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DISTRICT IV

Case No. 2018AP799-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES A. CULVER,

Defendant-Appellant.

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ON APPEAL FROM AN ORDER DENYING  
POSTCONVICTION RELIEF ENTERED IN DANE  
COUNTY CIRCUIT COURT, THE HONORABLE  
TIMOTHY C. SAMUELSON, PRESIDING

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**BRIEF OF PLAINTIFF-RESPONDENT**

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## **ISSUE PRESENTED**

In 2008, Defendant-Appellant James A. Culver pled no contest to operating a vehicle while intoxicated (OWI) as a fifth offense with minor passengers, an unclassified felony. Ten years later, he challenges as unlawfully excessive the extended supervision portion of his bifurcated sentence for that offense. Should Culver's sentence be commuted?

The postconviction court determined that Culver's sentence was lawful.

This Court should affirm.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The State does not request oral argument because the positions of the parties, the underlying facts, and the relevant legal authorities should be adequately set forth in their briefs.

Publication may be warranted if this Court's decision provides guidance on how to structure a bifurcated sentence for the unclassified felony offense of OWI with minor passengers.

## **INTRODUCTION**

In 2007, Culver drove with two of his children to Madison to purchase and consume drugs. He then drove his children home while intoxicated. Culver later pled no contest to OWI with minor passengers. It was not Culver's first OWI offense—it was his fifth.

Although initially charged as a Class H felony with a maximum six-year imprisonment term, the parties and the circuit court agreed that Culver's offense was actually an unclassified felony with a maximum 12-year imprisonment term. The court sentenced Culver to a total of seven years:

one year and six months' confinement followed by five years and six months' extended supervision. Culver completed his term of confinement and was released on extended supervision.

After being revoked and reincarcerated for the second time in 2016, Culver filed a pro se motion challenging his term of extended supervision as unlawfully excessive. He requested commutation, arguing that his extended supervision was two years and six months too long because a term of extended supervision for a Class H felony is capped at three years and cannot be extended by a penalty enhancer. The postconviction court disagreed and denied Culver relief.

This Court should affirm. Culver was not convicted of, or sentenced for, an enhanced Class H felony. As the amended judgment of conviction reflects, he pled no contest to an unclassified felony offense that was not tethered to the confinement and supervision caps applicable to Class H felony bifurcated sentences. Culver is judicially estopped from asserting otherwise.

Should this Court find that Culver is nonetheless entitled to relief, a remand for resentencing is the proper remedy.

## **STATEMENT OF THE CASE**

### **A. The charge against Culver and his plea.**

The State charged Culver in mid-2007 with one count of OWI as a fifth offense<sup>1</sup> with a minor passenger, in

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<sup>1</sup> At sentencing, the parties and the court agreed that it was in fact Culver's sixth OWI offense. (R. 58:21–22.) Because a fifth and sixth OWI offense were subject to the same penalties, this correction is irrelevant to this appeal. *See* Wis. Stat. § 346.65(2)(am)5. (2007–08).

violation of Wis. Stat. §§ 346.63(1)(am) and 346.65(2)(f).<sup>2</sup> (R. 1:1, 5.) The complaint alleged that in late 2006, Culver drove with an approximately ten-week-old infant and a two-year-old toddler to Madison to purchase and consume drugs, and then drove them home while in an intoxicated state. (R. 1:3–5, 9.)

The complaint specified that a fifth OWI offense was a Class H felony subject to a maximum of six years' imprisonment. (R. 1:2.) But because Culver had committed the offense with minor passengers, Wis. Stat. § 346.65(2)(f) controlled his penalty. (R. 1:2.) Pursuant to that subsection, “the applicable minimum and maximum forfeitures, fines, or imprisonment . . . for the conviction are doubled.” Wis. Stat. § 346.65(2)(f).

