FILED
05-12-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2019AP691-CR & 2019AP692

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

CESAR ANTONIO LIRA,

Defendant-Appellant.

On Appeal from a Decision of the Wisconsin Court of Appeals, District I, Reversing in Part Orders Denying a Motion for Custody Credit and a Motion for Reconsideration in the Milwaukee County Circuit Court, the Honorable Frederick C. Rosa, Presiding.

RESPONSE BRIEF OF DEFENDANT-APPELLANT

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

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

Attorney for Defendant-Appellant

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QUESTIONS PRESENTED

1) Is Mr. Lira entitled to sentence credit toward his Wisconsin sentence under Wis. Stat. § 973.15(5) for time spent in custody in Oklahoma from April 5, 2006 until the date he completed his Oklahoma sentence?

The circuit court did not address this claim on the merits. (R1 68:6; R2 55:6).[1] Instead, the circuit court concluded that Mr. Lira failed to adequately exhaust his procedural remedies. (R1 68:6; R2 55:8).

The Court of Appeals addressed the issue on the merits and reversed, holding that Mr. Lira was entitled to credit under 973.15(5) and *State v. Brown*, 2006 WI App 41, 289 Wis. 2d 823, 711 N.W.2d 708. *State v. Lira*, Nos. 2019AP691-CR & 2019AP692-CR, 2020 WL 5778503 (Wis. Ct. App. September 29, 2020) (unpublished). (App. 115-116).

2) Is Mr. Lira entitled to sentence credit for the time he spent in custody in both Wisconsin and Texas after his revocation order and warrant had been signed, but before he was transported to the Wisconsin prison system?

The circuit court also did not address this claim on the merits, once again applying its interpretation of

[1] As this is a consolidated appeal, counsel will use "R1" to refer to the record in 2019AP691 and "R2" to refer to the record in 2019AP692.

the administrative exhaustion "rule." ((R1 68:6; R2 55:6).

The Court of Appeals addressed the issue on the merits and reversed, holding that Mr. Lira was entitled to credit under Wis. Stat. § 304.072 and § 973.155(5). *Lira*, Nos. 2019AP691-CR & 2019AP692-CR, ¶ 46. (App. 120).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By accepting review of this case, this Court has indicated that both publication and oral argument are warranted.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are complex but largely undisputed. As approximately the first fifteen pages of the State's brief are devoted to a robust explanation of the factual and procedural background, Mr. Lira offers only the following additional summary:

Initial Circuit Court Proceedings

On March 25, 1992, Mr. Lira was arrested for possession of cocaine as a second and subsequent offense in Milwaukee County Case No. 1992CF921195. (R1 52:10; R1 1:1; R2 39:10). He pleaded guilty to that offense and was sentenced to ten years of imprisonment on July 21, 1992. (R1 17:1). On

September 17, 1996, Mr. Lira was released on parole. (R1 52:12; R2 39:12).

On January 11, 1999, Mr. Lira was arrested on several new charges in Milwaukee County Case No. 1999CF163. (R2 1:1). As a result, Mr. Lira's parole on 1992CF921195 was revoked on February 5, 1999. (R1 52:13; R2 39:13). He returned to Department of Corrections (DOC) custody to begin serving that revocation sentence and, while incarcerated, resolved 1999CF163 with a guilty plea. (R2 12:1). Mr. Lira was then sentenced to a short term of imprisonment for being a felon in possession of a firearm. (R2 20:1). On a separate drug charge in that same case, Mr. Lira received an imposed and stayed prison sentence and was placed on probation for twelve years. (R2 21:1) (R2 17:1). The sentencing for 1999CF163 occurred on December 1, 1999. (R2 21:1); (R2 17:1).[2]. Mr. Lira was again released from prison on January 2, 2001. (R1 52:12; R2 39:12).

Absconding, Filing of Milwaukee County Case No. 2004CM1010, and Initiation of Revocation Proceedings

In November of 2002, Mr. Lira absconded from supervision. (R1 52:12; R2 39:12). He was rearrested on January 6, 2004. (R1 52:12; R2 39:12). DOC records indicate that a formal violation of probation (VOP) hold pertaining to both the 1992 and 1999 cases was placed on Mr. Lira on January 9, 2004. (R1 52:19; R2

[2] The sentencing transcript was sealed by the circuit court. (R2 61:2).

39:19). Mr. Lira was also facing new criminal allegations of endangering safety in Milwaukee County Case No. 2004CM1010.[3] (R1 68:2; R2 55:2).

Escape, Revocation Order, and Oklahoma Sentence

On April 15, 2004, Mr. Lira escaped from custody. (R1 52:20; R2 39:20). The very next day, April 16, 2004, the Department of Corrections issued a revocation order and warrant (ROW) formally revoking Mr. Lira's parole on 1992CF921195 and probation on 1999CF163. (R1 52:19; R2 39:19). That ROW "commanded" that Mr. Lira be returned to Dodge Correctional Institution to begin serving those revocation sentences. (R1 52:19; R2 39:19).

That same day, Mr. Lira was arrested for new criminal conduct in Oklahoma. (R1 68:2; R2 55:2). Wisconsin also placed a detainer on Mr. Lira. (R1 52:20; R2 39:20). Mr. Lira faced several charges due to his conduct in Oklahoma. (R1 64:18; R2 54:18.). He resolved the Oklahoma case with another guilty plea and was sentenced to 20 years of imprisonment on September 29, 2004.[4] (R1 52:21–22; R2 39:21-22).

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[3] As set forth in the circuit court's findings of fact, this charge was originally issued as Milwaukee County Case No. 2002CM9589. (R1 68:2; R2 55:2). It would appear to relate to Mr. Lira's actions when initially absconding from supervision.

[4] The circuit court made a finding of fact that Mr. Lira was sentenced on September 30, 2004. (R1 68:2; R2 55:2). The State reiterates that date in its brief. (State's Br. at 7). However, documentation provided by undersigned counsel in the circuit court proceedings below clearly indicates a date of September (continued)

First and Second Return to Wisconsin

As a result of his escape from custody, Wisconsin initiated another criminal case against Mr. Lira, Milwaukee County Case No. 2004CF2092. (R1 68:2; R2 55:2). Following his sentencing in Oklahoma, Mr. Lira was returned to Wisconsin "on or about May 22, 2005." (R1 68:2; R2 55:2).[5] He remained in the Milwaukee County Jail for about a month, until he was mistakenly released on June 15, 2005. (R1 68:2; R2 55:2). Mr. Lira was then rearrested in Texas on December 13, 2005. (R1 52:35; R2 39:35).

At that point, Wisconsin initiated a third criminal case against Mr. Lira, charging him with a single count of felony bail jumping in Milwaukee County Case No. 2005CF6953. (R1 68:2; R2 55:2). Mr. Lira returned once more to Milwaukee County on January 11, 2006, where he remained in custody while his open criminal cases were pending in the circuit court. (R1 52:28; R2 39:28). On March 17, 2006, he

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29th. (R1 52:21–22; R2 39:21-22). In any case, this factual dispute does not impact this Court's analysis of the legal issues presented herein.

[5] The State asserts that Mr. Lira entered Wisconsin custody on May 22, 2005. (State's Br. at 7). However, the circuit court's factual findings are imprecise and fix the date as either May 19th or May 22nd. (R1 68:2; R2 55:2). The Court of Appeals noted that the record was somewhat inconsistent on this point. *Lira,* Nos. 2019AP691-CR & 2019AP692-CR, ¶ 8, n.7. (App. 105). The Court of Appeals suggested that the circuit court could address the matter on remand. *Id.* (App. 105). Mr. Lira uses the "on or about" language from the circuit court's findings of fact.

resolved all three open Milwaukee County cases in a plea agreement, receiving a global sentence of three years initial confinement and three years of extended supervision, consecutive to his Oklahoma sentence. (R1 68:2; R2 55:2).

