STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP462-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL K. FERMANICH,

Defendant-Respondent-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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Defendant-Respondent-Petitioner Michael K. Fermanich's seeks review of the court of appeals' decision in this case. The court of appeals reversed an order of the Langlade County Circuit Court granting 433 days of sentence credit on Fermanich's conviction for taking and driving a motor vehicle in Langlade County. (Pet-App. 3–18.)

This case turns on the meaning of the phrase "course of conduct for which sentence was imposed" in Wis. Stat. § 973.155(1)(a), a well-settled matter. In *State v. Tuescher*, 226 Wis. 2d 465, 475, 479, 595 N.W.2d 443 (Ct. App. 1999), the court of appeals held that the phrase means the "specific acts" or offense, relying in part on this Court's discussion of "course of conduct" in *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988). Applying *Tuescher*, the court of appeals concluded that Fermanich's offenses committed in Onieda County on the same night as his Langlade County offense were not part of the "course of conduct for which sentence was imposed" in the Langlade County case. (Pet-App. 11–12.) Thus, Fermanich was not entitled to credit on his Langlade County conviction for his pretrial Oneida County custody on the Oneida County charges.

Fermanich makes two arguments for review. First, he argues that *Tuescher*'s interpretation of "course of conduct" to mean "specific acts" applies *only* to custody on a separate sentence, not to pretrial custody. (Pet. 6, 10–16.) Alternatively, he argues that this Court should overrule *Tuescher* and adopt a definition of "course of conduct for which sentence was imposed" to mean the broader criminal episode. (Pet. 6, 16–19.)

Fermanich's view that "course of conduct" has different meanings based on the type of custody is needlessly confusing. And Fermanich fails to make the compelling showing required to warrant overruling *Tuescher*. The petition should be denied.

STATEMENT OF THE CASE

On the night of September 30, 2017, Michael K. Fermanich stole three trucks in succession, taking three joyrides in Langlade and Oneida Counties. (Pet-App. 4.) Fermanich stole a truck in the Town of Antigo and drove it to the Thirsty Bear tavern. (Pet-App. 4.) There, he abandoned the first truck and stole another, driving it to Fischer's Bar in the Town of Parish. (Pet-App. 4–5.)

Fermanich left the second truck outside the bar and stole a third truck, driving it into Oneida County. (Pet-App. 5.) The truck, which had apparently been reported as stolen, was spotted on the road by an Oneida County sheriff's deputy, who gave pursuit. (Pet-App. 5.) Fermanich led the deputy on a chase through the county before losing control of the truck and sliding it down a ditch and into a creek. (Pet-App. 5.)

On October 1, 2017, Fermanich was charged with multiple offenses in Oneida County case number 2017CF245. (Pet-App. 5.) Fermanich was unable to post cash bail and was held in the Oneida County jail for 433 days. (Pet-App. 5.) On December 29, 2017, Fermanich was charged in with multiple offenses in Langlade County case number 2017CF313. (Pet-App. 5.) A signature bond was imposed in the Langlade County case. (Pet-App. 6.)

The two cases were eventually consolidated and resolved by a global plea agreement. (Pet-App. 6.) Pursuant to the agreement, Fermanich entered no-contest pleas to three charges: Count 1 (Langlade County), taking and driving a motor vehicle without consent as a repeat offender as to the first truck; Count 4 (Oneida County), taking and driving a motor vehicle without consent as to the third truck; and Count 5 (Oneida County), attempting to flee or elude an officer. (Pet-App. 6.) The remaining counts were dismissed and read-in. (Pet-App. 6.) The court withheld sentence and placed

Fermanich on probation for 5 years with 30 days of conditional jail time on Count 1. (Pet-App. 6.)

Fermanich's probation was ultimately revoked, and he was returned to the circuit court for sentencing. (Pet-App. 6.) At a November 2020 hearing, the court imposed a sentence of 18 months of initial confinement and 24 months of extended supervision on each of the three counts, to be served concurrently to each other. (Pet-App. 6.) The court did not fully resolve at sentencing the amount of credit due. (Pet-App. 6–7.)