Accordingly, the State moved to amend the information to reflect that Culver's offense should have been charged as an unclassified felony rather than a Class H felony. (R. 21:1; 22:1.) In support, the State explained that a fifth or sixth OWI offense was designated a Class H felony except where, as here, the offense involved minor passengers and thus fell under Wis. Stat. § 346.65(2)(f). (R. 21:1.) The circuit court granted the State's motion at the final pretrial hearing “upon stipulation of [the] parties.” (R. 23:1.)

Culver pled no contest to the amended charge. (R. 36:1.) The plea hearing transcript is not extant in the appellate record, but Culver's plea questionnaire and waiver form reflects that the parties agreed he faced a 12-year maximum sentence. (R. 25:1.) The State agreed to recommend a bifurcated sentence totaling seven years: two

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<sup>2</sup> Unless otherwise indicated, all subsequent citations to the Wisconsin Statutes are to the 2007–08 version.

years' initial confinement and five years' extended supervision. (R. 25:2.)

### **B. Culver's sentencing.**

The State was true to its word. (R. 58:7.) The prosecutor acknowledged at sentencing that a lengthy prison sentence would disrupt Culver's ability to provide support for his wife and children and to maintain his relationship with them. (R. 58:5.) Because Culver did "well" while previously on supervision, the prosecutor presented the State's recommended shorter prison term followed by a longer term of supervision as "sensible." (R. 58:7–8.) The State also requested that the court revoke Culver's driver's license for five years. (R. 58:8.) When the court questioned whether a five-year term of license revocation was available for Culver's offense, the prosecutor responded that "[t]he revocation length doubles just as everything else doubles" when an OWI offense is committed with minor passengers. (R. 58:9.) Defense counsel countered with a recommendation of seven years' probation. (R. 58:17.)

In crafting Culver's sentence, the court expressed concern about his accumulation of OWI convictions, but acknowledged his recent treatment efforts. (R. 58:29, 32.) In the end, the court imposed the State's recommended seven-year bifurcated sentence with a slight modification: the term of initial confinement would last one year and six months, and the term of extended supervision would last five years and six months. (R. 58:33.) The court wanted Culver to have the threat of significant confinement time hanging over him to help keep him out of trouble while on supervision. (R. 58:33.) The court also revoked Culver's motor vehicle operating privileges for five years. (R. 58:8, 36.)

Following the judgment of conviction, the Department of Corrections (DOC) sent a letter to the sentencing judge regarding Culver's term of extended supervision. (R. 32:1.)

The DOC noted that the extended supervision portion of a Class H felony bifurcated sentence could not exceed three years under Wis. Stat. § 973.01(2)(d)5. (R. 32:1.)

The prosecutor responded with a letter to the court, noting that the judgment of conviction inaccurately indicated that Culver was convicted of a Class H felony. (R. 33:1.) The prosecutor explained that the judgment of conviction should be amended because the parties had agreed and the court had found “for very good reason” that Culver’s offense fell under Wis. Stat. § 346.65(2)(f) and was therefore “an unclassified Felony with a 12-year maximum.” (R. 33:1.) Accordingly, “under § 973.01(2)(d) the only restriction on the extended supervision was that it may not be less than 25% of the term of initial confinement.” (R. 33:1.) Because Culver’s term of extended supervision was “far more than 25%,” the prosecutor argued the sentence was lawful. (R. 33:1.) Culver’s attorney agreed in her response to the court that the judgment “should reflect Felony unclassified,” and requested four days of sentence credit. (R. 34:1.)

The court amended the judgment of conviction accordingly and awarded Culver an additional four days of sentence credit. (R. 35:1; 36:1.)

**C. Culver’s extended supervision is revoked twice.**

Culver was sentenced on December 3, 2008. (R. 27:1.) He was released on extended supervision on June 8, 2010. (R. 37:1.)

