No. 22AP1129

IN THE

Wisconsin Court of Appeals

DISTRICT IV

STATE OF WISCONSIN EX REL. CHRISTOPHER P. KAWLESKI,
Petitioner-Appellant,

v.

STATE OF WISCONSIN,
Respondent.

On Appeal from the Jefferson County Circuit Court,
The Honorable William F. Hue, Presiding, Case No. 21CF43

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

I. Is the discharge date from extended supervision calculated based on the law as it existed at the time of Kawleski's crimes, as it exists today, or as it existed at some intermediate time?

Answered by the Circuit Court: The Circuit Court deferred to the calculation by the Department of Corrections based on the current version of Wis. Stat. § 302.113(9)(c).

This Court should calculate the discharge date based on the law as it existed at the time of Kawleski's conviction and sentencing, which is Wis. Stat. § 302.113(9)(c) (1997–98).

II. If the law as it existed at the time of the crimes is applied, what is the correct determination of the discharge date from extended supervision?

Answered by the Circuit Court: The Circuit Court determined that Kawleski's maximum discharge date is May 14, 2033.

Applying the law as it existed at the time of the crimes, the discharge date is February 10, 2028, over five years earlier than the Department of Corrections' calculation.

III. Did an Administrative Law Judge in the Division of Hearings and Appeals, an executive agency, have jurisdiction to impose Kawleski's term of reconfinement upon revocation?

Answered by the Circuit Court: The Circuit Court did not address the Administrative Law Judge's jurisdiction to impose the prison term upon revocation.

This Court should decide that Wis. Stat. § 302.113(9)(am), authorizing the "reviewing authority" to impose a term of reconfinement, violates the separation of powers by improperly vesting judicial sentencing authority with the executive branch.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court should hear oral argument and publish its opinion in this case. The opinion will likely clarify existing rules of law concerning release after extended supervision revocation, apply an established rule of law concerning the Ex Post Facto clause to a factual situation significantly different from that in published opinions, contribute to the legal literature, and affect the public interest, thereby satisfying multiple criteria for publication under Wis. Stat. § 809.23(1)(a).

INTRODUCTION

In 1997, the Wisconsin legislature overhauled the state's sentencing framework by implementing a "Truth-in-Sentencing" scheme, which applied to felonies committed after December 31, 1999. The core feature of this new determinate sentencing structure was the bifurcated sentence, consisting of an initial term of confinement in prison followed by a term of extended supervision. If a person's extended supervision was revoked, the law provided that a person released to extended supervision after revocation "is subject to all conditions and rules under sub. (7) until the expiration of the term of extended supervision portion of the bifurcated sentence." Wis. Stat. § 302.113(9)(c) (1997–98); 1997 Wis. Act 283. With the passage of 2001 Wisconsin Act 109, effective February 1, 2003, however, the method of calculating the remaining term of a person's extended supervision changed by excluding previously served periods of extended supervision.

In 2001, Christopher Kawleski was convicted of a Class B felony and sentenced under the pre-Act 109 law to an initial term of confinement of 2 years and 6 months and a term of extended supervision of 17 years and 6 months. Kawleski's extended supervision was revoked twice, in 2005 and 2018. When the Department of Corrections calculated Kawleski's discharge date after his revocations (May 14, 2033), it should have applied the pre-Act 109 language but instead improperly applied the post-Act 109 language. This error resulted in a longer term of extended supervision than under the prior law. Indeed, Act 109's retroactive application is an unconstitutional *ex post facto* violation because it results in a punishment that is more burdensome than what the law provided at the time of Kawleski's crime, conviction, and sentence. Under the pre-Act 109 law, Kawleski's term of extended supervision expires on February 10, 2028.

But Kawleski's 2018 reconfinement was not valid in the first instance because the Division of Hearings and Appeals lacked jurisdiction to impose a term of reconfinement. The statute placing the reconfinement decision with the "reviewing authority" violates the separation of powers, because the imposition of a sentence is an exclusive power of the judiciary. *See* Wis. Stat. § 302.113(9)(am) (2009–10). In seeking meaningful habeas relief, Kawleski requests that this Court order the circuit court to apply the unlawfully imposed term of reconfinement—4 years, 7 months, and 26 days—toward the calculation of maximum discharge. Accordingly, habeas relief is warranted, and Kawleski should be released from extended supervision.

STATEMENT OF THE CASE

I. FACTUAL AND STATUTORY BACKGROUND.

A. Truth-in-Sentencing Part I: 1997 Wisconsin Act 283

The Wisconsin legislature "establish[ed] the infrastructure for truth-in-sentencing" with the enactment of 1997 Wisconsin Act 283, initiating a significant overhaul of sentencing policy and structure. Hammer, Thomas J., *The Long and Arduous Journey to Truth-in-Sentencing in Wisconsin*, 15 Fed. Sentencing Reporter 1, 15 (Oct. 2002) [hereinafter Hammer, *Journey to Truth-in-Sentencing*]. With that law, the legislature "abandoned Wisconsin's indeterminate sentencing system in favor of" determinate sentencing, under which a court must impose a bifurcated sentence consisting of a term of confinement in prison followed by a term of extended supervision. *State v. Brown*, 2006 WI 131, ¶ 31, 298 Wis. 2d 37, 725 N.W.2d 262 (citing Michael B. Brennan, Thomas J. Hammer, & Donald V. Latorraca, *Fully Implementing Truth-in-Sentencing,* 75 Wis. Law. 10 (Nov. 2002)); *see also* 1997 Wis. Act 283, § 419; Wis. Stat. § 973.01(1)

(1999–2000). The law applied to felonies committed on or after December 31, 1999. 1997 Wis. Act 283, § 419.

