STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2019AP1832-CR & 2019AP1833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. YAKICH,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING DECISIONS AND COMMITMENT ORDERS ENTERED IN WAUPACA COUNTY CIRCUIT COURT, THE HONORABLE VICKI L. CLUSSMAN, PRESIDING

RESPONSE BRIEF OF STATE OF WISCONSIN

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INTRODUCTION

Christopher Yakich received consecutive commitments after he pled not guilty by reason of mental disease or defect (NGI) to multiple counts. He raises a single issue before this Court: whether a circuit court may impose consecutive NGI commitments. More than 30 years ago, the court of appeals held that a maximum NGI commitment under Wis. Stat. § 971.17 is based on consecutive terms. *State v. C.A.J.*, 148 Wis. 2d 137, 434 N.W.2d 800 (Ct. App. 1988).

The sole issue before this Court is whether the Legislature implicitly repealed that holding when it amended this statute in 2001. It did not. Rather, the Legislature amended this statute to maintain that a maximum NGI commitment equals the maximum length of prison incarceration for the same underlying offense. Because consecutive prison sentences are allowed, consecutive NGI commitments are permissible under Wis. Stat. § 971.17. The court relied on this parity in *C.A.J.* The substance of the relevant statutory language is still the same as it was when *C.A.J.* was decided. The Legislature did not repeal *C.A.J.* by implication.

ISSUE PRESENTED

Did the Legislature implicitly repeal binding Wisconsin precedent that held that a maximum NGI commitment is based on consecutive terms?

The circuit court imposed consecutive NGI commitments here.

The court of appeals reframed the issue and affirmed Yakich's length of commitment.

This Court should answer "no" and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

In May 2018, Yakich called his mother on the phone and said "that he had a two foot pipe and a can of gas," he was going to burn his brother's house down, and he was going to beat up his brother so badly that his brother would have "to drink out of a straw." (R. 1:2.)[1] Yakich told his mother to relay this message to his brother. (R. 1:2.) Yakich was on a signature bond in a felony case when he made this threatening phone call. (R. 1:2.) As a result of this phone call, the State charged Yakich with one count of telephone harassment and one count of felony bail jumping in Waupaca County Circuit Court case number 2018-CF-169. (R. 1:1.)

In August 2018, Yakich called the Waupaca County Department of Health and Human Services on the phone, "was hysterical," talked about suicide, and said he was having chest pains. (R2. 3:3.) Law enforcement officers went to Yakich's apartment to check on his welfare. (R2. 3:3.) Officers asked Yakich to open the door, but he failed to do so. (R2. 3:3.) Officers were unable to enter the apartment after using a battering ram because Yakich had barricaded the front door with a headboard for a child's crib. (R. 3:3–5.) Yakich exited "the trap door at the back of the apartment." (R2. 3:3.) Officers handcuffed and searched Yakich, who "began yelling loudly" that an officer was sexually assaulting him. (R2. 3:4.)

Officers entered Yakich's apartment to see if anyone was inside or injured. (R2. 3:3.) Yakich yelled and used profanities as officers tried to enter his apartment. (R2. 3:4.)

[1] This brief uses "R." to cite documents in the court record for appeal number 2019AP1832-CR and uses "R2." to cite documents in the court record for appeal number 2019AP1833-CR.

After entering the apartment, officers saw drug paraphernalia and suspected illegal narcotics in plain view, so they obtained a warrant to search the apartment. (R2. 3:4.) Officers more thoroughly searched the apartment with a warrant and found drugs and drug paraphernalia. (R2. 3:5.) As a result, the State charged Yakich in Waupaca County Circuit Court case number 2018-CF-301 with two counts of felony bail jumping and one count each of misdemeanor bail jumping, telephone harassment, obstructing an officer, possession of THC, disorderly conduct, and possession of drug paraphernalia. (R2. 3:1–2.)

