STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP1129

STATE OF WISCONSIN EX REL.
CHRISTOPHER P. KAWLESKI,

Petitioner-Appellant-Petitioner,

v.

STATE OF WISCONSIN,

Respondent-Respondent-Respondent.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The State of Wisconsin offers this response to Christopher P. Kawleski's petition for review of the Wisconsin Court of Appeals' opinion, *State ex rel. Kawleski v. State*, No. 2022AP1129 (Wis. Ct. App. July 3, 2025) (Pet-App. 3–29).[1] Kawleski sexually assaulted a child in 2001. Under truth-in-sentencing I (TIS-I), which applied to defendants given bifurcated sentences for crimes committed from December 31, 1999, through February 2003, he was sentenced to two and one-half years of initial confinement and seventeen and one-half years of extended supervision, then was released and reconfined multiple times. Kawleski argued that the statute violated separation of powers principles by allowing the executive branch, instead of the judiciary, to revoke and reconfine him. He further argued that TIS-I should be read to give him credit against the extended supervision portion of his sentence for each day he spent on extended supervision prior to being revoked.

The court of appeals agreed with Kawleski that he was entitled to credit for each day spent on extended supervision before being revoked. The court held that under TIS-I, a defendant sentenced to a given number of days of extended supervision must serve exactly that number of days on extended supervision—no more and no less—regardless of any time spent in confinement and reconfinement. The court then declined to address Kawleski's separation of powers issue because, under its new interpretation of TIS-I, Kawleski's maximum discharge date would not change even if he were correct about the unconstitutionality of his reconfinement. The reconfinement time (whether proper or improper) was not spent on extended supervision, so it could not count toward Kawleski's term of extended supervision.

[1] The court of appeals' decision has now been published at *State ex rel. Kawleski v. State*, 2025 WI App 45.

Kawleski now seeks this Court's review on the separation of powers issue.

The separation of powers issue Kawleski has presented does not warrant review. It is settled law that sentencing is a shared power and that the legislature may properly vest revocation and reconfinement in the executive branch, and Kawleski offers no compelling reason for this Court to revisit that settled legal principle. However, this Court should consider granting review to address the court of appeals' interpretation of TIS-I, which improperly held that a defendant's remaining extended supervision time is essentially unrelated to the amount of time he has spent in confinement and reconfinement. The court of appeals' decision will improperly shorten some sentences, improperly lengthen others, and may lead to absurd results.

BACKGROUND

The facts are largely undisputed. Kawleski pleaded guilty to first-degree sexual assault of a child. *State of Wisconsin v. Christopher P. Kawleski*, Jefferson County Case No. 2001CF43, Wis. Cir. Ct. Access, wcaa.wicourts.gov (last visited Sept. 16, 2025).[2] In June 2001 he was sentenced to two years and six months of initial confinement followed by seventeen years and six months of extended supervision. (Pet-App. 5.)

Kawleski was initially released to extended supervision on December 16, 2003. (Pet-App. 7.) On August 8, 2005, he was revoked and was reconfined by the circuit court[3] for

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[2] This Court may take judicial notice of CCAP entries. *See Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

[3] At the time of Kawleski's first revocation, the statute provided that the circuit court in which the defendant was

two years. (Pet-App. 7–8.) Kawleski was again released to extended supervision on May 22, 2007. (Pet-App. 8.)

Kawleski's extended supervision was revoked again on November 15, 2018. The Division of Hearings and Appeals (DHA)[4] ordered Kawleski to be reconfined for four years, seven months, and 26 days. (Pet-App. 8.) He was released to extended supervision on July 2, 2022. (Pet-App. 8.) The Department of Corrections (DOC) informed Kawleski that his maximum discharge date was May 14, 2033, based on the total length of his sentence minus the time he had served in confinement and reconfinement. (Pet-App. 8.)

