STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP982-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMIE R. ANDERSON,

Defendant-Appellant.

APPEAL FROM AN A DECISION AND ORDER DENYING DEFENDANT'S PETITION FOR SENTENCE ADJUSTMENT, ENTERED IN THE MONROE COUNTY CIRCUIT COURT, THE HONORABLE MARK L. GOODMAN PRESIDING

SUPPLEMENTAL BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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QUESTION PRESENTED

Under Wisconsin's sentence adjustment statute, certain offenders may petition for sentence adjustment, but only after serving the "applicable percentage" of their confinement. The statute provides that for Class F through I felonies, the applicable percentage is 75%, and for Class C through E

felonies, the applicable percentage is 85%. The statute does not provide an applicable percentage for Class A and B felonies, or misdemeanors. May a misdemeanor offender obtain sentence adjustment under the statute?

- The circuit court concluded that misdemeanant offenders are not eligible to petition for sentence adjustment under Wis. Stat. § 973.195(1r),[1] and therefore denied Anderson's petition.

- This court should affirm the circuit court's decision, and conclude that the statute's exclusion of an "applicable percentage" for misdemeanor offenses precludes sentence adjustment for misdemeanants under Wis. Stat. § 973.195(1r).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. This case may be resolved by applying established principles of statutory interpretation to the facts of record and materials presented in the briefs. *See* Wis. Stat. § (Rule) 809.22. Publication, however, is warranted, based on the novelty of the question presented and the likelihood that the situation presented in this case will recur.

STATEMENT OF THE CASE

In accordance with Wis. Stat. § (Rule) 809.19(3)(a)2., the State elects not to present a supplemental statement of the case. Instead, relevant facts will be set forth in the Argument section.

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[1] Unless otherwise indicated, all references to the Wisconsin Statutes are to the 2013-14 edition.

ARGUMENT

I. Summary of the argument.

The State of Wisconsin, by the Wisconsin Department of Justice as supplemental-respondent, submits this brief to provide the court with a broader picture of the history and practice surrounding the sentence adjustment provision, Wis. Stat. § 973.195(1r), as well as to supplement the adversarial position expressed in the Respondent's opening brief.[2] At the same time, the State acknowledges that the practice of the Department of Corrections (DOC) has been to verify misdemeanants' petitions after the offenders complete 75% of their confinement, as occurred in Anderson's case (*see* A-Ap. B and C). While the State maintains that DOC's approach is not supported by the language of Wis. Stat. § 973.195 (or the statute's legislative history), the State takes no position on the propriety of DOC's approach as a practical matter. Ultimately, the State simply seeks a published decision from this court regarding whether Wis. Stat. § 973.195(1g) and (1r) allow misdemeanants to petition for sentence adjustment, and, if so, when they may petition.

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[2] The State agrees with Anderson's mootness analysis. Although Anderson has now been released from confinement and would not benefit from a decision in his favor, this case presents an issue of significant public importance to misdemeanants, prosecutors, corrections officials, and the courts. And, given the timing of misdemeanants' petitions in relation to the termination of their confinement (usually within a few months of release, based on DOC's use of the 75% standard), this situation will almost certainly continue to evade judicial review before any individual misdemeanant is released. Accordingly, under the rationale set forth in Anderson's brief (pp. 13-15), and the established exceptions to the mootness doctrine, *see, e.g.*, *In re Commitment of Schulpius*, 2006 WI 1, ¶ 15, 287 Wis. 2d 44, 707 N.W.2d 495, the State agrees that this case is as appropriate a vehicle as any to review the question presented.

That said, the State's statutory argument is straightforward: because the language of the sentence adjustment statute, Wis. Stat. § 973.195(1g) and (1r), does not provide any mechanism by which misdemeanants may petition for sentence adjustment, the statute should be construed as precluding sentence adjustment for misdemeanants. Under Wis. Stat. § 973.195(1r)(a), one prerequisite to filing a sentence adjustment petition is the service of the "applicable percentage" of confinement. Because only two applicable percentages are provided—both for certain classes of felony offenses—a misdemeanant cannot satisfy one of the prerequisites to a sentence adjustment petition, and therefore cannot demonstrate that he would be entitled to adjustment under the plain language Wis. Stat. § 973.195(1r).

