COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2181 **Cir. Ct. No. 1992CF45**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE C. BRENIZER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Reversed and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. In 1993, Bruce Brenizer entered guilty pleas to five counts of first-degree intentional homicide. He was subsequently found not guilty by reason of mental disease or defect (NGI) on three of the counts. On the two

counts for which Brenizer accepted criminal responsibility, the circuit court imposed consecutive sentences of life imprisonment. On the remaining counts, the court ordered Brenizer committed to the Wisconsin Department of Health and Social Services (DHS)[1] for life. Brenizer resided at the Mendota Mental Health Institute until May 2013, at which point he was transferred to the custody of the Department of Corrections (DOC) at the Dodge Correctional Institution. In 2014, Brenizer filed a motion challenging the transfer, which the circuit court denied.

¶2 Brenizer argues the circuit court erred by denying his motion because DHS lacked authority to transfer him to the custody of DOC. We agree. The commitment order unambiguously states that Brenizer is to be committed to DHS custody for life with placement in institutional care, unless his commitment is terminated under WIS. STAT. § 971.17(5) (1991-91).[2] As the State concedes, Brenizer's commitment has not been terminated. Accordingly, DHS lacked authority to transfer Brenizer to DOC custody. ***State v. Szulczewski***, 216 Wis. 2d 495, 574 N.W.2d 660 (1998), which was decided after Brenizer's commitment order was entered, does not change this result because it cannot be retroactively applied to Brenizer's commitment order.

[1] The Department of Health and Social Services was renamed the Department of Health and Family Services in 1996. *See* ***Milwaukee Cty. v. Delores M.***, 217 Wis. 2d 69, 74 n.3, 577 N.W.2d 371 (Ct. App. 1998). The Department of Health and Family Services was renamed the Department of Health Services in 2008. *See* ***State v. Stanley***, 2012 WI App 42, ¶1 n.1, 340 Wis. 2d 663, 814 N.W.2d 867. For ease of reference, we refer to the agency that had custody of Brenizer as "DHS" throughout this opinion, even though it operated under its prior names during portions of the relevant time period.

[2] The State asserts we should apply the 1991-92 version of the Wisconsin Statutes. Brenizer asserts we should apply the 1993-94 version. For purposes of this appeal, there are no relevant, substantive differences between the 1991-92 and 1993-94 versions of the statutes. Accordingly, unless otherwise noted, all references to the Wisconsin Statutes are to the 1991-92 version.

¶3 We therefore reverse the order denying Brenizer's motion challenging his transfer to DOC custody. We remand for the circuit court to enter an order granting Brenizer's motion and directing DOC to return him to the custody of DHS.

BACKGROUND

¶4 In April 1992, the State charged Brenizer with five counts of first-degree intentional homicide in the April 22, 1991 killings of his father, his father's live-in girlfriend, and her three minor daughters, one of whom was Brenizer's half-sister. Brenizer was fifteen years old when the killings occurred. In 1993, Brenizer entered guilty pleas on all five counts but asserted he should be found NGI on the three counts related to the children. Following a bench trial, the circuit court found Brenizer NGI on those three counts.

¶5 On June 9, 1993, the circuit court held a two-part hearing, during which it first sentenced Brenizer and then addressed his NGI commitment. On the two counts for which Brenizer accepted criminal responsibility, the court imposed consecutive sentences of life imprisonment. With respect to the three remaining counts, the court ordered Brenizer "committed to [DHS] with placement in institutional care at Mendota State Hospital for a period of life." The court clarified, "That may be interrupted by appropriate legal procedures [and] should for any reason he be released from that commitment, he shall be released to the Wisconsin State Prison system to meet the obligations under the sentence relating to Counts 1 and 2 herein."

¶6 An order of commitment was entered on June 9, 1993, followed by a substantially identical amended order of commitment on June 11, 1993. As relevant to this appeal, the amended commitment order provided:

CONCLUSIONS OF LAW

1. That clear and convincing evidence has been presented to warrant institutional placement at the Mendota Mental Health Institute under Sections 971.17 and 51.37(3), Wis. Stats.

2. That said commitment shall be for a period of life, unless terminated under Section 971.17(5), Wisconsin Statutes.

3. That should said termination occur, the Defendant shall be released only to the State Prison System.

ORDER

IT IS HEREBY ORDERED that Bruce C. Brenizer be committed to [DHS] with placement in institutional care at the Mendota Mental Health Institute for a period of life unless said placement is terminated under 971.17(5); that Bruce C. Brenizer not be admitted to any form of conditional release during his period in the mental health system, unless he be released to the State Prison System.

IT IS FURTHER ORDERED that his commitment is concurrent with his prison sentence.

¶7 From June 1993 until May 2013, Brenizer resided at the Mendota Mental Health Institute in DHS custody. However, on May 9, 2013, Brenizer was transferred to DOC custody at the Dodge Correctional Institution. Brenizer subsequently filed a "Motion to Enforce Court Order and Statute" in the circuit court arguing, in relevant part, that his transfer from Mendota to Dodge violated the June 11, 1993 amended commitment order and was contrary to WIS. STAT. § 971.15(5), which provides that a commitment order may be terminated only by the committing court. Brenizer also argued the administrative policy permitting

his transfer, if such a policy existed, was invalid because "an administrative rule has no force against the plain language of a statute."[3]

¶8 In response to Brenizer's motion, the State asserted the commitment order had not been terminated and was still in effect—DHS had simply discharged Brenizer from Mendota and transferred him to DOC custody without terminating the commitment. The State argued this transfer was undertaken pursuant to a Memorandum of Agreement between DHS and DOC.[4] The State further argued that, because Brenizer was subject to both a criminal sentence and a commitment order, nothing prevented DHS from transferring him to DOC custody.