On November 19, 2012, Culver was taken into custody on new charges. (R. 39:13, 15.) He pled no contest to battery, resisting or obstructing an officer, and disorderly conduct on April 25, 2013, in Dane County Circuit Court case number 2012CF2355 and was sentenced to one year in the county jail offset by 113 days’ sentence credit. (R. 40:3.)

Due to the above new charges, the DOC revoked Culver's extended supervision in this case on December 21, 2012. (R. 37:1; 39:12.) On July 18, 2013, an administrative law judge ordered that Culver be reincarcerated for 18 months with credit from the date he was taken into custody in case number 2012CF2355. (R. 39:16.)

Culver was again released on extended supervision on May 13, 2014. (R. 44:1.) The record does not reveal why, but Culver's supervision was revoked for the second time on November 8, 2016, and he was again sentenced to prison. (R. 44:1; 47:1.) Culver alleges that an administrative law judge ordered his reincarceration for 30 months, and that this time "will be served" by late December 2018. (Culver's Br. 2.)

#### **D. Culver's postconviction motion.**

Culver did not take a direct appeal under Wis. Stat. § (Rule) 809.30. Instead, he unsuccessfully petitioned for a sentence adjustment in the interest of justice in 2014. (R. 39:1; 43:1–2.) He then filed a pro se motion in 2018 that is the subject of this appeal. In it, Culver sought to commute what he alleged was the excessive extended supervision portion of his bifurcated sentence. (R. 47; 48.) Culver filed his motion pursuant to Wis. Stat. § 973.13. (R. 47:1.) The postconviction court construed Culver's motion as also seeking collateral relief under Wis. Stat. § 974.06. (R. 49:1.)

Culver claimed that the court inappropriately doubled his maximum three-year term of extended supervision for a Class H felony. (R. 47:1–2.) Culver maintained that his second revocation occurred after he had served the maximum available three years of extended supervision, therefore the State had no authority to reincarcerate him again. (R. 47:2.)

The State responded that Wis. Stat. § 346.65(2)(f) unambiguously provided for the doubling of all penalties for

defendants convicted of committing OWI offenses with minor passengers and this doubling fit within an OWI statutory scheme designed to encourage the “vigorous prosecution of impaired drivers.” (R. 51:3.) The State distinguished OWI crimes under the traffic statutes from the habitual criminality penalty enhancers found in Chapter 939. (R. 51:4–5.) At the motion hearing, the State also pressed that Culver was not convicted of a Class H felony but rather of an unclassified felony. (R. 57:5.)

The postconviction court denied Culver’s motion. (R. 54:1; 57:10.) The court noted that the Legislature had recently amended the truth-in-sentencing statutory scheme. (R. 57:8–9.) Moreover, the court reasoned that the sentencing statute’s plain language allowed for the sentencing court to increase both the maximum term of confinement as well as the maximum term of extended supervision. (R. 57:9.) The court concluded that Culver’s sentence “was consistent with the maximum penalty” for his OWI offense. (R. 57:10.)

Culver appeals. (R. 55.)

### **STANDARD OF REVIEW**

Sentencing is generally a matter of trial court discretion. *State v. Gallion*, 2004 WI 42, ¶ 4, 270 Wis. 2d 535, 678 N.W.2d 197. Whether Culver’s 2008 sentence comports with applicable statutes, however, is a question of law this Court reviews de novo. *State v. Jackson*, 2004 WI 29, ¶ 11, 270 Wis. 2d 113, 676 N.W.2d 872.

## ARGUMENT

**The circuit court imposed a lawful sentence for Culver’s unclassified felony offense.**

**A. Unambiguous statutes are given their full effect and obvious and intended meaning.**

Statutory interpretation “begins with the language of the statute.” *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). “[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *Id.* ¶ 44. If the statutory language is unambiguous, the Court simply applies the ordinary and accepted meaning of the language to the facts presented in the case. *Id.* ¶¶ 45–46.

