STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP000462 – CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL K. FERMANICH,

Defendant-Respondent-Petitioner.

On Appeal from a Judgment of Conviction Entered in the Langlade County Circuit Court, the Honorable John B. Rhode, Presiding

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BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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ISSUE PRESENTED

On the night of September 30, 2017, Michael Fermanich took three unoccupied trucks, one immediately after the other, before attempting to elude arrest. The incident straddled two counties: Langlade County and Oneida County. The State filed charges in both counties. The Oneida County Circuit Court imposed $10,000 cash bail. Then, the Langlade County Circuit Court imposed a $10,000 signature bond. Mr. Fermanich remained in custody for 433 days. The cases were later consolidated. Mr. Fermanich pled to three charges: count one, related to the first truck taken in Langlade County, and counts four and five, related to the third truck taken in Langlade County and driven into Oneida County. The remaining charges from both counties were dismissed and read in. The circuit court imposed concurrent sentences of the same length and granted 433 days of sentence credit on each count. The State appealed the credit on count one only.

A defendant is entitled to sentence credit on each sentence for all days spent in custody "in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a).

The issue presented is:

> Whether Mr. Fermanich is entitled to sentence credit for the 433 days of pretrial confinement on all three counts or counts four and five only.

The circuit court granted 433 days of credit on all three counts, concluding that, "this was all the same course of conduct. It happened on the same day within a short period of time. The only reason we're dealing with this issue is because it happened to spill over a county line." (R. 44:26; App.59).

The court of appeals reversed the grant of 433 days of credit on count one, after determining that to be entitled to credit Mr. Fermanich was required to prove that count one arose from the same "specific act" as counts four and five, and that he had failed to do so. *State v. Fermanich*, No. 2021AP462-CR, unpublished slip op., ¶20 (April 12, 2022) (App.11-12).

This Court is asked to reverse the court of appeals and affirm the circuit court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are customary for this Court.

STATEMENT OF THE CASE AND FACTS

On September 30, 2017, at approximately 9:40 pm, in the town of Antigo, twenty-one-year-old Michael Fermanich drove off in another person's unoccupied truck. (R.1:2; App.20). The truck's owner chased after him and called law enforcement. (*Id.*). Sergeant Michael O'Neill from the Langlade County Sheriff's Office responded to the call. (*Id.*). While

responding, Sergeant O'Neill received an update from dispatch about a second truck taken from the Thirsty Bear Pub in the town of Peck. (*Id.*). Sergeant O'Neill responded to that location, where he found the first truck, abandoned. Sergeant O'Neill then received word of a third truck taken from Fischer's Bar in the town of Parish. (*Id.*). Sergeant O'Neill responded to that location, where he found the second truck, abandoned. (*Id.*). All of this conduct occurred in Langlade County.

Based on his movement, Sergeant O'Neill believed that Mr. Fermanich was likely traveling toward Oneida County, and at 10:18 pm, the Langlade County Sheriff's office sent a teletext to the Oneida County Sheriff's office notifying them of the situation. (R. 44:22; App.55). Shortly thereafter, Sergeant O'Neill learned that Oneida County officers located the truck, and the driver had eluded police before driving into a ditch. The driver, Mr. Fermanich, was arrested. (R.1:3; App.21).

Mr. Fermanich was charged in both counties. On October 2, 2017, the State filed a criminal complaint in Oneida County Case No. 17CF245 and the circuit court imposed a $10,000 cash bond. (R.44:12; App.45) (R.48:1; App.18). On December 29, 2017, the State filed a criminal complaint in Langlade County Case No. 17CF313. (R.1; App.19-21). On February 16, 2018, the circuit court imposed a $10,000 signature bond. (R.47:1; App.22). Mr. Fermanich was unable to post bond and remained in the Oneida County Jail for

the duration of the proceedings, which amounted to 433 days.

Mr. Fermanich was found indigent, and the State Public Defender appointed an attorney to represent him in both cases. (R.2). On June 6, 2018, defense counsel filed an application for consolidation in Oneida County Case No. 17CF245, and the Oneida County District Attorney filed a consent to consolidation on the same day.[1] *See* Wis. Stat. § 971.09(1).[2]

The cases resolved on December 6, 2018. An amended information was filed in Langlade County Case No. 17CF313, which incorporated the charges from the Oneida County case, renumbered as counts four through eight. (R.10:1-3; App.23-25). The parties also filed another set of consolidation documents: application for consolidation; consent to consolidation;

[1] The Court is asked to take judicial notice of the date of filing of these documents. *See* Wis. Stat. § 902.01(2)(b) (facts not subject to reasonable dispute and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned). *See State v. Kirk v. Credit Acceptance Corp*, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (taking judicial notice of circuit court records as reflected on CCAP).