¶9 The circuit court denied Brenizer's motion, following a hearing. The court concluded that, contrary to Brenizer's assertion, the amended commitment order did not require Brenizer to remain in DHS custody until the termination of his commitment. The court explained, "[I]f [the committing court's] intent was for there to be a very specific order that could never be modified, [it] would have stayed the prison sentence." The court continued:

> And if [the committing court] would have stayed [the prison sentence] then there would have been—my impression is … that there would not have been any way

[3] In addition to these arguments, Brenizer asserted: (1) the transfer violated his right to due process; (2) his release from commitment without a court order "raise[d] potentially significant civil liberty concerns"; and (3) he was denied his right to counsel. Brenizer does not renew these arguments on appeal, and, accordingly, we need not address them further. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (An issue raised in the circuit court, but not raised on appeal, is deemed abandoned.).

[4] As relevant to this case, the Memorandum of Agreement permits an individual who has been sentenced on some charges and committed to DHS custody on other charges, and who is currently placed in a mental health treatment facility, to be transferred from that facility into DOC custody if DHS determines the individual does not need inpatient mental health services and DOC agrees with that determination.

> for [DHS] to transfer you back to prison without someone coming to court and saying we want you to lift the stay, Judge. That stay that was put in place 22 years ago. But they weren't. There wasn't anything stayed. They were concurrent.
>
> And so I think that the State's argument is going to carry the day that there are equally[] valid sentences. A Judgment of Conviction and an Order for Commitment and that without the stay of one of them the order is in the hands of someone other than the court.

¶10 Brenizer now appeals the order denying his motion challenging his transfer to DOC custody.

DISCUSSION

¶11 Brenizer argues the plain language of the amended commitment order unambiguously requires that he remain in DHS custody until his commitment is terminated under WIS. STAT. § 971.17(5). Because Brenizer's commitment has not been terminated, he argues DHS lacked authority to transfer him to DOC custody. Conversely, the State argues the amended commitment order merely requires Brenizer to remain *subject to* an NGI commitment until the commitment is terminated, and because neither the commitment order nor the judgment of conviction was stayed, his custody and placement were left to the discretion of DHS. Stated slightly differently, the State argues Brenizer was at all times subject to both an NGI commitment order and a judgment of conviction, and because neither was stayed, the State could choose whether to place him in prison or in a mental health facility.

¶12 The interpretation of Brenizer's amended commitment order and judgment of conviction presents a question of law that we review independently. *See* ***Park Manor, Ltd. v. DHFS***, 2007 WI App 176, ¶13, 304 Wis. 2d 512, 737 N.W.2d 88. "We interpret an order in the same way we interpret a contract; that

is, we construe the language of the order as it stands, attempting to give meaning to every provision." ***Id.***

¶13 As noted above, the "Conclusions of Law" section of Brenizer's amended commitment order states that: (1) sufficient evidence has been presented "to warrant institutional placement at the Mendota Mental Health Institute"; and (2) "said commitment shall be for a period of life, unless terminated under [WIS. STAT. §] 971.17(5)." The "Order" section of the amended commitment order then directs that Brenizer "be committed to [DHS] with placement in institutional care at the Mendota Mental Health Institute for a period of life unless said placement is terminated under [§] 971.17(5)." We agree with Brenizer that these provisions plainly and unambiguously require him to remain committed to DHS custody for life, in institutional care, unless his commitment is terminated under § 971.17(5). Because Brenizer's commitment has not been terminated, his transfer to DOC custody violated the express terms of the amended commitment order.[5]

[5] As the State notes, to the extent the amended commitment order requires Brenizer to be placed at a specific institution, it is inconsistent with WIS. STAT. § 971.17(3)(a) & (c). Section 971.17(3)(a) provides that an order for commitment "shall specify either institutional care or conditional release." Section 971.17(3)(c), in turn, provides that if the commitment order specifies institutional care, DHS "shall place the person in an institution under s. 51.37(3)"—that is, either Mendota or the Winnebago Mental Health Institute. Under these statutes, the circuit court lacked authority to order Brenizer placed at a specific institution. However, this error does not matter for purposes of this appeal. Even without the language ordering Brenizer placed at Mendota, the amended commitment order clearly conveys that the committing court intended Brenizer to be committed to institutional care in DHS custody for life, unless his commitment is terminated under § 971.17(5).

(continued)

¶14 We acknowledge the State's argument that Brenizer is subject to both the amended commitment order and a judgment of conviction. If neither the commitment order nor the judgment of conviction specified the circuit court's intent as to whether the NGI commitment or sentences were to take precedence, we might agree with the State that, in the absence of a stay, the State would be free to choose whether to place Brenizer in prison or in a mental health facility. However, as discussed above, the amended commitment order clearly and unambiguously indicates the committing court intended Brenizer's NGI commitment to take precedence over his sentences. Nothing in the judgment of conviction negates that clear intent. Reading the two documents together, it is plain the committing court did not intend the State to be able to determine, at its discretion, whether Brenizer should be placed in prison or in a mental health facility. Rather, the court intended Brenizer to be committed to the custody of DHS and placed in institutional care for life, unless his commitment is terminated. By transferring Brenizer to DOC custody while his commitment was still in effect, DHS violated the committing court's clear intent.