Under Act 283, violations of the conditions of extended supervision subjected the person to revocation of extended supervision and reconfinement to prison "for any specified period of time that does not exceed the time remaining on the bifurcated sentence." *Id.* § 207; Wis. Stat. § 302.113(9)(a) (1999–2000). The law defined the "time remaining on the bifurcated sentence" as "the total length of the bifurcated sentence, less time served by the person in custody before release to extended supervision." 1997 Wis. Act 283, § 207; Wis. Stat. § 302.113(9)(a) (1999–2000).

Separately, upon release to extended supervision after reconfinement, that person "is subject to all conditions and rules under sub. (7) until the expiration of the term of extended supervision portion of the bifurcated sentence." 1997 Wis. Act 283, § 207; Wis. Stat. § 302.113(9)(c) (1999–2000). Unlike Section (9)(a), Section (9)(c) did not further define "the term" of extended supervision.

B. Truth-in-Sentencing Part II: 2001 Wisconsin Act 109

In 2001, the legislature enacted the second part of the truth-in-sentencing framework with 2001 Wisconsin Act 109, which was fully implemented in 2003. *Id.* at 17.

Among other things, Act 109 altered the calculation of extended supervision following revocation and reconfinement by removing the reference to the "term" of extended supervision and defining the "remaining extended supervision portion of the bifurcated sentence" under Section (9)(c):

> 302.113(9)(c) A person who is subsequently released to extended supervision after service of the period of time specified by the ~~department of corrections in the case of a waiver or by the division of hearings and appeals in the department of administration in the case of a hearing~~ court under par. ~~(a)~~ (am) is subject to all conditions and rules under ~~sub.~~ subs. (7) and, if applicable, (7m) until the expiration of the ~~term of~~ remaining extended supervision portion of the bifurcated sentence. The remaining extended supervision portion of the bifurcated sentence is the total length of the bifurcated sentence, less the time served by the person in confinement under the bifurcated sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the bifurcated sentence.

2001 Wis. Act 109, § 401. With Section 9(c), "the legislature [also] took reconfinement authority away from administrative law judges, and specified that circuit judges were to determine the amount of reconfinement or reincarceration time upon revocation of extended supervision." *Brown*, 2006 WI 131, ¶ 31 (citing 75 Wis. Law. at 53).

The current version of Section 302.113(9)(c) provides:

> **(9)(c)** A person who is subsequently released to extended supervision after service of the period of time specified by the order under par. (am) is subject to all conditions and rules under sub. (7) and, if applicable, sub. (7m) until the expiration of the remaining extended supervision portion of the bifurcated sentence. The remaining extended supervision portion of the bifurcated sentence is the total length of the bifurcated sentence, less the time served by the person in confinement under the bifurcated sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the bifurcated sentence.

Wis. Stat. § 302.113(9) (2021–22). The current language reflects, however, the legislature's removal of the authority to impose a term of reconfinement following revocation from the circuit court to the "reviewing authority," either the Division of Hearings and Appeals if a revocation hearing is

held, or the Department of Corrections if the hearing is waived. *See* 2009 Wis. Act 28, § 2726.

II. TIMELINE OF KAWLESKI'S CONVICTION AND BIFURCATED SENTENCE.

On June 1, 2001, Christopher Kawleski was convicted of first-degree sexual assault of a child. R.26; R.18. On June 19, 2001, the circuit court imposed a twenty-year bifurcated sentence. R.26. This sentence included two years and six months of initial confinement and a term of extended supervision not to exceed 17 years and six months. R.26; R.32:41.

With respect to extended supervision, the court informed Kawleski:

> While you are on extended supervision, you will be subject to certain conditions. If you violate any of these conditions, you may be returned to prison to serve not more than the time remaining on your sentence. **The time remaining on your sentence is the total length of your sentence less any time served in custody**.

R.24 (Form CR-234) (emphasis added); R.32:41. Kawleski completed his initial confinement and was released to extended supervision on December 16, 2003. R.58.

Kawleski's extended supervision was revoked twice. On August 8, 2005, the Division of Hearings and Appeals revoked Kawleski's extended supervision. R.58. At a reconfinement hearing on October 28, 2005, the circuit court ordered him reconfined for two years. R.56; R.43 (Form CR-253, Order for Reconfinement after Revocation of Extended Supervision). The court further ordered that "[t]he balance of the time remaining on the bifurcated sentence shall be served on extended supervision." R.43. Kawleski was released back to extended supervision on May 22, 2007. R.87:33, 47.

On November 6, 2017, Kawleski was placed in custody for violations of his extended supervision conditions.

R.87:47, R.83:8. Upon signing a waiver of the final revocation hearing with the Department of Corrections on November 15, 2018, Kawleski's extended supervision was again revoked. R.87:17, 33, 77. A reconfinement hearing was held before an Administrative Law Judge (ALJ) on March 4, 2019. R.87:25. The ALJ imposed a term of reconfinement of four years, seven months, and 26 days. R.87:33. Kawleski returned to extended supervision on July 2, 2022. R.87:46.

On October 7, 2021, Kawleski filed a petition for writ of habeas corpus with the court of appeals. Petition; R.72; *See State of Wisconsin ex rel. Christopher P. Kawleski v. Kevin A. Carr*, No. 2021AP1761-W (WI. App. Oct. 7, 2021). Kawleski asserted that he served eleven years, ten months, and twenty-five days of extended supervision prior to his November 28, 2018 revocation, and that his maximum discharge date was June 19, 2021. R.73. The court of appeals declined to exercise its concurrent jurisdiction and referred the petition to the circuit court. R.73; R.76.

