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SUPREME COURT

STATE OF WISCONSIN  
IN SUPREME COURT  
Case No. 2019AP001785-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TORY J. AGNEW,

Defendant-Appellant-Petitioner.

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PETITION FOR REVIEW

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## ISSUE PRESENTED

Tory J. Agnew pled no contest to an unclassified felony with a maximum underlying term of imprisonment of two years. He was sentenced as a repeat offender subject to Wis. Stat. § 939.62(1)(b). Under TIS-II, 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 six months to one year and (2) imposed a term of confinement of three years that exceeds Wis. Stat. § 973.01(2)(c)1.'s cap on enhanced confinement, pursuant to the "25% rule" set forth in Wis. Stat. § 973.01(2)(d)?

The circuit court denied Agnew's postconviction motion for resentencing and the court of appeals affirmed. *See State v. Agnew*, No. 2019AP1785-CR, unpublished slip op., 2020 WL 4355450 (WI App July 30, 2020). (Pet. App. 101-117).

## CRITERIA SUPPORTING REVIEW

Review is necessary and warranted because not only did the circuit court impose and the court of appeals affirm an illegal and excessive sentence in this case, but uncertainty exists around these seemingly simple and fundamental questions: under Truth-in-Sentencing-II (TIS-II), what are the constraints that apply to the terms of total imprisonment, confinement, and extended supervision when a sentencing court imposes an

enhanced sentence upon someone convicted of an *unclassified* felony?

Uncertainty has existed related to these questions since the advent of TIS, especially during TIS-I, and even more so during TIS-II for three primary reasons: (1) the relevant sentencing statutes do not provide clear or complete answers to these questions, (2) the controlling precedent is both incomplete and contradictory, as applied to TIS-II sentences, and (3) TIS-II made significant changes to the relevant sentencing statutes, previously addressed by this Court during TIS-I, but not yet addressed by this Court under TIS-II.

These existing uncertainties were overlooked or ignored by the court of appeals in this case, and review by this Court is warranted in order to develop, clarify, and harmonize the law. Wis. Stat. § (Rule) 809.62(1r)(c). Further, the question is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by this Court. Wis. Stat. § (Rule) 809.62(1r)(c)3. Specifically, the decision below, which is unpublished but citable pursuant to Wis. Stat. § (Rule) 809.23(3)(b), ignored the significance of the change TIS-II made to TIS-I's "penalty enhancement" provision: Wis. Stat. § 973.01(2)(c)1.

Moreover, the court of appeals decision is in conflict with a controlling court of appeals decision, *State v. Kleven*, 2005 WI App 66, 280 Wis. 2d 468, 696 N.W.2d 226. In rejecting Agnew's claim for

resentencing, the court repeatedly ignored and failed to apply *Kleven*'s holding concerning the "constraints [that] apply to the term of extended supervision that may be ordered for the enhanced offense" by dismissing the applicable constraint as merely "a clause" in a footnote. See *State v. Agnew*, No. 2019AP1785-CR, at ¶¶23, 28-33, 37 (Pet. App. 110-116). By doing so, the court of appeals violated the clear rule that it "may not overrule, modify or withdraw language from a previously published decision of the court of appeals." *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

Finally, even if it could be argued that the decision below is arguably in accord with a prior decision of this Court, *State v. Jackson*, 2004 WI 29, 270 Wis. 2d 113, 676 N.W.2d 872, *superseded by statute on other grounds as recognized by State v. Neill*, 2020 WI 15, 390 Wis. 2d 248, 938 N.W.2d 521, or *State v. Kleven*, 280 Wis. 2d 468, the enactment of TIS-II, and specifically Wis. Stat. § 973.01(2)(c)1., has rendered *Jackson* and *Kleven* ripe for reexamination by this Court. While this Court need not overturn either case to decide this case in Agnew's favor, review is necessary to apply the presently existing TIS-II sentencing statutes to this recurring question concerning enhanced sentences for unclassified felonies.

## STATEMENT OF THE CASE AND FACTS

On December 11, 2017, the state charged 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). Specifically, the court noted that there had been a question raised about the legality of the sentence the state was prepared to recommend at sentencing. (91:3-5). Later, the court ordered the parties to file letter briefs on the issue. (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 confinement and maximum term of extended supervision. (62; 64).

At sentencing, the court noted that it had received the parties' sentencing "memos," but did not specifically address the parties' arguments. (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; Pet. App. 118-19).

