STATE OF WISCONSIN

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

DISTRICT II

CASE NO. 2020AP000033 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TANYA M. LIEDKE,

Defendant-Appellant.

Appeal from a Judgment and Order
Entered in the Fond du Lac County Circuit Court,
the Honorable Richard J. Nuss, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

MEGAN SANDERS-DRAZEN
Assistant State Public Defender
State Bar No. 1097296

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8383
sandersdrazenm@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

The issues presented are whether Tanya Liedke is entitled to more credit based on time she spent in jail, whether credit is due for her time under GPS monitoring, and whether she was required to petition the Department of Corrections before filing a credit motion in the circuit court. The last issue is the State's focus and the focus of this reply.

Construing Wis. Stat. § 973.155(5) to impose an administrative precondition to filing a credit motion would upend Wisconsin's longstanding system for resolving credit disputes. No one would benefit from the upheaval—not inmates, not courts, not DOC, not taxpayers. More importantly, the sea change the State seeks is not supported by the statutory text.

This Court should reject the State's analysis and clarify that a defendant may move the circuit to correct her credit without first petitioning DOC. And, because the Attorney General's office has repeatedly pushed its misreading of sub. (5),[1] this Court should do so in a published opinion.

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[1] *See, e.g.*, Brief of Plaintiff-Respondent at 33-36, *State v. Lira*, 2020 WI App 70, 394 Wis. 2d 523, 950 N.W.2d 687 (per curiam) (petition for review of unrelated issues granted on January 20, 2021). This Court may take judicial notice of arguments in prior court filings under Wis. Stat. § 902.01(2)(b). *See Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶¶10-11, 313 Wis. 2d 411, 756 N.W.2d 667.

I. There is no administrative precondition to seeking correction of sentence credit in the circuit court.

The circuit court held that it's DOC's job to grant credit towards imposed-and-stayed sentences. That is only partially true. But instead of correcting the court's error, the State adds to it, arguing that it's DOC's job to handle credit towards *all* sentences (with one ill-defined exception mentioned in a footnote[2]). Grasping just how wrong the State's analysis is—and how half-baked—requires understanding the varied ways credit disputes are resolved and the varied sources of authority that govern their resolution. This broader view makes clear that a circuit court *never* loses competency to correct a defendant's credit.

A. The current system for granting and correcting credit.

Credit is granted and disputed at different junctures, and there are multiple (sometimes overlapping) paths to correcting it.

1. Correcting credit granted at sentencing.

A sentencing court must make a credit finding and put it in the judgment of conviction. § 973.155(2). Credit is not discretionary; the court must grant all credit due.[3] If it doesn't (and the error isn't corrected),

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[2] *See* Resp. Br. 10 n.3.

[3] *See State v. Kontny*, 2020 WI App 30, ¶9, 392 Wis. 2d 311, 943 N.W.2d 923.

the defendant may be confined, unconstitutionally, after her sentence ends.[4]

The defendant can challenge the sentencing court's credit finding by appealing under Rule 809.30.[5] She'll have the right to counsel in doing so.[6] If she doesn't pursue a direct appeal and her deadlines elapse, she can still move the circuit court to correct her credit (just as she can move the court to fix any other illegality in her sentence)—but she won't have the right to counsel.[7]

If the circuit court denies an 809.30 credit motion, the defendant can challenge the denial in the court of appeals.[8] If the circuit court denies a non-809.30 credit motion, the defendant can proceed to the court of appeals without the right to counsel, or she can challenge the denial by filing a notice of intent to pursue postconviction relief, beginning a credit-specific 809.30 appeal.[9] In both standard and credit-specific 809.30 appeals, the defendant will have the right to counsel.[10]

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[4] *See generally Allen v. Guerrero*, 2004 WI App 188, ¶¶11-27, 276 Wis. 2d 679, 688 N.W.2d 673.

[5] *See* Wis. Stat. § 973.155(6).

[6] *See* § 809.30(2)-(3).

[7] *See State v. Dowdy*, 2010 WI App 158, ¶28, 330 Wis. 2d 444, 792 N.W.2d 230 (circuit courts have inherent authority to correct sentence illegality).

[8] § 809.30(2)(h), (j).

[9] §§ 809.30(2), 973.155(6).

[10] § 809.30(2)-(3).

2. Correcting credit granted upon revocation.

Even if the initial credit grant was right, disputes can arise later on. They generally relate to time a defendant spent in jail after sentencing but before revocation from probation, parole, or extended supervision.

