STATE OF WISCONSIN

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

DISTRICT II

Case No. 2023AP1371-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANGELA R. JOSKI,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING SENTENCE ADJUSTMENT ENTERED IN WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE DANIEL STEVEN JOHNSON PRESIDING

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

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ARGUMENT

The question presented in this case is this: Is a person who is sentenced to the mandatory minimum of three years in prison under Wis. Stat. § 346.65(2)(am)6. required to fully serve three years even if a circuit court finds her eligible for early release under the sentence adjustment statute, Wis. Stat. § 973.195? As the State's brief noted, this Court has not specifically addressed the question, but it has held, in a virtually identical case, that a mandatory minimum sentence must be "served in full" "regardless of" eligibility for early release under another statute.[1]

This Court asked the parties for supplemental briefing to "address the impact" on this case of *Stenklyft*,[2] which was cited in the amicus brief.

The amicus brief argued that the Court should affirm the circuit court order granting the sentence adjustment because the sentence adjustment statute must be given effect despite the conflict with the mandatory minimum statute (Amicus. 15–16), given that "the general rule of statutory construction in Wisconsin where two statutes relate to the same subject matter is that the specific statute controls over the general statute." *Gottsacker Real Est. Co. v. State, Dep't of Transp., Div. of Highways*, 121 Wis. 2d 264, 269, 359 N.W.2d 164 (Ct. App. 1984).

In this portion of amicus's argument, amicus quoted a sentence about the sentence adjustment statute it attributed to *Stenklyft*. (Amicus Br. 15.) It then asserted that "the OWI-penalty provision is the general statute; the sentence adjustment statute is the specific statute." (Amicus Br. 15.) It asserted that "[t]hus, precedent makes clear" that one statute

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[1] (Plaintiff-Appellant's Br. 5–6.)

[2] *State v. Stenklyft*, 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769.

"creates a broad framework" while the other "provides an exception" to it. (Amicus Br. 16.)

Does the language amicus cited from *Stenklyft* support that proposition? It does not. It is actually a quote of a quote that appears in passing in what amounts to a concurrence in *Stenklyft*. It is true—it simply says that an inmate who seeks a reduction in his sentence based on a change in sentencing law has to do so under the sentence adjustment statute as opposed to alleging a new factor as a basis for sentence modification—as far as it goes. It has no relevance to the issue presented here.

Stenklyft resolved a dispute about the constitutionality of one provision in the sentence adjustment statute. To preserve the statute's constitutionality, the *Stenklyft* court construed the words of one subsection—that a court "shall deny" a petition "[i]f the district attorney objects"[3]—to mean that a circuit court may grant a requested adjustment if the district attorney objects. That issue is not disputed here.

But neither the majority writings nor the lead opinion in *Stenklyft* addressed the comparison of the sentence adjustment statute with another potentially conflicting statute. The case certainly does not stand for the proposition, as amicus seems to argue (Amicus Br. 13–16), that the sentence adjustment statute is "the specific" statute that overrides any other statute as "general."

The language cited in the amicus brief is the following direct quote from this Court's decision in *Torres*, which was later quoted in *Trujillo*, then in the minority writing in *Stenklyft*. There is no dispute that the statement itself is good

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[3] "If the district attorney objects to adjustment of the inmate's sentence within 45 days of receiving notification under this paragraph, the court shall deny the inmate's petition." Wis. Stat. § 973.195(1r)(c).

law—it comes from two cases holding that a change in sentencing statutes cannot constitute a new factor to support an inmate's sentence modification request:

> Wisconsin Stat. § 973.195 reflects the legislature's intent to create a separate and specific statutory procedure for requesting a sentence reduction that should be used in place of Wis. Stat. § 809.30 (2001–02) whenever 'a change in law or procedure related to sentencing ... effective after the inmate was sentenced that would have resulted in a shorter term of a confinement' is the basis for the modification.

State v. Torres, 2003 WI App 199, ¶ 9, 267 Wis. 2d 213, 670 N.W.2d 400; *State v. Trujillo*, 2005 WI 45, ¶ 24, 279 Wis. 2d 712, 694 N.W.2d 933 (abrogated on other grounds by *State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828); *State v. Stenklyft*, 2005 WI 71, ¶¶ 46, 59, 281 Wis. 2d 484, 697 N.W.2d 769 (Wilcox, J., writing for three justices).

In *Trujillo*, the Wisconsin Supreme Court added that the statement meant that the sentence adjustment statute is the mechanism for challenging a sentence when the basis for the sentence modification is a change in sentencing law: "The legislature . . . has provided an adequate remedy by enacting Wis. Stat. § 973.195." *Trujillo*, 279 Wis. 2d 712, ¶¶ 2, 30.

The holdings from *Torres* and *Trujillo* remain good law, but neither case adds anything to the analysis required to determine how to give effect to the two statutes at issue here.

Nor do the two holdings in *Stenklyft*. That case produced a lead opinion and two separate writings, which resulted in the following holdings[4]:

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[4] The quoted statement from *Torres* and *Trujillo* appears twice in the first 81 paragraphs of the *Stenklyft* opinion. *Stenklyft*, 281 Wis. 2d 484, ¶¶ 46, 59. That portion constitutes the lead opinion, which was the opinion of three justices. *Id.*, ¶¶ 80, 82, 83, 121, 123. It is not binding authority for any proposition. *State v. Elam*, 195

1) The sentence adjustment statute, if interpreted as granting a district attorney veto power over a petition for sentence adjustment, would be a violation of the separation of powers doctrine. *Stenklyft*, 281 Wis. 2d 484, ¶¶ 82–84.

