STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP462-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL K. FERMANICH,

Defendant-Respondent-Petitioner.

ON REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT III, REVERSING A JUDGMENT ORDERING SENTENCE CREDIT IN LANGLADE COUNTY CIRCUIT COURT, THE HONORABLE JOHN B. RHODE, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Under Wis. Stat. § 973.155(1), a convicted offender is entitled to credit against his or her sentence "for all days spent in custody in connection with the course of conduct for which sentence was imposed."

In *Boettcher*,[1] this Court read the phrase "course of conduct for which sentence was imposed" narrowly to have the same meaning as "the crime for which such sentence was imposed" in the credit provision of the Model Penal Code, an original source for Wis. Stat. § 973.155. Relying in part on *Boettcher*, the court of appeals held in *Tuescher*[2] that "course of conduct for which sentence was imposed" means the "specific act" for which the defendant was sentenced, not the broader "criminal episode."

Michael K. Fermanich committed several offenses in one night, taking and joyriding three pickup trucks in succession from three different locations in Langlade County. He drove the third truck into Oneida County, where he led officers on a high-speed chase before crashing the vehicle. He was apprehended and held in custody in Oneida County. Fermanich was charged with offenses in both counties, and his cases were resolved by a global plea agreement.

One of the three pled-to counts was taking and driving the first truck without consent in Langlade County (Count 1). The other two—Count 4 (driving the third truck) and Count 5 (eluding an officer)—were Oneida County offenses for which Fermanich was held in Oneida County awaiting trial. Fermanich received 433 days of credit against his Count 4 and

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[1] *State v. Boettcher*, 144 Wis. 2d 86, 97–98, 423 N.W.2d 533 (1988).

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

Count 5 sentences for this pretrial custody. Fermanich seeks credit for this time against his Count 1 sentence as well.

Under *Tuescher*'s and *Boettcher*'s longstanding interpretation of "course of conduct" to mean "the specific acts" or "the crime" for which sentence was imposed, was Fermanich's Oneida County custody on Counts 4 and 5 part of the "course of conduct" for which sentence was imposed on Count 1?

The circuit court answered yes based on its own reading of "course of conduct."

The court of appeals answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court publishes its decisions. Oral argument is set for December 12 at 9:45 a.m.

STATEMENT OF THE CASE

The following facts from the criminal complaint are undisputed. (R. 26:1, Pet-App. 29; 45:15.)

On the night of September 30, 2017, Michael Fermanich took and drove three trucks in succession from three locations in Langlade County. (R. 1:2–3, Pet-App. 20–21.) At around 9:30 p.m., Fermanich stole a truck in the Town of Antigo and drove it to the Thirsty Bear tavern in the Town of Peck. (R. 1:2, Pet-App. 20.) There, he abandoned the first truck and took another, driving it to Fischer's Bar in the Town of Parish. (R. 1:2, Pet-App. 20.)

Fermanich abandoned the second truck outside the bar and took a third truck, driving it into Oneida County. (R. 1:2–3, Pet-App. 20–21.) The truck, which had apparently been reported as stolen, was spotted on the road by an Oneida County sheriff's deputy, who gave pursuit. (R. 1:3, Pet-App.

21; 44:22, Pet-App. 55.) Fermanich led the deputy on a chase through the county before losing control of the truck and going down a ditch and into a creek. (R. 1:3, Pet-App. 21.)

The deputy approached Fermanich, who seemed disoriented and said that he "was running." (R. 1:3, Pet-App. 21.) When asked who he was running from, Fermanich said, "Maybe God." (R. 1:3, Pet-App. 21.) Fermanich said that he did not know who owned the truck, but it was the third one he had taken that night. (R. 1:3, Pet-App. 21.)

On October 1, 2017, Fermanich was charged in Oneida County case number 2017CF245 with the following counts associated with operation of the third truck: taking and driving a motor vehicle without the owner's consent, contrary to Wis. Stat. § 943.23(2); obstructing an officer, contrary to Wis. Stat. § 946.41(1); failure to obey a traffic officer, contrary to Wis. Stat. §§ 346.04(2t) and 346.17(2t); and two counts of attempting to flee or elude an officer, contrary to Wis. Stat. § 346.04(3). (R. 12:1–2; 26:1, Pet-App. 29.) The circuit court imposed a $10,000 cash bond, and Fermanich was held in the custody of the Oneida County jail. (R. 45:22, 27; 48:1, Pet-App. 18.)

On December 29, 2017, Fermanich was charged in Langlade County case number 2017CF313 with the following counts associated with operation of the first two trucks: one count of taking and driving a motor vehicle without consent as a repeat offender, contrary to Wis. Stat. §§ 943.23(2)(b) and 939.62(1)(b); and two counts of taking and driving a motor vehicle without consent (joyriding) as a repeat offender, contrary to Wis. Stat. §§ 943.23(3m) and 939.62(1)(a).[3] (R.

[3] Wisconsin Stat. § 943.23(2)(b) provides that "intentionally tak[ing] and driv[ing]" a vehicle without the owner's consent is a

1:1–2, Pet-App. 19–20.) Langlade County did not issue a warrant until January 29, 2018,[4] and, shortly thereafter, on February 6, 2018, Fermanich made his initial appearance on the Langlade County case, satisfying the warrant. (R. 44:11, Pet-App. 44.) Fermanich also signed a $10,000 signature bond the court imposed at the hearing. (R. 44:11, Pet-App. 44; 45:18–19.) *See also* Wisconsin Circuit Court Access website, *State of Wisconsin v. Michael K. Fermanich*, Langlade County case number 2017CF313, wcca.wicourts.gov (accessed Nov. 6, 2022).

The two cases were eventually consolidated for the purpose of resolution by plea. Fermanich waived his right to a trial in Oneida County, and the State filed an amended information in the Langlade County case adding the five Oneida County charges as counts four through eight. (R. 10–12.)

A plea and sentencing hearing was held on December 6, 2018, in Langlade County Circuit Court, the Honorable John B. Rhode, presiding. (R. 45.) Pursuant to a plea agreement, Fermanich pleaded no contest to three charges in the amended information: Count 1, taking and driving a motor vehicle without consent as a repeat offender (the first truck, Langlade County); Count 4, taking and driving a motor vehicle without consent (the third truck, Oneida County); and Count 5, attempting to flee or elude an officer (Oneida County). (R. 45:2–3.) The remaining counts were dismissed

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Class H felony. The "joyriding" statute, Wis. Stat. § 943.23(3m), mitigates a violation under section 943.23(2) (or (3), not relevant here) to a Class A misdemeanor "if the defendant abandoned the vehicle without damage within 24 hours after the vehicle was taken from the possession of the owner."