Yakich entered into a plea agreement to resolve both cases. He pled guilty to one count of felony bail jumping and one count of phone harassment in case number 2018-CF-169 and two counts of felony bail jumping in case number 2018-CF-301. (R. 34:16–18.) The State did not contest that Yakich was not guilty by reason of mental disease or defect. (R. 34:9, 22.) The circuit court accepted Yakich's guilty pleas, found him guilty, but then also found him not guilty by reason of mental disease or defect in both cases. (R. 34:22.)

The parties disputed how long Yakich's commitment terms should be. Yakich recommended a maximum term of commitment, which he contended was three years. (R. 34:11, 27.) Yakich argued that NGI[2] commitments could not be run consecutively. (R. 34:24–27.) The State recommended a total commitment of five years. (R. 34:23.) The circuit court imposed a two-year commitment in case number 2018-CF-169 and a three-year commitment in case number 2018-CF-301, to run consecutively to one another. (R. 34:27–28.)

[2] "NGI" is shorthand for "not guilty by reason of insanity," which under Wisconsin law is called not guilty "by reason of mental disease or defect." *State v. Stanley*, 2012 WI App 42, ¶ 1, 340 Wis. 2d 663, 814 N.W.2d 867.

Yakich later petitioned for conditional release in May 2019. (R2. 14.) The circuit court found that Yakich was appropriate for conditional release from his custody at Mendota Mental Health Institute. (R. 21:1.)

Yakich appealed from his commitment order in each case. (R. 23; R2. 22.) The court of appeals affirmed in an authored but unpublished decision. The court "frame[d] the issue somewhat differently than the parties ha[d] articulated it in their briefs." (Yakich's App. 9 ¶ 13.)[3] On appeal, "[t]he parties frame[d] their dispute as whether circuit courts have the statutory authority to impose 'consecutive NGI commitments.'" (Yakich's App. 10 ¶ 15.) The court "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." (Yakich's App. 9 ¶ 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.'" (Yakich's App. 4 ¶ 2.) After this reframing, the court held that Yakich's commitment was lawful. (Yakich's App. 4–5 ¶ 2.)

STANDARD OF REVIEW

"Statutory interpretation and the application of a statute to a given set of facts are questions of law that [this Court] review[s] de novo." *State v. Shoeder*, 2019 WI App 60, ¶ 6, 389 Wis. 2d 244, 936 N.W.2d 172.

[3] Citations to Yakich's appendix are to the electronic page numbers, not the page numbers listed at the bottom of the appendix.

ARGUMENT

The circuit court properly ordered consecutive NGI commitments here.

A. Binding precedent allows consecutive NGI commitments.

The sole issue before this Court is whether Wis. Stat. § 971.17 allows a circuit court to impose consecutive NGI commitments. But the court of appeals has "already held that the maximum period of [NGI] 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 *State v. C.A.J.*, 148 Wis. 2d 137, 141, 434 N.W.2d 800 (Ct. App. 1988)).

When *C.A.J.* was decided, the relevant statutory provision stated: "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).

In *C.A.J.*, the court of appeals agreed with the State's argument "that the statutory language demonstrates that the maximum period of commitment is defined by consecutive maximum terms." *C.A.J.*, 148 Wis. 2d 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.*

C.A.J. is binding precedent. "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 v. Gehl Co.*, 2004 WI 103, ¶ 21, 274 Wis. 2d 220, 682 N.W.2d 405 (citations omitted).

Indeed, Yakich does not urge this Court to overrule *C.A.J.* He instead argues that the Legislature repealed *C.A.J.* when it amended Wis. Stat. § 971.17 in 2001. He is wrong. The amendments to this statute show the Legislature's intent to maintain *C.A.J.*'s holding, not repeal it.

"The court's construction of a statute will stand unless the legislature specifically changes the particular holding." *State v. Rosenburg*, 208 Wis. 2d 191, 208, 560 N.W.2d 266 (1997). "The legislature is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged . . . ." *Reiter v. Dyken*, 95 Wis. 2d 461, 471, 290 N.W.2d 510 (1980) (citation omitted).

