STATE OF WISCONSIN

IN SUPREME COURT

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

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

CESAR ANTONIO LIRA,

Defendant-Appellant.

APPEAL FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING IN PART AND REVERSING IN PART ORDERS DENYING MOTIONS FOR SENTENCE CREDIT AND RECONSIDERATION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE FREDERICK C. ROSA, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUES PRESENTED

1. Wisconsin Stat. § 973.15(5) provides that a convicted offender lawfully made available to another jurisdiction is entitled to credit for custody in the other jurisdiction "under the terms of s. 973.155."[1] In turn, the plain language of Wis. Stat. § 973.155 provides that credit is available only for custody connected to the sentenced conduct, and that "dual credit" is prohibited on nonconcurrent sentences.

In *State v. Brown*, 2006 WI App 41, 289 Wis. 2d 823, 711 N.W.2d 708, the court of appeals read Wis. Stat. § 973.15(5) to bar consideration of Wis. Stat. § 973.155 in determining credit under the statute, treating the phrase "under the terms of s. 973.155" as surplusage.

Here, the court of appeals, relying on *Brown*, granted Defendant-Appellant Cesar Antonio Lira over 11 years of credit for custody on Oklahoma sentences—an award that, contrary to Wis. Stat. § 973.155, conferred impermissible dual credit on custody that was not connected to the sentence imposed.

Should this Court overrule *Brown*, adopt a reading of Wis. Stat. § 973.15(5) that is faithful to the statutory language, and reverse the court of appeals' decision granting Lira over 11 years of sentence credit?

2. The court of appeals also granted about four and one-half months of credit for Lira's custody upon his May 2005 return to Wisconsin from Oklahoma to face new charges unconnected to the sentenced conduct. The court granted

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[1] Note to reader: This case concerns two similarly numbered but distinct statutes, Wis. Stat. § 973.15(5) and Wis. Stat. § 973.155.

credit for this time under Wis. Stat. § 304.072(5) upon concluding that, at the time, Lira was awaiting transfer to prison on his present sentence—even though he did not, and could not, begin serving those sentences until completing his out-of-state sentences many years later. The court also determined that the custody on the detainer was connected to the conduct for which the present sentences were imposed—even though the detainer was on other charges, and sentence had already been imposed in the present cases.

Should this Court determine that Lira was not awaiting transfer to prison on his present sentences while in custody on the 2005 Wisconsin detainer, and that Lira's custody on the detainer was not connected to the sentenced conduct?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

INTRODUCTION

In April 2004, Cesar Lira was in jail on probation and parole holds. Facing revocation—and the imposition of a 16-year prison term upon revocation—Lira escaped jail custody. The Wisconsin Department of Corrections (DOC) issued a revocation order and warrant revoking his probation and parole and imposing sentence.

The day after his escape, Lira was arrested for committing grave new offenses in Oklahoma for which he was ultimately incarcerated for 12 years. Upon completing his Oklahoma sentences in 2017, Lira was returned to Wisconsin to begin serving his 16-year sentence on revocation, and other sentences.

But for his 2004 escape to avoid his Wisconsin sentences, Lira's Oklahoma crimes and sentences would not

have occured. And Lira's Oklahoma crimes had nothing to do with his Wisconsin crimes. Nonetheless, Lira sought credit toward his Wisconsin sentences for all custody time in Oklahoma, and for several months of custody following a May 2005 return to Wisconsin to face new charges unconnected to the sentenced conduct. DOC and the circuit court denied his requests.

Lira appealed, and the Wisconsin Court of Appeals affirmed in part and reversed in part. Addressing Lira's Oklahoma custody, the court considered whether Lira was entitled to credit under Wis. Stat. § 973.15(5), which provides that a "convicted offender" who is "lawful[ly]" "made available" to another jurisdiction must be credited with service of his or her Wisconsin sentence "under the terms of s. 973.155" for custody time in the other jurisdiction. The court concluded that Lira was not entitled to credit for his initial period of custody in Oklahoma—from his April 2004 arrest until his May 2005 transport to Wisconsin—because he had not been "lawfully" "made available" to Oklahoma authorities during that time; he had escaped Wisconsin custody and been arrested in Oklahoma.

But the court concluded that Lira was entitled to more than 11 years of credit (April 2006 to June 2017) for the remainder of his Oklahoma custody because Wisconsin "lawfully" "made [Lira] available" to Oklahoma when it returned Lira back to Oklahoma in April 2006 to serve his Oklahoma sentences.

Relying on its interpretation of Wis. Stat. § 973.15(5) in *Brown*, 289 Wis. 2d 823, the court of appeals did not consider whether, pursuant to Wis. Stat. § 973.15(5), its order of credit was "under the terms of s. 973.155," the general sentence credit statute. That is because *Brown* read section 973.15(5) to *preclude* courts from considering section 973.155's terms when determining credit under section 973.15(5). *Brown*

regarded sections 973.15(5) and 973.155 as conflicting, and treated the phrase "under the terms of s. 973.155" as surplusage.

This Court should overturn *Brown*. *Brown*'s interpretation of Wis. Stat. § 973.15(5) is objectively wrong, resulting, as here, in large awards of credit not authorized by the statute's plain language. Instead, this Court should interpret section 973.15(5) in a manner that gives full effect to the phrase "under the terms of s. 973.155" and harmonizes sections 973.15(5) and 973.155. Under such an interpretation, Lira is not entitled to credit for his Oklahoma custody toward his present sentences.

In its decision, the court of appeals also granted credit for several months of custody upon Lira's May 2005 return to Wisconsin to face the escape charge and another charge. The court awarded credit upon concluding that (1) Lira was awaiting transfer to prison to serve his present revocation sentences under Wis. Stat. § 304.072; and (2) Lira's custody was connected to the conduct for which he was sentenced. Both these conclusions are incorrect. In May 2005, Lira was not awaiting transfer to prison to serve his present sentences, which did not, and could not, begin until the Oklahoma sentences were completed in June 2017. And his custody upon Wisconsin's extradition request to face new charges was not in connection with the course of conduct for which Lira was sentenced in the present cases.