[4] *See* Wisconsin Circuit Court Access website (WCCA), *State v. Michael K. Fermanich*, Langlade County case no. 2017CF313, Court record wcca.wicourts.gov (accessed Nov. 7, 2022).

and read-in. (R. 45:2–3.) The court accepted Fermanich's pleas and proceeded to sentencing. (R. 45:15.)

Pursuant to the agreement, the State asked the court to withhold sentence and place Fermanich on probation for five years with six months of conditional jail time on Count 1. (R. 45:3–4, 18–19.) The court adopted the State's recommendation except it imposed only 30 days of conditional jail time on Count 1. (R. 45:18–19, 25, 27.) The court determined that, if probation was revoked and sentence was imposed, Fermanich would be entitled to 433 days of sentence credit for his Oneida County custody against his sentence on Counts 4 and 5. (R. 45:27.)

Fermanich committed several probation violations in 2019 and 2020. As a result, Fermanich spent additional time in custody on probation holds and alternative-to-revocation arrangements. (R. 21; 22; 24:5–6.) On September 14, 2020, the Division of Hearings and Appeals issued an order and warrant revoking Fermanich's probation and returning him to the circuit court for sentencing. (R. 24:1.)

The circuit court held a hearing on November 3, 2020, to impose sentence. (R. 43:1.) On the parties' joint recommendation, 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. (R. 43:5, 12–13.)

At the hearing, the court said that it would award the credit that the parties could agree upon and resolve any disputes another day. (R. 43:4–5.) The parties agreed that Fermanich was entitled to credit for custody on the recent

probation holds.[5] (R. 43:14–15.) But Fermanich argued that the 433 days of credit ordered at the original sentencing on Counts 4 and 5 should be applied to his sentence on Count 1, as well. (R. 26:1–5, Pet-App. 29–33.) The State opposed this request. (R. 43:14.) The court set a hearing to resolve the dispute. (R. 43:16.)

At the February 2, 2021 hearing, the parties agreed with the DOC's calculation of 638 days of credit on Count 4, consisting of 433 days awarded at the original sentencing and 205 days for probation holds and conditional time as an alternative to revocation. (R. 44:19, Pet-App. 52.) The parties also agreed that 638 days of credit was due on Count 5. (R. 44:18–19, Pet-App. 51–52.) The parties also appeared to agree that Fermanich was entitled to at least 236 days of credit on Count 1: 31 days for the conditional jail time imposed at the original sentencing plus 205 days for probation holds. (R. 44:19, Pet-App. 52.)

The only disputed issue was whether Fermanich was also entitled to credit for the 433 days of Oneida County pretrial custody against his sentence on Count 1. (R. 44:19–

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[5] The parties agreed that the credit time for probation holds was 198 days. (R. 43:14–15.) The court mistakenly applied this time to Count 1 only at the November 2020 hearing but fixed this error at the next hearing in February 2021. (R. 28:1; 43:15–16.) After the hearing, the Department of Corrections (DOC) wrote the court to state its belief that Fermanich was entitled to additional credit. (R. 33:2.) DOC indicated that it calculated the credit for probation holds to be 205 days (not 198 days) on all counts, with an additional 31 days on Count 1 for the conditional jail time imposed at sentencing. (R. 33:2.)

DOC agreed with the court's determination that Fermanich was entitled to 433 days of credit for his Onedia County pretrial custody on Count 4. (R. 33:1.) (Count 5 was apparently overlooked and not mentioned in the letter). DOC *did not* list Fermanich's 433 days of pretrial custody in Oneida County as a period of custody for which the court should have awarded credit on Count 1. (R. 33:1.)

20, Pet-App. 52–53.) Among other arguments, District Attorney Elizabeth Gebert asserted that credit was unavailable because the Oneida County custody was not connected with the "course of conduct" for which Fermanich was sentenced in Count 1. (R. 44:8–10, Pet-App. 41–43.) Defense counsel argued that Fermanich was entitled to credit because his Oneida County custody was based on the same "course of conduct" for which sentence was imposed in Count 1. (R. 26:3, Pet-App. 31; 44:21–22, Pet-App. 54–55.)

The court granted the motion in a bench ruling. At the outset, the court remarked that "the state of the case law in this situation is a mess . . . ." (R. 44:25, Pet-App. 58.) But it declared, "This was all the same course of conduct." (R. 44:26, Pet-App. 59.) "It happened on the same day within a short period of time." (R. 44:26, Pet-App. 59.) The court made no specific factual findings. (R. 44:26, Pet-App. 59.) The court also hedged its ruling, indicating it believed that the issue was close ("both sides are right"). (R. 44:26, Pet-App. 59.) But the court said that it was siding with Fermanich because, if it ruled in the State's favor and was eventually reversed on appeal, Fermanich would have already served most, if not all, of the disputed time. (R. 44:27, Pet-App. 60.)

The court ordered the judgment of conviction to be amended to grant Fermanich 638 days of credit on all three counts. (R. 36:1, Pet-App. 64; 44:29, Pet-App. 62.)

The State appealed, and the court of appeals, District III, reversed. *State v. Michael K. Fermanich*, No. 2021AP462-CR, 2022 WL 1086681 (Wis. Ct. App. Apr. 12, 2022) (unpublished). (Pet-App. 3–17.) In a *per curiam* opinion, the court concluded that the circuit court erred in awarding 433 days of credit against the Count 1 sentence as well as the Count 4 and 5 sentences. *Id.* ¶ 20. (Pet-App. 11–12.)

The court explained: "Fermanich was in custody on Counts 4 and 5 for a different course of conduct than that for

which sentence was imposed on Count 1." *Id.* ¶ 20. (Pet-App. 11.) The court noted that *Tuescher* had rejected an interpretation of "course of conduct" in Wis. Stat. § 973.155(1) as a broader "criminal episode," and had held that the "course of conduct for which sentence was imposed" is the "specific acts for which sentence was imposed." *Id.* ¶ 20. (Pet-App. 11–12.) The court concluded that the "specific acts" for which sentence was imposed in Count 1—taking and driving the first truck in Langlade County—were not the same as the acts in Count 4 (driving the third stolen truck in Oneida County) and Count 5 (attempting to elude an officer) for which Fermanich was in custody in Oneida County. *Id.* ¶¶ 20–21. (Pet-App. 12.) Thus, credit was available for the Oneida County offenses against the Count 4 and 5 sentences, but not the Count 1 sentence. *Id.* (Pet-App. 12.)

