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STATE OF WISCONSIN  
C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019AP001785-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TORY J. AGNEW,

Defendant-Appellant.

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On Appeal from a Judgment Of Conviction and Order  
Denying Defendant's Postconviction Motion for  
Resentencing, Entered in the Dodge County Circuit  
Court, the Honorable Brian A. Pfitzinger, Presiding

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BRIEF AND APPENDIX OF  
DEFENDANT-APPELLANT

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## **ISSUE PRESENTED**

Tory J. Agnew pled no contest to an enhanced unclassified felony with a maximum sentence on the base offense of 18 months initial confinement and 6 months extended supervision. Is Agnew entitled to resentencing where (1) the circuit court unlawfully applied the penalty enhancer to increase Agnew's maximum term of extended supervision from 6 months to 1 year and (2) imposed a term of initial confinement of 3 years that violates the "25% rule" set forth in Wis. Stats. §§ 973.01(2)(c)1. and (2)(d)?

The circuit court denied Agnew's postconviction motion for resentencing.

## **POSITION ON ORAL ARGUMENT AND PUBLICATION**

The issue presented involves a fairly complex question of statutory interpretation concerning the "TIS-II" version of Wis. Stat. § 973.01(2)(c)1. as applied to an enhanced sentence imposed on an unclassified felony. Further, relevant precedent, which interpreted the "TIS-I" version of Wis. Stats. §§ 973.01(2)(b), (c), and (d), is only partially controlling as applied to the issue presented in this case. Thus, this case presents the court with an opportunity to enunciate and apply a new rule of law concerning the interpretation and application of the TIS-II version of Wis. Stat. § 973.01(2).

While Agnew believes the briefs should fully address the issue presented, he would welcome oral argument should the court deem it necessary or helpful to the court's resolution of the issue presented. Publication will likely be appropriate under Wis. Stats. §§ (Rule) 809.23(1)(a)1. and 2.

## INTRODUCTION

The issue presented in this case is seemingly simple: is the sentence imposed upon Agnew legal? However, whether the circuit court imposed a lawful sentence and whether Agnew is entitled to resentencing depends upon a complex question of statutory interpretation that involves relevant precedent that interpreted prior versions of the applicable statutes. Further, the applicable statutes have been substantively modified such that the relevant precedent is only partially on point.

As will be fully explained below, a proper resolution of the issue presented in this case requires, first, the statutory interpretation of the TIS-II versions of the Wisconsin Statutes applicable to Agnew's sentence and, second, the application of the relevant holdings of precedent that interpreted and applied the TIS-I versions of the relevant statutes.

As relevant to Agnew's case, the most significant statutory change from TIS-I to TIS-II is the addition of subdivision 1. to the penalty



enhancement provision in Wis. Stat. § 973.01(2)(c).<sup>1</sup> Unlike the TIS-I version (*see* Wis. Stat. § 973.01(2)(c) (1997-2002)), the TIS-II version explicitly subjects any enhanced term of confinement to the “25% rule” set forth in Wis. Stat. § 973.01(2)(d). *See* Wis. Stat. § 973.01(2)(c)1. What this means is that while Wis. Stat. § 973.01(2)(c)1. allows the maximum term of confinement that could be imposed under Wis. Stat. § 973.01(2)(b)10. to be increased “by any applicable penalty enhancement statute,” any increase is explicitly capped to ensure that the term of extended supervision is at least 25 percent of the increased term of confinement.

As will be demonstrated below, the plain text of the applicable statutes and the controlling precedent yield three key constraints on Agnew’s sentence:

- (1) The maximum term of extended supervision that may be imposed, if the circuit court seeks to enhance Agnew’s term of confinement pursuant to the applicable repeater enhancer, is 6 months. *See State v. Kleven*, 2005 WI App 66, ¶¶24-27, ¶26 n.6, 280 Wis. 2d 468, 696 N.W.2d 226; *see also* Wis. Stats. §§ 973.01(2)(b)10., (2)(c)1., and (2)(d).

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<sup>1</sup> All references to the Wisconsin Statutes in this brief are to the 2017-18 version except where otherwise noted. Included in the Defendant-Appellant’s Appendix at 106-113, are copies of these “TIS-I” versions of Wis. Stats. §§ 973.01(1) and (2) (Wisconsin Statutes 1997-2002) and the “TIS-II” version applicable to Agnew’s case (Wisconsin Statutes 2017-18).

- (2) The maximum term of confinement the court may order is 24 months because any amount of confinement in excess of 24 months, would violate Wis. Stat. § 973.01(2)(c)1.'s limitation that any enhanced term of confinement imposed must not violate paragraph (2)(d)'s "25% rule." *See* Wis. Stats. §§ 973.01(2)(c)1., (2)(d), (2)(b)10.
- (3) The maximum period of imprisonment that Agnew faces is 30 months: the maximum term of confinement (24 months) plus the maximum term of extended supervision (6 months). *See* Wis. Stat. § 973.01(2).

Agnew is entitled to resentencing because the sentence imposed by the circuit court violates each of the above constraints.

