STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2020AP33-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TANYA M. LIEDKE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT AND ORDER ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT, THE HONORABLE RICHARD J. NUSS, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

JOSHUA L. KAUL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 294-2907 (Fax)
latorracadv@doj.state.wi.us

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ISSUES PRESENTED

The State reframes the issues.

1. Wisconsin Stat. § 973.155(5) provides that a person may petition the Department of Corrections (DOC) for sentence credit if the person did not receive credit at sentencing. If DOC is unable to determine credit or otherwise refuses to award it, the person may petition the sentencing court for relief. Did section 973.155(5) require Liedke to petition DOC for sentence credit before she petitioned the sentencing court for credit?

The circuit court did not answer.

This Court should answer: Yes.

2. While on probation, DOC placed Liedke on GPS monitoring. Was Liedke entitled, as a matter of equal protection, to sentence credit for the time she was subject to GPS monitoring while on probation?

The circuit court answered: No.

This Court should not answer if it determines section 973.155(5) required Liedke to petition DOC for sentence credit before she petitioned the sentencing court. But if this Court considers this issue, it should answer: No.

3. Liedke pleaded guilty to five felony counts in this case. With respect to Counts One, Two, and Three, the court imposed and stayed prison sentences and placed her on probation. With respect to Counts Four and Five, the court placed her on probation. Liedke seeks credit following the revocation of her probation. Is Liedke entitled to additional sentence credit for time she spent in custody in connection with this case?

The circuit court answered: No.

This Court should not answer if it determines section 973.155(5) required Liedke to petition DOC for sentence

credit before she petitioned the sentencing court. But if this Court considers this issue, it should answer: Yes. With respect to Counts One, Two, and Three, she is entitled to 400 days of sentence credit. With respect to Counts Four and Five she is entitled to 422 days of sentence credit.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The State agrees publication may be appropriate if the Court addresses whether section 973.155(5) requires a person to petition DOC for sentence credit before petitioning the sentencing court.

INTRODUCTION

Tanya M. Liedke pleaded guilty to five felonies. With respect to Counts One, Two, and Three, the circuit court imposed consecutive terms of imprisonment, stayed those sentences, and placed Liedke on probation. With respect to Counts Four and Five, the circuit court withheld sentence and placed Liedke on probation. While on probation, Liedke participated in drug-court programming and occasionally DOC placed her on GPS monitoring. The Division of Hearings and Appeals (DHA) revoked Liedke's supervision. Liedke contends she is entitled to sentence credit that was not awarded for some of the time she spent in custody. She also contends, as a matter of equal protection, that she was entitled to 147 days she was on GPS monitoring.

This Court should deny Liedke's request for sentence credit. The record does not demonstrate that Liedke followed section 973.155(5)'s two-step process that required her to petition DOC for sentence credit before petitioning the circuit court for relief. Without this showing, the circuit court lacked competency to decide her sentence credit motion after sentencing.

This Court should not answer the second and third issues because the first issue on competency is dispositive. But if it does answer them, Liedke is not entitled, as a matter of equal protection, to sentence credit for time that she spent on probation subject to GPS monitoring. And if Liedke was not required to petition DOC for sentence credit before petitioning the circuit court, Liedke is entitled to additional credit including (a) 400 total days credit on her revoked imposed and stayed sentences on Counts One, Two, and Three, and (b) 422 total days credit on Counts Four and Five, for which the circuit court sentenced her after revocation.

STATEMENT OF THE CASE

The State charged Liedke in a 16-count complaint with several offenses that occurred on January 14, 2015, including (1) burglary of a building or dwelling, as a repeater, contrary to Wis. Stat. § 943.10(1m)(a); (2) forgery, as a repeater, contrary to Wis. Stat. § 943.38(1); (3) attempted forgery, as a repeater, contrary to Wis. Stat. §§ 939.32 and 943.38(2); (4) misappropriation of personal identifying information, as a repeater, contrary to Wis. Stat. § 943.201(2)(a); and (5) felony bail jumping as a repeater, contrary to Wis. Stat. § 946.49(1)(b). (R. 1:1–4.)

On July 13, 2015, Liedke pleaded guilty to burglary, forgery, attempted forgery, misappropriation of personal identifying information, and bail jumping. (R. 20:1–7; 62:3–4, 17.) Liedke also pleaded guilty to charges filed against her in two other cases, including misdemeanor theft in Case Number 2014CF380. (R. 62:5.)

With respect to Counts One, Two, and Three, the circuit court sentenced Liedke to five-year terms of imprisonment, consisting of a two-year and six-month terms of initial confinement and a two-year and six-month terms of extended supervision, and ordered those sentences to be served

consecutively. (R. 20:4.) It withheld the sentences and placed Liedke on four-year terms of probation. (R. 20:4.)

With respect to Counts Four and Five, the circuit court withheld sentence and placed her on four-year terms of probation. (R. 20:1.)

With respect to the misdemeanor theft charge in 14CF380, the circuit court placed Liedke on probation for one year. (R. 62:18.)

The court determined that Liedke was entitled to 164 days of sentence credit on both cases. (R. 20:2; 62:8.)

Liedke's revocation of supervision. A probation revocation report noted Liedke's challenges with probation supervision and documented violations, holds, and her participation in drug treatment court. (R. 31:3–6.) On October 30, 2017, Liedke's agent placed a hold on her, and her probation supervision was revoked on November 15, 2017, with respect to two misdemeanor cases. (R. 31:6.) With respect to case number 14CT479, she was sentenced to 10 days in the county jail on December 12, 2017. (*Id*.) With respect to case number 14CM380, she was sentenced to 201 days on December 20, 2017, and was released that same day based on her sentence credit. (*Id*.)

On December 29, 2017, DOC placed another hold on Liedke. (R. 31:7.) On May 4, 2018, the Division of Hearings and Appeals (DHA) issued an order revoking Liedke's probation supervision on all five counts in this case. (R. 31:1.) The DHA revocation order and warrant included the following notation:

> Recommended Jail Credit: 164 days; From 08/19/15 to 10/19/15; 11/06/15 to 11/09/15; 07/08/16 to 07/10/16; 08/26/16 to 08/29/16; 09/09/16 to 09/12/16; 10/09/17 to 10/12/17; 10/30/17 to 11/15/17; 12/29/17 until his [sic] return to court.