¶15 Alternatively, the State argues that, to the extent the amended commitment order requires Brenizer to remain in DHS custody in institutional care until his commitment is terminated, the order is invalid as a matter of law,

---

Brenizer argues that, upon determining the committing court erroneously ordered him placed in a specific institution, the circuit court should have vacated the amended commitment order and sentences and ordered new commitment and sentencing proceedings. However, Brenizer cites no authority directly supporting this argument. Moreover, Brenizer effectively concedes that his argument that the committing court erred by ordering him placed in a specific institution is moot for purposes of this appeal. He acknowledges that, even if the circuit court had vacated the commitment order and sentences and entered a new commitment order that did not specify a placement location, "at the end of the day, [we would] be right back where we began with the real issue of this case." We generally decline to address moot issues. *See* ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

and DHS was therefore free to disregard it.[6] The State's argument on this point is based on ***Szulczewski***, which was decided almost five years after the amended commitment order was entered.[7] The issue in ***Szulczewski*** was whether an NGI commitment or criminal sentence takes precedence in a case where the defendant is subject to both. ***Szulczewski***, 216 Wis. 2d at 497-99. In order to answer that question, our supreme court was required to harmonize two apparently conflicting statutes: (a) WIS. STAT. § 971.17(1) (1987-88), which provided that, upon finding a defendant NGI of a crime, a court "shall order" him or her committed to DHS for custody, care, and treatment until he or she is discharged from commitment; and (b) WIS. STAT. § 973.15(1) (1993-94), which stated that "all sentences

[6] The State relies on ***State ex rel. Helmer v. Cullen***, 149 Wis. 2d 161, 164, 440 N.W.2d 790 (Ct. App. 1989), for the proposition that DHS may disregard invalid language in a commitment order. We are not convinced that, under the circumstances of this case, ***Helmer*** permitted DHS to disregard any invalid language in Brenizer's amended commitment order. Nevertheless, we need not resolve this issue because, for the reasons explained below, we conclude the case later invalidating the relevant language in the amended commitment order—***State v. Szulczewski***, 216 Wis. 2d 495, 574 N.W.2d 660 (1998)—need not and cannot be retroactively applied to that order.

[7] The State also cites ***State v. Harr***, 211 Wis. 2d 584, 568 N.W.2d 307 (Ct. App. 1997), which was decided almost four years after Brenizer's amended commitment order was entered. In ***Harr***, we held that a criminal sentence cannot be imposed consecutive to an NGI commitment because an NGI commitment is not a "sentence." ***Id.*** at 586-87.

Based on ***Harr***, the State argues Brenizer's amended commitment order is invalid, to the extent it states Brenizer's NGI commitment is "concurrent with" his prison sentences. Be that as it may, it is irrelevant for purposes of this appeal. Regardless of the language describing the NGI commitment and sentences as concurrent, the amended commitment order unambiguously provides that Brenizer is to be committed to DHS custody for life, unless his commitment is terminated under WIS. STAT. § 971.17(5). Thus, even if DHS could properly disregard as invalid the portion of the amended commitment order describing the commitment and sentences as concurrent, the order still prevented DHS from transferring Brenizer to DOC custody prior to the termination of his commitment.

commence at noon on the day of sentence." *See* ***Szulczewski***, 216 Wis. 2d at 499-500.[8]

¶16 The ***Szulczewski*** court recognized that WIS. STAT. § 971.17(1) "does not on its face authorize the discharge of an NGI acquittee for imprisonment upon sentence for a crime[,] while [WIS. STAT. §] 973.15 requires immediate imprisonment of a convicted defendant, with no exception made expressly for NGI acquittees." ***Szulczewski***, 216 Wis. 2d at 501. However, the court noted that a sentencing court may stay the execution of a sentence in three circumstances: (1) for legal cause; (2) to place the defendant on probation; and (3) for not more than sixty days. ***Id.*** at 500 (citing § 973.15(8)(a) (1993-94)). The court held that an NGI commitment constitutes "legal cause" to stay a sentence under § 973.15(8)(a), and a circuit court may therefore "exercise its discretion in determining whether to stay execution of a prison sentence imposed on an NGI acquittee." ***Szulczewski***, 216 Wis. 2d at 507.

[8] The ***Szulczewski*** court interpreted the 1987-88 version of WIS. STAT. § 971.17(1) and the 1993-94 version of WIS. STAT. § 973.15(1). *See* ***Szulczewski***, 216 Wis. 2d at 497 n.1, 499 n.4.

