:3, R2. 51:3.) Further, when Lira was returned to Oklahoma in May 2006 after Oklahoma honored the detainer so Lira could be transported to Wisconsin, *Brown* did not apply "as the defendant was never Wisconsin's to 'make available' to Oklahoma." (R1. 64:3, R2. 51:3.) The State also argued that Lira was not entitled to credit under Wis. Stat. § 973.155, because the Oklahoma cases did not arise from the same "course of conduct." (R1. 64:3–7, R2. 51:3–7.)

In a March 25, 2019, decision and order, Judge Rosa denied the motion for reconsideration. (R1. 68:1–8, R2. 55:1–8, A-App. 198–204.) The court considered the merits of Lira's first claim upon determining that Lira petitioned DOC for this time, and DOC addressed this claim. (R1. 68:3–5, R2. 55:3–5, A-App. 200–202.) The court agreed with the State that Lira was not entitled to credit under Wis. Stat. § 973.15(5) and *Brown* for April 16, 2004, onward because he was not "made available" to Oklahoma in a "lawful manner" when he absconded and was arrested in Oklahoma. (R1. 68:4–5, R2. 55:4–5, A-App. 201–202.)

The court declined to address Lira's second and third claims for credit, determining that it lacked sufficient information on which to decide these claims. (R1. 68:5–7, R2. 55:5–7, A-App. 202–204.) The court appeared to conclude that Lira failed to satisfy the requirement that he petition DOC under Wis. Stat. § 973.155(5) for post-sentence credit. (R1. 68:5–7, R2. 55:5–7, A-App. 202–204.) As a result, DOC "did not specifically address the defendant's [second] 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." (R1. 68:5–6, R2. 55:5–6, A-App. 202–203.) The court also rejected Lira's argument that he was not required to petition DOC for credit under Wis. Stat. § 973.155(5) before making his claims in the circuit court. (R1. 68:6, R2. 55:6, A-App. 203.)

The State provides additional analysis from the circuit court's decision in Argument.

RELEVANT STATUTES

Wisconsin Stat. § 973.15. **Sentence, terms, escapes**.

> (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.

Wisconsin Stat. § 973.155. **Sentence credit**.

(1)(a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:

1. While the offender is awaiting trial;

2. While the offender is being tried; and

3. While the offender is awaiting imposition of sentence after trial.

(b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113(8m), 302.114 (8m), 304.06(3), or 973.10(2) placed upon the person for the same course of conduct as that resulting in the new conviction.

. . .

(2) After the imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction. In the case of revocation of probation, extended supervision or parole, the department, if the hearing is waived, or the division of hearings and appeals in the department of administration, in the case of a hearing, shall make such a finding, which shall be included in the revocation order.

. . .

(5) 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.

STANDARD OF REVIEW

Application of Wis. Stat. § 973.15(5) and Wis. Stat. § 973.155(1) to a set of facts to determine if sentence credit is available is an issue of law this Court decides de novo. *State v. Martinez*, 2007 WI App 225, ¶ 7, 305 Wis. 2d 753, 741 N.W.2d 280.

ARGUMENT

I. Lira is not entitled to additional credit on his sentences under Wis. Stat. § 973.15(5) for any time spent in custody in Oklahoma, as Lira requests in his first and second claims.

A. Principles of statutory interpretation.

This case involves interpretation of Wis. Stat. § 973.15(5) and Wis. Stat. § 973.155. The Court determines questions of statutory interpretation without deference to the circuit court. *See State v. Setagord*, 211 Wis. 2d 397, 405–06, 565 N.W.2d 506 (1997). "If the plain meaning of the statute is clear, a court need not look to rules of statutory construction or other extrinsic aids." *State v. Sweat*, 208 Wis. 2d 409, 415, 561 N.W.2d 695 (1997) (citations omitted). "Instead, a court should simply apply the clear meaning of the statute to the facts before it." *Id.*

B. Wisconsin Stat. § 973.15(5) as interpreted by this Court.

The general rule for determining the availability of sentence credit is stated in Wis. Stat. § 973.155. As set forth above, a person is entitled to credit against his or her sentence only for days "spent in custody in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1). The "course of conduct" means the specific acts for which the defendant is sentenced, *State v. Tuescher*, 226 Wis. 2d 465, 471–72, 595 N.W.2d 443 (Ct. App. 1999), and the defendant's custody must be factually connected to the course of conduct to be creditable. *State v. Johnson*, 2009 WI 57, ¶ 33, 318 Wis. 2d 21, 767 N.W.2d 207. "An offender is in general not entitled to sentence credit under § 973.155 for custody that is being served in satisfaction of another unrelated criminal sentence." *State v. Lamar*, 2011 WI 50, ¶ 37 n.9, 334 Wis. 2d 536, 799 N.W.2d 758 (quoting Wis. JI–Criminal SM–34A at 10 (1994)).

Wisconsin Stat. § 973.15(5) provides that credit is available when a person serving a Wisconsin sentence is made available to another jurisdiction. As shown above, Wis. Stat. § 973.15(5) states that 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 . . . under the terms of s. 973.155 for the duration of custody in the other jurisdiction."

