



**STATE OF WISCONSIN
DEPARTMENT OF JUSTICE**

**FILED
10-29-2020
CLERK OF WISCONSIN
COURT OF APPEALS**

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October 29, 2020

Sheila T. Reiff
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Re: *State of Wisconsin v. Christopher W. Yakich*,
Case Nos. 2019AP1832-CR & 2019AP1833-CR
District IV

Dear Ms. Reiff:

On September 29, 2020, the Court ordered the parties in the case mentioned above to each submit a supplemental letter brief by October 29, 2020. The State submits this letter brief pursuant to that order.

The Court ordered the parties to discuss two issues in their letter briefs. First, the Court stated, "Please discuss the impact of 1989 Wis. Act 334 on your interpretation of the NGI statutes." Second, the Court stated, "Please discuss the amendments made to the NGI statutes by 2001 Wis. Act 109 in light of the prior amendments made by 1989 Wis. Act 334."

Each of those Acts supports the State's view that Wis. Stat. § 971.17(1)(b) authorized the circuit court to order Christopher W. Yakich to serve consecutive NGI commitments. The Legislature passed those Acts after this Court upheld the propriety of consecutive NGI commitments, but the Legislature did not purport to overrule that precedent. Instead, those Acts maintained the principle that a maximum NGI commitment would equal the maximum prison sentence for the same underlying offenses. This parity strongly suggests that the Legislature has continued to allow consecutive NGI commitments.

Ms. Reiff
October 29, 2020
Page 2

1. ***1989 Wisconsin Act 334 supports the State's view.***

In 1988, this Court held that Wis. Stat. § 971.17(4) allowed a circuit court to impose consecutive NGI commitments on a defendant. *State v. C.A.J.*, 148 Wis. 2d 137, 140–41, 434 N.W.2d 800 (Ct. App. 1988). This Court reasoned that “the legislature intended to prohibit a person found not guilty by reason of mental defect or disease from being committed any longer than the underlying offense.” *Id.* at 140. It further reasoned that, “[u]nder sec. 973.15(2), Stats., the sentencing court may impose in multiple offense situations consecutive sentences if it so desires.” *Id.*

Although the *C.A.J.* court relied on Wis. Stat. § 973.15(2), that statute was not mentioned in Wis. Stat. § 971.17(4) (1987–88). When *C.A.J.* was decided, the relevant statutory language provided: “When the maximum period for which a defendant could have been imprisoned if convicted of the offense charged has elapsed, subject to s. 53.11 and the credit provisions of s. 973.155, the court shall order the defendant discharged” Wis. Stat. § 971.17(4) (1987–88).

Shortly after *C.A.J.* was decided, the Legislature repealed and recreated Wis. Stat. § 971.17, adding an explicit reference to Wis. Stat. § 973.15(2). This newly recreated statute read, as relevant here:

When a defendant is found not guilty by reason of mental disease or mental defect, the court shall commit the person to the department of health and social services for a specified period not exceeding two-thirds of the *maximum term of imprisonment that could be imposed under s. 973.15 (2)* against an offender convicted of the same crime or crimes

1989 Wis. Act 334, § 5 (emphasis added), available at <https://docs.legis.wisconsin.gov/1989/related/acts/334.pdf>.

This explicit reference to section 973.15(2) was a codification of *C.A.J.*'s holding that consecutive NGI commitments were permissible. When the Legislature passed Act 334, Wis. Stat. § 973.15(2) authorized circuit courts to impose concurrent or consecutive sentences in criminal cases. Wis. Stat. § 973.15(2) (1989–90), available at <https://docs.legis.wisconsin.gov/1989/statutes/statutes/973.pdf>. Because the newly recreated section 971.17(1) expressly linked maximum NGI commitments to maximum sentences under section 973.15(2), this statutory amendment was an explicit adoption of *C.A.J.*'s holding.