With newly appointed counsel, Agnew filed 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).

On appeal, the court of appeals affirmed the circuit court's sentence and the denial of his postconviction motion. *State v. Agnew*, No. 2019AP1785-CR, unpublished slip op. (Pet. App. 101-117). The court of appeals rejected Agnew's reliance on *State v. Kleven*, 280 Wis. 2d 468, and concluded that Agnew's sentence of three years

confinement followed by one year extended supervision was lawful. *Id.* (Pet. App. 111-117).

## ARGUMENT

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

#### **A. Introduction**

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.

Pursuant to Wis. Stat. § 973.01(1) and (2), and controlling precedent that has previously interpreted the meaning of these statutory provisions in the context of the circuit court's authority to impose an enhanced sentence on an unclassified felony, the following constraints apply to Agnew's enhanced sentence:

- (1) The maximum term of extended supervision is 6 months if the court



seeks to apply the penalty enhancer to increase Agnew's underlying maximum term of confinement, which is indisputably 18 months. *See State v. Kleven*, 280 Wis. 2d 468, ¶26; *see also State v. Agnew*, No. 2019AP1785-CR, unpublished slip op., ¶15. (Pet. App. 106-07).

- (2) The maximum term of enhanced confinement that guarantees compliance with the minimum 25% rule for extended supervision is 24 months. Wis. Stats. §§ 973.01(2)(c)1. and 973.01(2)(d).
- (3) The maximum total term of imprisonment, which consists of the maximum applicable term of confinement plus the maximum term of extended supervision, in Agnew's case is 30 months. Wis. Stat. § 973.01(2).

To arrive at these three conclusions, it is necessary to first understand the basic sentencing principles applicable to Agnew's sentence. After that, and because the sentencing statutes do not explicitly set forth the applicable maximum term of enhanced confinement or the maximum term of extended supervision, it is necessary to understand what this Court and the court of appeals has previously held, under TIS-I, in *State v. Jackson*, 270 Wis. 2d 113, and

*State v. Kleven*, 280 Wis. 2d 468, with regard to those portions of Agnew’s enhanced sentence. Finally, the holdings set forth in *Jackson* and *Kleven* must be reconciled with the TIS-II version of the “penalty enhancement” provision, Wis. Stat. § 973.01(2)(c)1.

### **B. Basic sentencing principles.**

Despite uncertainty and dispute about Agnew’s maximum term of imprisonment, confinement, and extended supervision, there is broad agreement about most of the relevant sentencing provisions. *See State v. Agnew*, No. 2019AP1785-CR, unpublished slip op., ¶¶11-15 (Pet. App. 105-07).

First, with regard to Agnew’s underlying offense, the statutes are plain and clear. As a result of Agnew’s plea and conviction under Wis. Stats. §§ 346.63(2)(a)1. and 346.65(3m), he stands convicted of an unclassified felony with a maximum term of imprisonment of two years. Pursuant to Wis. Stat. § 973.01(1), because the court sentenced Agnew to a term of imprisonment it was required to impose a bifurcated sentence. A bifurcated sentence consists of a term of confinement in prison followed by a term of extended supervision. Wis. Stat. § 973.01(2). The total length of the bifurcated sentence may not exceed the statutory maximum provided for the crime (two years), except as provided by the penalty enhancement provision, Wis. Stat. § 973.01(2)(c)1. Wis. Stat. § 973.01(2)(a).

Second, like all bifurcated sentences, the term of imprisonment must be at least one year. Wis. Stat.

§ 973.01(2)(b). Because Agnew's offense is an unclassified felony, Wis. Stat. § 973.01(2)(b)10. provides that the underlying maximum term of confinement may not exceed 75% of the total bifurcated sentence. This is known as the "75% rule."

Third, as with all bifurcated sentences, the term of extended supervision imposed must be at least 25% of the term of confinement imposed. This is known as the "25% rule." Wis. Stat. § 973.01(2)(d).

Applying these relatively straightforward rules, Agnew's underlying sentence, without application of the penalty enhancer, must consist of at least 1 year confinement, which would mandate at least 3 months extended supervision. The court could impose up to 18 months confinement, which would mandate at least 4.5 months but no more than 6 months extended supervision. The court would also have the authority to impose any combination of confinement and extended supervision that complied with those rules: for example: 1 year confinement and 1 year extended supervision, 16 months confinement and four to six months extended supervision, and so on.