This Court should reverse the court of appeals' decision.

STATEMENT OF THE CASE

Factual Background

The 1992 and 1999 convictions. In 1992, Lira was convicted of possession of cocaine in Milwaukee County case number 1992CF1195 ("the 1992 case") and sentenced to a

term of 10 years of imprisonment. (R1.[2] 17:1, Pet-App. 122.) In 1996, Lira was released to parole supervision. (R1. 52:12, R2. 39:12.)

In January 1999, Lira was charged with new offenses in Milwaukee County case number 1999CF163 ("the 1999 case"). (R2. 1.) Lira was convicted later that year upon guilty pleas of conspiracy to deliver cocaine and possession of a firearm as a repeater. (R2. 1; 20:1, Pet-App. 125; 21:1–2, Pet-App. 123–24.) On the drug count, the court imposed and stayed a sentence of up to 16 years of imprisonment, and ordered him placed on probation for 12 years. (R2. 21:1, Pet-App. 123.) On the firearm count, the court sentenced Lira to 2 years of imprisonment. (R2. 20:1, Pet-App. 125.) Lira's parole in the 1992 case was also revoked and he was reconfined. (R1. 52:13, R2. 39:13.) After serving the revocation confinement on the 1992 case, Lira was (re-)released to parole and probation in 2001. (R1. 52:12, R2. 39:12.)

In November 2002, Lira absconded supervision when his probation agent attempted to take him into custody for rules violations.[3] (R1. 52:12, R2. 39:12.) Lira remained at large until January 2004, when he was arrested by Wisconsin Department of Justice agents. (R1. 52:12, R2. 39:12.)

Lira's escape to Oklahoma*, *revocation of parole and probation in the 1992 and 1999 cases*, *and adjudication of new Oklahoma charges. The Department of Corrections (DOC) placed parole and probation holds on Lira in the 1992 and 1999 cases. From January 2004 to mid-April 2004, Lira was in custody at the Milwaukee Secure Detention Facility. (R1. 52:19, R2. 39:19, Pet-App. 127.) The

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[2] "R1." refers to the record in 2019AP691-CR, and "R2." to the record in 2019AP692-CR.

[3] These included unauthorized out-of-state travel and "possessing approximately $55,000 cash." (R1. 52:12, R2. 39:12.)

State also charged Lira with a new offense, endangering safety with use of a dangerous weapon, in Milwaukee County case number 2004CM1010 ("the 2004 endangering safety case"). (R1. 68:2, R2. 55:2, Pet-App. 132.)

On April 15, 2004, Lira escaped the custody of law enforcement while being transported to a medical appointment.[4] (R1. 52:20; 64:4; R2. 39:20; 51:4.) Lira was charged with escape in Milwaukee County case number 2004CF2092 ("the 2004 escape case") as a result. (R1. 68:2, R2. 55:2, Pet-App. 132.)

On April 16, 2004, DOC entered a revocation order and warrant revoking Lira's parole and probation.[5] (R1. 52:19, R2. 39:19, Pet-App. 127.) The order removed the stay of sentence in the 1999 case and ordered reconfinement in the 1992 case. (R1. 52:19, R2. 39:19, Pet-App. 127.)

That day, April 16, 2004, Lira was arrested in Oklahoma upon committing new offenses. (R1. 52:20, R2. 39:20.) Wisconsin placed an interstate detainer on Lira. (R1. 52:20, R2. 39:20.)

Oklahoma charged Lira with several offenses for his criminal conduct on April 16.[6] (R1. 64:18; R2. 55:4.) On

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[4] Upon arriving at the appointment, Lira fled officers into his girlfriend's waiting vehicle. (R1. 64:4; R2. 55:4.)

[5] The order indicated that Lira was due 97 days of credit for his January 9 to April 15 custody on the probation hold. (R1. 52:19, R2. 39:19, Pet-App. 127.) This credit is not at issue in this appeal.

[6] Lira led Oklahoma officers on a high-speed chase, which ended when he ran a roadblock 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.)

September 30, 2004, Lira pled guilty to second-degree murder, eluding a police officer, running a roadblock, child neglect, and being a fugitive from justice, and was sentenced to a total of 20 years of imprisonment. (R1. 52:21–22; 64:21; R2. 39:21–22; 55:5.) Lira remained in Oklahoma custody from April 16, 2004, until May 2005. (R1. 64:3; R2. 39:3.)

May 2005 return to Wisconsin, mistaken release, April 2006 return to Oklahoma. In May 2005, Oklahoma returned Lira to Wisconsin on a detainer to face the escape and endangering safety charges in the 2004 cases. (R1. 68:2, R2. 55:2.)

Lira entered the custody of the Milwaukee County Sheriff's Department on May 22, 2005. (R1. 52:28–34; R2. 39:28–34.) On June 15, 2005, Lira was mistakenly released after posting bail in the 2004 cases. (R1. 68:2, R2. 55:2, Pet-App. 132.) Lira absconded to Texas; on December 13, 2005, he was arrested in San Antonio. (R1. 68:2, R2. 55:2, Pet-App. 132.) Lira was subsequently charged with bail jumping in Milwaukee County case number 2005CF6953 ("the 2005 case"). (R1. 68:2, R2. 55:2, Pet-App. 132.)