Following the resolution of Mr. Lira's open Wisconsin cases—and despite the preexisting revocation order and warrant commanding that Mr. Lira be returned to Dodge Correctional—Wisconsin returned Mr. Lira to Oklahoma on April 5, 2006, where he remained while serving his Oklahoma sentence. (R1 52:28; R2 39:28).

Third and Final Return to Wisconsin

Mr. Lira completed his Oklahoma sentence on June 9, 2017. (R1 68:2; R2 55:2). On June 16, 2017, Mr. Lira was finally returned to Dodge Correctional Institution, as "commanded" in the revocation order and warrant issued 13 years earlier. (R1 52:20; R2 39:20). The DOC, however, appeared to believe that Mr. Lira was being "returned from escape"—even though Mr. Lira had previously been returned to Wisconsin twice after his 2004 escape. (R1 52:20; R2 39:20). The DOC issued an amended ROW giving Mr. Lira credit for time spent in custody in Oklahoma prior to his sentencing there. (R1 52:39; R2 39:39). The DOC later rescinded that credit in a second amended ROW. (R1 56:17; R2 43:17).

Pursuit of Administrative Remedies and Circuit Court Litigation

In September of 2017, Mr. Lira initiated the litigation ultimately leading to this appeal by filing a *pro se* motion for sentence credit. (R1 35:1; R2 22:1). Mr. Lira cited *Brown* and requested that he be credited, on his revocation sentences, for all time spent in custody from the date of his arrest in Oklahoma until the date his Oklahoma sentence was completed. (R1 35:1; R2 22:1). The circuit court denied the motion on procedural grounds, directing Mr. Lira to first exhaust his administrative remedies under its reading of Wis. Stat. § 973.155(5). (R1 36:1, R2 23:1.)

Mr. Lira then filed a second motion for sentence credit in January of 2018, attaching proof that he had requested the credit from the DOC. (R1 37:1; R2 24:1). Mr. Lira again requested credit under § 973.15(5) and *Brown*. (R1 37:1; R2 24:1). Once again, the motion was denied. (R2 40:1; R2 27:1). The circuit court's decision and order did not cite or apply § 973.15(5) or *Brown*; instead, the circuit court held that Mr. Lira was not entitled to credit for time spent serving another sentence. (R1 40:1; R1 27:1).

Although Mr. Lira initially appealed that order to the Wisconsin Court of Appeals, undersigned counsel ultimately asked that the appeal be voluntarily dismissed in order to file a more robust motion and give the circuit court an opportunity to fully address the legal issues involved. (R1 49; R2 36).

The Court of Appeals granted the request. (R1 50; R2 37.)

Thereafter, Mr. Lira, by appointed counsel, filed a third motion for sentence credit in October 2018. (R1 52:1–42, R2 39:1–42.) Mr. Lira's motion sought sentence credit on several grounds. First, Mr. Lira asked for credit from the date of his arrest in Oklahoma until the date his sentence completed under § 973.15(5) and *Brown*. (R1 52:5–6, R2 39:5–6.)

Second, if the circuit court determined that Mr. Lira was not entitled to this entire amount of credit (which was previously sought in his *pro se* pleadings), Mr. Lira asked that he receive credit against the revocation sentences for time spent in custody after returning to Wisconsin in 2005 under Wis. Stat. § 304.072. (R1 52:6; R2 39:6). Mr. Lira argued that he accrued credit against the revocation sentences when he was returned from Wisconsin in May of 2005 until his release in June of 2005, and from the date he was arrested in Texas until he was returned to Oklahoma from Wisconsin in 2006. (R1 52:6; R2 39:6). Once Wisconsin then sent him back to Oklahoma, Mr. Lira again asserted that he was entitled to credit from that point onward under § 973.15(5) and *Brown*. (R1 52:6; R2 39:6).

Further, as another alternative, Mr. Lira also sought to reinstate the credit removed from the first amended revocation order and warrant for time spent in pretrial custody in Oklahoma. (R1 52:7; R2 39:7). Finally, he also requested additional revocation credit

on the 1992 case that appeared not to have been credited during the 1999 revocation proceedings. (R1 52:7; R2 39:7).

The circuit court denied the motion shortly after it was filed, again asserting that Mr. Lira had failed to adequately exhaust his administrative remedies. (R1 53:1–3, R2 40:1–3).

Mr. Lira then filed a motion for reconsideration in November 2018, including additional documentation related to his credit claims. (R1 56:1–24, R2 43:1–24.) The State filed a brief in opposition. (R1 64:1– 8, R2 51:1–8.)

The circuit court then issued another decision on March 25, 2019. (R1 68; R2 55). It concluded that Mr. Lira was not entitled to credit against his revocation sentence for time spent in custody from the date of his arrest in Oklahoma until the date that sentence concluded, finding that Mr. Lira had not been "made available" to Oklahoma in a lawful fashion; instead, he escaped. (R1 68:4-5; R2 55:4-5). It did not address the remaining claims for credit on the merits, asserting that there was still insufficient proof that Mr. Lira had exhausted his administrative remedies. (R1 68:5–7, R2 55:5–7).[6]

[6] The circuit court rejected the claim for additional credit on the 1992 case which should have been credited during the 1999 revocation proceedings because it received evidence that Mr. Lira received that credit. (R1 68:7; R2 55:7). Mr. Lira did not renew this claim on appeal.

Mr. Lira appealed. (R1 72; R2 58).

Court of Appeals Decision

The Court of Appeals ultimately issued an uncitable *per curiam* decision on September 29, 2020. The Court of Appeals first rejected any claim that Mr. Lira had failed to exhaust his administrative remedies, holding that "Lira made good-faith efforts and exercised due diligence in appealing his sentence credit determinations through DOC and the administrative process." *Lira*, Nos. 2019AP691-CR & 2019AP692-CR, ¶ 20. (App. 109-110). The State did not petition this Court regarding that holding and it concedes that this issue is no longer before the Court. (State's Br. at 12).

Turning to the merits, the Court of Appeals first addressed Mr. Lira's claims for credit under the plain language of § 973.15(5) and *Brown*. *Id*., ¶ 24. (App. 111). Finding "no dispute" that Mr. Lira was a "convicted offender" for the purpose of § 973.15(5), the Court of Appeals focused on whether Mr. Lira had been "made available" as required by the statute. *Id*., ¶ 25-26. (App. 112).

The Court of Appeals then rejected Mr. Lira's claim that he was "made available" to Oklahoma as a result of his arrest and detention on April 16, 2004. *Id*., ¶ 28. (App. 113). Mr. Lira's initial presence in Oklahoma was the result of his escape, not a lawful transfer by Wisconsin authorities. *Id*. (App. 113). Accordingly, the Court of Appeals held that Mr. Lira could not prove he was "made available…in any other

lawful manner" as required under § 973.15(5). *Id.* (App. 113). Thus, Mr. Lira could not receive credit from the date of his arrest in Oklahoma until the date he was returned to Wisconsin in 2005. *Id.*, ¶ 32. (App. 114-115). Mr. Lira did not petition this Court to review that holding; accordingly, that issue is conclusively resolved and no longer in dispute for the purposes of this appeal.

However, the Court of Appeals accepted Mr. Lira's argument that he was eventually "made available" when Wisconsin—having taken custody of him in May 2005—chose to send him back to Oklahoma in April 2006. *Id.*, ¶ 35. (App. 115-116). That result was squarely mandated by the Court of Appeals' prior decision in *Brown*. *Id.* (App. 115-116).