The court of appeals rejected each of Fermanich's arguments in support of his claim for credit.

First, the court concluded that the fact that Fermanich was arrested "for the entirety of his conduct on that day" did not, as Fermanich claimed, establish that the Oneida County custody was "in connection with the course of conduct for which sentence was imposed" in Count 1. *Fermanich*, 2022 WL 1086681, ¶ 22. (Pet-App. 12–13.) The court noted that Wis. Stat. § 973.155(1) does not reference the basis for the arrest as a ground for determining credit, and an arrest itself would provide only a procedural, not a factual, connection between offenses. *Id.* ¶ 22. (Pet-App. 12–13.)

Second, the court rejected Fermanich's argument that *Tuescher*'s interpretation of "course of conduct" applied only to cases involving time in custody between the commencement of one sentence and the commencement of another: "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 were pretrial or otherwise." *Id.* ¶ 24. (Pet-App. 13.)

Third, the court rejected Fermanich's argument under *State v. Ward*, 153 Wis. 2d 743, 746, 452 N.W.2d 158 (Ct. App. 1989), that denying credit on Count 1 would effectively deprive him of credit on Counts 4 and 5 because the sentences were ordered to run concurrently. *Fermanich,* 2022 WL 1086681, ¶¶ 25, 26. (Pet-App. 13–14.) The court noted that this Court explicitly rejected the same argument in *State v. Elandis Johnson*, 2009 WI 57, ¶¶ 63–66, 318 Wis. 2d 21, 767 N.W.2d 207, disavowing *Ward. Id.* ¶ 26. (Pet-App. 14.)

Finally, the court concluded that Fermanich was not entitled to credit under the holding of *State v. Floyd*, 2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155, abrogated on other grounds by *State v. Straszkowski,* 2008 WI 65, ¶¶ 2–3, 310 Wis. 2d 259, 750 N.W.2d 835, that pretrial custody on a dismissed but read-in count should be credited against the offender's sentence. Unlike in *Floyd*, Fermanich already received credit for the custody at issue when the court ordered credit on Counts 4 and 5.

Fermanich sought review, which this Court granted.

SUMMARY OF ARGUMENT

Fermanich received 433 days of sentence credit for his pretrial custody in Oneida County on Count 4 and Count 5 for crimes committed and charged in Oneida County. He seeks credit for the same time on Count 1, a crime committed earlier that night in Langlade County. The circuit court granted credit for this time, and the court of appeals reversed.

To be entitled to credit on Count 1, Fermanich must show that his Onedia County custody was "in connection with the course of conduct for which sentence was imposed." In *Tuescher*, the court of appeals held that the phrase "course of conduct for which sentence is imposed" means the "specific

acts" or offense for which sentence was imposed, relying in part on this Court's similar, narrow interpretation of this same phrase in *Boettcher*. *State v. Tuescher,* 226 Wis. 2d 465, 471–72, 595 N.W.2d 443 (Ct. App. 1999); *see also State v. Boettcher,* 144 Wis. 2d 86, 97–98, 423 N.W.2d 533 (1988).

Applying *Tuescher*, Fermanich cannot show that his custody was connected to the specific acts for which he was sentenced on Count 1. Fermanich's Oneida County custody was based on Oneida County offenses, including Count 4 (driving the third truck) and Count 5 (eluding an officer). It was not on the "specific acts" for which sentence was imposed on Count 1—driving the first truck in Langlade County. Accordingly, the court of appeals properly reversed the circuit court's order granting credit on Count 1.

Tuescher controls this case, and none of Fermanich's counter arguments are convincing. First, he maintains that the circumstances of his arrest establish a factual connection between his custody and Count 1. But the operative test for the "in connection" requirement of Wis. Stat. § 973.155(1) is not what the offender was arrested for, but whether the custody is connected to the "course of conduct," *i.e.*, the specific acts, "for which sentence was imposed." Second, he argues that he is entitled to credit under *Floyd*[6] against Count 1 for his custody because some of his Oneida County offenses were read in. But Fermanich already received credit for this time against Counts 4 and 5, and thus *Floyd* does not apply. Third, he argues that *Tuescher's* interpretation of "course of conduct" applies only to custody on existing sentences, not his pretrial custody. But having two interpretations of "course of conduct" based on the type of custody would be needlessly

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[6] *State v. Floyd*, 2000 WI 14, ¶ 17, 232 Wis. 2d 767, 606 N.W.2d 155, abrogated on other grounds by *State v. Straszkowski*, 2008 WI 65, ¶¶ 2–3, 310 Wis. 2d 259, 750 N.W.2d 835.

confusing, not to mention contrary to principles of statutory construction.

Finally, Fermanich argues that this Court should disavow *Tuescher*—and apparently *Boettcher*, too, and adopt a more expansive definition of "course of conduct for which sentence was imposed." But Fermanich fails to show that *Tuescher*'s and *Boettcher*'s interpretation of this phrase is objectively wrong or that there is a compelling reason to disavow their interpretation. Indeed, the cases' interpretation of the phrase at issue is more reasonable, clearer, and easier to apply than Fermanich's proposed interpretation. Thus, *Tuescher's* and *Boettcher*'s interpretation of "course of conduct for which sentence was imposed" should be upheld.

This Court should affirm the court of appeals decision.

STANDARD OF REVIEW

This case involves the application of Wis. Stat. § 973.155 and case law interpreting the statute. Application of a statute to undisputed facts is a question of law that this Court reviews *de novo* while benefitting from the analyses of the court of appeals and circuit court. *See State v. Friedlander*, 2019 WI 22, ¶ 17, 385 Wis. 2d 633, 923 N.W.2d 849.

ARGUMENT

Fermanich is not entitled to credit on Count 1 because his custody was not in connection with the course of conduct for which he was sentenced in Count 1.

I. An offender is entitled to credit only for custody in connection with the specific acts for which the sentence was imposed.