Fourth, the penalty enhancement provision, Wis. Stat. § 973.01(2)(c)1., allows the court to increase the underlying maximum term of confinement set forth in Wis. Stat. § 973.01(2)(b)10. (the 75% rule), in Agnew's case 18 months, by any applicable penalty enhancer. Wis. Stat. § 973.01(2)(b) and 973.01(2)(c)1. However, under TIS-II, the penalty enhancement provision explicitly subjects any

increase in the underlying maximum term of confinement to the 25% rule set forth in Wis. Stat. § 973.01(2)(d). In other words, the court may use the applicable penalty enhancer to impose greater than 18 months confinement, but the term of confinement imposed must not force the term of extended supervision imposed to violated the 25% rule. It is also agreed upon that the penalty enhancer cannot be bifurcated and no portion of the penalty enhancer may be applied to the term of extended supervision. *See State v. Agnew*, No. 2019AP1785-CR, unpublished slip op., ¶¶16-17 (Pet. App. 107-08); *see also State v. Volk*, 258 Wis. 2d 584, ¶35, and Wis. Stat. § 973.01(2)(c)1.

At this point, however, the statutes fail. They do not provide a clear maximum enhanced term of confinement or a clear maximum term of extended supervision for an enhanced unclassified felony sentence. In theory, if Agnew's maximum underlying term of confinement is indisputably 18 months and he is subject to a 4-year penalty enhancer, then his statutory maximum term of confinement would be 5.5 years (18 months plus 4 years). However, under *Jackson*, 270 Wis. 2d 113, ¶¶31-44, and as explained below, that theory would be wrong.

Further, in terms of extended supervision, and because the statutes are clear that any penalty enhancer must be used to increase a defendant's maximum term of confinement, the question becomes what is Agnew's *maximum* term of extended supervision on an enhanced sentence? Is it 1 year

because the court could impose a total sentence of 1 year confinement and 1 year extended supervision on the underlying offense? Or, is Agnew's maximum term of extended supervision 6 months, because that would be the maximum term of extended supervision *if* the court "maxed out" Agnew's underlying term of confinement to comply with the rule that penalty enhancers are used to increase a defendant's maximum term of confinement? Under *Kleven*, 280 Wis. 2d 468, ¶26, which relied upon *Jackson* and *Volk* for this holding, Agnew's maximum term of extended supervision is 6 months.

Thus, at this point, it's necessary to examine *Jackson* and *Kleven* to determine what rules from these TIS-I cases apply, and which rules can't apply, to Agnew's sentence.

**C. *Jackson's* and *Kleven's* imperfect application to Agnew's case.**

In 2004, this Court decided *State v. Jackson*, 270 Wis. 2d 113, ¶¶2-3, 39-44, which addressed the question of how penalty enhancers are applied to unclassified felonies in calculating the maximum term of *confinement* under TIS-I.<sup>1</sup> *Jackson* had been convicted of fleeing an officer, which was an unclassified felony under TIS-I that subjected him to three years imprisonment. *Jackson*, 270 Wis. 2d 113, ¶¶1, 4. As a repeat offender, *Jackson* was also subject

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<sup>1</sup> Since *Jackson* concerned a TIS-I offense, the 1997-98 version of the relevant sentencing statutes applied. *Jackson*, 270 Wis. 2d 113, ¶2.

to Wis. Stat. § 939.62(1)(b)'s six-year penalty enhancer. *Id.*, ¶4.

To determine how the penalty enhancer applied to Jackson's unclassified felony and to determine Jackson's maximum term of confinement, the court started with the relevant sentencing statutes. *Id.*, ¶13. The penalty enhancer for repeat offenders, Wis. Stat. § 939.62(1)(b) allows for an increase in the "maximum term of imprisonment" of six years. *Id.*, ¶¶13-14.

