

FILED
10-29-2020
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Nos. 2019AP691-CR & 2019AP692-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

CESAR ANTONIO LIRA,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

JOSHUA L. KAUL
Attorney General of Wisconsin

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 294-2907 (Fax)
wittwerjj@doj.state.wi.us

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUES.....	1
STATEMENT OF CRITERIA SUPPORTING REVIEW	2
STATEMENT OF THE CASE.....	5
ARGUMENT	11
I. This Court should grant review to give effect to the plain meaning of Wis. Stat. § 973.15(5) and clarify when a convicted offender sent to another jurisdiction is entitled to credit for custody time in that jurisdiction.	11
A. Wisconsin Stat. § 973.15(5) and the court of appeals' interpretation of the statute in <i>Brown</i>	11
B. <i>Brown</i> should be overturned because its interpretation of Wis. Stat. § 973.15(5) is contrary to the plain meaning of the statute and <i>Boettcher</i>	15
II. Review is also appropriate because the court of appeals' award of credit for custody in Wisconsin and Texas in 2005 and 2006 was contrary to Wis. Stat. § 973.155 and <i>Boettcher</i>	17
CONCLUSION.....	19

The State of Wisconsin petitions this Court to review the court of appeals' decision in *State v. Cesar Antonio Lira*, Nos. 2019AP691-CR and 2019AP692-CR (Wis. Ct. App. Sept. 29, 2020). The court of appeals affirmed in part, reversed in part, and remanded for further proceedings orders of the Milwaukee County Circuit Court denying motions for sentence credit and reconsideration.

The court of appeals concluded that credit was unavailable for Lira's custody in the State of Oklahoma following his 2004 escape from Wisconsin custody. But the court concluded Lira was entitled to credit for his service of an Oklahoma sentence from 2006 to 2017 pursuant to Wis. Stat. § 973.15(5), and for custody in Wisconsin and Texas in 2005 and 2006 pursuant to Wis. Stat. § 973.155.¹

STATEMENT OF THE ISSUES

1. Under Wis. Stat. 973.155, a convicted offender is entitled to sentence credit for "all days spent in custody in connection with the course of conduct for which sentence was imposed." Wisconsin Stat. § 973.15(5) provides that an offender lawfully made available to another jurisdiction is entitled to credit for custody time in that jurisdiction "under the terms of s. 973.155."

In this case, the court of appeals awarded Lira over 11 years of credit for custody in Oklahoma under section 973.15(5), despite the fact that the Oklahoma sentence was not "in connection with" the Wisconsin offenses for which he was sentenced. The court of appeals relied on its earlier decision in *State v. Brown*, 2006 WI App 41, 289 Wis. 2d 823, 711 N.W.2d 708, which holds that courts determining credit

¹ Note to reader: This case involves two different statutes with very similar numbers, Wis. Stat. § 973.15(5) and Wis. Stat. § 973.155.

under section 973.15(5) *may not consider* “the terms of s. 973.155,” including whether the custody in the other jurisdiction is “in connection with” the Wisconsin offense.

Should Lira’s award of credit be reversed because, under the terms of Wis. Stat. § 973.155, Lira’s Oklahoma custody was not connected to the conduct for which he was sentenced in Wisconsin? Should *Brown* be overruled because it misinterpreted the interplay between Wis. Stat. § 973.15(5) and section 973.155?

The answer to both questions is yes.

2. Under Wis. Stat. § 973.155(1)(a) and case law interpreting the statute, credit is available only for custody that is “in connection with” the conduct for which sentence is imposed, and dual credit is not available on nonconcurrent sentences. Here, the court of appeals awarded credit to Lira under section 973.155 for a second period of custody that was not connected to the present sentences, and that duplicated credit that had already been applied in another case.

Should this award of credit to Lira be vacated because it is contrary to Wis. Stat. § 973.155(1)(a) and case law interpreting the statute?

The answer is yes.

STATEMENT OF CRITERIA SUPPORTING REVIEW

1. On the first issue, a decision by this Court will help develop or clarify the law, and the issue is a question of law of a type that is likely to recur unless resolved by this Court. *See* Wis. Stat. § (Rule) 809.62(1r)(c)3.