The circuit court held a hearing on the petition on February 10, 2022. R.83. At the hearing, the Offender Records Supervisor at Oshkosh Correctional testified that Kawleski's maximum discharge date is May 14, 2033. Noting that Kawleski was released to extended supervision three days short of the 2 years and 6 months confinement term, the Supervisor explained that upon his first revocation, Kawleski had "a total of 17 years, 6 months, 3 days available for revocation." R.83:6–7. The Supervisor stated that Kawleski was reincarcerated for two years and released on May 27, 2007. R.83:7. The Supervisor explained that the second revocation left Kawleski with a "left-to-serve time of 10 years, 10 months, 12 days yet out on the street," resulting in the May 14, 2033 maximum discharge date. R.83:6–8. The circuit court denied

the petition by simply deferring to the DOC's calculations.R.83:8–9; R.116.

Kawleski appeals the denial of the petition. R.88; R.92.

STANDARD OF REVIEW

"A circuit court's order denying a petition for writ of habeas corpus presents a mixed question of fact and law." *State ex rel. Singh v. Kemper*, 2016 WI 67, ¶ 25, 371 Wis. 2d 127, 883 N.W.2d 86 (citing *State v. Pozo,* 2002 WI App 279, ¶ 6, 258 Wis.2d 796, 654 N.W.2d 12). The court "will not reverse the circuit court's findings of fact unless they are clearly erroneous. *Id.* (citing *Pozo*, 2002 WI App 279, ¶ 6). The court "independently review[s] the 'legal issues arising in the context of a petition for habeas corpus.'" *State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 17, 290 Wis. 2d 352, 362, 714 N.W.2d 900, 904, *clarified on denial of reconsideration*, 2006 WI 121, ¶ 17, 297 Wis. 2d 587, 723 N.W.2d 424 (citing *State ex rel. Marberry v. Macht,* 2003 WI 79, ¶ 8, 262 Wis. 2d 720, 665 N.W.2d 155; *State ex rel. Hager v. Marten,* 226 Wis. 2d 687, 694, 594 N.W.2d 791 (1999)). "A party seeking habeas relief must be restrained of his liberty and 'show that the restraint was imposed by a body without jurisdiction or that the restraint was imposed contrary to constitutional protections.'" *State ex rel. Lopez-Quintero v. Dittmann*, 2019 WI 58, ¶ 14, 387 Wis. 2d 50, 928 N.W.2d 480 (quoting *State ex rel. Haas v. McReynolds*, 2002 WI 43, ¶ 12, 252 Wis. 2d 133, 643 N.W.2d 771).

Meanwhile, "whether a statute violates the ex post facto clauses of the Wisconsin and United States Constitutions is a question of law that this Court reviews independently." *Singh*, 2016 WI 67, ¶ 26 (citing *State v. Elward,* 2015 WI App 51, ¶ 5, 363 Wis. 2d 628, 866 N.W.2d 756). "There is a strong

presumption that legislative enactments are constitutional." *Id.* (citing *Bostco LLC v. Milwaukee Metro. Sewerage Dist.,* 2013 WI 78, ¶ 76, 350 Wis. 2d 554, 835 N.W.2d 160). The petitioner "has the burden of establishing beyond a reasonable doubt that the challenged legislation is unconstitutional." *Id.* (citing *Chappy v. LIRC,* 136 Wis. 2d 172, 184–85, 401 N.W.2d 568 (1987)); *see also State v. Scruggs*, 2017 WI 15, ¶ 12, 373 Wis. 2d 312, 891 N.W.2d 786.

ARGUMENT

I. THE CALCULATION OF THE DISCHARGE DATE FROM EXTENDED SUPERVISION IS BASED ON THE LAW AS IT EXISTED AT THE TIME OF KAWLESKI'S CONVICTION AND SENTENCING.

This Court should reverse the circuit court's denial of Kawleski's habeas corpus petition because the circuit court erroneously applied the wrong version of Wis. Stat. § 302.113(9)(c) in calculating Kawleski's discharge date from extended supervision. Indeed, the post-Act 109 version of Wis. Stat. § 302.113(9)(c) violates the *Ex Post Facto* Clauses because it retroactively enhanced Kawleski's punishment.

A. The Circuit Court Erred By Failing to Apply the Pre-Act 109 Version of Wis. Stat. § 302.113(9)(c).

On June 1, 2001, Kawleski was convicted in Jefferson County. R.26. On June 19, 2001, Kawleski was sentenced to a 20-year bifurcated prison sentence, including 2.5 years of initial confinement and 17.5 years of extended supervision. R.26. The new Truth in Sentencing laws took effect on June 30, 1998 and applied to Kawleski's conviction and sentencing, including the pre-Act 109 version of Wis. Stat. § 302.113(9)(c). It is well-established that the law applicable to an inmate's sentence is the one in effect at the time of his sentencing. *See, e.g., State v. Swaims*, 2004 WI App 217, ¶ 6,

277 Wis. 2d 400, 690 N.W.2d 452; *State ex rel. Singh v. Kemper*, 2016 WI 67, ¶ 36, 371 Wis. 2d 127, 883 N.W.2d 86. Act 109 applied to revocation proceedings after February 1, 2003. *See* 2001 Wis. Act 109. Therefore, the circuit court erred in not applying the pre-Act 109 version of Wis. Stat. § 302.113(9)(c) in calculating Kawleski's discharge date from extended supervision.

B. The Post-Act 109 version of Wis. Stat. § 302.113(9)(c) Violates the *Ex Post Facto* Clauses Because it Retroactively Enhanced Kawleski's Punishment.