1. *Brown*

In 2006, this Court addressed Wis. Stat. § 973.15(5) for the first time in *Brown*. Brown was on probation for a 1992 drug offense when he committed several rules violations. *Brown*, 289 Wis. 2d 823, ¶ 2. In July 1995, an administrative law judge revoked his probation and imposed sentence. *Id.* ¶ 3 & n.7. But Brown never entered the state prison system, and instead was turned over to federal authorities to face federal

drug charges. *Id.* ¶ 3. In November 1995, Brown was convicted and sentenced on these charges. *Id.* He remained in the federal system until completing his sentences in 2004, when he was transferred to the custody of state authorities. *Id.*

While serving his state sentence, Brown petitioned DOC for credit for his time in federal custody. *Brown*, 289 Wis. 2d 823, ¶ 5. After DOC denied his requests, Brown filed motions for credit in the circuit court. *Id.* The circuit court denied these motions under Wis. Stat. § 973.155(1), concluding that Brown's incarceration on federal charges was unrelated to his Wisconsin sentence. *Id.*

On appeal, this Court reversed, determining that Brown was entitled to credit under Wis. Stat. § 973.15(5). *Brown*, 289 Wis. 2d 823, ¶¶ 1, 11. Concluding that Brown's claim was controlled by section 973.15(5), not Wis. Stat. § 973.155, the Court determined Brown was "a convicted offender" who was "made available to another jurisdiction" in a "lawful manner." *Id.* ¶ 11.

Having concluded that section 973.155 did not apply to Brown's case, the Court rejected the State's argument that Lira was not entitled to credit because his federal sentences were not "in connection with the course of conduct for which [his state] sentence was imposed." *Id.* The Court also rejected the argument that Lira was not entitled to credit under section 973.15(5) because he had yet to enter the state prison system, and thus had not started serving his sentence under Wis. Stat. § 973.10(2)(b) when he was made available to federal authorities. *Id.*

2. *Martinez*

In *Martinez*, 305 Wis. 2d 753, the only subsequent decision (published or unpublished) to cite *Brown*, this Court concluded that a defendant was not entitled to credit under Wis. Stat. § 973.15(5). In 1993, Martinez was sentenced to

prison on state drug charges. *Martinez*, 305 Wis. 2d 753, ¶ 2. In 2001, Martinez was convicted and sentenced on federal drug charges. *Id.* Later that year, Martinez was paroled on his state sentence directly to federal authorities to serve his federal sentences. *Id.* In 2006, Martinez was released from federal custody to serve the remainder of his state-ordered parole in Wisconsin. *Id.* ¶ 3. Three months later, Martinez violated his parole and was revoked and incarcerated in Wisconsin. *Id.* ¶ 4.

Martinez filed a motion for credit on his Wisconsin sentence for his time spent in federal custody under Wis. Stat. § 973.15(5), which the circuit court denied. *Martinez*, 305 Wis. 2d 753, ¶ 5. On appeal, this Court affirmed, rejecting Martinez's argument that *Brown* applied, and concluding that credit was unavailable under section 973.15(5). *Id.* ¶¶ 1, 9–13. This Court distinguished Martinez's case from *Brown* on the ground that, when Martinez was transferred to federal custody, he was on parole. *Id.* ¶ 13. "Whether Martinez would be subject to state incarceration again," the court explained, "was purely speculative." *Id.*

This Court further concluded that it had addressed a similar situation in *State v. Rohl*, 160 Wis. 2d 325, 466 N.W.2d 208 (Ct. App. 1991), and concluded that credit was unavailable. *Martinez*, 305 Wis. 2d 753, ¶¶ 8, 14–18. There, Rohl, while on parole for a Wisconsin conviction, committed a new offense in California, for which he was convicted and sentenced. *Rohl*, 160 Wis. 2d at 328. The California court awarded Rohl credit for presentence custody in California. *Id.* When Rohl returned to Wisconsin to complete his parole, Rohl sought credit for his presentence California custody. *Id.* at 328–29. The circuit court denied his request. *Id.* This Court affirmed, concluding that an award of credit would constitute impermissible dual credit against two nonconcurrent sentences. *Id.* at 327–29.

Addressing *Rohl*, the *Martinez* Court concluded that, "[l]ike Rohl, at the time Martinez was serving his federal sentence, he did not have a custodial sentence to which the federal sentence could be, or could presumed to be, concurrent." *Martinez*, 305 Wis. 2d 753, ¶ 18. Accordingly, credit was not available under Wis. Stat. § 973.15(5) in those circumstances. *Id.*

In concurrence, Judge Neal Nettesheim wrote that he agreed Martinez was not entitled to credit, and that the case was governed by *Rohl*. *Martinez*, 305 Wis. 2d 753, ¶ 19 (Nettesheim, J. concurring). However, he said that he would also hold that *Brown* was incorrectly decided. *Id.* ¶ 22. He asserted that the debate in *Brown* about whether Wis. Stat. § 973.15(5) or Wis. Stat. § 973.155 was controlling was a "false issue." *Id.* That is because, as Judge Nettesheim observed, section 973.15(5) provides that, when a convicted offender is made available to another jurisdiction, the offender "shall be credited with service of his or her Wisconsin sentence . . . *under the terms of s. 973.155* . . . ." *Id.* Thus, he asserted, credit is available under section 973.15(5) when, consistent with section 973.155, the custody is "in connection with the course of conduct for which sentence was imposed." *Id.* Because, he explained, *Brown* conflicts with the Court's earlier decision in *Rohl*, he asserted that *Brown* is invalid and *Rohl* should control. *Id.* ¶ 23 (*citing State v. Swiams*, 2004 WI App 217, ¶ 23, 277 Wis. 2d 400, 690 N.W.2d 452 (first decision governs when two court of appeals decisions conflict)).

