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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case Nos. 2022AP00658-CR, 2022AP00659-CR,
2022AP00661-CR, 2022AP00662-CR,
2022AP00663-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AARON L. JACOBS

Defendant-Appellant.

On Appeal from a Non-Final Order Entered
in the Circuit Court for Shawano County, the
Honorable Katherine Sloma Presiding.

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

In 2019, Aaron L. Jacobs was released from custody after posting cash bonds in Outagamie County and Forest County. He subsequently failed to appear for hearings in each county and both courts issued bench or "body only" warrants for his arrest. On March 16, 2020, Mr. Jacobs was arrested and taken into custody in Shawano County on new charges and the Outagamie County and Forest County warrants. At no point after March 16, 2020, was Mr. Jacobs able to obtain release from custody on bond related to the Outagamie County or Forest County cases.

The issue presented in these consolidated interlocutory appeals is whether Mr. Jacobs, after his arrest on March 16, 2020, was "released from custody under ch. 969" such that the state can lawfully prosecute 17 counts of felony bail jumping for alleged offenses that occurred after March 16, 2020, while Mr. Jacobs remained in custody at the Shawano County Jail?

The circuit court denied Mr. Jacobs' motions to dismiss and motions for reconsideration. This Court subsequently granted Mr. Jacobs' Petition for Leave to Appeal.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Jacobs does not request oral argument because the briefs should fully and adequately present the issue on appeal. Publication may be appropriate as no appellate decision directly addresses the specific prosecutorial theory presented below: that a defendant once released on bond is thereafter perpetually and indefinitely "released from custody under ch. 969," for bail jumping purposes, regardless of whether they are subsequently taken into custody for violating a condition of their bond and are never again released from custody on bond. Also, because bail jumping is the most commonly charged criminal offense in Wisconsin, a published decision here is likely to be of substantial and continuing public interest.[1] *See* Wis. Stat. §§ (Rule) 809.22(2)(b) and 809.23(1)(a)5.

STATEMENT OF CASE AND FACTS

This consolidated appeal concerns 17 counts of felony bail jumping pending in five Shawano County cases. More specifically, each bail jumping count is based on an allegation that Mr. Jacobs, while "released from custody under ch. 969," intentionally failed to comply with the terms of his bond in

[1] *See* Amy Johnson, The Use of Wisconsin's Bail Jumping Statute: A Legal and Quantitative Analysis, 2018 Wis. L. Rev. 619, 637 (2018) (noting that in 2016 bail jumping was by far the most commonly charged criminal offense in the state of Wisconsin).

Outagamie County Case No. 19-CF-936 and Forest County Case No. 19-CF-62. Prior to detailing the necessary factual background, a few foundational points are worth noting.

First, each count of felony bail jumping at issue here is based on alleged conduct committed by Mr. Jacobs after his arrest on March 16, 2020, and while he was an inmate in the Shawano County Jail. (R:22AP658: 2:1-9; R:22AP659: 2:1-16; R:22AP661: 2:1-16; R:22AP662: 2:1-13; R:22AP663: 2:1-6).[2]

Second, the basis for Mr. Jacobs' custody during this time period were new charges in Shawano County and the arrest warrants issued by Outagamie County and Forest County after Mr. Jacob's failed to appear in court as required by and in violation of his bond in each county. (R:22AP661: 11:10; R:22AP659: 1; 66:30-31, 36-38; *see also* Exhibits B and C within the Appendix to Amended Petition for Leave to Appeal in Case No. 2022AP659 at 124-26; App. 41-43).[3]

Third, at no point in time relevant to this appeal was Mr. Jacobs' released on bond from his Outagamie County or Forest County cases. (R:22AP658: 2:1-9; R:22AP659: 2:1-16; R:22AP661:

[2] Unless otherwise noted, each citation to the record in these consolidated appeals will note the appropriate appellate record.

[3] Exhibits B and C are included in the appendix to this brief at 41-43.

2:1-16; R:22AP662: 2:1-13; R:22AP663: 2:1-6). During all dates relevant to this appeal, Mr. Jacobs was in custody as a result of his inability to make bond in Outagamie County Case No. 19-CF-936 and Forest County Case No. 19-CF-62. (App. 7-14, 24-35, 41-43).