At a subsequent hearing, the only dispute was over whether Fermanich was entitled to 433 days of credit against the Langlade County charge for his days of custody in Oneida County on the Oneida County charges. (Pet-App. 7.) Relying on *Tuescher*, District Attorney Elizabeth Gebert asserted that he was not entitled to this time because the Oneida County custody was not connected with the "course of conduct" for which Fermanich was sentenced in Count 1. (Pet-App. 7–8.)

But the circuit court declared, "This was all the same course of conduct"; "It happened on the same day within a short period of time." (R. 44:26.) The court then ordered the 433 days in Oneida County custody applied toward the sentence on the Langlade County conviction. The State appealed.

The Wisconsin Court of Appeals, District III, reversed in a *per curiam* opinion. *State v. Michael K. Fermanich*, 2021AP462-CR, 2022 WL 1086681 (Wis. Ct. App. Apr. 12, 2022) (unpublished). (Pet-App. 3–18.) Applying *Tuescher*, the court of appeals concluded that the circuit court erred in ordering credit on the Langlade County conviction in Count 1 for Fermanich's 433 days of Oneida County custody because this custody was not connected with the "course of conduct"—i.e., the specific acts or offense—for which sentence was imposed on the Langlade County conviction. (Pet-App. 11–

12.) Fermanich taking and driving the first car in Langlade County was a separate act or offense from taking and driving the third car and fleeing officers in Oneida County later that night. His Oneida County custody on the Oneida County charges (Counts 4 and 5) was therefore not in connection with the course of conduct for which sentence was imposed on the Langlade County offense (Count 1). (Pet-App. 11–12.)

The court also rejected Fermanich's argument that the interpretation of "course of conduct" in *Tuescher* applies only to cases involving "time spent in custody between the commencement of one sentence and the commencement of another," not to pretrial custody. (Pet-App. 13.) The court explained: "We see neither any reason nor any language in the statute indicating that the interpretation of 'course of conduct' under Wis. Stat. § 973.155(1) would apply differently based on whether the custody was pretrial or otherwise." (Pet-App. 13.)

Fermanich requests this Court's review.

ARGUMENT

I. *Tuescher*'s interpretation of "course of conduct" to be the "specific acts" or offense for which sentence was imposed is well grounded in Wisconsin law, including on this Court's analysis of the phrase in *Boettcher*.

As the court of appeals reiterated in 2019, "[t]he term 'course of conduct'" in Wis. Stat. § 973.155(1)(a) "refers to the specific offense or acts embodied in the charge for which the defendant is being sentenced." *State v. Zahurones*, 2019 WI App 57, ¶ 14, 389 Wis. 2d 69, 934 N.W.2d 905 (citing *Tuescher*, 226 Wis. 2d at 471–72). This interpretation has deep roots in Wisconsin case law, as the court of appeals recognized. (Pet-App. 10–11.)

In *State v. Gavigan*, 122 Wis. 2d 389, 390, 362 N.W.2d 162 (Ct. App. 1984), the defendant committed a robbery and, 24 hours later, led police on a high-speed chase. *Gavigan* was charged with robbery and fleeing in separate complaints. *Id.* Gavigan was sentenced first in the fleeing case, then sought 107 days of credit against the robbery sentence for time served on the fleeing sentence. *Id.* at 391. The circuit court denied the request. *Id.* On appeal, Gavigan argued that he was entitled to credit against the robbery for custody time on the fleeing sentence because the two crimes were part of the same course of conduct. *Id.* at 393. The court of appeals disagreed, concluding that the fleeing charge arose from an incident that was separate from the robbery. *Id.* at 394–95.

In *Tuescher*, 226 Wis. 2d at 467, the defendant burglarized a restaurant while armed with a shotgun. When police confronted him, he exchanged gun fire, wounding an officer. *Id.* Tuescher was convicted of attempted burglary, attempted second-degree homicide, and felon in possession of a firearm. *Id.* The court sentenced Tuescher to 22½ years on the attempted homicide and to shorter concurrent terms on the other offenses. *Id.* at 467–68. The circuit court later vacated the conviction on the attempted homicide charge, and Tuescher eventually pleaded guilty to first-degree reckless injury for which he was sentenced to 15 years of imprisonment, to be served concurrently with the other two offenses. *Id.* at 468.