Liedke began serving her consecutively imposed five-year terms of imprisonment on Counts One, Two, and Three. (R. 31:1.) The DOC offender locator reflects that Liedke was admitted to DOC custody as a probation violator on May 15, 2018.[1]

Liedke was ordered returned to circuit court for sentencing after revocation on Counts Four and Five. (R. 31:1.) On June 6, 2018, the circuit court sentenced Liedke to two four-year terms of imprisonment as to Counts Four and Five and ordered the terms to be served concurrently with each other and with any other sentence. (R. 63:18.) The circuit court awarded Liedke 421 days of sentence credit. (R. 36:4; 63:19.)

Liedke's requests for sentence credit. In a letter dated November 15, 2018, Liedke asked the circuit court for sentence credit on Counts One, Two, and Three. (R. 65:1.) Liedke included her Inmate Classification Report, which reflected that she had received no credit with respect to Counts One, Two, and Three, and received 421 days of credit with respect to Counts Four and Five. (R. 65:3.) The circuit court noted on her letter: "Credit on JOC is correct. Further concerns need to be addressed by DOC." (R. 65:1.)

By letter dated December 2, 2018, Liedke asked the court to verify that she would receive credit of 398 days on each of her consecutively imposed sentences. (R. 66:1.)

By letter dated December 20, 2018, Liedke asked the circuit court for credit toward her sentence for the days she

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[1] *See* Tanya Liedke's DOC offender locator page, under the Movement Tab, at https://appsdoc.wi.gov/lop/home.do (last viewed August 5, 2020.) *See Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶¶ 10–11, 313 Wis. 2d 411, 756 N.W.2d 667 (appellate court may take judicial notice of matters of record in government files under Wis. Stat. § 902.01).

spent as part of a substance abuse treatment program. (R. 67:1.) The circuit court replied: "JOC is attached. As stated previously[,] you received the correct credit per JOC that's 421 days." (R. 67:1.)

In a motion for sentence modification dated January 9, 2019, Liedke represented that she received 398 days sentence credit on Counts One, Two, and Three and 421 days of sentence credit on Counts Four and Five. (R. 39:1–2.) She asked for additional credit for all days she spent as a participant in Fond du Lac County's drug court program. (R. 39:3.) The circuit court denied the motion, stating that there was no new sentencing factor and sentence credit had previously been addressed. (R. 39:1.)

On December 18, 2019, Liedke filed a motion for correction of sentence credit. Liedke asked for 435 days of credit, consisting of days in custody before her plea and sentencing and days in custody on her probation hold. (R. 53:7.) She also argued, on equal protection grounds, that she was entitled to additional sentence credit for 147 days, based on the number of days she wore a GPS bracelet while on probation. (R. 53:4.)

The circuit court denied Liedke's motion, including her request for credit for the days she was on GPS monitoring. (R. 54.) In its order, the circuit court stated: "Further, the court does not recalculate sentence credit and amend a judgment of conviction following a revocation of probation on an imposed and stayed sentence to reflect additional credit resulting from the revocation as that is the responsibility of DOC." (*Id.*)

Liedke appeals.

STANDARD OF REVIEW

Whether a defendant is entitled to sentence credit under Wis. Stat. § 973.155(1) presents a legal question that this Court reviews independently. *State v. Carter*, 2010 WI 77, ¶ 12, 327 Wis. 2d 1, 785 N.W.2d 516.

Liedke makes an as-applied constitutional challenge to section 973.155, as interpreted by the supreme court in *State v. Magnuson,* 2000 WI 19, 233 Wis. 2d 40, 606 N.W. 2d 536. Whether a statute and its application are constitutional present legal questions that this Court independently reviews. *Gwenevere T. v. Jacob T.*, 2011 WI 30, ¶ 16, 333 Wis. 2d 273, 797 N.W.2d 854.

ARGUMENT

I. Section 973.155(5) required Liedke to petition DOC for sentence credit before she petitioned the circuit court for relief.

A. Legal principles guiding sentence credit determinations under section 973.155

Statutory interpretation. The right of a person to receive sentence credit and the procedures that a person must follow to receive sentence credit require this Court to interpret section 973.155. "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "This Court begins statutory interpretation with the language of [the] statute." *State v. Quintana*, 2008 WI 33, ¶ 13, 308 Wis. 2d 615, 748 N.W.2d 447. "If the meaning of the statute is plain," this Court "ordinarily stop[s] the inquiry and give[s] the language its 'common, ordinary, and accepted meaning . . . .'" *Id.* (citation omitted).

The right to sentence credit. "A convicted offender" is entitled to sentence credit "for all days spent in custody in

connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a). Under this subsection, a defendant is entitled to presentence credit for time spent in custody while "awaiting trial," while "being tried," and while "awaiting imposition of sentence." Wis. Stat. § 973.155(1)(a)1., 2., and 3.; *State v. Marcus Johnson*, 2007 WI 107, ¶ 4 n.2, 304 Wis. 2d 318, 735 N.W.2d 505. Because sentence credit is mandatory, *Carter*, 327 Wis. 2d 1, ¶ 51, "[n]othing in § 973.155 authorizes the parties to agree to an amount of sentence credit that differs from the amount to which the defendant is entitled under the statute." *State v. Kontny*, 2020 WI App 30, ¶ 9, 392 Wis. 2d 311, 943 N.W.2d 923.

Credit determinations for concurrent and consecutive sentences. When a circuit court imposes concurrent sentences, the defendant is entitled to dual sentence credit provided that the "custody [is] factually connected with the course of conduct for which sentence was imposed." *State v. Elandis Johnson*, 2009 WI 57, ¶¶ 3, 76, 318 Wis. 2d 21, 767 N.W.2d 207. But when a circuit court imposes a sentence consecutive to another sentence, the defendant is not entitled to receive dual sentence credit. *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). "Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively." *Id*. Because "custody credits should be applied in a mathematically linear fashion," credit is applied to the sentence that is imposed first. *Id*. at 100.

When credit must be determined. Wisconsin Stat. § 973.155(2) identifies two junctures when sentence credit must be calculated and awarded. First, the circuit court must make a sentence credit determination when it imposes a sentence and include its determination on the judgment of conviction. *Id*. Second, when a defendant's supervision is revoked, section 973.155(2) requires DOC, when a defendant waives revocation, or DHA, when a defendant has a

revocation hearing, to make a sentence credit "finding" and include it in the revocation order. *Id*.

