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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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. The language of the statute does not support consecutive commitments.

The state's response ignores the plain language of the statute, which is the first place a court should look. *Landis v. Physicians Ins. Co. of Wisconsin, Inc.*, 2001 WI 86, ¶14, 245 Wis. 2d 1, 628 N.W.2d 893. The authority to impose a particular disposition "must be derived from the statutes." *Grobarchik v. State*, 102 Wis. 2d 461, 467, 307 N.W.2d 170 (1981). Thus, the plain language of the statute must authorize the court to impose consecutive terms of commitment.

The plain language of the statute does not do that. It reads, "when a defendant is found not guilty by reason of mental disease or mental defect of a felony . . . , the court shall commit the person to the department of health 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." Wis. Stat. § 971.17(1)(b). This gives the court the authority to impose a specific commitment period in each case. So, in each of Mr. Yakich's cases, the court had the authority to impose up to the maximum term of confinement in prison that could have been imposed for the counts to which he pled NGI had he been convicted in that case. The statute does not, however, give the court the authority to run separate commitment orders from separate cases consecutive to one another.

The state dismisses Mr. Yakich's analogies to other dispositions like probation and juvenile dispositions which do not authorize consecutive dispositions because "they do not involve the commitment statute that controls here." (Respondent's Br. at 19). Of course they do not; but they are analogous. Each is a disposition that the legislature has authorized the courts to impose, just as a criminal sentence is. This Court has consistently concluded that absent explicit authority in the text of the statute, courts may not run a disposition consecutive. (Opening Br. at 8-9). In some situations, the legislature has authorized consecutive dispositions. In others, the legislature has not. The NGI commitment statute falls squarely into this second category.

Take, for example, the case of probation, which, like an NGI commitment, is an alternative disposition to a criminal sentence. Wis. Stat. § 973.09(2)(b) authorizes the court to impose no "more than either the maximum term of confinement in prison for the crime or 3 years, whichever is greater." This language directly mimics the language in the NGI commitment statute, allowing the court to impose a period of probation for up to the maximum term of confinement for the crimes convicted of in that case. However, in the probation context, the legislature went further. It explicitly authorized courts to run a period of probation "consecutive to a sentence on a different charge." § 973.09(1)(a). The legislature did not include this authority in the NGI commitment context. The unambiguous interpretation of this silence is that the

court is not authorized to run NGI commitments consecutive to one another.

II. *C.A.J.* is not binding or helpful in this case.

Despite the clear statutory language, the state attempts to muddy the issue by arguing that *State v. C.A.J.*, 148 Wis. 2d 137, 434 N.W.2d 800 (Ct. App. 1988), still applies. In doing so, the state makes the same errors the court of appeals made.

A. *C.A.J.* is not binding precedent.

The state first argues that *C.A.J.* is binding precedent. (Respondent's Br. at 10). First, *C.A.J.* actually held that the maximum period of an NGI commitment *must* be calculated by running separate commitments consecutive to one another. *C.A.J.*, 148 Wis. 2d at 138. The state does not even argue, and the current statute does not support, that the court cannot run NGI commitments concurrent. That alone is a clear indication that the substantive changes to the statute have rendered *C.A.J.* no longer good law.

Further, the state ignores that fact that the statute has undergone significant substantive revisions twice since *C.A.J.* was decided. The statute that the Court is interpreting today is not the same statute that *C.A.J.* interpreted. Therefore, *C.A.J.* is no longer binding. *See Progressive Northern Ins. Co. v. Romanshek*, 2005 WI 67, ¶52, 281 Wis. 2d 300, 697 N.W.2d 417 ("[A] construction given to a statute by the court becomes a part thereof, unless the legislature subsequently amends the statute.").

B. *C.A.J.* is not helpful in interpreting the current statute.

Not only is *C.A.J.* not binding, it is not particularly useful in answering the question before this Court. In 1989, significant changes were made to the way NGI commitments were handled in Wisconsin. When *C.A.J.* was decided, the statute read, "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." § 971.17(4) (1987-88). At that time, as discussed in the opening brief, a person was automatically committed for "the maximum period" for which they could have been imprisoned. (Opening Br. at 17-18). If a subsequent commitment was ordered, the "maximum period" was recalculated. Thus, the term "maximum period" referred to the defendant's maximum discharge date, and *C.A.J.* determined how to calculate this maximum discharge date.