Further, even if this court were to agree with Anderson's assertion that the sentence adjustment statute is ambiguous, and thereon turn to extrinsic sources to ascertain the statute's meaning, the argument against allowing sentence adjustment for misdemeanants becomes even stronger. Extrinsic sources—including legislative history and contemporaneous analyses surrounding the enactment of the sentence adjustment statute—suggest that the sentence adjustment provision was a narrowly drawn compromise, solely intended to afford some opportunity for felons to obtain early release under Truth-in-Sentencing's lengthier sentences for felonies. Nothing in the legislative history suggests that that provision was intended to extend any benefit to misdemeanants, whose sentences remained largely unaffected by Truth-in-Sentencing. Most notable, when the sentencing statutes were amended to require bifurcated sentences for enhanced misdemeanors, the legislature declined to provide an "applicable percentage" for misdemeanors under the sentence adjustment statute—even though the two provisions were part of the same Act.

Finally, any attempt to craft an applicable percentage for misdemeanors would disregard substantial distinctions that the legislature has maintained between felonies and misdemeanors. Additionally, any percentage that might be adopted would be arbitrary, in light of the lack of legislative guidance as to what percentage would be appropriate for misdemeanors in contrast with the percentages applied to felonies.

II. Under the plain meaning of Wis. Stat. § 973.195, service of the "applicable percentage" of confinement time is a prerequisite to filing a sentence adjustment petition. Because misdemeanor offenders are not able to satisfy this statutory prerequisite, the sentence adjustment statute precludes adjustment for misdemeanants.

A. General principles of statutory interpretation.

The goal of statutory interpretation is "to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. The process begins with an examination of the language of the statute. *Id*. ¶ 45. If the meaning of the statutory language is plain, a court need not go any further. *Id*.

The plain meaning of statutory language is dependent on context, as well as the structure of the statutory provisions at issue. *See id.* ¶ 46. Statutory language is therefore "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*

Statutory interpretation (and the corresponding inquiry into ambiguity) therefore "focuses first . . . on the language of

the statute, not the competing interpretations of it offered by lawyers or judges." *Bruno v. Milwaukee Cnty.*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656. If the statutory language yields a plain, clear meaning, there is no ambiguity, and the statute should be applied according to this meaning. *See id.*

Statutory interpretation, of course, "involves the ascertainment of meaning, not a search for ambiguity." *Id.* ¶ 25. A statute should be deemed ambiguous only if the court concludes, after examining the language, context, and structure of the statute, that "there is more than one reasonable interpretation" of the terms at issue. *See id.* ¶ 22. When a statute is deemed ambiguous, a court may turn to extrinsic sources such as legislative history to ascertain the legislature's intent. *See Kalal*, 271 Wis. 2d 633, ¶ 50. Legislative history may also be used to confirm or verify a plain-meaning interpretation of the statutory language. *See id.* ¶ 51; *see also Anderson v. Aul*, 2015 WI 19, ¶¶ 109-12, __Wis. 2d __, __ N.W.2d __ (Ziegler, J., concurring) (opinion of the court).

B. Statutory language alone demonstrates that misdemeanor offenders cannot obtain sentence adjustment under Wis. Stat. § 973.195.

The relevant sentence adjustment provisions, Wis. Stat. § 973.195(1g) and (1r), provide as follows:

> (1g) Definition. In this section, "applicable percentage" means 85% for a Class C to E felony and 75% for a Class F to I felony.
>
> (1r) Confinement in prison.
>
> (a) Except as provided in s. 973.198, an inmate who is serving a sentence imposed under s. 973.01 for a crime other than a Class B felony may petition the sentencing court to adjust the sentence if the inmate has served at least the applicable percentage of the term of confinement in prison portion of the sentence.

Under the plain language of Wis. Stat. § 973.195(1r), a confined individual must meet two prerequisites before filing a sentence adjustment petition: (1) the individual must be serving a bifurcated sentence under Wis. Stat. § 973.01; and (2) the individual must have served the "applicable percentage" of his confinement time, as provided in § 973.195(1g).

With regard to the first condition, under Wis. Stat. § 973.01(1), an offender convicted of an enhanced misdemeanor may be sentenced to confinement in the Wisconsin state prisons, and such a sentence must be bifurcated. *See State v. Lasanske*, 2014 WI App 26, ¶¶ 8-9, 353 Wis. 2d 280, 844 N.W.2d 417, *review denied sub nom. State v. Lasanke*, 2014 WI 122, __ Wis. 2d __, 855 N.W.2d 694. A sentence on an enhanced misdemeanor in which prison is ordered thus constitutes a "sentence imposed under s. 973.01" for purposes of the sentence adjustment statute.[3] The State therefore does not dispute that Anderson satisfies the first prerequisite for filing a petition under § 973.195(1r).