In light of these underlying facts, the state's theory of prosecution and the basis for the circuit court's rulings at issue here, is that because Mr. Jacobs was released on bond in Outagamie County and Forest County in 2019, he is perpetually and indefinitely subject to his original bond conditions despite his subsequent custody status at the time of the alleged offenses in these cases. (R: 22AP659: 66:38-47; 82:30-34; App. 45-54, 57-61).[4]

Outagamie County Case No. 19-CF-936

On November 7, 2019, Mr. Jacobs was released from custody after posting a $2,000 cash bond in Outagamie County Case No. 19-CF-936. (R: 22AP659: 2:13; 66:16-19, 24; App. 14).[5] On February 5, 2020,

[4] To aid the reader's understanding of the timeline of events relevant to the issue presented, a "Timeline of Relevant Cases" is included for reference in the appendix to this brief at 69.

[5] On July 16, 2021, the circuit court, without objection from the state, took judicial notice of "CCAP" records in Outagamie County Case No. 19-CF-62 and 19-CF-936. (R:22AP659: 66:16-19, 37-38, 48). As relevant to these consolidated appeals, Mr. Jacobs' asks this Court to do the same

Mr. Jacobs failed to appear in court and on February 7, 2020, Outagamie County Circuit Court Judge Emily I. Lonergan signed a bench warrant, pursuant to Wis. Stat. § 968.09, which notified law enforcement that Mr. Jacobs "shall be held for an appearance in court." (App. 12, 43). On March 16, 2020, Mr. Jacobs was arrested in Shawano County on this warrant. (R:22AP659: 13; 66:31, 36-38). On June 3, 2020, Mr. Jacobs appeared by video in Outagamie County and Judge Lonergan quashed the bench warrant and ordered the previously posted $2,000 cash bond returned to the poster. (R:22AP659: 11:2; 66:44; R:22AP658: 94:1-2; App. 11). Mr. Jacobs thereafter remained in custody unable to post the $2,000 cash bond through his sentencing in Outagamie County Case No. 19-CF-936 on April 12, 2021. (R:22AP659: 11:2; 66:44; R:22AP658: 94:1-2; App. 7-11).

Forest County Case No. 19-CF-62

On November 18, 2019, Mr. Jacobs was released from custody after posting a $5,000 cash bond in Forest County Case No. 19-CF-62. (R: 22AP659: 2:14; 12:11; App. 35-37). On February 4, 2020, Mr. Jacobs failed to appear in court and Forest County Circuit Court Judge Michael H. Bloom ordered the $5,000 bond forfeited and signed a statewide

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pursuant to Wis. Stat. § 902.01(4). Copies of the Outagamie County CCAP record and the Forest County CCAP record are included in the appendix to this brief at 3-40.

"body only" warrant, also pursuant to Wis. Stat. § 968.09, which notified law enforcement that Mr. Jacobs was to be "held for an appearance in court." (R: 22AP659: 12:10; App. 34, 41-42). On March 16, 2020, Mr. Jacobs was arrested in Shawano County on this warrant, and Forest County lodged a detainer in Shawano County on March 17, 2020, based on its bench warrant. (R:22AP659: 12:9-10, 13; 66:31, 36-38; App. 34).

On September 8, 2020, Mr. Jacobs appeared in Forest County Case No. 19-CF-62 and the circuit court quashed the warrant and, having previously forfeited Mr. Jacobs' previously posted $5,000 bail, set a new $10,000 cash bond. (R: 22AP659: 12:8-10; App. 32-34). Mr. Jacobs remained in custody unable to obtain release on bond until August 31, 2021, when the Judge Bloom converted the $10,000 cash bond to a signature bond. (R: 22AP659: 12:8-9; App. 24-25).

Shawano County

On June 16, 2020, roughly three months after Mr. Jacob's arrest in Shawano County, the state filed Case No. 20-CF-286 charging Mr. Jacobs with disorderly conduct, battery by prisoner, and discharging bodily fluids at a public safety worker, and with two counts of felony bail jumping. (R:22AP658: 2:1-3). The first bail jumping charge relied on the bond ordered in 2019 in Forest County Case No. 19-CF-62 and the second bail jumping count relied on the bond ordered in 2019 in Outagamie County Case No.

19-CF-936. (R:22AP658: 2:1-3). The date of each alleged offense is June 10, 2020. (R:22AP658: 2:1-3).

On July 8, 2021, the state filed Case Nos. 21-CF-278, 21-CF-279, and 21-CF-280. (R:22AP659: 2; R:22AP661: 2; R:22AP662: 2). As relevant here, these three cases included 31 total criminal charges, including 14 of the 17 felony bail jumping charges at issue in this appeal. (Id.). As in Case No. 20-CF-286, the 14 felony bail jumping charges in these three cases relied on the bonds ordered in 2019 in Outagamie County and Forest County. (Id.). In Case No. 21-CF-278, the alleged offense date for two counts of felony bail jumping is April 26, 2020. (R:22AP659: 2:1-2). In Case No. 21-CF-279, the alleged offense date for four counts of felony bail jumping is November 11, 2020. (R:22AP661: 2:1-4). In Case No. 21-CF-280, the alleged offense date for eight counts of felony bail jumping is December 18, 2020. (R:22AP662: 2:1-7).