[2] Under Wis. Stat. § 971.09(1). "[a]ny person who admits that he or she has committed crimes in the county in which he or she is in custody and also in another county in this state may apply to the district attorney of the county in which he or she is in custody to be charged with those crimes so that the person may plead guilty and be sentenced for them in the county of custody."

and waiver of right to be tried in Oneida County. (R.11, R.12, R.13).

On December 6, 2018, the Langlade County Circuit Court held a plea and sentencing hearing, the Honorable John B. Rhode, presiding. (R.45). Mr. Fermanich pled to three charges: count one, operating a motor vehicle without owner's consent in Langlade County, Wis. Stat. § 943.23(2); count four, operating a motor vehicle without owner's consent in Oneida County, Wis. Stat. § 943.23(2); and count five, fleeing and eluding in Oneida County, Wis. Stat. § 346.04(3). (R. 20:1; App.26). Counts two, three, and six through eight were dismissed and read in. (R.20:2; App.27). The court proceeded to sentencing. The court withheld sentence and imposed five years of probation on each count. (R.20; App.26).

The court noted that there was a joint recommendation for six months of conditional jail time; however, it only imposed 30 days because "that strikes me as quite a bit of time you already served in county jail in one county or another as a result of your actions on September 30th of last year." (45:27). The court approved of the consolidation, concluding that the charges "all arise out of incidents from the same day spilling over into another county." (R.45:5).

Two years later, Mr. Fermanich was revoked from probation. The day before the sentencing after revocation hearing, Mr. Fermanich filed a motion for pretrial sentence credit. (R.26:1-5; App.29-33). He

argued for 433 days of pretrial credit on all three counts. He asserted, "Oneida County officers were dispatched on September 30, 2017 as a result of reports of stolen cars in Langlade County, and for this reason searched for, pursued, and arrested Mr. Fermanich." (R.26:3; App.31). Counsel further argued that, "[t]his exact series of events formed the basis for both his Oneida County and Langlade county cases, which were ultimately consolidated together into this singular Langlade County case." (*Id.*). In addition, as part of the plea, several Oneida County charges were dismissed and read in. (R.26:4; App.32).

On November 3, 2020, the court held the sentencing after revocation hearing, Judge Rhode, again presiding. (R.43). The court followed the parties' joint sentencing recommendation of 18 months of initial confinement and 24 months of extended supervision on each count, run concurrently. (R.43:12-13). The court indicated that it would hear further arguments about pretrial credit at a subsequent hearing. (R.43:5).

On February 2, 2021, the court held a sentence credit hearing. (R.44:1-30; App.34-63).[3] The State argued that Mr. Fermanich was only entitled to pretrial credit on counts four and five, reasoning that count one involved one truck and victim in Langlade County, whereas counts four and five involved a different truck and victim in

[3] There have been subsequent corrections to credit based on probation holds, which are not relevant to this appeal.

Oneida County. (R.44:10; App.43). The State further noted that the cases were charged separately and there was a signature bond imposed in the Langlade County case. (R.44:11-12; App.44-45).

Defense counsel argued that the incident underlying all three counts was a "singular course of conduct." (R.44:25; App.58). He argued that Mr. Fermanich "was arrested then and brought to jail because of activity that began in Langlade County. And he sat until his sentencing for 433 days because of what began in Langlade County." (*Id.*). Counsel further argued that credit was also due because there were charges from Oneida County that were dismissed and read in. (R.44:22-23; App.55-56). Finally, because of consolidation, the dismissed and read in Oneida County charges were "not just considered at sentencing, they were the basis of sentencing." (R.44:23; App.56).

The circuit court considered the parties' arguments, and concluded that the 433 days of pretrial credit should be granted on all three counts. (R.44:29; App.62). The court determined that, "this was all the same course of conduct. It happened on the same day within a short period of time. The only reason we're dealing with this issue is because it happened to spill over a county line." (R.44:26; App.59). The State appealed the sentence credit on count one only.

The court of appeals reversed the circuit court's grant of pretrial credit on count one. In reliance on *State v. Gavigan*[4] and *State v. Tuescher*,[5] it held that, to be entitled to credit, Mr. Fermanich was required to prove that count one arose from the same "specific act" as counts four and five, and had failed to do so. *Fermanich*, No. 2021AP462-CR, unpublished slip op., ¶¶17-18, 20. (App.10-12). The court of appeals held:

> The specific act or offense for which sentence was imposed on Count 1 was taking and driving the first truck in Langlade County, a charge for which Fermanich posted a signature bond. The Oneida County custody was connected to the specific offenses Fermanich committed in that county, including taking and driving the third stolen truck into Oneida County (Count 4) and attempting to elude an officer (Count 5). Notably, Fermanich could have reflected and stopped his conduct before he drove the third vehicle from Langlade County into Oneida County and then attempted to elude an officer. Because the Oneida County custody was not in connection with the specific acts for which sentence was imposed on Count 1, Fermanich is not entitled to 433 days of credit against Count 1 for that custody.

