STATE OF WISCONSIN

IN SUPREME COURT

Nos. 2019AP1832-CR & 2019AP1833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. YAKICH,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes

Other Authorities

INTRODUCTION

Christopher W. Yakich urges this Court to review a supposedly "novel question of statutory interpretation" that the court of appeals resolved more than 30 years ago. (Pet. 1.) When a defendant is found not guilty by reason of mental disease or defect ("NGI"), "the maximum term of commitment must be based on consecutive terms." *State v. C.A.J.*, 148 Wis. 2d 137, 138, 434 N.W.2d 800 (Ct. App. 1988). Yakich, however, argues that "*C.A.J.* is no longer good law." (Pet. 2.)

The court of appeals soundly rejected Yakich's argument. It was incorrect, though, to reframe the issue as asking what is the maximum length of a *single* NGI commitment. The parties correctly framed the issue as whether a circuit court may order *multiple* NGI commitments to run consecutively. But, because the decision below is unpublished and thus not precedential, its incorrect framing of the issue will not create problems. Because the court of appeals was correct in holding that the Legislature did not overrule *C.A.J.*, this Court should deny Yakich's petition for review.

ARGUMENT

I. Yakich's issue is hardly novel and not worthy of this Court's review.

The court of appeals in *C.A.J.* "conclude[d] that the maximum term of [NGI] commitment must be based on consecutive terms under [Wis. Stat. §] 971.17(4)." *C.A.J.*, 148 Wis. 2d at 141. It agreed with the State's argument "that the statutory language demonstrates that the maximum period of commitment is defined by consecutive maximum terms." *Id.* at 140. The 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

maximum sentence for] the underlying offense." *Id.* (citing *State v. Mahone*, 127 Wis. 2d 364, 376, 379 N.W.2d 878 (Ct. App. 1985)). 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.* The court thus concluded that "[t]o construe 'maximum period' to include multiple offenses and the possibility of consecutive terms is consistent with the rules of statutory interpretation." *Id.*

Yakich does not argue that *C.A.J.* was wrongly decided, nor does he urge this Court to overrule it. Instead, he argues that the Legislature overruled *C.A.J.* when it amended the commitment statute, Wis. Stat. § 971.17, in 2001. (Pet. 11–14, 16–17.) He bases his argument on two amendments to the commitment statute. First, when the Legislature amended the commitment statute in 1989, it added a cross-reference to Wis. Stat. § 973.15(2), which authorizes consecutive criminal sentences. Second, when the Legislature amended various aspects of the commitment statute it 2001, it removed the cross-reference to section 973.15(2). Yakich thus argues that the 2001 amendment forbids circuit courts from imposing consecutive NGI commitments.

Yakich's argument has no merit. "[R]epeals by implication are . . . 'very much disfavored.'" *Est. of Miller v. Storey*, 2017 WI 99, ¶ 51, 378 Wis. 2d 358, 903 N.W.2d 759 (second alteration in original) (citation omitted). The 1989 and 2001 amendments to the commitment statute maintained the principle that a maximum NGI commitment is equal to the maximum sentence for the underlying offense. This parity strongly suggests that the Legislature has continued to allow consecutive NGI commitments.

In 1989, the Legislature amended the commitment statute to allow a circuit court to commit an NGI defendant "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, available at https://docs.legis.wisconsin.gov/1989/related/acts/334.pdf. "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.wispd.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.

The Legislature maintained this parity between maximum NGI commitments and maximum sentences in the 2001 amendment to the commitment statute. After the Legislature adopted truth-in-sentencing and abolished parole, "[t]he [Criminal Penalties Study Committee, or CPSC] 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. *Id.* In other words, the Legislature 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." Brennan et al., *Truth-in-Sentencing Part II: 2001 Wisconsin Act 109 Crimes and Their Penalties*, *supra*, at 18.

So, over the last 30-plus years, the Legislature has consistently maintained the parity between maximum NGI commitments and maximum confinement in prison. This parity strongly suggests that, because consecutive prison sentences are allowed, consecutive NGI commitments are also allowed. The Legislature has not mandated *concurrent* NGI commitments while allowing *consecutive* criminal sentences. When the Legislature amended the commitment statute in 2001, it did not make maximum NGI commitments *shorter* than the maximum terms of initial confinement for the same underlying offenses. Nothing about the 2001 amendment purported to overrule *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 2001 amendment to Wis. Stat. § 971.17 was intended to eliminate consecutive NGI commitments, the Legislative Council memo would have said so.

After the 2001 amendment, the commitment statute still uses key language that is essentially identical to the language at issue in *C.A.J.* After it was amended in 2001, the commitment statute authorized a circuit court to impose an NGI commitment "period 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 (emphasis added). This language is still the same in the version of the statute that was in effect in 2018, when Yakich committed his crimes in this case. Wis. Stat. § 971.17(1)(b) (2017–18). When *C.A.J.* was decided, the statute 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) (emphasis added). Then, as now, the commitment statute equated the maximum NGI commitment with the maximum sentence of imprisonment for the same underlying offense.

Yakich is wrong to suggest that the commitment statute forbids consecutive commitments simply because it no longer cross-references Wis. Stat. § 973.15(2). When *C.A.J.* was decided, as now, the commitment statute did not cross-reference section 973.15(2). Yet the court in *C.A.J.* relied on section 973.15(2) for support because the commitment statute equated a maximum NGI commitment with a maximum possible sentence for the underlying offense. *C.A.J.*, 148 Wis. 2d at 140. "[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. Because the commitment statute did not cross-reference section 973.15(2) when *C.A.J.* was decided, the Legislature presumably knew that removing this cross-reference would not overrule *C.A.J.* by implication.