The 1991-92 and 1993-94 versions of WIS. STAT. § 973.15(1) are identical. The 1987-88 version of WIS. STAT. § 971.17(1) differs from the 1991-92 and 1993-34 versions, which are identical to one another. The 1987-88 version of § 971.17(1) states that, when a person is found NGI of a crime, the court "shall order him to be committed to [DHS] to be placed in an appropriate institution for custody, care and treatment until discharged as provided in this section." In contrast, the 1991-92 and 1993-94 versions provide that, when a person is found NGI of a crime, the court "shall commit the person to [DHS] for a specified period not exceeding two-thirds of the maximum term of imprisonment that could be imposed … against an offender convicted of the same crime or crimes." Sec. 971.17(1) (1991-92); Sec. 971.17(1) (1993-94). The 1991-92 and 1993-94 versions of the statute further provide that, "[i]f the maximum term of imprisonment is life, the commitment period specified by the court may be life, subject to termination under sub. (5)." Sec. 971.17(1) (1991-92); Sec. 971.17(1) (1993-94). Neither the State nor Brenizer argues the differences between the 1987-88 and 1991-92/1993-94 versions of § 971.17(1) are relevant for purposes of this appeal, and we perceive no such relevant difference.

¶17 The ***Szulczewski*** court then set forth specific factors a circuit court should consider when exercising its discretion, explaining:

> [A] circuit court may determine that the purposes of both the criminal and NGI statutes are best served by allowing the defendant to remain in a mental health institution pursuant to the NGI acquittal. In these cases WIS. STAT. § 971.17 is given primary importance. This disposition may be appropriate, for example, in cases involving less serious crimes or defendants with serious mental illness or special treatment needs.
>
> In other cases a circuit court may determine that the goals of retribution, rehabilitation, deterrence and segregation are best served by committing the defendant to the custody of the DOC upon sentencing. This disposition may be appropriate, for example, in cases where the crime requires severe punishment, where there is a need to deter both the particular defendant and the general NGI population, and where the defendant needs to be segregated from the general NGI population.

Id.

¶18 Based on ***Szulczewski***, the State argues Brenizer's amended commitment order is invalid to the extent it ordered Brenizer "committed to [DHS] with placement in institutional care" for life, unless his commitment is terminated. The State contends that, under ***Szulczewski***, in order to ensure Brenizer's placement with DHS, the circuit court was required to stay Brenizer's criminal sentences. Absent a stay, the State argues the criminal sentences take precedence over the NGI commitment, and Brenizer could have been transferred to DOC custody at any time.

¶19 The problem with the State's argument is that, as noted above, ***Szulczewski*** was decided after Brenizer's amended commitment order and judgment of conviction were entered. Although the State argues ***Szulczewski***'s holding applies retroactively to the amended commitment order and the judgment

of conviction, we disagree, for the reasons explained below. *See* ***State v. Thiel***, 2001 WI App 52, ¶7, 241 Wis. 2d 439, 625 N.W.2d 321 (the retroactive application of a new rule of law presents a question of law that we review independently).

¶20 "Wisconsin generally adheres to the 'Blackstonian Doctrine,' which provides that a decision that clarifies, overrules, creates or changes a rule of law is to be applied retroactively." ***Id.*** However, despite this general rule of retroactivity, not all judicial decisions may be retroactively applied. The analysis used to determine whether a particular decision applies retroactively differs based on whether the new rule announced in the decision is a rule of criminal law or civil law, whether it is substantive or procedural, and whether the case to which the new rule is to be applied is "final."[9] *See, e.g.*, ***State v. Lagundoye***, 2004 WI 4, ¶11, 268 Wis. 2d 77, 674 N.W.2d 526; ***State ex rel. Brown v. Bradley***, 2003 WI 14, ¶13, 259 Wis. 2d 630, 658 N.W.2d 427.

¶21 For instance, in the criminal context, a new substantive rule is "presumptively applied retroactively to all cases, whether on direct appeal or on collateral review." ***Lagundoye***, 268 Wis. 2d 77, ¶12. New rules of criminal procedure "are to be applied retroactively to all cases pending on direct review or non-finalized cases still in the direct appeal pipeline." ***Id.*** A new rule of criminal procedure "generally cannot be applied retroactively to cases that were final before the rule's issuance," unless the rule falls under one of two "well-delineated

[9] A case is final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." ***Griffith v. Kentucky***, 479 U.S. 314, 321 n.6 (1987).

exceptions." ***Id.***, ¶13 (citing ***Teague v. Lane***, 489 U.S. 288, 307 (1989)); *see also infra*, ¶¶33-34.

¶22 In the civil context, retroactive application of judicial decisions is presumed. *See* ***Wenke v. Gehl Co.***, 2004 WI 103, ¶69, 274 Wis. 2d 220, 682 N.W.2d 405; ***Brown***, 259 Wis. 2d 630, ¶13; ***Browne v. WERC***, 169 Wis. 2d 79, 112, 485 N.W.2d 376 (1992). In determining whether to set aside this presumption and apply a new rule prospectively, Wisconsin courts consider three factors identified by the United States Supreme Court in ***Chevron Oil Co. v. Huson***, 404 U.S. 97, 106-07 (1971), and adopted by the Wisconsin Supreme Court in ***Kurtz v. City of Waukesha***, 91 Wis. 2d 103, 109, 280 N.W.2d 757 (1979). *See* ***Brown***, 259 Wis. 2d 630, ¶13.[10]