The assessment of whether someone was in custody and entitled to credit. In deciding whether to grant sentence credit, the circuit court decides (1) whether the defendant was "in custody" as the term is defined under sec. 973.155(1); and (2) whether the "custody" was "in connection with the course of conduct for which sentence was imposed." *Elandis Johnson*, 318 Wis. 2d 21, ¶ 27. The defendant bears "the burden of demonstrating both 'custody' and its connection with the course of conduct for which the . . . sentence was imposed." *Carter*, 327 Wis. 2d 1, ¶ 11.

B. Section 973.155(5) creates an administrative process for obtaining sentence credit.

Section 973.155(5)[2] establishes a procedure that guides the determination of sentence credit when section 973.155 "has not been applied at sentencing to any person who is in custody" or who is on supervision. It provides that the person "may petition" DOC to be given credit. *Id*. If DOC verifies the facts alleged in the petition, then DOC shall apply the credit "retroactively to the person." *Id*. If DOC "is unable to determine whether credit should be given, or otherwise

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[2] Wisconsin Stat. § 973.155(5) provides:

> If this section has not been applied at sentencing to any person who is in custody or to any person who is on probation, extended supervision or parole, the person may petition the department to be given credit under this section. Upon proper verification of the facts alleged in the petition, this section shall be applied retroactively to the person. If the department is unable to determine whether credit should be given, or otherwise refuses to award retroactive credit, the person may petition the sentencing court for relief. This subsection applies to any person, regardless of the date he or she was sentenced.

refuses to award retroactive credit, the person may petition the sentencing court for relief." *Id.*[3]

Suggesting that section 973.155(5)'s "meaning remains obscure," Liedke notes that the "vast majority of sentence credit case law" does not acknowledge or enforce the administrative process that section 973.155(5) appears to dictate. (Liedke's Br. 23–24.) But Liedke overlooks three supreme court cases that treat section 973.155(5)'s administrative process as mandatory, requiring persons to petition DOC before bringing a post-sentencing credit claim in the circuit court.

In *Larson v. State*, 86 Wis. 2d 187, 200, 271 N.W.2d 647 (1978), the Court declined to address the merits of a credit request made to the circuit court. Instead, the Court declared that Larson's "remedy is to now pursue the matter by petition to [DOC's precursor agency[4]] as provided in sec. 973.155(5), Stats." Likewise, in *Clark v. State*, 92 Wis. 2d 617, 644, 286 N.W.2d 344 (1979), the Court determined that Clark was entitled credit, but announced that "[h]is remedy to obtain credit under sec. 973.155(5), Stats., is to petition [DOC]." And, in *Haskins v. State*, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980), the Court again declined to address the merits of a defendant's credit claim, restating the view that Haskins's remedy was to "pursue the matter by petition" to the agency under Wis. Stat. § 973.155(5).

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[3] Section 973.155(5)'s two-step petition process applies only when section 973.155 "has not been applied at sentencing." Under section 973.155(2), the court has a duty to make a sentence credit determination when it sentences a person and enter credit on the judgment of conviction. The person may appeal the court's adverse credit determination under Wis. Stat. § (Rule) 809.30 without first petitioning DOC under section 973.155(5). Wis. Stat. § 973.155(6).

[4] The Division of Corrections was part of the Department of Health and Social Services before it was reorganized as a separate Department of Corrections in 1989 Wisconsin Act 31, §§ 73, 2569.

The supreme court's decisions in *Larson*, *Clark*, and *Haskins* are consistent with section 973.155(5)'s structure. In contrast to the first sentence, which authorizes the person to petition DOC for "credit," the second sentence authorizes the person to petition the sentencing court for "relief." When the second sentence is read in its entirety, relief means relief from DOC's inability or refusal to grant sentence credit in response to the person's petition. In other words, section 973.155(5) allows a person to petition the sentencing court, but only if the person has first petitioned DOC and DOC was unable to determine or refused to award credit.

Under "expressio unius," a canon of statutory interpretation, "the expression of one thing in a statute excludes another that is not stated." *Nw. Airlines, Inc. v. Wisconsin Dep't of Revenue*, 2006 WI 88, ¶ 50, 293 Wis. 2d 202, 717 N.W.2d 280. "This presumption is perhaps at its height in the context of an 'if-then' statement like the one at issue here. This is an unequivocal statement of a condition. And the condition would be eviscerated if we were to read the expressed condition as exemplary and not exclusive." *State v. Wadsworth*, 393 P.3d 338, 341 (Utah Sup. Ct. 2017). Similarly, in the context of section 973.155(5), the "if," i.e., DOC's inability or refusal to grant credit in response to a petition, is a condition precedent to the person petitioning the circuit court for relief.

The supreme court's view—that the procedure established in Wis. Stat. § 973.155(5) is mandatory—is consistent with its approach to all statutes that establish administrative remedies. "[W]here a statute sets forth a procedure for review of administrative action and court review of the administrative decision, such remedy is exclusive and must be employed before other remedies are used." *Nodell Inv. Corp. v. City of Glendale*, 78 Wis. 2d 416, 422, 254 N.W.2d 310 (1977). This rule "is a doctrine of judicial restraint, justified by good policy reasons." *St. Croix Valley*

Home Builders Ass'n, Inc. v. Twp. of Oak Grove, 2010 WI App 96, ¶ 11, 327 Wis. 2d 510, 787 N.W.2d 454. "It permits the administrative agency to apply its own expertise to the matter, promotes judicial efficiency, and may provide the court with greater clarification of the issues in the event the matter is not resolved before the agency. *Id.*

DOC has developed expertise calculating sentence, promulgating administrative rules to ensure timely, accurate, and consistent sentence credit computations. Wis. Admin. Code §§ DOC 302.22–302.24. Placing the issue before DOC—with complete and accurate evidence—would allow it "to perform the functions the legislature has delegated to it and to employ its special expertise and fact-finding facility." *Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶ 13, 305 Wis. 2d 788, 741 N.W.2d 244. "Preventing premature judicial intervention also allows the agency to correct its own error, thus promoting judicial efficiency." *Id.* Also, "in the event judicial review is necessary, the complete administrative process may provide a greater clarification of the issues." *Id.*

As Liedke's case demonstrates, requiring an initial DOC review of credit requests after sentencing is good policy. DOC maintains all records of an offender's Wisconsin custody, and DOC staff have expertise in sentence computation. In Liedke's case, DOC, not the sentencing court, had the information necessary to calculate Liedke's credit based on postsentencing custody, including the time she spent on probation holds after sentencing and her revocation on other cases. (R. 31:1, 7.) Requiring claims to first be presented to DOC is thus more apt to produce correct determinations—and to reduce the number of credit claims in the courts.