Turning then to the second condition, service of the applicable percentage of confinement, there is no question that Wis. Stat. § 973.195(1g) does not provide an applicable percentage of confinement time for misdemeanor offenses. Frankly, this omission should end the inquiry: without any statutory provision establishing the method by which a

[3] It is worth noting here that, even under Anderson's broad reading of Wis. Stat. § 973.195(1r), not all misdemeanants would be able to petition for sentence adjustment: only those misdemeanants whose sentences are bifurcated as a result of penalty enhancers would be able to satisfy the bifurcated-sentence prerequisite under the sentence adjustment provision. As discussed in greater depth *infra*, Section II.C., the effect of this interpretation would be to afford a benefit to those misdemeanants whose sentences are increased due to penalty enhancers, while denying any similar benefit to those whose offenses did not warrant penalty enhancers.

misdemeanor offender may satisfy the second prerequisite for seeking sentence adjustment, the statute unambiguously precludes those offenders from obtaining sentence adjustments.

Anderson nonetheless argues that, because some bifurcated misdemeanor sentences are contemplated under Wis. Stat. § 973.01(1), some method must exist by which misdemeanants may satisfy the applicable-percentage prerequisite under Wis. Stat. § 973.195. He asserts that the language of Wis. Stat. § 973.195 suggests that misdemeanants *may* petition but simply fails to provide *when* they are eligible to petition, and that therein lies the ambiguity of the statute (*see* Anderson's brief at 4).

But this purported ambiguity only arises by side-stepping a complete reading of the statute. Rather than reading the two prerequisites as parallel limitations on the ability to obtain adjustment, Anderson presupposes that misdemeanor offenders must be entitled to seek sentence adjustment because some misdemeanor sentences (i.e., those subject to penalty enhancers) will satisfy the first prerequisite under Wis. Stat. § 973.195. This reasoning suggests that if an offender can satisfy one of the prerequisites, the second statutory prerequisite is effectively irrelevant.

The question presented, however, is not simply *when* a misdemeanant may petition for adjustment, but rather *whether* a misdemeanor offender may obtain sentence adjustment under the language of Wis. Stat. § 973.195. This question requires examining the entirety of the statute's language, as well as the context of the provision at issue. *See* 2A Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 47:2 (7th ed. 2014) (advocating "whole act" interpretation of statutes, so that statutory language will be interpreted in the broader context of the overall act of which it is a part); *see also Force ex rel. Welcenbach v. Am. Family Mut. Ins. Co.*, 2014 WI 82,

¶ 31 n.19, 356 Wis. 2d 582, 850 N.W.2d 866 (recognizing that statutory history, including "changes the legislature has made over the course of several years," may be considered as part of a plain meaning analysis) (internal quotations omitted). A more comprehensive reading of Wis. Stat. § 973.195 demonstrates that the statute is not intended to provide misdemeanor offenders any mechanism for obtaining sentence adjustment.

C. Statutory context demonstrates that the legislature's omission of an applicable percentage for misdemeanors precludes sentence adjustment for misdemeanants under Wis. Stat. § 973.195.

Wisconsin Stat. § 973.195 was created as a part of the large-scale amendments to the criminal sentencing regime colloquially known as "Truth-in-Sentencing II" (TIS-II). *See generally* Michael B. Brennan et al., *Fully Implementing Truth–in–Sentencing*, Wis. Lawyer, Nov. 2002 (R-Ap. 101-19); *see also State v. Stenklyft*, 2005 WI 71, ¶ 18-24, 281 Wis. 2d 484, 697 N.W.2d 769. Specifically, Wis. Stat. § 973.195 was created by 2001 Wis. Act 109, § 1143m, and, for current purposes, was identical to the current phrasing of the statute. In particular, Act 109 provided the same two "applicable percentages" that are now included in Wis. Stat. § 973.195(1g): 75% for Class F through I felonies, and 85% for Class C through E felonies.

Act 109 also effected one other change relevant to the current analysis: the Act amended Wis. Stat. § 973.01, governing the structure of bifurcated sentenced, to require that certain misdemeanor sentences be bifurcated between confinement time and extended supervision. *See* 2001 Wis. Act 109, § 1114. Previously, Wis. Stat. § 973.01 had only required bifurcation of felonies, but Act 109 amended that provision to require bifurcation of any misdemeanor sentence in which prison was ordered, which, by the nature of misdemeanor

sentences, means that only those misdemeanors subject to penalty enhancers would be bifurcated. *See Lasanske*, 353 Wis. 2d 280, ¶ 8.