"[R]epeals by implication are . . . 'very much disfavored.'" *Miller v. Storey*, 2017 WI 99, ¶ 51, 378 Wis. 2d 358, 903 N.W.2d 759 (second alteration in original) (citation omitted). "The rule against implied repeal especially applies where the earlier statute is of long standing and has been stringently followed, unless it is so manifestly inconsistent and repugnant to the later statute that the two cannot reasonably stand together." *State v. Gonnelly*, 173 Wis. 2d 503, 512, 496 N.W.2d 671 (Ct. App. 1992). "The earlier statute also may be set aside where the legislative intent to repeal by implication clearly appears." *Id.*

Yakich has not shown that the Legislature clearly repealed *C.A.J.*'s holding by implication. When the Legislature amended the commitment statute in 1989 and 2001, it maintained the principle that a maximum NGI commitment is equal to the maximum incarceration for the

underlying offenses. 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. Back then, an inmate had a mandatory release onto parole after serving two-thirds of his or her sentence. Wis. Stat. § 302.11(1) (1989–90); *see also State v. Stanley*, 2014 WI App 89, ¶ 4, 356 Wis. 2d 268, 853 N.W.2d 600. "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 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 prison

confinement when it amended the commitment statute in 2001. 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 commitment length and maximum initial incarceration in prison. This parity strongly indicates that, because consecutive prison sentences are allowed, consecutive NGI commitments are also allowed. The Legislature has not mandated *concurrent* NGI commitments while allowing *consecutive* prison sentences. When the Legislature amended the commitment statute in 2001, it did not make maximum NGI commitments *shorter* than the maximum terms of prison 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. *See* 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 Legislature had intended the 2001 amendment to Wis. Stat. § 971.17 to forbid 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 the commitment statute was amended in 2001, it 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 . . . 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 prison confinement for the same underlying offenses. Because a maximum prison sentence is based on consecutive terms, a maximum NGI commitment is also based on consecutive terms.

B. Yakich has not shown a clear legislative intent to repeal *C.A.J.* by implication.

Yakich is wrong to argue that the commitment statute forbids consecutive NGI commitments because it no longer cross-references Wis. Stat. § 973.15(2), which authorizes consecutive sentences. (Yakich's Br. 18–20.) 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) to support its holding because the commitment statute equated a maximum NGI commitment with the maximum imprisonment 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 repeal *C.A.J.* in 2001 by removing this 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." (Yakich's App. 22 ¶ 38.) The court noted that "the 2001 Act did remove a number of such cross-references." (Yakich's App. 22 ¶ 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. (Yakich's App. 20–21 ¶ 35 & nn. 17–18.) The Legislature did not implicitly repeal *C.A.J.*'s holding by removing an unnecessary cross-reference in a provision inapplicable to Yakich.

Yakich is also wrong to suggest that the commitment statute does not allow consecutive terms because it does not mention consecutive (or concurrent) terms. (Yakich's Br. 13–14, 19.) 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 argues that "it makes sense" to think that the Legislature repealed *C.A.J.*'s holding because its adoption of truth-in-sentencing "greatly increased the maximum penalties for judges to impose." (Yakich's Br. 19.) He contends that the Legislature "perhaps" thought that consecutive NGI commitments were no longer necessary after this increase in maximum penalties. (Yakich's Br. 20.) But consecutive sentences are still allowed under Wisconsin's truth-in-sentencing system. Wis. Stat. § 973.15(2)(a). As noted, the Legislature amended the commitment statute in 2001 to maintain the parity between maximum NGI commitments and maximum incarceration for the same underlying offenses. If anything, this increase in maximum penalties hurts Yakich's argument. Removing the possibility of consecutive commitments would have been inconsistent with the Legislature's intent to adopt longer maximum penalties.

Yakich incorrectly suggests that consecutive NGI commitments are prohibited because circuit courts have discretion to impose NGI commitments below the maximum. (Yakich's Br. 22–24.) He reasons that "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." (Yakich's Br. 23.) That reasoning is plainly wrong. Since the 2001 amendment, the statute has allowed 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; Wis. Stat. § 971.17(1)(b) (2017–18). The maximum commitment term is still the same as the maximum incarceration.