Next, the court recognized that Wis. Stat. § 973.01(1) requires courts, when imposing a term of "imprisonment," to impose a "bifurcated sentence," consisting of a term of confinement and a term of extended supervision. *Id.*, ¶15. The structure of each bifurcated sentence is set forth in Wis. Stat. § 973.01(2) and subdivisions 1 through 5 address the maximum term of confinement for classified felonies, while subdivision 6 addresses the maximum term of confinement for unclassified felonies. *Id.*, ¶16.<sup>2</sup> For unclassified felonies, Wis. Stat. § 973.01(2)(b)6. states

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<sup>2</sup> For example, the TIS-I version of Wis. Stat. § 973.01(2)(b)1. provided: "For a Class B felony, the term of confinement in prison may not exceed 40 years." At the low end, Wis. Stat. § 973.01(2)(b)5. provided: "For a Class E felony, the term of confinement in prison may not exceed 2 years." See Wis. Stat. § 973.01(2)(b) (1997-02). Under TIS-II, the legislature reclassified felonies as A through I instead of A through E and classified many felonies not previously classified under TIS-I. See Wis. Stat. § 973.01(2)(b)1.-9. (2003-04) *contra* Wis. Stat. § 973.01(2)(b)1.-5. (1997-02).

that the term of confinement may not exceed “75% of total length of the bifurcated sentence.” *Id.*

Finally, the court explained that “[t]he key to understanding the applicability of penalty enhancers under TIS-I lies in Wis. Stat. § 973.01(2)(c), which is entitled ‘penalty enhancement.’” *Id.*, ¶17. That provision directs sentencing courts to “add the penalty enhancer to the *maximum* term of confinement” and states that “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.” *Id.* (Emphasis added).

After setting forth these statutory parameters, the court explained that it agreed with the state’s position that the penalty enhancer is “not subject to bifurcation” and must be “added to the underlying *maximum* term of confinement that could be imposed.” *Id.*, ¶20. (Emphasis added). The court also relied on *State v. Volk*, 2002 WI App 274, 258 Wis. 2d 584, 654 N.W.2d 24, which held that no portion of a penalty enhancer may be added to the term of extended supervision. *Id.*, ¶21. Further, the court explained that *Volk*’s holding was, in part, based on the legislative history of TIS, which confirmed that penalty enhancers “increase the *maximum* term of confinement for the underlying crime” and “do not lengthen the *maximum* term of extended supervision for the underlying crime.” *Id.*, ¶¶21-24. (Emphasis added).

Having definitively concluded that penalty enhancers, if they are to be applied, must be used to increase a defendant's maximum term of confinement on the underlying offense and that they may not be used to increase a defendant's maximum term of extended supervision, the court turned to "the question of how to calculate the maximum confinement time for unclassified felonies with penalty enhancers under TIS-I." *Id.*, ¶31. The court noted the fact that the circuit court, the court of appeals, and the state all reached different conclusions on this question. *Id.*, ¶¶31-39.<sup>3</sup>

In resolving the question, the court reasoned that Wis. Stat. §§ 973.01(2)(b)6. and 973.01(2)(c) should be read together. *Id.*, ¶39. The court explained that the first step is to "identify the total length of the bifurcated sentence," which is accomplished by applying Wis. Stat. § 973.01(2)(c), which states that "the total length of the bifurcated sentence is increased by the same amount that was added to the underlying maximum term of confinement with enhancement." *Id.*, ¶40. Next, the court applied the "75% rule" set forth in Wis. Stat. § 973.01(2)(b)6. to determine the maximum term of confinement available on an unclassified felony subject to penalty enhancement. *Id.* Moreover, the court relied on the rule of lenity, which "generally establishes that

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<sup>3</sup> With regard to Jackson's maximum term of enhanced confinement, the circuit court concluded it was 90 months, the court of appeals determined it was 86.4 months, and the state argued it was 99 months. *Jackson*, 270 Wis. 2d 113, ¶32.



ambiguous penal statutes should be interpreted in favor of the defendant.” *Id.*, ¶¶41-42.

Under this analysis, the court concluded that Jackson’s maximum term of confinement was six years, nine months. *Id.*, ¶42, n.9. The court reached this figure by adding the applicable six-year penalty enhancer to Jackson’s underlying three-year maximum term of imprisonment and then multiplying that figure (nine years) by 75% to obtain a maximum term of enhanced confinement (six years, nine months).<sup>4</sup> The *Jackson* court ended its analysis after determining the maximum term of enhanced confinement because, “[i]n the end, while our method of calculations differs from that used by the court of appeals, we affirm because the difference here in calculations has no practical effect on Jackson’s sentence.” *Id.*, ¶44.

In 2005, the court of appeals attempted to answer the question left unresolved by *Jackson*: what constraints apply to the term of extended supervision that may be ordered for an enhanced unclassified felony. *State v. Kleven*, 280 Wis. 2d 468, ¶24. Kleven was convicted of an unclassified TIS-I felony and was subject to two penalty enhancers: the habitual offender enhancer and an enhancer for using dangerous weapon. *Kleven*, 280 Wis. 2d 468, ¶¶3-4.