Thus, within the same Act, the legislature actively modified one section to include a reference to bifurcation of certain misdemeanor sentences, while at the same time declining to modify Wis. Stat. § 973.195(1g) to provide any "applicable percentage" for those misdemeanor sentences now included under Wis. Stat. § 973.195(1r). Construed in this context, the omission of an "applicable percentage" for misdemeanors is highly probative. *See, e.g.*, 2A Singer & Singer, § 47:24 (discussing canon of construction "expressio unius est exclusio alterius," noting that inclusion of a statutory term in one section is typically construed to mean that the term's exclusion in another section expresses an intended limitation on the term's application); *contra* Anderson's brief at 11 (suggesting that the parallel enactment of the provisions suggests that the legislature intended an implicit carryover). Because misdemeanors were unquestionably on the legislature's radar when enacting Act 109, the reference to misdemeanors in one section and their exclusion in a closely related statute strongly suggests that the legislature intended to limit sentence adjustment to the particular felonies set forth in Wis. Stat. § 973.195(1r).

Also noteworthy when examining context and statutory structure is that the sweeping changes effected by the first phase of Truth-in-Sentencing (TIS-I) were limited to felony offenses. *See, e.g.*, 1997 Wis. Act 283, § 419 (creating Wis. Stat. § 973.01, which applied only to felonies); *see also* Brennan et al., *Fully Implementing Truth-in-Sentencing*, at 11 (R-Ap. 101) ("The new law [TIS-I] was to apply for the first time to felonies committed on and after Dec. 31, 1999."). The acknowledged effect of TIS-I was to increase felony sentences, a situation that TIS-II was partly intended to ameliorate. *See State v. Tucker*,

2005 WI 46, ¶ 20, 279 Wis. 2d 697, 694 N.W.2d 926. But other than making enhanced misdemeanors subject to bifurcation under Wis. Stat. § 973.01(1), TIS-II did not make any significant changes to misdemeanor sentences, as had occurred for felony sentences under TIS-I. *See generally* 2001 Wis. Act 109, §§ 1114–1143m (sole reference to "misdemeanor" in TIS-II amendments was in Wis. Stat. § 973.01(1)). Accordingly, given the limited effect that Truth-in-Sentencing had on misdemeanor offenses, the absence of any "applicable percentage" for misdemeanors in Wis. Stat. § 973.195 is unremarkable.

Finally, construing Wis. Stat. § 973.195(1r) to preclude sentence adjustment for misdemeanants avoids the absurd result of creating a benefit for more serious, enhanced misdemeanor offenses, while withholding any benefit for less serious, un-enhanced offenses. That is, although enhanced misdemeanors may satisfy the first prerequisite for sentence adjustment under Wis. Stat. § 973.195(1r), reading an applicable percentage into the statute would allow those offenders convicted of an enhanced misdemeanor to petition for adjustment, but would have no effect on those offenders convicted of the same offense but without any penalty enhancers.

To illustrate: Persons X and Y each commit nearly identical batteries. Battery is a Class A misdemeanor under Wis. Stat. § 940.19(1), with a maximum period of imprisonment of nine months. *See* Wis. Stat. § 939.51(3)(a). Person X, however, is a repeater, and therefore the nine month maximum can be increased to two years. *See* Wis. Stat. §§ 939.51(3)(a) and 939.62(1)(a); *see also Lasanske*, 353 Wis. 2d 280, ¶ 9. Assuming that sentence adjustments are extended to misdemeanants, Person Y, who is not subject to an enhancer (and therefore would not be subject to a bifurcated sentence under Wis. Stat. § 973.01(1)), would not be eligible to petition for an adjustment, even if he received a maximum sentence. On the other hand,

Person X, a repeater, could petition for adjustment. Moreover, under some scenarios X could serve nearly the same amount of time in confinement as his non-repeater counterpart, even if X's initial period of confinement was longer.[4] Creating such a benefit for more serious offenders while denying the benefit to less culpable offenders would be absurd, particularly in the absence of any legislative indication that the more serious offenders merit a special opportunity for early release. Avoiding this absurdity requires nothing more than applying Wis. Stat. § 973.195(1r) as it is written, so that no misdemeanants may petition for sentence adjustment.