Besides, Yakich's argument about circuit court discretion misses the point. Yakich notes that circuit courts have had "discretion to order [NGI commitments] up to the statutory maximum" since the 1989 amendment to the commitment statute. (Yakich's Br. 23.) He claims that this statutory change has "rendered *C.A.J.* inapplicable to the current . . . statute." (Yakich's Br. 24.) He reasons that, after the 1989 amendment, "the maximum commitment period was no longer required to be based on consecutive calculations." (Yakich's Br. 23–24.)

That argument conflates two distinct concepts: whether a circuit court has discretion to impose an NGI commitment term shorter than the maximum, and what the maximum term is. True, the 1989 amendment gave circuit courts discretion to impose an NGI commitment period shorter than the maximum, and no such discretion existed when *C.A.J.* was decided. But discretion to impose a commitment period below the maximum says nothing about what the maximum is. Yakich raises the same question that was presented 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 terms of incarceration allowed for the same underlying offenses. Circuit courts are no longer required to impose the maximum NGI commitment, but this grant of discretion did not alter what the maximum is.

Yakich, though, claims that the question in *C.A.J.* was "whether the statute requires the maximum period to be calculated consecutively," while the question now "is whether the statute grants the circuit court authority to order

commitments consecutive to one another." (Yakich's Br. 24.) But these questions ask the same thing with slightly different wording: is the maximum NGI commitment length based on consecutive or concurrent terms? The answer here, as in *C.A.J.*, is consecutive terms.

Indeed, the Legislature's grant of circuit court discretion belies Yakich's argument against consecutive commitments. As Yakich recognizes, in 1989 the Legislature amended the commitment statute to give circuit courts discretion over the length of a commitment, including whether to impose consecutive or concurrent commitments. (Yakich's Br. 16.) When the Legislature adopted Wisconsin's second phase of truth-in-sentencing in July 2002, it intended to give circuit courts "maximum sentencing discretion." *State v. Cole*, 2003 WI 59, ¶ 42, 262 Wis. 2d 167, 663 N.W.2d 700 (citation omitted). The Legislature's consistent desire for circuit court sentencing discretion is incompatible with Yakich's argument that the Legislature implicitly stripped circuit courts of their discretion to impose consecutive commitments in 2001.

Yet Yakich suggests that the adoption of truth-in-sentencing somehow overruled *C.A.J.*'s view of the maximum NGI commitment length. (Yakich's Br. 24–27.) According to Yakich, the commitment statute's current phrase "term of confinement" is "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.'" (Yakich's Br. 27.) According to Yakich, "a 'term of confinement in prison' cannot include multiple offenses because it is statutorily defined as a portion of *one* sentence." (Yakich's Br. 27.)

Yakich's logic does not hold up. His reasoning ignores that a term of confinement for one offense may be consecutive to a term of confinement for a different offense. Wis. Stat. § 973.15(2)(a). When a circuit court imposes consecutive

sentences, the overall term of confinement *does* encompass multiple offenses and cases. "All consecutive sentences imposed for crimes committed on or after December 31, 1999, shall be computed as one continuous sentence." Wis. Stat. § 302.113(4) (2017–18). So, "the aggregate terms of confinement and extended supervision in consecutive sentences are treated as single continuous terms." *State v. Collins*, 2008 WI App 163, ¶ 9, 314 Wis. 2d 653, 760 N.W.2d 438. There is no merit to Yakich's argument that the commitment statute's current language ("maximum term of confinement") is so different from the prior language ("maximum period for which a defendant could be confined") that the statute no longer allows consecutive commitments. (Yakich's Br. 26.) These two statutory phrases are very similar, not "substantively very different." (Yakich's Br. 22.)