Wisconsin Stat. § 973.155 provides that a convicted offender is entitled to sentence credit for “all days spent in custody in connection with the course of conduct for which sentence was imposed.” In *State v. Boettcher*, 144 Wis. 2d 86,

100, 423 N.W.2d 533 (1988), this Court interpreted section 973.155(1)(a) to provide that credit should be awarded in a linear, day-for-day fashion, such that dual credit is not available on nonconcurrent sentences.

Wisconsin Stat. § 973.15(5) provides as follows: “A convicted offender who is made available to another jurisdiction . . . in any . . . 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.”

This Court has never addressed the interplay between Wis. Stat. § 973.155 and Wis. Stat. § 973.15(5). The court of appeals has done so in two decisions, both published.

In *Brown*, the court of appeals considered whether a recently convicted offender who was made available to federal authorities to face federal drug charges was entitled to credit for time spent in federal custody. 289 Wis. 2d 823, ¶ 8. The court concluded that he was so entitled, and held that, when a convicted offender’s custody is transferred to another jurisdiction, Wis. Stat. § 973.15(5) is the exclusive means for determining the availability of credit. *Id.* Further, the court held that the familiar standards of section 973.155—notably the “in connection with” limitation—do not apply. *Id.*

In *State v Martinez*, 2007 WI App 225, ¶¶ 13–18, 305 Wis. 2d 753, 741 N.W.2d 280, the court of appeals determined that a “convicted offender” who was *on parole* when he was “made available” to federal authorities was not entitled to credit for his federal custody against a revocation and reconfinement occurring *after* completion of the federal term. In a concurring opinion, Judge Neal Nettesheim wrote that *Brown* was incorrectly decided and invalid as contrary to a previous court of appeals decision, *State v. Rohl*, 160 Wis. 2d 325, 466 N.W.2d 208 (Ct. App. 1991). *Martinez*, 305

Wis. 2d 753, ¶ 22 (Nettesheim, J., concurring). The judge explained that Wis. Stat. § 973.15(5) plainly incorporates Wis. Stat. § 973.155, and that Martinez was not entitled to credit under the standards of Wis. Stat. § 973.155 and case law interpreting that statute. *Id.*

Here, Lira escaped Wisconsin custody in 2004 while on probation and parole holds in the present cases and was revoked and ordered reconfined the next day. Lira was then arrested in Oklahoma for committing new offenses there, and was convicted and sentenced there. In 2005, Lira was returned to Wisconsin to face new charges, and, ultimately, was returned to Oklahoma in 2006 to serve out his Oklahoma sentences.

The court of appeals applied *Brown*. It concluded that, because Wisconsin “made [Lira] available” to Oklahoma in “a lawful manner” in 2006, he was entitled to credit against his revocation sentences in the present cases for the time he spent in Oklahoma custody on his Oklahoma sentences from 2006 through 2017. The court did not consider whether, pursuant to Wis. Stat. § 973.155(1)(a), Lira’s Oklahoma custody to serve his Oklahoma offenses was “in connection with the course of conduct” for which his sentences were imposed in the present Wisconsin cases.

Review is necessary to address whether *Brown*’s interpretation of Wis. Stat. § 973.15(5), which prohibits courts from considering the standards in Wis. Stat. § 973.155 when section 973.15(5) applies, is contrary to the section’s plain language, which provides for credit for custody in the other jurisdiction “under the terms of s. 973.155.”

2. On the second issue, review is warranted because the court of appeals’ decision conflicts with Wis. Stat. § 973.155 and controlling opinions of this Court

interpreting the statute. *See* Wis. Stat. § (Rule) 809.62(1r)(d).

As noted, Wis. Stat. § 973.155(1)(a) provides that a convicted offender is entitled to sentence credit “for all days spent in custody in connection with the course of conduct for which sentence was imposed.” And *Boettcher* holds that dual credit is not available on nonconcurrent sentences. 144 Wis. 2d at 100.

Here, the court of appeals determined that Lira was entitled to credit against his revocation sentences for his 2005 and 2006 custody in Wisconsin and Texas awaiting trial in two Wisconsin cases apart from the present cases.

But Lira’s 2005 and 2006 custody in Wisconsin and Texas had nothing to do with his revocation sentences. Lira’s return to Wisconsin was not related to his revocation sentences, which were already imposed when he was revoked in April 2004. Further, this time had already been applied to Lira’s Oklahoma sentences because they continued to run when he was in Wisconsin custody, and the allocation of credit against his revocation sentences constituted impermissible dual credit as well.