2) Notwithstanding the statute's language permitting such veto power to a district attorney, a circuit court has discretion to accept or reject the objection of a district attorney on an inmate's petition for sentence adjustment. *Id.* ¶¶ 121, 123.

The *Torres* and *Trujillo* language appears in the lead opinion in *Stenklyft* to support the proposition, soundly rejected by the court's majority, that the legislature could constitutionally give district attorneys veto power over a sentence adjustment petition. But as noted above, regardless of its use in *Stenklyft*, the *Torres* and *Trujillo* statement itself is good law.

That does not help Joski. It does not, contrary to amicus's argument, mean that any court has ever held that in comparison with another statute, the sentence adjustment statute is "the specific statute" such that it is given effect over a second statute to resolve any conflict between the two. Amicus's argument takes the word "specific" from its original context in *Torres,* (describing the statute as the "specific . . . procedure" created for obtaining sentence modification that is based on a change in law). *Torres*, 267 Wis. 2d 213, ¶ 9. It then ascribes a different significance to the word by invoking it with a canon of statutory interpretation. It then attributes the newly constructed meaning to precedent. (Amicus Br. 15–16.) Not one of the three cases (*Torres*, *Trujillo*, and *Stenklyft*) that

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Wis. 2d 683, 685, 538 N.W.2d 249 (1995) (citing *State v. Dowe*, 120 Wis. 2d 192, 194–95, 352 N.W.2d 660 (1984) (per curiam) (When examining a divided opinion of the Wisconsin Supreme Court to determine its holding, "a majority of the participating [justices] must have agreed on a particular point for it to be considered the opinion of the court.").)

include the statement deals with a specific/general comparison; nor do they say anything about how to determine which statute is "specific" and which is "general.

That determination should be made based on the substance of the statutes. Both apply to the subject of sentencing. The sentence adjustment statute, passed in 2001,[5] applies to inmates generally. The mandatory minimum statute requiring a three-year prison sentence for only those convicted of OWI as a seventh, eighth, or ninth offense, was passed in 2009,[6] eight years after the general statute. "Where two statutes apply to the same subject, the more specific controls, and this is especially true where the specific statute is enacted after the general statute." *Clean Wisconsin, Inc. v. Pub. Serv. Comm'n of Wisconsin*, 2005 WI 93, ¶ 175, 282 Wis. 2d 250, 700 N.W.2d 768.

Finally, the State notes that the amicus brief appears to rely on a citation to *Stenklyft* in its discussion of the *expressio unius* canon of interpretation. (Amicus Br. 19.) After noting the classes of felonies that the legislature identified as potentially eligible for sentence adjustment, amicus cites to a sentence from *Stenklyft* observing that the text of the statute "explicitly excludes inmates convicted of Class B felonies." (Amicus Br. 19 (citing *Stenklyft*, 281 Wis. 2d 484, ¶ 24).)

That citation is followed by the assertion, "Therefore, precedent requires this [C]ourt to assume that the legislature did not wish to exclude" anyone else, including "persons sentenced to a mandatory minimum," from eligibility for sentence adjustment. (Amicus Br. 20.) The reference to "precedent" appears to refer not to *Stenklyft* but to the cases

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[5] 2001 Wis. Act 109, Wis. Stat. § 973.195.

[6] 2009 Wis. Act 100, Wis. Stat. § 346.65(2)(am)6; *see also State v. Williams*, 2014 WI 64, ¶¶ 22–31, 355 Wis. 2d 581, 852 N.W.2d 467 (reviewing history of penalties for OWI up through 2009 Wis. Act 100).

previously cited for the proposition that courts "may presume that the legislature purposefully excluded" whatever it did not "explicitly include[ ]" in a statute. (Amicus Br. 11 (quoting *Jefferson v. Dane Cnty*., 2020 WI 90, ¶ 29, 394 Wis. 2d 602, 951 N.W.2d 556).) This argument stands or falls not on the quoted language from *Stenklyft*'s lead opinion about the exclusion of Class B felonies, which is apparent from the statute, but on the statute's language and precedent applying a particular canon of statutory interpretation. *Stenklyft* has no impact on this argument either.

CONCLUSION

Stenklyft has no relevance to the question of whether, for purposes of statutory interpretation, the sentence adjustment statute is "specific" or "general" when considered in conjunction with the mandatory minimum sentence statute. As previously argued, Wisconsin courts have, when presented with conflicting statutes, repeatedly held that the specific requirement of the mandatory minimum sentence must be given effect.[7] This Court should reverse the circuit court's grant of sentence adjustment.

[7] (Plaintiff-Appellant's Br. 10–11.)

Dated this 16th day of September 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Sonya K. Bice
SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

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 1,724 words.

Dated this 16th day of September 2024.

Electronically signed by:

Sonya K. Bice
SONYA K. BICE
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

I further certify that a copy of the above document was mailed on September 16, 2024 to:

Angela Joski
N2641 State Road 67
Williams Bay, WI 53191

Dated this 16th day of September 2024.

Electronically signed by:

Sonya K. Bice
SONYA K. BICE
Assistant Attorney General