Competency refers to "the power of a court to exercise its subject matter jurisdiction." *Kohler Co. v. Wixen*, 204 Wis. 2d 327, 336, 555 N.W.2d 640 (Ct. App. 1996). A circuit court's competency to proceed (i.e., "its ability to undertake a consideration of the specific case or issue before it") is a power

conferred by the legislature, not its jurisdictional authority conferred by the state constitution. *State v. Minniecheske,* 223 Wis. 2d 493, 497–98, 590 N.W.2d 17 (Ct. App. 1998). "Failures to abide by statutory mandates that are 'central to the statutory scheme' of which they are a part will deprive the circuit court of competency." *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶ 18, 348 Wis. 2d 282, 832 N.W.2d 121. Because section 973.155(5) mandates a procedure that must be followed to obtain credit after sentencing, noncompliance with this statutory mandate affects the court's competency to decide sentence credit. *See City of Eau Claire v. Booth*, 2016 WI 65, ¶ 12, 370 Wis. 2d 595, 882 N.W.2d 738.

Therefore, based on *Larson*, *Clark*, and *Haskins*, and the principles set forth above, this Court should—and likely must—conclude that Wis. Stat. § 973.155(5) requires persons seeking credit after sentencing to petition DOC before bringing their claims in the circuit court. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case"). And when the person does not comply with section 973.155(5)'s mandated procedures, the sentencing court lacks competency to decide sentence credit.

C. Liedke's arguments notwithstanding, section 973.155(5) creates a procedure for seeking credit after sentencing.

Liedke suggests that section 973.155(5)'s use of "may" rather than "shall" suggests that the section's administrative process is permissive and did not prevent her from seeking credit directly from the circuit court. (Liedke's Br. 25.) Even without *Larson*, *Clark*, or *Haskins*, Liedke's interpretation would be suspect. Here, "may" refers to the person's option to seek credit at all—you "may" seek credit if you believe you

have a claim—not to whether the petition provision is optional or mandatory.

To illustrate, an administrative code provision establishing a mandatory procedure uses "may" in a similar manner. Wisconsin Admin. Code § DOC 310.09(1) provides that an inmate "may" file an administrative appeal from the denial of an inmate complaint. There, "may" means the inmate has the right to file an administrative appeal; it does not mean the agency process is optional, and the inmate may instead seek direct review in the courts. *See Moore v. Stahowiak*, 212 Wis. 2d 744, 750, 569 N.W.2d 711 (Ct. App. 1997) (inmate must exhaust claims through administrative review process before seeking court review).

This Court should also decline Liedke's invitation to grant sentence credit apart from section 973.155(5) based on inherent authority. (Liedke's Br. 25–26.) Inherent authority refers to the powers "necessary to enable courts to accomplish their constitutionally and legislatively mandated functions." *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350. The supreme court has recognized that exercise of inherent authority implicates the separation of powers among the branches of government and the judiciary's obligation to preserve its constitutionally mandated functions. *State v. Schwind*, 2019 WI 48, ¶ 14, 386 Wis. 2d 526, 926 N.W.2d 742. Therefore, the supreme court carefully invokes inherent authority, but only when necessary to maintain the dignity of the courts, transact business, and accomplish the purposes of the courts' existence. *Id.* ¶ 15.

"Wisconsin courts have generally exercised inherent authority in three areas: (1) to guard against actions that would impair the powers or efficacy of the courts or judicial system; (2) to regulate the bench and bar; and (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice." *Henley,* 328 Wis. 2d 544, ¶ 73. The legislature's decision to confer initial authority on the

executive branch through DOC to determine sentence credit after sentencing does not intrude on any of these interests.

First, the legislature's creation of a two-step review process under section 973.155(5) is consistent with the supreme court's recognition that sentencing is an area of shared power among the three branches of government. *Schwind*, 386 Wis. 2d 526, ¶¶ 20–27. Requiring a person to petition DOC for credit after sentencing but before seeking relief from the sentencing court does not impair the judiciary's power. To the contrary, the process enhances the judiciary's power by giving it the final say through its review of DOC's decision to deny the requested credit.

Second, by requiring DOC to review sentence credit first, section 973.155(5) enhances the sentencing court's ability to efficiently and effectively function and fairly administer justice. DOC, not the sentencing court, often has information relevant to sentence credit determination arising from events after sentencing, including holds, arrests and sentences on new cases, and revocation of other sentences, often imposed by other courts. If DOC grants credit, then justice has been administered without wasting scarce judicial resources. If DOC denies credit, the sentencing court can decide credit based on its independent review of the data DOC has compiled and the information the person submits.

Third, section 973.155(5)'s two-step process does not impact the judiciary's ability to regulate the bench and the bar.

Through section 973.155(5), the legislature created an orderly scheme for determining sentence credit after sentencing. Section 973.155(5) gives the sentencing court a decisive role in resolving credit disputes when a person disagrees with DOC's determination. Because section 973.155(5) does not impair the judiciary's shared area of power over sentencing, this Court should decline Lieske's

invitation to exercise its inherent authority to address her sentence credit request.

Liedke argues that exhaustion is unnecessary to confer jurisdiction on the circuit court and that good reason supports not applying exhaustion to her case. (Liedke's Br. 26.) She asserts that requiring her to petition DOC would enforce a procedure for which she had no notice. (*Id.*) But Liedke had notice. First, section 973.155(5)'s plain language contemplates that she must petition DOC before petitioning the sentencing court. *See supra* Section I.B. Second, *Larson*, *Clark*, and *Haskins* unequivocally describe the process as administrative. In each case, the defendant appealed the circuit court's refusal to grant credit, and each time, the supreme court directed the defendant to pursue the matter through a petition as provided under section 973.155(5). *Larson*, 86 Wis. 2d at 200; *Clark*, 92 Wis. 2d at 643–44; *Haskins*, 97 Wis. 2d at 424–25.