The *ex post facto* clauses of the federal and state constitutions prohibit the Legislature from passing any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3. U.S. 386, 390 (1798) (Opinion of Chase, J.); *see also State v. White*, 97 Wis. 2d 517, 518-19, 294 N.W.2d 36 (Ct. App. 1979). Wisconsin Stat. § 302.113(9)(c) (2003–04) is an *ex post facto* law that violates both of these clauses.

Before the amended Wis. Stat. § 302.113(9)(c) took effect on February 1, 2003, inmates released to extended supervision after revocation remained subject to the terms and conditions of that extended supervision only until "the expiration of the term of extended supervision portion of the bifurcated sentence." The plain language of this pre-Act 109 provision accounted for previously served periods of extended supervision in calculating the inmate's discharge date. *See* Wis. Stat. § 302.113(9)(c) (1997–98). In contrast, the post-Act 109 amended Wis. Stat. § 302.113(9)(c), for the first time, specifically defined the "remaining extended supervision portion of the bifurcated sentence" to exclude previously served periods of extended supervision from the calculation of an inmate's discharge date. This change to the law

necessarily extends the time that inmates who earned time towards their discharge date remain on extended supervision and, therefore, violates the *ex post facto* clauses.

1. The Ex Post Facto Clauses Prohibit the Legislature from Increasing the Punishment for an Offense After it has been Committed.

The Declaration of Rights in Wisconsin's Constitution says that "No…*ex post facto* law…shall ever be passed…" Wis. Const. Art. I, sec. 12. The United States Constitution says that "No State shall pass any…*ex post facto* law…." U.S. Const. Art. I, sec. 10, cl. 1. Regarding the interpretation of these two clauses, this Court has stated: "We have long looked to the pronouncements of the United States Supreme Court in construing the Ex Post Facto Clause of the Federal Constitution as a guide to construing the Ex Post Facto Clause of the Wisconsin Constitution." *State v. Thiel*, 188 Wis. 2d 695, 699, 524 N.W.2d 641 (1994).

Under these clauses,

> No one can be punished more severely than prescribed by the law which existed before or at the time the supposed offense or offenses were committed. A law which makes an innocent act criminal, which changes the nature of the offense, or which increases the punishment for the same offense, violates the constitutional prohibition against *ex post facto* law.

White, 94 Wis. 2d at 518-19; *see also, e.g.*, *Calder*, 3 U.S. 396. This case involves the last prohibition described in *White*. Because the amended Wis. Stat. § 302.113(9)(c) is a law that "increases the punishment for the same offense," *White*, 97 Wis. 2d at 519—specifically, it increases the punishment for individuals who earned time towards their discharge date while on extended supervision—the statute violates the *ex post facto* clauses.

2. Wisconsin Stat. § 302.113(9)(c) is an Ex Post Facto Law Because it Retroactively Increases the Sentences of Inmates Who Were Convicted under the Act 283 Statute.

The post-Act 109 version of Wis. Stat. § 302.113(9)(c) is an unconstitutional *ex post facto* law because it defined the "remaining extended supervision portion of the bifurcated sentence" to exclude time already served on extended supervision, thereby increasing the total amount of time that an inmate convicted under its predecessor statute serves on extended supervision.

The Wisconsin Supreme Court's decision in *Mueller v. Powers*, 64 Wis. 2d 642, 221 N.W.2d 692 (1974) illuminates the unconstitutionality of such a retroactive statute. In *Mueller*, a group of inmates brought a writ proceeding on behalf of a class of similarly-situated inmates seeking a declaration that an amendment to the parole laws was an *ex post facto* law. 64 Wis. 2d at 644–45. Specifically, the inmates challenged a 1973 act that extended their initial eligibility date for parole from two years to five. *Id.* at 645. The Wisconsin Supreme Court agreed and declared the 1973 law unconstitutional, reasoning that the law, which increased "the time that must be served by petitioners before they are eligible for parole consideration from two to five years in a very real and practical sense imposes an additional penalty and violates the constitutional inhibition against *ex post facto* legislation." *Id.* at 647. According to the *Mueller* court, the inmates had "as a matter of right the opportunity to be considered for parole after serving a given period of time." *Id.* When the Legislature took away the right to be considered at two years and delayed parole consideration until the prisoner had served five years, it violated the *ex post facto* clauses. *See also Thiel*, 188 Wis. 2d at 699-703 (affirming

Mueller's holding that retroactively increasing a sentence was an *ex post facto* violation).

Mueller compels the same result in this case. The post-Act 109 version of Wisconsin Stat. § 302.113(9)(c), like the 1973 act, took away the right from inmates to be discharged at the conclusion of their term of extended supervision, inclusive of time spent on extended supervision, thus delaying their discharge date.

The proof is in the statute's plain language. *See Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶ 11, 400 Wis. 2d 417, 970 N.W.2d 1 (instructing that statutory interpretation "'begins with the language of the statute.' If the meaning of the language is plain, our inquiry ordinarily ends.") (quoting *Milwaukee Dist. Council 48 v. Milwaukee County*, 2019 WI 24, ¶ 11, 385 Wis. 2d 748, 924 N.W.2d 153); *see also State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The pre-Act 109 statute stated:

> A person who is subsequently released to extended supervision after service of the period of time specified by the department of corrections in the case of a waiver or by the division of hearings and appeals in the department of administration in the case of a hearing under par. (a) is subject to all conditions and rules under sub. (7) until the expiration of the term of extended supervision portion of the bifurcated sentence.