“[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses.” *Kalal*, 271 Wis. 2d 633, ¶ 47. “Wisconsin courts ordinarily do not consult extrinsic sources of statutory interpretation unless the language of the statute is ambiguous.” *Id.* ¶ 50. “[E]xtrinsic sources” are “resources outside the statutory text—typically items of legislative history.” *Id.* (citation omitted). However, legislative history can be “consulted to confirm or verify a plain-meaning interpretation.” *Id.* ¶ 51.

Statutory provisions are not read in isolation. “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Kalal*, 271 Wis. 2d 633, ¶ 46 (citation omitted).

**B. As a threshold matter, Culver should be judicially estopped from pursuing his claim on the merits.**

As a threshold matter, this Court should exercise its discretionary authority to apply judicial estoppel and decline to address the merits of Culver’s sentencing challenge. *See State v. Steinhardt*, 2017 WI 62, ¶ 18 n.14, 375 Wis. 2d 712, 896 N.W.2d 700 (judicial estoppel is invoked at the court’s discretion); *see also, e.g., State v. Hardwick*, 144 Wis. 2d 54, 61, 422 N.W.2d 922 (Ct. App. 1988) (applying judicial estoppel in the criminal context). The equitable doctrine of judicial estoppel is intended to prevent a litigant from “playing fast and loose with the courts.” *State v. Johnson*, 2001 WI App 105, ¶ 9, 244 Wis. 2d 164, 628 N.W.2d 431 (citation omitted).

“The doctrine precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position.” *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). It requires proof of three conditions. First, the defendant’s later position must be “clearly inconsistent” with the earlier position. *Id.* at 348. Second, “the facts at issue should be the same in both cases.” *Id.* (citation omitted). Third, “the party to be estopped must have convinced the first court to adopt its position.” *Id.* (citation omitted).

Here, Culver stipulated through counsel that his offense was an unclassified felony and the circuit court so found. (R. 23:1; 33:1, 34:1.) He signed a plea questionnaire and waiver form indicating that he agreed he faced a 12-year maximum term of imprisonment. (R. 25:1.) At sentencing, Culver’s attorney acknowledged that his felony offense was unclassified with a 12-year maximum. (R. 58:17, 20.) Culver raised no objection to the sentence the court imposed. (*See* R. 58:36–40.)

Culver should be estopped from claiming, after two extended supervision revocations, that he was in fact improperly sentenced for a different kind of felony offense subject to different term limitations. As the Wisconsin Supreme Court explained: “It is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error.” *State v. Gove*, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989). But should this Court disagree, the State addresses the merits of Culver’s claim below.

**C. Culver pled to an unclassified felony offense with a 12-year maximum term of imprisonment.**

The sole issue in this case concerns the length of Culver’s term of extended supervision imposed under Truth-in-Sentencing II (TIS-II)<sup>3</sup> for his unclassified felony offense. To resolve the question, this Court must first interpret Wis. Stat. § 346.65(2)(am)5. and (f) to determine the nature of Culver’s conviction. Then, this Court must consider Wis. Stat. § 973.01(2) to determine whether Culver’s sentence was properly bifurcated. While these two statutory schemes may not always knit together seamlessly, if this Court finds that Culver was properly sentenced for an unclassified

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<sup>3</sup> Truth-in-Sentencing legislation was adopted in Wisconsin in two phases. The first phase, 1997 Wis. Act 283 (TIS-I), was enacted in June 1998 and applied to offenses committed on or after December 31, 1999. The second phase, 2001 Wis. Act 109 (TIS-II), was enacted in July 2002 and applied to offenses committed on or after February 1, 2003. *See State v. Cole*, 2003 WI 59, ¶ 4, 262 Wis. 2d 167, 663 N.W.2d 700. Culver committed the offense in question in 2006, thus TIS-II applies.

felony with a 12-year maximum term of imprisonment, Culver is not entitled to relief.