A. Under settled principles of statutory interpretation, this Court begins with the language of the statute.

"Wisconsin's statutes reflect the legislature's policy determination with respect to sentence credit determinations." *Friedlander*, 385 Wis. 2d 633, ¶ 19. Thus, analysis of sentence credit law begins with the language of the sentence credit statute, Wis. Stat. § 973.155. *Id.* (citing *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). "[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." *Id.* (quoting *Kalal,* 271 Wis. 2d 633, ¶ 44). "If the meaning of the statute is plain, we ordinarily stop the inquiry." *Kalal*, 271 Wis. 2d 633, ¶ 45.

Context and the structure of a statute are important to statutory meaning. *Kalal*, 271 Wis. 2d 633, ¶ 46. "Therefore, 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.*

B. Under Wis. Stat. § 973.155(1)(a), credit is available for custody connected with the course of conduct for which sentence was imposed.

Wisconsin Stat. § 973.155(1)(a) provides that 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."[7]

To be entitled to credit, the offender bears the "burden of demonstrating both 'custody' and its connection with the course of conduct for which the Wisconsin sentence was imposed." *State v. Carter*, 2010 WI 77, ¶ 11, 327 Wis. 2d 1, 785 N.W.2d 516. The "connection" between the custody and the criminal conduct described in Wis. Stat. § 973.155(1)(b) must be a factual connection. *Floyd*, 232 Wis. 2d 767, ¶ 17. "[A] procedural or other tangential connection will not suffice." *Id.*

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[7] Wisconsin Stat. § 973.155(1) provides as follows:

(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.

(b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113(8m), 302.114(8m), 304.06(3), or 973.10(2) placed upon the person for the same course of conduct as that resulting in the new conviction.

Courts apply sentence credit in a "linear fashion" so that "[t]he total time in custody" is "credited on a day-for-day basis against the total days imposed." *Boettcher*, 144 Wis. 2d at 100. Thus, when custody is factually connected to the course of conduct on more than one count, but the sentences are imposed consecutively, credit is available against only the first sentence in line.[8] *See id.* at 100–01. If, however, the same sentences are imposed concurrently, credit is available against each sentence. *Id.* But the mere fact that two or more sentences are imposed concurrently does not mean that so-called "dual credit" is available; the custody must satisfy the "in connection" requirement of Wis. Stat. § 973.155(1) as to each count for credit to apply against each sentence. *See Elandis Johnson*, 318 Wis. 2d 21, ¶¶ 52–69 (disavowing *Ward*, 153 Wis. 2d at 746).

C. "Course of conduct" means the "specific acts" or "crime" for which sentence was imposed, not any broader criminal episode of which the offense may have been a part under *Tuescher* and *Boettcher*.

It is undisputed that Fermanich was "in custody" within the meaning of Wis. Stat. § 973.155(1) while in the Oneida County jail. This case concerns whether that custody was "in connection with the course of conduct for which sentence was imposed." Section 973.155(1). "The term 'course of conduct' . . . 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 is well rooted in Wisconsin case law.

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[8] Or, if the custody credit exceeds the confinement time of the first sentence, the first sentences in line.

Under the specific-acts standard, the court of appeals held that commission of a robbery and fleeing from the scene were distinct acts. 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. The defendant was charged with robbery and fleeing in separate complaints. *Id.* Gavigan was sentenced first in the fleeing case. He later sought credit against the robbery sentence for time served on the fleeing sentence on the theory that 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.

Four years later, this Court considered the meaning of Wis. Stat. § 973.155(1)'s "in connection with" requirement in *Boettcher* and validated *Gavigan*'s narrow reading of "course of conduct." Addressing when "dual credit" may be available under the statute, *Boettcher* examined the federal credit statute, 18 U.S.C. § 3568,[9] one of two models for section 973.155. *See Boettcher*, 144 Wis. 2d at 92–94. The Court noted that the federal statute and section 973.155(1) used similar language in addressing when credit is available: "[E]ach uses the language, 'in connection with'—in the state statute, 'in connection with the course of conduct for which sentence was imposed,' and in the federal statute, 'in connection with *the offense or acts* for which sentence was imposed.'" *Id.* at 93 (emphasis added). The Court concluded: "We perceive no meaningful difference between these words." *Id.* Having so determined, the Court then examined federal case law

[9] The federal statute was repealed and recreated in a revised form as 18 U.S.C. § 3385 in 1984. *See Boettcher*, 144 Wis. 2d at 97 n.3. Wisconsin Stat. § 973.155 has not been revised substantially and thus still resembles the former federal credit statute, 18 U.S.C. § 3568.

interpreting 18 U.S.C. § 3568 to address when dual credit may be available under section 973.155. *Id.* at 94–97.

The *Boettcher* Court also examined the second model for Wis. Stat. § 973.155, Model Penal Code (MPC) § 7.09. *Boettcher*, 144 Wis. 2d at 97–98. This discussion addressed the meaning of "arising out of the same course of conduct" in the second sentence of section 973.155(1)(a), a phrase the defendant argued mandated dual credit even for consecutive sentences. *Id.* The Court noted that MPC § 7.09 authorized credit for custody connected to "*the crime* for which such sentence is imposed," not "the course of conduct for which sentence was 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 limit the availability of credit to the crime charged, and to deny credit when the case is resolved under a different crime for the same criminal acts. *Id.*

In light of this comment, *Boettcher* said "it would appear that the drafters of the Wisconsin statute, who acknowledged their use of the MPC as a model, simply avoided the problem inherent in the MPC's use of the phrase, 'for *the crime* for which such sentence is imposed'" by instead "referring to the defendant's objectionable behavior as a '*course of conduct.*'" 144 Wis. 2d at 98 (emphasis added). The Court thus rejected the defendant's argument that the Legislature had expanded the scope of Wisconsin's credit statute by referring to the defendant's misdeeds as the "course of conduct" instead of "the crime." *Id.*

Relying on *Boettcher* and *Gavigan*, the court of appeals held in *Tuescher* that "course of conduct" in Wis. Stat. § 973.155(1) means the "specific acts" constituting the offense or charge for which the defendant was sentenced. *Tuescher*, 226 Wis. 2d at 470–72. Tuescher burglarized a restaurant while armed with a shotgun. *Id.* at 467. When police confronted him, he fired his weapon, 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 22 and one-half years on the attempted homicide, and to shorter concurrent terms on the other offenses. *Id.* at 467–68. The conviction on the attempted homicide charge was later vacated, and Tuescher ultimately pleaded guilty to first-degree reckless injury for the same conduct. *Id.* at 468. Tuescher was sentenced to 15 years of imprisonment on the new count, to be served concurrently with the other two counts. *Id.*