Review is warranted because the court of appeals’ award of a substantial amount of credit for Lira’s custody in Wisconsin and Texas in 2005 and 2006 contravenes Wis. Stat. § 973.155 and this Court’s decision in *Boettcher*.

STATEMENT OF THE CASE

This case has a lengthy history. The following summary is taken from the court of appeals decision and parts of the record provided in the appendix.

The 1992 and 1999 cases. In 1992, Lira was convicted of possession with intent to deliver cocaine in Milwaukee County case number 1992CF1195 (“the 1992 case”) and

sentenced to a 10-year indeterminate sentence. (R. 17; Pet-App. 103, 122.)²

While out on parole in the 1992 case, Lira was charged in Milwaukee County case number 1999CF163 (“the 1999 case”) with conspiracy to deliver cocaine and possession of a firearm as a felon. (Pet-App. 103.) Lira’s parole was revoked and he was reconfined to prison on the 1992 case. (Pet-App. 103.) Lira pleaded guilty to the drug and firearm counts in the 1999 case, and the court imposed and stayed a 16-year indeterminate sentence of imprisonment, and ordered him placed on probation for 12 years. (R. 2019AP692-CR:20; 21; Pet-App. 103, 123–25.) In 2001, Lira was again released to parole on the 1992 case. (Pet-App. 103.)

In 2002, Lira absconded from supervision. (Pet-App. 104.) In January 2004, Lira was taken into custody and the Wisconsin Department of Corrections (DOC) placed holds on him in the 1992 and 1999 cases. (Pet-App. 104.) In a third case, the State charged Lira with endangering safety in Milwaukee County case 2004CM1010 for conduct related to the holds. (Pet-App. 104.)

Escape, revocation of parole and probation, and arrest on new offenses in Oklahoma. While in custody on case 2004CM1010 and the revocation holds, Lira escaped from jail custody. (Pet-App. 104.) The State accordingly charged Lira with escape in a fourth case, Milwaukee County case number 2004CF2092. (Pet-App. 104.) On April 16, 2004, DOC entered a revocation order and warrant revoking Lira’s parole and probation in the 1992 and 1999 cases. (R. 38; Pet-App. 104, 126.) The order lifted the stay on the previously

² This cite and record cites hereinafter are to the record in 2019AP691-CR, except when the record cite specifically references 2019AP692-CR.

imposed 1999 sentence, and ordered Lira's reconfinement in the 1992 case. (R. 38; Pet-App. 126.)

On the same day, Lira was arrested in Oklahoma for committing new offenses. Wisconsin placed an interstate detainer on Lira. (Pet-App. 104.) In September 2004, Lira was convicted in Oklahoma of second-degree murder, eluding a police officer, running a roadblock, and child abuse/neglect and was sentenced to 20 years of imprisonment. (R. 64:18.)

Return to Wisconsin, flight to Texas, return to Wisconsin again, and return to Oklahoma. In May 2005, Oklahoma sent Lira to Wisconsin to face trial on his outstanding Wisconsin charges. (Pet-App. 105.) In June 2005, local authorities mistakenly released Lira on bail, and Lira again absconded. (Pet-App. 105.) Lira was arrested in Texas in December 2005, and was returned to Milwaukee in January 2006. (Pet-App. 105.) In March 2006, Lira pleaded guilty to the endangering safety and escape charges, and to a new bail jumping charge for his 2005 flight to Texas. (Pet-App. 105.) The court sentenced Lira to three years of initial confinement and three years of extended supervision, to be served consecutively to his Oklahoma sentence. (Pet-App. 105.)

In April 2006, Wisconsin returned Lira to Oklahoma to continue serving his Oklahoma sentence. (Pet-App. 105.) Lira completed his Oklahoma sentence in June 2017, and was returned to Wisconsin to serve his Wisconsin sentences—the 2004 revocation sentences in the present cases, and the sentence on the 2005 convictions. (Pet-App. 105.)

Motions for sentence credit and circuit court orders denying credit. Lira filed two *pro se* motions requesting

credit for his custody in Oklahoma, Wisconsin, and Texas from 2004 to 2017 against his revocation sentences.³ (Pet-App. 106.) The circuit court denied Lira's first motion for failure to petition DOC for a determination of credit on the revocation pursuant to Wis. Stat. § 973.155(2). (Pet-App. 106.) The circuit court denied the second motion on the ground his Oklahoma custody was not connected to his Wisconsin sentences. (Pet-App. 107.)