In 1989, Wis. Stat. § 971.17 was repealed and re-written to read, "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." 1989 Wis. Act. 334 § 5. This completely changed how the length of NGI commitment periods was determined. Now, instead of a statutorily prescribed discharge date, courts were required to

exercise discretion in imposing a separate term of commitment in each case. The legislature anticipated that when giving the court the discretion to determine the length of commitments, it also needed to determine whether to allow courts to run multiple NGI commitments consecutive to one another. It referenced Wis. Stat. § 973.15(2), the statute authorizing consecutive sentences to do so. Judicial Council Insanity Defense Committee Summary of Proceedings, Nov. 10, 1989, at 1.

In 2001, the legislature again made more substantive changes to § 971.17 in order to make it consistent with the new truth-in-sentencing ("TIS") legislation. During these revisions, the cross-reference to Wis. Stat. § 973.15(2) was removed.

The court of appeals attempted to use *C.A.J.*'s construct of a single "maximum period" of commitment that encompassed all commitment orders from separate cases. Jan. 14, 2021 slip op., ¶13. Under the statutory scheme that existed in *C.A.J.*, this made sense. *C.A.J.* decided how the courts should calculate the maximum discharge date. Just as with a maximum discharge date from incarceration, this "maximum period" encompassed all commitment orders a person was under. But the current statute deals with the court's authority to impose a particular disposition. The statute authorizes the courts to impose up to the maximum term of confinement that could be imposed in that case.

In this context, all of the state's arguments based on *C.A.J.* fall apart. The state argues that *C.A.J.*'s interpretation of "maximum period" as requiring the maximum discharge date to be calculated based on consecutive commitments should be imposed on the current statutory text. It argues that "a term of confinement for one offense may[1] be consecutive to a term of confinement for another offense," thus authorizing consecutive terms of commitment. (Respondent's Br. at 17). It accuses Mr. Yakich of conflating two distinct concepts when actually, it is the state that fails to recognize the distinction. (Response Br. at 16). A maximum discharge date, which the *C.A.J.* version of the statute dealt with, encompasses all commitments being served. A term of commitment, however, which the current statute deals with, only governs a single case.

Wis. Stat. § 971.17(1)(b) governs the court's authority to specify the term of commitment *for that case*. As the state correctly points out, the court must impose a separate NGI commitment order in each new case. (Respondent's Br. at 19-20). Each time "a defendant is found not guilty by reason of mental disease or mental defect," the statute requires the court to commit a person "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." § 971.17(1)(b) (emphasis added). It must

[1] As discussed above, this is actually inconsistent with *C.A.J.*'s holding that the maximum discharge *must* be calculated based on consecutive commitments. *C.A.J.*, 148 Wis. 2d at 138.

determine a specific commitment period based on the maximum term of confinement for "the same felony" to which the defendant pled NGI. So, in a case where a defendant is found NGI of multiple counts within the same case, arguably the state's interpretation of the "maximum term of confinement" authorizes the court to calculate the overall commitment period in that case based on consecutive terms of confinement for each count in that case.

But nothing in the language of § 971.17(1)(b) stretches the court's authority to then run separate NGI commitments in separate cases consecutive to one another. Here, there are two separate cases, two separate NGI findings, and two separate commitment orders.

In other words, the "maximum term of confinement" in § 971.17(1)(b) defines the maximum length for the commitment period in an individual case. While applying *C.A.J.*'s reasoning arguably permits a court to issue a term of commitment that is based on a consecutive calculation of the maximum terms of confinement for all counts in that case, it does not authorize the running of separate commitment orders from separate cases consecutively. To extend the meaning of "a specified period not exceeding the maximum term of confinement in prison that could have been imposed on an offender convicted of the same felony" to include consecutive commitments in separate cases exceeds the statutory authority granted by the legislature.

C. Mr. Yakich does not argue that anything was "repealed by implication."

The state argues that Mr. Yakich is arguing "repeal by implication." (Respondent's Br. at 10-11). But the legislature explicitly repealed the statute that *C.A.J.* interpreted and replaced it with a substantively different statute. 1989 Wis. Act 334 § 5. Thus, *C.A.J.* is no longer good law.