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 his custody after the grant of the new trial because he was serving that time on only the two undisturbed convictions of 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 attempted burglary and firearm possession convictions. *Id.* at 470. The court of appeals determined that the phrase "course of conduct" in Wis. Stat. § 973.155(1)(a) was ambiguous. *Tuescher,* 226 Wis. 2d at 471. It could be interpreted broadly to encompass an entire "criminal episode" or narrowly to include just the "specific acts" constituting the offense for which the sentence is 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." *Tuescher*, 226 Wis. 2d 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.*

Finally, *Tuescher* excerpted *Boettcher*'s discussion about Wis. Stat. § 973.155's origins in the MPC and the meaning of "course of conduct for which sentence was imposed." 226 Wis. 2d at 476–78 (citing *Boettcher*, 144 Wis. 2d at 97–98.) Relying on *Boettcher*, *Tuescher* noted that the Legislature's choice to substitute "course of conduct" for "the crime" in the MPC ensured that Tuescher received the credit he was entitled to after he was convicted of a new crime (first-degree reckless injury) arising from the same course of conduct for which he was originally convicted of attempted second-degree homicide. *Tuescher*, 226 Wis. 2d at 478.

Tuescher held that the "course of conduct for which sentence was imposed" was limited to the "specific acts" for which the attempted homicide and the reckless-injury sentences were imposed. *See Tuescher*, 226 Wis. 2d at 471–72. Acts committed close in time to the specific acts for which Tuescher was sentenced—the acts constituting attempted burglary and felon-in-possession of a firearm—were not part of the same course of conduct. *See id.*

II. Because Fermanich's Oneida County custody was not in connection with the specific acts for which he was sentenced on Count 1, Fermanich is not entitled to credit for this time on Count 1.

Fermanich appropriately received credit against his sentences on Counts 4 and 5 for the 433 days he spent in jail custody in Oneida County. On these counts, his custody was connected to the specific acts for which he was sentenced: Fermanich took and drove the third truck (Count 4) into Oneida County, attempted to flee (Count 5) once detected by

a sheriff's deputy there, and was charged and held on those offenses by Oneida County authorities.

But as the court of appeals correctly concluded, the circuit court erred in also awarding Fermanich credit for this custody time against his sentence on Count 1, based on its misunderstanding of the phrase "course of conduct for which sentence was imposed" in Wis. Stat. § 973.155.

The circuit court appeared to apply a colloquial understanding of the phrase "course of conduct," and it considered this phrase in isolation without the accompanying language "for which sentence was imposed." "This was all the same course of conduct," the circuit court declared. (R. 44:26, Pet-App. 59.) "It happened on the same day within a short period of time." (R. 44:26, Pet-App. 59.) The court thus concluded that Fermanich's conduct charged in Count 4 and 5 was part of the conduct for which sentence was imposed on Count 1. The court did not apply the specific meaning Wisconsin courts have ascribed to the operative language in Wis. Stat. § 973.155. Had it applied the legal meaning of the phrase "course of conduct for which sentence was imposed" as used in section 973.155, it would have reached a different conclusion.

The term "course of conduct for which sentence was imposed" has been defined narrowly to mean the specific acts constituting the offense for which the defendant was sentenced. *Zahurones*, 389 Wis. 2d 69, ¶ 14 (citing *Tuescher*, 226 Wis. 2d at 471–72); *see also Boettcher*, 144 Wis. 2d at 97–98. Under this definition, it is impossible to view the series of criminal acts committed on September 30, 2017, to all be part of the same "course of conduct for which sentence was imposed" in Count 1.

On that night, Fermanich went on a crime spree, committing multiple specific criminal acts at different locations across Langlade and Oneida Counties. At 9:30 p.m.,

in the Town of Antigo, he took and drove the first truck, the offense in Count 1. (R. 1:2, Pet-App. 20.) Then, in the Town of Peck in Langlade County, he took and drove a second truck (Count 2, dismissed and read-in). (R. 1:2, Pet-App. 20.) Then, in the Town of Parrish in Langlade County, he took the third truck and drove it into Oneida County, charged as Count 3 (dismissed and read-in) for the Langlade County portion of the conduct and as Count 4 for the Oneida County conduct on which Fermanich was convicted and sentenced. (R. 1:2–3, Pet-App. 20–21.) And, once detected by an Oneida County sheriff's deputy, Fermanich led the deputy on a chase through Oneida County, for which Fermanich was charged, convicted, and sentenced in Count 5. (R. 1:2–3, Pet-App. 20–21.)

While these acts all occurred within approximately a two-hour period (R. 1:2, Pet-App. 20; 44:22, Pet-App. 55), this fact does not show that they amounted to the same "course of conduct" within the meaning of Wis. Stat. § 973.155(1)(a). *Tuescher* featured no separation in time between the offender's burglarizing the restaurant and shooting an officer who confronted him at the scene. *Tuescher*, 226 Wis. 2d at 467. And yet those criminal acts were deemed separate "course[s] of conduct" for purposes of the sentence credit statute. *Id.* at 479. That's because the "course of conduct for which sentence was imposed" on the attempted homicide/reckless injury counts were the specific acts constituting those offenses. *Id.* at 469, 478–79. And the "course of conduct for which sentence was imposed" on the attempted burglary and felon-in-possession of a firearm counts were the specific acts constituting those offenses. *Id.*

Likewise, the similarity of two of the acts meant that they were two violations of the same statute (taking and driving a motor vehicle), but it does not mean that they were the same "course of conduct" under Wis. Stat. § 973.155. These were separate specific acts—committed in different locations at different specific times, targeting different trucks

owned by different individuals—and thus constituted different "course[s] of conduct for which sentence was imposed" under section 973.155(1)(a). *See Tuescher*, 226 Wis. 2d at 497–98.

Fermanich's pretrial custody in Oneida County was not connected to the course of conduct—the specific acts committed at the beginning of the spree in Langlade County—for which Fermanich was sentenced on Count 1. The circuit court erred in conceiving of the offenses as all the same "course of conduct" for which sentence was imposed on Count 1, and the court of appeals properly reversed under *Tuescher*, *Gavigan*, and *Boettcher*.