¶23 The State refers to the rules outlined in the preceding paragraphs as the "traditional retroactivity analysis." The State then asserts this traditional retroactivity analysis does not apply to ***Szulczewski***. While the State concedes ***Szulczewski***'s holding is a "new rule," in the sense that its interpretation of the relevant statutes was not "compelled" by precedent, *see* ***State v. Horton***, 195 Wis. 2d 280, 291, 536 N.W.2d 155 (Ct. App. 1995), the State asserts the new rule announced in ***Szulczewski*** was neither procedural nor substantive. Rather, the State asserts ***Szulczewski*** merely defined the scope of a circuit court's power under the applicable statutes to determine placement of persons subject to both NGI commitments and criminal sentences. The State contends a judicial decision

[10] In ***Harper v. Virginia Department of Taxation***, 509 U.S. 86, 97 (1993), the United States Supreme Court abandoned the three-factor standard it announced in ***Chevron Oil Co. v. Huson***, 404 U.S. 97 (1971). *See* ***State ex rel. Brown v. Bradley***, 2003 WI 14, ¶13 n.5, 259 Wis. 2d 630, 658 N.W.2d 427. However, the Wisconsin Supreme Court continues to use the ***Chevron*** analysis. *See* ***Brown***, 259 Wis. 2d 630, ¶13 n.5.

"addressing the scope of a court's power conferred by statute" is not subject to the traditional retroactivity analysis, but instead applies retroactively to all cases in which "the version of the statute applied in the original proceeding is substantially similar to the version interpreted in the later judicial decision."

¶24 We reject the State's argument that the traditional retroactivity analysis does not apply to ***Szulczewski***. First, the State does not cite any legal authority supporting its novel argument that judicial decisions interpreting the extent of a circuit court's statutory authority are exempt from the traditional retroactivity analysis, and we are aware of none. Second, contrary to the State's assertion, the new rule announced in ***Szulczewski*** is clearly procedural.

¶25 In ***Lagundoye***, our supreme court clarified that, in the criminal context, substantive law "is that which declares what acts are crimes and prescribes the punishment therefor," while procedural law "is that which provides or regulates the steps by which one who violates a criminal statute is punished." ***Lagundoye***, 268 Wis. 2d 77, ¶21 (quoting ***E.B. v. State***, 111 Wis. 2d 175, 189, 330 N.W.2d 584 (1983)). In the civil context, the court has stated that "[a] procedural law is that which concerns the manner and order of conducting suits or the mode of proceeding to enforce legal rights[,] and the substantive law is one that establishes the rights and duties of a party." ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2007 WI 88, ¶41, 302 Wis. 2d 299, 735 N.W.2d 1 (quoted source omitted).

¶26 Under these standards, the new rule set forth in ***Szulczewski*** is indisputably procedural. As discussed above, ***Szulczewski*** held that an NGI commitment constitutes "legal cause" to stay a sentence, and a circuit court may therefore "exercise its discretion in determining whether to stay execution of a

prison sentence imposed on an NGI acquittee." ***Szulczewski***, 216 Wis. 2d at 507. The court set forth factors a circuit court should consider when exercising its discretion, specifically, whether "the purposes of both the criminal and NGI statutes are best served by allowing the defendant to remain in a mental health institution pursuant to the NGI acquittal" or by "committing the defendant to the custody of the DOC upon sentencing." ***Id.*** In so doing, the ***Szulczewski*** court dictated the procedure a circuit court must follow in order to ensure that an NGI commitment takes precedence over a criminal sentence. ***Szulczewski*** thus regulated the steps by which an NGI acquittee who is also subject to a criminal sentence is punished for his or her crimes. *See* ***Lagundoye***, 268 Wis. 2d 77, ¶21. Stated differently, the new rule announced in ***Szulczewski*** pertained to "the manner and order of conducting" NGI commitment proceedings. *See* ***Trinity Petroleum***, 302 Wis. 2d 299, ¶41.

¶27 The State next argues that, even if the new rule set forth in ***Szulczewski*** is procedural and the traditional retroactivity analysis therefore applies, ***Szulczewski*** should nevertheless be applied retroactively to Brenizer's amended commitment order. The State contends the new rule announced in ***Szulczewski*** is civil, rather than criminal. Consequently, the State asserts the "presumption of retroactivity associated with new rules of civil procedure … should apply." The State further argues the three factors established by the United States Supreme Court in ***Chevron*** and adopted by the Wisconsin Supreme Court in ***Kurtz*** do not overcome the presumption of retroactivity.

¶28 In support of its argument that the rule announced in ***Szulczewski*** is civil, rather than criminal, the State asserts an NGI commitment "is not a criminal proceeding." The State does not, however, cite any legal authority in support of

that assertion. Moreover, our independent research indicates this issue is not as clear-cut as the State suggests.

¶29 When a defendant enters an NGI plea, the resulting bifurcated criminal trial consists of two phases: (1) a guilt phase; and (2) a responsibility phase. ***State v. Magett***, 2014 WI 67, ¶33, 355 Wis. 2d 617, 850 N.W.2d 42. The guilt phase is clearly a criminal proceeding. *See* ***id.***; *see also* ***State v. Lagrone***, 2016 WI 26, ¶33, 368 Wis. 2d 1, 878 N.W.2d 636. In contrast, our supreme court has stated the responsibility phase "contains 'elements of civil procedure' and is 'something close to a civil trial.'" ***Lagrone***, 368 Wis. 2d 1, ¶33 (quoting ***Magett***, 355 Wis. 2d 617, ¶¶36, 39-40). However, the responsibility phrase is not "purely civil." ***Id.***, ¶34 (quoting ***State v. Koput***, 142 Wis. 2d 370, 397, 418 N.W.2d 804 (1988)). Instead, "[t]he civil hues of the responsibility phase, coupled with the fact that bifurcation and the NGI plea are statutory in nature, not constitutional, remove the proceeding from the exacting demands of criminal proceedings and leave it in a category of its own." ***Magett***, 355 Wis. 2d 617, ¶40.