On July 13, 2021, Mr. Jacobs filed motions to dismiss the relevant felony bail jumping charges in Case Nos. 21-CF-278, 21-CF-279, and 21-CF-280. (R:22AP659: 11; R:22AP661: 9; R:22AP662: 9). In the motion, Mr. Jacobs argued that at the time of each alleged felony bail jumping at issue here, he was not released from custody on bond under chapter 969 and therefore was not subject to the conditions of the bonds or felony bail jumping under Wis. Stat. § 946.49(1)(b). (*See* R:22AP659:11).

On July 16, 2021, the circuit court held preliminary hearings in Case Nos. 21-CF-278, 21-CF-279, and 21-CF-280. (R:22AP659: 66; App. 44). At the outset of the hearing, the court, the Honorable Katherine Sloma presiding, acknowledged Mr. Jacobs' pending motions, but proceeded with the preliminary hearings due to statutory timelines. (R:22AP659: 66:4). At the end of the evidentiary portion of the preliminary hearing in Case No. 21-CF-280, Mr. Jacobs asked the court to take judicial notice of the court records in Outagamie County Case No. 19-CF-936 and Forest County Case No. 19-CF-62. (R:22AP659: 66:16-19). The state did not object, noting, "[t]hey're a part of CCAP," and the court agreed. (R:22AP659: 66:16-19; App. 3-40).

After the end of the evidentiary portion of the preliminary hearing in Case No. 21-CF-279, Mr. Jacobs again requested that the court record in Outagamie County Case No. 19-CF-936 and Forest County Case No. 19-CF-62 be entered into the record. (R:22AP659: 66:36-38). At this point, the state noted that "[t]his is part of the motion, and I don't know that we're getting to that." (R:22AP659: 66:38; App. 45). Mr. Jacobs responded by arguing that the bond issue was relevant to the preliminary hearings because "there would be no felony and there would be no bind over on Counts 3, 4, 7, 8, 9, and 10." (R:22AP659: 66:38; App. 45). In response, the state argued that "all the state has to prove is that he was

charged with a felony," "[h]e was released on conditions and he agreed to abide by those conditions. Now whether his cash bond was revoked at some point or returned to the poster, that's not part of the elements." (R:22AP659: 66:38; App. 45).

The court stated that it agreed with "analysis for purposes of today." (R:22AP659: 66:38; App 45). After a brief discussion between the court and the parties, the court continued: "I mean, it's very clear to me, [trial counsel] that he was on bond…I just, I fail to understand how the other conditions of bond would evaporate just because he is sitting on a high cash bond amount." (R:22AP659: 66:39-41; App. 46-48). The court further noted that it had "read the case that you cited[6]…And I don't find that analogous because in that particular case, the person never got out of jail on cash. [Mr. Jacobs] was out on cash. Then he didn't come back like he was supposed to and the judge upped it. I see that as a differentiation between what we have." (R:22AP659: 66:41; App. 48). The court then highlighted its analysis that "[Mr. Jacobs] was on bond. He was out. He didn't show up. The court upped the cash amount, but none of the other conditions went away." (R:22AP659: 66:41; App. 48).

Mr. Jacobs, in response, argued that the bond conditions were "conditions of release," and that "[o]nce you're back in custody, you're not released. He

[6] Presumably, the case the court was referring to is *State v. Orlik*, 226 Wis. 2d 527, 534, 595 N.W.2d 468 (Ct. App. 1999).

couldn't he was not released on these cases. So I think there's a clear plain language explanation why the conditions of release don't apply when you're in custody on that matter." (R:22AP659: 66:42; App. 49). The state responded by arguing that Mr. Jacobs' reasoning would give "defendants across the state carte blanche to go ahead and commit any crimes by posting and then failing to appear for their very next court appearance." (R:22AP659: 66:42-43; App. 49-50).

After some further discussion, the court stated that it had "heard enough." (R:22AP659: 66:46 App. 53). The court explained: "I don't think that the practical application makes any sense if I grant [Mr. Jacobs'] motion or following along with what [he's] saying. And I don't think legislative intent and public policy go along with what [he] is saying either." (R:22AP659: 66:46; App. 53). The court continued, "He is charged. He is out on bond. He sets conditions. Why on earth are we setting bond every day and setting all these conditions every day if all of the sudden the person comes back into custody on a higher amount and then nothing else matters. It just doesn't make any sort of logical sense to me." (R:22AP659: 66:46; App. 53).