Wis. Stat. § 302.113(9)(c) (1997–98) (emphasis added). Under this pre-Act 109 statute, an inmate released to extended supervision after a period of reconfinement remains subject to the conditions and rules of extended supervision only for the **period of time remaining on his "term of extended supervision."** This bold language simply means the calendar days left until the end of the inmate's extended supervision. Nothing in this older version of the statute contemplates enlarging an inmate's term of extended supervision.

See State v. Fitzgerald, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165 ("One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning.") (quoting *Fond Du Lac Cty. v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989)); *see also Wisconsin Ass'n of State Prosecutors v. WERC*, 2018 WI 17, ¶ 45, 380 Wis. 2d 1, 907 N.W.2d 425 ("Nothing is to be added to what the text states or reasonably implies" (quoting Scalia & Garner, Reading Law at 93)).

In contrast, the amended Wis. Stat. § 302.113(9)(c) applied a new specific definition to the term "extended supervision portion of the bifurcated sentence," thereby crafting a term of art with meaning beyond its ordinary meaning. Specifically, the amended version drew from Wis. Stat. § 302.113(9)(am) to define the length of time until "expiration of the term of extended supervision" as running from the "the total length of the bifurcated sentence"—*excluding* previously served periods of extended supervision. Meanwhile, the older version runs down from "the term of extended supervision portion of the bifurcated sentence" until zero—*including* previously periods of extended supervision.

The consequence is that unlike the older version, the new version creates circumstances in which the inmate is on extended supervision longer than his original bifurcated sentence. *See Schuenke v. Kostrzewa,* Case No. 21-C-1353, 2021 WL 8016750, at *2 (E.D. Wis. Dec. 7, 2021) ("[U]nder [the post-Act 109] Wisconsin law, the execution of a bifurcated sentence may lawfully span a longer period of calendar time than is specified in the judgment of conviction."); Michael B. Brennan, Thomas J. Hammer, & Donald v. Latorraca, *Fully Implementing Truth-in-Sentencing*, 75 Wis. Law. 10 (Nov. 2002) (describing Act 109's change to Wis. Stat. 302.113(9)(c) as permitting "[i]n some circumstances the amount of time

an offender actually spends on ES could be longer than that ordered by the judge at sentencing."). Therefore, the post-Act 109 statute is an ex post facto law because it "makes more burdensome the punishment for a crime, after its commission," by applying a more burdensome definition to the calculation of time remaining on extended supervision in Wis. Stat. § 302.113(9)(c). *See Singh*, 2016 WI 67, ¶ 28 (quoting *Thiel*, 188 Wis. 2d at 703).

The Wisconsin Supreme Court's decision in *State ex rel. Singh v. Kemper* supports this conclusion. In *Singh*, the Court addressed the effects of 2011 Wis. Act 38, which (1) retroactively repealed positive adjustment time and (2) created a statute preserving the opportunity for certain individuals to earn early release based on positive adjustment time but altering the procedure for doing so. *Id.* ¶ 10. The petitioner inmate Singh had been sentenced under 2009 Wis. Act 28, which provided inmates like Singh with the opportunity to earn early release from prison. *Id.* ¶ 11. In 2012, Singh filed a petition for positive adjustment time, which the DOC denied, followed by a petition for writ of habeas corpus, which the circuit court dismissed. *Id.* ¶¶ 21–22. The court of appeals determined that the retroactive repeal of positive adjustment time was unconstitutional, but that the creation of the new statute modifying the procedures for obtaining positive adjustment time was not an ex post facto law.

The Wisconsin Supreme Court agreed with Singh that the statute modifying the procedures for obtaining positive adjustment time was an ex post facto law. *Id.* ¶ 3. The Court determined that the delayed release of inmates under the law "results in a longer period of incarceration, thus making the punishment for an offense more burdensome after it was committed." *Id.* ¶ 4. The Court also concluded that "because the early release provisions of [the earlier law] were

retroactively in effect when Singh was convicted and sentenced for the first offense, as well as at the time he committed the second offense, that the retroactive repeal of positive adjustment time in [the later law] violates the ex post facto clauses of the Wisconsin and United States Constitutions." *Id.* ¶ 8. In so holding, the *Singh* court declared that "[t]he animating principle underlying the ex post facto clauses is the concept of fair warning." *State ex rel. Singh v. Kemper*, 2016 WI 67, ¶¶ 39–41, 371 Wis. 2d 127, 145, 883 N.W.2d 86 (citing *State v. Kurzawa,* 180 Wis. 2d 502, 513, 509 N.W.2d 712 (1994)). Because Singh "relied on 2009 Wis. Act 28 as the law at the time of his plea and sentencing," a subsequent change to that law resulting in a greater punishment constitutes an ex post facto violation. *Id.* ¶¶ 40, 44 (recognizing that "the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects").

As in *Singh*, Kawleski "relied on [1997 Wis. Act 283] as the law at the time of his plea and sentencing." *Id.* ¶ 40. On June 1, 2001, Kawleski was convicted in Jefferson County and on June 19, 2001, Kawleski was sentenced. R.26. Both of these events occurred while the pre-Act 109 statutory structure applied. In other words, at the time Kawleski was convicted and sentenced, Wis. Stat. § 302.113(9)(c) provided only that "[a] person who is subsequently released to extended supervision after service of the period of time specified . . . is subject to all conditions and rules under sub. (7) *until the expiration of the term of extended supervision portion of the bifurcated sentence*." The court sentenced Kawleski to a 20-year bifurcated sentence with the term of Kawleski's extended supervision portion of the bifurcated sentence to last 17 years and 6 months. R.26. The notice Kawleski received at the time referenced only this extended supervision term imposed during sentencing. R.26. The Ex

Post Facto Clauses recognize that Kawleski was entitled to rely on the version of the statute in effect at the time of his conviction and sentencing. Because the post-Act 109 statute "increase[d] or alter[ed] the punishment of [Kawleski] to his detriment, *after he has been convicted and sentenced*," and without receiving fair notice before his conviction and sentencing of such a potential increase, the post-Act 109 statute is an unconstitutional *ex post facto* law. *State ex rel. Eder v. Matthews*, 115 Wis. 2d 129, 340 N.W.2d 66 (Ct. App. 1983).