As Liedke notes, Wisconsin courts have granted sentencing credit without reference to section 973.155(5)'s two-step process. But these cases did not address the exhaustion requirement, either because the State did not raise it, or the appellate courts have overlooked it. This Court "is not at liberty to disregard the plain, clear words of the statute." *Kalal*, 271 Wis. 2d 633, ¶ 46 (citations omitted). Absent some showing that the supreme court has overruled *Larson*, *Clark*, and *Haskins*, this Court must follow those prior decisions. Unless the person first petitions DOC for credit after sentencing, the sentencing court lacks competency to decide whether a person should receive credit.

D. Liedke did not prove that she petitioned DOC for sentence credit before she petitioned the circuit court for credit.

Liedke asks this Court to remand her case to the sentencing court for an evidentiary hearing if this Court

agrees that she was required to petition DOC for credit before seeking relief from the sentencing court. (Liedke's Br. 29.) Courts have the discretion to deny an evidentiary hearing when the motion fails to allege sufficient facts, presents only conclusory allegations or, even if the motion is sufficient on its face, the record conclusively shows that the defendant is not entitled to relief. *State v. Romero-Georgana*, 2014 WI 83, ¶ 30, 360 Wis. 2d 522, 849 N.W.2d 668. As drafted, Liedke's motion for sentence credit is insufficient because it does not allege that she petitioned DOC for credit and that DOC was either unable to determine credit or refused to award it. Based on this record, this Court should decline to order the sentencing court to conduct an evidentiary hearing.

* * * * *

This Court should affirm the circuit court order denying Liedke's motion for sentencing credit. Although the circuit court did deny on the ground of competency, this Court is "free to examine a ground other than that relied on by the trial court if the alternate ground results in an affirmance." *State v. Heyer*, 174 Wis. 2d 164, 170, 496 N.W.2d 779 (Ct. App. 1993). Here, this Court should affirm solely on competency because the circuit court lacked statutory authority to grant credit because Liedke failed to prove she had petitioned DOC for credit. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) ("An appellate court should decide cases on the narrowest possible grounds.").

II. Liedke is not entitled, as a matter of equal protection, to 147 days of credit for time spent on GPS monitoring while on probation.

Likening her situation to prisoners placed on electronic monitoring through intensive sanctions, Liedke contends, as a matter of equal protection, that she is entitled to credit for 147 days she wore a GPS bracelet while on probation. (Liedke's Br. 11–19.) Liedke cannot demonstrate that she was

similarly situated to prisoners placed on electronic monitoring through intensive sanctions. Further, under the rational basis test, treating probationers on GPS monitoring differently from prisoners on intensive sanctions is neither irrational nor arbitrary.

A. *Magnuson*'s custody test

In *State v. Magnuson*, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536, the supreme court addressed the meaning of section 973.155(1)'s custody requirement. The question in *Magnuson* was whether electronic monitoring constituted "custody" for purposes of the sentence credit statute. *Id.* ¶ 1. Magnuson sought six months credit for time he was released on bond to home detention with electronic monitoring and a strict curfew. *Id.* ¶¶ 1, 8–9.

The supreme court rejected this Court's previous adoption of a case-by-case definition of custody based on whether specific restrictions to the person's freedom represented "the functional equivalent of confinement." *Magnuson*, 233 Wis. 2d 40, ¶¶ 18, 22 (quoting *State v. Collett*, 207 Wis. 2d 319, 325, 558 N.W.2d 642 (Ct. App. 1996). Instead, the supreme court adopted a bright line rule for determining whether an offender is "in custody" under Wis. Stat. 973.155(1)(a): "[A]n offender's status constitutes custody for sentence credit purposes when the offender is subject to an escape charge for leaving that status." *Magnuson*, 233 Wis. 2d 40, ¶¶ 25, 31, 47.

The supreme court did not limit its inquiry to the definition of custody contained only in Wis. Stat. § 946.42(1)(a). It recognized other statutes where "the legislature has classified certain situations as restrictive and custodial." *Magnuson*, 233 Wis. 2d 40, ¶ 26. For example, a convicted offender placed in the community residential confinement program under Wis. Stat. § 301.046(1) is a "prisoner" who may be charged with escape for unauthorized

flight from the program. *Id.* ¶ 28. Also, an offender in the intensive sanctions program is likewise a "prisoner" who may be charged with escape under Wis. Stat. § 301.048(5) for failure to apply with the conditions of the program. *Id.* ¶ 29. And a "prisoner" originally confined to jail who is placed in a home detention program may be charged with escape for intentionally leaving the limits of his or her detention. Wis. Stat. § 302.425(6); *Magnuson*, 233 Wis. 2d 40, ¶ 30. Offenders placed in these programs thus may claim credit for time in the program under *Magnuson*.

B. Equal protection challenges to differences in treatment of criminal defendants

"Equal protection guarantees that similarly-situated persons are treated similarly." *State ex rel. Harr v. Berge*, 2004 WI App 105, ¶ 5, 273 Wis. 2d 481, 681 N.W.2d 282. "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *State v. Post*, 197 Wis. 2d 279, 321, 541 N.W.2d 115 (1995).

The first step of equal protection analysis is to address the threshold issue of whether the groups at issue are "similarly situated." *See Lake Country Racquet & Athletic Club, Inc. v. Morgan*, 2006 WI App 25, ¶ 33, 289 Wis. 2d 498, 710 N.W.2d 701. In this case, Liedke bears the burden to show that her cohort is similarly situated to another group, and that the *Magnuson* rule treats these groups differently. *State v. Benson*, 2012 WI App 101, ¶ 13, 344 Wis. 2d 126, 822 N.W.2d 484.

Courts apply two levels of scrutiny to equal protection challenges. Under rational basis scrutiny, a statute or rule "is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Milwaukee Cty. v. Mary F.-R.*, 2013 WI 92, ¶ 35, 351

Wis. 2d 273, 839 N.W.2d 581 (citation omitted). However, "'when a statute classifies by race, alienage, or national origin' or 'when state laws impinge on personal rights protected by the Constitution,'" strict scrutiny applies. *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985)). Under strict scrutiny, a court will uphold a law "only if narrowly tailored 'to serve a compelling state interest.'" *Id.* (quoting *City of Cleburne*, 473 U.S. at 440).