Next, the Court of Appeals held that Mr. Lira was not entitled to credit against his revocation sentences under § 973.155(1)(a) for the time he spent in custody in Oklahoma while that criminal case pended. *Id.*, ¶ 38. (App. 116-117). Mr. Lira did not petition this Court to review that holding; accordingly, that issue is conclusively resolved and no longer in dispute for the purposes of this appeal.

Finally, the Court of Appeals concluded that Mr. Lira was entitled to credit against his revocation sentences under Wis. Stat. § 304.072 and § 973.155(1)(a) for time spent in Wisconsin and Texas after having been returned from Oklahoma. *Id.*, ¶ 46. (App. 120).

The State petitioned for review, asserting that Mr. Lira could not earn credit for time spent serving the Oklahoma sentence because the authority on which he relied for that credit, *Brown*, was wrongly decided. (State's Petition for Review at 15). In the State's view, *Brown* fails to incorporate the substantive requirements of § 973.155(1)(a) into § 973.15(5). (State's Petition for Review at 15). Because the State argues that Mr. Lira cannot satisfy those requirements, it asserts that no credit is therefore due. (State's Br. at 15). As to the other grant of credit—for credit earned as a revoked inmate awaiting commencement of the revocation sentences—the State avers that the Court of Appeals misapplied the governing legal authority and no credit is warranted. (State's Petition for Review at 17).

This Court accepted the petition, the State has now filed their initial brief, and this response brief follows.

ARGUMENT

I. Wis. Stat. § 973.15(5) represents a coherent and freestanding policy choice on behalf of our legislature; accordingly, this Court should decline the State's invitation to overrule *Brown*.

A. Introduction.

As noted above, the Wisconsin Court of Appeals awarded substantial credit to Mr. Lira against his

Wisconsin sentences for time in custody in Oklahoma under its reading of *Brown*. Notably, the State's brief filed in the Court of Appeals raised several arguments as to why credit was impermissible—asserting that Mr. Lira's sentence was not "running," that *Brown* was distinguishable from the facts in this case, and that Mr. Lira failed to satisfy the requirements of Wis. Stat. § 973.15(5) as set forth in *Brown*. (State's Ct. App. Br. at 19-28).

In its brief to this Court, however, the State has not resurrected these specific arguments. Instead, the State requests a finding by this Court that *Brown* was incorrectly decided because it did not incorporate the requirements of § 973.155(1)(a) into its reading of 973.15(5). As it asserts that Mr. Lira cannot satisfy those requirements, the State claims Mr. Lira is not entitled to credit under § 973.15(5). (State's Br. at 23; 28-29). In other words, the State no longer disputes that, if *Brown* remains black letter law, Mr. Lira's motion satisfies the two statutory prerequisites to credit set forth therein—that Mr. Lira was a convicted offender who had been lawfully turned over to a foreign jurisdiction.

For the State to prevail, this Court must therefore accept its argument that *Brown* incorrectly interpreted § 973.15(5). Accordingly, Mr. Lira begins his analysis with an assessment of that otherwise binding precedent and its interpretation of the governing statute.

B. Standard of review and governing legal principles.

Although this Court exercises *de novo* review of the Court of Appeals decision in assessing the meaning of a statute, *State v. Wiskerchen*, 2019 WI 1, ¶ 16, 385 Wis. 2d 120, 921 N.W.2d 730, this Court does not act with unfettered and unlimited power in discerning the meaning of the law as articulated by the legislature. As prior cases have established, the process of statutory interpretation is ultimately an exercise in judicial restraint:

> It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the 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. Cir. Ct. for Dane Cty., 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. Under this view of statutory interpretation, our elected

representatives "speak" to the reader via the words set forth in a particular statute; it is this Court's duty to listen carefully and to faithfully interpret and apply the statute as it was written.

To put it another way, a sound process of statutory interpretation begins with an explicit acknowledgement that the task of making policy is left to the legislature. *Fabick v. Evers*, 2021 WI 28, ¶ 14, 956 N.W.2d 856.[7] Only in the most extraordinary of situations—as in the case of a genuinely absurd result that is manifestly at odds with the expressed intent of the legislature—does this Court have cause to abandon its usual deference. *See Force ex rel. Welcenbach v. Am. Fam. Mut. Ins. Co.*, 2014 WI 82, ¶ 143, 356 Wis. 2d 582, 850 N.W.2d 866 (Prosser, J., *concurring*).

Moreover, in a case like Mr. Lira's—where the State is urging this Court to overrule a prior published Court of Appeals decision—the Court's analysis is doubly deferential: Not only does this Court "defer" to the plain language of the text, but the Court must also assess whether there is a "compelling reason" not to defer to otherwise binding precedent already establishing the text's meaning. *See Wehnke v. Gehl*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405.

As will be shown below, the State has failed to establish an intelligible alternative interpretation of § 973.15(5), nor has it proven that a departure from the

[7] Wisconsin Reports citation is not yet available.

principle of *stare decisis* is warranted. The State's reading of the statute is simply mistaken. Although it seeks modification of the legal principles which allowed Mr. Lira to prevail in the Court of Appeals, this Court should decline such outcome-oriented arguments. *See Fabick*, 2021 WI 28, ¶ 15 n.6. ("[O]ur role is not to rule in favor of outcomes we like; it is to interpret and apply the law, whether we like it or not.")

C. The plain language of Wis. Stat. § 973.15(5) reflects a policy judgment that Wisconsin inmates should receive credit against their Wisconsin sentences when Wisconsin authorities choose to make them "available" to another jurisdiction.

Wis. Stat. § 973.15(5) is embedded within a broader subsection of the statutes setting forth the basic "rules" as to how sentences "work" under Wisconsin law. It reads:

> 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.

Wis. Stat. § 973.15(5). This language was passed into law as part of 1977 Wis. Act. 353—which also created the sentence credit statute, Wis. Stat. § 973.155—and has remained unchanged in the intervening 44 years.

The statutory language is clear and authorizes a defendant to obtain credit against his or her Wisconsin sentence for time spent in custody in a foreign jurisdiction when two preconditions are met: the offender must: (1) be a "convicted offender" and (2) "made available…in any…lawful manner" to the foreign jurisdiction. § 973.15(5). So long as those statutory conditions are met, the text of the statute asserts that the offender is entitled to credit against their Wisconsin sentence "under the terms of s. 973.155." *Id*.

Taking into consideration its placement in Chapter 973, which establishes procedural rules for sentences, the plain language clearly evinces an intent that in a circumstance where a defendant is convicted—and would ordinarily begin serving their Wisconsin sentence—but is then transferred to another jurisdiction (an action over which the offender has no control), he or she receives credit against his Wisconsin sentence for as long as they remain in that other jurisdiction. In other words, the sentence is constructively "running" while the offender remains in custody outside of Wisconsin.

The statute therefore evinces a legislative preference that Wisconsin inmates ought to promptly serve their Wisconsin sentences in a Wisconsin prison. For example, when authorities of the State of Wisconsin take hold of a revoked probationer, they are ordinarily directed to transport that person to Dodge Correctional Institution so that they may begin

serving their Wisconsin sentence in connection with their Wisconsin offense. Wis. Stat. § 973.10(2)(b).

However, assume that these state actors do not stop the transport at Dodge Correctional Institution; instead, they make the affirmative choice to send the convicted offender out-of-state to answer for unrelated allegations in a foreign jurisdiction. But-for the language of § 973.15(5), the Wisconsin sentence is put on hold and effectively subordinated to these out-of-state proceedings. § 973.15(5) makes clear, however, that an inmate need not physically enter Dodge Correctional Institution to begin serving their Wisconsin sentence; if the Wisconsin authorities make the affirmative choice to delay prompt entry into the Wisconsin prison system, they do so with the knowledge that the inmate will accrue credit until they are returned to Wisconsin.