II. UNDER THE LAWS IN PLACE AT THE TIME OF KAWLESKI'S SENTENCING, KAWLESKI'S MAXIMUM DISCHARGE DATE IS 5 YEARS EARLIER THAN CALCULATED BY THE DEPARTMENT OF CORRECTIONS.

The pre-Act 109 version of Wis. Stat. § 302.113(9)(c) governs the calculation of Kawleski's maximum discharge date. The DOC, however, calculated Kawleski's 2033 discharge date based on the amended Wis. Stat. §302.113(9)(c). The DOC's calculation resulted in the unconstitutional extension of Kawleski's maximum discharge date by more than 6 years.

During the February 10, 2022 hearing on Kawleski's habeas petition, the court relied on testimony from Heath Tomlin, Offender Records Supervisor at Oshkosh Correctional. R.83. Mr. Tomlin testified that the DOC derived Kawleski's maximum discharge date of May 14, 2033 from the 10 years, 10 months, 12 days he had remaining to serve as of his July 2, 2022 release date:

> [Kawleski] initially had 2 years, 6 months' confinement with 17 years, 6 months' extended supervision. He initially served 2 years, 5 months, 27 days, . . . So it was just three days short of complete six—2 years, 6 months, and so he was released to extended supervision.

> And then he was revoked while on supervision for this case and what we do is he's got a total of 17 years, 6 months, 3 days available for revocation. So—because he was released that—just the three days earlier than the complete 2 years, 6 months. So it's basically taking the three days off of when he was released before and putting it onto what's available for reincarceration.

R.83:5–6. After explaining that Kawleski's first revocation resulted in a two-year reincarceration, with a May 27, 2007 release back to extended supervision, Mr. Tomlin described the calculation following Kawleski's second revocation:

> And then [Kawleski] has—he got another one and that left him with 15 years, 6 months, 8 days available for revocation after that. Basically kind of took off two years from the 17 years, 6 months, 3 days. So he's left with 15 years, 6 months, 8 days available.
>
> This time, he was revoked for 4 years, 7 months, 26 days. So we take the—you know, the "from" date from—from the revocation. We subtracted any credit available like holds or anything like that and that turned out to be 5 months, 19 days.
>
> So then we have a sentence began date for this current incarceration for November 6th, 2017, and then we just add the 4 years, 7 months, 26 days of the reincarceration, which brings us to July 2nd, 2022.
>
> And then he's got a left-to-serve time of 10 years, 10 months, 12 days yet out on the street and that's—that will all be available for revocation if needed.

R.83:6–8. The 10 years, 10 months, 12 days applied to the July 2, 2022 release date results in a maximum discharge date of May 14, 2033. R.83:6.

Mr. Tomlin and the DOC misapplied the statute in calculating the maximum discharge date. The DOC applied the post-Act 109 extended supervision statutes and its definition of the "remaining extended supervision portion of the bifurcated sentence," which excludes time served on extended supervision before revocation. *See* Wis. Stat. § 302.113(9)(c) (2021–22) (defining the "remaining extended supervision portion of the bifurcated sentence" as the length of the

bifurcated sentence, less any time served in confinement or reconfinement). The DOC calculation fails to account for the periods of extended supervision Kawleski had already served before his first and second revocations. The DOC should have instead calculated Kawleski's discharge date under the pre-Act 109 version of the statute, which subjected Kawleski to extended supervision conditions only until "the expiration of the term of extended supervision portion of the bifurcated sentence," without limitation to confinement.

Kawleski's term of extended supervision is 17 years and six months. By July 2, 2022, upon release from his second reconfinement, Kawleski had already served 11 years, 10 months, and 22 days on extended supervision, and therefore had 5 years, 7 months, and 8 days remaining until the expiration of his term—resulting in a maximum discharge date of February 10, 2028. [1] Accordingly, Kawleski has approximately 3 years, 6 months, and 24 days remaining until the expiration of his 17.5-year term of extended supervision, resulting in a maximum discharge date of February 10, 2028—over five years earlier than the DOC's May 14, 2033 calculation.

III. THE LEGISLATURE'S TRANSFER OF THE RECONFINEMENT DECISION FROM THE CIRCUIT COURT TO THE "REVIEWING AUTHORITY" VIOLATES THE SEPARATION OF POWERS.

Following Kawleski's first revocation in 2005—and for all revocation proceedings between February 2003 and

[1] Kawleski's 17.5-year term of extended supervision began upon completion of his initial confinement, on December 16, 2003. Between December 16, 2003 and July 2, 2022, Kawleski spent a total of 6 years, 7 months, and 26 days in reconfinement. The remaining time—11 years, 10 months, and 22 days—was spent on extended supervision.

October 2009—the circuit court determined his period of reconfinement, pursuant to Wis. Stat. § 302.113(9)(am) (providing that a defendant whose extended supervision was revoked would "be returned to the circuit court for the county in which the person was convicted of the offense for which he . . . was on extended supervision, and the court shall" impose a reconfinement sentence).