The court later took judicial notice of the Outagamie County and Forest County court records with respect to the preliminary hearing in Case No. 21-CF-278, and stated that it would "make the same determinations that I already made with respect to the Court's decision on the validity of those bonds." (R:22AP659: 66:47-48; App. 54-55).

On August 24, 2021, the state charged Mr. Jacobs in Case No. 21-CF-351 with lewd and lascivious conduct and disorderly conduct based on alleged conduct that occurred on in the Shawano County Jail on August 12, 2021. (R:22AP663: 2:1-6). In the same complaint, the state alleged two corresponding counts of felony bail jumping that relied on the bond ordered in 2019 in Forest County Case No. 19-CF-62. (R:22AP663: 2:2-5).

On December 17, 2021, Mr. Jacobs filed a motion to dismiss the two felony bail jumping counts charged in Case No. 21-CF-351. (R:22AP663: 30:1, 6-7). Also, on February 7, 2022, February 8, 2022, and March 16, 2022, Mr. Jacobs filed a motion to reconsider the court's order denying his motions to dismiss filed in Case Nos. 21-CF-278, 21-CF-279, and 21-CF-280. (R:22AP659: 72:1-6; R:22AP661: 50; R:22AP662: 40).

The court held motion hearings on March 22, 2022. (R:22AP659: 82; R:22AP663:63; App. 56, 62). With regard to Mr. Jacobs' motions to dismiss the bail jumping counts, the court noted that it would

allow Mr. Jacobs to make arguments on this issue, but that "I'm not going to let this go on forever, though, because I already heard this back in summer." (R:22AP659: 82:8).

Mr. Jacobs' arguments at this hearing paralleled the arguments he made at the preliminary hearings on July 16, 2021, but were supplemented by explicit reliance on "Dewitt and Orlik,[7] which clearly define what release is." (R:22AP659: 82:8-30, 22). In response, the state again argued that "in each of those instances, he had been released on bond." (R:22AP659: 82:25).

After considering the parties arguments," the court issued its final decision:

> All right. Well, I've said it before. I said it in summer and I will say it again. The Court thinks Orlik is clearly distinguishable from Mr. Jacobs' case. In I believe almost every case Mr. Jacobs has, he was released from custody on cash bond or a signature bond.
>
> Orlik is different. Mr. Orlik was never released truly from custody, subject to conditions of bond or not. He did not post cash. He did not get out of jail. He had contact with someone in violation of his bond terms.

[7] *See State v. Dewitt*, 2008 WI App 134, 758 N.W.2d 201, 313 Wis. 2d 794; *State v. Orlik*, 226 Wis. 2d 527, 595 N.W.2d 468 (Ct. App. 1999).

That is extremely different from the situation that is going on with Mr. Jacobs, which is why I asked [trial counsel] to at least go over the timeline with the Outagamie County case for me. I have the timeline for the Forest County case in front of me.

And this Court's position remains that even though I understand that the defense attorneys are arguing for me the definition of custody, I find that it's different in this case because Mr. Jacobs was out of custody. He was not physically in the custody of the jail or prison or any sort of entity.

For example, at one point Mr. Jacobs was in a treatment center. He was supposed to be in a treatment center. He was still potentially subject to custody in that situation.

But in all of these cases I'm hearing about, Outagamie County, Forest County, there was a warrant. I don't believe that the warrant status changes the custody situation. He was out. He violated a condition of his bond. We say this all the time, the primary purpose of cash bond -- cash bail is to assure that the defendant comes back to court. When they don't come back to court, miss a court date, then the Court can authorize a warrant. If enough time goes by, there's a forfeiture hearing. That doesn't negate all of the other terms of bond.

The primary one that's probably subject to argument here is don't commit a new crime. So then there's a new crime. There's new charges. There's bail jumping.

I agree with [trial counsel] that the floodgates can open with bail jumping. And I agree with [trial counsel] that there's all kinds of bail jumping charged.

But the reason for that is because, and I say this all the time too, when we set bond, we're not setting these rules just to hear ourselves talk. We're setting them for various reasons. We're setting them for safety reasons. We're setting them for public policy reasons.

There's all kinds of various reasons that we set these extra conditions of bond and then there are standard conditions of bond, for example, don't commit a new crime.

But it's clear to me that in the Outagamie County case and the Forest County case, Mr. Jacobs was not in custody. He was in warrant status. And I find that to be clearly distinguishable from everything that I have heard today.

And I acknowledge the arguments of the defense, and I acknowledge that perhaps he couldn't post the cash to get out of warrant status, or maybe he couldn't even post cash because it was a body only warrant. That doesn't mean he shouldn't take care of his responsibilities.