*****

As the preceding discussion suggests, the meaning of the statutory language used in Wis. Stat. § 973.195 is bound up with numerous statutory provisions, and is affected by multiple amendments over the years. While such statutory history is typically accepted as part of a plain-meaning analysis, *see Anderson*, 2015 WI 19 ¶ 111 (Ziegler, J., concurring) (opinion of the court), the State acknowledges that the further one delves into such legislative materials, the more the analysis looks like legislative history research, as is typically reserved to situations in which ambiguity is found. Accordingly, although the State maintains that the plain language of Wis. Stat. § 973.195 precludes adjustment for misdemeanants, the following section assumes that the statute is ambiguous as to whether misdemeanants may petition for sentence adjustment. But as demonstrated below, extrinsic sources only buttress the conclusion that the legislature did not intend to extend sentence adjustment to misdemeanants under § 973.195.

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[4] For example, if Y received a nine-month sentence and X received a twelve-month sentence, X could seek adjustment after serving just nine months under the 75% approach advocated by Anderson and applied by DOC.

III. The legislative histories of Wis. Stat. § 973.195 and related statutes demonstrate that sentence adjustment is not intended to be available for misdemeanants under the statute.

A. *Tucker*'s finding of ambiguity in Wis. Stat. § 973.195 does not support Anderson's conclusion that the statute should extend to misdemeanors.

Anderson's ambiguity argument relies heavily on *State v. Tucker*, which examined whether the sentence adjustment provision was intended to apply only to felony sentences imposed under TIS-II, or also to felony sentences under TIS-I. *See Tucker*, 279 Wis. 2d 697, ¶¶ 14-17. The *Tucker* court concluded that the statute was ambiguous as to whether a TIS-I offender could petition, and construed the statute to extrapolate an "applicable percentage" for TIS-I offenses.

Tucker's conclusion, however, is hardly dispositive of the question presented here. *See Seider v. O'Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659 (noting that, depending on the facts presented, the same statute may be found ambiguous in one circumstance and unambiguous in another). Moreover, as demonstrated below, even assuming that the statute is ambiguous regarding whether misdemeanants may petition, and that that ambiguity might suggest that the statute should be expanded to allow petitions by misdemeanants, the arbitrariness of determining *when* a misdemeanant might petition counsels against attempting to craft any "applicable percentage" for misdemeanors, and thus against expanding the scope of the statute.

In *Tucker*, the question presented was whether a TIS-I offender could petition for sentence adjustment under Wis. Stat. § 973.195(1r), given that that statute is structured to address TIS-II's nine felony classes, without any reference to

TIS-I's six felony classes. *See Tucker*, 279 Wis. 2d 697, ¶¶ 14, 16. The *Tucker* court concluded that the sentence adjustment provision was ambiguous as to whether and how that provision applied to TIS-I felonies because the TIS-I felony classification system did not include Class F-I felonies, which were included under Wis. Stat. § 973.195(1g); and the statute did not provide an "applicable percentage" for felonies that had been unclassified under TIS-I. *See id.* ¶¶ 16-17.

In concluding that the statute was ambiguous, the *Tucker* court reasoned that because a felon sentenced under TIS-I was serving a bifurcated sentence under Wis. Stat. § 973.01(1), the statute could reasonably be construed to allow those offenders to petition for adjustment. *See id.* ¶¶ 16-17. In its analysis, the *Tucker* court emphasized the ease with which Wis. Stat. § 973.195 could be construed to apply to TIS-I sentences, as well as the need to address the lengthier felony sentences imposed under TIS-I. *See id.* ¶¶ 20-23. Because TIS-I sentences were most in need of adjustment, and because defining the "applicable percentage" for those TIS-I sentences merely required superimposing the TIS-II classification onto a particular TIS-I offense, the court concluded that the legislature had intended the sentence adjustment provision to apply to TIS-I offenders. *See id.*

Notably, the *Tucker* court indicated that its conclusion was grounded in the ease with which an applicable percentage could be ascertained for TIS-I felonies. *See id.* ¶¶ 23-24. In particular, the court acknowledged that it was "sensitive" to the reality that there would be some offenses for which a TIS-II classification could not simply be superimposed to ascertain an "applicable percentage." *See id.* ¶ 24. Reserving for another day the question of how to address such offenses, the court stated that "in the vast majority of cases, a court will simply look to how the previously unclassified crime is classified under TIS-II in order to determine the 'applicable percentage.' There is no

reason why the analysis we set forth today cannot apply to persons falling into this category." *Id.*

The question presented in the current case was therefore left unaddressed by *Tucker*. What is more, the *Tucker* decision suggests that the court was wary of crafting an "applicable percentage" for offenses where the legislature had not crafted one, or had not strongly suggested what the applicable percentage should be. *See id*. Such wariness is well-founded as to misdemeanor offenses, as there is no legislative indication that those offenses should be subject to sentence adjustment.