Lira, by counsel, filed a third motion for credit. (Pet-App. 107.) The circuit court, the Honorable Frederick C. Rosa, presiding, denied the motion without prejudice and without reaching the merits because Lira had failed to show that he had petitioned DOC for credit against the revocation sentences under Wis. Stat. § 973.155(2) and (5). (R. 53:2–3; Pet-App. 107, 129–30.) The court also concluded that it had insufficient information to decide the motion. (R. 53:2–3; Pet-App. 107, 129–30.)

Lira moved for reconsideration, providing additional documentation. (Pet-App. 107.) In a March 25, 2019 decision and order, the court concluded that Lira was not entitled to credit for his Oklahoma custody from his April 2004 arrest to his March 2005 return to Wisconsin. The court reasoned that, since Lira was only in Oklahoma because he had escaped Wisconsin custody, was not “lawfully” “made available” to Oklahoma under Wis. Stat. § 973.15(5). (R. 68:3–5; Pet-App. 107, 133–35.) The court denied all other

³ In response to Lira's requests for credit, DOC issued an amended revocation order and warrant to grant Lira credit for his Oklahoma custody from his April 2004 arrest to his October 2004 sentencing. (R. 52:39–40; Pet-App. 107.) But upon determining that Lira escaped Wisconsin custody prior to his Oklahoma arrest, DOC withdrew credit for this time because Lira was not “made available” to Oklahoma “in a lawful manner” under Wis. Stat. § 973.15(5). (R. 52:42; Pet-App. 107.)

requests for credit without reaching the merits because DOC had not specifically addressed those claims, and because Lira failed to show that he had exhausted those claims with DOC under Wis. Stat. § 973.155(5). (R. 68:5–6; Pet-App. 107, 135–36.)

Court of appeals decision. On appeal, Lira renewed his claims that he was entitled to credit against his revocation sentences for all custody time in Oklahoma, Wisconsin, and Texas from April 16, 2004 to June 2017.

As to Lira’s request for credit for his Oklahoma custody from his 2006 return to the Sooner State until the completion of his sentence in 2017, the State argued that credit against his revocation sentences was unavailable under Wis. Stat. § 973.15(5). The State argued that the statute contemplates that the “convicted offender” will be serving a period of incarceration that will continue to run when he or she is “made available” to another jurisdiction. (State’s Br. 19–25.) Here, Lira was not serving a sentence but was merely on holds when he escaped in April 2004, and his sentences did not commence until he completed his Oklahoma sentence in 2017.

Alternatively, the State argued that the court of appeals’ interpretation of Wis. Stat. § 973.15(5) was contrary to the statute’s plain language—which incorporates the standards for credit in Wis. Stat. 973.155—and that credit was unavailable under section 973.155(1)(a) and *Rohl*. (State’s Br. 28–30.) The State also argued that Lira was not entitled to credit for his custody in Wisconsin and Texas in 2005 and 2006 awaiting adjudication of his new Wisconsin charges. (State’s Br. 36–38.)

In a *per curiam* opinion, the court of appeals affirmed in part and reversed in part the circuit court’s orders denying credit and reconsideration, and remanded for further proceedings. (Pet-App. 101–02.)

The court of appeals agreed with the circuit court that Lira was not entitled to credit under Wis. Stat. § 973.15(5) for the Oklahoma custody from his April 2004 arrest to his March 2005 return to Wisconsin. Lira was not “made available” to Oklahoma authorities “in a lawful manner” when he escaped Wisconsin custody, committed new crimes in Oklahoma, and was arrested there. (Pet-App. 113–15.) The court also concluded that credit was unavailable for his Oklahoma custody from his April 2004 to his September 2004 sentencing under Wis. Stat. § 973.155 because his presentence detention in Oklahoma was based on his arrest and criminal conduct there, and was not connected to the course of conduct for which he was sentenced in Wisconsin. (Pet-App. 117.)