¶30 The above-cited cases suggest that, while NGI commitment proceedings are not wholly criminal in nature, they are likewise not wholly civil. Moreover, as the State concedes, ***Szulczewski*** examined "the intersection of the NGI commitment statute, WIS. STAT. § 971.17, with a *criminal* sentencing statute, WIS. STAT. § 973.15." (Emphasis added.) What the State fails to acknowledge is that § 971.17 is also a criminal statute—WIS. STAT. ch. 971 is entitled "Criminal Procedure—Proceedings Before and At Trial." ***Szulczewski*** therefore interpreted and harmonized two criminal statutes. This fact undermines the State's assertion that the new procedural rule announced in ***Szulczewski*** was civil, rather than criminal.

¶31 Ultimately, however, we need not resolve whether the new rule announced in ***Szulczewski*** was civil or criminal. Regardless of whether we apply the retroactivity analysis for criminal procedural rules or civil procedural rules, we conclude ***Szulczewski***'s holding should not be applied retroactively to Brenizer's amended commitment order.

¶32 As noted above, new rules of criminal procedure "are to be applied retroactively to all cases pending on direct review or non-finalized cases still in the direct appeal pipeline." ***Lagundoye***, 268 Wis. 2d 77, ¶12. Here, Brenizer's case is (and has long been) final—the prosecution is no longer pending, a final order has been entered, the right to a state court appeal has been exhausted, and the time for certiorari review in the United States Supreme Court has expired. *See* ***Thiel***, 241 Wis. 2d 439, ¶19 n.10. Thus, assuming the new procedural rule announced in ***Szulczewski*** is a criminal rule, it cannot be applied retroactively to Brenizer's case unless it falls under one of two well-delineated exceptions. *See* ***Lagundoye***, 268 Wis. 2d 77, ¶13 (citing ***Teague***, 489 U.S. at 307).

¶33 The first of these exceptions states that a new rule of criminal procedure should be applied retroactively to cases on collateral review if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" ***Id.*** (quoting ***Teague***, 489 U.S. at 307). The ***Szulczewski*** court did not decriminalize any conduct or place any conduct beyond the power of the legislature to prohibit. Instead, ***Szulczewski*** defined the procedure a circuit court must follow in order to ensure that an NGI commitment takes precedence over a criminal sentence. Accordingly, the first exception to the general rule of nonretroactivity set forth in ***Teague*** and ***Lagundoye*** does not apply in Brenizer's case.

¶34 The second exception provides that a new rule of criminal procedure should not be applied retroactively to cases that were final before the new rule was announced unless the new rule encompasses procedures that are "implicit in the concept of ordered liberty." ***Lagundoye***, 268 Wis. 2d 77, ¶33 (quoting ***Teague***, 489 U.S. at 307). This exception is "reserved for watershed rules of criminal procedure." ***Id.*** (quoting ***Teague***, 489 U.S. at 311). In other words, the exception "is limited to 'those new procedures without which the likelihood of an accurate conviction is seriously diminished.'" ***Id.***, ¶34 (quoting ***Teague***, 489 U.S. at 313). The ***Lagundoye*** court concluded the new rule at issue in that case—namely, that violations of WIS. STAT. § 971.08(1)(c) were not subject to a harmless error analysis—did not fall within this second exception because it "did not implicate a constitutional right, the accuracy or fundamental fairness of a trial, or change our understanding of the bedrock procedural elements inherent in the concept of ordered liberty." ***Lagundoye***, 268 Wis. 2d 77, ¶41. Similarly, the new rule announced in ***Szulczewski*** does not implicate a constitutional right or the accuracy or fundamental fairness of a trial, nor does it change our understanding of bedrock elements of criminal procedure. It cannot fairly be characterized as a watershed rule of criminal procedure. *See* ***Lagundoye***, 268 Wis. 2d 77, ¶33.

¶35 Thus, ***Szulczewski***'s holding does not fall within either of the two exceptions to the general rule that new criminal procedural rules do not apply retroactively to cases that are already final. Accordingly, assuming the new procedural rule announced in ***Szulczewski*** is criminal in nature, it cannot be

retroactively applied to Brenizer's case, which was final before ***Szulczewski*** was decided.[11]

¶36 Alternatively, even if ***Szulczewski***'s holding is construed as a new rule of civil procedure, we nevertheless conclude it should not be retroactively applied to Brenizer's amended commitment order. As the State correctly notes, new civil procedural rules are presumed to apply retroactively. *See, e.g.*, ***Browne***, 169 Wis. 2d at 112. However, after considering the three factors established by the United States Supreme Court in ***Chevron*** and adopted by the Wisconsin Supreme Court in ***Kurtz***, we conclude the presumption of retroactivity has been overcome in the instant case.[12]