In any event, the truth-in-sentencing concept of "confinement" and its possible differences from the previous system of indeterminate sentencing are beside the point. Sure, the maximum length of incarceration for a given offense under the old system of indeterminate sentencing might be different than the maximum length of initial confinement under the current truth-in-sentencing system. But the issue before this Court is whether the maximum length of an NGI commitment is based on consecutive or concurrent terms. Under truth-in-sentencing, as under the old sentencing system when *C.A.J.* was decided, a maximum NGI commitment is equal to the maximum incarceration. The length of the maximum might vary under these two sentencing systems, but the maximum is based on consecutive terms under either system. The precise nature of these sentencing systems is not relevant here. What matters here is that maximum NGI commitments are still statutorily tied to the maximum incarceration, which includes the possibility of consecutive terms.

Finally, Yakich wrongly compares NGI commitments to consecutive dispositions that are not statutorily authorized, such as consecutive terms of probation. (Yakich's Br. 14–16.) None of those situations are analogous to Yakich's because they do not involve the commitment statute that controls here, Wis. Stat. § 971.17. As the court held in *C.A.J.*, section 971.17 provides that a maximum NGI commitment is based on consecutive terms because this statute equates a maximum NGI commitment with a maximum prison sentence. Although a prison sentence may not be consecutive to an NGI commitment, *State v. Harr*, 211 Wis. 2d 584, 587, 568 N.W.2d 307 (Ct. App. 1997), prison sentences may be consecutive to each other, Wis. Stat. § 973.15(2)(a). Consecutive NGI commitments are thus permissible because a maximum NGI commitment equals the "maximum term of confinement in prison that could be imposed on an offender convicted of the same felony." Wis. Stat. § 971.17(1)(b) (2017–18).

C. The court of appeals should not have reframed the issue.

The court of appeals reached the correct result—Yakich's commitment length is lawful—but it should not have reframed the issue. As noted, the court of appeals reframed the issue on appeal as "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." (Yakich's App. 9 ¶ 13.) It stated that, "in cases involving multiple offenses," a circuit court should not designate NGI commitment periods as consecutive or concurrent. (Yakich's App. 4 ¶ 2.)

The court of appeals' framing would be 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 hypothetical newer case, the circuit court could not extend the length of the previously imposed NGI commitment without creating constitutional problems. 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' framing of the issue did not seem to envision that scenario.

Besides being unworkable, the court of appeals' framing is inconsistent with the law. The commitment statute requires a circuit court to commit an NGI defendant "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." Wis. Stat. § 971.17(1)(b). Although this statute uses the singular word "period," it does not mean that a circuit court must impose a single commitment instead of multiple (consecutive or concurrent) commitments. As the court explained in *C.A.J.*, "[t]he singular includes the plural." *C.A.J.*, 148 Wis. 2d at 140 (alteration in original) (quoting Wis. Stat. § 990.001). Because the maximum length of imprisonment includes consecutive terms, the maximum NGI commitment period also "include[s] multiple offenses and the possibility of consecutive terms." *Id.* The commitment statute allows a circuit court to impose multiple commitment terms on a single defendant in a case with multiple NGI pleas. And the circuit court may order them to run consecutively.

* * *

This Court should reaffirm *C.A.J.*'s holding that a maximum NGI commitment is based on consecutive terms. The court in *C.A.J.* relied on statutory language that was substantially similar to the relevant language in the current version of the commitment statute. Yakich has fallen far short of showing that a "legislative intent to repeal by implication clearly appears." *Gonnelly*, 173 Wis. 2d at 512. The Legislature did not implicitly repeal *C.A.J.* simply because it

cleaned up the commitment statute by deleting an unnecessary cross-reference that was not even part of the statute when *C.A.J.* was decided. Rather, when the Legislature amended the commitment statute in 1989 and 2001, it maintained that a maximum NGI commitment equals the maximum incarceration in prison for the same underlying offense. Because consecutive prison sentences are allowed, maximum NGI commitments are based on consecutive terms. This Court should not upend 30 years of precedent.

CONCLUSION

This Court should affirm and modify the court of appeals' decision.

Dated this 24th day of August 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 4591 words.

Dated this 24th day of August 2021.

SCOTT E. ROSENOW
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019-20)

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) (2019-20).

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 24th day of August 2021.

SCOTT E. ROSENOW
Assistant Attorney General