But, unlike the circuit court, the court of appeals concluded that Lira had exhausted his administrative remedies under Wis. Stat. 973.155(5), detailing his efforts to raise his claims with DOC. (Pet-App. 109–10.)⁴

Turning to the merits, the court concluded that Lira was entitled to credit against his revocation sentences for his Oklahoma custody from his March 2006 return to Oklahoma to the completion of his Oklahoma sentence in June 2017. (Pet-App. 115–16.) The court relied on *Brown* to conclude that he was entitled to credit for this time under Wis. Stat. § 973.15(5) because he was “made available” to Oklahoma “in a lawful manner” when Wisconsin sent him to Oklahoma in March 2006 to continue serving his Oklahoma sentences. (Pet-App. 115–16.)

The court did not address either of the State’s arguments that credit was unavailable under Wis. Stat. § 973.15(5).

⁴ The State does not seek review of this determination.

The court also concluded that Lira was entitled to credit for his Wisconsin and Texas custody in 2005 and 2006 awaiting the adjudication of his new Wisconsin offenses. The court offered a variety of reasons for this conclusion. First, the court said that it was “persuaded” that this custody time “must be considered under Wis. Stat. § 304.072(5), which states that ‘[t]he sentence of a revoked probationer shall be credited with the period of custody in a jail . . . pending revocation and commencement of sentence according to the terms of s. 973.155.’” (Pet-App. 119.) Then, the court concluded without comment that his confinement in jail in Wisconsin “had a sufficient factual connection to the revocation sentences in the 1992 and 1999 cases to entitle Lira to sentence credit in those cases” under Wis. Stat. § 973.155(1)(a). (Pet-App. 119.) The court added that, because Lira did not earn sentence credit against his 2004-05 cases, it did not need to address whether an award of credit for this time on the revocation sentences would constitute dual credit. (Pet-App. 120.)

The State requests review of the court of appeals decision.

ARGUMENT

I. This Court should grant review to give effect to the plain meaning of Wis. Stat. § 973.15(5) and clarify when a convicted offender sent to another jurisdiction is entitled to credit for custody time in that jurisdiction.

A. Wisconsin Stat. § 973.15(5) and the court of appeals’ interpretation of the statute in *Brown*.

Wisconsin Stat. § 973.155 provides that a convicted offender is entitled to sentence credit for “all days spent in custody in connection with the course of conduct for which

sentence was imposed.” In *Boettcher*, 144 Wis. 2d at 100, this Court interpreted section 973.155(1)(a) to provide that credit should be awarded in a linear, day-for-day fashion, such that dual credit is not available on nonconcurrent sentences.

Under Wis. Stat. § 973.15(5), “[a] convicted offender who is made available to another jurisdiction . . . in any . . . 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.”

In 2006, the court of appeals addressed Wis. Stat. § 973.15(5) for the first time in *Brown*. Brown was on probation for a drug offense when, in 1995, he committed rules violations, and an administrative law judge revoked Brown’s probation and imposed sentence. *Brown*, 289 Wis. 2d 823, ¶ 3 & n.7. While waiting in jail to be transferred to state prison to serve his revocation sentence, Brown was sent to federal authorities to face federal drug charges. *Id.* ¶ 3. Brown was convicted and sentenced on these charges and remained in the federal system until completing his sentences in 2004, when he was returned to Wisconsin custody to serve his revocation sentence. *Id.*

Brown petitioned DOC for credit against his sentence for his federal custody. *Brown*, 289 Wis. 2d 823, ¶ 5. After DOC denied his requests, Brown filed motions for credit in the circuit court, which were also denied. *Id.*

The court of appeals reversed, determining that Brown was entitled to credit under Wis. Stat. § 973.15(5). *Brown*, 289 Wis. 2d 823, ¶¶ 1, 11. The court rejected the State’s argument that Brown was not entitled to credit under the sentence credit statute, Wis. Stat. § 973.155(1)(a), determining that section 973.15(5) precluded consideration of the standards in section 973.155. *Id.* ¶ 11.

“[W]hether [Brown’s] federal sentences ‘were in connection with the course of conduct for which sentence was imposed’ [under Wis. Stat. § 973.155(1)(a)] is not the correct test,” the court announced. *Brown*, 289 Wis. 2d 823, ¶ 11. “The question to be answered is whether Brown falls within the ambit of Wis. Stat. § 973.15(5), which is the specific statute governing this case. We conclude that he does.” *Id.* The court then concluded that Brown was entitled to credit because he was a “convicted offender” who was “made available” to another jurisdiction “in a lawful manner.” *Id.* The court also rejected as irrelevant to section 973.15(5) the State’s alternative argument that credit was unavailable because Brown’s revocation sentence did not begin until his federal sentence was completed. *Id.* ¶ 11 & n.6.