The court granted Tuescher credit against the new sentence for the time served from sentencing on the three felonies to the grant of the new trial. *Tuescher*, 226 Wis. 2d at 468. But it denied credit for the period after the grant of the new trial because he was serving that time on only the two undisturbed convictions for felon in possession and attempted burglary. *Id.*

On appeal, Tuescher argued that he was entitled to credit for the time he served after the circuit court vacated the

attempted homicide conviction up to his plea. *Tuescher*, 226 Wis. 2d at 470. Tuescher contended that his shooting of the police officer arose "out of the same course of conduct" as the burglary and possession convictions. *Id.* at 470. This Court interpreted Tuescher's contention as advocating that "'course of conduct' broadly . . . mean[s] 'criminal episode.'" *Id.* at 471.

The *Tuescher* Court concluded that the phrase "course of conduct" in Wis. Stat. § 973.155(1)(a) was ambiguous. 226 Wis. 2d at 471. It could be interpreted broadly to encompass a "criminal episode" or narrowly limited to the "specific acts" for which the sentence was imposed. *Id.*

Relying in part on *Gavigan*, the court adopted the narrower definition of the phrase, holding that "a defendant earns credit toward a future sentence while serving another sentence only when both sentences are imposed for the same specific acts." *Id.* at 479. Thus, the court determined that Tuescher was "not entitled to credit toward his reckless injury sentence for time he spent serving his sentences for burglary and possession of a firearm after his attempted homicide conviction was vacated, because those sentences did not arise out of the same 'course of conduct.'" *Id.*

Tuescher also relied on *Boettcher*, 144 Wis. 2d 86. *Boettcher*, which established basic rules for applying credit to consecutive and concurrent sentences, also considered the history and meaning of "course of conduct" in Wis. Stat. § 973.155, which *Tuescher* quoted at length. *See Tuescher*, 226 Wis. 2d at 476–78 (citing *Boettcher*, 144 Wis. 2d at 97–98).

The *Boettcher* Court explained that the Model Penal Code (MPC), upon which the Wisconsin drafters based the sentence credit statute, authorized credit for custody connected to "*the crime* for which such sentence is imposed." *Boettcher*, 144 Wis. 2d at 97 (emphasis added). A comment to the MPC advised, however, that the words "the crime" might well be misinterpreted to indicate that credit is tied to the

crime charged, and that it might be denied on a conviction for a different charge. *Id.* To remedy this problem, the Wisconsin drafters substituted "the course of conduct" for "the crime" in the statute. *Id.*

Thus, as *Boettcher* made clear, the phrase "course of conduct" in Wis. Stat. § 973.155 was intended to ensure that the defendant received credit if convicted of a crime different than the one charged. *Boettcher*, 144 Wis. 2d at 97–98. It was not intended to expand the availability of credit beyond custody linked to the specific acts for which sentence was imposed to all custody associated with any part of a broader criminal episode. *See id.*; *Tuescher*, 226 Wis. 2d at 478–79.

The court of appeals properly applied *Tuescher*'s well-grounded interpretation of "course of conduct" to mean the "specific acts" or offense for which sentence was imposed in concluding that Fermanich not entitled to credit on his Langlade County conviction for his Oneida County custody. (Pet-App. 11–12.) The "specific acts"—or offense or "crime"—for which sentence was imposed on the Langlade County count was taking and driving the first truck. Because Fermanich's Oneida County custody was for different acts or offenses—driving the third vehicle into Oneida County and fleeing an officer there—his custody on those offenses was not connected to the course of conduct for which sentence was imposed in the present case. To the extent Fermanich may argue that the credit determination in this case is arbitrary, stemming from the fact that the offenses occurred in two jurisdictions instead of one, it is not. Fermanich chose to continue his crime spree in Oneida County, exposing himself to charges in multiple jurisdictions.

The foregoing demonstrates that Fermanich's assertion that the court of appeals applied an interpretation of Wis. Stat. § 973.155(1) that is "unsupported" by case law is wrong. (Pet. 5.) *Tuescher* applied proper rules of statutory interpretation in determining that the phrase "course of

conduct for which sentence was imposed" was ambiguous, relying on *Gavigan* and *Boettcher* to resolve that ambiguity in concluding that the phrase means the "specific acts" or offense for which sentence was imposed. *Tuescher*, 226 Wis. 2d at 473–79. Fermanich does not show that a broader definition of "course of conduct for which sentence was imposed" is the only reasonable definition of the phrase, or that the interpretation of the phrase in *Tuescher* (and *Gavigan* and *Boettcher*) is otherwise incorrect.

