STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case Nos. 2019AP001832-CR & 2019AP001833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. YAKICH,

Defendant-Appellant-Petitioner.

On review from Decisions and Commitment Orders in Waupaca County Circuit Court, the Honorable Vicki L. Clussman, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

> When a defendant has been found not guilty by reason of mental disease or defect in two separate cases and is subject to two separate commitment orders, does the circuit court have the authority to run the terms of commitment consecutive to one another?

The circuit court concluded that it had the authority to run two commitment orders consecutive to one another.

The court of appeals reframed the issue, stating that the question was whether the circuit court had the authority to order "a total commitment period that is longer than the maximum term of confinement in prison that could have been imposed for any one of the crimes to which [Mr.] Yakich pleaded NGI." Jan. 14, 2021 slip op., ¶13. (App. 107) The court of appeals concluded that it did have such authority.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are customary for this Court.

STATEMENT OF THE CASE AND FACTS

This case presents a novel question of statutory interpretation[1]: whether the circuit court can run two separate NGI[2] commitment orders consecutive to one another. *See* Wis. Stat. Rule § 809.62(1r)(c)2.

On May 20, 2018, the Waupaca County Sheriff's Department responded to a complaint about a telephone threat. (1:1).[3] Mr. Yakich's mother reported that while she was on the phone with Mr. Yakich, he made threats to harm his brother. (1:2). Mr. Yakich was arrested and charged in Case No. 18-CF-169 with phone harassment, in violation of Wis. Stat. § 947.012(1)(a), and felony bail jumping, in violation of Wis. Stat. § 946.49(1)(b).[4] (1:1). He was subsequently released on a signature bond. (2:1).

On August 20, 2018, the Waupaca Police Department responded to Mr. Yakich's residence in order to perform a welfare check. (2019AP001833,

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[1] Because Mr. Yakich challenges the court of appeals' construction of a statute, he has served copies of this brief on the attorney general, the speaker of the assembly, the president of the senate, and the senate majority leader pursuant to Wis. Stat. § 893.825. *See* attached cover letter.

[2] "NGI" is an acronym that refers to instances where criminal defendants are found not guilty by reason of mental disease or defect and subsequently committed under Wis. Stat. § 971.17.

[3] This is a consolidated appeal of two cases. Unless otherwise noted, all citations to the record refer to the record in 2019AP001832.

[4] At the time, Mr. Yakich was on bond in another case, giving rise to the bail jumping charge.

3:3). A crisis worker at the Waupaca County Department of Health and Human Services had called 9-1-1 stating that she had concerns that Mr. Yakich was suicidal. (2019AP001833, 3:3). When officers knocked, Mr. Yakich did not answer the door. (2019AP001833, 3:3). As officers attempted to break into the front door of the apartment, Mr. Yakich exited the back door and surrendered to officers. (2019AP001833, 3:4). Officers then searched Mr. Yakich's apartment, where they found marijuana and drug paraphernalia. (2019AP001833, 3:5). Mr. Yakich was arrested and charged in Case No. 18-CF-301 with two counts of felony bail jumping, in violation of Wis. Stat. § 946.49(1)(b); one count of misdemeanor bail jumping, in violation of Wis. Stat. § 946.49(1)(a); unlawful use of a telephone/threatening harm, in violation of Wis. Stat. § 947.012(1)(a); resisting or obstructing an officer, in violation of Wis. Stat. § 846.41(1); possession of THC, in violation of Wis. Stat. § 961.41(3g)(e); disorderly conduct, in violation of Wis. Stat. § 947.012(1); and possession of drug paraphernalia, in violation of Wis. Stat. § 961.573(1). (2019AP001833, 3:1-2).