The next year, in *Martinez*, the court of appeals considered a Wis. Stat. § 973.15(5) claim for credit from another defendant who was also plainly a “convicted offender” “lawful[ly]” “made available” to federal authorities. *Martinez*, 305 Wis. 2d 753, ¶¶ 2–5. But Martinez was a parolee when he was taken into custody by federal authorities, and he did not violate his parole and cause his reconfinement until he was back on state parole months after completing his federal sentence. *Id.*

While the judges agreed that Martinez was not entitled to credit, they were split on the rationale. The majority concluded that to grant Martinez credit under Wis. Stat. § 973.15(5) for his federal custody in these circumstances would be absurd. *Martinez*, 305 Wis. 2d 753, ¶¶ 13, 17. Credit was unavailable because, the majority explained, “[w]hether Martinez would be subject to state incarceration again was purely speculative” at the time he was in federal custody. *Id.*

The majority also said that Martinez’s situation resembled that of the defendant in *Rohl*. *Martinez*, 305

Wis. 2d 753, ¶ 14 (discussing *Rohl*, 160 Wis. 2d at 328). *Rohl*, like Martinez, was on parole when he was serving a sentence in another jurisdiction (California). *Id.* After completing his California sentence and being returned to Wisconsin, his parole was revoked, and *Rohl* sought credit for his California custody against his revocation sentence. *Id.* The circuit court rejected his claim, and the court of appeals affirmed, concluding that an award of credit “would constitute impermissible double credit against two nonconcurrent sentences.” *Id.* ¶ 16 (discussing *Rohl*, 160 Wis. 2d at 327–29).

In concurrence, Judge Nettesheim said that he would hold that *Brown* was incorrectly decided, and further, because it conflicted with the court’s prior decision in *Rohl*, *Brown* was invalid under the first-decision-in-time rule, *State v. Swiams*, 2004 WI App 217, ¶ 23, 277 Wis. 2d 400, 690 N.W.2d 452. *Martinez*, 305 Wis. 2d 753, ¶¶ 21–23 (Nettesheim, J. concurring).

“The debate in *Brown*,” explained the judge, “as to which statute was more specific was a false issue because Wis. Stat. § 973.15(5) expressly references Wis. Stat. § 975.155.” *Martinez*, 305 Wis. 2d 753, ¶ 22 (Nettesheim, J. concurring). Thus, “[s]ection 973.15(5) allows for sentence credit when the offender is turned over to another jurisdiction to serve a sentence there, but [section] 973.155(1)(a) limits that credit when the latter sentence is linked to the course of conduct that produced the Wisconsin sentence.” *Id.* “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.” *Id.* Finally, the judge said that “*Brown* was wrongly decided because it conferred dual credit contrary to Wis. Stat. § 973.155(1)(a) and *Rohl*.” *Id.* ¶ 23.

Lira is the first court of appeals decision to apply Wis. Stat. § 973.15(5) since *Martinez* and *Brown*.

B. *Brown* should be overturned because its interpretation of Wis. Stat. § 973.15(5) is contrary to the plain meaning of the statute and *Boettcher*.

Brown's interpretation of Wis. Stat. § 973.15(5), which holds that Wis. Stat. § 973.15(5) precludes consideration of the rules for sentence credit in Wis. Stat. § 973.155, is contrary to the statute's plain meaning, and to this Court's decision in *Boettcher*.

The text of Wis. Stat. § 973.15(5) does not preclude consideration of Wis. Stat. § 973.155; it *requires* consideration of section 973.155. The statute provides that, when a convicted offender is lawfully made available to another jurisdiction, he or she "shall be credited with service of his or her Wisconsin sentence or commitment *under the terms of s. 973.155 . . .*" Section 973.15(5) (emphasis added).

In turn, the most familiar "term" of Wis. Stat. § 973.155(1)(a) provides that credit is available for "all days spent in custody in connection with the course of conduct for which sentence was imposed." Thus, as correctly read by the *Martinez* concurrence, section 973.15(5) entitles an offender to credit when he or she is sent to another jurisdiction to serve a sentence there, if, under section 973.155(1)(a), that sentence is linked to the course of conduct that produced the Wisconsin sentence. *Martinez*, 305 Wis. 2d 753, ¶ 22 (Nettesheim, J. concurring).