The Oneida County custody was also not connected to the Langlade County charges by any formal demand on Fermanich's liberty. As noted, Langlade County did not issue a warrant against Fermanich until January 29, 2018, and Fermanich satisfied the warrant on February 16, 2018, by making his initial appearance in the Langlade County case. (R. 44:11, Pet-App. 44.) The circuit court imposed a $10,000 signature bond, which Fermanich posted. (R. 44:11, Pet-App. 44; 45:18–19.) When an offender is "free" on a signature bond on one count, but is actually in custody at that time, Wisconsin courts have relied in part on the existence of the signature bond to deny credit. *See State v. Beiersdorf*, 208 Wis. 2d 492, 498, 561 N.W.2d 749 (Ct. App. 1997).

To be clear, the State is not arguing that the fact of the posted signature bond and absence of an outstanding warrant are dispositive of his claim. Fermanich is not entitled to credit on Count 1 because, as shown, his Oneida County custody does not satisfy the "in connection with" requirement of Wis. Stat. § 973.155(1). The State merely points to the posted signature bond and the absence of a warrant as additional reasons Fermanich is not entitled to credit for his Oneida County custody against his Langlade County offense in Count 1. *See Beiersdorf*, 208 Wis. 2d at 498.

Under well-established case law, this Court should conclude that the 433 days of custody for which Fermanich seeks credit is not "in connection with the course of conduct" for which he was sentenced on Count 1. The court of appeals decision reversing the circuit court's award of credit on this count should be affirmed.

III. Fermanich's arguments in support of credit are unavailing.

As shown, *Tuescher* compels the result in this case. But Fermanich makes several arguments in favor of the circuit court's credit award, all of which are unavailing.

A. Fermanich's "factual connection" argument, which focuses on the circumstances of his arrest, ignores the "course of conduct" requirement.

Fermanich argues that his custody is factually connected to Count 1 because he was arrested for the entirety of his conduct that night, not just his offenses committed in Onedia County. (Fermanich's Br. 18–19.) This argument attempts to show a "factual connection" without engaging the "course of conduct" requirement at all.

To be entitled to credit, the matter that Fermanich must show is factually connected to his custody is "the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a). Again, "course of conduct" means narrowly the "specific acts" constituting the offense for which sentence was imposed. *See Tuescher*, 226 Wis. 2d at 479–80. Here, those are the specific acts constituting the offense in Count 1, and do not concern the grounds for Fermanich's arrest. The credit statute mentions nothing about the basis for the arrest as a ground for determining the availability of credit. *See* Wis. Stat. § 973.155(1). Indeed, as the court of appeals observed, the arrest itself would appear to be a procedural, not a factual,

connection to the custody. *Fermanich*, 2022 WL 1086681, ¶ 22. (Pet-App. 12–13.) *See Floyd*, 232 Wis. 2d 767, ¶ 17.

Having failed to show that the basis for his arrest satisfies the "in connection" requirement, Fermanich acknowledges that he posted a signature bond in the Langlade County case (which included Count 1), but argues that the posted signature bond "is an insignificant procedural fact." (Fermanich's Br. 19–20.) No, it is a reminder that Fermanich cannot show that his custody is in connection with his offense in Count 1 through a demand on his liberty by Langlade County under a cash bond or an outstanding warrant.

This fact distinguishes Fermanich's case from *Carter*, the primary case on which Fermanich relies here. (Fermanich's Br. 18–19.) In *Carter*, the defendant was subject to an outstanding Wisconsin felony warrant and authorization for extradition when he was arrested in Illinois, in part on the Wisconsin warrant. *Carter*, 327 Wis. 2d 1, ¶¶ 59–62. Carter remained in Illinois custody for the better part of a year until resolution of new Illinois charges and refused extradition. *Id.* ¶¶ 62–72.

Throughout this time, Carter was subject to a demand (the warrant and authorization for extradition) from the State of Wisconsin. *See Carter*, 327 Wis. 2d 1, ¶¶ 62–72. This on-going demand on Carter's liberty throughout his custody, not the ground for the arrest itself, was the primary justification for credit for this time. Thus, Carter's Illinois custody was due in part to the "specific acts" constituting the Wisconsin offenses because of the Wisconsin warrant and extradition request alleging those offenses as a ground for detaining Carter.

By contrast, Fermanich was not subject to a warrant, cash bail, or any other demand from Langlade County, and thus the primary basis for custody credit in *Carter* was not

present here. And, as shown, Fermanich cannot demonstrate that the circumstances of his arrest prove that his Oneida County custody was in connection with the specific acts constituting the offense for which he was sentenced on Count 1.

B. The fact that some of the Oneida County charges were dismissed and read-in does not entitle Fermanich to credit on Count 1.

Fermanich next argues that he should receive credit on Count 1 because three of his Oneida County charges (Counts 6, 7, and 8 of the amended information) were dismissed and read-in, citing *Floyd*, 232 Wis. 2d 767. (Fermanich's Br. 21.) But this is not a *Floyd* case, and applying *Floyd* here would represent an unwarranted extension of that case.

In *Floyd*, the supreme court adopted a bright-line rule requiring credit under Wis. Stat. § 973.155(1) for time spent in custody on offenses that are dismissed but read-in at sentencing. *Floyd*, 232 Wis. 2d 767, ¶ 32. Floyd was out on bond on multiple charges when he was arrested on a new count of armed robbery. *Id.* ¶ 3. Floyd was held in custody for seven months on the new charge until his cases were resolved by a global plea agreement. *Id.* ¶¶ 3–4. Pursuant to the agreement, the armed robbery charge was dismissed and read in at sentencing. *Id.* ¶ 4. This Court held that Floyd was entitled to credit for his custody on the read-in armed robbery count because read-in offenses *may* be considered at sentencing; thus read-ins should be treated as "an offense for which the offender is ultimately sentenced" under section 973.155(1). *Id.* ¶¶ 27–32. *Floyd* therefore ensured that custody credit connected only to offenses read-in at sentencing is not lost because those offenses were dismissed as part of a plea agreement. *See id.*

Unlike in *Floyd*, Fermanich already received credit for his Oneida County custody against Counts 4 and 5. He now

seeks to use *Floyd* to tack the same custody credit onto a third count (Count 1) that he has failed to show is "in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1). Allowing Fermanich to use *Floyd* to get credit against another count, too, just because there are some read-ins in the case would stretch *Floyd* beyond its logic and purpose. Fermanich is not entitled to credit on Count 1 under *Floyd*.

Fermanich also argues that credit should be awarded on Count 1 for his Oneida County custody because, if it is not, he will not receive the benefit of the credit ordered on Counts 4 and 5, because all three counts were ordered to run concurrently. (Fermanich's Br. 22–23.) In fact, this is a main theme of his brief. (Fermanich's Br. 15, 22–23.) But Fermanich's argument that credit should be applied to Count 1 to avoid depriving him of the benefit of credit on Counts 4 and 5 is little more than a request to ignore the requirements of Wis. Stat. § 973.155 on this count.