Mr. Yakich ultimately entered a plea agreement resolving both cases, as well as two other cases that pre-dated these. With regard to these two cases, Mr. Yakich entered a bifurcated plea: He pled guilty to one count of felony bail jumping and one count of phone harassment in 18-CF-169 and two counts of felony bail jumping in 18-CF-301. (34:10). He also pled not guilty by reason of mental

disease or defect as to those counts.[5] (34:10). The state did not contest that Mr. Yakich was not guilty by reason of mental disease or defect. (34:9). The court accepted Mr. Yakich's guilty and not guilty by reason of mental disease or defect pleas in both cases. (34:22).

The parties disagreed on the appropriate length of the commitment periods. The state requested a total of five years' commitment, a two-year term of commitment in 18-CF-169 and a three-year term of commitment in 18-CF-301, to run consecutive to one another. (34:12-14, 23). Mr. Yakich objected, arguing that separate commitment orders could not be run consecutive to one another. (34:24-27). The court disagreed and ordered a two-year term of commitment in 18-CF-169 and a three-year term of commitment in 18-CF-301, to run consecutive to one another and to any other term of commitment. (34:27-28). Mr. Yakich appealed, and the court of appeals affirmed the circuit court. Jan. 14, 2021 slip op. (App. 101-21). Mr. Yakich is currently on conditional release. (22:1).

[5] As part of the global plea agreement, Mr. Yakich also pled no contest to one count of disorderly conduct in Waupaca County Case No. 15-CM-10 and one count of assault by a prisoner in Waupaca County Case No. 17-CF-140.

ARGUMENT

NGI commitments cannot be run consecutive to one another.

This case requires the court to decide whether circuit courts have the authority to run two separate commitment orders, entered in different cases based on separate conduct, consecutive to one another. The trial court's authority to commit an individual found not guilty by reason of mental disease or defect derives from statute. *State ex rel. Helmer v. Cullen*, 149 Wis. 2d 161, 164, 440 N.W.2d 790 (Ct. App. 1989). As such, the question is one of statutory interpretation, which this court reviews de novo. *Landis v. Physicians Ins. Co. of Wisconsin, Inc.*, 2001 WI 86, ¶13, 245 Wis. 2d 1, 628 N.W.2d 893.

A. There is no statutory authority permitting circuit courts to run separate commitment orders consecutive to one another.

When a criminal defendant is found not guilty by reason of mental disease or defect, the circuit court is required to commit the individual to the department of health and human services. Wis. Stat. § 971.17. This is a statutorily-created two-step process. First, the circuit court enters an order for commitment, in which the court enters a formal finding of not guilty by reason of mental disease or defect and determines the maximum time period for which the individual may be subject to the commitment order. Wis. Stat. § 971.17(1).

Second, the court determines the appropriate placement for the individual during his term of commitment. Wis. Stat. § 971.17(3). The court may order institutional care or conditional release. *Id.* If an individual is placed in institutional care, he has the opportunity to petition for conditional release every six months. Wis. Stat. § 971.17(4)(a). If an individual is placed on conditional release, he has the opportunity to petition for early termination of the commitment order every six months. Wis. Stat. § 971.17(5).

This appeal involves the court's statutory authority in the first step of this process, determining the appropriate term of commitment. In interpreting a statute, this court first looks to its plain language. *Landis*, 245 Wis. 2d 1, ¶14. If the language of the statute "clearly and unambiguously sets forth the legislative intent," this court should not look beyond the language. *Id.* In examining the language of a statute, this court does not look at the language in isolation but rather interprets its meaning in the context of related statutes. *Id.* ¶16.