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<sup>4</sup> Six year penalty enhancer (72 months) + underlying maximum term of imprisonment (36 months) = 108 months x 75% = 81 months or six years, nine months maximum term of enhanced confinement available. *Jackson*, 270 Wis. 2d 113, ¶42, n.9.

After granting Kleven's motion for resentencing, the circuit court imposed a sentence of 11 years confinement and 1 year, 3 months extended supervision. *Id.*, ¶9. Kleven challenged this sentence on multiple grounds. *Id.*, ¶¶10, 16.

After rejecting Kleven's arguments, the court turned to an issue raised by the state: "the correctness of the sentence before us under recent decisions of this court and the supreme court that addressed how to compute bifurcated sentences for offenses committed during the period that the period that the first phase of Truth-in-Sentencing (TIS-I) was in effect." *Id.*, ¶19.

First, the court considered Kleven's maximum term of enhanced confinement under *Jackson*. *Id.*, ¶¶20-23. Under *Jackson*, the court determined that Kleven faced an underlying maximum term of confinement of two years, six months, and a maximum term of enhanced confinement of 11 years, 3 months. *Id.*

Next, the court proceeded to determine "what constraints apply to the term of extended supervision that may be ordered for the enhanced offense." *Id.*, ¶24 ("The State correctly notes that the supreme court did not expressly address this issue in *Jackson*. The court ended its analysis after determining that the 75% rule limited the term of maximum confinement that could be ordered.").

As the *Jackson* court had recognized with regard to the maximum term of confinement

available on an enhanced unclassified felony, *see Jackson*, 270 Wis. 2d 113, ¶31, the *Kleven* court acknowledged that the applicable statutes did not provide a clear answer with regard to the constraints that apply to the term of extended supervision. *Id.*, ¶24. The court explained that two possibilities existed with regard to the maximum term of extended supervision available on Kleven's enhanced sentence, considering that the circuit court imposed 11 years confinement. *Id.*

First, because Kleven's enhanced term of total imprisonment was 15 years (5 years on the underlying offense plus 10 years based on the applicable penalty enhancers), there might be 4 years of extended supervision available. *Id.*, ¶25. The court noted that under Wis. Stat. § 973.01(2)(d), the term of extended supervision would have to be at least 25 percent of the term of confinement imposed (11 years), meaning that the court would have to impose at least 2 years, 9 months extended supervision, but no more than 4 years extended supervision. However, the court also noted, under this first possibility, that since the court imposed a term of extended supervision of 1 year, 3 months, the term of extended supervision imposed violated the 25 percent rule set forth in Wis. Stat. § 973.01(2)(d). *Id.*, ¶25.

The second possibility, "because the penalty enhancer cannot be bifurcated," is that Kleven could be ordered to serve, at most, the maximum term of extended supervision available on his underlying offense, which was 2 years, six months. *Id.*, ¶26. The

court acknowledged that under this interpretation, the sentencing court would *not* be able to satisfy the “minimum 25% of confinement rule for extended supervision” if the court imposed more than 10 years confinement. *Id.*

Importantly, the court explained how to determine the “maximum term of extended supervision” available on the underlying unclassified felony. *Id.*, ¶26, n.6. The court explained that because the maximum term of confinement on the underlying offense “must be deemed to have been imposed in order for the enhanced term of confinement to apply,” the maximum term of extended supervision available on an enhanced unclassified sentence is calculated by subtracting the maximum underlying term of confinement from the maximum term of total imprisonment on the underlying offense. *Id.*

In Kleven’s case, this meant that his maximum term of extended supervision available on his enhanced sentence was 2 years, six months. *Id.* The court concluded that the second alternative was the more reasonable interpretation because it was consistent with *Jackson’s* holding that penalty enhancers may not be bifurcated and serve only to increase the maximum underlying term of confinement. *Id.*, ¶27. Further, it was consistent with the rule of lenity applied in *Jackson* because it “favors the defendant by producing shorter maximum terms of extended supervision and total imprisonment.” *Id.* The court also noted that this interpretation was consistent with *Volk’s* rule that “a

penalty enhancer cannot be applied to a term of extended supervision.” *Id.*

Having concluded the Kleven’s maximum enhanced term of confinement was 11 years, 3 months, and his maximum term of extended supervision was 2 years, 6 months, the court ordered resentencing because (1) “the circuit court improperly allocated three years, nine months of confinement to Kleven’s base offense” and (2) “Kleven’s present sentence includes too short a term of extended supervision,” which was required to be not less than 25 percent of the confinement ordered, “capped, however, as discussed above, at 2.5 years.” *Id.* The court’s remand order set forth the following “understandings:”