Id. ¶20. (App.11-12).

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[4] *State v. Gavigan*, 122 Wis. 2d 389, 362 N.W.2d 162 (Ct. App. 1984).

[5] *State v. Tuescher*, 226 Wis. 2d 465, 595 N.W.2d 443 (Ct. App. 1999).

This Court granted Mr. Fermanich's petition for review.

SUMMARY OF ARGUMENT

The State concedes that Mr. Fermanich is entitled to 433 days of pretrial credit on counts four and five and only appeals the credit on count one. Given that the sentences are the same length and concurrent, if this Court affirms the court of appeals, this credit will have no practical effect and Mr. Fermanich will be taken into custody and incarcerated for an additional 433 days.

There are three reasons why the circuit court correctly found that the 433 days of pretrial confinement were "in connection with the course of conduct for which sentence was imposed" on count one. Wis. Stat. § 973.155(1)(a). First, Mr. Fermanich's arrest and resulting custody was based in part on his taking of the first truck in Langlade County. Second, charges from Oneida County were dismissed and read in through the case consolidation, and thus became part of the basis for the sentence on count one. Third, under a reasonable definition of "course of conduct," it is apparent that all three counts arose from a single course of conduct. The court of appeals' reliance on *Gavigan* and *Tuescher* is misplaced. These cases only limit credit in situations where a defendant seeks credit for custody that was served in satisfaction of a separate, preexisting sentence credit, a situation not present here. Alternatively, this Court should reject

Tuescher's unduly restrictive interpretation of the phrase "course of conduct" as "specific act."

ARGUMENT

The circuit court properly held that Mr. Fermanich's pretrial incarceration was "in connection with the course of conduct for which sentence was imposed" on all three counts, including count one. *See* Wis. Stat. § 973.155(1)(a).

A. Legal principles and standard of review.

Sentence credit is governed by Wis. Stat. § 973.155. The statute provides, in pertinent part:

> 973.155 Sentence credit.
>
> (1) (a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
>
> 1. While the offender is awaiting trial;
>
> 2. While the offender is being tried; and

> 3. While the offender is awaiting imposition of sentence after trial.

Wis. Stat. § 973.155(1)(a).

A person seeking sentence credit toward a sentence must establish first, that he or she was "in custody" during the relevant time period, and second, that the custody was "in connection with the course of conduct for which sentence was imposed." *State v. Elandis Johnson*, 2009 WI 57, ¶27, 318 Wis. 2d 21, 767 N.W.2d 207 (quoting Wis. Stat. § 973.155(1)(a)). Credit is given for custody spent awaiting trial and sentencing. Wis. Stat. § 973.155(1)(a)1.-3.

If pretrial confinement is factually connected to more than one sentence, and the sentences are imposed concurrently, credit may be granted to each sentence. *Elandis Johnson*, 318 Wis. 2d 21, ¶¶65-66. Alternatively, if the sentences are imposed consecutively, credit is only available on one of the sentences, in order to avoid granting duplicate credit. *State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988). The commencement of sentence "severs" the connection between the custody and any other unrelated charge. *State v. Beets*, 124 Wis. 2d 372, 383, 369 N.W.2d 382 (1985). "Sentence credit is designed to afford fairness so that a person does not serve more time than that to which he or she is sentenced." *State v. Obriecht*, 2015 WI 66, ¶23, 363 Wis. 2d 816, 867 N.W.2d 387. The grant of lawfully earned sentence credit is mandatory. *State v. Kitt*, 2015 WI App 9, ¶3, 359 Wis. 2d 592, 859 N.W.2d 164.

Application of the sentence credit statute to a given set of facts is a question of law, reviewed de novo. *State v. Kontny*, 2020 WI App 30, ¶6, 392 Wis. 2d 311, 943 N.W.2d 923. The circuit court's findings of fact will not be set aside unless clearly erroneous. *State v. Carter*, 2010 WI 77, ¶20, 327 Wis. 2d 1, 785 N.W.2d 516.

B. Mr. Fermanich's pretrial incarceration was factually connected to the conduct underlying count one.

Mr. Fermanich is entitled to pretrial sentence credit on count one because his pretrial custody resulted in part from his taking of the first truck in Langlade County. *See Carter*, 327 Wis. 2d 1, ¶53 (a person is eligible for sentence credit "if the custody was in whole or in part in connection with the course of conduct for which sentence was imposed"). A person is eligible for credit on more than one sentence even if the conduct underlying each sentence is not identical, as long as there is a factual connection between the custody and the sentence. *See e.g. id.*, ¶¶62, 79 (defendant entitled to credit for Illinois custody toward Wisconsin sentence where the custody was based in part on the Illinois charge and in other part on a Wisconsin warrant).