The circuit court's authority to commit individuals who have been found not guilty by reason of mental disease or defect stems from Wis. Stat. § 971.17, which requires the circuit court to enter a commitment order "as soon as practicable after the judgment of not guilty by reason of mental disease or defect is entered." Wis. Stat. § 971.17(2)(a). The statute specifically instructs courts on how to determine the maximum term of commitment for a single commitment order. *See* Wis. Stat. § 971.17(1)(a)-(d). However, the statute is silent on

whether courts can run two separate commitment orders consecutively. In fact, nowhere in the statutes has the legislature authorized the circuit court to run separate commitment orders consecutive to one another or consecutive to any other form of supervision, like a criminal sentence or term of probation. Without such statutory authorization, the court may not do so. *See, e.g.*, *Grobarchik v. State*, 102 Wis. 2d 461, 467, 307 N.W.2d 170 (1981) ("If the authority to fashion a particular . . . disposition exists, it must be derived from the statutes.").

It is clear that the legislature knows how to authorize circuit courts to impose consecutive terms of supervision when it wants to. For example, circuit courts are authorized to run criminal sentences consecutive to one another. *See* Wis. Stat. § 973.15(2) ("[T]he court may . . . provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously."). The legislature has also explicitly authorized courts to run a term of probation consecutive to a criminal sentence. Wis. Stat. § 973.09(1)(a) ("The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously."). No parallel statute exists in the context of NGI commitments, indicating the legislature's intent that NGI commitments not run consecutively.

The court of appeals has used similar reasoning in concluding that NGI commitments may not be run consecutive to other forms of supervision. In *State v. Harr*, this court considered whether NGI commitments and prison sentences may be run

consecutively. 211 Wis. 2d 584, 587, 568 N.W.2d 307 (Ct. App. 1997). The court concluded that Wis. Stat. § 973.15, which authorizes consecutive criminal sentences, does not apply to NGI commitments because a commitment is not a "sentence" within the meaning of the statute. *Id*. Because neither Wis. Stat. § 973.15 nor § 971.17 authorize the running of NGI commitments consecutive to criminal sentences, the court concluded that courts lack the authority to do so. *Id*.

Wisconsin courts have also examined whether other analogous forms of supervision may be run consecutive to one another, and their conclusions support the interpretation that the statutes do not authorize courts to run NGI commitments consecutively. For example, probation is similar to an NGI commitment in that both impose supervision and other conditions on an individual but are not "sentences." *State v. Gereaux*, 114 Wis. 2d 110, 113, 338 N.W.2d 118 (Ct. App. 1983). Chapter 973, which governs sentencing and probation procedures, lacks any explicit authority for courts to impose a term of probation consecutive to another term of probation. *State v. Schwebke*, 2001 WI App 99, ¶¶27-29, 242 Wis. 2d 585, 627 N.W.2d 213 *affirmed on other grounds*, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666. Lacking such statutory authority, circuit courts may not run probation terms consecutive to one another. *Id*.

Another analogous example is that of juvenile dispositions, which also are not considered "sentences." *State v. Woods*, 173 Wis. 2d 129, 137-38, 496 N.W.2d 144 (Ct. App. 1992). Because they are not

considered sentences, Wis. Stat. § 973.15 does not authorize courts to impose juvenile dispositions consecutive to one another. *See id.* And Chapter 938, which governs the juvenile justice system, provides no similar authority for courts to run juvenile dispositions consecutive to one another. *Id.* Thus, juvenile dispositions may not be run consecutively. *Id.*; *see also In re Commitment of Wolfe*, 2001 WI App 136, ¶15, 246 Wis. 2d 233, 631 N.W.2d 240. ("[T]he concept of consecutive sentences is foreign in the context of juvenile adjudications and dispositions.").

NGI commitments are analogous to probation and juvenile dispositions in that while they involve government-imposed restraint on liberty, they are not "sentences" and therefore not governed by Wis. Stat. § 973.15(2). There is no other statutory authority for running them consecutively. As in the case of probation and juvenile dispositions, the lack of statutory authority prohibits courts from running them consecutive to one another.

B. The statutory background and the drafting history of the NGI commitment statutes support the conclusion that commitments cannot be run consecutive to one another.