C. Lira is not due credit under Wis. Stat. § 973.15(5) for his custody in Oklahoma because his Wisconsin sentences did not commence until June 2017, and *Brown* is plainly distinguishable.

Lira maintains that he is entitled to credit on his sentences in case numbers 1992CF1195 and 1999CF163 for his custody in Oklahoma from his April 16, 2004, arrest until

his June 9, 2017, release from prison. (Lira's Br. 18–24.) Lira argues that he is entitled to credit under Wis. Stat. § 973.15(5) for all custody in Oklahoma because his sentences in 1992CF1195 and 1999CF163 began on the day Wisconsin issued the revocation order, April 16, 2004; and because he was "made available" to Oklahoma authorities in "a lawful manner." (Lira's Br. 21–22.) These arguments fail.

To be entitled to credit for custody in another jurisdiction under Wis. Stat. § 973.15(5), a person must be serving the Wisconsin sentence that credit is sought against when he or she is made available to the other jurisdiction. Or the person must be in Wisconsin custody, like the defendant in *Brown*, merely awaiting transfer to prison to be begin serving the sentence. Because, as set forth below, Lira was not serving his Wisconsin sentences when he was arrested (i.e., "made available" to authorities) in Oklahoma, and the circumstances that led this Court to deem Brown's sentences commenced are not present here, Lira is not entitled to credit under section 973.15(5) for any time spent in Oklahoma custody.

1. Section 973.15(5) applies only if the Wisconsin sentence was running when the offender was made available to the other jurisdiction, or if, as in *Brown*, sentence has been imposed and the person remains in Wisconsin custody awaiting transport to the prison system.

Wisconsin Stat. § 973.15(5) ensures that, when a defendant serving a Wisconsin custodial sentence is extradited or otherwise sent from Wisconsin custody to another state during that sentence, his Wisconsin sentence continues to run. Thus, section 973.15(5) provides credit for custody in a jurisdiction when a person is serving a Wisconsin sentence when he or she is made available to the other

jurisdiction. *See* Wis. Stat. § 973.15(5); *see also Brown*, 289 Wis. 2d 823, ¶ 11.

The requirement that the offender actually be serving the Wisconsin sentence that credit is sought on when he or she is made available to another jurisdiction is all but explicit in the statute. Wisconsin Stat. § 973.15(5) provides that a "convicted offender" made available to another jurisdiction "shall be credited with service *of his or her Wisconsin sentence or commitment*"—that is, the sentence or commitment the offender was serving on his conviction when the offender was "made available" to the other jurisdiction—"under the terms of s. 973.155 for the duration of custody in the other jurisdiction." Section 973.15(5) (emphasis added). Again, section 973.15(5) merely ensures that a Wisconsin sentence continues to run when a Wisconsin offender is lawfully made available to another jurisdiction. *Id.*

This Court's decision in *Brown* turned on the question of whether the defendant's sentence had commenced when his custody was transferred to another jurisdiction. *Brown*, 289 Wis. 2d 823, ¶ 11. At the time Brown was made available to federal authorities, an administrative law judge had revoked his probation and imposed sentence, and Brown was in local custody awaiting transfer to Dodge Correctional Institution to begin serving his sentence. *Id.* ¶ 3. Brown never made it there. *Id.* Instead, he was transferred from the local jail directly to federal authorities. *Id.*

On these facts, the State argued that Brown was not entitled to credit for his time in federal custody because his sentence had yet to commence, relying on Wis. Stat. § 973.10(2)(b). *Brown*, 289 Wis. 2d 823, ¶ 11. Section 973.10(2)(b)[7] provides that a probationer with an imposed and

[7] Wisconsin Stat. § 973.10(2)(b) provides that "[i]f probation is revoked, [DOC] shall . . . [,] [i]f the probationer has already been

stayed sentence—like Brown's and Lira's in case number 1999CF163—does not begin service of that sentence until he or she enters a Wisconsin prison after revocation of his or her probation. The State argued that, because Brown never entered the Wisconsin prison system when he was made available to federal authorities, his sentence had yet to commence under section 973.10(2)(b), and thus he was not entitled to credit under Wis. Stat. § 973.15(5). *Id.*

This Court rejected the State's argument and concluded that Brown was entitled to credit under Wis. Stat. § 973.15(5). *Brown*, 289 Wis. 2d 823, ¶ 11. The Court's analysis accepted the premise that a person's sentence must be running when he or she is made available to another jurisdiction to accept credit under section 973.15(5). *Id.* But the Court concluded that denying credit based on a mechanical application of Wis. Stat. § 973.10(2)(b) in Brown's case—precluding credit only because officials had yet to transfer him to state prison—was unjust because he *was* lawfully in Wisconsin custody and had no control over how Wisconsin handled the mechanics of his Wisconsin custody. *Brown*, 289 Wis. 2d 823, ¶ 11. Denying credit in this instance, the Court explained, would be "harsh and unjust, as Brown had no control over where he was housed. . . ." *Id.* ¶ 11 n.6. Thus, on the facts of *Brown*, this Court effectively deemed Brown's sentences commenced for purposes of section 973.15(5), despite Wis. Stat. § 973.10(2)(b)'s definition of when a sentence after revocation commences. *See id.* ¶ 11.