The court of appeals below correctly determined that the Legislature did not implicitly overrule *C.A.J.* in 2001 by removing the cross-reference to Wis. Stat. § 973.15(2). As the court of appeals explained in rejecting Yakich's argument, "The more likely explanation is that the legislature was attempting to simplify an already complex statute by omitting cross-references that were deemed unnecessary." (Pet-App. 120, ¶ 38.) The court noted that "the 2001 Act did remove a number of such cross-references." (Pet-App. 120, ¶ 38.) And the Legislature removed the cross-reference to section 973.15(2) in a provision of the commitment statute that does not apply to Yakich—i.e., the provision that applies to felonies committed before July 30, 2002. (Pet-App. 118–19, ¶ 35 & nn. 17–18.)

Yakich is also wrong to suggest that the commitment statute does not allow consecutive terms simply because it does not mention consecutive (or concurrent) terms. The court rejected that idea in *C.A.J.*, noting that the Legislature did not prohibit consecutive NGI commitments although "it could easily have" done so. *C.A.J.*, 148 Wis. 2d at 140. The Legislature also easily could have done so when it amended the statute in 2001, but it didn't. Nothing in the plain language of the commitment statute forbids consecutive commitments.

Yakich also errs by conflating circuit court discretion with a maximum commitment length. He correctly notes that when the Legislature amended the commitment statute in 1989, it gave circuit courts discretion to impose an NGI commitment shorter than the maximum length. (Pet. 17–18.) But he incorrectly suggests that this grant of discretion somehow stripped circuit courts of the discretion to impose consecutive commitments. (Pet. 18–19.) Discretion to impose a commitment shorter than the maximum says nothing about what the maximum is. This new discretion aside, Yakich's

petition raises the same question as in *C.A.J.*: what is the maximum NGI commitment length? The answer here, as in *C.A.J.*, is that a maximum NGI commitment is equal to the maximum consecutive sentences of prison confinement allowed for the underlying offenses.

In short, this Court should not grant review because Yakich's issue is not novel. The court in *C.A.J.* relied on statutory language that was substantially similar to the language in the current version of the commitment statute. The Legislature did not implicitly overrule *C.A.J.* simply because it cleaned up this statute by deleting an unnecessary cross-reference that was not even part of the statute when *C.A.J.* was decided. This Court should not grant review to consider that meritless argument.

II. The court of appeals' reframing of the issue is not problematic because its decision is not binding precedent.

On appeal below, "[t]he parties frame[d] their dispute as whether circuit courts have the statutory authority to impose 'consecutive NGI commitments.'" (Pet-App. 108, ¶ 15.) The court of appeals "frame[d] the issue somewhat differently than the parties have articulated it in their briefs." (Pet-App. 107, ¶ 13.) It "conclude[d] that the issue is best stated as follows: whether the circuit court had statutory authority to order a total commitment period that is longer than the maximum term of confinement in prison that could be imposed for any one of the crimes to which Yakich pleaded NGI." (Pet-App. 107, ¶ 13.) It stated "that in cases involving multiple offenses, a court exercising its statutory authority does not actually impose multiple commitment periods designated as either 'concurrent' or 'consecutive.'" (Pet-App. 102, ¶ 2.) After this reframing, the court held that Yakich's commitment was lawful. (Pet-App. 102–03, ¶ 2.)

The court of appeals reached the right conclusion—Yakich's commitment length is lawful—although it should not have reframed the issue. The distinction between the parties' framing and the court of appeals' framing does not ultimately matter in a case where, as here, a circuit court imposes an NGI commitment for a defendant on multiple counts at a *single* hearing. But the court of appeals' framing of the issue would prove unworkable if a circuit court imposed an NGI commitment on a defendant who was already serving an NGI commitment on a different case. In that newer case, the circuit court could not simply extend the length of the prior NGI commitment. Instead, the circuit court would need to decide whether to impose the new NGI commitment consecutive to, or concurrent with, the existing NGI commitment. The court of appeals' reframing of the issue did not seem to envision that scenario.

Fortunately, *C.A.J.* "already held that the maximum period of commitment must be based on consecutive terms." *State ex rel. Helmer v. Cullen*, 149 Wis. 2d 161, 162, 440 N.W.2d 790 (Ct. App. 1989) (citing *C.A.J.*, 148 Wis. 2d at 141). The court in *C.A.J.* did not speak of a single commitment. It instead used the phrases "consecutive terms," "consecutive maximum terms," and "maximum consecutive terms" nine times total. It construed the commitment statute "to include multiple offenses and the possibility of consecutive terms." *C.A.J.*, 148 Wis. 2d at 140. So, contrary to the decision below, a circuit court may impose consecutive commitment *terms* on a single defendant across multiple counts or cases. A circuit court is not limited to imposing a *single* commitment up to the maximum consecutive sentences for the underlying offenses.

Because *C.A.J.* held that consecutive NGI commitment terms are allowed, it does not matter that the decision below framed this issue slightly differently. "Officially published opinions of the court of appeals shall have statewide

precedential effect." Wis. Stat. § 752.41(2). *C.A.J.* is thus controlling on whether a circuit court may impose consecutive NGI terms. Because the decision below is not published, it "is not precedent" and "is not binding on any court of this state." Wis. Stat. § 809.23(3)(b). If the decision below were published, then the State perhaps would encourage this Court to grant review to fix the court of appeals' incorrect reframing of the issue. But, because that decision is unpublished, there is no need to correct that non-precedential error.

CONCLUSION

This Court should deny Yakich's petition for review.

Dated this 4th day of May 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.62(4) for a response to petition for review produced with a proportional serif font. The length of this response is 2376 words.

_____
SCOTT E. ROSENOW
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 4th day of May 2021.

_____
SCOTT E. ROSENOW
Assistant Attorney General