### **STATEMENT OF THE CASE AND FACTS**

On December 11, 2017, the state charged Tory J. Agnew with four criminal counts stemming from an automobile crash on Interstate 41 in Dodge County. (1). Eventually, Agnew pled no contest, as charged in an amended information, to operating a motor vehicle while under the influence of a controlled substance and causing injury, while having a minor passenger in the vehicle, and as a repeater, contrary to Wis. Stats. §§ 346.63(2)(a)1., 346.65(3m), and 939.62(1)(b). (58; 60). Pursuant to the plea agreement, the state agreed to recommend a sentence of four years imprisonment, consisting of 3 years initial confinement and 1 year extended

supervision, and Agnew was free to argue for a lesser sentence. (60).

The court accepted Agnew's plea on December 21, 2018. (91). At the outset of the plea hearing, the court noted an off-the-record conversation in which the parties alerted the court "to a concern regarding the sentence and the interplay of various cases and the statutes of the State of Wisconsin." (91:2). The court further explained:

following up on that discussion, and I have had a chance to review the *Harris* case and then subsequent to that there's *Volk* and subsequent to that there's *Jackson*, so if you're trying to figure out why, what was taking so long was I was in the process of reading three court of appeals' decisions trying to make sure that the sentence that the Court -- or at least looking at the structure as [the prosecutor] put it, that it was sound if the Court were to go that direction.

(91:3). The court then had a discussion with the state about its agreed upon sentencing recommendation:

Court: Attorney Thompson, the amount of initial confinement you believe that would be applicable at this point is 66 months; is that correct, 18 plus 48?

Prosecutor: Yes, 66 months of confinement followed by six months of extended supervision, is that what your (sic) proposing, Judge?

Court: Well, no, that's—

Prosecutor: I come up with 72 months. If you face two years for the original count, then an additional four, that's a total of six years for six times 12 is 72.

Court: Right, but the underlying charge is an unclassified two year felony.

Prosecutor: Correct.

Court: And his exposure on that offense, what do you believe, without the enhancer, what do you believe I could sentence him to on that offense?

Prosecutor: On that I believe you could give him 18 months of confinement, six months extended supervision.

Court: That's -- and that's where we come up with the four years plus 18 is confinement, just that part is 66 months.

Prosecutor: I agree.

Court: Okay. And as far as extended supervision, six months?

Prosecutor: Six months; unless let's say you gave him two years in prison, I think you could give him 12 months and 12 months. That would be a legal sentence. So he could get more extended supervision. The question became if we're going to add on that enhancer, does that immediately

obligate us to reduce the extended supervision down to six months. And I'm, my – what I'm going to recommend is three years of confinement and I'm asking for 12 months extended supervision. If the Court thinks only six is available, that's fine. I still want to recommend the three years of confinement. That's my position.

(91:3-5).

During its plea colloquy with Agnew, the court briefly returned to the sentencing issues and asked the parties to:

put together a very short letter detailing what you believe to be the maximum term of confinement and the maximum term of extended supervision. As I said, I was trying desperately to read these three cases. There is, I believe on a Westlaw search 72 cases came up. I was reading what I thought was the most relevant to an immediate decision, but I would like the two of you to take a look at this issue. I'm not particularly interested in having a bunch of post-judgment litigation.

(91:9-10).

Thereafter, the court accepted Agnew's plea and scheduled sentencing for a later date. (91:21-24).

As directed, the parties filed letters with the court prior to sentencing addressing the parties' respective positions as to Agnew's maximum overall term of imprisonment, including the maximum term

of initial confinement and maximum term of extended supervision. (62; 64).

First, the state explained that, as a result of his plea, Agnew faced a maximum sentence of two years imprisonment on his underlying felony conviction. (62:1). The state then asserted that, as a result of the applicable repeater enhancer, Agnew's sentence could be increased by four years and that Agnew therefore faced a maximum term of imprisonment of 6 years. (62:1). The state then argued that Agnew's underlying 2-year sentence could be lawfully bifurcated as either 1 year initial confinement and 1 year extended supervision or 18 months initial confinement and 6 months extended supervision and that the state's sentencing recommendation "contemplates the former bifurcation." (62:2).

In other words, the state argued that the court could and should utilize two years of the repeater enhancer to increase Agnew's sentence from two years imprisonment, bifurcated evenly between initial confinement and extended supervision, to four years imprisonment, bifurcated between 3 years initial confinement and 1 year extended supervision. (62:2). At the same time, the state recognized that if the court used the "latter bifurcation" of 18 months initial confinement and 6 months extended supervision, then adding two years of the repeater enhancer would result in an unlawful sentence because the "term of extended supervision may not be less than 25 percent of the length of the term of confinement in prison," citing Wis. Stats. §§ 973.01(2)(b)10. and (2)(d). (62:2).

In Agnew's letter brief, he argued that prior to applying the applicable penalty enhancer, the court must sentence Agnew to the maximum amount of initial confinement authorized by law on the "base offense." (64:3). Thus, contrary to the state's argument, Agnew argued that the court could not simply choose to enhance a base sentence of 1 year confinement and 1 year extended supervision and must, if the court sought to enhance Agnew's sentence, apply the repeater enhancer to increase Agnew's underlying maximum sentence: 18 months confinement and 6 months supervision. (64:3 *contra* 62:2).