"A challenge to the difference in treatment of criminal defendants is subject to the rational basis test." *State v. Chapman*, 175 Wis. 2d 231, 245, 499 N.W.2d 222 (Ct. App. 1993). Under this standard, "any reasonable basis for the difference in treatment will validate" the classification. *Id.* "The basic test is not whether some inequality results from the classification but whether there exists a rational basis to justify the inequality of the classification." *Harr*, 273 Wis. 2d 481, ¶ 5 (citation omitted). "The challenger has only been denied equal protection of the law if the classification chosen . . . is irrational or arbitrary." *Chapman*, 175 Wis. 2d at 245.

C. Denying Liedke sentence credit for the days she spent subject to GPS monitoring as a condition of probation does not violate equal protection.

Liedke assumes, without demonstrating, that because she was subjected to GPS monitoring as a condition of her probation, she is similarly situated to persons on intensive sanctions.

The intensive sanctions program. The legislature created the intensive sanctions program to be a "[p]unishment that is less costly than ordinary imprisonment." Wis. Stat. § 301.048(1)(a). A person on intensive sanctions is a prisoner "in the custody and under the control of the department." Wis. Stat. § 301.048(4); *State v. Pfeil*, 2007 WI App 241, ¶ 16, 306 Wis. 2d 237, 742 N.W.2d 573.

The rules of intensive sanctions are established by the Department of Corrections, *see* Wis. Stat. § 301.048(1), and are set forth in Chapter 333 of the Wisconsin Administrative Code for the Department of Corrections. *See* Wis. Admin. Code § DOC 333.07 ("Rules of supervision"). The intensive sanctions program has component phases that are intensive and highly structured and includes 18 specific restrictions on liberty. *See* Wis. Admin. Code § DOC 333.07(1)(a)–(r). For example, section DOC 333.07(1)(n) provides that "an inmate shall wear an electronic device continuously on the inmate's person," when directed by staff to do so, "and comply with other requirements of the electronic monitoring system as directed." Other provisions require inmates to submit a schedule of daily activities to staff, make themselves available for searches and tests ordered by staff, attend and participate in programs and treatment mandated by staff, and "not purchase, lease, possess, trade, sell, or operate a motor vehicle without advance approval" of staff. Wis. Admin. Code § DOC 333.07(1)(h), (i), (j) & (L).

Liedke is not similarly situated. To meet the similarly situated requirement, Liedke had to show that the restrictions that she was subjected to while on probation and subject to GPS monitoring were similar to the restrictions of persons placed on intensive sanctions. *See Benson*, 344 Wis. 2d 126, ¶ 13. Liedke makes no such showing. Apart from the electronic monitoring requirement, Liedke did not identify other specific restrictions that she was subject to while on probation, much less show that these restrictions were like those associated with intensive sanctions. Because Liedke failed to make a threshold showing that she was similarly situated to prisoners in intensive sanctions, her equal protection claim fails.

The different treatment does not violate equal protection. Under a rational basis review, *Magnuson*'s interpretation of "custody" for sentence credit purposes does not violate

Liedke's right to equal protection. A rational basis supports treating probationers like Liedke who are subject to GPS monitoring differently from prisoners on intensive sanctions.

Importantly, as the supreme court explained, an interpretation of "custody" in the sentence credit statute that is tied to whether an offender's status would subject him or her to an escape charge for leaving that status is easy to administer and promotes uniformity. *Magnuson*, 233 Wis. 2d 40, ¶¶ 22, 25. In rejecting the case-by-case approach, the *Magnuson* court said that a test that "requires sentencing courts to engage in detailed inquiries as to the specific restrictions presented in each case[] imposes an unnecessary burden upon those courts and hinders consistency." *Id*. ¶ 22. Because the classification in *Magnuson* is tied to the legitimate governmental purpose of adopting standards that are easy to administer and promote consistency, it survives rational basis review.

In addition to being easy to administer, a definition of custody for sentence credit purposes that is tied to the statutes' statements about when an escape charge will lie (and when it will not) appropriately accounts for the Legislature's determinations of what constitutes custody. Deference to the Legislature's policy choices is a reasonable ground for differential treatment.

Further, treating those on ordinary probation[5] differently for sentence credit purposes from those sentenced to or placed on intensive sanctions reflects the different purposes of probation and intensive sanctions. *See* Wis. Stat. § 301.048(1)(a) (explaining that intensive sanctions is a "[p]unishment that is less costly than ordinary imprisonment and more restrictive than ordinary probation or parole

[5] "Ordinary probation" because, as noted, a person on probation may be placed on intensive sanctions as an alternative to revocation. *See* Wis. Stat § 301.048(2)(am)4.

supervision or extended supervision"); *State ex rel. Flowers v. Dep't of Health and Social Servs.*, 81 Wis. 2d 376, 385, 260 N.W.2d 727 (1978) (probation is intended to foster the reintegration of an individual into society at the earliest opportunity).

But Liedke asserts that this Court should apply strict scrutiny to its analysis of her equal protection claim because *Magnuson*'s interpretation of "custody" impinges on her fundamental right to physical liberty. (Liedke's Br. 15–17.) Liedke does not address several cases that apply a rational basis rather than strict scrutiny analysis to equal protection challenges related to sentence credit. *Hilber* established that differences in treatment of criminal defendants are reviewed under the rational basis test, 89 Wis. 2d 49, 54, 277 N.W.2d 839 (1979), and *Chapman* applied *Hilber* and rational basis review to an equal protection challenge involving sentence credit. *Chapman*, 175 Wis. 2d at 245. Like here, the classification in *Chapman* directly impacted the defendant's physical liberty: it kept his parole eligibility date from being shortened by the application of sentence credit. In *Reginald D. v. State*, 193 Wis. 2d 299, 309–12, 533 N.W.2d 181 (1995), the supreme court applied rational basis review to a claim that disallowing sentence credit to a juvenile who was in secure custody prior to disposition violated equal protection because adult offenders received credit for presentence custody. Based on *Chapman*, *Hilber*, and *Reginald D.*, this Court should address Liedke's claim under rational basis and not strict scrutiny analysis.