It's extremely contrary to public policy for me to make the findings that the defense wants me to make, particularly that if you're in warrant status, then you can't get charged with bail jumping.

> If that were the case, then any person who was criminally thinking would skip their court date, not come back to court, be in warrant status, commit their crime, and benefit from that. Because then they could argue well, I shouldn't get charged with bail jumping because I was in warrant status.
>
> That makes no sense to me. I think that's contrary to the statutes that I'm reading. That's contrary to the case law that's in front of me, particularly the Orlik case. And I think that's contrary to public policy.
>
> So for all the reasons that I have stated back in summer in July, and for the reasons that I stated now, the motion is denied.

(R:22AP659: 82:30-34; App. 57-61).

On the same date, the court held a motion hearing in the afternoon in Case No. 21-CF-351, and incorporated its oral ruling "from earlier today" with regard to the felony bail jumping charges in Case No. 21-CF-351. (R:22AP663: 63:6-8; App. 63-65). At this hearing, the court, on other grounds, dismissed one of the two felony bail jumping charges, leaving one felony bail jumping charge (count six), pending at this time. (R:22AP663: 63:19-21).

Finally, on April 18 and 19, 2022, the court signed written orders denying Mr. Jacobs' motions to dismiss and motions to reconsider the 17 pending counts of felony bail jumping. (R:22AP658: 96; R:22AP659: 84; R:22AP661: 67; R:22AP662: 75;

R:22AP663:65; App, 66-68). This interlocutory appeal follows.

ARGUMENT

The circuit court erred when it denied Mr. Jacobs' motions to dismiss and motions for reconsideration after concluding that Mr. Jacobs, after March 16, 2020, was "released from custody" and lawfully subject to the 17 bail jumping charges at issue in this appeal.

While this case presents a factually cumbersome background, once understood, the answer to the issue presented is clear. Bail jumping is a charge that requires a defendant, at the time of the alleged intentional violation of the terms of bond, to be "released from custody" on the bond at issue. Because Mr. Jacobs' was not released from custody on bond from either Outagamie County Case No. 19-CF-936 or Forest County Case No. 19-CF-62 at the time of any of the 17 bail jumping charges at issue here, the circuit court erred in not granting his motions to dismiss or motions to reconsider.

The state's position in the circuit court was that a defendant once released on bond is perpetually and indefinitely released from custody on bond for purposes of potential bail jumping charges. As applicable to Mr. Jacobs' case, this theory of prosecution extends to situations where a defendant is

taken back into custody on a bench warrant related to the bond at issue, subsequently has his bond reset or increased, and is thereafter unable to obtain release on bond.

As will be demonstrated below, the state's theory of prosecution and the circuit court's decision violate the clear statutory text and would result in an absurd and unreasonably expansive scope of the bail jumping statute.

A. The standard of review.

This appeal presents a purely legal question of statutory interpretation, which this Court reviews *de novo*. *State v. Orlik*, 226 Wis. 2d 527, 534, 595 N.W.2d 468 (Ct. App. 1999).

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Statutory language is generally "given its common, ordinary, and accepted meaning." *Id.* Because "[c]ontext" and "structure of the statute in which the operative language appears" are "important to meaning," "statutory language is interpreted in the context in which is it 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 results." *Id.*, ¶46. Further, "[s]tatutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.*

A statute is not "rendered ambiguous merely because the parties disagree as to its meaning." *State v. Orlik*, 226 Wis. 2d at 534. A statute is only ambiguous when it is capable of being understood in two or more different senses by reasonably well-informed persons." *Id.*

B. "Bail," "bond," and "bail jumping."

Before explaining why Mr. Jacobs is not lawfully subject to the 17 bail jumping charges at issue here, it is worthwhile to clearly define and establish the foundation upon which the issue presented rests.

First, "bail" is defined by chapter 969 as "monetary conditions of release." Wis. Stat. § 969.001(1). Bail is similarly, but verbosely, defined in chapter 967 as "the amount of money set by the court which is required to be obligated and secured as provided by law for the release of a person in custody so that the person will appear before the court in which the person's appearance may be required and that the person will comply with such conditions as are set forth in the bail bond." Wis. Stat. § 967.02(1d).

Second, "bond" is defined as "an undertaking either secured or unsecured entered into by a person in custody by which the person binds himself or herself to comply with such conditions as are set forth therein." Wis. Stat. § 967.02(1h). A person may be released "on bond," with or without "bail."