Notably, Lira here also appears to accept the premise that his Wisconsin sentences had to be running when he was "made available" to Oklahoma to claim credit for his Oklahoma custody under Wis. Stat. § 973.15(5). His argument for credit begins as follows: "Mr. Lira's Wisconsin sentences

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sentenced, order the probationer to prison, and the term of the sentence shall begin on the date the probationer enters the prison."

commenced when the revocation order was entered on April 16, 2004." (Lira's Br. 18.) Only after making this necessary assertion does Lira proceed to argue that Wis. Stat. § 973.15(5) applies because he was "made available" to Oklahoma authorities in a "lawful manner." (Lira's Br. 21–24.)

Thus, credit is available under Wis. Stat. § 973.15(5) for custody in another jurisdiction only to those serving a Wisconsin sentence—or in custody awaiting transfer to serve a sentence—when they are made available to another jurisdiction. Wis. Stat. § 973.15(5); *see also Brown*, 289 Wis. 2d 823, ¶ 11. The State next addresses Lira's claim that his sentences did, in fact, commence on April 16, 2004.[8]

2. Lira's sentences were not running when he was "made available" to Oklahoma authorities, and his sentences should not be deemed to have commenced on April 16, 2004, under *Brown*.

a. Lira's Wisconsin sentences did not begin until June 2017 under the Wisconsin statues.

Like Brown, Lira was on probation with an imposed and stayed sentence when his probation was revoked. *Brown*, 289 Wis. 2d 823, ¶¶ 2–3. (R1. 52:19, R2. 39:19, A-App. 147.) Thus, the question of whether Lira was serving his sentences at the time he was ostensibly "made available" to Oklahoma authorities should start with Wis. Stat. § 973.10(2)(b). Again, this statute provides that a probationer with an imposed and

[8] The State has been unable to determine from the record what happened first on April 16, 2004: the entry of the revocation order or Lira's arrest in Oklahoma. But no matter the sequence of events on April 16, 2004, Lira is not entitled to credit under Wis. Stat. § 973.15(5).

stayed sentence does not begin serving his or her sentence following revocation of probation until he or she enters a Wisconsin prison. Section 973.10(2)(b).

Here, it is undisputed that Lira did not enter the state prison system to serve his sentences until June 2017, when he was released upon completing his Oklahoma sentences. (R1. 68:2–3, R2. 55:2–3, A-App. 199–200.) Therefore, Lira's sentences were not running on April 16, 2004, when Lira claims he was "made available" to Oklahoma authorities, and did not commence until June 2017 under Wis. Stat. § 973.10(2)(b). The DOC's calculation that Lira's sentences in case numbers 1992CF1195 and 1999CF163 in June 2017 is therefore correct.[9] (R1. 68:2–3, R2. 55:2–3, A-App. 199–200.)

Lira provides no authority for his assertion that his sentences began running on April 16, 2004. (Lira's Br. 18–20.) He merely observes that this Court in *Brown* rejected the State's argument under Wis. Stat. § 973.10(2)(b) that Brown's sentence had not commenced when he was made available to federal authorities. (Lira's Br. 19–20.) But the Court's determination that section 973.10(2)(b) should not preclude credit was tied to the facts of Brown's case, which are very different from those here.

[9] Technically, DOC determined that his sentences began on June 7, 2017, the date he was released from Oklahoma custody, not when he entered the Wisconsin prison system later that month. (R1. 68:2–3, R2. 55:2–3, A-App. 199–200.)

b. *Brown* is distinguishable, and Lira's sentences should not be deemed to have commenced on April 16, 2004, for purposes of Wis. Stat. § 973.15(5).

The circumstances surrounding Lira's and Brown's revocations and their being "made available" to a foreign jurisdiction could scarcely be more different.

Brown remained in custody through the revocation of his probation and imposition of sentence. Following the revocation hearing, Brown was returned to local Wisconsin custody to await his transfer to the Wisconsin state prison to being serving his sentence. He remained in local Wisconsin custody until he was made available to federal authorities to face federal charges. The only reason he was not technically serving his Wisconsin sentence at this time under Wis. Stat. § 973.10(2)(b), is because Wisconsin authorities never first transferred him to the state prison. On these facts, this Court concluded it would be harsh and unjust to deny him credit under Wis. Stat. § 973.15(5), despite the definition of custody in section 973.10(2)(b). *Brown*, 289 Wis. 2d 823, ¶¶ 2–3, 11.

Here, on the other hand, Lira escaped custody on April 15, 2004, rather than face revocation and the imposition of a 14-year prison sentence in case number 1999CF163. The next day, DOC entered the order revoking his probation and imposing sentence. Lira was also arrested that day in Oklahoma after committing several new crimes. Because he absconded, and committed new crimes in another state, he was not in custody in Wisconsin waiting to be sent to prison to begin his sentence. He was in custody in Oklahoma awaiting the issuance of new charges. None of these circumstances warrant deeming Lira's sentences commenced on April 16, 2004.

Accordingly, Lira's sentences did not commence until June 2017, as DOC correctly determined, and there is no

reason to deem them commenced on April 16, 2004. Because credit is available under Wis. Stat. § 973.15(5) only against sentences that were running when the person was made available to another jurisdiction, and Lira's sentences were not running when he was ostensibly "made available" to Oklahoma law enforcement, he is not entitled to credit under Wis. Stat. § 973.15(5) for any part of his Oklahoma custody.