Kawleski filed a pro se petition for a writ of habeas corpus in the court of appeals, which the court of appeals referred to the circuit court for a hearing. (Pet-App. 8.) The DOC records supervisor explained how the DOC determined the maximum discharge date, and the circuit court denied Kawleski's petition. (Pet-App. 8–9.)

The Wisconsin Court of Appeals appointed counsel to represent Kawleski on appeal. (Pet-App. 9.) The State conceded on appeal that the sentencing statutes that were in effect between December 31, 1999, and February 2003 (Truth-in-Sentencing I) applied in determining Kawleski's maximum discharge date, as he was convicted and sentenced while TIS-I was in effect. (Pet-App. 5.)

Kawleski argued that he was entitled to immediate release because his second reconfinement, which was done by

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originally convicted was to order the period of reconfinement after revocation. From 2003 to 2009, the legislature vested reconfinement after revocation in the judiciary rather than the executive. (Pet-App. 8); *see* Wis. Stat. § 302.113(9)(am) (2003–04).

[4] In 2018 (and now) the statute provided that the reconfinement order is to be made by the Division of Hearings and Appeals if a revocation hearing is held, or by the Department of Corrections if the hearing is waived. *See* Wis. Stat. § 302.113(9).

the executive branch instead of the circuit court, violated the separation of powers doctrine. (Pet-App. 7.) He further argued that under TIS-I, a defendant must receive credit against his remaining extended supervision time for any time spent on extended supervision prior to a revocation. (Pet-App. 6.) The State argued that sentencing was a shared power and that there was no separation of powers violation. (Pet-App. 28.) The State further argued that the DOC calculated Kawleski's maximum discharge date correctly because under TIS-I (as well as every other iteration of the sentence calculation statutes), a defendant's remaining extended supervision time is calculated by subtracting the period of initial confinement and any periods of reconfinement from the total length of the bifurcated sentence. (Pet-App. 19.)

The court of appeals agreed with Kawleski that under TIS-I, Kawleski's maximum discharge date was actually February 10, 2028. (Pet-App. 24.) The court held that for criminal defendants given bifurcated sentences for felonies committed between December 31, 1999, and February 2003, the maximum discharge date is determined by subtracting the time already served on extended supervision from the total term of extended supervision that was imposed at sentencing. (Pet-App. 17–18.)

In other words, the court held that under TIS-I, "the period of extended supervision to be served equals the term of extended supervision portion of the bifurcated sentence minus the time the defendant has already served on extended supervision." (Pet-App. 18.) This means a defendant's term of extended supervision is completely unaffected by how much time, if any, the defendant has served in reconfinement. (Pet-App. 17.) The defendant receives credit toward his term of extended supervision for each day on extended supervision, and only for each day spent on extended supervision. (Pet-App. 17.)

The court of appeals did not reach the separation of powers issue due to its decision on sentence calculation under TIS-I. (Pet-App. 7.) The court explained that even if Kawleski were correct that his second reconfinement violated the separation of powers, he would still not be entitled to an earlier release because, under the court of appeals' new interpretation of TIS-I, Kawleski would still need to serve his entire term of extended supervision regardless of any time spent in confinement and reconfinement. (Pet-App. 28.) In other words, he could not receive credit against his term of extended supervision for any time spent in unlawful confinement, because only time spent on extended supervision can be credited toward a defendant's term of extended supervision. (Pet-App. 28–29.)

Kawleski now asks this Court to review the separation of powers question.

KAWLESKI'S ISSUE PRESENTED DOES NOT WARRANT REVIEW

The separation of powers issue that forms the basis for Kawleski's petition does not warrant review. If this Court does accept review, however, this Court should also address the court of appeals' incorrect interpretation of TIS-I.

I. Kawleski's issue presented does not warrant review because the separation of powers issue he raises has long been settled.

Kawleski's claim that allowing the executive branch to make reconfinement decisions violates the separation of powers does not warrant review. He asserts that circuit courts made the reconfinement decision "in the past," but the legislature than transferred that power to the executive in 2009. (Pet. 15.)