II. Fermanich's reading of *Tuescher*'s interpretation of "course of conduct" is strained and needlessly complicated.

Fermanich first argues that this Court should grant review to "clarify that the holdings in *Gavigan* and *Tuescher* apply to the situation in which a defendant seeks credit for time spent in custody serving a preexisting sentence." (Pet. 6.) Fermanich notes that the phrase "course of conduct" is used twice in Wis. Stat. § 973.155(1)(a). (Pet. 11.) To avoid the interpretation *Gavigan* and *Tuescher*'s interpretation of "course of conduct" to mean "specific acts," Fermanich argues that this interpretation applies to the second usage of the phrase only. (Pet. 11–12.) Fermanich suggests that the first usage of the phrase—the one that applies in his case—has a broader meaning, albeit one which has yet to be identified and applied in any case. (Pet. 15–16.)

Nothing in Wis. Stat. § 973.155(1)(a) suggests that "course of conduct" has two different meanings based on the type of custody at issue. As the court of appeals properly concluded: "We see neither any reason nor any language in the statute indicating that the interpretation of 'course of conduct' under Wis. Stat. § 973.155(1) would apply differently based on whether the custody was pretrial or otherwise." (Pet-App. 13.)

As a general rule, the same term or phrase used in closely related statutes is presumed to have the same meaning. *See State v. Kirch*, 222 Wis. 2d 598, 604–05, 587 N.W.2d 919 (Ct. App. 1998). It is odd to suggest that the legislature meant for the same phrase used in the *same statute* to have different meanings. And requiring the bench and bar to apply two different meanings for the phrase "course of conduct" based on the type of custody at issue would be needlessly confusing.

III. *Tuescher*'s interpretation of Wis. Stat. § 973.155(1) is deeply rooted in Wisconsin law, and Fermanich does not make a compelling case to warrant overturning *Tuescher*.

More straightforwardly, Fermanich argues that *Tuescher* was wrongly decided and should be overturned. But this argument for review is also unpersuasive.

As shown, *Tuescher*'s interpretation of "course of conduct" is well grounded in Wisconsin law. *Tuescher* itself is over 20 years old and has been applied in multiple published cases. *See, e.g., State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶ 31, 274 Wis. 2d 1, 681 N.W.2d 914; *State v. Lamar*, 2009 WI App 133, ¶ 19, 321 Wis. 2d 334, 773 N.W.2d 446, *aff'd*, 2011 WI 50, ¶ 19, 334 Wis. 2d 536, 799 N.W.2d 758. And to overturn *Tuescher*, this Court would also likely need to disavow language in *Boettcher* construing "course of conduct" to narrowly mean "the crime" for which sentence was imposed. *See Boettcher*, 144 Wis. 2d at 97–98.

Fermanich has not shown that the only reasonable interpretation of "course of conduct" in Wis. Stat. § 973.155(1)(a) is the broader "criminal episode" "for which sentence was imposed." Indeed, this interpretation is *less* reasonable than *Tuescher*'s because the conduct "for which sentence was imposed" always includes the defendant's specific acts constituting the crime or offense. A sentence

may—*but need not*—also be imposed for additional acts, including those constituting a criminal episode of which the specific offense or crime was a part.

At any rate, Fermanich fails to make the showing necessary to warrant setting aside *Tuescher* and language in *Boettcher*. "When a party asks this court to overturn a prior interpretation of a statute, it is his 'burden . . . to show not only that [the decision] was mistaken but also that it was objectively wrong, so that the court has a compelling reason to overrule it.'" *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 45, 281 Wis. 2d 300, 697 N.W.2d 417 (citing *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)). Fermanich has not demonstrated a compelling reason to overturn *Tuescher*'s well-established interpretation "course of conduct" in Wis. Stat. § 973.155(1)(a). Review is therefore not warranted.

CONCLUSION

The petition for review should be denied.

Dated this 24th day of May 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 2,921 words.

Dated this 24th day of May 2022.

JACOB J. WITTWER
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

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

Dated this 24th day of May 2022.

JACOB J. WITTWER
Assistant Attorney General