The State initially charged Culver with a Class H felony. (R. 1:2.) Indeed, a fifth or sixth OWI offense was so classified in 2008.<sup>4</sup> Wis. Stat. § 346.65(2)(am)5. Under that statutory scheme, however, a fifth or sixth OWI offense was designated a Class H felony “[e]xcept as provided in” § 346.65(2)(f) and (g). Wis. Stat. § 346.65(2)(am)5. (emphasis added). Wisconsin Stat. § 346.65(2)(f), which applies to any OWI offense with a minor passenger, does not indicate a felony classification. *See* Wis. Stat. § 346.65(2)(f). Hence, as the parties and the circuit court agreed, an OWI with a minor in the vehicle is an unclassified felony. *Cf. Jackson*, 270 Wis. 2d 113, ¶ 37 n.8 (noting that operating a vehicle while intoxicated with a minor passenger as a third or fourth offense contrary to Wis. Stat. § 346.65(2)(f) is one of the “few unclassified felonies” remaining under TIS-II). Culver develops no argument otherwise. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“We may decline to review issues inadequately briefed.”).

True, a defendant convicted of a Class H felony is subject to “imprisonment not to exceed 6 years.” Wis. Stat. § 939.50(3)(h). And under TIS-II, neither portion of a bifurcated sentence for a Class H felony can exceed three years. Wis. Stat. § 973.01(2)(b)8., (d)5. But at the time of Culver’s sentencing, OWI law instructed that when a defendant committed an OWI with minor passengers, “the applicable minimum and maximum forfeitures, fines, or imprisonment . . . for the conviction are doubled.” Wis. Stat.

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<sup>4</sup> The Legislature has since reclassified an OWI fifth or sixth offense to a Class G felony, but has otherwise left Wis. Stat. § 346.65(2)(am)5. unaltered. *See* 2015 Wis. Act 371, § 7.

§ 346.65(2)(f).<sup>5</sup> Although Culver argues that “imprisonment” refers only to confinement, under truth-in-sentencing the term encompasses the total bifurcated sentence. Wis. Stat. § 973.01(1); *Jackson*, 270 Wis. 2d 113, ¶ 15. Therefore, under the plain language of Wis. Stat. § 346.65(2)(am)5. and (f), Culver pled no contest to an unclassified felony with a maximum sentence of 12 years’ imprisonment untethered from the Class H felony confinement and supervision caps specified in Wis. Stat. § 973.01(2)(b)8. and (d)5.

Culver indicated on his plea questionnaire and waiver form that he understood he faced a maximum penalty of 12 years for his unclassified felony offense. (R. 25:1.) He does not allege that there was a defect in the plea proceedings that impeded his understanding of what he was pleading to, or that his defense counsel was ineffective in any way. Accordingly, Culver gives no reason to view his offense, or his understanding of that offense when he pled to it, as anything other than what it was.

**D. The circuit court imposed a lawful bifurcated sentence for Culver’s unclassified felony offense.**

The crucial question is whether the circuit court properly structured Culver’s bifurcated sentence. Under TIS-II, a court must impose a bifurcated sentence for a felony committed on or after December 31, 1999. Wis. Stat. § 973.01(1). A bifurcated sentence “consists of a term of confinement in prison followed by a term of extended supervision.” Wis. Stat. § 973.01(2). The maximum terms of

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<sup>5</sup> The Legislature renumbered this provision as Wis. Stat. § 346.65(2)(f)2. after Culver’s sentencing. *See* 2009 Wis. Act 100, § 48. The Legislature has retained the term “imprisonment” through its various revisions of the OWI code. *See* 2009 Wis. Act 100, § 48; *see also* 2015 Wis. Act. 371, § 11.

confinement and extended supervision for classified felonies are limited as specified in Wis. Stat. § 973.01(2)(b)1.–9. and (d)1.–6. Bifurcated sentences imposed for unclassified felonies, however, are subject to different limitations.