3. There are additional reasons credit is unavailable under Wis. Stat. § 973.15(5) for Lira's Oklahoma custody.

If this Court agrees with the analysis above—that Lira is not entitled to credit for any of his Oklahoma custody under Wis. Stat. § 973.15(5) because his sentences were not running when he was ostensibly "made available" to Oklahoma authorities—it may end its analysis there as to the availability of credit under section 973.15(5). But, if it wishes to go further, there are at least two additional reasons credit is unavailable under section 973.15(5).

a. Credit is unavailable for custody from April 16, 2004, until at least April 5, 2006, because Lira was not "made available" to Oklahoma authorities in a "lawful manner" on April 16, 2004.

In arguing that he meets the requirements for credit under Wis. Stat. § 973.15(5), Lira maintains that he was "made available" to another jurisdiction in a "lawful manner" on the day of his arrest in Oklahoma. Specifically, he asserts that the lawful-manner requirement "is satisfied by the combined effect of" (a) the signing of the revocation order (b) the issuing of a detainer by the State of Wisconsin on April 16, 2004, upon his arrest in Oklahoma; and (c) Wisconsin's

acquiescence to Lira's detention in Oklahoma. (Lira's Br. 21–22.) This argument ignores the facts.

The circuit court correctly determined that Lira could not meet this requirement of Wis. Stat. § 973.15(5) in denying Lira's first claim for credit ("from April 16, 2004 onward") on the merits. (R1. 68:4–5, R2. 55:4–5, A-App. 201–202.) As the court explained, Lira was not "made available" in a "lawful manner" to Oklahoma—he escaped custody and was arrested there—and the detainer (or the signing of the revocation order or Wisconsin's "acquiescence") had nothing to do with it:

> The defendant submits that he was made available to Oklahoma by the Wisconsin detainer that was placed on him. The defendant acknowledges that the filing of a detainer ordinarily is not sufficient to trigger credit under section 973.155, Stats., *see State v. Nyborg*, 122 Wis. 2d 765 768 (Ct. App. 1985); however, he argues that it is still a means of lawfully making available a defendant to a foreign jurisdiction. *But that is not what happened.* In this instance, it was not the detainer that resulted in the defendant being "made available" to Oklahoma. The defendant escaped and was arrested in Oklahoma for new crimes. Wisconsin played no part in that.

(R1. 68:4–5, R2. 55:4–5, A-App. 201–202 (emphasis added).)

Lira's failure to show that he was made available to Oklahoma authorities is a sufficient ground on which to conclude that Wis. Stat. § 973.15(5) credit is unavailable for at least the first part of Lira's Oklahoma custody.

But it may not be sufficient grounds to show he is due no credit as to all of his time in Oklahoma—particularly for the period after April 5, 2006, when Wisconsin ("lawfully") returned Lira to Oklahoma following disposition of case numbers 2004CM1010, 2004CF2092, and 2005CF6953. (R1. 68:2, R2. 55:2, A-App. 199.) The circuit court did not address whether credit for this time on would be available under section 973.15(5); it was raised as a part of Lira's second claim

for credit (R1. 52:6–7, R2. 39:6–7, A-App. 134–35.), which the circuit court denied without prejudice for failure to petition DOC under Wis. Stat. § 973.155(5). (R1. 68:5–7, R2. 55:5–7, A-App. 202–204.)

That Wisconsin may have made Lira available to Oklahoma in a "lawful manner" in April 2006 does not mean, however, that credit is available for Lira's Oklahoma custody from April 2006 onward. That is because, as argued in the previous section, Lira's sentence was not running, as required by Wis. Stat. § 973.15(5), when he was "made available" in April 2004—or in April 2006. Again, it did not begin running until June 2017, as DOC correctly determined.

b. *Brown* was incorrectly decided, and, because it conflicts with this Court's prior decision in *Rohl*, *Rohl* governs.

To this point, the State has argued that Lira is not entitled to credit under Wis. Stat. § 973.15(5), as the statute was interpreted in *Brown*. If this Court rejects these arguments against credit, the State respectfully submits that it should re-examine its decision in *Brown*.

The State agrees with the concurrence's view in *Martinez* that *Brown* was wrongfully decided. *Martinez*, 305 Wis. 2d 753, ¶ 22 (Nettesheim, J. concurring). As Judge Nettesheim explained, *Brown* improperly framed the issue as whether Wis. Stat. § 973.15(5) or Wis. Stat. § 973.155(1) was controlling, ignoring text in section 973.15(5) indicating that the statute incorporates section 973.155's standards for determining credit:

> I would hold that *Brown* was incorrectly decided. The debate in *Brown* as to which statute was more specific was a false issue because *Wis. Stat. § 973.15(5) expressly references Wis. Stat. § 973.155.* Section 973.15(5) says, in relevant part, that when a convicted offender is made available to another

> jurisdiction, the offender " shall be credited with service of his or her Wisconsin sentence ... *under the terms of s. 973.155* ...." (Emphasis added.) And § 973.155(1)(a), in turn, says that such credit is limited to "all days spent in custody in connection with the course of conduct for which sentence was imposed." Thus, the two statutes stand comfortably alongside each other. Section 973.15(5) allows for sentence credit when the offender is turned over to another jurisdiction to serve a sentence there, but § 973.155(1)(a) limits that credit when the latter sentence is linked to the course of conduct that produced the Wisconsin sentence. The *Brown* court should have applied the clear language of the two complementary statutes instead of erecting a barrier between the two and deciding which one prevailed.