While an inmate in the revocation context—like Mr. Lira—therefore makes for the most dramatic example of this principle, the statute also functions, in connection with § 973.15(1), to make clear that a Wisconsin sentence cannot be "paused" at any point. Thus, if a Wisconsin offender is convicted and sent to prison, only to be later transported to another jurisdiction to face charges there, the Wisconsin sentence will continue to run. The statute therefore incentivizes tight control of inmates who have been ordered to serve time in a Wisconsin prison in connection with Wisconsin criminality.

Notably, while the State's brief is largely concerned with what it views as an improper awarding of double credit, the State has an easy way of avoiding that outcome merely by following statutory procedures. If the State wishes to avoid a sentence constructively running while it passively allows the defendant to languish in some other jurisdiction, the remedy is for the State to insist that the defendant promptly serve their Wisconsin sentence as the legislature intended. This does not mean, however, that Wisconsin ought to avoid transporting inmates to other jurisdictions. Wisconsin obviously has an interest in the reciprocal exchange of prisoners as this encourages the timely resolution of criminal charges. It simply means that if Wisconsin chooses to loan out a prisoner to some other jurisdiction for allegations in that location to be sorted out, then Wisconsin ought to insist on the prisoner's return for the purpose of serving their preexisting Wisconsin sentence when the out-of-state proceedings are completed.

For example, in Mr. Lira's case, Wisconsin issued the revocation order and warrant in 2004. Once Mr. Lira completely resolved his open Oklahoma case and was transported back to Wisconsin in 2006 to deal with his legal obligations in this state, there was nothing stopping Wisconsin from enforcing that order *before* returning him to Oklahoma to serve his sentence in connection with their later-occurring judgment. Instead, however, Wisconsin took a passive stance and did not affirmatively enforce its judgment until many years had passed. Properly read, the statute would discourage this practice and would

instead motivate Wisconsin authorities to make sure that Wisconsin sentences are being given primacy under Wisconsin law.

Notably, as the State observes, the Wisconsin legislature has already ratified a similar rule allowing a sentence to constructively run via Wis. Stat. § 976.05(5). (State's Br. at 27). That statute provides that if a defendant is turned over pursuant to the specific procedure under the Interstate Agreement on Detainers, then they receive credit against their Wisconsin sentence while in "temporary custody" in the other jurisdiction. Significantly, the IAD is drafted to enable the "expeditious and orderly disposition" of out-of-state allegations. Wis. Stat. § 976.05(1). Its reference to "temporary" custody is therefore a deliberate choice; the statute is designed to enable a defendant to resolve out-of-state allegations and to then be promptly returned to the sending state. Wis. Stat. § 976.05(5)d&e.

Yet, as the State also points out, the awarding of credit under this section hinges on a technicality that will not always apply—and does not apply to Mr. Lira's case due to the circumstances of his transfer between the two states. (State's Br. at 27).[8]

[8] In other words, when Mr. Lira was returned to Oklahoma, he was not being sent to that state to serve "temporary custody" in connection with pending allegations; he was being sent to that state to serve a previously imposed sentence.

Hence, our legislature's directive that § 973.15(5) applies regardless of whether the specific provisions of the IAD are at play, it awards credit so long as the defendant is turned over in "any other lawful manner." This drafting choice makes sense; after all, the IAD is a contract entered into, but not drafted by, the legislature. It is not irrational to assume that, in drafting § 973.15(5), the legislature intended to create a catch-all provision applying to more offenders and providing for broader grants of credit while also specifically speaking to the policy goals of the IAD—enabling the prompt disposition of out-of-state allegations while still recognizing the primacy of the sending state's preexisting conviction.

At the same time, the statute also appears to prevent possible abuses and inequities suffered by the convicted defendant—the State cannot artificially delay the defendant serving and completing his sentence merely by farming him out to other jurisdictions where he may have other pending criminal matters. As the Court of Appeals has correctly observed, § 973.15(5) avoids the otherwise "harsh and unjust" rule that a defendant—who has no control over the transportation of his person—must physically cross the threshold of Dodge Correctional Institution to actually begin serving their sentence. *Brown*, 2006 WI App 41, ¶ 11, n.6.

The statute also protects against an unfair outcome in at least one other notable scenario—when the foreign allegations do not result in a conviction. For example, a defendant who is revoked in Wisconsin,

transported to another state to face other charges, but is acquitted after a lengthy detention there may be facing a "dead time" scenario, but-for the intervention of Wis. Stat. § 973.15(5).

Thus, while appeals to public policy are not strictly relevant to an assessment of the statutory text, here the statute's plain language is simple, direct, and appears rationally designed to effectuate a logical policy aim. Allowing credit to an offender like Mr. Lira is not an "absurd" outcome which would therefore require this Court to abandon its usual deference. Instead, it appears a wholly rational legislative directive that must be honored.

D. The reference to § 973.155 is procedural and does not create new substantive requirements for the awarding of credit under § 973.15(5).

The State does not dispute in its brief that Mr. Lira satisfied the two statutory preconditions of Wis. Stat. § 973.15(5)—that he was (1) a convicted offender (2) lawfully transferred to a foreign jurisdiction. Instead, it focuses on a distorted and mistaken reading of the statute's reference to the sentence credit statute, § 973.155, in an attempt to evade the commonsense reading set forth above.

According to the State, a defendant must satisfy *three* conditions: (1) be a "convicted offender," (2) be lawfully transferred to a foreign jurisdiction and (3) satisfy the specific rules for obtaining sentence credit under § 973.155 and the dozens of precedential

authorities interpreting that statute. (State's Br. at 25). This reading is mistaken.

Because Wis. Stat. § 973.15(5) requires that the defendant be a "convicted offender" in order to earn credit, it establishes a substantive "rule" for postconviction sentence credit. To effectuate and enforce that rule, the legislature included a cross-reference to the sentence credit statute, which has several important procedural components. First, § 973.155(3) explains to the DOC how credit, once awarded, is computed against the defendant's prison sentence. Second, § 973.155(5) creates the procedural mechanism for seeking credit via petition to the DOC and/or the circuit court. Third, § 973.155(6) establishes that an appeal of a sentence credit order is governed by Wis. Stat. § 809.30.

This procedural explanation of the cross-reference makes historical sense. Sentence credit initially arose as an equal protection issue; the legislature then created Wis. Stat. § 973.155 to both codify the duty to award credit for presentence custody and to create a mechanism for enforcing that duty. *State v. Boettcher*, 144 Wis. 2d 86, 90-91, 100, 423 N.W.2d 533 (1988). In that context, § 973.155 appears intended to serve a remedial purpose—to provide a procedural mechanism to guarantee that offenders receive credit for time spent in custody prior to sentencing. It therefore makes sense that, when setting forth the special credit rule under § 973.15(5)—a rule which was created as part of the same legislation creating the sentence credit statute—the

legislature would "loop in" the potential inmates for whom this provision applied by directing them back to the general-purpose remedial statute they created under § 973.155 as a means of guaranteeing that credit was in fact received.

The State wholly ignores this reading and insists that the generic reference to § 973.155 *must* be read as a specific reference to the substantive requirements of § 973.155(1)(a)—a statutory subsection which is primarily concerned with presentence, not postconviction, credit. However, the State does not try to incorporate those portions of the statute discussing confinement which could not plausibly relate to the custody described in § 973.15(5)—such as days spent in a Wisconsin substance abuse program. By selectively focusing on only one subsection of § 973.155—and wholly ignoring the procedural components of the statute—the arbitrariness of the State's position is clearly apparent. The State is guilty of cherry-picking which portions of § 973.155 it wishes to incorporate into § 973.15(5).