- (1) Kleven’s maximum term of confinement on his underlying offense was 2 years, six months;
- (2) The penalty enhancers could be applied only to increase Kleven’s maximum underlying term of confinement;
- (3) The maximum term of confinement that may be ordered is 11 years, 3 months; and
- (4) A term of extended supervision must be ordered that equals at least 25 percent of the term of confinement imposed, *except* that the maximum

term of extended supervision that may be ordered is 2 years, 6 months regardless of the length of confinement ordered.

*Id.*, ¶32.

The *Kleven* court's "understandings" notably failed to address a significant internal conflict between the maximum term of enhanced confinement and the maximum term of extended supervision available to the circuit court: "a sentencing court would not be able to satisfy the minimum 25%-of-confinement rule for extended supervision if it imposes a term of confinement in excess of ten years." *Id.*, ¶26. Further "the 25% rule produces a minimum term of extended supervision of 2.75 years to follow the eleven years of confinement imposed, which would exceed the maximum 2.5 years' extended supervision available for Kleven's base offense." *Id.* Nevertheless, the court concluded that this explicitly problematic "alternative" was "the more reasonable interpretation." *Id.*, ¶27.

How is it that *Kleven*, in nearly the same breath, indicates on one hand, that any term of confinement in excess of 10 years would result in a mandatory term of extended supervision (2.75 years) that would exceed Kleven's maximum term of extended supervision, and on the other hand, that the circuit court may impose up to 11 years, 3 months confinement? The answer is not clear. *Kleven* does not reconcile this conflict, it merely acknowledges it

and moves on to purportedly instruct circuit courts how to impose a sentence on an enhanced unclassified felony. *Id.*, ¶¶26-27, 32.

One possible explanation, not explicitly addressed by *Kleven*, is that under TIS-I, *Jackson* reasoned that the court of appeals' reliance on Wis. Stat. § 973.01(2)(d)'s "25% extended supervision rule" was "misplaced." *Jackson*, 270 Wis. 2d 113, ¶36. The court of appeals had used Wis. Stat. § 973.01(2)(d) to "limit the term of confinement" available on Jackson's enhanced sentence. *Id.*, ¶35. After examining Wis. Stats. §§ 973.01(2)(b)6. and 973.01(2)(c), the *Jackson* court held that it was the 75% rule alone that limited Jackson's maximum term of enhanced confinement. *Id.*, ¶39-43.

Since the *Kleven* court was bound by *Jackson*, and both cases concerned the TIS-I versions of the relevant sentencing statutes, it is not surprising that *Kleven* didn't limit the maximum term of enhanced confinement available even though that figure would violate the 25% rule set forth in Wis. Stat. § 973.01(2)(d).

Transitioning to the present case, the most significant difference between Agnew's case and either *Jackson* or *Kleven* is that the TIS-I versions of the relevant sentencing statutes, applicable in *Jackson* and *Kleven*, do not apply to Agnew. Rather, Agnew's case arises well after the changes enacted by TIS-II, which, inter alia, explicitly subjected Wis. Stat. § 973.01(1)(c)'s "penalty enhancement"

provision to the “minimum period of extended supervision required under par. (d).” *See* Wis. Stat. § 973.01(2)(c)1. (2003-04) *contra* Wis. Stat. § 973.01(2)(c) (1997-2002).

Under TIS-II, subdivisions 1 and 2 were added to Wis. Stat. § 973.01(2)(c). Subdivision 1 is identical to the TIS-I version of Wis. Stat. § 973.01(2)(c) *except that* it includes the following prefatory clause:

*“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.”*

Wis. Stat. § 973.01(2)(c)1.

This prefatory clause did not exist under TIS-I. Accordingly, it is not a surprise that the *Jackson* court refused to limit the enhanced term of confinement based on the 25% rule. Under TIS-I, the penalty enhancement provision was not subject to the 25% rule set forth in Wis. Stat. § 973.01(2)(d). Under TIS-II, however, and under the statutory authority that applies to Agnew’s case, the legislature has explicitly subjected any term of confinement, enhanced under Wis. Stat. § 973.01(2)(c)1., to the 25% rule set forth in Wis. Stat. § 973.01(2)(d).