Mr. Fermanich was arrested and placed in custody on September 30, 2017, as a result of a joint effort between law enforcement in both counties to apprehend him for all of his criminal acts in both counties, including the taking of the three trucks in

Langlade County and driving and eluding conduct in Oneida County. (*See* R.1:2-; App.20-21). The court of appeals criticized Mr. Fermanich's reliance on the reasons for his arrest, finding it to be a mere procedural connection. *Fermanich*, No. 2021AP462-CR, unpublished slip op., ¶22. (App.12-13). To the contrary, Mr. Fermanich's arrest and booking represented day one of his 433 days in custody. *See Carter*, ¶63 (examining the reason for "the defendant's *arrest* and resulting presentence custody") (emphasis added).

From that date of arrest to the date of sentencing, Mr. Fermanich's charges were intertwined. He applied for consolidation on June 6, 2018, and the Oneida County prosecutor consented on the same day.[6] As part of consolidation, a person admits to the charges. Wis. Stat. § 971.09(1). The cases resolved on December 6, 2018, with a plea to an amended information containing charges from both counties. (R.10:1-3; App.23-25). The 433 days it took to get from arrest, to consolidation, to sentencing were "in connection with the course of conduct for which sentence was imposed" on all three counts, including count one. Wis. Stat. § 973.155(1)(a).

The fact that there was a signature bond in the Langlade County case is not a deciding factor. A person is entitled to credit toward a sentence for time spent in custody—even if there was a signature bond—if the custody was "at least in part" due to the conduct

[6] *See supra* n.1.

underlying the sentence. *See State v. Hintz*, 2007 WI App 113, ¶¶8-9, 300 Wis. 2d 583, 731 N.W.2d 646. (defendant entitled to credit on new charge for time spent in custody on a probation hold even though there was a signature bond on the new charge because the hold was based in part on the new charge); *see also*, *State v. Zahurones*, 2019 WI App 57, ¶¶15-16, 389 Wis. 2d 69, 934 N.W.2d 905 (defendant entitled to credit toward a deferred charge carrying a signature bond for time spent in custody on probation holds on separate charges).

Ultimately, the issuance of a signature bond is an insignificant procedural fact. The incident occurred on a single day, and Oneida County just happened to file first, imposing a $10,000 cash bond. (R.48; App.18). This was an unsurmountable amount for an indigent twenty-one-year-old. Following this, the Langlade County court would have been hard-pressed to justify cash bail.[7] Had Mr. Fermanich not signed the bond form in the Langlade County case, or had the court imposed even one dollar of cash bail, the State would not be disputing the pretrial credit on count one. Yet, the presence of Mr. Fermanich's signature on the bond form is not a basis to deny credit in this case.

[7] Under Wis. Stat. § 969.01(1), "[b]ail may be imposed at or after the initial appearance only upon a finding by the court that there is a reasonable basis to believe that bail is necessary to assure appearance in court."

C. Dismissed and read in charges from Oneida County were part of the basis for which sentence was imposed on count one.

Mr. Fermanich additionally establishes that the custody was "in connection with the course of conduct for which sentence was imposed" pursuant to Wis. Stat. § 973.155(1)(a), because there was a cash bond on all of the Oneida charges, and several of those charges were dismissed and read in when the cases were consolidated. [8]

The sentence credit statute "requires sentence credit for confinement on charges that are dismissed and read in at sentencing." *State v. Floyd*, 2000 WI 14, ¶1, 232 Wis. 2d 767, 606 N.W.2d 155.[9] In *Floyd*, the defendant was arrested and charged with five counts. He was released on a signature bond. While out of custody, he picked up a new charge for armed robbery. A cash bond was imposed. He remained in custody because he could not post the cash bond. Floyd pled to two of the original counts, with all of the other counts—including the robbery—dismissed and read in. *Id.*, ¶4. Floyd was entitled to credit on the new charge. *Id.*, ¶32. This Court has subsequently confirmed that "read-in charges become a factual

[8] Count six, obstructing an officer, Wis. Stat. § 946.41(1); count seven, resisting a traffic officer, Wis. Stat. § 346.04(2t); and count eight, attempting to flee or elude a traffic officer, Wis. Stat. § 346.04(3). (R.20:2; App.27).

[9] Abrogated on other grounds by *State v. Straszkowski*, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835.

consideration in the sentencing determination." *Elandis Johnson*, 318 Wis. 2d 21, ¶40.