Thus, the reference to § 973.155 clearly does not require an "all or nothing" approach under which the statutory language of 973.155(1)(a) subsumes the more specific directive in § 973.15(5). Instead, the more sensible interpretation is one that recognizes § 973.155 as *both* a substantive and procedural statute—the statute is both a list of specific fact patterns giving rise to credit *and* a procedural statute creating an avenue by which defendants can have

credit applied to their sentences. Thus, § 973.15(5) is best understood as just one other fact pattern identified by the legislature, which if satisfied, would enable the defendant to seek credit under § 973.155's procedural mechanism.

E. The State's interpretation does not result in a consistent and "harmonized" statutory scheme.

The State claims in its brief that its overarching goal is to "harmonize" § 973.15(5) and § 973.155. (State's Br. at 16). If accepted, however, its arguments will instead promote a grossly discordant reading of these statutes, and render § 973.15 superfluous.

First, it is well-settled that this Court must strive to "give reasonable effect to every word, in order to avoid surplusage." *Kalal*, 2004 WI 58, ¶ 46. The State claims that, to be awarded credit under § 973.15(5), the defendant must also satisfy the requirements of § 973.155(1)(a). (State's Br. at 25). As stated above, it is notable that the State chooses some, but not all, of § 973.155's statutory language to be binding on a defendant seeking credit under § 973.15(5). In any case, the State's rigid focus on § 973.155(1)(a)'s definitional requirements is problematic because it renders § 973.15(5) wholly superfluous. This is not harmonization; it is an invitation to effectively eliminate a plainly stated legislative directive.

That is, if the defendant must satisfy the requirements of § 973.155(1)(a) to obtain credit, then

§ 973.15(5) has no independent function. A defendant seeking credit under the State's reading would have no cause to cite the specific language in § 973.15(5), as any credit claim could be resolved via solely § 973.155(1)(a). If the holding sought by the State is that § 973.15(5) permits a defendant to earn credit for time in custody "in connection with" the conduct underpinning the Wisconsin sentence, then § 973.155(1)(a) already provides for that credit. Under that reading, Wis. Stat. § 973.15(5) is superfluous.

Likewise, the State suggests that § 973.15(5) grants credit for time in another jurisdiction when that sentence is concurrent to a Wisconsin sentence. (State's Br. at 26). Once again, however, the other provisions of § 973.15 already make clear that concurrent sentences are to be computed together in determining the date of release; § 973.15(5) does no special "work" in that scenario, either.

In addition to rendering § 973.15(5) superfluous, the State's reading would also create substantial inconsistency in the statutes. Thus, setting aside those scenarios already covered by other statutory language, imposing the requirements of § 973.155(1)(a) on § 973.15(5) (as identified in binding precedent interpreting that statute) would result in a finding of "no credit" in many of the circumstances in which the plain language of the statute would otherwise apply.

For example, a defendant who is convicted in Wisconsin and then transported to another state would not ordinarily be entitled to claim their pretrial

confinement in that state against their sentence here, as § 973.155(1)(a) disallows credit based on a merely "procedural" connection. *State v. Johnson*, 2009 WI 57, ¶ 33, 318 Wis. 2d 21, 767 N.W.2d 207. While the defendant may have a detainer on file notifying the foreign jurisdiction that he was to be eventually returned to Wisconsin, that document alone would not necessarily entitle him to credit, either. *See State v. Carter,* 2010 WI 77, ¶ 33, 327 Wis. 2d 1, 785 N.W.2d 516.[9] And, of course, once the defendant was sentenced, any connection would be "severed"—the defendant could not claim the days in custody as credit, although if the sentences were concurrent, they would be computed as such. *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985).

Thus, instead of creating a special credit rule, as the legislature apparently intended, the language of § 973.15(5) is swallowed whole by § 973.155(1)(a). Either § 973.155(1)(a) already allows the defendant to seek credit under that statute with no consideration of § 973.15(5) or, in the alternative, credit plausibly allowed under § 973.15(5) is disallowed under the "controlling" language of § 973.155(1)(a) and the cases interpreting it.

Faced with this difficult reading, the State claims that § 973.15(5) would allow credit in one special situation: when the defendant is lawfully

[9] Obviously, if the detainer was one filed under the IAD, the defendant may be entitled to credit for his "temporary custody" under the terms of that statute. Wis. Stat. § 976.05(f).

transported to another jurisdiction and receives a concurrent sentence for conduct that is "factually connected" with the sentence he received in Wisconsin. (State's Br. at 27). This attempt to save a flawed statutory construction is problematic for several reasons.

First, it would apply to an extremely small number of potential defendants and would require an incredibly unique fact pattern that seems so rare as to be almost impossible. In interpreting the statute, it makes little sense to assume the legislature was specially articulating an obscure rule only rarely applicable to special fact patterns.

Second, it would create an additional precondition on the computation of sentences that would now contradict the conventional understanding of concurrent and consecutive sentences—while a defendant would ordinarily be entitled to have their Wisconsin and out-of-state concurrent sentences run together, this reading appears to suggest that the two sentences need to be factually related for this to be so. Thus, if a defendant is sentenced in Wisconsin, and then receives a concurrent sentence in some other jurisdiction, what principle does the Department of Corrections apply in computing that sentence? Do the sentences run concurrently or must the defendant now establish that they are factually related?

Third, it places multiple affirmative requirements on the statute that are not reflected in the plain language. For example, the statute does not

appear to require an eventual conviction in the foreign jurisdiction; indeed, it appears to allow credit if the defendant was transported and then, after a lengthy trial, acquitted.

Accordingly, this Court should reject the State's interpretation, which requires not only a jettisoning of precedent, but also a departure from conventional statutory interpretation principles.

F. A proper interpretation of § 973.15(5) establishes that *Brown* was correctly decided.

1. *Brown* correctly interpreted the statute.

As set forth above, the plain language of § 973.15(5) makes clear that a Wisconsin defendant is entitled to sentence credit against their Wisconsin sentence when the state makes the affirmative decision to transfer them to a foreign jurisdiction. This reading was ratified by the Court of Appeals in *Brown*.

As described by the Court of Appeals, the facts of that case are as follows: In 1992, Brown pleaded guilty to a drug offense. *Brown*, 2006 WI App 41, ¶ 2. He was placed on probation and then revoked in 1995. *Id*., ¶ 3. "Although Brown was ordered to be sent to Dodge Correctional Institution to serve his sentence, he apparently never arrived there […]." *Id*. Instead, he was turned over to federal authorities and ultimately charged with drug crimes in federal court. *Id*. He was convicted, served his sentence, and then returned to

Wisconsin. *Id.* At that point, Brown was surprised to learn that his federal incarceration did not count toward his Wisconsin sentence and ultimately asked for that credit in circuit court. *Id.*, ¶ 7. After the circuit court denied the motion, the Court of Appeals reversed. *Id.*, ¶ 11.

Notably the State's position in *Brown* was similar to its position here—that § 973.155(1)(a)'s "course of conduct" rule mandated that no credit be awarded. *Id.*, ¶ 11. However, the Court of Appeals concluded § 973.155(1)(a) was "not dispositive" and therefore looked to a more specific statute—§ 973.15(5). *Id.* Because the plain language of that statute has two requirements which Brown satisfied—that he was a convicted offender and that he had been lawfully turned over to a foreign jurisdiction—the Court of Appeals held that he was entitled to credit against his Wisconsin case for time spent in federal custody. *Id.* This published decision and its interpretation of § 973.15(5) became binding law throughout Wisconsin. Wis. Stat. § 752.41(2).