Further, because the term of extended supervision may never be less than 25 percent of the term of initial confinement imposed, Agnew argued that only 6 months of the repeater enhancer could lawfully be applied, which would yield a maximum bifurcated sentence of 24 months initial confinement and 6 months extended supervision. (64:3).

At sentencing, the court first noted that it had received the parties' sentencing "memos." (86:3). The state then recommended a sentence of four years imprisonment, consisting of 3 years initial confinement and 1 year extended supervision. (86:13). Agnew, through counsel, argued for a sentence of two years imprisonment, consisting of 18 months initial confinement and 6 months extended supervision. (86:19). The court then imposed the sentence recommended by the state. (86:30; 71; App. 101-02).

After sentencing, Agnew filled a postconviction motion for resentencing, in which he renewed his argument that the maximum overall sentence available to the court was 30 months imprisonment, consisting of 24 months initial confinement and 6 months extended supervision. (74). After a non-evidentiary hearing, the court denied Agnew's postconviction motion. (92:12-13; 77; App. 103-05).

This appeal follows.

## **ARGUMENT**

### **Agnew Is Entitled to Resentencing Because the Sentence Imposed Is Unlawful.**

#### **A. Introduction and standard of review**

Agnew seeks resentencing, under *State v. Volk*, 2002 WI App 274, ¶¶46-50, 258 Wis. 2d 584, 654 N.W.2d 24, because the sentence imposed exceeds the applicable overall maximum term of imprisonment, the maximum term of initial confinement, and the maximum term of extended supervision. Agnew does not challenge the circuit court's exercise of sentencing discretion. Rather, Agnew challenges whether the court imposed a lawful sentence pursuant to the relevant sentencing statutes.

The interpretation of the relevant sentencing statutes presents a question of law subject to independent appellate review. *See State v. Kleven*,



280 Wis. 2d 468, ¶8; *State v. Jackson*, 2004 WI 29, ¶11, 270 Wis. 2d 113, 676 N.W.2d 872.

The goal of statutory interpretation is to discern the intent of the legislature. *State v. Jackson*, 270 Wis. 2d 113, ¶12. Statutory interpretation begins with the language of the statute and if the meaning is plain, a reviewing court ordinarily stops its inquiry. *State v. Johnson*, 2007 WI 107, ¶28, 304 Wis. 2d 318, 735 N.W.2d 505 (citing *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110). Courts interpret statutory language 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. *Id.*

**B. The relevant statutes applicable to Agnew's sentencing claim.**

Ultimately, this case concerns how the circuit court may apply the habitual criminality penalty enhancer to Agnew's unclassified felony that has an underlying maximum term of imprisonment of 2-years. Thus, the relevant statutes include the statutes related to the underlying charge to which Agnew pled, the habitual criminality penalty enhancer statute, Wis. Stat. § 939.62(1)(b), and Wis. Stats. §§ 973.01(1) and (2), which set forth the requirements the circuit court must comply with to impose a valid bifurcated sentence.

Agnew stands convicted of operating a motor vehicle while under the influence of a controlled substance and causing injury, while having a minor

passenger in the vehicle, as a repeater, in violation of Wis. Stats. §§ 346.63(2)(a)1., 346.65(3m), and 939.62(1)(b).

Subdivision 346.63(2)(a)1. makes it unlawful to cause injury to another person by the operation of a vehicle while under the influence of a controlled substance. Subsection 346.65(3m) makes the offense a felony and provides for a maximum period of imprisonment of two years for a violation of Wis. Stat. § 346.63(2) if there was a minor passenger under 16 years of age in the motor vehicle at the time of the violation.

Additionally, Agnew's 2-year maximum term of imprisonment may be increased "by not more than four years," as allowed by the applicable statutes, because he was convicted and sentenced as a repeater, with a prior felony conviction, under Wis. Stat. § 939.62(1)(b). The habitual criminality or "repeater" penalty enhancer applicable to Agnew provides the following:

If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed... the maximum term of imprisonment prescribed by law for that crime may be increased as follows: ... A maximum term of imprisonment of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 4 years if the prior conviction was for a felony.

Wis. Stat. § 939.62(1)(b).

Next, Wis. Stats. §§ 973.01(1) and (2) set forth various requirements applicable to sentences of imprisonment to the Wisconsin state prisons for felonies committed on or after December 31, 1999. Sections (1) and (2) provide the following:

973.01(1) BIFURCATED SENTENCE  
REQUIRED. Except as provided in sub. (3), whenever a court sentences a person to imprisonment in the Wisconsin state prisons for a felony committed on or after December 31, 1999, or a misdemeanor committed on or after February 1, 2003, the court shall impose a bifurcated sentence under this section.

973.01(2) STRUCTURE OF BIFURCATED SENTENCES. A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113. 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. An order imposing a bifurcated sentence under this section shall comply with all of the following:

(a) *Total length of bifurcated sentence.* Except as provided in par. (c), the total length of the bifurcated sentence may not exceed the maximum period of imprisonment specified in s. 939.50 (3), if the crime is a classified felony, or the maximum term of imprisonment provided by statute for the crime, if the crime is not a classified felony, plus additional imprisonment authorized by any applicable penalty enhancement statutes.