Ms. Reiff
October 29, 2020
Page 3

The prefatory note to 1989 Wisconsin Act 334 further supports the conclusion that the Legislature adopted *C.A.J.*'s holding. The prefatory note stated that “[p]resent law on [NGI procedures] is a confusing blend of judicial decisions, a 1969 enactment patterned on the model penal code, and portions of the mental health act”—citing *C.A.J.*, other case law, and various statutes. 1989 Wis. Act 334, Prefatory Note. The prefatory note explained that the Act was enacting a bill that “specifies that the maximum commitment period is two-thirds of the maximum sentence which could be imposed if the defendant had been convicted of the crime, unless the maximum sentence is life, in which case the maximum commitment period is also life.” *Id.* The Legislature was thus aware of *C.A.J.* when it passed Act 334, but nothing indicates that it intended to overrule that precedent.

To the contrary, Act 334 adopted a two-thirds rule that was consistent with *C.A.J.*'s holding. Again, when this Court held that consecutive NGI commitments were permissible, it reasoned that “the legislature intended to prohibit a person found not guilty by reason of mental defect or disease from being committed any longer than the underlying offense.” *C.A.J.*, 148 Wis. 2d at 140. The Legislature adopted the two-thirds rule in 1989 to ensure that parity. “When the legislature specified that institutionalization of NGI acquittees may not exceed 2/3rds of the maximum imprisonment for the underlying offense, it was obviously pegging maximum institutionalization for these individuals to the maximum an ordinary offender could serve in prison prior to being mandatorily paroled on a maximum sentence.” Michael B. Brennan et al., *Truth-in-Sentencing Part II: 2001 Wisconsin Act 109 Crimes and Their Penalties*, at 18, available at <https://www.wisprd.org/images/AppellateFolder/templatesforms/TISpartII.pdf>. In other words, the two-thirds rule for maximum NGI commitments created “a maximum term of institutionalization at the same point in time as mandatory release on parole” under the then-governing system of indeterminate sentencing. Michael B. Brennan et al., *Fully Implementing Truth-in-Sentencing*, Wisconsin Lawyer, Vol. 75, No. 11 (Nov. 2002), available at <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=75&Issue=11&ArticleID=259>. By adopting this two-thirds rule for NGI commitments, the Legislature made clear that the maximum length of NGI commitments would equal the maximum prison sentences for the underlying offenses.

Ms. Reiff
October 29, 2020
Page 4

In short, 1989 Wisconsin Act 334 adopted *C.A.J.*'s holding allowing consecutive NGI commitments. Although this Act's prefatory note did not mention concurrent or consecutive NGI commitments, it cited *C.A.J.*, thus showing that the Legislature was aware of that precedent. By adding an explicit reference to Wis. Stat. § 973.15(2) in the newly recreated Wis. Stat. § 971.17(1), the Legislature signaled that consecutive NGI commitments were permissible. This conclusion finds further support in the two-thirds rule, which the Legislature adopted to ensure that maximum NGI commitments would equal the maximum prison sentences for the same offenses. This parity strongly suggests that the Legislature intended to allow consecutive NGI commitments when it adopted 1989 Wisconsin Act 334.¹

2. 2001 Wisconsin Act 109 supports the State's view.

When the Legislature amended Wis. Stat. § 971.17 in 2002, it maintained the parity principle that an NGI acquittee would not serve more time in a mental-health institution than a defendant would serve in prison if convicted of the same offenses. This principle strongly suggests that the Legislature intended to maintain the option of consecutive NGI commitments.

After the Legislature adopted truth-in-sentencing and abolished parole, “[t]he [Criminal Penalties Study Committee, or CSPC] recommended that the NGI statutes be amended to tie maximum institutionalization for felony offenses to the maximum initial term of confinement in prison for those crimes.” Brennan et al., *Fully Implementing Truth-in-Sentencing*, *supra*. “This [amendment] would *maintain the approach of prior law that maximum institutionalization ought to equal the maximum amount of time that a defendant could serve in prison prior to first release.*” *Id.* (emphasis added). “The legislature adopted this recommendation in [2001 Wisconsin] Act 109, which specifies that the maximum commitment term for a person found not guilty by reason of mental disease or defect may not exceed the maximum initial term of confinement for a felony offense plus any additional imprisonment authorized by any applicable penalty enhancers.” *Id.*