B. The progression of Truth-in-Sentencing legislation and its amendments shows that the legislature did not intend misdemeanants to be eligible for sentence adjustment under Wis. Stat. § 973.195.

1. Contemporaneous analyses of the sentence adjustment provision.

Perhaps the strongest evidence of the legislature's intended exclusion of misdemeanors from the sentence adjustment process is the treatment of misdemeanors in 2001 Wis. Act 109. *See supra*, Section II.C. That Act, which brought enhanced misdemeanors into the purview of Wis. Stat. § 973.01(1)'s bifurcated sentence regime, also created the sentence adjustment provision without any reference to misdemeanor offenders. This disparate treatment within the same Act is particularly probative of the legislature's intention that misdemeanants not be allowed to seek sentence adjustment.

The implicit meaning of the legislature's omission of misdemeanors is further borne out in contemporaneous analyses of the effects of the TIS-II amendments. For example,

commentators noted that a version of the sentence adjustment provision was proposed by the Criminal Penalties Study Committee (CPSC), which had been charged with the task of analyzing TIS-I and suggesting remedies for perceived shortcomings of the legislation. *See* Brennan et al., *Fully Implementing Truth-in-Sentencing*, at 54 & n.80 (R-Ap. 109, 119). The CPSC's proposed provision, however, was not adopted; instead the provision that became Wis. Stat. § 973.195 was the result of legislative compromise, and was more limited in scope than what the CPSC had suggested. *See id.*; *see also* John A. Birdsall & Raymond M. Dall'Osto, *Problems with the New Truth-in-Sentencing Law*, Wis. Lawyer, Nov. 2002, at 13 (R-Ap. 120-21); *see also* Michael B. Brennan, *The Pendulum Swings: No More Early Release*, Wis. Lawyer, Sep. 2011, at 6 (R-Ap. 122). For example, then-judge Michael Brennan, who was staff counsel for the CPSC, suggested that while the adjustment provision might be construed to include adjustment for enhanced misdemeanors based on the bifurcation provision of Wis. Stat. § 973.01(1), the legislature had declined to provide any applicable percentage, instead including mechanisms for petitioning only on Class C through I felonies. *See* Brennan et al., *Fully Implementing Truth-in-Sentencing*, at 54 & n.81 (R-Ap. 109, 119).

Similarly, Professor Thomas Hammer, reporter for the CPSC, viewed the sentence adjustment statute as a compromise provision, but one that removed only "a modest amount of 'truth' from felony sentences." *See* Thomas J. Hammer, *The Long and Arduous Journey to Truth-in-Sentencing in Wisconsin*, Fed. Sentencing Rptr., Oct. 2002, at 17-18 (R-Ap. 131-32). Hammer observed that this removal of some "truth" from Truth-in-Sentencing had been intended to address some concerns that TIS-I's longer, determinate felony sentences cried out for a mechanism by which felony offenders could obtain early release. *See id.* Professor Hammer also noted that the adjustment provision was limited to "mid-range" and "lower-end" felonies. *See id.* at 17 (R-Ap. 131). Nothing in Professor

Hammer's analysis suggests that the adjustment provision was intended to extend to misdemeanor sentences.[5] *See id.*

These contemporaneous commentaries by individuals intimately involved in the adoption of TIS-II are particularly useful because they reaffirm the legislature's silence as to whether the sentence adjustment provision was intended to extend to misdemeanor offenses. Perhaps tellingly, most documents speak of "felons" petitioning for adjustment, and discuss the two different "applicable percentages" to which those felons would be subject. *See, e.g.*, Wisconsin Legislative Reference Bureau, *Wisconsin Briefs, Truth-in-Sentencing and Criminal Code Revision*, 4 (Aug. 2002) (R-Ap. 136). These contemporaneous analyses therefore suggest that misdemeanor offenses were not intended to be subject to sentence adjustment under the initial version of Wis. Stat. § 973.195.

2. Subsequent legislation and DOC rulemaking affecting sentence adjustment.

At least two other developments in the Truth-in-Sentencing arena are relevant in ascertaining the legislature's intent in the sentence adjustment provision. First, in 2009, another relatively large-scale legislative modification was intended to provide methods by which offenders could obtain early release. *See* Brennan, *The Pendulum Swings: No More Early Release*, at 6 (R-Ap. 122-23); *see generally* 2009 Wis. Act 28. That Act expanded or created a number of mechanisms to facilitate early release, including risk reduction sentences, the earned release and challenge incarceration programs, and positive

[5] Other commentators echoed the limited scope of the sentence adjustment provision, noting, for example, that the provision "applies only to some classes of felonies," and that its restrictions "severely limit[ed]" its utility. *See* Birdsall & Dall'Osto, *Problems with the New Truth-in-Sentencing Law*, at 13 (R-Ap. 120-21).

adjustment time. *See* Brennan, *The Pendulum Swings: No More Early Release*, at 6 (R-Ap. 122-23). Act 28, however, did not expand the sentence adjustment provision under Wis. Stat. § 973.195, and actually limited the application of that provision to sentences imposed before October 1, 2009. *See id.* at 7 (R-Ap. 124).