On January 11, 2006, Lira was returned to Wisconsin from Texas to face charges in the 2004 cases and the new 2005 case. (R1. 52:28, R2. 39:28.) On March 17, 2006, the cases were resolved by a global plea agreement. (R1. 68:2, R2. 55:2, Pet-App. 132.) The circuit court imposed a total sentence of three years of initial confinement and three years of extended supervision, to be served consecutively to his Oklahoma sentence. (R1. 68:2, R2. 55:2, Pet-App. 132.) For reasons not clear on this record, the circuit court did not grant credit against the sentences for Lira's predisposition custody in 2005 and 2006 in Wisconsin and Texas. (Pet-App. 119–20.)

On April 5, 2006, Wisconsin returned Lira to Oklahoma. (R1. 68:2, R2. 55:2, Pet-App. 132.) He completed

his Oklahoma sentences on June 9, 2017. (R1. 68:2, R2. 55:2, Pet-App. 132.)

June 2017 return to Wisconsin and 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.)

DOC determined that Lira began serving his 2004 revocation sentences on June 9, 2017, the date he completed his Oklahoma sentences. (R1. 68:2–3, R2. 55:2–3, Pet-App. 132–33.) 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.) In March 2018, DOC removed this credit in a second amended revocation order. (R1. 56:17, R2. 43:17.)

Requests for Sentence Credit in Circuit Court

Lira's pro se motions. In September 2017, Lira filed a *pro se* motion for credit against the 1992 and 1999 revocation sentences. (R1. 35:1, R2. 22:1.) Lira requested credit under Wis. Stat. § 973.15(5) and Wis. Stat. § 973.155(1) for all days spent in custody in Oklahoma from April 16, 2004, to June 9, 2017. (R1. 35:1–2, R2. 22:1–2.) The circuit court, the Honorable Carl Ashley presiding, denied the motion without addressing the merits because Lira had not shown that he had petitioned DOC for the additional credit before seeking relief in the circuit court. (R1. 36:1, R2. 23:1.)

In January 2018, Lira filed a second motion for credit. (R1. 37:1, R2. 24:1.) With this motion, Lira provided documents showing that he had asked multiple DOC officials for the credit. (R1. 37:2–8, 13–14, R2. 24:2–8, 13–14.) Lira also provided the computation sheet showing DOC's credit calculations in his cases, and, upon the court's request, the

April 16, 2004 revocation order. (R1. 37:11; 39:2; R2. 24:11; 25:2.)

In a January 22, 2018 decision and order, the circuit court, by Judge Ashley, denied Lira's credit request on the merits. (R1. 40:1, R2. 27:1.) The court concluded that credit was unavailable because Lira's Oklahoma crimes were unrelated to his Wisconsin offenses. (R1. 40:1, R2. 27:1.)

Lira appealed by appointed counsel. (R1. 46; R2. 33.) On counsel's motion for voluntary dismissal, the court of appeals dismissed the appeal to allow counsel to relitigate the credit claims in the circuit court. (R1. 49; 50; R2. 36; 37.)

Motion by counsel. In October 2018, Lira, by counsel, filed a third motion for credit against his revocation sentences in the 1992 and 1999 cases. (R1. 52:1–42, R2. 39:1–42.) Lira divided his requests into three claims:[7]

(1) *Credit from April 16, 2004, to June 2017*. Lira argued that he was entitled to credit for the entire period from his April 16, 2004 arrest in Oklahoma until completion of his Oklahoma sentences in June 2017, under Wis. Stat. § 973.15(5). (R1. 52:5–6, R2. 39:5–6.)

(2) *Credit from May 2005 to June 2017*. As an additional alternative, Lira argued that, even if he was not entitled to credit for his initial period of custody in Oklahoma from April 2004 to April 2005, he was nonetheless entitled to credit for his custody in Oklahoma from April 2006 to June 2017 under Wis. Stat. § 973.15(5). (R1. 52:6–7, R2. 39:6–7.) Lira also argued that he was entitled to credit for all days in custody from his May 22, 2005 return to Wisconsin to

[7] Lira also sought 35 days for credit that was not awarded against the 1999 revocation sentence in 1992CF1195. (R1. 52:8, R2. 39:8.) Lira did not renew this request in the court of appeals.

his April 2006 return back to Oklahoma.[8] Lira maintained that this time was creditable because, once he returned to Wisconsin, he was in jail awaiting commencement of his revocation sentences under Wis. Stat. § 304.072. (R1. 52:6, R2. 39:6.)

(3) *Credit from April 16, 2004, to September 29, 2004*. As another alternative, Lira argued that, while his Oklahoma case was pending between his April 2004 arrest and his September 2004 sentencing in Oklahoma, he was in jail awaiting commencement of his Wisconsin revocation sentences under Wis. Stat. § 304.072. (R1. 52:7, R2. 39:7.)

In an October 15, 2018, decision and order, the circuit court, the Honorable Frederick C. Rosa presiding, denied these claims "without prejudice and without deciding the merits." (R1. 53:1–3, R2. 40:1–3, Pet-App. 128–30.) The court said that it lacked sufficient information to decide Lira's claims because Lira had not shown that he had "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, Pet-App. 129.)

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.) 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.) Lira also submitted additional documents. (R1. 56:8–24, R2. 43:8–24.)

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[8] But, as noted, Lira was only in custody for about four and one-half months of this because he was at liberty from June to December 2005 upon his mistaken release from Milwaukee jail custody. (R1. 68:2, R2. 55:2.)

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, Pet-App. 131–38.) 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, Pet-App. 133–35.) The court agreed with the State that Lira was not entitled to credit under Wis. Stat. § 973.15(5) and *Brown* for his Oklahoma custody from April 16, 2004, onward because he was not "made available" to Oklahoma in a "lawful manner" when he escaped Wisconsin custody and was arrested in Oklahoma. (R1. 68:4–5, R2. 55:4–5, Pet-App. 134–35.)

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, Pet-App. 135–37.) 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, Pet-App. 135–37.) 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, Pet-App. 135–36.) 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, Pet-App. 136.)