While the State asserts *Brown* is mistaken and should be overruled, its arguments are not persuasive.

First, the State asserts that *Brown* rendered the phrase "under the terms of s. 973.155" surplusage. (State's Br. at 24). This is not true. *Brown* does not "read the statutory phrase…out of the statute." *State v. Matasek*, 2014 WI 27, ¶ 17, 353 Wis. 2d 601, 846 N.W.2d 811. Instead, the language at issue still contributes to a construction which is faithful to

legislative intent, meaning it is not surplusage. *Id.*, ¶ 18. As set forth above, the reference to § 973.155 can be understood as a procedural mechanism for effectuating § 973.15(5)'s substantive rule. Merely because the language is not playing the role the State wishes does not make it wholly superfluous.[10]

Second, the State alleges that *Brown* "ignores," "conflicts," and is "inconsistent" with § 973.155. (State's Br. at 24). Again, this is not so. Faced with a plainly articulated legislative directive to award credit in certain scenarios, *Brown* gave effect to the specific language in § 973.15(5). As set forth above, there is still room for § 973.155 in the Court of Appeals' reading; the Court of Appeals merely declined to adopt a reading of the statute which would allow it to be swallowed whole by § 973.155(1)(a). Just because the State is unhappy with the result does not mean that this interpretation is irrational or arbitrary, as it alleges in its brief. (State's Br. at 24).

Next, the State misstates the holding of *Brown*, claiming that the Court of Appeals held "the statutes cannot be reconciled, and thus one must defeat the other." (State's Br. at 24). The Court of Appeals did no such thing. When faced with two substantive credit

[10] Moreover, the judicial "preference" against surplusage is not "absolute." *State v. Mason*, 2018 WI App 57, ¶ 26, 384 Wis. 2d 111, 918 N.W.2d 78. It is permissible for a reasonable interpretation furthering plain legislative intent to render "some" language surplusage. Thus, a reading which incorporates some, but not all, of § 973.155 is perfectly consistent with settled canons of statutory construction.

rules, the Court of Appeals prudently applied the more specific statute--§ 973.15(5). In doing so, the Court of Appeals did not read out the reference to § 973.155, instead, it gave effect to the expressed legislative intent as it was mandated to do.

Contrary to its argument that the statute is unambiguous and can be resolved via plain meaning analysis, the State then makes a cursory legislative history argument. (State's Br. at 24). Observing that both § 973.15(5) and § 973.155 were drafted at the same time, the State suggests this is proof that the legislature intended the statutes to work in harmony. (State's Br. at 25). That assumption is fair; yet it does not work in the State's favor—as set forth above, the statutes can be harmonized, just not in a way consistent with the State's preferred reading.

Finally, the State makes a naked appeal to policy, dragging the facts of this case into its statutory construction argument. (State's Br. at 25). The State appears to suggest, without evidence, that the outcome of this specific case is inconsistent with legislative intent. These arguments, however, are not appropriately considered in discerning plain language meaning; they are an appeal to outcome-determinative judging and should be wholly rejected.

2. When properly understood, there is no conflict with *Rohl* or *Boettcher*.

In order to justify its request that the Court overrule *Brown*, the State manufactures an alleged conflict between *Brown* and two other sentence credit

cases: *State v. Rohl*, 160 Wis. 2d 325, 466 N.W.2d 208 (Ct. App. 1991) and *State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988). The conflict is illusory.

In *Boettcher*, this Court held that when a defendant seeks sentence credit under Wis. Stat. § 973.155(1)(a), that credit must be applied on "a day-for-day basis" with no dual credit permitted. *Boettcher*, 144 Wis. 2d at 100.

The Court of Appeals relied on *Boettcher* for its holding in *Rohl*. As set forth by the Court of Appeals, Rohl was under the supervision of the Department of Corrections when he transferred that supervision to California. *Rohl*, 160 Wis. 2d at 209. While in California, he committed new crimes and was jailed pending the resolution of his California case. *Id*. Wisconsin also issued a revocation warrant. *Id*. Rohl was ultimately convicted and served a brief prison sentence in California. *Id*. He received credit against the California case for his presentence confinement in California. *Id*.

Following completion of his California prison term, Rohl was returned to Wisconsin, where he was then formally revoked from his Wisconsin supervision and returned to prison. *Id*. Rohl asked that he receive credit, against his Wisconsin case, for his presentence confinement in California—the same credit that had already been applied to his California sentence. *Id*. at 210. The circuit court denied the motion. *Id*.

On appeal, the Court of Appeals affirmed, relying on § 973.155 to conclude that credit was not

warranted. *Id*. Wis. Stat. § 973.15(5) was neither cited nor relied upon in that case, as it was inapplicable to those facts—Rohl had not yet been revoked from his Wisconsin supervision when he began serving his California sentence. Instead, the Court of Appeals concluded that the California sentence—which predated Rohl's revocation and sentencing in Wisconsin—could not be construed as "concurrent" (as no Wisconsin sentence was running at that time) and thus, dual credit was not permitted under Wis. Stat. § 973.155 and *Boettcher*, 144 Wis. 2d 86. *Id*.

Rohl therefore covers a distinct factual situation than was addressed in *Brown* because Rohl had entirely served his California sentence before his sentence was revoked in Wisconsin. Had Rohl been first revoked in Wisconsin—like Brown and Mr. Lira—then *Brown* and § 973.15(5) would arguably allow credit if Wisconsin had made the decision, at that point, to transport him to California. Instead, Rohl completed his California sentence prior to revocation of his Wisconsin supervision, and thus Wis. Stat. § 973.15(5) was inapplicable, and not even referenced in *Rohl*, which relied entirely upon Wis. Stat. § 973.155.

Accordingly, because *Rohl* concerns a significantly distinct fact pattern which did not fall under Wis. Stat. § 973.15(5), it is difficult to understand how or why it "conflicts" at all with *Brown*.

3. *State v. Martinez,* and the separate writing cited by the State, is inapplicable to this case.

Having failed to establish an actual conflict between binding precedents and having also failed to make a free-standing argument for an alternative reading of § 973.15(5), the State falls back on its only remaining source of "authority": a concurrence filed in *State v. Martinez*, 2007 WI App 225, 305 Wis. 2d 753, 741 N.W.2d 280.

Martinez is the only other published case addressing the applicability of § 973.15(5). Notably, the authored opinion is relatively innocuous and does not stand for any notable legal proposition relevant to this appeal as, like *Rohl*, it is factually distinct from the circumstances of *Brown* and Mr. Lira's case.

Martinez was charged, convicted, and sentenced in Wisconsin. *Martinez,* 2007 WI App 225, ¶ 2. He completed his sentence and was released on parole. *Id.* At that point, federal authorities took custody of him and he began serving a federal sentence. *Id*. Martinez completed that sentence and was again released to serve out the remainder of his Wisconsin parole. *Id*., ¶ 3. Martinez subsequently violated his parole and was reincarcerated. *Id*., ¶ 4.

Upon his reincarceration in his Wisconsin case, Martinez asked that he be given credit on his reincarceration term for the federal sentence he had previously served, citing § 973.15(5). *Id*., ¶ 5. On appeal, the Court of Appeals correctly concluded that

§ 973.15(5) was inapplicable; unlike the defendant in *Brown* (and, like *Rohl*) Martinez was not revoked and serving his Wisconsin sentence when he was turned over to federal authorities—instead he was on parole. *Id*., ¶ 17. Because Martinez was not serving his Wisconsin sentence at the time he was in federal custody, he was not entitled to credit against a hypothetical future revocation, a result which the Court of Appeals labeled "absurd." *Id*. The case was therefore decided via straightforward application of *Rohl*.