Contrary to *Brown*'s interpretation of Wis. Stat. § 973.15(5), this reading of the statute harmonizes sections 973.15(5) and 973.155 rather than creating conflict where there was none. *See State v. Reyes Fuerte*, 2017 WI 104, ¶ 29, 378 Wis. 2d 504, 904 N.W.2d 773 ("Where multiple statutes

are at issue, this court seeks to harmonize them through a reasonable construction that gives effect to all provisions.”). This reading also does not treat the phrase “under the terms of s. 973.155” as surplusage. *See State v. Matasek*, 2014 WI 27, ¶ 18, 353 Wis. 2d 601, 846 N.W.2d 811 (“[E]very word appearing in a statute should contribute to the construction of the statute . . .”).

Brown’s incorrect reading of Wis. Stat. § 973.15(5) results in large awards of credit when credit is plainly not authorized by the statute. Here, as in *Brown* and *Martinez*, the statute does not authorize credit for two reasons. First, credit is not available because, under Wis. Stat. § 973.155(1)(a), Lira’s custody on his Oklahoma sentences was for the new crimes committed in Oklahoma and was not connected to the Wisconsin conduct resulting in his 1992 and 1999 offenses and 2004 revocation.

Second, credit is not available for Lira’s 2006 to 2017 Oklahoma custody under this Court’s interpretation of Wis. Stat. § 973.155 in *Boettcher*. As noted, *Boettcher* holds that section 973.155 entitles convicted offenders to credit on a day-for-day basis, such that credit is available on the first sentence imposed and not on subsequent, nonconcurrent sentences. 144 Wis. 2d at 100.

Lira’s revocation sentences did not begin until he completed his Oklahoma sentence and was returned to Wisconsin in June 2017. *See* Wis. Stat. § 973.10(2) (sentence imposed by a revocation order does not begin until the offender enters prison). Lira’s revocation sentences were therefore nonconcurrent with the Oklahoma sentence, and thus an award of credit for the Oklahoma custody would constitute impermissible dual credit on noncurrent sentences, contrary to this Court’s interpretation of Wis. Stat. § 973.155(1)(a) in *Boettcher*, and to the court of appeals decision in *Rohl*.

For these reasons, review should be granted to overturn the court of appeals decision in *Brown*, and to give effect to the plain meaning of Wis. Stat. § 975.15(5).

II. Review is also appropriate because the court of appeals' award of credit for custody in Wisconsin and Texas in 2005 and 2006 was contrary to Wis. Stat. § 973.155 and *Boettcher*.

As noted, Wis. Stat. § 973.155(1)(a) provides that an offender is entitled to credit against a sentence “for all days spent in custody in connection with the course of conduct for which sentence was imposed.” And *Boettcher* interpreted section 973.155 to hold that dual credit is not available on nonconcurrent sentences. *Boettcher*, 144 Wis. 2d at 100.

The court of appeals' award of credit for Lira's pretrial custody in Wisconsin and Texas jails on his 2004 and 2005 cases was contrary to Wis. Stat. § 973.155(1)(a) and *Boettcher*.

When Lira was returned to Wisconsin in 2005, it was to face charges in the 2004 and 2005 cases for endangering safety and escape. His custody in Wisconsin and then Texas had nothing to do with his revocation sentences in the 1992 and 1999 cases (at issue here), which were imposed when the revocation order and warrant was issued in April 2004 following his escape.

So, when Lira was in Wisconsin in 2005 and 2006, he was not awaiting his transfer to prison to serve his revocation sentence under Wis. Stat. § 304.072(5),⁵ as the

⁵ Wisconsin Stat. § 304.072(5) provides: “The sentence of a revoked probationer shall be credited with the period of custody in a jail, correctional institution or any other detention facility pending revocation and commencement of sentence according to the terms of s. 973.155.”

court of appeals incorrectly concluded. (Pet-App. 119.) In 2005 and 2006, Lira was only in Wisconsin temporarily awaiting trial on two unconnected Wisconsin cases, to be returned to Oklahoma upon resolution of those cases. There was no prospect in 2005 and 2006 of him being transferred from a Wisconsin or Texas jail to a Wisconsin prison to serve his revocation sentences.

