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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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This Court should overturn *Brown*, adopt a reading of Wis. Stat. § 973.15(5) that is faithful to the statute's language, and reverse the court of appeals' award of over 11 years of credit for Lira's Oklahoma custody. It should also reverse the court of appeals' award of four and one-half months of credit for Lira's custody in Wisconsin and Texas in 2005 and 2006 while on a detainer to face new Wisconsin charges.

Lira makes a remarkable number of legal assertions—some of which have little bearing on the relatively narrow question of statutory interpretation presented by this case. To avoid claims of forfeiture, the State here opposes all assertions made in Lira's brief that are not consistent with the State's arguments in its briefs, and here reasserts all arguments made in the opening brief.

I. *Brown* should be overturned because it misread section 973.15(5) to prohibit consideration of Wis. Stat. § 973.155. Under the plain meaning of section 973.15(5), Lira is not entitled to credit for his Oklahoma custody.

A. Wisconsin Stat. § 973.15(5) plainly incorporates Wis. Stat. § 973.155's terms.

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," the general sentence credit statute.

As explained, Wis. Stat. §§ 973.15(5) and 973.155 were created in adjacent provisions of the same legislative enactment. *See* 1977 Wis. Act 353, §§ 8 and 9. Thus, at the time, the legislature was fully aware of the contents of section 973.155 when it referenced that section in section 973.15(5). Had the legislature meant *not* to link a determination of credit under section 973.15(5) with section 973.155's "terms," it could have omitted any reference to section 973.155 in

section 973.15(5) or explicitly stated that the provisions of section 973.155 do not apply.

So, which "terms" of section 973.155 does section 973.15(5) incorporate? The statute does not identify certain subsections, or select only the procedural requirements of section 973.155. It provides that section 973.15(5) credit determinations are made "under the terms of s. 973.155," a phrase that, by the absence of any limiting language, encompasses all terms of section 973.155 that can reasonably apply to a determination of credit under section 973.15(5).[1]

Two familiar terms of Wis. Stat. § 973.155 are of particular relevance, one substantive and one procedural:

- credit is available for custody "in connection with the course of conduct for which sentence was imposed," section 973.155(1)(a); and
- credit is determined in a linear, day-for-a-day manner, such that days are not counted twice ("dual credit") on non-concurrent sentences, as this Court interpreted section 973.155 in *State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988).

Thus, consistent with Judge Neal Nettesheim's reading of the statute, *State v. Martinez*, 2007 WI App 225, ¶¶ 21–23, 305 Wis. 2d 753, 741 N.W.2d 280 (Nettesheim J. concurring), the plain meaning of Wis. Stat. § 973.15(5) is as follows: A "convicted offender" who is "lawful[ly]" "made available" to another jurisdiction is entitled to credit for custody in that jurisdiction when, "under the terms of s. 973.155," that custody is in connection with the course of conduct for which

[1] Although Lira accuses the State of "cherry-picking," it is Lira who is "cherry-picking" when he argues that only procedural terms of section 973.155 apply here. (Lira's Br. 22–25.)

sentence is imposed, and a credit award would not result in double-counting custody on nonconcurrent sentences.

B. *Brown*'s interpretation of Wis. Stat. § 973.15(5) is contrary to the statute's plain language.

Lira takes issue with the State's account of the *Brown* decision. (Lira's Br. 30–31.) But *Brown* plainly regarded Wis. Stat. §§ 973.15(5) and 973.155 as conflicting, and made no effort to harmonize the statutes or to account for the phrase "under the terms of s. 973.155." *State v. Brown*, 2006 WI App 41, ¶ 11, 289 Wis. 2d 823, 711 N.W.2d 708. *Brown* determined that the more specific statute, section 973.15(5), trumped the more general, section 973.155, which, it held, had no application to section 973.15(5): "[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." *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 State argued that credit was unavailable because Brown had yet to begin serving his Wisconsin sentence when he was sent to federal authorities—he had been revoked and sentenced but was awaiting transfer to prison.[2] In other words, the State's position was that the days in federal custody could not be counted a second time under *Boettcher* because the state sentence did not run concurrently with the federal sentence. *Brown*, 289 Wis. 2d 823, ¶ 11 n.7. The court

[2] *See* Wis. Stat. § 304.072(4) (after revocation of supervision, a person's sentence "resumes running on the day he or she is received at a correctional institution").

criticized this position as "harsh and unjust" because Brown had no control over when this transfer to start his prison sentence might occur. *Id.* ¶ 11 n.6. So the court adopted an interpretation of Wis. Stat. § 973.15(5) prohibiting consideration of any of the "terms of Wis. Stat. § 973.155," even the rule against dual credit—proving that hard cases really do make bad law.