The legislative history of Wis. Stat. § 971.17 confirms that the circuit court lacked the authority to run Mr. Yakich's NGI commitments consecutive to one another. Over the past few decades, § 971.17 has undergone several substantive changes. In 1989, the Judicial Council's Insanity Defense Committee redrafted the NGI statutes. The committee sought to clarify commitment procedures and codify existing

case law. 1989 Wis. Act 334, Prefatory Note. (App. 126).[6]

The committee specifically intended to authorize consecutive NGI commitments, and the committee notes confirm this. At the committee's November 10, 1989, meeting, the committee specifically discussed "concerns about the question of concurrent versus consecutive commitments." Judicial Council Insanity Defense Committee Summary of Proceedings, Nov. 10, 1989, at 1. (App. 131).[7] Several committee members expressed their desire to allow courts to impose consecutive NGI commitments. *Id*. (App. 131). To clarify that commitments could be run consecutively, the committee decided to reference § 973.15(2), the statute which authorizes courts to impose consecutive criminal sentences. *Id*. at 1-2. (App. 131-32).

Thus, after the passage of Act 334, § 971.17(1) read as follows: "When a defendant is found not guilty by reason of mental disease or defect, the court shall commit the person . . . for a specific 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 crimes." (emphasis added). This reference made clear that courts had the authority to run NGI commitments consecutive to one another.

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[6] Available at https://docs.legis.wisconsin.gov/1989/related/acts/334.

[7] The committee's meeting notes can be found in their entirety in the LRB's drafting file for Act 334, on file at the Wisconsin Law Library. The relevant committee note is included in the appendix to this brief. *See* (App. 131-38).

In 2001, several substantive changes to Wisconsin's criminal code were passed as part of Act 109. The purpose of these changes was to make various portions of the criminal code consistent with the truth-in-sentencing (TIS) legislation that had been passed in 1998. *See* 1997 Wis. Act 283.[8] These changes included an amendment to the maximum permissible length of an NGI commitment under § 971.17. 2001 Wis. Act 109 §§ 1106-1108. (App. 140-41).[9] Most relevant here, the amendment removed the reference to § 973.15(2). *Id*. (App. 140-41).

The drafting history of Act 109 indicates an initial intent to maintain the court's authority to run NGI commitments consecutive to one another, even under TIS. Early drafts still included the reference to Wis. Stat. § 973.15(2). 1999 Assembly Bill 465 §§ 733-735. (App. 143-45).[10] In later drafts however, references to Wis. Stat. § 973.15(2) were removed. *See* 2001 Assembly Bill 3 §§ 780-782. (App. 147-48).[11]

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[8] Available at https://docs.legis.wisconsin.gov/1997/related/acts/283.pdf. For a summary of the history of truth in sentencing in Wisconsin, *see* Michael B. Brennan, Thomas J. Hammer & Donald V. Latorraca, "Fully Implementing Truth-in-Sentencing," 75 Wis. Lawyer 10 (Nov. 2002), *available at* https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=75&Issue=11&ArticleID=259.

[9] Available at https://docs.legis.wisconsin.gov/2001/related/acts/109.pdf.

[10] Available at https://docs.legis.wisconsin.gov/1999/related/proposals/ab465.pdf.

[11] Available at https://docs.legis.wisconsin.gov/2001/related/proposals/ab3.pdf.

The legislative history is silent as to the exact reason the reference to § 973.15(2) was removed. When the legislative history contains no clear statement as to why a certain amendment was made, the statutory background ("previously enacted and repealed statutory provisions") is the most telling indication of the meaning of a statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶52 n.9, 271 Wis. 2d 633, 681 N.W.2d 110; *see also County of Dane v. Labor and Industry Review Commission*, 2009 WI 9, ¶27, 315 Wis. 2d 293, 759 N.W.2d 571. The reference to § 973.15(2) was originally added to the NGI commitment statute in 1989 to authorize courts to run NGI commitments consecutively. The legislature is presumed to have known this. *In re Commitment of West*, 2011 WI 83, ¶61, 329 Wis. 2d 710, 790 N.W.2d 543 ("The legislature is presumed to know the law, and to know the legal effect of its actions."). Its deliberate removal in Act 109 makes clear that the legislature intended to remove courts' authority to run NGI commitments consecutively.