Martinez, 305 Wis. 2d 753, ¶ 22 (Nettesheim, J. concurring).

The State also agrees with the concurrence that *Brown* conflicts with *Rohl*, and because *Rohl* predates *Brown*, *Rohl* governs:

> *Brown* also falters on another front by failing to discuss *Rohl*, an earlier case relevant to the issue in *Brown*. As the majority correctly holds, this case is akin to *Rohl* because a grant of sentence credit to *Martinez* would constitute impermissible double credit against two nonconcurrent sentences. Majority, ¶ 18. *See also State v. Boettcher*, 144 Wis.2d 86, 93-96, 423 N.W.2d 533 (1988), and *Rohl*, 160 Wis.2d at 327, 466 N.W.2d 208. *Brown* was wrongly decided because it conferred dual credit contrary to Wis. Stat. § 973.155(1)(a) and *Rohl*. Where two court of appeals decisions conflict, the first decision governs. *State v. Swiams*, 2004 WI App 217, ¶ 23, 277 Wis.2d 400, 690 N.W.2d 452. Moreover, the award of dual credit in *Brown* conflicts with *Boettcher*, a prior supreme court decision that clearly controls.

Martinez, 305 Wis. 2d 753, ¶ 23 (Nettesheim, J. concurring).

The foregoing analysis demonstrates that Brown was wrongly decided, and that *Rohl* should control claims like those in *Brown*, *Martinez*, and the present case. Should this

analysis be adopted, Lira would not be entitled to credit under Wis. Stat. §§ 973.15(5) and 973.155. That is because such an award would amount to dual credit on nonconcurrent sentences. *See Rohl*, 160 Wis. 2d at 327.

D. Lira is not entitled to credit based on the standard-language phrase "until received at the institution" printed on Lira's revocation order form.

Lira also makes a brief argument that he is entitled to credit for all custody time in Oklahoma and Wisconsin from April 16, 2004, until his June 2017 entry into the prison system under standard language printed on the revocation order. (Lira's Br. 22–23.) The phrase, printed in jail credit box of the order, states: "until received at the institution." (R1. 52:19, R2. 39:19, A-App. 147.) This form language does not entitle Lira to credit.

On this form, like all standard-language revocation orders, the phrase "until received at the institution" appears in the bottom of the "thru" column in the jail credit box. (R1. 52:19, R2. 39:19, A-App. 147.) This language ensures that, in the usual case, a probationer who is in custody on a hold when his or her probation is revoked receives credit for any time he or she remains in custody following revocation, before transport to the institution. It reflects the common-sense rule, recognized in statute and case law, that credit is available for such time. *State v. Davis*, 2017 WI App 55, ¶¶ 6–10, 377 Wis. 2d 678, 901 N.W.2d 488; Wis. Stat. § 304.072(4).[10]

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[10] In *Brown*, the administrative law judge's statement that Brown was entitled to credit for time in custody on probation and from the hearing date "until his receipt at the institution" also reflects this established principle. *State v. Brown*, 2006 WI App 41, ¶ 11 n.7, 289 Wis. 2d 823, 711 N.W.2d 708. This pronouncement in *Brown*—a usual case in which the defendant was in custody

But Lira's case is not a usual case, and these authorities do not entitle Lira to credit for all custody time from April 2004 to his June 2017 receipt at the Wisconsin institution. Lira escaped custody on April 15, 2004. On the revocation order, DOC properly indicated that Lira was entitled to credit for time in Wisconsin custody on holds through April 15, 2004. But the revocation order was issued the following day, April 16, 2004, when Lira was no longer in Wisconsin custody. It would make little sense to order credit from April 15 "until received at the institution," when he was not in custody awaiting transfer to the Wisconsin institution.

Further, though Lira was taken into custody by Oklahoma authorities on April 16, 2004, his escape and additional criminal conduct led to a criminal proceeding delayed Lira's "receipt at the institution" by more than 4000 days. Neither *Davis* nor Wis. Stat. § 304.072(4) provide that credit is available in such circumstances. To grant Lira such a windfall in these circumstances would be absurd and unjust.

For these reasons, Lira is not entitled to credit DOC's form under the standard phrase "until received at the institution" printed on the revocation order form.

II. As to the remaining periods of custody set forth in Lira's second and third credit claims, this Court should uphold the circuit court's decision declining to rule on Lira's claims; alternatively, it may reach the merits and conclude that Lira is not due the credit.

As argued, Lira is not entitled to credit for any portion of his custody in another jurisdiction under Wis. Stat. § 973.15(5) because (1) his sentences were not running when

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throughout the revocation proceedings—says little about whether credit is available in this case under the standard "until received at the institution" printed on DOC's revocation order form.

he was "made available" to Oklahoma authorities, and (2) alternatively, because *Brown* was wrongly decided, and *Rohl* governs.

What remains to be addressed are Lira's following two requests for credit, contained in claims two and three of Lira's motion and petition:

- Custody from his May 19, 2005, return to Wisconsin until his March 17, 2006, return to Oklahoma, minus time he was at liberty following his mistaken release from jail custody from June 15, 2005 until December 13, 2005.[11] (124 days credit); and

- Oklahoma presentencing custody from his April 16, 2004, arrest, to his September 29, 2004, sentencing (166 days of credit).