[11] The State argues the retroactivity analysis set forth in ***Teague v. Lane***, 489 U.S. 288 (1989), and ***State v. Lagundoye***, 2004 WI 4, 268 Wis. 2d 77, 674 N.W.2d 526, applies only to cases in which a *defendant* has collaterally attacked his or her conviction. The State therefore argues the analysis does not apply in the instant case because "Brenizer's motion for return to DHS is not a collateral challenge to his judgments of conviction." We disagree with the State regarding the applicability of the ***Teague***/***Lagundoye*** retroactivity analysis. Although *Brenizer* has not collaterally challenged his judgments of conviction or his amended commitment order, *the State* argued in response to Brenizer's motion for return to DHS that the operative language in the amended commitment order was invalid under ***Szulczewski***, and, as a result, DHS was not required to comply with it. The State's argument in that regard amounted to a collateral attack on the amended commitment order. The State cites no authority for the proposition that the ***Teague***/***Lagundoye*** analysis cannot apply in circumstances like these, in which the State attempts to use a new rule of criminal procedure to invalidate the plain language of an NGI commitment order that was final before the new rule was announced.

[12] Brenizer argues the retroactive application of new civil procedural rules is limited to cases that are pending on direct appeal or in which no final judgment has been entered. He asserts a new civil procedural rule cannot under any circumstances be used to collaterally attack a final judgment in a case that is no longer pending on direct appeal. We find this argument somewhat appealing. However, it appears to be contrary to our supreme court's decision in ***Brown***.

(continued)

¶37 Under the first ***Chevron*/*Kurtz*** factor, we must consider whether ***Szulczewski*** "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." ***Kurtz***, 91 Wis. 2d at 109 (quoting ***Chevron***, 404 U.S. at 106). As the State correctly points out, ***Szulczewski*** did not overrule clear past precedent—there were no previous cases addressing the steps a circuit court needed to take in order to ensure an NGI commitment would take precedence over a criminal sentence.

¶38 However, contrary to the State's assertion, we conclude ***Szulczewski*** decided an issue of first impression whose resolution was not clearly foreshadowed. As discussed above, ***Szulczewski*** harmonized two apparently conflicting statutes—one that required a court to commit a defendant to DHS custody after finding him or her NGI of a crime, and another that provided the

---

In ***Brown***, the court considered the extent to which a new civil procedural rule should apply retroactively. *See* ***Brown***, 259 Wis. 2d 630, ¶2. The court noted that new rules of *criminal procedure* generally apply retroactively "only to those cases pending on direct review or not yet final," but "*[t]he standards for civil procedural rules differ in that retroactive application is presumed*." ***Id.***, ¶13 (emphasis added). The court then applied the ***Chevron*/*Kurtz*** factors to determine "whether the application of the new rule [at issue in ***Brown***] should be retroactive or prospective." ***Id.***, ¶15. After applying those factors, the court concluded "neither a prospective nor a fully retroactive application of the [new] rule … is warranted. A limited retroactive application best promotes the operation of the rule and produces the most equitable results." ***Id.***, ¶26. The court therefore held that the new rule at issue in ***Brown*** "applie[d] retroactively to cases on direct appeal that were not finalized before the date we adopted the … rule and to pro se prisoners who had raised the issue in habeas petitions that were still pending before this court." ***Id.***, ¶37.

Brown appears to demonstrate that, when faced with a retroactivity question regarding a civil procedural rule, the Wisconsin Supreme Court presumes that rule applies retroactively to all cases, and it then uses the ***Chevron*/*Kurtz*** factors to determine whether retroactive application of the rule should be limited, either in full or in part. ***Brown*** is therefore inconsistent with Brenizer's assertion that new civil procedural rules can never be retroactively applied on collateral attack.

same defendant's criminal sentence would commence at noon on the day of sentencing. *See* ***Szulczewski***, 216 Wis. 2d at 499-500. The ***Szulczewski*** court's holding—that, in order for an NGI commitment to take precedence, a circuit court must stay the defendant's criminal sentence—was not clearly foreshadowed by any preexisting legal authority.

¶39 Moreover, before ***Szulczewski*** was issued, neither litigants nor circuit courts could have foreseen the specific factors the ***Szulczewski*** court would ultimately require circuit courts to consider when deciding whether to impose a stay. In addition, we observe the committing court in this case clearly believed the amended commitment order was sufficient to ensure Brenizer would be committed to DHS custody for life, unless his commitment was terminated under WIS. STAT. § 971.17(5). Neither the court nor the parties appear to have anticipated that a stay of Brenizer's sentences was required in order for him to be placed in DHS custody after his sentences and commitment order were both entered. This is evidenced by the fact that, even though Brenizer's sentences were not stayed, he was placed in DHS custody immediately following his sentencing and commitment hearing, and he remained there for nearly twenty years before he was transferred to the custody of DOC. Under these circumstances, the first ***Chevron***/***Kurtz*** factor weighs heavily against retroactively applying ***Szulczewski*** to Brenizer's amended commitment order.

¶40 Under the second ***Chevron***/***Kurtz*** factor, we must consider whether retroactive application of the new rule "will further or retard its operation." ***Kurtz***, 91 Wis. 2d at 109 (quoting ***Chevron***, 404 U.S. at 106). Under the circumstances of this case, we conclude this factor is essentially neutral.