Following Act 28, the DOC enacted an emergency rule intended to implement the new legislation. *See* Drafting file for Wis. Admin Code § DOC 302.36, Emergency Rule 0939 (Dec. 31, 2009), *available at* http://docs.legis.wisconsin.gov/code/emergency_rules/all/. (hereinafter Emergency Rule 0939) (R-Ap. 138-50). The emergency rule interpreted Wis. Stat. § 302.113 (2009-10), which had been amended by Act 28 to provide that misdemeanor offenders who earned positive adjustment time could petition for adjustment. *See* Wis. Stat. § 302.113(1) (2009-10). With language nearly identical in certain respects to Wis. Stat. § 973.195's sentence adjustment provisions, Wis. Stat. § 302.113 provided that DOC could release to extended supervision qualifying offenders serving a bifurcated sentence for a misdemeanor or Class F through I felony "using the sentence modification procedure described in this subsection." *See* Wis. Stat. § 302.113(1) and (9h) (2009-10). The DOC was directed to enact rules to implement this procedure. *See* Wis. Stat. § 302.113(9h)(b) (2009-10).

The DOC's emergency rule thus created a mechanism for sentence adjustment separate from Wis. Stat. § 973.195 but which had a similar practical effect to that statutory provision, namely, allowing certain offenders to petition DOC for sentence adjustment after serving 75% or 85% of their sentences. Most notable for current purposes is the rule's inclusion of misdemeanors in the provision allowing for a sentence adjustment petition after an offender served 75% of his confinement. This emergency rule became a final rule on

December 1, 2010. *See* Wis. Admin. Code § DOC 302.36(1); 2009 Clearinghouse Rule 120.

It appears that that rule, enacted pursuant to Wis. Stat. § 302.113 (2009-10), is what has formed the basis for DOC's current treatment of misdemeanants' petitions under Wis. Stat. § 973.195, whereby DOC processes those petitions upon a misdemeanant's completion of 75% of his confinement time (*see* Anderson's brief at 12-13). Putting aside whether DOC's rule should have ever been applied to petitions under Wis. Stat. § 973.195(1r), what is clear now is that any legislative support for a 75% standard for misdemeanants was eliminated when the relevant language in Wis. Stat. § 302.113 (2009-10) was repealed.

That repeal came about in 2011 Wis. Act 38, by which the legislature eliminated or altered many of the early release provisions that had been enacted in 2009 Wis. Act 28. *See* Brennan, *The Pendulum Swings: No More Early Release*, at 7, 60-61 (R-Ap. 123-26). Notably, 2011 Wis. Act 38 repealed those references to misdemeanor offenders in Wis. Stat. § 302.113(1) that had been added by the 2009 amendment.[6] By doing so, 2011 Act 38 eliminated any statutory basis for a 75% standard for misdemeanants.

In addition to this express removal of the standard for misdemeanants under Wis. Stat. § 302.113(1) (2009-10), what is perhaps most telling is that, throughout all these changes, the legislature never adopted an "applicable percentage" for misdemeanants under Wis. Stat. § 973.195.

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[6] *See* 2011 Wis. Act 38, § 36. The Act also returned Wis. Stat. § 973.195 to its pre-2009 status, thereby allowing eligible felons sentenced after October 2009 to petition for adjustment. *See* Brennan, *The Pendulum Swings: No More Early Release*, at 60-61 (R-Ap. 125-26).

Currently, then, the statutes governing sentence adjustment do not include any references to misdemeanor offenders seeking adjustment. The DOC's practice of processing misdemeanants' petitions after 75% of their confinement thus rests solely on the agency's internal procedure, which was *never* grounded in the statutory language of Wis. Stat. § 973.195, and was instead apparently extrapolated from DOC's reading of its authority under § 302.113(9g). *See* Emergency Rule 0939, at 1-2 (R-Ap. 138-39).