Kawleski is wrong. Aside from the brief period of time from 2003 to 2009 during which the legislature chose to vest

the reconfinement decision in the circuit court, the decision has nearly always been vested in the executive. And it has long been settled that vesting this authority in the executive complies with the separation of powers doctrine.

It is black-letter law that sentencing in Wisconsin is a shared power not exclusive to any branch. *State v. Horn*, 226 Wis. 2d 637, 645–46, 594 N.W.2d 772 (1999). Thus, even before truth-in-sentencing, Wisconsin's indeterminate sentencing laws could constitutionally vest the reconfinement decision with the executive branch. *State ex rel. Bieser v. Percy*, 97 Wis. 2d 702, 295 N.W.2d 179 (Ct. App. 1980). In *Ex rel. Bieser*, for example, the Wisconsin Court of Appeals rejected a claim that allowing the executive to make decisions on forfeiture of good time violated the separation of powers and interfered with the judiciary's role in sentencing. 97 Wis. 2d at 711. The court explained that the sentence imposed by the court was "subject to the statutory parole and good time provisions which are administered by the executive." *Id.* Thus, by ordering revocation of parole and forfeiture of street time, the executive "did no more than exercise its executive authority." *Id.*

In *Horn*, 226 Wis. 2d at 653, this Court similarly confirmed that under both Wisconsin and United States Supreme Court precedent, administrative revocation of probation was a decision properly delegated to the executive branch. *See also State v. Burchfield*, 230 Wis. 2d 348, 353–54, 602 N.W.2d 154 (Ct. App. 1999).

It is true that with the enactment of TIS-II, the legislature briefly took the reconfinement authority away from the executive branch beginning in 2003 and gave it to the circuit court. *State v. Brown*, 2006 WI 131, ¶ 31, 298 Wis. 2d 37, 725 N.W.2d 262; 2001 Wis. Act 109. But in 2009, the Legislature amended Wis. Stat. § 302.113(9)(am) and returned the decision on revocation of extended supervision and reconfinement to the reviewing authority, either the

Division of Hearings and Appeals or the Department of Corrections. 2009 Wis. Act 28, § 2726.

Thus, aside from the six years in which the legislature chose to (but did not have to) vest the power in the circuit court, the decision to revoke and reincarcerate a person has been vested in the executive branch. And Wisconsin courts have repeatedly affirmed that this structure is constitutionally permissible. *See Bieser*, 97 Wis. 2d at 711; *Horn*, 226 Wis. 2d at 645–46.

Kawleski says this structure violates federal law. (Pet. 28.) He is wrong. Kawleski relies on a nonbinding Second Circuit opinion, *Earley v. Murray*, 451 F.3d 71 (2nd Cir. 2006), that is nothing like this case. There, the court sentenced Earley to six years of incarceration pursuant to a plea agreement. *Id.* at 73. The court did not include *any* post-release supervision as part of the sentence. *Id.* In other words, Earley's sentence was six years in, zero days out.

The problem in *Earley* was that New York's Department of Correctional Services added five years of post-release supervision to Earley's sentence. *Id.* at 72. This was a substantial increase in Earley's sentence that was not authorized by the sentencing judge, so the surprise administrative increase in Earley's sentence violated due process. *Id.* at 75–76.

Here, in stark contrast to *Earley*, each part of Kawleski's sentence was imposed by the sentencing judge. He was sentenced to two and one-half years of confinement followed by seventeen and one-half years of supervision, during which everyone understood he could be revoked and reconfined by the executive branch for violating his rules of supervision. If the Wisconsin Department of Corrections had decided to make Kawleski serve 22 years of extended supervision rather than 17 and one-half, that would make this case comparable to *Earley*. But that is not what

happened. In contrast to *Earley*, everything the executive did here was explicitly permitted, and contemplated, in the original sentence.