(b) *Confinement portion of bifurcated sentence.* The portion of the bifurcated sentence that imposes a term of confinement in prison may not be less than one year and, except as provided in par. (c), is subject to whichever of the following limits is applicable:

1. For a Class B felony, the term of confinement in prison may not exceed 40 years.
3. For a Class C felony, the term of confinement in prison may not exceed 25 years.
4. For a Class D felony, the term of confinement in prison may not exceed 15 years.
5. For a Class E felony, the term of confinement in prison may not exceed 10 years.
- 6m. For a Class F felony, the term of confinement in prison may not exceed 7 years and 6 months.
7. For a Class G felony, the term of confinement in prison may not exceed 5 years.
8. For a Class H felony, the term of confinement in prison may not exceed 3 years.
9. For a Class I felony, the term of confinement in prison may not exceed one year and 6 months.
10. For any crime other than one of the following, the term of confinement in prison may not exceed 75 percent of the total length of the bifurcated sentence:
  - a. A felony specified in subds. 1. to 9.
  - b. An attempt to commit a classified felony if the attempt is punishable under s. 939.32 (1) (intro.).

(c) *Penalty enhancement*.<sup>2</sup>

1. Subject to the minimum period of extended supervision required under par. (d), the maximum term of confinement in prison specified in par. (b) may be increased by any applicable penalty enhancement statute. If the maximum term of confinement in prison specified in par. (b) is increased under this paragraph, the total length of the bifurcated sentence that may be imposed is increased by the same amount.

2. If more than one of the following penalty enhancement statutes apply to a crime, the court shall apply them in the order listed in calculating the maximum term of imprisonment for that crime:

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<sup>2</sup> Significant to the issue presented, and as noted above and as further explained below, the original version of Wis. Stat. § 973.01(1)(c) included *neither* subdivisions 1. or 2. included in the version of the statutes applicable to this case. Instead, the paragraph, as it was enacted and existed through “TIS-I,” read as follows: “The maximum term of confinement in prison specified in par. (b) may be increased by any applicable penalty enhancement. If the maximum term of confinement in prison specified in par. (b) is increased under this paragraph, the total length of the bifurcated sentence that may be imposed is increased by the same amount.” *See* Wis. Stat. § 973.01(2)(c) (1997-2002). (*See* App. 106-11). Thus, the TIS-I version of Wis. Stat. § 973.01(2)(c) did not subject any increased term of confinement to the requirement that the term of extended supervision must be at least 25 percent of the term of confinement imposed. *Contra Jackson*, 270 Wis. 2d 113, ¶¶33-38 (interpreting the 1997-98 version of Wis. Stats. §§ 973.01(2)(b), (c), and (d)).

a. Sections 939.621, 939.632, 939.635, 939.645, 946.42 (4), 961.442, 961.46, and 961.49.

b. Section 939.63.

c. Section 939.62 (1) or 961.48.

(d) *Minimum and maximum term of extended supervision.* The term of extended supervision may not be less than 25 percent of the length of the term of confinement in prison imposed under par. (b) and, for a classified felony, is subject to whichever of the following limits is applicable:

1. For a Class B felony, the term of extended supervision may not exceed 20 years.

2. For a Class C felony, the term of extended supervision may not exceed 15 years.

3. For a Class D felony, the term of extended supervision may not exceed 10 years.

4. For a Class E, F, or G felony, the term of extended supervision may not exceed 5 years.

5. For a Class H felony, the term of extended supervision may not exceed 3 years.

6. For a Class I felony, the term of extended supervision may not exceed 2 years.

Particularly relevant to Agnew's case are the following requirements set forth in Wis. Stat. § 973.01(2):

- Wis. Stat. § 973.01(2) defines the term “bifurcated sentence” as “a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113.” Further, 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. Also, an order imposing a bifurcated sentence must comply with the conditions and requirements set forth in paragraphs (a), (b), (c), and (d). Wis. Stat. § 973.01(2).
- Paragraph (a) states that, “[e]xcept as provided in par. (c)” (the “penalty enhancement” paragraph within Wis. Stat. § 973.01(2)), “the total length of the bifurcated sentence may not exceed the maximum period of imprisonment,” either specified in Wis. Stat. § 939.50(3) for classified felonies, or “the maximum term of imprisonment provided by statute for the crime, if the crime is not a classified felony, plus additional imprisonment authorized by any applicable penalty enhancement statutes.” Wis. Stat. § 973.01(2)(a).

Thus, a bifurcated sentence may not exceed the maximum term of imprisonment authorized for the crime, but the maximum term of imprisonment may be increased “as

provided in par. (c)” and as “authorized by any applicable penalty enhancement statutes.” *See* Wis. Stat. § 973.01(2)(a).

- Paragraph (b) sets forth the minimum and maximum confinement portion of a bifurcated sentence. First, the confinement portion of a bifurcated sentence must be at least 1 year. Second, the paragraph states that, “except as provided in par. (c),” subdivisions 1.-9. set forth the maximum terms of confinement for classified felonies. For example, the maximum term of confinement for a Class B felony is 40 years, whereas the maximum term of confinement for a Class I felony is 1 year and 6 months. *See* Wis. Stat. § 973.01(2)(b)1., 9.