Therefore, DOC's practice of processing misdemeanants' petitions offers little to assist in discerning the legislative intent of Wis. Stat. § 973.195. Moreover, DOC's processing of these misdemeanants' petitions has no practical effect other than allowing the petition to proceed to a court for a decision on the petition. *See* Wis. Stat. § 973.195(1r)(c). Rejecting the DOC's current approach would thus have minimal impact on courts' decisions to grant or deny such petitions. Most importantly, though, rejecting that approach would reaffirm the legislative intent underlying the adjustment provision.

C. Anderson's suggested "applicable percentage" for misdemeanors disregards meaningful legislative distinctions between felonies and misdemeanors, and represents an arbitrary designation without legislative support.

In attempting to reconcile what he views as statutory ambiguity regarding when misdemeanants should be able to petition, Anderson argues that the absence of any "applicable percentage" for misdemeanors in Wis. Stat. § 973.195(1g) is easily remedied by subjecting misdemeanants' petitions to the 75% standard that is currently applicable to Class F–I felonies (*see* Anderson's brief at 11-12). He argues that an enhanced Class A misdemeanor conviction exposes an offender to the same maximum confinement as would a conviction for a Class

I felony, so the two types of offenses should be subject to the same treatment with respect to sentence adjustment (*see id.*). But Anderson's arguments suggesting when a misdemeanant should be able to petition raise two significant considerations, both of which militate against construing Wis. Stat. § 973.195 to extend sentence adjustment to misdemeanors.

First, although the two categories of offenses may be similar in terms of confinement, the legislature nonetheless chose to classify them differently. That distinction represents a clear expression of legislative intent, and is entitled to deference. *Cf. State ex rel. Gaynon v. Krueger*, 31 Wis. 2d 609, 620, 143 N.W.2d 437 (1966) (noting that decision to upgrade classification of offense from misdemeanor to felony "requires a clear expression of intent of the legislature; it should not be left to indirection and circuity"). The legislature weighs various factors when designating offenses, and simply isolating for comparison the time of confinement ignores other significant considerations in designating an offense a felony or a misdemeanor. Indeed, by definition, there are fundamental differences between felonies and misdemeanors, suggesting an intended difference in kind, not merely degree. *See State v. Thomas*, 2004 WI App 115, ¶ 29, 274 Wis. 2d 513, 683 N.W.2d 497 (recognizing legislative judgment in distinguishing offense as felony versus misdemeanor).

Moreover, regardless of any similarities between the confinement times for Class I felonies and Class A misdemeanors, Anderson's argument ignores the greater disparity between misdemeanors and the Class F felonies at the high end of the range of offenses for which the "applicable percentage" is 75%. This range, like the designation of felonies and misdemeanors, represents an exercise of legislative judgment, and should not be disturbed absent some indication that the legislature exceeded the scope of its authority in limiting the provision to certain felonies. *Cf. State v. Dried Milk*

Products Co-op, 16 Wis. 2d 357, 363, 114 N.W.2d 412 (1962) (holding that where legislature acts within its authority, "fairly debatable questions as to reasonableness, wisdom, and propriety of action, are not for the determination of the court but for the legislative body"). The legislature's decision regarding which offenses to include in any "applicable percentage" is a proper exercise of its authority to prescribe the terms of confinement and supervision. The applicable percentages set forth in Wis. Stat. § 973.195(1g) should therefore be sustained as written, without reading in an applicable percentage for misdemeanors.

Finally, and somewhat related to the previous point is that any "applicable percentage" chosen for misdemeanors would be arbitrary in light of the legislative silence on what might be an appropriate percentage. Thus, while Anderson's suggested 75% figure might be appropriate, it also might be too high in light of the substantial differences between felonies and misdemeanors. Given that Class F felonies are subject to the 75% requirement, an argument could be made that the "applicable percentage" for Class A misdemeanors should be lower, such as 70% or 65%. This murkiness highlights the impropriety of attempting to craft an appropriate percentage without any of the guidance that is presumed to accompany a legislative determination. Without such guidance, the lack of any applicable percentage for misdemeanors should be construed to preclude sentence adjustment for misdemeanants under Wis. Stat. § 973.195.

CONCLUSION

Based on the foregoing statutory analysis, including both the plain language and the legislative history of Wis. Stat. § 973.195, the State asks this court to affirm the circuit court's order denying Anderson's petition for sentence adjustment on the theory that Wis. Stat. § 973.195 does not allow petitions on misdemeanor offenses.

Dated this 2nd day of March, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,003 words.

Dated this 2nd day of March, 2015.

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 2nd day of March, 2015.

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