Wisconsin Court of Appeals' decision

On appeal, Lira renewed his three alternative requests for credit. Lira relied primarily on *Brown* in arguing that he was entitled to credit for his time in Oklahoma custody from his April 16, 2004 arrest to the June 2017 completion of his sentences. (Lira's WCA Br. 19–23, 44–45.) And, as to his second and third requests for credit, Lira argued that he was not required to exhaust his credit claims with DOC before raising those claims in the circuit court. (Lira's WCA Br. 25–33.) Regardless, Lira argued, he had exhausted those claims, and he was due the requested credit. (Lira's WCA Br. 34–42.)

In response, the State argued that Lira was not entitled to credit for his Oklahoma custody under Wis. Stat. § 973.15(5) because he was an escapee and thus was not "lawful[ly]" "made available" to Oklahoma. (State's WCA Br. 23–28.) The State also argued that *Brown* was wrongly decided and conflicted with a prior decision, *State v. Rohl*, 160 Wis. 2d 325, 466 N.W.2d 208 (Ct. App. 1991), which was controlling instead. (State's WCA Br. 28–30.) The State maintained that Lira was required under Wis. Stat. § 973.155(5) to exhaust his claims with DOC, and that, at least as to some of his requests, the circuit court was correct that Lira had failed to do so. (State's WCA Br. 31–36.) But the State argued that, even if his claims were exhausted, Lira was not entitled to the additional requested credit. (State's WCA Br. 36–38.)

In a *per curiam* decision, the Wisconsin Court of Appeals, District I, affirmed in part, and reversed in part, the orders denying motions for sentence credit and reconsideration. *State v. Lira*, case nos. 2019AP691-CR & 2019AP692-CR (Wis Ct. App. Sept. 29, 2020) (unpublished). (Pet-App. 101–02.) The court first concluded that Lira had "made sufficient efforts at administrative review" under Wis. Stat. § 973.155(5) to exhaust his credit claims. (Pet-App. 109–10.) The State does not challenge this determination on review.

Turning to the merits, the court of appeals then determined that Lira was not entitled to credit under Wis. Stat. § 973.15(5) for custody in Oklahoma from his April 2004 arrest until May 2005 because he was not "made available" to Oklahoma following his April 2004 escape from Wisconsin custody. (Pet-App. 113–15.) The court also concluded that Lira was not entitled to credit under pre-printed language on the revocation order and warrant stating that jail credit accrues "until received at the institution." (Pet-App. 114.) Finally, the court determined that Lira was not entitled to credit for his Oklahoma custody under Wis. Stat. § 973.155(1) because his custody was not "in connection with the course of conduct" for which Lira was sentenced in the 1992 and 1999 Wisconsin cases. (Pet-App. 116–17.)

The Court thus affirmed the circuit court's order denying credit as to Lira's Oklahoma custody from April 2004 to May 2005. Lira has elected not to challenge this adverse ruling. *See* Wis. Stat. § (Rule) 809.62(3m)(a) (party who seeks to reverse, vacate, or modify an adverse decision of the court of appeals must file a cross-petition within 30 days of another party filing a petition).

However, the court of appeals concluded that Lira was entitled to credit under Wis. Stat. § 973.15(5) for his Oklahoma custody from April 5, 2006, to June 9, 2017,

because Lira was "made available" to Oklahoma after sentencing on his 2004 and 2005 cases. (Pet-App. 112–13, 115–16.) The court appeared to accept that Lira was not serving his revocation sentences, which did not begin until June 2017, when he was returned to Oklahoma in 2006. (Pet-App. 115.) But, the court explained, this fact was irrelevant under *Brown*, which read section 973.15(5) to require only the "convicted offender" be "made available" to the other jurisdiction to be entitled to credit for custody time spent in that jurisdiction. (Pet-App. 112–13, 115–16.)

Finally, the court of appeals concluded that Lira was entitled to credit for all days in Wisconsin and Texas jail custody in 2005 and 2006. (Pet-App. 118–19.) As noted, this period involved Lira's May 2005 return to Wisconsin to face the 2004 charges; his June 2005 mistaken release, absconding, and December 2005 arrest in Texas; his return to Wisconsin; and his April 2006 return back to Oklahoma. The court concluded that Lira's custody during this time, in addition to being connected to the 2004 (and later 2005) cases that he was facing, "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.) The court also concluded that Lira was entitled to credit under Wis. Stat. § 973.155(1)(a) because this period of custody was "in connection with the course of conduct for which sentence was imposed" in the 1992 and 1999 cases. (Pet-App. 119–20.) Finally, the court said that it was awarding credit for this period against the present sentences because the custody time had not been awarded against the sentences in the 2004 and 2005 cases. (Pet-App. 119–20.)

Confusingly, the court also determined in this section of the opinion that Lira was entitled to credit for his jail custody

from January 2004 until his April 15, 2004 escape under Wis. Stat. § 304.072(5). (Pet-App. 118–19.) DOC already awarded 97 days of credit for this custody on the revocation order and warrant, and so Lira did not request credit for this time on appeal. (R1. 39:2, R2. 25:2, Pet-App. 127.)

The court of appeals' award of credit in Lira's case exceeded the time remaining on Lira's sentences. In late October 2020, Lira petitioned the circuit court for his release from custody pending appellate review, pursuant to Wis. Stat. § (Rule) 809.31. The court granted Lira's petition in a December 28, 2020 decision and order, and Lira was released on bond. The State timely filed a Wis. Stat. § (Rule) 809.31(5) motion in the court of appeals to reverse the order granting Lira's release, which is still pending as of this writing.

STANDARD OF REVIEW

This case involves interpretation of Wis. Stat. § 973.15(5) and Wis. Stat. § 973.155 and application of these statutes to undisputed facts. The interpretation of a statute and its application to undisputed facts are questions of law this Court determines *de novo*. *State v. Jones*, 2018 WI 44, ¶ 27, 381 Wis. 2d 284, 911 N.W.2d 97.