The circuit court denied these requests without addressing the merits, concluding that Lira had failed to petition DOC under Wis. Stat. § 973.155 for the specific credit requested. (R1. 68:5–7, R2. 55:5–7, A-App. 202–204.)

As set forth below, the State believes that Wis. Stat. § 973.155(5) plainly requires defendants seeking credit after sentencing to petition DOC before bringing a credit claim in the circuit court. This interpretation is consistent with the Wisconsin Supreme Court case law.

Accordingly, this Court may uphold the circuit court's decision not to adjudicate Lira's remaining credit requests. If this Court elects to address these requests on the merits, it should conclude Lira is not entitled to credit on either request.

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[11] As Lira correctly observes, Lira is not entitled to credit for this time under *State v. Friedlander*, 2019 WI 22, ¶ 42, 385 Wis. 2d 633, 923 N.W.2d 849 (rejecting common law rule that credit is available for time at liberty through no fault of the offender).

A. The Wisconsin Supreme Court has correctly interpreted Wis. Stat. § 973.155(5) to require defendants seeking additional credit post-sentencing to first petition DOC before bringing claims in the circuit court.

At sentencing, the circuit court must determine under Wis. Stat. § 973.155(1) the days of credit to which the defendant is entitled for presentence custody. *See State v. Carter*, 2010 WI 77, ¶ 51, 327 Wis. 2d 1, 785 N.W.2d 516 (award of sentence credit is mandatory).

In Wis. Stat. § 973.155(5), the Legislature established a procedural mechanism for persons to seek credit from DOC *after* sentencing. The statute provides that a person "may petition the department to be given credit," and that "[i]f 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." Section 973.155(5).[12]

The Wisconsin Supreme Court has indicated that Wis. Stat. § 973.155(5) is mandatory, requiring persons to petition

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[12] Section 973.155(5) provides in full:

> 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.

DOC before bringing a postsentencing credit claim in the circuit court.

In *Larson v. State*, 86 Wis. 2d 187, 200, 271 N.W.2d 647 (1978), the Court declined to address merits of credit request made to the circuit court. Instead, the Court declared that Larson's "remedy is to now pursue the matter by petition to [DOC's precursor agency] as provided in sec. 973.155(5), Stats." Likewise, in *Clark v. State*, 92 Wis. 2d 617, 644, 286 N.W.2d 344 (1979), the Court determined that Clark was entitled credit, but announced that "[h]is remedy to obtain credit under sec. 973.155(5), Stats., is to petition [DOC]"); And, in *Haskins v. State*, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980), the Court again declined to address the merits of a defendant's credit claim, restating the view that Haskins's remedy was to "pursue the matter by petition" to the agency under Wis. Stat. § 973.155(5).

The Court's view—that the procedure established in Wis. Stat. § 973.155(5) is mandatory—is consistent with its approach to all statutes that establish administrative remedies. "[W]here a statute sets forth a procedure for review of administrative action and court review of the administrative decision, such remedy is exclusive and must be employed before other remedies are used." *Nodell Inv. Corp. v. City of Glendale*, 78 Wis. 2d 416, 422, 254 N.W.2d 310 (1977). This rule "is a doctrine of judicial restraint, justified by good policy reasons." *St. Croix Valley Home Builders Ass'n, Inc. v. Twp. of Oak Grove*, 2010 WI App 96, ¶ 11, 327 Wis. 2d 510, 787 N.W.2d 454. "It permits the administrative agency to apply its own expertise to the matter, promotes judicial efficiency, and may provide the court with greater clarification of the issues in the event the matter is not resolved before the agency. *Id.*

Likewise, requiring an initial DOC review of credit requests after sentencing is good policy. As the circuit court explained in its decision, courts "ha[ve] no independent

information about custody after sentencing." (R1. 68:5–7, R2. 55:5–7, A-App. 202–204.) DOC, however, maintains all records of an offender's Wisconsin custody, and DOC staff have expertise in sentence computation. Requiring claims to be presented to DOC is thus more apt to produce correct determinations—and to reduce the number of credit claims in the courts.

Therefore, based on *Larson*, *Clark*, and *Haskins*, and the principles set forth above, this Court should—and likely must—conclude that Wis. Stat. § 973.155(5) requires persons seeking credit after sentencing to petition DOC before bringing their claims in the circuit court. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246, 256 (1997) ("supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case").

Lira argues that the use of "may" ("the person may petition the department to be given credit") in Wis. Stat. § 973.155(5) indicates that the Legislature intended to merely provide a defendant with another option for requesting credit. Even if the supreme court had not spoken on this issue, this interpretation would be suspect. Here, "may" refers here to the person's option to seek credit at all—you "may" seek credit if you believe you have a claim—not to whether the petition provision is optional or mandatory.

To illustrate, an administrative code provision establishing a mandatory procedure uses "may" in a similar manner. Wisconsin Admin. Code § DOC 310.09(1) provides that an inmate "may" file an administrative appeal from the denial of an inmate complaint. There, "may" means the inmate has the right to file an administrative appeal; it does not mean the agency process is optional, and the inmate may instead seek direct review in the courts. *See Moore v. Stahowiak*, 212 Wis. 2d 744, 750, 569 N.W.2d 711 (Ct. App. 1997) (inmate must exhaust claims through administrative review process before seeking court review).