A bifurcated sentence for an unclassified felony cannot exceed the maximum term of imprisonment provided by statute for the crime. Wis. Stat. § 973.01(2)(a). The term of confinement “may not exceed 75% of the total length of the bifurcated sentence,” or “be less than one year.” Wis. Stat. § 973.01(2)(b), (b)10. “The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision.” Wis. Stat. § 973.01(2). The latter portion “may not be less than 25% of the length of the term of confinement in prison.” Wis. Stat. § 973.01(2)(d).

Here, Culver faced a maximum of 12 years’ imprisonment under Wis. Stat. § 346.65(2)(f). The court could not impose a term of confinement longer than 75 percent of “the total length of the bifurcated sentence.” *See* Wis. Stat. § 973.01(2)(a), (b)10. Culver’s prison term of one year and six months is significantly less and he does not challenge its imposition or calculation here. Nor could the court impose a term of extended supervision less than 25 percent of one year and six months, or four months and 15 days. Wis. Stat. § 973.01(2)(d). Culver’s extended supervision term of five years and six months is considerably greater. The total length of Culver’s bifurcated sentence does not exceed “the maximum term of imprisonment provided by statute for the crime.” Wis. Stat. § 973.01(2)(a). Culver’s sentence comports with the plain language of Wis. Stat. § 973.01(2).

The crux of Culver’s challenge is that he was sentenced for an enhanced Class H felony and the court thus improperly imposed a term of extended supervision beyond three years. (Culver’s Br. 1, 3–5.) It is true that the total

length of a bifurcated sentence may be increased via a penalty enhancer only by applying it to the maximum term of confinement otherwise available for the underlying offense. Wis. Stat. § 973.01(2)(c). What Culver’s argument does not consider, however, is that he agreed to be sentenced for an unclassified felony offense that was not subject to the Class H confinement and extended supervision maximums specified in Wis. Stat. § 973.01(2)(b)5. and (d)5. or otherwise enhanced. That unclassified felony is a crime distinct in nature from an OWI fifth or sixth offense, and the statute provides that it is subject to a different base term of imprisonment. *See* Wis. Stat. § 346.65(2)(am)5. and (f).

In support of his position, Culver relies on two decisions and their progeny that examine how habitual criminality penalty enhancers are applied to bifurcated felony sentences under TIS-I.<sup>6</sup> (Culver’s Br. 3–5.) In *State v. Volk*, the defendant was convicted of a Class D felony as a repeat offender. 2002 WI App 274, ¶ 27, 258 Wis. 2d 584, 654 N.W.2d 24. Pursuant to the habitual criminality penalty enhancer, the defendant’s total possible imprisonment increased from ten to twelve years. *Id.* The court imposed a twelve-year bifurcated sentence, consisting of six years’ confinement and six years’ extended supervision. *Id.* ¶ 29.

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<sup>6</sup> In addition to the two cases discussed below, Culver also cites to an unpublished per curiam decision issued by this Court, *State v. Rodriguez*, No. 2014AP2477-CR, 2015 WL 7161956 (Wis. Ct. App. Dist. I, Sept. 29, 2015) (unpublished). (Culver’s Br. 5.) Because this unpublished opinion is not authored, it may not be cited even for persuasive value. *See* Wis. Stat. § (Rule) 809.23(3)(a), (b) (2015–16). It may be cited to “support a claim of claim preclusion, issue preclusion, or the law of the case,” none of which applies here. Wis. Stat. § (Rule) 809.23(3)(a) (2015–16). Accordingly, this Court “need not distinguish or otherwise discuss” *Rodriguez*, and the State “has no duty to research or cite it.” Wis. Stat. § (Rule) 809.23(3)(b) (2015–16).

The defendant argued that the enhancer could not be applied to his term of extended supervision. *Id.* ¶ 2. This Court agreed, and reversed and remanded for resentencing. *Id.* ¶¶ 12, 48–49.