Kawleski has shown no good reason to reconsider the long-settled principle that revocation and reconfinement may properly be delegated to the executive. The separation of powers issue does not warrant this Court's review.

II. If this Court accepts review, this Court should address the Wisconsin Court of Appeals' incorrect interpretation of TIS-I.

Kawleski's issue presented does not warrant review for the reasons discussed above. If this Court accepts review, however, this Court should address the court of appeals' incorrect interpretation of TIS-I, Wis. Stat. § 302.113 (1999–2000), which is now binding law because the decision below has been published.

Under the State's interpretation of TIS-I (and every other iteration of the statute), which has been the prevailing interpretation until now, a defendant's "term of extended supervision," Wis. Stat. § 302.113(7) (1999–2000), equals the total length of the bifurcated sentence minus any time spent in confinement and reconfinement. This common-sense interpretation squares with all other iterations of the same statute, gives meaning to all parts of the statute, and avoids absurd results.

The State's interpretation also recognizes that in enacting TIS-I, the legislature used nearly identical language to that used in calculating time remaining on parole under the indeterminate sentencing law. Before truth-in-sentencing, a defendant who was confined in prison, released to parole, and then revoked and reconfined, received no credit for the time he served on parole before he was revoked. *State ex rel. Ludtke v. Dep't of Corr., Div. of Prob. and Parole*, 215 Wis. 2d 1, 5–6, 572 N.W.2d 864 (Ct. App. 1997). In

determining in *Ludtke* that no credit was due for time served on parole, this Court relied on Wis. Stat. § 302.11(7)(a) (1997–98), which provided that a person whose parole is revoked may be returned to prison "for a period up to the remainder of the sentence for a violation of the conditions of parole. The remainder of the sentence is the entire sentence, less time served in custody prior to parole." *Id.* at 5.

This Court recognized that a person whose parole is revoked is not credited the time he served on parole before revocation. *Id.* at 7. And this Court recognized that while a person who is revoked "*may be* incarcerated for the reminder of the sentence," the department could instead reincarcerate him for less than the remainder of the sentence. *Id.* If the department reincarcerated the person for less than the remainder of the sentence, any time he spent on parole before being reincarcerated was not credited. *Id.*

TIS-I, which uses nearly identical language, should be interpreted the same way. Wisconsin Stat. § 302.11(7)(a) (1997–98) provided that a person whose parole is revoked may be returned to prison "for a period up to the remainder of the sentence for a violation of the conditions of parole. The remainder of the sentence is the entire sentence, less time served in custody prior to parole." Similarly, Wis. Stat. § 302.113(9)(a) (1999–2000) provided that a person who is revoked "shall be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence. The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in custody before release to extended supervision." Thus rather than dramatically changing what came before and after, TIS-I was previously read as continuing this common-sense scheme for extended supervision.

The court of appeals instead created a new interpretation of TIS-I that will lengthen many inmates'

maximum discharge dates and will shorten others. The court of appeals concluded that TIS-I creates three different periods of time: (1) the length of the bifurcated sentence, (2) the term of confinement portion, and (3) the term of extended supervision portion. The court held that under TIS-I, as opposed to any other iteration of the statute, a defendant must serve his entire term of extended supervision, and only his entire term of extended supervision, independent of any time spent in reconfinement. (Pet-App. 15–18.) In other words, a defendant receives credit against his term of extended supervision for any day spent on supervision prior to reconfinement, while any reconfinement time does not affect the amount of time a defendant must spend on supervision. (Pet-App. 15–18.)

For example, suppose a defendant is sentenced to ten years of confinement and ten years of supervision. He is released to extended supervision, then four years later is revoked and reconfined for two years. Under the court of appeals' interpretation of TIS-I, he would have six years left to serve on extended supervision (ten-year term of extended supervision minus four years already served on ES), despite the possibility of reconfinement for up to eight more years. (Pet-App. 15–18.)