ARGUMENT

I. Lira is not entitled to sentence credit under Wis. Stat. § 973.15(5) for his time spent in custody in Oklahoma from April 2006 to June 2017.

A. Statutes should be read to give reasonable effect to every word, and statutes addressing the same subject matter should be harmonized.

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of the statute. *Id.* ¶ 45. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46.

"Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Kalal,* 271 Wis. 2d 633, ¶ 46. "Statutory interpretations that render provisions meaningless should be avoided." *Belding v. Demoulin*, 2014 WI 8, ¶ 17, 352 Wis. 2d 359, 843 N.W.2d 373.

"Under the ordinary rules of statutory interpretation statutes should be reasonably construed to avoid conflict." *State v. Szulczewski*, 216 Wis. 2d 495, 503–04, 574 N.W.2d 660 (1998). Rather, statutory provisions dealing with the same subject matter "should be read in harmony such that each has force and effect." *Belding*, 352 Wis. 2d 359, ¶ 17. Even "[w]hen two statutes [do] conflict, a court is to harmonize them, scrutinizing both statutes and construing

each in a manner that serves its purpose." *Szulczewski*, 216 Wis. 2d at 503–04 (citation omitted).

B. Wis. Stat. § 973.155 and Wis. Stat. § 973.15(5)

1. Under Wis. Stat. § 973.155, credit is available for custody time connected to the conduct for which sentence is imposed, and credit is awarded in a linear, day-for-day fashion.

Wisconsin Stat. § 973.155(1)(a),[9] the general sentence credit statute, provides that "[a] convicted offender shall be

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[9] In relevant part, Wis. Stat. § 973.155 provides as follows:

(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

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." Wis. Stat. § 973.155(1)(a). Periods of custody for which credit may accrue include, without limitation: pretrial, trial, and pre-sentencing jail custody; and custody on a probation, parole, or extended supervision hold. Wis. Stat. § 973.155(1)(a) & (b).

In *Boettcher*, this Court examined Wis. Stat. § 973.155 to determine how days of credit should be applied. *Boettcher* held that "custody credits should be applied in a mathematically linear fashion. The total time in custody should be credited on a day-for-day basis against the total days imposed . . . ." *State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988). Thus, the Court determined that double counting or "dual credit" for the same period of custody is not available on nonconcurrent sentences. *See Boettcher*, 144 Wis. 2d at 100. "The core idea of *Boettcher* is that 'dual credit is not permitted' where a defendant has already received credit against a sentence which has been, or will be, separately served." *State v. Jackson*, 2000 WI App 41, ¶ 19, 233 Wis. 2d 231, 607 N.W.2d 338 (quoting *Boettcher*, 144 Wis. 2d at 87).

In *State v. Rohl*, 160 Wis. 2d 325, 466 N.W.2d 208 (Ct. App. 1991), the court of appeals relied on *Boettcher* in rejecting credit under Wis. Stat. § 973.155(1)(a) for presentence incarceration previously applied to a separately served, nonconcurrent California sentence. Rohl, a Wisconsin parolee, committed new offenses in California, resulting in a

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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.

California sentence and Wisconsin's issuance of a revocation warrant. *Rohl*, 160 Wis. 2d at 327–28. Following service of his California sentence and return to Wisconsin, Rohl was revoked and sentenced, and sought credit for over 400 days of pre-sentence custody in California. *Id.* at 328.

The circuit court denied the request, and the court of appeals affirmed. *Rohl*, 160 Wis. 2d at 327. The court noted that Rohl had received credit for this time against his California sentence, and concluded that dual credit was not available because the California and Wisconsin sentences were not concurrent. *Id.* at 328, 332. Though he was subject to a revocation warrant, Rohl was not yet serving a Wisconsin sentence during his California incarceration. *Id.* at 331–32.

2. Under Wis. Stat. § 973.15(5), a convicted offender lawfully made available to another jurisdiction must receive credit "under the terms of s. 973.155" for custody in the other jurisdiction.

Wisconsin Stat. § 973.15(5) was created in 1978 by the same legislative enactment that created Wis. Stat. § 973.155. *See* 1977 Wis. Act 353, § 8 (repealing and recreating section 973.15; creating section 973.15(5)) and section 9 (creating section 973.155). Wisconsin Stat. § 973.15(5) provides, in full: "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." Chapter 976, referenced in this provision, contains the Uniform Extradition Act and the Interstate Agreement on Detainers (IAD).

Briefly, the State notes that the IAD, codified at Wis. Stat. § 976.05, contains a provision closely related to section 973.15(5). It provides: "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 . . . ." Wis. Stat. § 976.05(5)(f). Oklahoma has adopted the IAD, and this provision is contained at Okla. Stat. tit. 22 § 1347, art. V(f) (2016), of the Oklahoma statutes.

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

3. *Brown* interpreted Wis. Stat. § 973.15(5) to *preclude* courts from considering the terms of Wis. Stat. § 973.155 when determining credit under section 973.15(5).