Responsibility for calculating credit upon a defendant's revocation is shared by two agencies and the circuit court. If a probationer's sentence was withheld, her credit will be calculated by the circuit court at sentencing after revocation,[11] where she'll have the right to counsel.[12] A probationer with an imposed-and-stayed sentence will have her credit calculated by the Division of Hearings and Appeals within the Department of Administration (if she contests her revocation) or by DOC (if she doesn't).[13] She'll have the right to counsel only if she contests.[14] The same is true for defendants revoked from parole or extended supervision: either DOC or DHA will tally their credit,[15] and they'll have the right to counsel if they contest their revocation.[16]

Defendants have several options for contesting credit granted upon their revocation. Those whose credit was tallied by DOC can use DOC's all-purpose

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[11] § 973.155(2).

[12] *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

[13] § 973.155(2).

[14] *See* Wis. Admin. Code § HA 2.05(3)(f).

[15] § 973.155(2).

[16] *See* Wis. Admin. Code § HA 2.05(3)(f).

complaint procedure,[17] or they can move the circuit court to order that a certain amount of credit is due.[18] Those whose credit was tallied by DHA can appeal to the DHA administrator,[19] prosecute a writ of certiorari in the circuit court (if the DHA administrator denies relief),[20] or—as always—file a credit motion in the circuit court.[21] If a credit motion is denied, the defendant can file a notice of intent to pursue postconviction relief, beginning a credit-specific 809.30 appeal, during which she'll have the right to counsel.[22] Finally, those whose credit was tallied by a sentencing after revocation court can challenge it by a motion within[23] or outside[24] the 809.30 process. If the court denies an 809.30 credit motion, the defendant can proceed to the court of appeals.[25] If the court denies a non-809.30 credit motion, the defendant can appeal (without the right to counsel) or file a notice of intent to pursue postconviction relief, beginning a credit-specific 809.30 appeal (with the right to counsel).[26]

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[17] *See* Wis. Admin. Code ch. DOC 310.

[18] *See Dowdy*, 2010 WI App 158, ¶28.

[19] Wis. Admin. Code § HA 2.05(8)-(9).

[20] *See State ex rel. Cramer v. Wis. Ct. App.*, 2000 WI 86, ¶28, 236 Wis. 2d 473, 613 N.W.2d 591.

[21] *See Dowdy*, 2010 WI App 158, ¶28.

[22] §§ 809.30(2), 973.155(6).

[23] § 973.155(6).

[24] *See Dowdy*, 2010 WI App 158, ¶28.

[25] § 809.30(2)(h), (j).

[26] §§ 809.30(2), 973.155(6).

B. Where § 973.155(5) fits in.

Notably absent from this scheme is any process for petitioning DOC. None exists. There is no form for defendants to fill out or any administrative rules governing credit petitions. There isn't even a definition of "petition." Nevertheless, the State says a petition is mandated by § 973.155(5). It isn't.

Subsection (5) provides that, if the credit statute wasn't "applied at sentencing," the defendant "may petition the department to be given credit." In its myopic focus on the provision's "petition the department" language, the State overlooks that sub. (5) applies only when the credit statute *was not applied at sentencing*. It doesn't apply when the defendant disagrees with the court's credit determination, in other words; it applies when the court made no determination at all.

There is one category of defendants whose credit disputes sub. (5) clearly governs: those sentenced before the credit statute became law. Since the statute applies retroactively, its enactment left prisons full of credit-seekers in its wake. Subsection (5) established an administrative process to handle the backlog.

DOC's administrative code confirms that this is sub. (5)'s purpose. Together, Wis. Admin. Code §§ DOC 302.01 and 302.24(1) say DOC's authority to grant credit outside the revocation context is limited to defendants in its custody who were sentenced before § 973.155's enactment. In all other situations, credit "shall" be granted by the circuit court.[27]

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[27] Wis. Admin. Code § DOC 302.

DOC's administrative code has the force of law and makes the limited reach of sub. (5) clear.[28] Legislative history makes it even clearer. The language of sub. (5) was recommended by William Gansner, at that point the head of the Criminal Appeals Unit within the Department of Justice.[29] Gansner argued that DOC should handle credit claims by those sentenced before the credit statute was enacted because DOC was already handling claims triggered by a pair of cases that made credit mandatory and retroactive.[30] Thus, reasoned Gansner, DOC was in the best position to handle retroactive credit.[31] Still, he recommended that the statute "provide that resolution of disputed cases be accomplished by court action."[32] His position won the day.

The trio of cases the State relies on arose in this context.[33] All three involved defendants sentenced before § 973.155 was enacted. It appears all three

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[28] *See Piper v. Jones Dairy Farm*, 2020 WI 28, ¶17 n.9, 390 Wis. 2d 762, 940 N.W.2d 701.