To reiterate, *Brown* should be overturned because its interpretation of Wis. Stat. § 973.15(5) ignores the phrase "under the terms of s. 973.155," and, worse yet, adopted an interpretation of section 973.15(5) that prohibited consideration of section 973.155's "terms" in determining credit. *Brown*, 289 Wis. 2d 823, ¶ 11.

C. Lira's interpretation of Wis. Stat. § 973.15(5) is driven by policy considerations, not the statutory language.

Lira's discussion of Wis. Stat. § 973.15(5) is roughly divided into two parts: (1) the policy underlying the statute; and (2) the meaning of the phrase "under the terms of s. 973.155."

1. Lira's view of the policy underlying Wis. Stat. § 973.15(5) is unsupported by the statute's text—and would result in Wisconsin authorities violating existing legal duties.

Lira's discussion of Wis. Stat. § 973.15(5) begins with a recitation of the statutory language, but quickly moves to his views of the statute's underlying policy. (Lira's Br. 16–22.)

At one point, Lira asserts: "The statute . . . evinces a legislative preference that Wisconsin inmates ought to promptly serve their Wisconsin sentences in a Wisconsin prison." (Lira's Br. 17.) Then, Lira claims that "there was

nothing stopping Wisconsin" from keeping him in Wisconsin in March 2006 to serve his present sentence instead of returning him to Oklahoma after his new charges were adjudicated. (Lira's Br. 19.) Instead, Lira complains, Wisconsin "took a passive stance," returning him to Oklahoma. (Lira's Br. 19.) "Properly read," he continues, Wis. Stat. § 973.15(5) "would discourage th[e] practice" of timely returning a prisoner to the state from which he or she was sent on a detainer "and would instead motivate Wisconsin authorities to make sure that Wisconsin sentences are being given primacy under Wisconsin law." (Lira's Br. 19–20.)

Thus, Lira argues that, pursuant to section 973.15(5), Wisconsin authorities should have *kept* him in Wisconsin in 2006 after his new crimes were adjudicated in 2006 to serve his present Wisconsin sentence. Lira seems to be arguing that, because Wisconsin could have kept him in March 2006 to serve his present sentence, that sentence should be deemed to have begun running when he was returned to Oklahoma in 2006.

All this would likely be news to Oklahoma,[3] and to Wisconsin officials who take seriously their obligations under the Interstate Agreement on Detainers (IAD). Again, records related to Lira's transfer from Oklahoma to Wisconsin and back are not in this case record. But Lira does not dispute that he was in Wisconsin pursuant to a detainer to face 2004 charges of escape and endangering safety.[4]

The IAD authorizes the transfer of a prisoner to the "temporary custody" of another state for only one purpose: to face pending charges "in order that speedy and efficient

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[3] Oklahoma has enacted the IAD. Okla. Stat. tit. 22 § 1347.

[4] Lira does not dispute in his response brief the State's assertion that he was provided to Wisconsin on a detainer in 2005.

prosecution may be had." Wis. Stat. § 976.05(5)(a). The statute provides that "[t]he temporary custody . . . *shall be only for the purpose of permitting prosecution on the charge or charges* . . . which form the basis of the detainer." Section 976.05(5)(d) (emphasis added). The statute requires prompt return of the prisoner upon the adjudication of the pending charges: "At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state." Section 976.05(5)(e).