The court of appeals first considered Wis. Stat. § 973.15(5) 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 in jail awaiting transfer to prison to begin serving his sentence, *see* Wis. Stat. §§ 304.072(4) and 973.10(2)(b),[10] Brown was sent to federal authorities to face federal drug charges unconnected to his Wisconsin offenses. *Id.* ¶ 3. Brown was convicted and sentenced on these charges and remained in the federal system until completing his sentences in 2004,

[10] Wisconsin Stat. § 304.072(4) provides: "The sentence of a revoked parolee or person on extended supervision resumes running on the day he or she is received at a correctional institution . . . ." Wisconsin Stat. § 973.10(2)(b) provides: "If the probationer has already been sentenced, order the probationer to prison, and the term of the sentence shall begin on the date the probationer enters the prison."

when he was returned to Wisconsin custody to begin serving 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 State argued that credit was unavailable pursuant to Wis. Stat. § 973.155(1)(a) and *Boettcher* because it would constitute dual credit on nonconcurrent sentences for conduct that was unconnected to his Wisconsin sentences. The court rejected the State's section 973.155 arguments, holding that section 973.15(5) precludes 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. *State v.*

Martinez, 2007 WI App 225, ¶¶ 2–5, 305 Wis. 2d 753, 741 N.W.2d 280. But Martinez was on parole when he was taken into custody by federal authorities, and he did not violate his parole and cause his reconfinement until *after* he had completed his federal sentence. *Id.*

While the judges agreed that Martinez was not entitled to credit, they 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. *Id.* Rohl, like Martinez, sought credit for a period of custody—here, Martinez's full federal custody—that had already been applied to a completed sentence. Thus, 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-in-time rule. *Martinez*, 305 Wis. 2d 753, ¶¶ 21–23 (Nettesheim, J. concurring) (citing *State v. Swiams*, 2004 WI App 217, ¶ 23, 277 Wis. 2d 400, 690 N.W.2d 452).

"The debate in *Brown*," explained Judge Nettesheim, "as to which statute was more specific was a false issue because *Wis. Stat. § 973.15(5) expressly references Wis. Stat.*

§ 973.155." *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, Judge Nettesheim said that "*Brown* was wrongly decided because it conferred dual credit contrary to Wis. Stat. § 973.155(1)(a) and *Rohl*." *Id.* ¶ 23.

C. *Brown* should be overruled because its interpretation of Wis. Stat. § 973.15(5) treats the phrase "under the terms of s. 973.155" as surplusage and does not harmonize sections 973.15(5) and 973.155.

"[T]his court has held that any departure from the doctrine of stare decisis demands special justification." *State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 25, 863 N.W.2d 592 (citations omitted). "Stare decisis is the preferred course [of judicial action] because it promotes evenhanded, predictable, and consistent development of legal principles . . . and contributes to the actual and perceived integrity of the judicial process." *Id.* (citation omitted).

Thus, a party asking this Court to overrule a prior interpretation of a statute carries the "burden . . . to show not only that [the decision] was mistaken but also that it was objectively wrong, so that the court has a compelling reason to overrule it." *State v. Friedlander*, 2019 WI 22, ¶ 18, 385 Wis. 2d 633, 923 N.W.2d 849 (citation omitted).

The court of appeals' interpretation of Wis. Stat. § 973.15(5) in *Brown* is objectively wrong and should be overruled.

Brown's interpretation of section 973.15(5) is not faithful to the statute's text. *See Kalal*, 271 Wis. 2d 633, ¶ 44. *Brown* treats the phrase "under the terms of s. 973.155" as surplusage. *See id.* ¶ 46 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."). Even worse, *Brown* adopts an interpretation that it is contrary to the disregarded phrase. The statutory language directs that the convicted offender 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." But *Brown* directs courts to *ignore section 973.155*, reading section 973.15(5) to conflict with section 973.155. Then, *Brown* concludes that section 973.15(5) controls under the rule of interpretation that, when two statutes conflict, the more specific statute prevails.

Brown's view that the statutes cannot be reconciled, and thus one must defeat the other, is not consistent with the statutory language. Wisconsin Stat. § 973.15(5) does not preclude consideration of Wis. Stat. § 973.155; it expressly incorporates Wis. Stat. § 973.155's "terms." *Martinez*, 305 Wis. 2d 753, ¶ 22 (Nettesheim, J. concurring) (calling the dispute in Brown about which statute was more specific "a false issue because *Wis. Stat. § 973.15(5) expressly references Wis. Stat. § 973.155*").

Nor is Brown's interpretation consistent with the brief statutory history of Wis. Stat. § 973.15(5) and Wis. Stat. § 973.155. *See State v. Williams*, 2014 WI 64, ¶ 17, 355 Wis. 2d 581, 852 N.W.2d 467. (statutory history may be considered as part of the statute's context). Wisconsin Stat. §§ 973.15(5) and 973.155 were created by adjacent provisions in the same legislative enactment. *See* 1977 Wis. Act 353, § 8

(repealing and recreating section 973.15; creating section 973.15(5)) and section 9 (creating section 973.155). This fact is persuasive evidence that the legislature meant for these provisions to work in harmony, not to conflict.

Critically, *Brown* leads to large awards of credit that are not authorized by the statutory language. In this case, for example, *Brown*'s conclusion that Wis. Stat. § 973.155 has no part in determining a claim for custody credit under Wis. Stat. § 973.15(5) resulted in the court of appeals awarding over 11 years of credit. Here, that credit was for sentences on Lira's crimes committed the day after his escape—and would be applied toward the very Wisconsin sentence Lira sought to avoid by his escape. As demonstrated below, an interpretation of section 973.15(5) that does not ignore the phrase "under the terms of s. 973.155" would result in no award in this case.

Accordingly, this Court should overturn *Brown* and adopt an interpretation of Wis. Stat. § 973.15(5) that gives effect to all the words of the statute and harmonizes section 973.15(5) and Wis. Stat. § 973.155.

D. Properly read, Wis. Stat. § 973.15(5) provides credit for custody in another jurisdiction when the offender is lawfully made available to the jurisdiction, and the provision of credit is consistent with Wis. Stat. § 973.155's terms.

To give effect to the phrase "under the terms of s. 973.155," this Court should read Wis. Stat. § 973.15(5) to incorporate the terms of Wis. Stat. § 973.155 when assessing the availability of credit under section 973.15(5). Two terms, already discussed above at length, are most relevant here.

The first is Wis. Stat. § 973.155's "in connection with" requirement. To repeat, an offender is entitled to credit under Wis. Stat. § 973.155 for custody that is "in connection with the

course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a).