[29] *See* Letter to Rep. Edward McClain, Chairman of Assemb. Crim. Just. & Pub. Safety Comm., from Assist. Att'y Gen. William Gansner at 1 (Feb. 1, 1978) (regarding 1977 S.B. 159, enacted as 1977 Wis. Act 353 § 9, which created § 973.155).

[30] *Id.* at 3 (citing *Klimas v. State*, 75 Wis. 2d 244, 248-52, 249 N.W.2d 285 (1977), which mandated sentence credit, and *Fitzgerald v. State*, 81 Wis. 2d 170, 174-75, 259 N.W.2d 743 (1977), which held that *Klimas* applies retroactively).

[31] *Id.*

[32] *Id.* at 4.

[33] *See* Resp. Br. 10-11 (discussing *Larson v. State*, 86 Wis. 2d 187, 200, 271 N.W.2d 647 (1978); *Clark v. State*, 92 Wis. 2d 617, 644, 286 N.W.2d 344 (1979); and *Haskins v. State*, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980)).

arrived at the Wisconsin Supreme Court on direct appeal, which even the State concedes is ordinarily a way to address credit without first petitioning DOC. And in all three cases, the Court directed the defendants to pursue the administrative process enacted to address their circumstances. None of these cases even suggests the State's view—that every defendant outside the direct appeal process must petition DOC before filing a credit motion in the circuit court. And, as Liedke's opening brief explains, 40 years of subsequent case law disprove it.[34]

In sum, sub. (5) created an administrative process to resolve the deluge of retroactive claims the credit statute's enactment would produce—not to impose an administrative barrier to seeking credit in the circuit court.

C. Practical issues.

Statutes are construed to avoid absurd results.[35] The State's interpretation of § 973.155(5) would produce more absurd results than a 3,000-word brief can enumerate,[36] but here is a selection:

- The State does not acknowledge that DOC lacks custody over (or records for) defendants serving jail sentences who

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[34] *See* App't's Br. 28.

[35] *State v. Hoseman*, 2011 WI App 88, ¶12, 334 Wis. 2d 415, 799 N.W.2d 479 (quoting *Wisconsin Citizens Concerned for Cranes and Doves v. Dep't Natural Res.*, 2004 WI 40, ¶35, 270 Wis. 2d 318, 677 N.W.2d 612, *superseded by statute on unrelated grounds*).

[36] For this reason, Liedke urges oral argument (unless the Court agrees the State is plainly wrong).

weren't first on probation. Does the State really think sub. (5) requires defendants to petition an agency that has no authority to address their concerns?

- A defendant contesting credit almost always has the right to counsel.[37] This matters: proving entitlement to credit can require records from jails, DOC, courts, and police, along with careful analysis of the credit statute, case law, and (as here) constitutional principles. These are tasks a lawyer, not a pro se defendant, has the training and resources to handle.

- Even sub. (5) acknowledges that DOC won't always be able to resolve a credit dispute.[38] It is DOC's records staff that generally deals with sentence issues, after all—not investigators or attorneys.[39] Records staff may not have the documents necessary to determine credit, or they may be unsure whether credit is due because of complex facts or confusing case law. It is thus unclear why the State thinks DOC is uniquely suited to decide credit claims brought by those in its custody—or why it believes DOC has authority to decide claims brought by those who aren't.

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[37] *See supra* pp. 2-6.

[38] § 973.155(5) (if DOC "is unable to determine whether credit should be given," the defendant "may petition the sentencing court for relief").

[39] *See* Wis. Admin. Code § DOC 302.22 (records staff computes inmates' release and discharge dates).

- Considering resource constraints and prison overcrowding,[40] as well as the frequency of credit disputes, sending credit claims to DOC whenever they're brought outside a direct appeal could cause the system to grind to a halt. Again, this matters: if DOC cannot get to a defendant's meritorious credit claim in time, she may overstay her sentence. That's a grave violation of her constitutional rights,[41] costly for taxpayers,[42] and potentially costly for DOC staff.[43] Delay may also result in a writ of habeas corpus,[44] landing the credit dispute in court and frustrating the State's judicial-efficiency aims.

- While the State says a defendant can dispute credit in an 809.30 appeal without first petitioning DOC, it apparently means a standard 809.30 appeal only—not a

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[40] There are over 2,000 more inmates in DOC's adult institutions than they were designed to accommodate. *See* Dep't Corr., *Offenders Under Control on 02_26_2021* at 1 (Feb. 2021) https://doc.wi.gov/DataResearch/WeeklyPopulationReports/02262021.pdf (last visited Feb. 28, 2021).

[41] *See Allen*, 2004 WI App 188, ¶¶11-27.