Further, it makes sense that the legislature decided to remove the courts' authority to run NGI commitments consecutive to one another. This change was made in conjunction with numerous other TIS-related changes, and the logical conclusion is that the many changes made under TIS required the removal of courts' authority to run NGI commitments consecutive to one another. For example, TIS greatly increased the maximum penalties available for judges to impose. *See, e.g.*, 2001 Wis. Act 109 § 553 (increasing the maximum penalty available for a Class C felony from 15 years

of imprisonment to 40 years). Given the already longer possible terms of commitment, perhaps the drafters did not see the necessity in allowing judges to commit individuals even longer by allowing consecutive commitments.

In summary, the legislature explicitly referenced § 973.15(2) in order to give courts the authority to run NGI commitments consecutive to one another. Later, as part of TIS legislation, the legislature removed the reference to § 973.15(2), thereby removing courts' authority to do so. And without clear statutory language, courts lack the authority to impose consecutive NGI commitments. *See Cullen*, 149 Wis. 2d at 164. Thus, the statute is clear, and the legislative history supports, that NGI commitments may not be run consecutive to one another.

C. The court of appeals erred in reframing the issue and in concluding that the five-year commitment period was permissible.

Despite the clear lack of statutory authority, the court of appeals affirmed the circuit court. However, the court of appeals reframed the issue, concluding 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.'" Jan. 14, 2021 slip op., ¶2. (App. 102). Instead, it held that the circuit court ordered "a total commitment period" of five years and that it "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 of the crimes to which Mr. Yakich pleaded NGI." *Id.* ¶¶13, 40. (App. 107-08, 121). The state agrees that the court of appeals' reframing of the issue was incorrect. (Response Opposing Petition for Review at 1).

The court of appeals' holding is contrary to how the circuit court actually structured Mr. Yakich's commitment orders. The court did not impose one five-year commitment period. The court imposed two separate commitment periods, in two separate cases, and ran them consecutive to one another. The court specifically stated, "On 18-CF-169, I will order that Mr. Yakich be committed to the department of health services for a period of two years . . . . And I will order on 18-CF-301, that he be committed to the department of health and human services for a period of three years. . . . I will order that this commitment be consecutive." (34:27-28). The court issued a separate commitment order in each case, one imposing a two-year commitment period, and one imposing a three-year commitment period. (2019AP001832, 8:2; 2019AP001833, 8:2). (App. 123, 125). Both orders stated that the commitment is "to run consecutive to any other § 971.17, Wis. Stats. commitments." (2019AP001832, 8:2; 2019AP001833, 8:2). (App. 123, 125).

This is consistent with how circuit courts around the state handle multiple NGI commitments. Courts routinely issue separate commitment orders in each case and either run them consecutive or concurrent to one another. The standard form order adopted by the Wisconsin Judicial Conference, which provides check boxes for concurrent or consecutive

commitments, reflects this common practice. *See* CR-271, 08/12, Order of Commitment (Not Guilty by Reason of Mental Disease or Defect).

Further, the court of appeals' decision is not supported by the plain language of the statute. The court cites no statutory authority to support its decision, and it even admits that "[t]he commitment statute does not provide explicit instructions on how to proceed when a defendant has been found NGI of more than one crime." Jan. 14, 2021 slip op., ¶11. (App. 106). Instead, the court improperly relies on language in *State v. C.A.J.*, 148 Wis. 2d 137, 434 N.W.2d 800 (Ct. App. 1988), despite the fact that the case was decided 30 years ago and interpreted statutory language that has been substantively altered twice since.

1. *C.A.J.* is no longer good law.