Third, a person may be charged with "bail jumping" if the person, "having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond." Wis. Stat. § 946.49(1). If the offense for which the person is released from custody is a felony then the crime is a Class H felony and referred to as "felony bail jumping." Wis. Stat. § 946.49(1)(b). *See also* WIS JI-CRIMINAL 1795.

Bail jumping includes three criminal elements: (1) the person was arrested or charged with a felony; (2) the person was "released from custody on bond under conditions established by a judge;" and (3) the person intentionally failed to comply with the terms of the bond. *Id.* Only the second element is at issue in this appeal: release from custody on bond.

C. Release from custody on bond under chapter 969.

The issue presented in this case with respect to each of the 17 pending felony bail jumping charges is whether, at the time of each alleged offense, Mr. Jacobs was released from custody on bond under chapter 969. It is undisputed that at all times relevant to this appeal Mr. Jacobs was physically in custody at the Shawano County Jail. Thus, the narrow issue is whether, despite Mr. Jacobs' custody in the Shawano County Jail, he was nevertheless simultaneously "released from custody" on bond with

respect to Outagamie County Case No. 19-CF-936 and Forest County Case No. 19-CF-62.

Unfortunately, no statute defines "release" as the term is used in Wis. Stat. § 946.49 or chapter 969. *See State v.* Dewitt, 2008 WI App 134, ¶14, 313 Wis. 2d 794, 758 N.W.2d 201. However, two decisions from this Court have addressed this statutory gap and provide clear insight into Mr. Jacobs' case.

First, in *State v. Orlik* the court considered whether a defendant unable to post a $320,000 cash bond, and therefore confined in the county jail, was nevertheless subject to the non-monetary bond conditions set by the circuit court. 226 Wis. 2d at 529. As in Mr. Jacobs' case, Orlik pursued an interlocutory appeal after the circuit court determined that he was bound by the "conditions of release" set by the court despite the fact that he remained in custody unable to post bond. *Id.*

Aside from the $320,000 cash bond, the circuit court set non-monetary conditions of Orlik's release, including a no contact provision with his wife. *Id.* at 530. Orlik objected and moved the court to clarify that the no contact order did not apply while he remained in custody and unable to post bail. *Id.* At 530-31. The state disagreed, arguing that the court had authority to set non-monetary conditions for release in order to protect the community and prevent intimidation of witnesses and that those conditions

applied even if a defendant remains in custody. *Id.* at 531-32.

The trial court denied Orlik's motion, and interpreted Wis. Stat. §§ 969.01 and 969.03 "to allow a court to impose a no-contact condition whether or not a defendant is released from custody." *Id.* at 532. The court reasoned that it would be "absurd" to interpret chapter 969 to order no contact upon a defendant's release from custody but not authorize such contact while the defendant remains in custody. *Id.*

After granting Orlik's petition for leave to appeal, this Court reversed. *Id.* at 534-41. In short, the court rejected the state's policy-based arguments and held that the plain text of the statute controlled. *Id.* at 537. "The flaw in the State's analysis is that it focuses only on the purposes of the conditions and ignores the language that provides context for setting those conditions: *release*." *Id.* (Emphasis added). The court recognized that a monetary condition of bond serves a different purpose than conditions meant to protect the public, but concluded that the "only reasonable interpretation of ["conditions of release"] is that the conditions the court is authorized to impose under §§ 969.01(4) and 969.03(1)(e) are conditions that govern the release of the defendant from custody." *Id.* at 538.

Second, this Court applied *Orlik* to a defendant's claim that nine bail jumping charges were "legally unsupportable." *See State v. Dewitt*, 2008 WI

App 134, ¶1, 313 Wis. 2d 794, 738 N.W.2d 201. Originally, the state charged Dewitt in three cases with a variety of crimes. *Id.*, ¶2. The court imposed a "$500 cash bond" in each of the two felony cases and imposed a "$500 signature bond" in the misdemeanor case. *Id.*, ¶3. The conditions ordered by the court in each case included a no-contact order with Dewitt's alleged victim. *Id.* Dewitt signed the signature bond, but could not immediately post the $500 cash bond. *Id*.

Before he did eventually post the $500 cash bond in the felony cases, and while he remained in physical custody, Dewitt contacted the alleged victim nine times. *Id.*, ¶¶3-4. The state then charged Dewitt with nine counts of misdemeanor bail jumping for violating the conditions of release ordered in the misdemeanor case. *Id.*

After Dewitt resolved all four cases with a global plea agreement and was sentenced to prison, he sought to withdraw his pleas, asserting that he was never "released from custody" and therefore the nine bail jumping charges were "illusory." *Id.*, ¶¶1, 7-8. While the court recognized that "release" is not statutorily defined within the bail jumping context, and that "the common meaning of the word contemplates physical release from custody," the court held that release "refers to the defendant posting the bond, be it signature or cash, and need not be accompanied by the defendant's physical departure from the jailhouse." *Id.*, ¶14.