However, for unclassified felonies, subdivision 10. provides that “the term of confinement in prison may not exceed 75 percent of the total length of the bifurcated sentence.” *See* Wis. Stat. § 973.01(2)(b)10. For example, the maximum term of confinement in prison for an unclassified felony with a maximum total term of imprisonment of two years is 18 months (75 percent of two years, or 24 months, is 18 months).

- As relevant here, paragraph (c) includes subdivision 1., which provides: “*Subject to the minimum period of extended supervision required under par. (d)*, the maximum term



of confinement in prison specified in par. (b) may be increased by any applicable penalty enhancement statute.” Wis. Stat. § 973.01(2)(c)1. (Emphasis added). In other words, the “maximum term of confinement specified in paragraph (b)” may be increased by any applicable penalty enhancer, but any such increase is “subject to the minimum term of extended supervision required under par. (d).” Thus, to properly understand how much a penalty may enhancer increase the maximum term of confinement in any given case, paragraph (d) must be read in conjunction with paragraph (b) and subdivision (c)1. See Wis. Stat. § 973.01(2)(c)1.

- Paragraph (d) concerns the extended supervision portion of a bifurcated sentence. In terms of the minimum: “The term of extended supervision may not be less than 25 percent of the length of the term of confinement in prison imposed under par. (b).” Wis. Stat. § 973.01(2)(d). As noted above, while paragraph (b) conditions the maximum term of confinement on the potential applicability of a penalty enhancement, subdivision (c)1. explicitly “subject[s]” any increase to a defendant’s maximum term of confinement to the requirement that “the term of extended supervision may not be less than 25 percent of the length of confinement in prison

imposed under par. (b).” *See* Wis. Stats. §§ 973.01(2)(c)1., (2)(d), and (2)(b).

In terms of the maximum term of extended supervision, subdivisions 1. through 6. set forth the applicable maximum term of extended supervision for classified felonies. Notably, paragraph (d) sets no maximum term of extended supervision for unclassified felonies. Wis. Stat. § 973.01(2)(d).

The meaning of the above statutes, as applicable to Agnew’s case is clear. First, the maximum term of confinement in prison that Agnew faced on the underlying unclassified 2-year felony to which he pled is 18 months. *See* Wis. Stat. § 973.01(2)(b)10. Second, “[s]ubject to the minimum period of extended supervision required under par. (d), Agnew’s maximum underlying term of confinement (18 months), could be increased, under Wis. Stats. §§ 973.01(2)(b) and (c)1., by “any applicable penalty enhancement statute.” *See* Wis. Stat. § 973.01(2)(c)1. Third, Agnew’s “term of extended supervision may not be less than 25 percent” of the length of the term of confinement imposed. *See* Wis. Stat. § 973.01(2)(d).

However, the statutory text does not explicitly address two questions relevant to the issue presented:

(1) How must a court apply a penalty enhancer to ensure that it is not unlawfully increasing a defendant’s extended supervision?

(2) What is Agnew's *maximum* term of extended supervision?

This Court *has*, however, previously answered these two questions. First, in *State v. Volk*, 258 Wis. 2d 584, ¶¶34-45, the court held that “a penalty enhancer cannot be applied to the term of extended supervision” because Wis. Stat. § 973.01(2)(c) (1999-2000), authorizes the “maximum term of confinement in prison specified in par. (b)” to be increased by any applicable penalty enhancement. *Volk*, 258 Wis. 2d 584, ¶¶35-36. In other words, a sentencing court may utilize any applicable penalty enhancer to increase a defendant's maximum term of initial confinement and may not “impose any portion of a penalty enhancer as extended supervision.” *Id.* No change in the relevant statutes from TIS-I to TIS-II affects this long-standing holding from *Volk*.

Second, in *State v. Kleven*, 280 Wis. 2d 468, ¶26, the court held that “because the penalty enhancer cannot be bifurcated,” a defendant subject to an enhanced unclassified felony “may be ordered to serve, at most, the maximum term of extended supervision available for his base offense.” Moreover, the court explained that the maximum term of extended supervision on an unclassified felony (the base offense) is determined by subtracting the maximum confinement from the maximum imprisonment. *Id.*, ¶26 n.6. For example, the maximum term of extended supervision available on an enhanced unclassified felony with a maximum term of imprisonment on the underlying offense of two years is 6 months (24 months less 18 months).

*See id.* Just as with *Volk*, the *Kleven* court's holding regarding the maximum term of extended supervision for an enhanced unclassified felony survives the changes made in TIS-II.

**C. The controlling precedent interpreting the relevant statutes.**

The applicable holdings from *Volk* and *Kleven*, when applied to the statutes applicable to Agnew's case, demonstrate how and why the sentence imposed by the circuit court is unlawful.