¶41 The State asserts the second ***Chevron***/***Kurtz*** factor weighs in favor of retroactive application of ***Szulczewski*** because "it is difficult to see how retroactive application … to Brenizer's NGI commitment and sentences would adversely impact operation of this rule." We agree with the State that retroactively applying ***Szulczewski*** to Brenizer's amended commitment order would not adversely impact the new rule's operation. On the other hand, however, we fail to see how retroactive application of ***Szulczewski*** to this case would "further" the operation of ***Szulczewski***'s holding. *See* ***Kurtz***, 91 Wis. 2d at 109 (quoting ***Chevron***, 404 U.S. at 106).

¶42 ***Szulczewski*** held that an NGI commitment constitutes "legal cause" to stay a prison sentence. ***Szulczewski***, 216 Wis. 2d at 507. Accordingly, a circuit court "may exercise its discretion in determining whether to stay execution of a prison sentence imposed on an NGI acquittee." ***Id.*** ***Szulczewski*** clarified the manner in which circuit courts should exercise that discretion. ***Id.*** Thus, under ***Szulczewski***, the determination of whether to stay a prison sentence, in order to give precedence to a defendant's NGI commitment, is squarely within the province of the circuit court.

¶43 Here, the committing court did not stay Brenizer's criminal sentences, as required by ***Szulczewski***. Nevertheless, it is clear from the plain language of the amended commitment order that the court intended Brenizer's NGI commitment to take precedence over his sentences. Under these circumstances, retroactively applying ***Szulczewski*** to contravene the committing court's clear intent does not further the operation of ***Szulczewski***'s holding, which left to circuit courts the determination of whether an NGI commitment or criminal sentence should take precedence.

¶44 The third ***Chevron***/***Kurtz*** factor requires us to consider "the inequity imposed by retroactive application." ***Kurtz***, 91 Wis. 2d at 109 (quoting ***Chevron***, 404 U.S. at 106). As with the second factor, the third ***Chevron***/***Kurtz*** factor does not weigh strongly in favor of either party because, regardless of whether we retroactively apply ***Szulczewski***, some inequity will result.

¶45 On one hand, retroactively applying ***Szulczewski*** to Brenizer's amended commitment order would be inequitable to Brenizer. As noted above, ***Szulczewski***'s holding was not clearly foreshadowed by preexisting legal authority. Thus, the committing court was unaware when it issued Brenizer's amended commitment order that, if it wanted Brenizer's NGI commitment to take precedence over his criminal sentences, it needed to stay the sentences. Nonetheless, the amended commitment order clearly indicates the court intended Brenizer's NGI commitment to take precedence. The order expressly states Brenizer is to be "committed to [DHS] with placement in institutional care at the Mendota Mental Health Institute for a period of life unless said placement is terminated under [WIS. STAT. §] 971.17(5)." The judgment of conviction, which is silent on the issue of Brenizer's NGI commitment, does not contradict the circuit court's clear intent, as expressed in the amended commitment order, that the NGI commitment should take precedence. Retroactively applying ***Szulczewski*** to allow DHS to ignore the unambiguous language of the amended commitment order would contravene the committing court's clear intent. Moreover, it would do so based on a subsequently imposed procedural requirement that the committing court could not have foreseen.

¶46 On the other hand, however, failing to apply ***Szulczewski*** retroactively would, in a different sense, be inequitable to the State. As the State notes, Brenizer was in DHS custody for nearly twenty years, during which time he

was also subject to two valid and unstayed life sentences. The State asserts that, because the amended commitment order described Brenizer's NGI commitment as "concurrent with" his criminal sentences, he has received the benefit of having "served" the unstayed criminal sentences during the nearly twenty years he spent in DHS custody. As a result, the State contends DOC has calculated Brenizer's parole eligibility date as January 18, 2018. Conversely, if the circuit court had complied with ***Szulczewski*** and stayed Brenizer's criminal sentences, Brenizer would be subject to the full length of his sentences upon termination of his NGI commitment and would not be deemed to have "served" any portion of those sentences during his commitment.[13]

¶47 The third ***Chevron***/***Kurtz*** factor is essentially neutral because, regardless of whether we apply ***Szulczewski*** retroactively, some inequity will result. As noted above, the second factor is also neutral. However, the first ***Chevron***/***Kurtz*** factor weighs strongly against retroactively applying ***Szulczewski*** to Brenizer's amended commitment order. Under these circumstances, we conclude that, assuming the new procedural rule announced in ***Szulczewski*** qualifies as a civil rule, the presumption of retroactive application has been overcome.

¶48 Because ***Szulczewski*** does not apply retroactively to Brenizer's amended commitment order, it cannot be used to invalidate the clear language in that order requiring Brenizer to be committed to DHS custody for life, unless his commitment is terminated under WIS. STAT. § 971.17(5). DHS's decision to

[13] The State does not argue that, if we rule in Brenizer's favor and reverse the order denying his motion to be returned to DHS custody, Brenizer's criminal sentences should be deemed as "stayed," pursuant to either ***Szulczewski*** or some other principle of law.

transfer Brenizer to DOC custody was therefore improper and without authority, as it contravened the plain language of the amended commitment order. Accordingly, the circuit court erred by denying Brenizer's motion challenging his transfer to DOC custody. We reverse the circuit court's order and remand for the court to enter an order granting Brenizer's motion and directing that he be transferred back to the custody of DHS.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.