The *Martinez* holding is not controversial; Mr. Lira does not dispute that the Court of Appeals got it right. Instead, *Martinez* shows the State doing what § 973.15(5) appears to require—putting the Wisconsin sentence first. Here, Wisconsin waited until Martinez's state sentence was completed; once he was released on parole, he was then taken into federal custody. Martinez did not receive dual credit as a result. Had Wisconsin done things otherwise—handing over Martinez to the federal authorities while he was still serving his Wisconsin sentence—then *Brown* and § 973.15(5) would mandate that his Wisconsin sentence continue to run. That, however, was not what happened in *Martinez*.

Martinez is therefore a straightforward § 973.155 case and is of no value to this Court's analysis of Wis. Stat. § 973.15(5), contrary to the State's assertion. The Court of Appeals in *Martinez* found § 973.15(5) inapplicable under the facts of that case, and instead applied § 973.155. It is therefore misleading to

suggest, as the State does throughout its brief, that this case developed the law with respect to § 973.15(5); the Court of Appeals simply found § 973.15(5) inapplicable to the facts in *Martinez* and applied other binding authority interpreting § 973.155.

Likewise, it is also not correct to assert, as the State does in its brief, that the three-judge panel "split on the rationale" for rejecting Martinez's credit claim. (State's Br. at 22). While Judge Nettesheim filed a concurrence, he agreed that the outcome of the case was governed by *Rohl*. *Id*., ¶ 19 (Nettesheim, J, *concurring*). He wrote separately, however, merely to voice his opinion that a case which the panel had already found to be inapplicable—*Brown*—ought to be overruled. *Id*., ¶ 22.

Judge Nettesheim believed that the Court of Appeals ought to overrule *Brown* for those reasons now endorsed by the State in this appeal—that it fails to fully incorporate § 973.155(1)(a) into § 973.15(5) and that it disregards *Rohl*.[11] As asserted throughout this brief, this viewpoint, while deserving of respect when voiced by a member of a three-judge panel, is still mistaken. Full incorporation of § 973.155(1)(a) into §

[11] It is unsurprising that this viewpoint is confined to a concurrence; not only was the Court of Appeals powerless to invalidate *Brown*, *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246, 256 (1997), the Court of Appeals was also duty-bound to decide the dispute in *Martinez* on the narrowest grounds. *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989).

973.15(5) is not textually required and would effectively "read out" that legislative directive. Moreover, as *Rohl* is a § 973.155 and not a § 973.15(5) case, there is no conflict.

Thus, the concurrence in *Martinez,* while technically "persuasive" authority, contributes nothing to this Court's analysis because the facts of *Martinez* are wholly distinguishable from the facts and the issue presented in this case. Accordingly, this Court should decline the State's invitation to overrule *Brown* based upon a concurring opinion in a factually distinct case.

G. Sound principles of *stare decisis* should govern.

Having demonstrated that *Brown* was not incorrectly decided, Mr. Lira will only briefly address the issue of *stare decisis*—an issue somewhat ignored in the State's brief requesting invalidation of *Brown.*

"This [C]ourt follows the doctrine of stare decisis scrupulously because of [its] abiding respect for the rule of law." *Johnson Controls, Inc. v. Emps. Ins. of Wausau,* 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. "The principle of stare decisis applies to the published decisions of the court of appeals and stare decisis requires [this Court] to follow court of appeals precedent unless a compelling reason exists to overrule it." *Wenke*, 2004 WI 103, ¶ 21 (internal citations omitted).

This Court has made clear that the decision to overrule prior precedent should not be made lightly:

> Fidelity to precedent ensures that existing law will not be abandoned lightly. When existing law "is open to revision in every case, 'deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.'" Consequently, this court has held that "any departure from the doctrine of stare decisis demands special justification."

Johnson Controls, Inc., 2003 WI 108, ¶ 94 (*quoting Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). Adherence to this principle is the "preferred" course of action. *Id*. Importantly, in seeking to overturn *Brown*, the State must go further than mere proof that *Brown* was wrongly decided, it must prove that the decision was "objectively wrong," *Wehnke*, 2004 WI 103, ¶ 21.

The State has not satisfied that imposing standard in this case. As shown above, its understanding of § 973.15(5) is problematic and cannot be viewed as the more reasonable interpretative choice. Instead, the Court of Appeals' interpretation in *Brown* is a rational explanation of the governing statute. Even if individual members of this Court may disagree with *Brown*'s holding, it is not "objectively" wrong—far from it. Instead, *Brown* gives voice to a sensible legislative policy choice without permitting that statute to be swallowed whole by § 973.155.

It is also worth noting that *Brown* was decided in 2006; its interpretation has been binding on Wisconsin courts for 15 years. Notably, the legislature has not intervened to "correct" the reading in *Brown*, even given Judge Nettesheim's concurrence. Accordingly, stability of the law—and adherence to the plain language of the statute—requires this Court to abide by the principle of *stare decisis*.

H. Applying these principles, Mr. Lira is entitled to credit against his Wisconsin sentences for the time spent serving his Oklahoma sentences from April 6, 2006 onward under a plain reading of Wis. Stat. § 973.15(5).

Notably, the State's entire argument at this stage of the appeal is that Mr. Lira is not entitled to credit because *Brown* was wrongly decided; if this Court declines the invitation to overrule *Brown,* then Mr. Lira is entitled to credit pursuant to the Court of Appeals decision below.

According to the undisputed facts in this case, Mr. Lira was returned to Oklahoma from Wisconsin on April 5, 2006, where he remained while serving his Oklahoma sentence. (R1 52:28; R2 39:28); (App. 156). According to the circuit court's findings of fact, Mr. Lira completed that sentence on June 9, 2017. (R1 68:2; R2 55:2); (App. 199). Notably, his revocation order and warrant formally revoking him from the two supervision cases in this case had already been signed

on April 16, 2004. (R1 52:19; R2 39:19). Although they were in custody of a revoked parolee/probationer, Wisconsin authorities opted not to enforce the ROW; instead, they sent Mr. Lira back to Oklahoma.

Having been revoked, Mr. Lira was at that point in an identical position to the defendant in *Brown*. Because he was lawfully turned over—and there is no longer any dispute on this point—his custody from that point forward satisfies the requirements of *Brown* and § 973.15(5). Thus, he is entitled to credit from April 6, 2006 until June 9, 2017. That is 4,102 days of sentence credit.[12]

II. Having been formally revoked, Mr. Lira was entitled to credit for custody in Wisconsin and Texas after having been returned from Oklahoma.

A. Legal principles and standard of review.

Determination of sentence credit is primarily a question of statutory interpretation requiring *de novo* review of the lower court decision. *State v. Johnson*, 2009 WI 57, ¶ 22, 318 Wis. 2d 21, 767 N.W.2d 207.

In this case, Mr. Lira was revoked from both a term of parole and a term of probation. Although a formal revocation order and warrant had been signed,

[12] The Court of Appeals did not specifically assess how the credit is to be allocated across the two cases; presumably this can be resolved on remand should this Court affirm the Court of Appeals decision.

the State concedes that neither sentence could formally commence until Mr. Lira entered a Wisconsin prison. (State's Br. at 30); Wis. Stat. § 304.072(4); Wis. Stat. § 973.10(2)(b).

The State also concedes that an offender who has been revoked is entitled to credit against their revocation sentence while they await formal commencement of their sentence. (State's Br. at 30-31). In support, the State relies on a broad reading of § 304.072(5) which discusses revoked "probationers." Mr. Lira, who was revoked on both parole and probation supervision statuses, does not dispute that interpretation, but draws this Court's attention to *State v. Davis*, 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488, which reads a similar credit rule into sub. 4 of the same statute, addressing inmates being revoked from parole or extended supervision.