The Wisconsin Supreme Court extended *Volk* to the unclassified felony context. *Jackson*, 270 Wis. 2d 113, ¶¶ 8, 25. The *Jackson* defendant was convicted as a repeat offender of an unclassified felony. *Id.* ¶¶ 4–5. The supreme court stated that, as in *Volk*, the enhancer should be added “to the maximum term of confinement for each underlying offense, thereby increasing the overall term of imprisonment by the same amount.” *Id.* ¶ 30. The court then focused on how to calculate the maximum confinement time for the defendant’s enhanced unclassified felony. *Id.* ¶¶ 31, 40, 42. With respect to the amount of extended supervision, the *Jackson* court stated only that it must “be at least 25% of the term of confinement that the sentencing court imposes.” *Id.* ¶ 36.

In sum, *Volk* applies when a classified felony is enhanced under TIS-I, *Volk*, 258 Wis. 2d 584, ¶ 27, and *Jackson* applies when an unclassified felony is enhanced under TIS-I, *Jackson*, 270 Wis. 2d 113, ¶ 11. Under *Volk*, the sentence for a classified felony is first bifurcated, and then a penalty enhancer can be used to increase the term of confinement only. *See Volk*, 258 Wis. 2d 584, ¶¶ 35–36. Under *Jackson*, the maximum term of confinement for the enhanced unclassified felony is calculated by: (1) adding the penalty enhancers to the underlying maximum term of confinement; (2) increasing the overall term of imprisonment by the same amount; and (3) multiplying this result by the 75-percent provision of Wis. Stat. § 973.01(2)(b)10. *See Jackson*, 270 Wis. 2d 113, ¶ 42. As for what constraints apply to extended supervision in the TIS-I enhanced unclassified felony context, this Court has held that a defendant can only be ordered to serve up to “the maximum

term of extended supervision available for his base offense.” *State v. Kleven*, 2005 WI App 66, ¶ 26, 280 Wis. 2d 468, 696 N.W.2d 226.

Culver does not explain whether *Volk* or *Jackson/Kleven* controls here, and neither decision is on point. (Culver’s Br. 3–6.) For one, Culver pled to and was sentenced for an unclassified felony under TIS-II, so *Volk* does not control the bifurcation question here. And Culver’s unclassified felony was not enhanced, so in that respect this case falls outside the purview of *Jackson/Kleven*. Cf. *Jackson*, 270 Wis. 2d 113, ¶ 37 n.8 (noting that operating a vehicle while intoxicated with a minor passenger as a third or fourth offense contrary to Wis. Stat. § 346.65(2)(f) is one of the “few unclassified felonies” remaining under TIS-II).

Moreover, the Wisconsin Supreme Court has noted the Legislature’s “specific intent that the sanctions” of the OWI statute “be applied in a manner substantially different from” general repeater statutes. *State v. Banks*, 105 Wis. 2d 32, 45–50, 313 N.W.2d 67 (1981) (holding that the provisions of Wis. Stat. § 346.65(2)(a) (1979–80) are applicable to repeat offenders). For example, “[t]he habitual criminality statutes increase the penalty for a particular misdemeanor or felony involved, but in no way change the nature of the crime.” *Harms v. State*, 36 Wis. 2d 282, 285, 153 N.W.2d 78 (1967). Here, Wis. Stat. § 346.65(2)(f) defines a different offense with a different designation. See Wis. Stat. § 346.65(2)(am)5., (f).

With respect to Wisconsin’s OWI laws, the Legislature has made its intent clear: “to encourage the vigorous prosecution of” OWI offenses. Wis. Stat. § 967.055(1)(a). And the Wisconsin Supreme Court has long recognized the Legislature’s objective to remove intoxicated drivers from the road and thus “prevent them from endangering the lives of themselves and others.” *Banks*, 105 Wis. 2d at 50. Culver’s

sentencing, and the OWI statutory scheme, are consistent with that intent.