Further, the court rejected Dewitt's reliance on *Orlik*. *Id.*, ¶¶15-17. The court distinguished *Orlik* on its facts because Dewitt "had three bonds. He was able to make bond on the misdemeanor simply by signing it, and he therefore committed himself to its conditions." *Id.*, ¶17. While not "physically released, Dewitt was released as contemplated by Wis. Stat. § 969.02 when he fulfilled the signature bond." *Id.*

Accordingly, *Orlik* and *Dewitt* establish three clear rules applicable to Mr. Jacobs' case:

(1) "conditions of release" set under chapter 969 apply only if the defendant is able to "make bond," either by posting a cash bond or by signing a signature bond.

(2) A defendant's physical location does not determine whether he is "released from custody under ch. 969" for the purposes of bail jumping.

(3) A bail jumping charge is invalid if, at the time of the alleged bond violation, the defendant was in custody as a result of his inability to "make bond" or otherwise obtain release on bond under chapter 969.

Mr. Jacobs' case falls somewhere between *Orlik* and *Dewitt*. In 2019, Mr. Jacobs' was released from custody on bond in Outagamie County Case No. 19-CF-936 and Forest County Case No. 19-CF-62.

However, during all times relevant to the 17 charges at issue here, he was undeniably in custody unable to obtain his release on bond in either of those two cases. While Mr. Jacobs' physical location in the Shawano County Jail did not relieve him of his previously ordered bond conditions, the fact that he was reincarcerated in connection with Outagamie County Case No. 19-CF-936 and Forest County Case No. 19-CF-62 means that he is not subject to bail jumping charges for his alleged conduct in the Shawano County Jail after March 16, 2020.

D. Mr. Jacobs was not "released from custody" on bond with respect to Outagamie County Case No. 19-CF-936 or Forest County Case No. 19-CF-62 at any time relevant to this appeal.

As detailed above, Mr. Jacobs was arrested and taken into custody in Shawano County on March 16, 2020. A basis for that arrest and subsequent custody were bench or "body only" warrants issued in Outagamie County Case No. 19-CF-936 and Forest County Case No. 19-CF-62. Thereafter, Mr. Jacobs remained in custody unable to make bond in either case. Thus, both physically and legally, Mr. Jacobs was not "released from custody" on bond under chapter 969 on any of the five offense dates at issue in this appeal.

Pursuant to Wis. Stat. § 968.09(1), courts may issue bench warrants for a defendant's failure to appear. Specifically, when a defendant fails to appear in court "as required" or violates a term of the defendant's bond, the court may issue a bench warrant for the defendant's arrest, "which shall direct that the defendant [] be brought before the court without unreasonable delay." Wis. Stat. § 968.09(1). Moreover, the statute provides that "[p]rior to the defendant's appearance in court after the defendant's arrest under sub (1), ch. 969 shall not apply." Wis. Stat. § 968.09(2).

In other words, a defendant arrested on a bench or body only warrant for failing to appear in court as required by his bond is not eligible for release on bond until they appear back in the court on the bench warrant.

That is exactly what happened in Mr. Jacobs' case. He was arrested on March 16, 2020, on two bench warrants issued after he failed to appear in court as required by his bonds in Outagamie County and Forest County. On June 3, 2020, he appeared in Outagamie County Case No. 19-CF-936 and the court quashed the bench warrant, returned Mr. Jacobs' $2,000 bail to the poster, and reinstated the $2,000 cash bond. (App. 11).

On September 8, 2020, Mr. Jacobs appeared in Forest County, where the court had previously ordered his $5,000 cash bond forfeited. (R:22AP659: 12:8; App. 32). The court quashed the outstanding

bench warrant and set a new $10,000 cash bond. (R:22AP659: 12:8-10; App. 32-34).

So, from March 16, 2020, to June 3, 2020, Mr. Jacobs was in custody on the Outagamie County bench warrant that stemmed from his failure to appear in court as required by his Outagamie County bond. After June 3, 2020, Mr. Jacobs remained in custody unable to post the $2,000 cash bond reset by the court. Similarly, from March 16, 2020, to September 8, 2020, Mr. Jacobs was in custody on the Forest County bench warrant that stemmed from his failure to appear in court as required by his Forest County bond. After September 8, 2020, Mr. Jacobs remained in custody unable to post the new $10,000 cash bond set by the court.