The court of appeals' reliance on *C.A.J.* is problematic because the statutory language interpreted in *C.A.J.* is substantively very different from the current statute. The numerous substantive changes that have been made over the past 30 years have rendered *C.A.J.* inapplicable.

Under the 1987-88 version of § 971.17 which *C.A.J.* interpreted, courts had the authority to commit defendants but not to specify the length of commitment. *See* Wis. Stat. § 971.17(1) (1987-88) ("When a defendant is found not guilty by reason of mental disease or defect, the court shall order him to be committed to the department to be placed in an appropriate institution for custody, care, and treatment until discharged as provided in this

section."). Rather, the term of the commitment was defined by statute as "the maximum period for which a defendant could have been imprisoned if convicted of the offense charged." Wis. Stat. § 971.17(4) (1987-88). The court had no discretion to issue a shorter commitment period. *See Cullen*, 149 Wis. 2d at 164.

Thus, the question *C.A.J.* answered was "whether the maximum term of commitment [as defined by statute] is equivalent to maximum consecutive terms or maximum concurrent terms." 148 Wis. 2d at 138. *C.A.J.*'s focus was on the definition of the term "maximum term of commitment." It concluded that the maximum term of commitment "must be based on consecutive terms." *Id.*

Under the current statute, the maximum period of commitment is no longer statutorily set as the maximum period for which a defendant could have been imprisoned if convicted of the offense charged. Now, the circuit court must order a specific commitment period, and it has the discretion to order up to the statutory maximum. *See* Wis. Stat. § 971.17(1). When the legislature gave courts the authority to impose a commitment period less than the maximum period of time a defendant could be imprisoned for the underlying charges, it also specifically gave the court the authority to run those commitments consecutive or concurrent to one another by referencing Wis. Stat. § 973.15(2). Judicial Council Insanity Defense Committee Summary of Proceedings, Nov. 10, 1989, at 1-2. (App. 131-132). In other words, the maximum commitment period was no longer required to be based on consecutive

calculations. Instead, this too was left to the court's discretion.

These changes rendered *C.A.J.* inapplicable to the current NGI commitment statute. The court of appeals is right when it says that *C.A.J.* did not hold that a circuit court can order consecutive commitments. *See* Jan. 14, 2021 slip op., ¶23. (App. 112). At that point in time, the courts did not have the authority to specify *any* term of commitment, let alone whether or not it would run consecutive to other commitments. Now, however, the court *does* have the authority to specify the term of commitment. Thus, the question is no longer whether the statute requires the maximum period to be calculated consecutively; the question is whether the statute grants the circuit court authority to order commitments consecutive to one another. *C.A.J.* did not answer this question, and by adopting language from *C.A.J.*, the court of appeals failed to answer it as well.

This distinction is important when one thinks of the practical application of the two statutes. Under the 1988 version, if a person was committed, the court had no discretion to specify the length of the commitment. Rather, the court simply ordered a person committed, and the maximum length of that commitment was determined by statute as the "the maximum period for which a defendant could have been imprisoned if convicted of the offense charged." Wis. Stat. § 971.17(4) (1987-88). If a person was subsequently committed in a new case, the judge in the new case would do the same; commit the person but without specifying a specific length of

commitment. The court did not specify whether the subsequent term of commitment was consecutive or concurrent to the first because there was no specific term of commitment ordered. Rather, the department of human services (and, when necessary, the courts) simply recalculated the maximum period of commitment.

The TIS legislation, however, gave courts the responsibility of ordering a specific commitment length. The statute was amended to address the limits of the courts' authority to do so. Now when a person is committed, the court orders a specific term of commitment. If that person is later committed in another case, that court must also specify a term of commitment. Now, rather than having two separate orders committing the person and a statutorily-defined "maximum period" which encompasses both orders, we have two separate orders specifying two separate terms of commitment. Whether the court may run those terms of commitment consecutive to one another is a very different question than how the maximum period of commitment, encompassing all offenses, must be calculated.