Finally, Liedke asserts: "But the *Magnuson* definition of custody isn't just unfair; it's also unnecessary." (Liedke's Br. 18.) This Court should reject her argument. This Court has no authority to define custody differently than the supreme court defined it, untethered to *Magnuson*'s requirement that a defendant must be subject to an escape

charge to be in custody for sentence credit purposes. *See Cook*, 208 Wis. 2d at 189–90.

Liedke's equal protection claim is subject to rational basis review, and a rational basis exists to uphold *Magnuson*'s interpretation of the sentence credit statute against Liedke's as-applied challenge.

III. Liedke may be entitled to additional sentence credit if she exhausts her administrative remedy through DOC, but not as much as she seeks.

Liedke seeks 582 days of sentence credit toward the five sentences, imposed after revocation of her probation. (Liedke's Br. 1.) Included in Liedke's calculation is her request for 147 days of sentence credit based on the days she was placed on GPS monitoring as a probation condition. (*Id*.) If Liedke is not entitled to credit for GPS condition time, *see supra* Section II, Liedke believes she is entitled to 435 days of credit. (Liedke's Br. 8.)

The State disagrees. First, Liedke is not entitled to any credit until she exhausts her administrative remedy through DOC, *see supra* Section I. Second, the State disagrees with Liedke's credit computations.

As explained below, two factors account for the difference between Liedke's request and the State's position. First, the State does not believe that Liedke is entitled to time she served in custody after revocation on unrelated misdemeanor charges. Second, Liedke's revoked consecutively imposed and stayed sentences on Counts One, Two, and Three commenced before the court sentenced her after revocation on Counts Four and Five.

To illustrate the differences between the State's and Liedke's credit computations, the State prepared a table that includes its calculations and Liedke's calculations. (Liedke's Br. 7.) The table does not include the credit Liedke requested

based on the time she spent subject to GPS monitoring as a probation condition.

Liedke's Custody Dates

Start Date	End Date	Reason	State	Liedke
1/30/15	7/13/15	Pretrial custody to plea/sentencing date	165	165
8/19/15	10/19/15	Probation hold	62	62
11/6/15	11/9/15	Probation hold	4	4
7/8/16	7/10/16	Probation hold	3	3
8/26/16	8/29/16	Probation hold	4	4
9/9/16	9/12/16	Probation hold	4	4
10/9/17	10/12/17	Probation hold	4	4
10/30/17	11/15/17	Probation hold[6]	17	53
12/29/17	5/14/18	Probation hold, to the day before her return to prison on Counts 1, 2, and 3[7]	137	137
5/15/18	6/6/18	Prison time to sentencing after revocation on Counts 4 and 5 [8,9]	22	
		TOTAL	422	435

[6] DHA's order reflects that the hold commenced on October 30, 2017, and ended on November 15, 2017. (R. 31:1.) Liedke believes she should receive credit from October 30, 2017, to December 20, 2017. (Liedke's Br. 5–6.) Her calculation does not account for the time she was serving on two revoked misdemeanor sentences from November 15, 2017, to December 20, 2017. (R. 31:6.)

[7] Liedke's revoked imposed and stayed sentences commenced on May 15, 2018, the day Liedke returned to prison. Wis. Stat. § 973.10(2)(b).

[8] June 6, 2018, the date the circuit court sentenced Liedke after revocation on Counts Four and Five, is not included in the sentence computation. *State v. Kontny*, 2020 WI App 30, ¶ 12, 392 Wis. 2d 311, 943 N.W.2d 923.

[9] Liedke does not account for this time. (Liedke's Br. 7.)

A. The State and Liedke agree that she was entitled to 165 days, not 164 days of pre-plea sentence credit.

When Liedke pleaded guilty and was sentenced, the circuit court determined, based on the parties' agreement, that she was entitled to 164 days of sentence credit. (R. 20:2; 62:8, 30–31). Jail records reflect that Liedke was arrested on January 30, 2015, and released on July 13, 2015, when the court placed her on probation. (R. 53:14; 62:27.)

Liedke believes she should receive credit for the date of her arrest, January 30, 2015. (Liedke's Br. 20.) The State agrees that Liedke is entitled to credit for the day of her arrest, even if she was only in custody for a portion of that day. *Kontny*, 392 Wis. 2d 311, ¶¶ 10–11. Liedke believes that she should receive credit for July 13, 2015, the day she pleaded guilty and was placed on probation for Counts One through Five. (Liedke's Br. 20.) Because she was in custody for a portion of July 13, 2015, and did not begin serving her sentence on that day, the State agrees she is entitled to credit for July 13, 2015. *Kontny*, 392 Wis. 2d 311, ¶ 12. The parties agree that the initial pretrial sentence credit computation of 164 days omits either the arrest date or the plea date, days for which she was in custody. Therefore, the State agrees Liedke should receive credit for 165 days.

B. Liedke is not entitled to credit from November 16, 2017, to December 20, 2017.

DHA determined that Liedke should receive sentence credit for the time from October 30, 2017, to November 15, 2017. (R. 31:1.) Relying on jail records, Liedke contends that she was in custody from October 30, 2017, to December 20, 2017, and, therefore, believes she is entitled to an additional 35 days. (Liedke's Br. 21.) Liedke contends that the "record contains no clear explanation for this 35-day discrepancy." (*Id.*)

DHA was not mistaken. DOC's revocation summary, which accompanied DHA's revocation order, reflects that Liedke was arrested on October 30, 2017, for a probation violation. (R. 31:5–6.) Based on this violation, Liedke's probation was revoked for two misdemeanor cases on November 15, 2017. (R. 31:6.) On December 12, 2017, Liedke was sentenced after revocation and received a 10-day jail sentence in case number 14CT479. (*Id.*) On December 20, 2017, Liedke received a 201-day jail sentence after her revocation in case number 14CF380.[10] (*Id.*) The agent reported, "She was released from custody the same day." (*Id.*) Therefore, based on this record, Liedke was serving sentences on unrelated misdemeanor cases from November 16, 2017, to December 12, 2017.