The alleged offense date in Mr. Jacobs' five pending Shawano County case at issue here range from April 26, 2020, through August 12, 2021. At no time during the relevant time frame was Mr. Jacobs "released from custody" on bond in Outagamie County Case No. 19-CF-936 or Forest County Case No. 19-CF-62. As a result, he is not lawfully subject to the 17 bail jumping charges at issue in this appeal.

E. The state's theory of prosecution ignores the plain statutory text, binding precedent, and basic common sense.

The state opposed Mr. Jacobs' motions to dismiss and motions to reconsider on the grounds that in 2019 Mr. Jacobs was released on bond in Outagamie County Case No. 19-CF-936 and Forest County Case No. 19-CF-62. (R:22AP659: 66:38-48; 82:17-19, 25-26; App. 45-55). Moreover, the state explicitly took the position that it was irrelevant whether Mr. Jacobs' bond was revoked or whether he was subsequently taken back into custody and unable to obtain his re-release on bond after March 16, 2020. (R:22AP659: 66:38, 42-46; 82:17-19; App. 45, 49-53). The state's position, that a defendant once released on bond is perpetually and indefinitely "released" on bond and thereafter always subject to bail jumping charges regardless of the defendant's actual custody status is unreasonable. *See State v. Orlik,* 226 Wis. 2d at 537-38.

As this Court recognized in *Orlik*, statutory interpretation begins, and usually ends, with the statutory text. 226 Wis. 2d at 534. Further, "conditions of release" only apply if the defendant is "released from custody" and a defendant is subject to bail jumping charges if an alleged bond violation occurred while the defendant was "released from custody under ch. 969." *Id.* at 537-38; *Dewitt*, 313 Wis. 2d 794, ¶¶12, 17.

With regard to each of the 17 felony bail jumping counts at issue here, the state alleged offenses that occurred while Mr. Jacobs was in custody at the Shawano County Jail and unable to "make bond" or obtain his release from custody under chapter 969 with regard to Outagamie County Case No. 19-CF-936 or Forest County 19-CF-62. As in *Orlik*, this Court should reject the state's policy-based and purpose-driven prosecutorial theory that "ignores the language that provides the context for setting these conditions: release." *Orlik*, 226 Wis. 2d at 537.

F. The circuit court's rulings fail to properly apply the controlling authority and appear to be the result of an erroneous application of the relevant facts.

Aside from its explicit agreement with the state's "practical application" and "public policy" based arguments, the court also appears to have mistakenly based its decision on erroneous findings of fact. (R:22AP659: 66:38-48; 82:30-34; App. 45-55, 57-61).

Specifically, in denying Mr. Jacobs' motion for reconsideration, the court erroneously asserted that "Mr. Jacobs was out of custody. He was not physically in the custody of the jail or prison or any sort of entity." (R:22AP659: 82:31; App. 58). The court further erred by stating that Mr. Jacobs was simply in "warrant status" and that "[h]e was out. He violated a condition of his bond." (R:22AP659: 82:31; App. 58). To the extent that the court based its decision on a

mistaken belief that after March 16, 2020, Mr. Jacobs was "out" or and not in custody in the Shawano County Jail based on his inability to make bond with respect to the Outagamie County and Forest County cases, the court is clearly mistaken.

Furthermore, at no point did Mr. Jacobs claim that being in "warrant status" between November 2019 and March 16, 2020, negated his prior release from custody in 2019. Between November 2019 and March 16, 2020, Mr. Jacobs was "released from custody under ch. 969" even while he was in warrant status. During that time period he had obtained his release from custody by posting bail in Outagamie County Case No. 19-CF-936 and Forest County Case No. 19-CF-62. Before his reincarceration on March 16, 2020, he was indisputably subject to the conditions of his bonds in those counties.

However, on March 16, 2020, he was taken into custody on bench or body only warrants issued after he failed to appear in court as required by his bonds in each county. Pursuant to Wis. Stat. § 968.09, Mr. Jacobs was thereafter ineligible for release on bond until he appeared in court in Outagamie County and Forest County. When he later did appear in Outagamie County and Forest County, each court reestablished cash bond that Mr. Jacobs was never able to post.

From the record, it is unclear whether the circuit court actually relied on a misunderstanding of the facts or simply accepted the state's "perpetual release" theory of prosecuting bail jumping. In either case, the circuit court erred and this Court should reverse.

CONCLUSION

For the reasons set forth above, Mr. Jacobs respectfully asks this court to reverse the circuit court's orders denying his motions to dismiss the 17 pending counts of felony bail jumping at issue in this appeal.

Dated this 14th day of October, 2022.

Respectfully submitted,

Electronically signed by
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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. The length of this brief is 6,234 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of October, 2022.

Signed:
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