The court of appeals appeared to justify in part its award of credit for the 2005 and 2006 time against the 1992 and 1999 revocation sentences because the sentencing court had not awarded Lira credit for pretrial custody against the 2004 and 2005 cases. (Pet-App. 119–20.) But, while the sentencing transcript in those cases is not a part of this record, it is very likely that this time was not awarded because Lira was not entitled to it. That's because, as the circuit court noted, Lira's Oklahoma sentences *continued to run* while he was awaiting trial in Wisconsin and Texas on the 2004 and 2005 cases. (R. 68:5; Pet-App. 135.) In other words, Lira's custody in Wisconsin and Texas in 2005 and 2006 had already been counted against his Oklahoma sentences. Because the sentences in the new Wisconsin cases were imposed *consecutively* to his Oklahoma sentence (Pet-App. 105), awarding Lira credit for this time against his Wisconsin sentences, too, would have amounted to impermissible dual credit on consecutive sentences. *See Boettcher*, 144 Wis. 2d at 100.

Likewise, the court of appeals' award of credit for Lira's 2005 and 2006 custody in Wisconsin and Texas against the revocation sentences (at issue here) amounted to impermissible dual credit on nonconcurrent sentences, contrary to *Boettcher*. As explained, while Lira was in Wisconsin and Texas in 2005 and 2006, the days were tallied against his Oklahoma sentence as that sentence continued to run. Because, as also explained, Lira's revocation

sentences were nonconcurrent with the Oklahoma sentence, awarding credit against the revocation sentences for the 2005 and 2006 Wisconsin and Texas custody, as well as for the 2006 to 2017 Oklahoma custody, improperly conferred dual credit on a nonconcurrent sentence. *See Boettcher*, 144 Wis. 2d at 100.

Accordingly, review is also warranted because the court of appeals' award of credit for Lira's 2005 and 2006 custody contravened Wis. Stat. § 973.155 and *Boettcher*.

CONCLUSION

For the reasons set forth herein, this Court should grant this petition and reverse the decision of the court of appeals.

Dated this 29th day of October 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 294-2907 (Fax)
wittwerjj@doj.state.wi.us

CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 5,288 words.

Dated this 29th day of October 2020.

JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

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

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

Dated this 29th day of October 2020.

JACOB J. WITTWER
Assistant Attorney General

Appendix
State of Wisconsin v. Cesar Antonio Lira
Case Nos. 2019AP691-CR & 2019AP692-CR

<u>Description of Document</u>	<u>Pages</u>
<i>State of Wisconsin v. Cesar Antonio Lira</i> , Case Nos. 2019AP691-CR & 2019AP692-CR, Court of Appeals Decision, dated Sept. 29, 2020.....	101–121
<i>State of Wisconsin v. Cesar Antonio Lira</i> , Milwaukee County Case No. 1992CF1195, Judgment of Conviction, dated July 21, 1992.....	122
<i>State of Wisconsin v. Cesar Antonio Lira</i> , Milwaukee County Case No. 1999CF163, Amended Judgment of Conviction, dated Apr. 4, 2001.....	123–124
<i>State of Wisconsin v. Cesar Antonio Lira</i> , Milwaukee County Case No. 1999CF163, Amended Judgment of Conviction, dated Dec. 9, 1999.....	125
<i>State of Wisconsin v. Cesar Antonio Lira</i> , Milwaukee County Case Nos. 1992CF1195 & 1999CF163, Revocation Order, dated Apr. 16, 2004.....	126–127
<i>State of Wisconsin v. Cesar Antonio Lira</i> , Milwaukee County Case Nos. 1992CF1195 & 1999CF163, Decision and Order Denying Motion for Custody Credit, dated Oct. 15, 2018	128–130

<i>State of Wisconsin v. Cesar Antonio Lira,</i> Milwaukee County Case Nos. 1992CF1195 & 1999CF163, Decision and Order Denying Motion for Reconsideration, dated Mar. 25, 2019	131–138
---	---------

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

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 first names and last initials instead of full names of persons, specifically including 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 29th day of October 2020.

JACOB J. WITTWER
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)**

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

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

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

Dated this 29th day of October 2020.

JACOB J. WITTWER
Assistant Attorney General