Mr. Yakich does argue that when the court removed the cross-reference to Wis. Stat. § 973.15(2) in 2001, it intentionally removed the court's ability to run commitments consecutive to one another. But this is not "repeal by implication." The state relies on *Miller v. Story*, 2017 WI 99, ¶51, 378 Wis. 2d 358, 903 N.W.2d 759, which holds that a judicial finding that the legislature "implicitly" repealed the common law by statute is disfavored, and *State v. Gonnelly*, 173 Wis. 2d 503, 512, 496 N.W.2d 671 (Ct. App. 1992), which discusses a judicial finding that the passage of one statute implicitly repealed another statute still on the books is disfavored. Neither case applies. Here, the cross-reference was explicitly added by the legislature in 1989 to give judges the authority to run commitments consecutive. The legislature then explicitly removed that language. There was nothing implicit about it—it removed the only textual authority for consecutive commitments.

The state argues that the legislature removed the cross-reference as part of an effort to "clean up" the commitment statute and that it merely "delet[ed] an

unnecessary part of the statute when *C.A.J.* was decided. (Respondent's Br. at 20-21). However, as discussed, when the statute was amended in 1989, it significantly changed the substance of the statute. The statute no longer dealt solely with how to calculate the maximum period of an NGI commitment; rather, it granted the court authority to set specific terms of a commitment. With that authority, an explicit authorization of the court's authority to run commitments consecutive was necessary, and the legislature referenced § 973.15(2) to grant that authority. The legislature is presumed not to add superfluous language to statutes. *WEPC v. PSC*, 110 Wis. 2d 530, 534, 329 N.W.2d 178 (1983).

In 2001, the intentional deletion of this language could signal only one thing. The legislature intentionally added the reference to grant courts the authority to run commitment consecutive; the deletion took that authority away.

The state also argues that had the legislature intended to remove the court's authority to run NGI commitments consecutive, it would have said so. (Respondent's Br. at 13). But this argument cuts both ways. The state points to no statement of legislative intent that the legislature removed the cross-reference simply to "clean up" the statute. In the absence of a clear statement of legislative intent, this court looks to the language of the statute, which does not support consecutive commitments. *Matter of Estate of Berth*, 157 Wis. 2d 717, 722, 460 N.W.2d 436 (Ct. App. 1990).

III. Legislative history does not support the conclusion that the statute authorizes consecutive sentences.

The state also argues that the legislature intended to maintain parity between criminal sentences and NGI commitments and asks this Court to interpret the statute so as to maintain that parity. (Response Br. at 10-11). It is true that prior to 2001, the legislature authorized courts to run NGI commitments consecutive to one another. But with the advent of truth-in-sentencing, the legislature made the explicit decision to remove the reference to § 973.15(2), removing the only textual authority for consecutive NGI commitments. This explicit act indicates an intent to deviate from the past practice of maintaining parity between criminal sentences and NGI commitments. The fact that the legislature once authorized consecutive NGI commitments, like criminal sentences, does not mean that it must continue to.

Finally, the state argues that interpreting the statute as permitting consecutive NGI commitments is in harmony with the legislative intent behind the TIS legislation, which was to impose "longer maximum penalties" and to give the courts "maximum sentencing discretion." (Respondent's Br. at 15, 17). But NGI commitments are *not* sentences or penalties. "[T]his court has already held that NGI commitments are not intended to be punishments, holding that their purpose is 'two-fold: to treat the NGI acquittee's mental illness and to protect the acquittee and society

from the acquittee's potential dangerousness.'" *State v. Fugere*, 2019 WI 33, ¶39, 386 Wis. 2d 76, 924 N.W.2d 76 (quoting *State v. Szulczewski*, 216 Wis. 2d 495, 504, 574 N.W.2d 660 (1998)). There is no reason to assume that legislative intent regarding sentencing in any way translates into legislative intent regarding the treatment of mental illness.

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 and filed this 15th day of September, 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 2,480 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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Dated and filed this 15th day of September, 2021.

Signed:

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