While Liedke may have been in custody for 36 days from November 16, 2017, to December 12, 2017, that custody was in connection with a sentence imposed on two unrelated cases. Under *Boettcher*, Liedke was not entitled to dual credit on this case because she "already received credit against a sentence which has been, or will be, separately served." *State v. Jackson*, 2000 WI App 41, ¶ 19, 233 Wis. 2d 231, 607 N.W.2d 338 (citing *Boettcher*, 144 Wis. 2d at 87). Therefore, Liedke did not prove that her custody was in "connection with the course of conduct for which the . . . sentence was imposed" in this case *Carter*, 327 Wis. 2d 1, ¶ 11.

C. Liedke is entitled to 400 days credit on Counts One, Two, and Three and 422 days of credit on Counts Four and Five.

Based on the available information, Liedke appears to be entitled to 400 days credit on Counts One, Two, and Three

[10] The revocation summary refers to case number 14CM380, but based on the sentencing transcript, it should read case number 14CF380. (R. 31:6; 62:1.)

and to 422 days of credit on Counts Four and Five. While DHA ordered Liedke's revocation on all five counts on May 4, 2018 (R. 31:1), the sentences for different counts commenced on different dates. With respect to Counts One, Two, and Three, her imposed and stayed sentences commenced on May 15, 2018, the day she entered prison. With respect to Counts Four and Five, she began serving the second set of sentences on June 6, 2018, the day she was sentenced after revocation.

Wisconsin § 973.10(2) specifies when a sentence commences following the revocation of probation. Under section 973.10(2)(a), a person who is revoked and returned to court for sentencing after revocation commences her sentence on the day of sentencing. In calculating sentence, the day of sentencing is counted toward the service of sentence and is not included in the presentence credit calculation. *Kontny*, 392 Wis. 2d 311, ¶ 12. In contrast, when a person's imposed and stayed sentence is revoked, the sentence commences the day the person entered prison. Wis. Stat. § 973.10(2)(b); *State v. Aytch*, 154 Wis. 2d 508, 513, 453 N.W.2d 906 (Ct. App. 1990).

Credit on Counts One, Two, and Three. The circuit court sentenced Liedke to a term of imprisonment as to each count and ordered those terms to be served consecutively. (R. 20:4.) The court ordered the sentences stayed and placed Liedke on probation. (*Id.*) When DHA revoked Liedke's sentences on Counts One, Two, and Three, she was ordered returned to prison. (R. 31:1.) According to DOC's offender locator page, Liedke was received at a DOC institution on May 15, 2018. *See* Tanya Liedke's DOC offender locator page, under the Movement Tab, at https://appsdoc.wi.gov/lop/home.do (last viewed August 5, 2020.) Therefore, under Wis. Stat. § 973.10(2)(b), Liedke's consecutively imposed sentences on Counts One, Two, and Three commenced on May 15, 2018, which means that the last date for which she would receive pre-sentence credit is May 14, 2018. Based on the

computations in the State's table, the State believes she would be entitled to 400 days credit, if DOC has not already awarded it.[11] The credit would be applied to the sentence that is imposed first, i.e., Count One. *Boettcher*, 144 Wis. 2d at 100.

Courts Four and Five. When DHA revoked Liedke's probation on May 4, 2018 (R. 31:1), she was returned to court for sentencing after revocation on Counts Four and Five on June 6, 2018. (R. 63:3.) The circuit court sentenced Liedke to prison on Counts Four and Five, ordering her to serve those sentences concurrently to each other and concurrent to any other sentences. (R. 36:1; 63:18.) In Liedke's case, the other sentences included the consecutively imposed and stayed sentences on Counts One, Two, and Three in this case that DHA ordered revoked on May 4. (R. 20:1–4; 31:1.) DHA's order recommended that Liedke receive credit until her return to court. (R. 31:1.) Because the court sentenced her after revocation on June 6, 2018 (R. 63:1), she would receive credit through June 5, 2018. *See Kontny*, 392 Wis. 2d 311, ¶ 12 (defendant not entitled to pre-sentence credit for day she is sentenced). Consistent with its obligation under section 973.155(2), the circuit court entered sentence credit in the amount of 421 days. (R. 36:4.)

However, the State believes that Liedke is entitled to 422 days credit, not the 421 days the circuit court awarded,

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[11] In a letter to the court, Liedke told the circuit court that she received 398 days jail credit on Counts One, Two, and Three. (R. 39:1–2.) Other than DHA's revocation order (R. 31:1), the State did not locate other information in the record that relates to DOC's computation of sentence credit on these counts. The absence in the record of information about DOC's computation of Liedke's sentence after her revocation illustrates the value of requiring persons to first petition DOC for review of sentence credit requests under section 973.155(5).

provided that she seeks the credit through DOC.[12] The State believes that the one-day difference stems from the parties' erroneous stipulation that she was entitled to 164 days credit when she was first placed on probation, rather than 165 days credit. (Liedke's Br. 20.) *See supra* Sec. III. A. If this Court answers this third issue, it should direct the circuit court on remand to amend the judgment of conviction and grant Liedke one additional day of credit for a total of 422 days of credit.

* * * * *

This Court should not answer the second and third issues because the first issue is dispositive. To be clear, the State does not oppose Liedke's efforts to obtain earned credit that DOC has not awarded, *see supra* Sec. III. *Kontny*, 392 Wis. 2d 311, ¶ 9. But it objects to awarding Liedke credit when she did not comply with section 973.155(5)'s procedural requirements. Section 973.155(5) does not foreclose Liedke from petitioning DOC for sentence credit while this appeal is pending. And if DOC does not award the credit she requests, she may petition the sentencing court to determine sentence credit while this appeal is pending. Wis. Stat. § 808.075(4)(g)4.

[12] The State does not include Liedke's June 6, 2018, sentencing date in this calculation because she is not entitled to credit for the day she was sentenced. *Kontny*, 392 Wis. 2d 311, ¶ 12.

CONCLUSION

This Court should affirm the circuit court order denying Liedke's motion for sentence credit. But if it decides to review her credit, it should order the circuit court to grant her 400 days of credit on Counts One, Two, and Three and 422 days of credit on Counts Four and Five.

Dated this 4th day of September 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 294-2907 (Fax)
latorracadv@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8604 words.

Dated this 4th day of September 2020.

Electronically signed by:

s/ Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

A copy of this certificate has been served with the copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of September 2020.

Electronically signed by:

s/ Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General