Accordingly, Lira's interpretation is unreasonable, and, regardless, contrary to *Larson*, *Clark*, and *Haskins*. As Lira points out, Wisconsin courts in recent years have not regularly applied the supreme court's interpretation of Wis. Stat. § 973.155(5). But *Larson*, *Clark*, and *Haskins* remain good law, and the circuit court did not err in following these cases by dismissing Lira's remaining claims without prejudice for Lira's failure to petition DOC for this credit.

B. If this Court reaches the merits, it should deny Lira's remaining claims.

As to the remaining requests for credit, this Court should conclude that the circuit court properly exercised its discretion in declining to address Lira's claims for failure to petition DOC under Wis. Stat. § 973.155(5). [13]

However, the State acknowledges that there is no case law establishing what constitutes an adequate "petition" to satisfy section 973.155(5). (Lira's Br. 34.) Here, in a letter to his probation agent seeking credit for all custody from April 16, 2004, onward, Lira referenced his 2004 presentence custody in Oklahoma. (R1. 37:2, R2. 24:2, A-App. 112.) He also referenced his 2005 to 2006 custody upon his return from Wisconsin, noting his absence for his mistaken release for part of this time. (R1. 37:2, R2. 24:2, A-App. 112.)

If this Court concludes that Lira, in fact, petitioned DOC with his remaining claims, and thus the circuit court should have addressed these claims, it may remand for the court to decide these claims on the merits. *See, e.g., State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶ 23, 252 Wis. 2d 404,

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[13] The Court did not, as Lira argues, misuse its discretion by not recognizing on the record that it had the discretion to apply (or not) Wis. Stat. § 973.155(5)'s petition requirement. (Lira's Br. 31.) The State is unaware of any authority requiring a court to "acknowledge" its discretion whenever exercising it.

643 N.W.2d 515 (remanding for circuit court to decide an issue court erred in not deciding in the first instance).

Alternatively, this Court may elect to simply proceed to the merits as to the remaining claims. If it does so, it should conclude that credit is unavailable under Wis. Stat. § 973.155(1).

As noted, Wis. Stat. § 973.155(1) provides that a person is entitled to credit on his or her sentence for days "spent in custody in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1). The defendant's custody must be factually connected to the course of conduct to be creditable. *Johnson*, 318 Wis. 2d 21, ¶ 33. The "course of conduct" means the specific acts for which the defendant is sentenced. *Tuescher*, 226 Wis. 2d at 471–72.

As to Lira's request for credit for his 2004 presentence Oklahoma custody, credit is unavailable because the Oklahoma case is factually unrelated to his Wisconsin cases. *Johnson*, 318 Wis. 2d 21, ¶ 33. Upon his escape, Lira drove to Oklahoma and committed new crimes, for which he was taken into custody and prosecuted. At the time, Lira was not on a probation hold in his Wisconsin cases—a Wisconsin revocation order and warrant was entered on April 16, 2014, the day of his Oklahoma arrest.

While Wisconsin had placed a detainer on Lira, the detainer merely represented a demand to return Lira to Wisconsin. *State v. Nyborg*, 122 Wis. 2d 765, 768, 364 N.W.2d 553 (Ct. App. 1985). It was insufficient under Wisconsin law to constitute custody in another jurisdiction for which credit would be available. *Id.* Finally, assuming Lira received credit for his presentence custody against his Oklahoma sentences, credit for this time against his current sentences under Wis. Stat. § 973.155 would constitute impermissible dual credit on noncurrent sentences. *Rohl*, 160 Wis. 2d at 327. Accordingly, DOC properly determined that credit was unavailable for

Lira's Oklahoma pretrial custody from his April 2004 arrest to his October 2004 sentencing.

Likewise, Lira is not entitled to credit for his 2005 to 2006 return to Wisconsin. At that time, Oklahoma returned to Wisconsin to face new charges in that were factually unrelated to his present cases. While a procedural connection exists on Lira's escape charge—he was in custody on holds in his present cases when he escaped—no factual connection existed between the cases. *State v. Zahurones*, 2019 WI App 57, ¶ 14, 389 Wis. 2d 69, 934 N.W.2d 905 (procedural connection does not suffice to satisfy connection requirement).

Additionally, any purported connection that may have existed between his present offenses and the Oklahoma custody was severed when the Oklahoma court imposed sentence in 2004. *See State v. Beets*, 124 Wis. 2d 372, 369 N.W.2d (1985). Moreover, assuming that Oklahoma returned Lira to Wisconsin pursuant to its codification of the Interstate Agreement on Detainers, Lira's Oklahoma sentences would have continued to run while he was in Wisconsin custody in 2005 and 2006. *See* 22 Okla. Stat. tit. 22 § 1347, art. V(f) ("During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run . . .). Thus, once again, an award of credit on his current sentences for this time under Wis. Stat. § 973.155 would constitute impermissible dual credit on nonconcurrent sentences. *Rohl*, 160 Wis. 2d at 327.

Accordingly, Lira is not entitled to credit against his sentences in case numbers 1992CF1195 and 1999CF163 for his 2004 presentencing custody in Oklahoma, or his 2005 2006 custody during his return to Wisconsin.

CONCLUSION

This Court should affirm the circuit court's order denying Lira's motion for sentence credit.

Dated this 18th day of December 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,859 words.

Dated this 18th day of December 2019.

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

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 18th day of December 2019.

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