[42] Confining an inmate in a DOC institution costs, on average, between $35,735 and $41,121 per year. *See* Div. Adult Inst., *Corrections at a Glance* at 2 (Jan. 2021), https://doc.wi.gov/DataResearch/DataAndReports/DAIAtAGlance.pdf (last visited Feb. 28, 2021).

[43] *Cf. Allen*, 2004 WI App 188, ¶¶1-2 (defendant who overstayed sentence sued DOC staff).

[44] *See generally* Wis. Stat. ch. 782.

> credit-specific 809.30 appeal, like this one, brought under § 973.155(6). Why?

Adopting the State's radical interpretation of sub. (5) would confuse Wisconsin's settled system for resolving credit disputes without making it more efficient or accurate. Thus, policy considerations do not support the State's position.

II. Liedke should be credited for the time she spent under GPS monitoring.

The State argues that denying Liedke credit doesn't violate equal protection.

First, the State says Liedke isn't similarly situated with intensive sanctions participants. It cites the administrative rules establishing the restrictions such participants can face. Importantly, however, those restrictions are largely discretionary—just as the restrictions imposed on probationers participating in drug court are largely discretionary. Because GPS monitoring can be the main restraint on liberty imposed on someone from either group, they are similarly situated for credit purposes.[45]

Second, the State says rational basis review applies here because it always applies to disparate treatment of criminal defendants. But it agrees strict scrutiny applies when the government disparately infringes on a fundamental right held by similarly situated individuals.[46] Does the State believe criminal defendants have no fundamental rights?

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[45] *See* Appellant's Br. 14-17.

[46] *See* Resp. Br. 19-20.

The State supports its rational-basis-review argument by citing a case on a statute governing parole eligibility determinations.[47] But insofar as that case suggests disparate treatment of criminal defendants never warrants strict scrutiny, it's trumped by contrary decisions from the United States Supreme Court.[48]

The State then says *Magnuson*[49] passes rational basis review, making no argument that it could survive strict scrutiny.[50] This Court should hold that Liedke is similarly situated with those in intensive sanctions, strict scrutiny applies, and *Magnuson* violates equal protection as applied to Liedke. She is entitled to credit for her time under GPS monitoring.

III. Liedke is entitled to 582 days' credit.

Beyond Liedke's GPS time, the parties have two disagreements.

The State contends that 35 days of Liedke's pre-revocation jail time went towards revocation sentences in two separate cases.[51] But on the existing record, it's impossible to determine how much credit

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[47] *See State v. Chapman*, 175 Wis. 2d 231, 244-48, 499 N.W.2d 222 (Ct. App. 1993).

[48] *See State v. Magnuson*, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536.

[49] *See, e,g.*, *Griffin v. Illinois*, 351 U.S. 12, 17-19 (1956).

[50] The State has forfeited the claim that *Magnuson* survives strict scrutiny as applied to Liedke. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

[51] *See* Resp. Br. 28.

Liedke had in those cases (and thus how much of the 35 days went towards those sentences). Further, doing the math shows Liedke *must* have had credit the record doesn't reveal; otherwise she wouldn't have completed her 10-day and 201-day jail sentences when she did (even with good time). Liedke thus asks this Court to grant the credit or to remand the case to the circuit court for an evidentiary hearing on this issue.[52]

The State also identifies 22 days Liedke spent in prison that it believes should be credited to her revocation sentences in this case. The State overlooks *State v. Beets*, 124 Wis. 2d 372, 374-76, 369 N.W.2d 382 (1985), which makes clear that these 22 days count solely towards Liedke's imposed-and-stayed sentences. This oversight underscores the complexity of credit case law—and the fallacy in the State's argument that DOC's records staff is best suited to navigate it.

[52] *See* Resp. Br. 26.

CONCLUSION

Liedke asks this Court to reverse the circuit court and hold that 582 days' credit are due. If the Court deems the record insufficient to establish the credit due, Liedke asks that it remand the matter for an evidentiary hearing on that issue. Likewise, if the Court decides Liedke had to petition DOC before filing a credit motion, she asks that it remand the matter for an evidentiary hearing so she can prove she did.

Dated this 1st day of March, 2021.

Respectfully submitted,

Electronically signed by
Megan Sanders-Drazen

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MEGAN SANDERS-DRAZEN
Assistant State Public Defender
State Bar No. 1097296

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8383
sandersdrazenm@opd.wi.gov

Attorney for Defendant-Appellant

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 2,942 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief of appellant, including the appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 1st day of March, 2021.

Signed:

Electronically signed by
Megan Sanders-Drazen

MEGAN SANDERS-DRAZEN
Assistant State Public Defender