¹ Regarding 1989 Wisconsin Act 334, this Court directed the parties' letter briefs to “address any pertinent materials in the files of the Judicial Council Insanity Defense Committee, which are kept at the Wisconsin Law Library.” Undersigned counsel obtained copies of five Insanity Defense Committee documents regarding 1989 Senate Bill 458, which was adopted in 1989 Wisconsin Act 334. None of these documents discusses concurrent or consecutive NGI commitments. (Exhibit 1.) A list of the Insanity Defense Committee's several hundred documents is available at <http://wilawlibrary.gov/judcoun/jc2insanitydefensecomm.html>.

Ms. Reiff
October 29, 2020
Page 5

In other words, when the Legislature passed Act 109, it adopted the CPSC's recommendation "that the NGI statute be amended to provide that the maximum period of institutionalization for felonies not exceed the maximum term of confinement the court may impose for the underlying offense." Michael B. Brennan et al., *Truth-in-Sentencing Part II: 2001 Wisconsin Act 109 Crimes and Their Penalties*, *supra*, at 18. The CPSC did not recommend making all NGI commitments concurrent.²

Because the Legislature has maintained the parity between maximum prison sentences and maximum NGI commitments, the Legislature has reaffirmed the propriety of consecutive NGI commitments. As already noted, when this Court found consecutive NGI commitments permissible, it reasoned that "the legislature intended to prohibit a person found not guilty by reason of mental defect or disease from being committed any longer than the underlying offense." *C.A.J.*, 148 Wis. 2d at 140. The Legislature maintained that principle when it adopted the two-thirds rule in 1989 Wisconsin Act 334, tying the maximum NGI commitment to the mandatory parole release date for a prison sentence for the same offenses. The Legislature left this parity principle intact when it passed 2001 Wisconsin Act 109, tying the maximum NGI commitment to the maximum term of initial confinement under the new truth-in-sentencing system.

3. *It is immaterial that 2001 Wisconsin Act 109 removed Wis. Stat. § 971.17's explicit reference to Wis. Stat. § 973.15.*

With 2001 Wisconsin Act 109, the Legislature amended Wis. Stat. § 971.17(1)(b) to read, as relevant here:

"the court shall commit the person to the department of health and family services for a specified period not exceeding the *maximum term of confinement* in prison that could be imposed on an offender convicted of the same felony,

² The CPSC's final report does not discuss concurrent or consecutive NGI commitments. The CPSC's final report has a short section titled "Maximum Term of Institutionalization for Persons Found Not Guilty by Reason of Mental Disease or Defect," at 101–02. That section is essentially verbatim with the section titled "Commitment of Persons Found Not Guilty by Reason of Mental Disease or Defect" in the article titled "Truth-in-Sentencing Part II: 2001 Wisconsin Act 109 Crimes and Their Penalties," which is hyperlinked in this letter brief.

Ms. Reiff
October 29, 2020
Page 6

plus imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155.

2001 Wis. Act 109, § 1107 (emphasis added), available at <https://docs.legis.wisconsin.gov/2001/related/acts/109.pdf>. In amending Wis. Stat. § 971.17(1)(a), which involved felonies committed before the effective date of that provision, the Legislature deleted language referring to Wis. Stat. § 973.15(2)(a). 2001 Wis. Act 109, § 1106. The new section 971.17(1)(b), which involved felonies committed after the effective date of that provision, did not mention section 973.15 at all. 2001 Wis. Act 109, § 1107.

By removing section 971.17's explicit reference to section 973.15, however, the Legislature did not prohibit consecutive NGI commitments. When the Legislature removes language from a bill, it does not necessarily signal that it intends to enact the opposite of that language. *See Richland Sch. Dist. v. Dep't of Indus., Labor, & Human Relations, Equal Rights Div.*, 174 Wis. 2d 878, 896 n.8, 498 N.W.2d 826 (1993) (citation omitted). Rather, sometimes it is “equally likely and reasonable” that the Legislature removes language because it is unnecessary. *See id.*