First, in *State v. Volk*, 2002 WI App 274, ¶¶26-45, 258 Wis. 2d 584, 654 N.W.2d 24, the court addressed how a circuit court may apply the habitual criminality penalty enhancer, Wis. Stat. § 939.62(1)(b) (1999-2000), to increase a defendant's "TIS-I" sentence. *Volk* had been convicted of aggravated battery, a class D felony, as a repeater. *Id.*, ¶¶26-27. *Volk* faced 10 years imprisonment, consisting of a maximum of five years confinement and five years extended supervision, on his class D felony conviction and faced an additional two years "total imprisonment" as a result of his repeater status under Wis. Stat. § 939.62(1)(b) (1999-2000). *Id.* The circuit court sentenced *Volk* to 6 years initial confinement followed by 6 years extended supervision. *Id.*, ¶29. Postconviction, *Volk* challenged the legality of the "enhanced term of extended supervision," arguing that the penalty enhancement could only be applied to increase his term of confinement in prison and not his extended supervision. *Id.*, ¶30. The circuit court denied *Volk*'s motion to reduce his term of extended supervision

from 6 years to 5 years, and Volk appealed. *Id.*, ¶¶30-31.

On appeal, the court explained that Wis. Stat. § 973.01(2)(c) (1999-2000) was unambiguous and that the clear text of the statute authorized the court to increase Volk's maximum term of confinement in prison and provided no such authority for the court to also increase Volk's term of extended supervision. *Id.*, ¶¶34-36. As a result, the court rejected the state's argument that a penalty enhancer can be added to a term of extended supervision. *Id.*, ¶38. In doing so, the court, in addition to the statutory text, relied upon the principle of statutory construction that "[w]hen the legislature has specified 1 exception to a general rule, we presume that the legislature intended to exclude other exceptions." *Id.*, ¶37.

Further, the court also looked to legislative history of the "truth-in-sentencing law" to confirm the court's statutory interpretation. *Id.*, ¶39. Specifically, the court examined the State of Wisconsin Criminal Penalties Study Committee's Final Report, issued on August 31, 1999, which the court concluded: "clearly supports our interpretation of Wis. Stat. § 973.01(2)(c)." *Id.*, ¶¶40-42.

Finally, the court rejected the state's argument that the court's interpretation "produces an unreasonable result because it necessarily limits the trial court's discretion in determining the appropriate duration of the term of extended supervision." *Id.*, ¶43. The court explained that its holding "might constrain a sentencing court's exercise of discretion in a given case," but rejected the argument that its

holding “produces an unreasonable or absurd result.” *Id.* Moreover, the court explained that while “a trial court has wide discretion in the matter of sentencing, the legislature is the ultimate authority that sets the maximum, and sometimes minimum, terms of imprisonment and confinement,” and that the state’s arguments were better directed to the legislature than the court. *Id.*, ¶45.

Thus, the applicable holding from *Volk* is that a court may not use a penalty enhancer to increase a defendant’s applicable maximum term of extended supervision. *Id.*, ¶¶35-36.

Next, in *State v. Kleven*, 280 Wis. 2d 468, the court of appeals addressed the applicability of a penalty enhancer to an unclassified “TIS-I” felony. The *Kleven* court, building on *Volk*’s holding that “a penalty enhancer cannot be applied to the term of extended supervision,” held that a defendant, sentenced to an increased term of confinement pursuant to an applicable penalty enhancer, “may be ordered to serve, at most, the maximum term of extended supervision available on his base offense.” 280 Wis. 2d 468, ¶26.

Kleven had been convicted and sentenced on an unclassified “TIS-I” felony that was subject to two separate penalty enhancers. *Id.*, ¶¶21-22. Specifically, Kleven was convicted of attempted third-degree sexual assault. *Id.*, ¶20. While third-degree sexual assault *was* classified under TIS-I as a Class D felony, an *attempt* to commit a classified felony was not classified. *Id.*, ¶¶20-22. The court held that Kleven faced a maximum term of confinement for his

“base offense” of two and one-half years (one-half of the five-year maximum confinement specified by statute for a Class D felony). *Id.*, ¶21. Relying on *State v. Jackson*, 2004 WI 29, 270 Wis. 2d 113, 676 N.W.2d 872 and the TIS-I version of the applicable statutes, the court then concluded that Kleven faced a maximum term of enhanced confinement of 11.25 years. *Id.*, ¶¶22-23.<sup>3</sup>

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<sup>3</sup> *Jackson* held that under *Volk* and TIS-I, specifically Wis. Stats. §§ 973.01(2)(b), (c), and (d) (1997-98) (see App. 106-07), a defendant’s maximum term of confinement on an enhanced unclassified felony was determined by applying the “75% rule” from Wis. Stat. § 973.01(2)(b)6. (1997-98), to the enhanced maximum term of total imprisonment under Wis. Stat. § 973.01(2)(c) (1997-98), to determine the defendant’s maximum term of confinement for the unclassified felony with the penalty enhancer. 270 Wis. 2d 113, ¶42. In so holding, the court rejected the court of appeals’ reliance on the “25% rule” from Wis. Stat. § 973.01(2)(d) (1997-98), which the court of appeals had used to limit the defendant’s maximum term of confinement. *Id.*, ¶¶36-37. The court also rejected the state’s argument that the legislature intended to “disjoin” the 75% rule from the penalty enhancement provision in Wis. Stat. § 973.01(2)(c) (1997-98). *Id.*, ¶37-39. Instead, the court held that the applicable “75% rule” must be read together with the penalty enhancement provision. *Id.*, ¶39. The court explained that by interpreting the applicable statutes as it did, it applied the rule of lenity, which concerns ambiguous penal statutes, in the defendant’s favor. *Id.*, ¶¶41-42.