The plain reading of this text is that, for unclassified felonies, the underlying maximum term of confinement may be increased up to the point where the total sentence complies with the 25% rule. While *Jackson* refused to apply a limit to the enhanced term of confinement under TIS-I, TIS-II's penalty enhancement provision, applicable to Agnew's sentence, now contains such a limit that subjects the increased term of confinement to the 25% rule.

Thus, under *Kleven* and Wis. Stat. § 973.01(2)(c)1., Agnew's maximum term of confinement is 24 months, his maximum term of extended supervision is 6 months, and his maximum total term of imprisonment is 30 months. It is undisputed that Agnew's underlying maximum term of confinement is 18 months. Under *Kleven*, that means Agnew's maximum term of extended supervision, if the court seeks to utilize the available penalty enhancer, is 6 months. *See Kleven*, 280 Wis. 2d 468, ¶26. While pure application of *Jackson* would yield a maximum term of enhanced confinement of 4.5 years, Wis. Stat. § 973.01(2)(c)1. now explicitly subjects the enhanced term of confinement to the 25% rule. Because any enhanced term of confinement in excess of 24 months, along with the maximum term of extended supervision of 6 months, would violate the 25% rule, Agnew's maximum term of confinement is limited to 24 months.

The court of appeals' decision in this case refused to acknowledge the significance of the TIS-II

version of Wis. Stat. § 973.01(2)(c)1. compared to the TIS-I version applicable in *Jackson* and *Kleven*. See *State v. Agnew*, No. 2019AP1785-CR, at ¶¶17-18, 22, 28-37 (Pet. App. 107-09, 111-116). Had the court addressed this issue head on, it would have distinguished *Jackson* and *Kleven* from Agnew's case to the extent that those cases were based on the TIS-I version of the applicable statutes. Instead, the court of appeals disregarded *Kleven*'s holding, concerning how to determine the maximum term of extended supervision on an enhanced unclassified felony, completely by referring to it as "a clause in a footnote." Further, the court strangely faulted Agnew for relying on *Kleven* by asserting that *Kleven*'s holding "has no statutory basis."

The court of appeals was wrong. *Kleven* firmly rests upon the applicable TIS-I versions of the relevant sentencing statutes, and to the extent that the statutes themselves were interpreted by prior cases, *Jackson* and *Volk*, its holding rests upon binding precedent the court of appeals is powerless to overturn or ignore. *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997) ("the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals.").

**D. This Court should accept review and reexamine *Jackson's* and *Kleven's* application to TIS-II cases like *Agnew's*.**

It's been more than 16 years since this Court last examined the issue of application of penalty enhancers to unclassified felonies under Truth-in-Sentencing, and the Court has not done so under TIS-II. While the *Jackson* court noted that “few unclassified felonies remain” under TIS-II and that the its holding “has limited application in future cases,” it is unacceptable that uncertainties remain when circuit court's impose enhanced sentences on someone like Agnew, who happens to be convicted of one of these remaining unclassified felonies. See *Jackson*, 270 Wis. 2d 113, ¶37, n.8. Even if *Jackson* and *Kleven* remain good law for someone convicted and sentenced under TIS-I, reexamination of these decisions is necessary under the applicable TIS-II sentencing statutes. If nothing else, defendants like Agnew are entitled to certainty about the sentence they face upon conviction for an enhanced unclassified felony. As evidenced by the facts in this case, uncertainty existed about the range of potential sentences Agnew faced from the time of his plea.

Because the court of appeals' decision below fails to adequately address these uncertainties, ignores or overrules *Kleven*, and allows Agnew's illegal and excessive sentence to stand, review by this Court is warranted.

## CONCLUSION

For the reasons stated above, this court should grant Agnew's petition for review.

Dated this 31<sup>st</sup> day of August, 2020.

Respectfully submitted,

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## CERTIFICATIONS

I hereby certify that this petition conforms to the rules contained in § 809.19(8)(b) and (c) and § 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 5,495 words.

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12) and § 809.62(4)(b). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with § 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (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 31<sup>st</sup> day of August, 2020.

Signed:

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Jeremy A. Newman  
Assistant State Public Defender

## **APPENDIX**

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