Prior to Kawleski's second revocation in 2018, however, the legislature amended Wis. Stat. § 302.113(9)(am) to transfer the reconfinement decision from the circuit court in the original county of conviction to the "reviewing authority," either the Division of Hearings and Appeals if a revocation hearing is held, or the Department of Corrections if the hearing is waived. 2009 Wis. Act 28, § 2726. For revocations after October 1, 2009, "the reviewing authority" shall impose a reconfinement sentence. *See* 2009 Wis. Act 28, § 2726; Wis. Stat. § 302.113(9)(ag).

The transfer of sentencing power from the judiciary to the executive is a violation of the separation of powers. Under the two-step separation of powers analysis concerning judicial power, the court first "must determine if the power allegedly intruded upon is 'within the judiciary's core zone of exclusive power.'" *State v. Stenklyft*, 2005 WI 71, ¶ 37, 281 Wis. 2d 484, 697 N.W.2d 769 (quoting *State v. Horn,* 226 Wis. 2d 637, 645, 594 N.W.2d 772 (1999)). If it is, "then '[*a*]*ny* exercise of power by the legislature or executive branch within such an area is an unconstitutional violation of the separation of powers.'" *Id.* (citing *Horn*, 226 Wis. 2d at 645). But if "the power at issue is 'within an area of shared powers[,]' then a statute that relates to such power 'is constitutional if it does not unduly burden or substantially interfere with either branch.'" *Id.* (quoting *Horn*, 226 Wis. 2d at 645).

Because the power to impose a sentence is exclusive to the judiciary, and because Wis. Stat. § 302.113(9)(ag) substantially interferes with the court's power to impose a sentence by transferring that authority to the executive, Section (9)(ag) violates the separation of powers. The ALJ with the Division of Hearings and Appeals lacked jurisdiction to impose a term of reconfinement on Kawleski after his 2018 revocation. Accordingly, habeas relief is warranted.

A. The power to impose a term of confinement in prison is a core function of the judiciary.

"[O]ne of the fundamental principles of the American constitutional system is that governmental powers are divided among the three departments of government[.]" *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶ 30, 387 Wis. 2d 511, 929 N.W.2d 209 (quoting *Goodland v. Zimmerman*, 243 Wis. 459, 466, 10 N.W.2d 180 (1943)). The separation of powers doctrine is "implicit in this tripartite division" and is embodied by Article IV, Section 1, Article V, Section 1, and Article VII, Section 2 of the Wisconsin Constitution. *Id.* (quoting *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384). The vesting of certain powers exclusively within each branch underscores "the importance of dispersing governmental power in order to protect individual liberty and avoid tyranny." *Id.* ¶ 31 (citing *Gabler*, 2017 WI 67, ¶¶ 4–9, 11).

Nowhere is this principle more evident than with the threat to an individual's personal liberty to be free from restraint. Sentencing and reconfinement hearings "are closely akin to each other, because both determine whether a person should be sent to prison and for how long." *State v. Brown*, 2006 WI 131, ¶ 28, 298 Wis. 2d 37, 725 N.W.2d 262 (citing *State v. Swiams,* 2004 WI App 217, ¶ 22, 277 Wis. 2d 400, 690 N.W.2d 452). The *Brown* court emphasized, "'In light of

the need for meaningful assessment of decisions that deprive persons of their liberty . . . we perceive no reason why a 'sentencing' under Wis. Stat. Rule 809.30 should not encompass reconfinement under Wis. Stat. § 302.13(9)(am) (2001–02)." *Id.* ¶ 20 (quoting *Swiams*, 2004 WI App 217, ¶ 23); *see also State v. Hines*, 2007 WI App 39, ¶ 18, 300 Wis. 2d 485, 730 N.W.2d 434. "Moreover, in *State v. Wegner,* 2000 WI App 231, ¶ 7, 239 Wis. 2d 96, 619 N.W.2d 289, the court of appeals held that the circuit court's duty at sentencing after revocation of parole, and the court's duty at the original sentencing, were the same." *Brown*, 2006 WI 131, ¶¶ 20, 22 ("[A] reconfinement decision, like an initial sentencing decision, involves the circuit court's discretion." (citing *State v. Spears,* 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999)). Indeed, prior to 2009 Wis. Act 28, the statutory language recognized the close relationship between sentencing and reconfinement by requiring that not just any court, but the "circuit court for the county in which the person *was convicted of the offense for which he or she was on extended supervision*," shall impose the order returning that person to prison. Wis. Stat. § 302.113(9)(am) (2005–06).

"[W]hile criminal sentencing is an exclusive function of the court, there is no inherent power in the judiciary to determine the nature of the punishment." *Steeno v. State*, 85 Wis. 2d 663, 668, 271 N.W.2d 396 (1978) (citing *State v. Sittig*, 75 Wis. 2d 497, 500, 249 N.W.2d 770 (1977)). Consistent with that principle, an administrative agency can determine whether extended supervision can be revoked, but it is the judiciary that must determine the sentence—the period of reconfinement.

In an analogous context, the Wisconsin Supreme Court concluded that Wis. Stat. § 973.10(2), requiring administrative, rather than judicial, revocation of probation, did not

violate the separation of powers doctrine. *State v. Horn*, 226 Wis. 2d 637, 639–40, 594 N.W.2d 772 (1999). The court reasoned that the "disposition of a criminal case, including imposing and revoking probation, is within powers shared among the branches of government," and that "the legislative delegation of probation revocation to the executive branch does not unduly burden or substantially interfere with the judiciary's constitutional function to impose criminal penalties." *Id.* at 640; *see also League of Women Voters*, 2019 WI 75, ¶ 32 (explaining that the Wisconsin Constitution "precludes each branch from obstructing the performance of another branch's constitutional duties." (citing *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872)).