The consolidation of Mr. Fermanich's cases created an even stronger factual connection than the more typical case in which charges are dismissed and read in. Consolidation of the cases "fused" the cases into a single action. *See State v. Rachwal*, 159 Wis. 2d 494, 515, 465 N.W.2d 490 (1991) ("when the consolidation took effect pursuant to sec. 971.09, Stats., the various pleadings essentially were fused into a single action"). At times, it is not clear whether a person admits a read in charge. *Straszkowski*, 310 Wis. 2d 259, ¶92. That is not the case here. It is clear that Mr. Fermanich admitted to the read in charges. The consolidation statute specifically requires the defendant to "admit" the crimes in their application for consolidation. Wis. Stat. § 971.09(1).

The court of appeals attempted to distinguish *Floyd* because "Fermanich received credit . . . on Counts 4 and 5 for the time served on the dismissed and read-in Oneida County counts." *Fermanich*, No. 2021AP462-CR, unpublished slip op., ¶28 (App.16). Yet, just because Mr. Fermanich received the credit on counts four and five does not mean the credit is not available on count one. The sentences are concurrent. *See Elandis Johnson*, 318 Wis. 2d 21, ¶¶65-66 (credit may be granted on more than one concurrent sentence). In fact, if the credit is not granted on all three counts, the credit will have no actual effect because the sentence on count one will be

433 days longer than the sentences on counts four and five.

D. Count one arose from the same "course of conduct" as counts four and five.

Finally, Mr. Fermanich is entitled to the 433 days of pretrial credit on count one because the charge arose from the same course of conduct as counts four and five, and Mr. Fermanich was in custody on counts four and five on the $10,000 cash bond. (R.48; App.18). The court of appeals determined that, to show that count one arose from the same "course of conduct" as counts four and five Mr. Fermanich was required to establish that count one arose from the same "specific act" as counts four and five. *Fermanich*, No. 2021AP462-CR, unpublished slip op., ¶20. (App.11-12).

For this definition of "course of conduct," the court of appeals cited its prior holding in *Tuescher*, 226 Wis. 2d 465. *See id*, ¶¶17-18 (App.10-11). *Tuescher*'s holding should not determine this case. First, its holding is inapplicable to the facts of Mr. Fermanich's case. Second, its definition of "course of conduct" as "specific act" should be disavowed, because it is objectively wrong.

1. *State v. Tuescher*'s holding applies to the situation where a defendant seeks credit for custody that was served in satisfaction of a separate, preexisting sentence, a situation not present here.

In deciding Mr. Fermanich's appeal, the court of appeals primarily relied on its prior decision in *Tuescher,* 226 Wis. 2d 465, which in turn primarily relied on its prior decision in *Gavigan*, 122 Wis. 2d 389. *See Fermanich*, No. 2021AP462-CR, unpublished slip op., ¶¶17-18. These two cases involved the situation where a defendant seeks credit on a sentence for time spent in custody serving a separate, preexisting sentence. This situation is not present here. Mr. Fermanich seeks credit for time spent in custody awaiting disposition of his case, applied toward concurrent sentences that commenced at the same time.

In *State v. Gavigan*, 122 Wis. 2d at 390, the defendant committed a robbery, and the next day, led police on a chase that resulted in a fleeing charge. *Id.* at 390. He pled to the fleeing and began serving a six-month sentence. *Id*. Later, he was convicted of the robbery and sentenced to three years, concurrent. *Id*. at 391. He received pretrial credit toward both sentences. *Id.*

However, after the commencement of the fleeing sentence, Gavigan's custody was solely in connection with the fleeing sentence and credit was no longer

available on the robbery charge. *Id.*, at 393-94. The court of appeals held that, "[i]n general, an offender is not entitled to sentence credit under sec. 973.155, Stats., for custody that is being served in satisfaction of another unrelated criminal sentence." *Id.* at 393. Gavigan argued that the robbery and fleeing were a single "course of conduct." *Id.* at 394. However, he was estopped from making this argument because in the circuit court, he argued in a motion in limine that they were unrelated. *Id.* Regardless, the charges appeared to be "separate and unrelated," having occurred 24 hours apart. *Id.* at 395.

One year after *Gavigan*, this Court decided *Beets*, 124 Wis. 2d at 383, which established the seminal rule that "sentencing on one charge severs the connection between the custody and [ ] pending charges." Beets was on probation for a drug conviction when he was arrested for burglary. He was sentenced after revocation on the drug conviction. *Id.* at 374-375. Subsequently, he was sentenced concurrently on the burglary. *Id.* He received the pretrial credit on both sentences. *Id.* However, once he started serving the drug sentence, he stopped earning credit toward the burglary charge. *Id.* at 383.