Thus, as read by the *Martinez* concurrence, "[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." *Martinez*, 305 Wis. 2d 753, ¶ 22 (Nettesheim, J. concurring). In other words, the time served in another jurisdiction must be connected to the Wisconsin offenses to be creditable under section 973.15(5).

The second term concerns the manner in which credit is applied, as set forth in *Boettcher*. As noted, *Boettcher* interpreted Wis. Stat. § 973.155 to require that sentence credit be allocated in a day-for-day, linear fashion, such that dual credit is not available on nonconcurrent sentences. *Boettcher*, 144 Wis. 2d at 100.

Thus, consistent with *Boettcher*, section 973.15(5) confers credit when the offender is made available to another jurisdiction, but only when the Wisconsin sentence and the custody in the other jurisdiction run concurrently. *Martinez*, 305 Wis. 2d 753, ¶ 23 (Nettesheim, J. concurring). Wisconsin Stat. § 973.15(5), by incorporating all of Wis. Stat. § 973.155's terms, prohibits dual credit against sentences that are not served concurrently under *Boettcher*'s interpretation of section 973.155. Therefore, the rule against dual credit for nonconcurrent sentences applies to credit awards under section 973.15(5). This requirement means that only a convicted offender serving the confinement portion of a Wisconsin sentence when he or she is "made available" to the other jurisdiction is eligible to receive credit under section 973.15(5).

The State asks this Court to adopt Judge Nettesheim's reading of Wis. Stat. § 973.15(5) in his *Martinez* concurrence incorporating Wis. Stat. § 973.155's terms, including the prohibition on dual credit and the requirement that custody be in connection with the conduct for which sentence was imposed. Accordingly, section 973.15(5) should be read to provide a convicted offender who is lawfully turned over to another jurisdiction with credit for custody time in that jurisdiction when, consistent with section 973.155, the custody is connected to the conduct for which the Wisconsin sentence is imposed and does not constitute dual credit on nonconcurrent sentences. This reading of the statute gives full effect to the statutory language and harmonizes sections 973.15(5) and 973.155.

While Wis. Stat. § 973.15(5)'s plain language thus limits the availability of credit by the provisions of Wis. Stat. § 973.155, the State observes that section 973.15(5) is not the only statute that provides credit for convicted offenders made available to another jurisdiction for prosecution. As noted, the Interstate Agreement on Detainers (IAD) includes the following provision: "During the continuance of temporary custody [in the other jurisdiction] 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 . . . ." Wis. Stat. § 976.05(5)(f).

Therefore, an offender confined on a Wisconsin sentence who is turned over to another jurisdiction on a detainer to face prosecution will receive credit toward his or her Wisconsin sentence for temporary custody in that jurisdiction under Wis. Stat. § 976.05(5)(f). Credit is available under this section regardless of whether the custody in the other jurisdiction is connected to the course of conduct for which the Wisconsin sentence was imposed. Of course, Lira cannot claim credit for custody under this statute because Wisconsin never provided

Lira to Oklahoma on a detainer; Lira arrived in Oklahoma in 2004 as an escapee. And, in 2006, Wisconsin merely sent Lira back to Oklahoma to finish his Oklahoma sentences upon disposition of new Wisconsin charges.

Returning to Wis. Stat. § 973.15(5), application of the correct reading of the statute shows that credit is not available to Lira for his Oklahoma custody.

E. Lira is not entitled to credit for his Oklahoma custody under a proper interpretation of Wis. Stat. § 973.15(5).

The court of appeals' conclusion that Lira is entitled to credit under Wis. Stat. § 973.15(5) for his Oklahoma custody from April 2006 to June 2017 is based on *Brown*'s misreading of the statute. Application of a proper interpretation of section 973.15(5)—one that gives effect to "under the terms of s. 973.155"—results in no credit for Lira's Oklahoma custody against his present sentences.

First, an award of credit under Wis. Stat. § 973.15(5) would constitute dual credit on noncurrent sentences. *See Boettcher*, 144 Wis. 2d at 100. Lira served his Oklahoma sentences separately from his Wisconsin sentences, which did not commence until Lira was returned to Wisconsin in June 2017 after completing the Oklahoma sentences. Because Lira escaped custody in April 2004 before DOC could revoke his parole and probation and impose sentence, then committed new crimes for which he was sentenced in another jurisdiction, Lira's Wisconsin sentences did not, and could not, begin until Lira completed his Oklahoma sentences in June 2017.

Thus, as in *Martinez*, an award of credit for a nonconcurrent sentence already served would constitute prohibited dual credit on nonconcurrent sentences, contrary

to *Boettcher* and *Rohl*. *See Boettcher*, 144 Wis. 2d at 100; *Rohl*, 160 Wis. 2d at 328.

Second, credit is unavailable because Lira's Oklahoma custody was not "in connection with" the courses of conduct for which sentence was imposed in his Wisconsin cases.[11] *See* Wis. Stat. § 973.155(1)(a). Lira's Oklahoma custody was for new crimes committed in Oklahoma unrelated to the Wisconsin conduct for which sentence was imposed in the present cases.

Thus, under a proper interpretation of Wis. Stat. § 973.15(5), Lira is not entitled to the over 11 years of credit for the Oklahoma custody awarded by the court of appeals. Accordingly, *Brown* should be overturned, section 973.15(5) should be read to incorporate Wis. Stat. § 973.155's terms, and the court of appeals' award of credit for Lira's Oklahoma custody should be reversed.

II. Lira is not entitled to credit for days in custody in Wisconsin and Texas in 2005 and 2006.

As noted, Lira was returned to Wisconsin May 22, 2005 on a detainer to face misdemeanor charges of endangering safety by use of a dangerous weapon and escape in two 2004 cases. (R1. 68:2, R2. 55:2, Pet-App. 132.) Lira was sent back to Oklahoma on April 5, 2006 after his cases were adjudicated. But Lira's total period of custody during this period was about four and one-half months because Lira was at liberty for nearly six months from his mistaken release on June 15, 2005, until his arrest in Texas on December 13, 2005. (R1. 68:2, R2. 55:2, Pet-App. 132.)