Thus, the IAD prohibited Wisconsin from keeping Lira to serve his present sentence in 2006, undermining Lira's view that Wis. Stat. § 973.15(5) "giv[es] primacy" to Wisconsin sentences for persons here on a detainer from another state. The legislature presumably understood the provisions of the IAD when it enacted Wis. Stat. § 973.15(5)—Chapter 976 is referenced in section 973.15(5)—and would not have enacted the statute to undermine its clear obligations under the IAD. *See State v. Lalicata*, 2012 WI App 138, ¶ 15, 345 Wis. 2d 342, 824 N.W.2d 921.

Even if Lira's policy theories had any validity, "[i]t is the enacted law, not the unenacted intent, that is binding on the public." *State ex rel. Kalal v. Cir. Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. And Lira's expressions about the policy underlying Wis. Stat. § 973.15(5) bear little resemblance to the language of the statute.

A final, related point. Lira's status in 2005 and 2006—he was an Oklahoma prisoner in "temporary custody" of Wisconsin for the sole purpose of adjudicating new charges under Wis. Stat. § 976.05—provides another reason Lira cannot receive credit under Wis. Stat. § 973.15(5): He was not Wisconsin's inmate to be "made available" to another jurisdiction for purposes of section 973.15(5).

Yes, Lira was an Oklahoma prisoner at the time: his Oklahoma sentence continued to run while he sat in Wisconsin and Texas jails, *see* Okla. Stat. tit. 22 § 1347, art. V(f) (2016) (Oklahoma's version of Wis. Stat. § 976.05(5)(f)). (Opening Br. 19–20.) Milwaukee County erred in releasing Lira on bail in 2005 because he was serving his Oklahoma sentence at the time and the IAD does not authorize release on bail. Section 976.05(5)(d) (requiring the prisoner to be "held in a suitable jail or other facility regularly used for persons awaiting prosecution").

That Lira was *already serving* his Oklahoma sentence while in Wisconsin in 2005 and 2006 when Wisconsin returned him to Oklahoma demonstrates the absurdity of the return on the detainer being the triggering event for credit under Wis. Stat. § 973.15(5). Lira could not be "made available" to Oklahoma at the time—he was already Oklahoma's prisoner serving an Oklahoma sentence.

2. Lira's view that the statute's reference to "under the terms of s. 973.155" is merely "procedural" is an arbitrary limitation—but even if he's right, Lira would not be entitled to credit under Wis. Stat. § 973.15(5) for his custody in Oklahoma.

Having made his policy arguments, Lira finally returns to the statutory language. Addressing the phrase "under the terms of s. 973.155," Lira posits that this reference in section 973.15(5) is to the procedural requirements of section 973.155 only. (Lira's Br. 22–25.) Lira then lists three procedural requirements as applicable provisions: sections 973.155(3), 973.155(5) and 973.155(6), which Lira describes in his brief.

The State agrees that these sections apply, of course. But Lira's position that only section 973.155's procedural requirements apply—and perhaps only the three listed

provisions—is arbitrary and not supported by the statutory text. As argued, the phrase "under the terms of s. 973.155" contains *no limitation*: It does not distinguish between "substantive" and "procedural" terms, or otherwise specify that some terms apply while others do not.

Lira complains that the plain-meaning reading that all section 973.155's terms apply renders section 973.15(5) "superfluous." (Lira's Br. 25.) Lira goes so far as to argue that if the "in-connection" requirement of section 973.155(1)(a) is incorporated, section 973.15(5) would be "swallowed whole" by section 973.155(1). (Lira's Br. 27.)

Lira demonstrates that the plain meaning of section 973.155 yields a statute with narrow application, but he fails to show that the legislature intended it to have a wider application. The incorporation of the "in-connection" requirement of section 973.155 may result in a statute with a narrow reach, but there is nothing absurd about that. *See Kalal*, 271 Wis. 2d 633, ¶ 46. There are circumstances in which an offender's criminal course of conduct under Wis. Stat. § 973.155(1)(a) may result in charges in multiple jurisdictions—for example, cases resulting in the commission of separate state and federal offenses for conduct occurring across state lines, such as multi-state drug conspiracies, kidnapping, many child sex crimes, and complex financial crimes. Other criminal courses of conduct may straddle state lines, such as drunk driving or a high-speed chase. The State believes that "under the terms of s. 973.155" plainly includes all terms, including the "in-connection" requirement of section 973.155(1)(a).