That all being said, the key to understanding *Jackson*’s precedential value to Agnew’s case is that *Jackson* interpreted and applied the TIS-I version of Wis. Stats. §§ 973.01(1) and (2) (1997-98), whereas the TIS-II version of these statutes, (2017-18) apply to Agnew’s sentence. (See App. 106-07 *contra* 112-13). As explained above, and as will be further argued below, the

Next, however, the court addressed the question unanswered by either *Volk* or *Jackson*: “what constraints apply to the term of extended supervision that may be ordered for the enhanced offense.” *Id.*, ¶24. Ultimately, the court concluded that, “because the penalty enhancer cannot be bifurcated, ...Kleven may be ordered to serve, at most, the maximum term of extended supervision available for his base offense.” *Id.*, ¶26. (Internal quotations and citation omitted). In a footnote, the court explained:

Recall, the maximum term of imprisonment for Kleven’s base offense is five years, and the maximum confinement that can be ordered for the base offense is two and one-half years. *Thus, because all two and one-half years of the confinement available for the base offense must be deemed to have been imposed in order for the enhanced term of confinement to apply, the maximum available extended supervision that may be ordered under this interpretation is two and one-half years (5 years’ maximum imprisonment for the base offense less 2.5 years’ maximum confinement for the base offense = 2.5 years’ maximum extended supervision available for the enhanced offense).*

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addition of subdivision Wis. Stat. § 973.01(2)(c)1., substantially negates *Jackson*’s holding regarding the maximum term of confinement applicable to Agnew’s enhanced unclassified felony sentence. Unlike Wis. Stat. § 973.01(2)(c) (1997-98), Wis. Stat. § 973.01(2)(c)1. explicitly subjects any increased term of confinement to the requirement that Agnew’s term of extended supervision must be at least 25 percent of the term of confinement imposed.



*Id.*, ¶26 n.6. (Emphasis added).

The court noted that this interpretation of the applicable statutes was consistent with *Volk*'s holding that "a penalty enhancer cannot be applied to the term of extended supervision." *Id.*, ¶27.

Under *Volk*, *Jackson*, and the applicable TIS-I statutes, the court then remanded the case to the circuit court for resentencing because the circuit court imposed Kleven's sentence with an improper understanding of the relevant maximum terms of confinement and supervision. *Id.*, ¶¶30-32.

Read in conjunction, Wis. Stat. § 973.01(2) and *Volk*, *Jackson*, and *Kleven* yield the following constraints of any enhanced sentence imposed in this case:

- (1) The maximum term of extended supervision that may be imposed, if the court seeks to enhance his term of confinement pursuant to the applicable repeater enhancer, is 6 months. *See Kleven*, 280 Wis. 2d 468, ¶¶24-27, ¶26 n.6; *see also* Wis. Stat. § 973.01(2)(b)10., (2)(c)1., and (2)(d).
- (2) The maximum term of confinement the court may order is 24 months because any amount of confinement in excess of 24 months, assuming the court orders 6 months extended supervision, would violate Wis. Stat. § 973.01(2)(c)1.'s limitation that any enhanced term of confinement imposed must not violate paragraph (2)(d)'s

“25% rule.” *See* Wis. Stats. §§ 973.01(2)(c)1., (2)(d), (2)(b)10. *See also State v. Lasanske*, 2014 WI App 26, ¶6, 353 Wis. 2d 280, 844 N.W.2d 417 (discussing the bifurcation and enhancement of felony sentences under the TIS-II version Wis. Stats. §§ 973.01(2)(c)1. and (2)(d), and stating: “Finally, all bifurcated sentences are subject to the requirement that the extended supervision portion ‘may not be less than 25% of the length of confinement in prison imposed under par. (b).’”) (quoting Wis. Stat. § 973.01(2)(d) (2011-12)).

- (3) The maximum period of imprisonment that Agnew faces is 30 months: the maximum term of confinement (24 months) plus the maximum term of extended supervision (6 months). *See* Wis. Stat. § 973.01(2).

**D. Agnew faced a maximum overall sentence of 30 months imprisonment, consisting of a maximum term of initial confinement of 24 months, and a maximum term of extended supervision of 6 months.**

As this Court explained in *Volk*: “Even though a trial court has wide discretion in the matter of sentencing, the legislature is the ultimate authority that sets the maximum, and sometime minimum, terms of imprisonment and confinement.” 258 Wis. 2d 584, ¶45. Pursuant to the applicable statutes, as modified by the legislature in TIS-II, the following legislative constraints apply to Agnew’s sentencing.