Because the statutory language is so different, the court of appeals' reliance on *C.A.J.*'s interpretation of the old statute is confusing and problematic. In attempting to adopt *C.A.J.*'s language regarding the maximum period of commitment, the court of appeals adopts a confusing concept of a single commitment period that somehow encompasses multiple commitment orders. This concept does not work under TIS, where courts are required to order a specific term of commitment in each new case, and it

threatens to cause confusion in the lowers courts about how to handle multiple NGI commitments.

2. This court should not rely on *C.A.J.*'s reasoning when interpreting the current statute.

The state argues that this court should interpret the current statute consistent with *C.A.J.* because the current version of § 971.17 uses similar language to the 1988 version of the statute that the court of appeals interpreted in *C.A.J.* (Response Opposing Petition for Review at 5). It argues that because the two statutes use similar phrasing, the statute should be interpreted as permitting consecutive commitment periods. Specifically, the state argues that the phrase "maximum term of confinement in prison" in the current statute and "maximum period for which a defendant could have been imprisoned if convicted" in the 1988 version of the statute require the court to interpret § 971.17(1)(b) as permitting consecutive commitment periods. (Response Opposing Petition for Review at 5).

The state's simplistic comparison of the phrases "maximum term of confinement" and "maximum period for which a defendant could be confined" ignores the vastly different contexts in which these two phrases are used. In *C.A.J.*, the court of appeals concluded that the term "maximum period" could be read to "to include multiple offenses." *C.A.J.*, 148 Wis. 2d at 140. Thus, under *C.A.J.*, the maximum period is treated as a blanket term that covers an overall computation of all offenses for

which a person has been found NGI. As discussed, because the "maximum period" was statutorily prescribed, this could be recalculated if new offenses were added as a result of subsequent commitments in new cases.

The current statute, however, uses "maximum term of confinement in prison," which cannot be interpreted in the same way. "Term of confinement in prison" is a term of art that was implemented along with TIS legislation; it refers to one-half of a bifurcated sentence, which consists of "a term of confinement in prison followed by a term of extended supervision." § 973.01(2). A term of confinement, therefore, refers to a specific portion of one sentence, not a blanket term that encompasses multiple offenses and cases. Thus, *C.A.J.*'s interpretation of the term "maximum period" cannot apply to the term "term of confinement in prison." By definition, a "term of confinement in prison" cannot include multiple offenses because it is statutorily defined as a portion of *one* sentence.

Rather, as discussed, the only logical interpretation of § 971.17(1)(b) is that it does not permit two separate commitment orders to run consecutive to one another. The statute contains no authority to run separate terms of commitment consecutive to one another. The court of appeals' and the state's attempts to read some sort of implicit authority to do so fail.

Absent any textual support for the proposition that NGI commitments can be run consecutive to one another, both the court of appeals and the state must

resort to trying to apply a 30-year-old case to a statute that has been substantively changed since the case was decided. The state admits that the court of appeals' attempt to apply *C.A.J.* does not work, and the state's fairs no better. That is because the reasoning in *C.A.J.* no longer makes sense given the changes made to the NGI commitment statutes along with the TIS legislation. The statute must be interpreted on its own terms, and the text of the statute lacks any authority for running separate NGI commitments consecutive to one another.

CONCLUSION

For the reasons stated above, Mr. Yakich respectfully requests that this court reverse the circuit court's imposition of consecutive terms of commitment is Waupaca County Case Nos. 18-CF-169 and 18-CF-301 and remand to the circuit court with instructions to amend the commitment orders to reflect that they run concurrent to one another.

Dated this 21st day of July, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,772 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 21st day of July, 2021.

Signed:

CARY BLOODWORTH
Assistant State Public Defender

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of July, 2021.

Signed:

CARY BLOODWORTH
Assistant State Public Defender