But even if this Court were persuaded otherwise, and elected to adopt Lira's view that only the procedural requirements of Wis. Stat. § 973.155 apply, Lira would not be entitled to credit under such an interpretation of Wis. Stat. § 973.15(5).

As briefed, Lira's argument that Wis. Stat. § 973.15(5) incorporates Wis. Stat. § 973.155's procedural requirements omits an important requirement of section 973.155 that is plainly procedural in nature: *Boettcher*'s basic rule for counting credit when, as here, two or more sentences are at issue. 144 Wis. 2d at 100. Again, *Boettcher* requires custody time to be counted in a linear, day-for-day fashion, such that double counting is not allowed for non-concurrent sentences. *See id.* If, as Lira asserts, Wis. Stat. § 973.15(5) incorporates the procedural requirements of section 973.155, it should incorporate *all* procedural requirements of the statute, including *Boettcher*'s bar on dual credit for non-concurrent sentences.

Since *Boettcher* applies, Lira is not entitled to credit under Wis. Stat. § 973.15(5) for his 2006–17 custody in Oklahoma. Lira's present sentence did not—and could not, as discussed above—begin until he completed his Oklahoma sentence and was returned to Wisconsin in 2017. His sentences were served separately, and thus his custody time may not be counted a second time against his present sentence.

In sum, section 973.15(5)'s plain language that credit is provided "under the terms of s. 973.155" means all terms of section 973.155, and Lira is not entitled to credit. Even if this Court disagrees, and adopts Lira's view that only the procedural requirements of section 973.155 apply, Lira still would not be entitled to credit because he cannot satisfy a longstanding procedural requirement of section 973.155: *Boettcher*'s rule against dual credit.

II. Lira is not entitled to approximately four-and-one-half months credit for his custody in Wisconsin and Texas in 2005 and 2006.

The State reasserts here its arguments made in its opening brief, and again opposes all Lira's assertions made in support of credit for the period in which Lira was present in Wisconsin and Texas on a detainer to face the escape and endangering safety counts. The State also offers some specific responses to Lira's arguments.

First, it is fact, not "sophistry," that Lira's presence in Wisconsin and Texas jails in 2005 and 2006 was not "pending . . . commencement" of his present sentences. *See* Wis. Stat. § 304.072. Lira was here for one reason only: To face the 2004 escape and endangering safety charges while on a detainer from Oklahoma. Credit is therefore not available for this period under Wis. Stat. § 304.072(5).

Second, Lira misreads the State's argument that credit for this time is unavailable under Wis. Stat. § 973.155 and *Boettcher* because it would amount to dual credit. Lira asserts that the State makes a "bizarre pivot" to claim that his present sentence began running way back in 2006. The State made no such argument. Rather, it argued that the sentence against which Lira's custody was applied was his *Oklahoma* sentence. Under the IAD, Lira's Oklahoma sentence would have continued to run while he was in Wisconsin and Texas pursuant to Okla. Stat. tit. 22 § 1347, art. V(f). *See also* Wis. Stat. § 976.05(5)(f). Put differently, Lira did not receive credit for this time because, as discussed, his Oklahoma sentence continued to run while he was here, and any award of credit would constitute double counting of time already put toward the Oklahoma sentence.

Finally, the State's assertion that Lira was serving his Oklahoma sentence while he was here is not "speculative"—

it is based on statute. (Lira's Br. 47.) If Oklahoma followed its version of the IAD, Lira's Oklahoma sentences would have continued to run the entire time Lira was in Wisconsin and Texas in 2005 and 2006. Under these circumstances, applying credit against his present sentences for this time would constitute impermissible dual credit on non-concurrent sentences.

In sum, Lira is not entitled to four and one-half months of credit for his time in Wisconsin and Texas on the detainer.

CONCLUSION

The court of appeals decision should be reversed.

Dated this 17th day of June 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 2,924 words.

Dated this 17th day of June 2021.

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 17th day of June 2021.

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