Now suppose a defendant is sentenced to ten years of confinement and ten years of supervision, is released to extended supervision, then four years later is revoked and reconfined for eight years. Under the court of appeals' interpretation of TIS-I, he would still need to serve six more years of extended supervision, despite the fact that he could be reconfined for a maximum of only two years. (Pet-App. 15–18.) This is a dramatic departure from the previous understanding and from every other iteration of the statute, under which the time remaining on extended supervision equals the total length of the sentence minus any time spent in confinement and reconfinement.

According to the court of appeals, the fact that the statutes called it a "*term* of extended supervision" necessitated the stark departure from the prior understanding. (Pet-App. 15–16.) But there is nothing about the word "term" that necessitates placing confinement time and extended supervision time on two separate, virtually unrelated clocks. On the contrary, such an interpretation leads to absurd results, which courts are to read statutes to avoid when possible. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

The court of appeals was clear that aside from Wis. Stat. § 302.113(3)(d) (1999–2000), a subsection related to misconduct in prison that is not applicable here, "there is no language" in the statute "that sets the time a defendant is to serve on extended supervision based on the time in confinement and reconfinement, based on the length of the bifurcated sentence, or based on any portion of the bifurcated sentence other than the term of extended supervision." (Pet-App. 17.) This means that a defendant who has been revoked and reconfined for the entire remaining length of his bifurcated sentence, but has not served his entire terms of extended supervision, could remain "on extended supervision" for years despite being unable to be reconfined for any reason. This is an absurd result.

The court of appeals' decision can also create bizarre and counterproductive incentives that could actually encourage defendants to violate their rules of supervision. Consider a defendant sentenced to 15 years of confinement and 15 years of supervision. Upon his initial release to extended supervision, he is repeatedly revoked and reconfined such that he has served 29 years and 11 months of confinement but has spent only one year on extended supervision. Under the state's reading of TIS-I (and of every other similar statute that came before and after), this

defendant would have one month of extended supervision to serve upon his release.

Under the court of appeals' new interpretation of TIS-I, however, this defendant would have 14 *years* remaining on extended supervision, despite the fact that he could be reconfined for a maximum of only one month for any violation. (Pet-App. 15–18.) Such a defendant may actually be incentivized to violate the terms of his extended supervision so he can serve his final remaining month of confinement and avoid another 14 years of restrictions on extended supervision. To be sure, this defendant may still technically be on extended supervision upon his release, but without any possibility of reconfinement there would be little if any incentive to report, abide by the rules of supervision, etc.

Even aside from these absurd results and bizarre incentives, the court of appeals' holding is likely to work to the detriment of many defendants, who will be surprised to learn that their sentences have suddenly become much longer than they previously were. Consider, for example, a defendant who was sentenced in 2000 to 15 years of initial confinement and 15 years of extended supervision. Upon his release to extended supervision in 2015, he is almost immediately revoked, is reconfined for ten additional years, and is released to extended supervision in 2025. Under the prior reading of TIS-I (and every other iteration of the statute), this defendant would be on extended supervision until 2030. At least that is what the DOC will have told him until the court of appeals issued its opinion. Now, his maximum discharge date will be suddenly changed from 2030 to 2040. (Pet-App. 15–18.)

For these reasons, if this Court accepts review, this Court should address the court of appeals' interpretation of TIS-I and return to the prior common-sense interpretation.

CONCLUSION

Kawleski's separation of powers issue does not warrant review. However, this Court should consider granting review to address the Wisconsin Court of Appeals' incorrect interpretation of TIS-I.

Dated this 23rd day of September 2025.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm), and 809.62(4) for a response produced with a proportional serif font. The length of this response is 3,610 words.

Dated this 23rd day of September 2025.

Electronically signed by:

Nicholas S. DeSantis
NICHOLAS S. DESANTIS
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of September 2025.

Electronically signed by:

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