**E. Culver’s challenge to the postconviction court’s reliance on two citable unpublished one-judge opinions is flawed and underdeveloped.**

Finally, Culver takes issue with the postconviction court’s reliance on two of this Court’s unpublished decisions. (Culver’s Br. 1–2.) The only claim of error he raises is that each opinion is unpublished and “per-curiam.” (Culver’s Br. 2.) But *State v. Smith-Iwer*, No. 2013AP1426-CR, 2013 WL 6818184 (Wis. Ct. App. Dist. 1, Dec. 27, 2013) (unpublished), and *State v. Robinson*, No. 2012AP2498-CR, 2013 WL 3795622 (Wis. Ct. App. Dist. I, July 23, 2013) (unpublished), are authored one-judge opinions issued after July 1, 2009. Although not eligible for publication, both decisions can be cited as persuasive authority. Wis. Stat. § 809.23(3)(b), (4)(b) (2015–16). The postconviction court relied on *Smith-Iwer* at the hearing for the proposition that the Legislature had amended the version of the truth-in-sentencing scheme addressed in *Volk*. (R. 57:8–9.) Which, it did. *See* 2001 Wis. Act 109.

Culver thus bases his argument on a flawed premise. Because Culver does not otherwise explain why the postconviction court was wrong to rely on either *Smith-Iwer* or *Robinson* as persuasive authority, this Court need not address his underdeveloped argument further. *Pettit*, 171 Wis. 2d at 646.

**F. If this Court determines that Culver’s term of extended supervision is statutorily illegal, resentencing is the appropriate remedy, not commutation.**

Culver argues he was improperly sentenced for an enhanced Class H felony, but he was properly charged with,

and pled to, an unclassified felony, and was sentenced accordingly. (Culver’s Br. 1.) Should this Court disagree and find that Culver’s term of extended supervision is statutorily illegal, the question becomes one of remedy.

Culver argues that he would be entitled to relief pursuant to Wis. Stat. § 973.13, which provides that where a court imposes the maximum penalty in excess of that permitted by law, the excess portion of the sentence is void and “shall stand commuted without further proceedings.” Wis. Stat. § 973.13. As this Court explained in *Volk*, however, resentencing is the proper remedy where a circuit court imposes a bifurcated sentence under a mistaken understanding of the available maximum term of supervision.

In *Volk*, this Court concluded that it could not commute a term of extended supervision under Wis. Stat. § 973.13 even though it was longer than authorized. *Volk*, 258 Wis. 2d 584, ¶¶ 46–48. This Court explained that when “a crucial component” of a bifurcated sentence is overturned, “it is proper and necessary for the sentencing court to revisit the entire question.” *Id.* ¶ 48. This is because the two portions of any bifurcated sentence “form a symbiotic relationship with the length of one necessarily influencing the length of the other and the overall length of the bifurcated sentence.” *Id.* To simply confirm Culver’s term of confinement and commute his extended supervision to three years, then, “would produce a sentence based on mathematics, rather than an individualized sentence.” *Id.*

Culver is entitled to the latter. If the circuit court incorrectly calculated Culver’s term of extended supervision based on a mistaken view of the law, the circuit court might have, under a correct view of the law, structured Culver’s bifurcated sentences differently. Perhaps the circuit court would have given Culver more confinement time if the maximum available supervision time it could have actually

imposed was less than it thought. Under *Volk*, 258 Wis. 2d 584, ¶¶ 47, 50, resentencing is thus the appropriate remedy, if a remedy is necessary at all in this case. *See also Kleven*, 280 Wis. 2d 468, ¶¶ 30–31 (remanding for resentencing).

### CONCLUSION

For these reasons, the State respectfully requests that this Court affirm the circuit court's order denying Culver's postconviction motion for relief.

Dated this 11th day of October, 2018.

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 5,052 words.

Dated this 11th day of October, 2018.

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## **CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 11th day of October, 2018.

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