**1. Agnew's maximum term of extended supervision in this case is 6 months.**

Under *Kleven*, 280 Wis. 2d 468, ¶¶24-27, if the circuit court seeks to increase Agnew's sentence using the applicable repeater enhancer, then Agnew's maximum term of extended supervision is 6 months. This is so because, "in order for the enhanced term of confinement to apply," the maximum term of confinement on the "base offense" "must be deemed to have been imposed. *Id.*, ¶26 n.6.

The maximum term of imprisonment on Agnew's "base offense" is two years. *See* Wis. Stat. § 346.65(3m). The maximum term of confinement that could be imposed on Agnew's base offense is 18 months. *See* Wis. Stat. § 973.01(2)(b)10. Thus, if the circuit court seeks to increase the maximum term of imprisonment on Agnew's base offense by increasing Agnew's maximum term of confinement, the maximum term of extended supervision available is 6 months. *See Kleven*, 280 Wis. 2d 468, ¶26 n.6.

The fact that Agnew's maximum term of extended supervision is 6 months means that the imposed a term of confinement of 3 years violates the "25% rule" set forth in Wis. Stat. § 973.01(2)(d), which is subject to the penalty enhancement provision in Wis. Stat. § 973.01(2)(c)1.

**2. Agnew's maximum enhanced term of initial confinement in this case is 24 months.**

Because Agnew stands convicted as a repeater, under Wis. Stat. § 939.62(1)(b), the maximum term of confinement available on his base offense (18 months) may be increased pursuant to Wis. Stat. § 973.01(2)(c)1. However, unlike the TIS-I version of Wis. Stat. § 973.01(2)(c), as interpreted in *Jackson*, subdivision “1.” of the applicable “penalty enhancement” paragraph explicitly subjects the term of confinement, increased by “any applicable penalty enhancement statute,” “to the minimum period of extended supervision required under par. (d).” Wis. Stat. § 973.01(2)(c)1. Paragraph (d) requires the term of extended supervision to be at least 25 percent of the term of confinement imposed. Wis. Stat. § 973.01(2)(d).

Accordingly, when read together, Agnew's 18-month maximum term of confinement on his base offense may be increased, pursuant to the repeater enhancer, so long as his term of extended supervision is at least 25 percent of the term of confinement imposed. Because the maximum term of extended supervision in this case is 6 months, the maximum term of increased confinement is 24 months (6 months is 25 percent of 24 months). Any further increase would violate the “25% rule” set forth in Wis. Stat. § 973.01(2)(d), to which the penalty enhancement provision, Wis. Stat. § 973.01(2)(c)1. is explicitly subject. In other words, the validity of Agnew's four year term of imprisonment, bifurcated

between 3 years of confinement and 1 year of extended supervision, must be assessed in light of the fact that the 1-year term of extended supervision exceeds the 6-month maximum under *Kleven* and *Volk*. Because Agner's term of extended supervision is capped at 6 months, his term of confinement, pursuant to Wis. Stats. §§ 973.01(2)(c)1. and (2)(d) is capped at 24 months.

**3. Agnew's maximum overall sentence in this case is 30 months imprisonment.**

Finally, pursuant to Wis. Stat. § 973.01(2), the total length of a bifurcated sentence is equal to the length of confinement in prison plus the length of the term of extended supervision. Because Agnew's maximum enhanced term of confinement in prison is 24 months and his maximum term of extended supervision is 6 months, his maximum overall sentence is 30 months.

**E. Agnew Is Entitled to Resentencing.**

In *Volk*, the court explained that “[r]esentencing is generally the proper method of correcting a sentencing error.” 258 Wis. 2d 584, ¶47 (quoting *State v. Holloway*, 202 Wis. 2d 694, 699-700, 551 N.W.2d 841 (Ct. App. 1996)). Further, the court explained that “[w]hen a crucial component of such sentence is overturned, it is proper and necessary for the sentencing court to revisit the entire question. *Id.*, ¶48. Finally, in rejecting Volk's request to have the excessive portion of his sentence commuted under Wis. Stat. § 973.13, the court

explained that doing so would “produce a sentence based on mathematics, rather than an individualized sentence based on ‘the facts of the particular case and the characteristics of the individual defendant.’” *Id.*

In Agnew’s case, the court imposed a sentence of four years imprisonment, consisting of 3 years initial confinement and 1 year extended supervision. (71; App. 101-02). As explained above, Agnew’s maximum sentence is 30 months, consisting of 24 months initial confinement and 6 months extended supervision. Therefore, each “crucial component” of Agnew’s sentence is excessive. Under *Volk*, this Court should vacate Agnew’s sentence and remand this case to the circuit court with directions to resentence Agnew in line with Wis. Stats. §§ 973.01(2)(a)-(d) and the relevant constraints outlined above.

## CONCLUSION

For the reasons argued above, Agnew respectfully asks this Court to reverse the circuit court's order denying Agnew's postconviction motion and remand this case to the circuit court for resentencing.

Dated this 17<sup>th</sup> day of December, 2019.

Respectfully submitted,

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### **CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,016 words.

### **CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 17<sup>th</sup> day of December, 2019.

Signed:

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JEREMY A. NEWMAN  
Assistant State Public Defender



### **CERTIFICATION AS TO APPENDIX**

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

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

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

Dated this 17<sup>th</sup> day of December, 2019.

Signed:

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