In *Beets*, there was no argument that the sentences were related. However, the Court acknowledged the possibility of a different result if the sentences were related. The court stated, "unless the acts for which the first and second sentences are imposed are truly related or identical, the sentencing on one charge severs the connection between the

custody and the pending charges," but the Court cautioned that, "the consequences of even that contingency is not clear-certainly not decided herein-for the acts underlying the drug charges and the burglary were not related." *Beets*, 124 Wis. 2d at 383.

Finally, in *Tuescher*, 226 Wis. 2d at 472, the court of appeals considered whether sentence credit was owed for time spent serving a separate, preexisting sentence, when the sentences were related. In *Tuescher*, the defendant robbed a restaurant, and as he was leaving the scene, shot at police. *Id.* He was convicted and sentenced concurrently on charges of attempted armed burglary, possession of a firearm, and attempted second-degree intentional homicide. The court's grant of pretrial credit on each sentence was undisputed. *Tuescher*, 226 Wis. 2d at 468.

On appeal, Tuescher won a new trial on the attempted homicide only. *Id.* He continued serving the other two sentences. He later pled to amended charge and was sentenced concurrently. *Id.* Tuescher requested credit toward the new sentence for the time spent in custody between the reversal of the attempted homicide conviction and resentencing on the amended charge. He argued that sentence credit was owed "by virtue of the statute's inclusion of time spent serving 'any other sentence arising out of the same course of conduct' within the definition of 'actual days spent in custody.'" *Id.* at 470. *See* Wis. Stat. § 973.155(1)(a).

Initially, the *Tuescher* court relied on *Beets* to conclude that the pretrial custody was not in connection with the sentences that had kept running. *Tuescher*, 226 Wis. 2d at 472-473. However, the court acknowledged that *Beets* had posed a possible exception for when "the acts for which the first and second sentences are imposed are truly related or identical. . .". *Id*. at 475-476 (quoting *Beets*, 124 Wis. 2d at 383). To determine whether the exception might apply, the court of appeals considered whether the charges arose from the same "course of conduct." The court concluded that the phrase "course of conduct" in Wis. Stat. § 973.155(1)(a) was ambiguous. *Id*. at 471. It could mean "criminal episode," or it could mean "specific acts" for which the sentence is imposed. *Id*. The court concluded 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. The burglary and shooting were not the same specific act. *Id*.

Unlike *Gavigan* and *Tuescher*, Mr. Fermanich does not seek credit on count one for custody that was served in satisfaction of a separate, preexisting sentence. He seeks credit for pretrial custody applied toward concurrent sentences that commenced at the same time. Pretrial credit was conceded and granted without dispute in *Tuescher*, *Gavigan*, and *Beets*.[10]

[10] *Tuescher*, 226 Wis. 2d at 468; *Gavigan*, 122 Wis. 2d at 391; *Beets*, 124 Wis. 2d at 375.

In Mr. Fermanich's case, the court of appeals found "neither any reason nor any language in the statute indicating that the [statute] would apply differently based on whether the custody was pretrial or otherwise." *Fermanich*, No. 2021AP462-CR, unpublished slip op., ¶24 (App.13). But in fact, Wis. Stat. § 973.155(1)(a) *does* use language indicating that the statute has special application to credit sought for custody spent serving a sentence. In its definition of custody, the statute separately addresses the situation where credit is sought for "confinement . . .*for any other sentence* arising out of the same course of conduct." Wis. Stat. § 973.155(1)(a) (emphasis added). In *Tuescher*, the court specifically quoted this part of the statute when it observed that determining sentence credit is "complex" when "multiple sentences are imposed at different times." *Tuescher*, 226 Wis. 2d at 469-470.

Because Mr. Fermanich's case does not involve the "complex" situation where multiple concurrent sentences are imposed at different times, he is not required to prove that count one arose from the same "specific act" as counts four and five.

2. *Tuescher*'s interpretation of "course of conduct" as "specific act" should be disavowed.

Alternatively, if this Court does not distinguish *Tuescher*, it should disavow *Tuescher*'s interpretation of "course of conduct" as "specific act." Statutory construction is a question of law, subject to

de novo review. *Noffke v. Bakke*, 2009 WI 10, ¶9, 315 Wis. 2d 350, 760 N.W.2d 156. A party asking to overrule a prior interpretation of a statute carries the 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." *State v. Friedlander*, 2019 WI 22, ¶18, 385 Wis. 2d 633, 923 N.W.2d 849 (internal citations omitted). The standard for overruling court of appeals holdings differs from the standard for overruling this Court's holdings because this Court is the law-declaring court, and it reviews the sentence credit statute de novo. *State v. Lira*, 2021 WI 81, ¶46, 399 Wis. 2d 419, 966 N.W.2d 605. Mr. Fermanich does not argue that *Tuescher*'s outcome was wrong. It follows from the logic in *Beets*, that commencement of a sentence severs the connection between the custody and any other charge. However, its definition of "course of conduct" should be disavowed by this Court.

Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, the Court ordinarily stops the inquiry. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id*. Statutory language "is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or

closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*, ¶46.

If application of the methodology for statutory interpretation yields a plain, clear statutory meaning, the statute is applied accordingly. *Id.*, ¶46. Where there is no ambiguity, there is no basis to consult extrinsic sources of interpretation, such as legislative history. *Id.* If a statute is ambiguous, the court may look to legislative history to ascertain meaning. *Id.*, ¶50. Yet, legislative history may not be used to contradict plain meaning. *Id.*, ¶51. A statute is ambiguous "if it is capable of being understood by reasonably well-informed persons in two or more senses." *Id.*, ¶47.

Application of the well-established rules of statutory construction demonstrates that *Tuescher*'s interpretation of "course of conduct" as "specific act" was incorrect. The phrase "course of conduct" is not defined in the sentence credit statute and should therefore be given its ordinary and common meaning. *See Kalal*, 271 Wis. 2d 633, ¶45. A dictionary definition of "course" is "act or action of moving in a path from point to point" or "series of acts or events." Merriam-Webster Dictionary, *available at,* https://www.merriam-webster.com/dictionary/course (last visited 10/4/22). A dictionary definition of "conduct" is "act." Merriam-Webster, *available at,* https://www.merriam-webster.com/dictionary/act (last visited 10/4/22).

The phrase "course of conduct" cannot mean "specific act" because that would read the word "course" out of the statute. The word "conduct" means "act," and therefore, "course of conduct" must mean something more. The legislature could have enacted a statute that says "for all days spent in custody in connection with the ~~course of~~ conduct for which sentence was imposed," but it did not. "Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute." *Kalal*, 271 Wis. 2d 633, ¶44.

A "course of conduct" is more reasonably defined as a series of acts. This reading is consistent with the way that the phrase "course of conduct" is defined in other statutes in the criminal code. *See Kalal*, 271 Wis. 2d 633, ¶46 (consulting closely-related statutes for statutory meaning). In the stalking statute, stalking is defined as "one who intentionally engages in a course of conduct that would cause a reasonable person to suffer fear of physical harm or serious emotional distress." Wis. Stat. § 940.32(2)(b). In turn, "'course of conduct' means a *series* of 2 or more *acts* carried out over time, however short or long, that show a continuity of purpose, including any of the following . . .". Wis. Stat. § 940.32(1)(a) (emphasis added). In the harassment statute, "'course of conduct' means a pattern of conduct composed of a *series of acts* over a period of time . . ." Wis. Stat. § 947.013(1)(a) (emphasis added).

The history and purpose of the sentence credit statute may be consulted to determine its plain meaning. *See Kalal*, 271 Wis. 2d 633, ¶48.[11] The statute was enacted in response to this Court's decision in *Klimas v. State*, 75 Wis. 2d 244, 252, 249 N.W.2d 285 (1977), which established a defendant's entitlement to credit when the defendant was financially unable to post bond. *See Floyd*, 232 Wis. 2d 767, ¶22. The sentence credit statute that was ultimately enacted was broader than *Klimas*, as it provides for credit against a sentence for any pretrial custody that is connected to the sentence regardless of whether it is based on inability to pay or some other reason. *See Floyd*, 232 Wis. 2d 767, ¶22. The *Floyd* court recognized a "remedial purpose underlying the conscious effort to provide sentence credit in a wide range of situations," and observed that "that the statute was 'designed to afford fairness' . . ." *Id.* ¶23. (quoting *Beets*, 124 Wis. 2d at 379). A more inclusive definition of "course of conduct" is in line with the purpose of the statute, which is to afford fairness in a wide range of situations.

Finally, a more inclusive definition of "course of conduct" would not conflict with other precedent.

[11] Some cases have determined that parts of Wis. Stat. § 973.155(1)(a) are ambiguous. *Elandis Johnson*, 318 Wis. 2d 21, ¶29 (listing cases). Other cases have determined that the statute is unambiguous. (*Id.*) (listing cases). The *Elandis Johnson* Court observed that whether it "is deemed ambiguous is likely to depend on the difficulty of applying its language to complex or unusual facts and the existence of reasonable competing views on how the statute should be interpreted." *Id.*, ¶30.