Here, it was likely and reasonable that the Legislature removed the reference to section 973.15 as unnecessary. As explained above, this Court in *C.A.J.* held that section 971.17 allowed consecutive NGI commitments—and it relied on section 973.15 for support, even though section 971.17 did not mention section 973.15 when *C.A.J.* was decided. When the Legislature amended section 971.17 in 2002, it simply went back to using language that was identical in substance to the statutory language at issue in *C.A.J.* When *C.A.J.* was decided, the statute required circuit courts to impose NGI commitments equal to “the maximum period for which a defendant could have been imprisoned if convicted of the offense charged . . .” Wis. Stat. § 971.17(4) (1987–88). Under the 2002 amendment, circuit courts may impose NGI commitments “not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony . . .” 2001 Wis. Act 109, § 1107. As the State has explained, “The substance of this current language is identical to the language at issue in *C.A.J.* By equating a maximum NGI commitment term with a maximum criminal sentence, section 971.17 implicitly refers to Wis. Stat. § 973.15(2), which allows a circuit court to impose consecutive sentences for criminal convictions.” (State's Resp. Br. 5.)

Ms. Reiff
October 29, 2020
Page 7

Because *C.A.J.* drew a connection between section 971.17's NGI commitment terms and section 973.15's allowance of consecutive prison sentences, there was no need for section 971.17 to explicitly refer to section 973.15 when the Legislature passed 2001 Wisconsin Act 109. "[T]he legislature is presumed to act with knowledge of the existing case law." *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶ 22, 236 Wis. 2d 316, 613 N.W.2d 120. By removing section 971.17's reference to section 973.15, the Legislature did not abrogate *C.A.J.* It just went back to using statutory language substantively identical to the language at issue in *C.A.J.* The Legislature presumably understood in 2002 that consecutive NGI commitments would continue to be allowed unless it expressly forbade them. Indeed, this Court in *C.A.J.* noted that the Legislature did not prohibit consecutive NGI commitments, although "it could easily have" done so in section 971.17. *C.A.J.*, 148 Wis. 2d at 140. The Legislature also easily could have done so when it amended the statute in 2002, but it didn't. The Legislature instead maintained *C.A.J.*'s holding by continuing to use statutory language that is substantively identical to the language at issue in *C.A.J.*

A contemporaneous source supports this view. The Legislative Council amendment memo regarding 2001 Assembly Bill 3—which was incorporated into 2001 Wisconsin Act 109—does not give any indication that the new language in Wis. Stat. § 971.17 would prohibit consecutive NGI commitments. Wisconsin Legislative Council Amendment Memo, 2001 Assembly Bill 3 (Feb. 15, 2001), available at <https://docs.legis.wisconsin.gov/2001/related/lcamendmemo/ab3.pdf>. This omission is important because, if the 2002 amendment to Wis. Stat. § 971.17 was intended to eliminate consecutive NGI commitments, the Legislative Council memo likely would have said so.

In short, the Legislature did not mandate *concurrent* NGI commitments while allowing *consecutive* criminal sentences. It had no intent to make maximum NGI commitments *shorter* than the maximum terms of initial confinement for the same offenses. Instead, over the past several decades, the Legislature has consistently maintained parity between the two maximums. In 1989 and again in 2002, the Legislature amended Wis. Stat. § 971.17 to keep this parity principle intact. This parity indicates that, because consecutive prison sentences are allowed, consecutive NGI commitments are also allowed.

Ms. Reiff
October 29, 2020
Page 8

Conclusion

This Court should affirm.

Sincerely,

Electronically signed by:

s/ Scott E. Rosenow
Scott E. Rosenow
Assistant Attorney General

SER:cjs

c: Katie R. York (via electronic notice)
Cary E. Bloodworth (via electronic notice)
Counsel for Defendant-Appellant

CERTIFICATION

I hereby certify that this letter brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a letter brief produced with a proportional serif font. The length of this brief is 2462 words.

Electronically signed by:

s/ Scott E. Rosenow
SCOTT E. ROSENOW
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this letter brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 29th day of October 2020.

Electronically signed by:

s/ Scott E. Rosenow
SCOTT E. ROSENOW
Assistant Attorney General