In *Elandis Johnson*, 318 Wis. 2d 21, ¶¶ 50–70, the supreme court expressly rejected the argument that any credit due on one sentence must also be applied to any other concurrently imposed sentence. *Elandis Johnson* disavowed language to the contrary in *Ward*, 153 Wis. 2d at 746, and labelled "unfortunate" a passage in the jury instruction special materials on which *Ward* relied. *Elandis Johnson*, 318 Wis. 2d 21, ¶¶ 58–59 (discussing Wis. JI–Criminal SM-34A at 11 (1982)). This passage no longer appears in the special materials. *See* Wis. JI–Criminal SM-34A (2020). Rather, as another part of the special materials states: "*There will . . . be situations where the periods of time for which credit is due on unrelated concurrent sentences will not line up with each other. Some credit will be due on one sentence and a different amount of credit will be due on another.*" *Elandis Johnson*, 318 Wis. 2d 21, ¶ 63 (quoting Wis. JI–Criminal SM-34A at 12).

C. "Course of conduct for which sentence was imposed" should not be read to have different meanings based on the type of custody at issue.

Fermanich next argues that the interpretation of "course of conduct for which sentence was imposed" in *Tuescher* and *Gavigan* applies only to cases in which a defendant seeks credit on a sentence for time spent in custody serving a separate, preexisting sentence. (Fermanich's Br. 24–28.) Fermanich points out that both *Gavigan* and *Tuescher* involved those circumstances, and he argues that a different, broader interpretation of "course of conduct" should apply to circumstances like the present case involving pretrial custody. (Fermanich's Br. 24–28.) This argument is also unavailing.

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." *Fermanich*, 2022 WL 1086681, ¶ 24. (Pet-App. 13.) Fermanich suggests that the phrase has two meanings because it appears twice in section 973.155—the first in the statute's general statement of the "in connection" requirement, the second in listing "any other sentence arising out of the same course of conduct" as a qualifying form of custody. But Fermanich does not really explain why two different standards are required. And adopting different legal standards for determining the "in connection with" requirement based on the *type of custody* would add another bit of complexity to an already challenging area of the law. *See State v. Marcus Johnson*, 2007 WI 107, ¶ 33, 304 Wis. 2d 318, 735 N.W.2d 505. Reading "course of conduct" to have different meanings in the same statute would also be contrary to the rule of statutory construction that words appearing in the same statute multiple times are

given the same meaning unless the context clearly requires a different meaning. *See Wilson v. Waukesha County*, 157 Wis. 2d 790, 796, 460 N.W.2d 830 (Ct. App. 1990).

This Court should reject Fermanich's invitation to adopt two meanings for "course of conduct" in Wis. Stat. § 973.155(1) based on the type of custody at issue.

D. Fermanich fails to meet the heavy burden required to show that *Tuescher* and *Boettcher* should be disavowed.

Finally, Fermanich asks this Court to reject *Tuescher*'s interpretation of "course of conduct for which sentence was imposed," arguing that it is objectively wrong. (Fermanich's Br. 29–35.) Though Fermanich requests only *Tuescher*'s disavowal, *Tuescher* is not an outlier in the case law. Its interpretation of "course of conduct" is deeply rooted in this Court's decision in *Boettcher*. (*See supra* pp. 20–23.) *Tuescher*'s holding that "course of conduct" for which the offender was sentenced was largely based on *Boettcher*'s understanding of this phrase. *See Tuescher*, 226 Wis. 2d at 476–78 (citing *Boettcher*, 144 Wis. 2d at 97–98). The State therefore believes that overturning or disavowing *Tuescher* would also require disavowal of significant portions of the *Boettcher* decision.

As this Court has explained, "any departure from the doctrine of stare decisis demands special justification." *State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592 (citations omitted). "Stare decisis is the preferred course [of judicial action] because it promotes evenhanded, predictable, and consistent development of legal principles . . . and contributes to the actual and perceived integrity of the judicial process." *Id.* (alteration in original) (citation omitted). "[B]ecause the legislature remains free to alter its construction" in response to case law, "stare decisis concerns are paramount where"—as here—"a court has authoritatively

interpreted a statute." *Friedlander*, 385 Wis. 2d 633, ¶ 18 (quoting *Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶ 45, 281 Wis. 2d 300, 697 N.W.2d 417).

Thus, a party asking this Court to overrule a prior interpretation carries a heavy burden. *Friedlander*, 385 Wis. 2d 633, ¶ 18. The party must "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." *Id.* (quoting *Romanshek*, 281 Wis. 2d 300, ¶ 45). Fermanich has not met his burden on either prong.

First, Fermanich fails to demonstrate that *Tuescher*'s and *Boettcher*'s interpretation of "course of conduct for which sentence is imposed" is objectively wrong. Fermanich's analysis seems to focus on the text of the "in connection with" requirement of Wis. Stat. § 973.155. He consults a dictionary for the meaning of the phrase "course of conduct" and identifies a definition—"a series of acts"—that differs from *Tuescher*'s definition. (Fermanich's Br. 30–32.) But Fermanich reaches this result only by reading "course of conduct" in isolation.

As noted, context and the structure of a statute are important to statutory meaning. *Kalal*, 271 Wis. 2d 633, ¶ 46. "Therefore, 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.*

Fermanich's blinkered analysis of "course of conduct" ignores the language that limits the phrase's scope in this instance: "*for which sentence was imposed.*" Wis. Stat. § 973.155(1). Under the statute's plain language, the relevant "course of conduct" satisfying the "in connection" requirement of Wis. Stat. § 973.155(1) is *only* the "course of conduct for which sentence was imposed." The second reference to "course

of conduct" likewise contains the same limiting language, though the word order is different: "sentence arising out of the same course of conduct." Section 973.155(1).

Taken as a whole, the phrase "course of conduct for which sentence was imposed" invites a narrow interpretation of "course of conduct" in this context. At sentencing, the only "course of conduct for which sentence [is] imposed" in all cases is the crime itself—*i.e.*, the specific acts constituting the offense. *See Tuescher*, 226 Wis. 2d at 469; *Boettcher*, 144 Wis. 2d at 92–93, 97–98. The sentencing court may consider other conduct, of course, including the "series of acts" surrounding the defendant's offense. But the "course of conduct for which sentence [is] imposed" necessarily includes the crime or offense in all cases, and not the "series of acts" (whatever they may be) apart from the offense itself.