Wisconsin Stat. § 302.113(9) unconstitutionally transgresses proper sentencing authority by placing the reconfinement decision with the executive branch. Because the reconfinement decision encompasses how much prison time to impose, this legislative delegation of judicial authority to the executive branch does "unduly burden or substantially interfere with the judiciary's *constitutional* function to impose criminal penalties." *Id.* (emphasis added). Like the improper power transfers in *Gabler* and *League of Women Voters*, the transfer of the reconfinement decision from the judiciary to the executive constitutes an unconstitutional encroachment by one branch on the core and exclusive function of another. *See League of Women Voters*, 2019 WI 75, ¶ 34; Wis. Stat. § 302.113(9)(c).

The transfer of the reconfinement decision from the judiciary to the executive not only undermines the liberty interests of persons subject to revocation, but it also eliminates a structural layer of review of a reconfinement recommendation. *See* Wis. Stat. § 302.113(9)(at) (2005–06) ("When a person is returned to court under par. (am) after revocation of

extended supervision, the reviewing authority shall make a recommendation to the court concerning the period of time for which the person should be returned to prison."). During Kawleski's first reconfinement proceedings, the court considered the period of reincarceration recommended by the Department of Corrections and the Division of Hearings and Appeals in their revocation decision. R.56:9.

Placing that entire process—revocation and reconfinement—within the same body eliminates this additional check on sentencing discretion, particularly where the executive is also supervising the person. *See, e.g.*, Renagh O'Leary, *Supervising Sentencing*, 57 U.C. Davis L. Rev. 1931, 1989 (2024) (cautioning that, "[i]n their supervisory role, community supervision agencies and officers are in a structurally antagonistic position toward defendants. They administer the punishment of community supervision, which involves surveilling compliance with invasive and burdensome supervision conditions, investigating suspected violations, initiating revocation proceedings, and seeking the incarceration of people they believe have violated their supervision conditions. In keeping with this antagonistic dynamic, ethnographic research has described the dominance within some community supervision agencies of negative views about defendants, who are seen 'dispositionally flawed,' 'deviant,' and 'dangerous.'"). Collapsing the revocation decision and the reconfinement decision—not to mention the administration of supervision itself—within the same branch is antithetical to the aims of "protect[ing] individual liberty" and "avoid[ing] tyranny." *League of Women Voters*, 2019 WI 75, ¶ 31.

The statute goes beyond consolidating sentencing power within the executive by removing the circuit court from the reconfinement decision entirely. Whereas the statute

specifies that revocation decisions following a hearing are subject to certiorari review, it is silent as to reconfinement decisions. *See* Wis. Stat. § 302.113(9)(g) (2021–22) (providing that following a hearing "concerning whether to revoke a person's extended supervision, the person on extended supervision may seek review of a decision to revoke extended supervision and the department of corrections may seek review of a decision to not revoke extended supervision" only by an action for certiorari). The statute lacks any provision for meaningful judicial review of the reviewing authority's reconfinement decision.

B. Habeas relief is appropriate because the Division of Hearings and Appeals lacked jurisdiction to impose a reconfinement sentence.

Contrary to the constitutional prerogative to keep the imposition of a sentence (and the attendant deprivation of liberty) within the province of the judiciary—an Administrative Law Judge in the Division of Hearings and Appeals determined Kawleski's reconfinement term after his extended supervision was revoked in 2018. Because the determination of a term of imprisonment is exclusive to the circuit court, neither the Division of Hearings and Appeals nor the Administrative Law Judge had the constitutional authority to sentence Kawleski to reconfinement following the revocation decision.

The "reviewing authority's" lack of jurisdiction over the reconfinement decision and resulting prison term warrants habeas relief. *See State v. Pozo*, 2002 WI App 279, ¶ 8, 258 Wis. 2d 796, 654 N.W.2d 12 ("[H]abeas corpus relief is available only where the petitioner demonstrates: (1) restraint of his or her liberty, (2) which restraint was imposed contrary to constitutional protections or by a body lacking jurisdiction

and (3) no other adequate remedy available at law."). The reconfinement term imposed by the ALJ has ended, but Kawleski remains on extended supervision. Kawleski thus requests that this Court apply the time during which Kawleski was unlawfully confined—4 years, 7 months, and 26 days—toward the calculation of maximum discharge, as he would have been on extended supervision if the ALJ had not imposed the term. Because Kawleski has less than that remaining, habeas relief is warranted, and Kawleski should be released from extended supervision. In the alternative, Kawleski's maximum discharge date should be reduced in accordance with the statutes in place at the time of his crimes, conviction, and sentencing.

The Court should reverse the circuit court's denial of the petition for writ of habeas corpus.

CONCLUSION

The Court should reverse the circuit court's denial of the petition for writ of habeas corpus. In the alternative, Kawleski's maximum discharge date should be reduced in accordance with the pre-Act 109 statutes in place at the time of his crimes, conviction, and sentencing.

Dated this 24th day of July, 2024.

Electronically signed by Samuel M. Mitchell

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b)–(c) for a brief and appendix produced with a proportional serif font. The length of this brief, including the Introduction, Statement of the Case, Argument, and Conclusion, is 7267 words.

Dated this 24th day of July, 2024.

Electronically signed by
Samuel M. Mitchell

APPENDIX CERTIFICATION

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 Wisconsin Statutes section 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 section 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 first names and last initials 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 24th day of July, 2024.

Electronically signed by
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CERTIFICATE OF SERVICE

I certify that on July 24, 2024, I electronically filed this brief and accompanying appendix using the Court's E-filing system, which will provide electronic service to all parties of record.

Dated this 24th day of July, 2024.

Electronically signed by
Samuel M. Mitchell