Tuescher relied on *Gavigan* and *Beets* as a basis for defining "course of conduct" as "specific act." *Tuescher*, 226 Wis. 2d at 473-474. Yet, these cases do not support a "specific act" interpretation of the phrase "course of conduct." Neither case used the phrase "specific act." *Gavigan* used the phrase "separate and unrelated." *Gavigan*, 122 Wis. 2d at 395. *Beets* used the phrase "truly related or identical." *Beets*, 124 Wis. 2d at 383. But more importantly, neither case undertook a comprehensive statutory interpretation of the phrase "course of conduct" because this was not key to their holdings. In *Gavigan*, the defendant was estopped from arguing that the offenses arose from a single course of conduct. *Gavigan*, 122 Wis. 2d at 394. In *Beets*, there was no argument that the offenses were even related.

Tuescher also cited *State v. Boettcher*, 144 Wis. 2d 86; however, *Boettcher* actually supports a more inclusive reading of the phrase "course of conduct." In *Boettcher* the issue was whether a person should receive pretrial credit toward more than one consecutive sentence. *Id*. at 87. To answer this question, the Court consulted federal cases. It did so because the legislative history to Wis. Stat. § 973.155(1)(a) references the federal sentence credit statute. *Id*. at 92. The Court considered whether the statutes were similar enough to justify adopting the federal rule. *Id*. at 96-97. Although the federal statute used the phrase "in connection with the offense or acts for which sentence was imposed" and the Wisconsin statute uses the phrase "in connection with the course of conduct for

which sentence was imposed," the Court found that there was "no meaningful difference" between the two clauses. *Id*. at 93. Having concluded that the statutes were substantially similar, the *Boettcher* court adopted the federal rule. *Id*. at 96-97. The Court did not specifically interpret the phrases "offense or acts" or "course of conduct," and did not deem them equivalent.

The *Boettcher* court also observed that Legislature considered the Model Penal Code (MPC). The MPC used the word "crime." *Id*. at 97. "Crime" is narrower than the phrase "course of conduct." *Id*. at 98. Using the phrase "course of conduct" would ensure that a defendant received when they were convicted of a different crime than what was originally charged. *Id*. at 97. By way of example, "there could be no argument that a defendant who was charged with rape, but convicted of assault, should not get his full presentence credit." *Id*. at 98. The comments to the MPC noted that, "'if the detention were for the 'same *series of acts* as the sentence,' presentence credit would not depend on their being the same crime in a narrow sense." *Id*. (emphasis added).

This Court should decline *Tuescher*'s interpretation of "course of conduct" as "specific act." Instead, the phrase "course of conduct" contemplates a series of acts. Ultimately, whether or not a set of facts qualifies as a course of conduct will be fact dependent—as sentence credit cases inevitably are—, but some considerations may be the nature of

the acts, their temporal proximity, and whether there were intervening events.

3. The incident in Mr. Fermanich's case was a single "course of conduct."

This Court should not overturn the circuit court's conclusion that the incident underlying counts one, four, and five was a single course of conduct. At the original sentencing hearing, the court found that the charges "all arise out of incidents from the same day spilling over into another county." (R.45:5). At the sentence credit hearing, the court reaffirmed this finding, stating that, "this was all the same course of conduct. It happened on the same day within a short period of time. The only reason we're dealing with this issue is because it happened to spill over a county line." (R. 44:26; App.59).

The court's ruling was not erroneous. The incident was a continuous series of acts that occurred on a single night, over a short period of time. Mr. Fermanich exited one truck before immediately getting into the next. (R.1:2-3; App.20-21). Law enforcement were in continuous pursuit. The owner of the first truck saw Mr. Fermanich drive off in his truck at 9:40 pm and called law enforcement. (R.1:2; App.20). Langlade County's Sergeant O'Neill responded immediately. (*Id.*). By 10:18 pm, Oneida County law enforcement knew about the third truck and were looking for Mr. Fermanich. (R.44:22; App.55). Mr. Fermanich was spotted, and

unsuccessfully tried escape before driving into a ditch. (R.1:3; App.21). He was arrested and immediately confessed to taking the three trucks. (*Id*.).

The only reason the State is appealing is because Mr. Fermanich happened to drive over the county line. Had he stayed within the geographical limits of Langlade County, there would be no dispute over the credit.

The temporal proximity, similarity of acts, continuity of acts, and lack of intervening events all support the circuit court's finding that this series of acts amounted to a single course of conduct. The circuit court's grant of pretrial credit on each of the three sentences arising from this course of conduct was correct. The court of appeals decision overturning the grant of credit should be reversed.

CONCLUSION

Mr. Fermanich's pretrial confinement was "in connection with the course of conduct for which sentence was imposed" on count one. Wis. Stat. § 973.155(1)(a). Therefore, this Court should reverse the court of appeals' decision overturning the circuit court's grant of 433 days of pretrial credit.

Dated this 5th day of October, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief produced with a proportional font. The length of this brief is 6,622 words.

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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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Dated this 5th day of October, 2022.

Signed:

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