In addition to reading "course of conduct" in isolation, there are at least two other problems with Fermanich's interpretation of the statute. First, his view that "course of conduct" means a "series of acts" has no obvious stopping point. When does an "act" other than the acts constituting the offense become too far removed to be an act "for which sentence was imposed"? Fermanich says only that "whether or not a set of facts qualifies as a course of conduct will be fact dependent," and suggests that "the nature of the acts, their temporal proximity, and whether there were intervening events" might be relevant. (Fermanich's Br. 34–35.) Such an open-ended definition will certainly invite litigation in a corner of sentence credit law that was previously settled.

Second, a broad definition of "course of conduct" makes little sense in the context of sentencing. Defendants are convicted of and sentenced for crimes, not a "series of acts." Of course, sentencing courts take into account facts other than the offense itself when imposing sentence, like the defendant's rehabilitative needs and dangerousness. But a

court is not required to sentence a defendant on the "series of acts" surrounding the offense itself.

The State disagrees with Fermanich's argument that *Boettcher* supports his interpretation of the statute. Yes, the MPC used the word "crime" and Wis. Stat. § 973.155(1) uses the phrase "course of conduct." (Fermanich's Br. 34.) But *Boettcher* specifically rejected a broad reading of "course of conduct" in Wis. Stat. § 973.155 and deduced from the comments to the MPC—a model for Wis. Stat. § 973.155—that the Legislature substituted "the course of conduct" for "the crime" merely to ensure that the availability of credit is not tied to "the crime" originally charged. *See Tuescher*, 226 Wis. 2d at 476–78 (quoting *Boettcher*, 144 Wis. 2d at 97–98). *Boettcher* specifically rejected the very argument Fermanich makes here that the use of "course of conduct" expanded the availability of credit under the statute. *See Boettcher*, 144 Wis. 2d at 97–98. Additionally, *Boettcher* concluded that there was "no meaningful difference" between the phrase "in connection with *the offense or acts* for which sentence was imposed" in the federal statute and "in connection with the course of conduct for which sentence was imposed" in section 973.155. 144 Wis. 2d at 93 (emphasis added).

In sum, Fermanich has not demonstrated that *Tuescher's* and *Boettcher*'s interpretation of "course of conduct for which sentence is imposed" is objectively wrong. *See Friedlander*, 385 Wis. 2d 633, ¶ 18. Indeed, the State believes that the "specific acts" interpretation is the only reasonable reading of the phrase. But at the very least, as *Tuescher* itself determined, the phrases "course of conduct for which sentence was imposed" and "any other sentence arising out of the same course of conduct" are ambiguous as to whether they apply narrowly to the "specific act[s]" for which sentence is imposed or to the broader "criminal episode." 226 Wis. 2d at 471. Because *Tuescher's* interpretation of the phrase is at least

reasonable, Fermanich cannot show that it is objectively wrong.

Fermanich also fails to show that there is a compelling reason to disavow *Tuescher* and *Boettcher*.

In addition to being reasonable, *Tuescher* and *Boettcher*'s interpretation of the phrase is easy to understand and apply. This Court favors clear, straightforward rules in this area[10] because application of the various legal principles to the limitless variety of factual scenarios makes determining credit difficult enough. *See Marcus Johnson*, 304 Wis. 2d 318, ¶ 33. By contrast, Fermanich's interpretation of "course of conduct" is vague and will almost certainly require additional litigation to clarify.

Tuescher is a 23-year-old precedent that has been applied in multiple published cases. *See, e.g., Zahurones*, 389 Wis. 2d 69; *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶¶ 1, 31, 274 Wis. 2d 1, 681 N.W.2d 914. The fact that a body of case law has developed around *Tuescher*—and that it is rooted in a 35-year-old precedent, *Boettcher*—argues against disavowal. *See Johnson Controls, Inc. v. Emp'rs Ins. of Wausa*u, 2003 WI 108, ¶ 106, 264 Wis. 2d 60, 665 N.W.2d 257. *Boettcher* itself is a foundational sentence credit case, and its analysis of the "course of conduct" language was relevant to its key holdings concerning the application of sentence credit to concurrent and consecutive sentences. 144 Wis. 2d at 97–98. Moreover, the Legislature has not modified section 973.155 in response to either decision. *See Romanshek*, 281 Wis. 2d 300, ¶ 45. Principles of stare decisis favor abiding by

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[10] *See State v. Magnuson*, 2000 WI 19, ¶ 22, 233 Wis. 2d 40, 606 N.W.2d 536 (adopting bright-line rule for determining custody). *Floyd*, 232 Wis. 2d 767, ¶ 32 (same as to credit for read-in offenses).

Tuescher's and *Boettcher*'s interpretation of "course of conduct" in section 973.155.

Finally, application of *Tuescher*'s interpretation to the specific facts of Fermanich's case does not make a compelling case for disavowing *Tuescher*'s clear rule. Fermanich has suggested that an accident of jurisdictional boundaries has resulted in the court of appeals' rejection of credit in his case; if he had committed all of his offenses in one county, he would have received credit for his custody on all three counts, including Count 1. But Fermanich chose to drive into another county and expose himself to criminal liability there. It is not an accident of fate that Fermanich was charged with crimes in two counties.

Fermanich has therefore not demonstrated that *Tuescher*'s and *Boettcher*'s interpretation of the phrase "course of conduct for which sentence was imposed" in Wis. Stat. § 973.155(1) is objectively wrong, or that there is a compelling reason to disavow this interpretation. Accordingly, Fermanich's challenge to *Tuescher* and *Boettcher* fails.

CONCLUSION

The court of appeals' decision reversing the circuit court's order awarding 433 days of sentence credit on Count 1 should be affirmed.

Dated this 14th day of November 2022.

Respectfully submitted,

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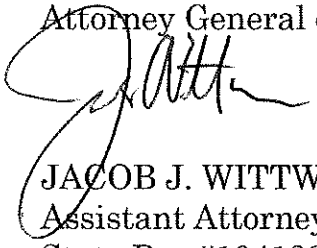

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,280 words.

Dated this 14th day of November 2022.

JACOB J. WITTWER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

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. § (Rule) 809.19(12) (2019-20).

I further certify that:

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

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

Dated this 14th day of November 2022.

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