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[11] For this reason, Lira is not entitled to credit under Wis. Stat. § 973.155 for any portion of his Oklahoma custody, as the court of appeals properly concluded. (Pet-App. 116–17.)

The court of appeals determined that Lira was entitled to credit for this custody time in Wisconsin and Texas against his present sentences on two grounds. (Pet-App. 118–19.) First, the court concluded that this custody time "must be considered under Wis. Stat. § 304.072(5)" as jail time pending commencement of sentence.[12] (Pet-App. 119.) Second, the court concluded that this custody "had a sufficient factual connection" to the present sentences for Lira to be entitled to credit under Wis. Stat. § 973.155(1)(a). (Pet-App. 119.) The court of appeals erred on both counts.

A. Credit is not available for this time under Wis. Stat. § 304.072 because Lira was not awaiting transfer to prison to serve his revocation sentences in 2005 and 2006.

Wisconsin Stat. § 304.072(5) authorizes credit for the jail custody of a revoked probationer who is awaiting transfer to DOC custody to start serving a sentence: "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." As noted, the statutes provide that the sentence of a revoked parolee or probationer does not commence until the offender is received at the prison. *See* Wis. Stat. § 304.072(4) (parolee); Wis. Stat. § 973.10(2)(b) (probationer).

Lira is not entitled to credit under Wis. Stat. § 304.072(5) for his Wisconsin and Texas custody time in 2005 and 2006.

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[12] As noted, the court also concluded that Lira was entitled to 97 days of credit for his jail custody prior to his April 15, 2004 escape, time that DOC already awarded on the revocation order and warrant. (R1. 39:2, R2. 25:2, Pet-App. 127.)

True, Lira was a "revoked probationer" at the time—his probation and parole were revoked upon entry of the revocation order and warrant in April 2014. But while in Wisconsin and Texas jails in 2005 and 2006, he was not there "pending . . . commencement" of his present sentences, i.e. awaiting transfer to prison to serve those sentences. Lira did not, and could not, begin serving those sentences until June 2017 upon completing his Oklahoma sentences. No, he was in Wisconsin (and then Texas) at the time on a detainer to face charges in the new pending cases. When Lira was in Wisconsin and Texas in 2005 and 2006, he was no more awaiting transfer to prison to serve his present sentences than he was during his entire 12-year confinement in Oklahoma. Lira cannot claim credit for this time under Wis. Stat. § 304.072(5).

B. Credit is also not available under Wis. Stat. § 973.155.

To reiterate, Wis. Stat. § 973.155(1)(a) confers credit upon an offender for time spent in custody in connection with the conduct for which sentence was imposed. Dual credit for the same period of custody is not available except on concurrent sentences. *Boettcher*, 144 Wis. 2d at 100.

There are two reasons why credit is not available for Lira's 2005 and 2006 Wisconsin and Texas custody against Lira's present revocation sentences on his 1992 and 1999 cases.

First, the custody on Lira's return to face the 2004 charges was not connected to the conduct for which the present sentences were imposed. Of course, Lira was entitled to, and received on the revocation order and warrant, credit for his custody on the probation and parole holds for his conduct that also resulted in the 2004 endangering safety charge. *See* Wis. Stat. § 973.155(1). But once the revocation

order was issued, and sentence was imposed, the connection between present cases and the later pretrial custody on the 2004 charge was severed. *See State v. Beets*, 124 Wis. 2d 372, 378–79, 369 N.W.2d 382 (1985).

Second, even if Lira could prove a factual link between the 2005 and 2006 custody and the present cases, credit is not available because a credit award would most likely constitute dual credit on nonconcurrent sentences.

Here, it does not appear that Lira has submitted Oklahoma records showing whether his Oklahoma sentences were credited with his 2005 and 2006 custody in Wisconsin and Texas. Likewise, the sentencing transcript in the 2004 and 2005 cases—which would likely shed light on why credit was not conferred for confinement awaiting disposition in those cases—is not of record.

But, as noted, Oklahoma has adopted the IAD, and Lira's Oklahoma sentence should have continued running while he was in custody on the Wisconsin detainer in 2005 and 2006, by operation of Okla. Stat. tit. 22 § 1347, art. V(f) (2016). Thus, it would appear likely that the 2005 and 2006 custody in Wisconsin and Texas was already applied to Lira's Oklahoma sentence. This would also explain the circuit court's non-award of credit at sentencing on the 2004 and 2005 cases. As noted, these sentences were imposed consecutively to the Oklahoma sentences. Thus, an award of credit against these sentences, where the 2005 and 2006 Wisconsin and Texas custody time was already allocated toward the Oklahoma sentences, would have been contrary to *Boettcher*, 144 Wis. 2d at 100.

If this Court determines that the availability of credit for this period of custody turns on whether Lira's sentences did, in fact, continue to run while he was in Wisconsin and

Texas in 2005 and 2006, it should remand to the circuit court to resolve this question of fact.

For these reasons, this Court should reverse the court of appeals decision granting credit for Lira's custody in Wisconsin and Texas and the detainer in 2005 and 2006.

CONCLUSION

The court of appeals decision should be reversed.

Dated this 6th day of April 2021, in Madison, Wisconsin.

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 8,975 words.

Dated this 6th day of April 2021.

_____

JACOB J. WITTWER
Assistant Attorney General

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 6th day of April 2021.

_____
JACOB J. WITTWER
Assistant Attorney General

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

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix.

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 6th day of April 2021.

_____

JACOB J. WITTWER
Assistant Attorney General

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WITH WIS. STAT. § 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 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 6th day of April 2021.

_____
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