In addition to credit under ch. 304, a revoked inmate is also able to support their claim for credit via § 973.155(1)(a), as any time spent in custody post-revocation but pre-commencement of sentence is necessarily "connected" to their revocation sentence factually and procedurally.

B. Mr. Lira was entitled to credit under § 304.072.

According to the circuit court's findings of fact, Mr. Lira first returned to Wisconsin from Oklahoma "on or about May 22, 2005." (R1 68:2; R2 55:2). As noted above, a revocation order and warrant for both supervision cases was already on file which

"commanded" that Mr. Lira be returned to Dodge Correctional Institution to serve out his revocation sentences. (R1 52:19; R2 39:19).

Because he had a pending ROW—and had not yet been transported to Dodge Correctional Institution—Mr. Lira was in the same or similar position as any defendant sitting in a county jail, post-revocation, awaiting their transportation to a DOC institution. *See* Wis. Stat. § 304.072(4)&(5). Thus, Mr. Lira would continue accruing credit from the date he was placed in a Milwaukee County Jail until he was erroneously released from custody on June 15, 2005.

After Wisconsin mistakenly released Mr. Lira, he was rearrested in Texas on December 13, 2005. (R1 52:35; R2 39:35). Mr. Lira returned once more to Milwaukee County on January 11, 2006, where he remained while his other open criminal cases wended their way through the circuit court. (R1 52:28; R2 39:28); (App. 156). While he remained in custody, his revocation order and warrant commanding authorities to return him to Dodge Correctional Institution remained in force. Once again, Mr. Lira was in the same position as any other revoked probationer, and there should have been nothing stopping Wisconsin from transporting him to Dodge to begin serving that sentence. However, Wisconsin chose not to enforce that warrant and sent Mr. Lira back to Oklahoma.

As stated above, this does not change the applicability of § 304.072 to this period of incarceration. Thus, Mr. Lira is entitled to credit from

December 13, 2005 until he was returned to Oklahoma, rather than transported to Dodge as ordered by the ROW.

The State, however, disagrees that Mr. Lira was entitled to this credit, asserting that although he was a revoked "probationer," he was not awaiting commencement of his revocation sentences. In the State's view, "Lira did not, and could not, begin serving those sentences until June 2017 upon completing his Oklahoma sentences." (State's Br. at 31). Accordingly, because Wisconsin chose instead to send him to Oklahoma—and to disregard the ROW commanding them to return Mr. Lira to Dodge Correctional Institution—the State argues his time in custody should not count.

This is sophistry. Mr. Lira's custody in Wisconsin and Texas plainly satisfies the terms of the statute, which requires that credit be awarded for time spent in custody pending commencement of the revocation sentence. Mr. Lira was revoked, and a warrant was in existence directing him to be turned over to Wisconsin DOC authorities to serve his sentence. Accordingly, he was in custody pending the commencement of the revocation sentence. Just because Wisconsin chose to ignore the ROW and to instead send Mr. Lira to Oklahoma should not change that analysis.

Because § 304.072 plainly requires that Mr. Lira receive this credit, this Court should therefore affirm the Court of Appeals order awarding credit. It should

not encourage, as the State does, the creation of a credit loophole—that a defendant who has been lawfully revoked is somehow precluded from earning sentence credit against their revocation so long as Wisconsin does not ever "activate" that sentence by formally sending him to Dodge Correctional Institution. The negative consequences of such a holding—and its attendant inequities—are readily apparent. Because the statutes evince a plain intent that revoked inmates continue accruing credit until their sentence formally starts, Mr. Lira is, as the Court of Appeals found, entitled to credit.

C. Mr. Lira was entitled to credit under § 973.155(1)(a).

The State also argues that Mr. Lira cannot earn credit for this disputed period of custody under Wis. Stat. § 973.155(1)(a). (State's Br. at 31). Thus, the State appears to concede that the language of § 304.072—referencing § 973.155—does not incorporate the requirements of § 973.155(1)(a); instead, the State suggests that § 304.072 and § 973.155(1)(a) are alternative grounds for the awarding of credit (substantially contradicting its reading of § 973.15(5), above). (State's Br. at 31).

Wis. Stat. § 973.155(1)(a) permits credit for time spent in custody "in connection with the course of conduct for which sentence was imposed." A revoked inmate, sitting in a jail waiting to be sent to Dodge Correctional Institution to begin serving their sentence, is necessarily in custody "in connection" with

that eventual sentence; to hold otherwise does violence to commonsense.

Moreover, should some further "factual" connection be required, the Court of Appeals properly concluded Mr. Lira was in custody in connection with his 2004 conduct—conduct which both resulted in a new criminal case and the revocation of his supervision. *Lira*, Nos. 2019AP691-CR & 2019AP692-CR, ¶ 45. (App. 119-120). Notably, while his supervision had been revoked, he was not yet serving that sentence as he still had not been transported to Dodge Correctional Institution.

Faced with these arguments, the State makes a bizarre pivot—claiming that Mr. Lira's sentence on the revocation was somehow running—an assertion that is at odds with the other arguments made in its brief. (State's Br. at 32). The State cites *Beets,* 124 Wis. 2d 372, to support its assertion.

A comparison with that authority is therefore instructive. In that case, Beets was in a similar position: he was facing both revocation of supervision and a new charge arising from the same underlying conduct. *Id*. at 374. Unlike Mr. Lira, he began serving his revocation service before resolving the new case. *Id*. at 375. Yet, no party disputed that Beets was entitled to credit against the revocation for time spent in custody in between formal revocation and initiation of the revocation sentence. *Id*.at 375. The question on appeal was whether credit could still be accrued, against the new case, for time spent in custody after

the sentencing after revocation. *Id*. The answer to that question was no. *Id*. at 376.

Thus, while the State cites *Beets* in support of their claim, the case is not helpful to its cause. Mr. Lira's revocation sentences were not yet being served while he was in custody in Wisconsin and Texas; under Mr. Lira's view they began constructively running once he was returned to Oklahoma or, in the State's view, did not commence until 2017. Under either view, Mr. Lira is entitled to the credit.

Next, the State argues that credit under § 973.155(1)(a) is not allowed because it may constitute double credit. (State's Br. at 32). It makes a series of speculative arguments suggesting that evidence outside this record may contradict the credit tally assessed by the Court of Appeals. (State's Br. at 32). It asks, for the first time, for a remand to resolve this factual issue. (State's Br. at 32).

Mr. Lira notes that the Court of Appeals decision already provided for a remand to resolve remaining factual disputes, such as whether Mr. Lira was returned to Wisconsin on May 19, 2005 or May 22, 2005. *Lira,* Nos. 2019AP691-CR & 2019AP692-CR, ¶ 8, n.7. (App. 105). While Mr. Lira urges this Court to resolve the issue on the merits, he does not object to this issue being clarified at a subsequent remand.

CONCLUSION

For the reasons set forth herein, Mr. Lira asks this Court to affirm the judgment of the Court of Appeals.

Dated this 11th day of May, 2021.

Respectfully submitted,

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

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

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,743 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 11th day of May, 2021.

Signed:

Christopher P. August
Assistant State Public Defender

CERTIFICATION AS TO SUPPLEMENTAL APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental 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 one or more initials or other appropriate pseudonym or designation 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 11th day of May, 2021.

Signed:

Christopher P. August
Assistant State Public Defender

APPENDIX

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TO
SUPPLEMENTAL APPENDIX

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