STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case Nos. 2022AP1129

STATE OF WISCONSIN ex rel.
CHRISTOPHER P. KAWLESKI,

Petitioner-Appellant,

v.

STATE OF WISCONSIN,

Respondent-Respondent.

ON APPEAL FROM AN ORDER DENYING A PETITION FOR A WRIT OF HABEAS CORPUS ENTERED IN THE JEFFERSON COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM F. HUE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

This appeal concerns whether Christopher P. Kawleski is being illegally detained by the Department of Corrections (DOC) because an administrative law judge rather than a circuit judge ordered him reconfined, violating the separation of powers, and also whether his maximum discharge date was correctly calculated when he was released to extended supervision a third time after he served his original term of initial confinement and two terms of reconfinement after revocation. DOC excluded time that Kawleski served on extended supervision before each of his revocations and determined that his maximum discharge date is May 14, 2033.

Kawleski, pro se petitioned for a writ of habeas corpus, asserting that he has served his entire 20-year sentence for first-degree sexual assault and that he is being illegally detained beyond his maximum discharge date of June 19, 2021. After the circuit court denied Kawleski's petition, he appealed, and this Court appointed counsel. Kawleski is now arguing, through counsel, that his maximum discharge date is February 10, 2028. He also argues that DOC and the circuit court erred by calculating his maximum discharge date using the (truth-in-sentencing II (TIS-II) statutes, rather than the TIS-I statutes, that the TIS-II version of Wis. Stat § 302.113(9)(c) is an ex post facto law, and that the TIS-II version of Wis. Stat. § 302.113(9)(am) that authorizes the Division of Hearings and Appeals and the Department of Corrections to make reconfinement decisions, rather than the circuit court, violates the separation of powers.

This Court should affirm the circuit court's order denying Kawleski's petition for a writ of habeas corpus for several reasons. First, and most fundamentally, to be entitled to habeas corpus relief a defendant must prove that he is being illegally detained. Kawleski argues that his maximum

discharge date is February 10, 2028, thus conceding that he is not being illegally detained, except for the separation of powers issue, which is without merit. He therefore has not shown that the circuit court erred when it denied his petition. Second, under either the TIS-I or TIS-II version of Wis. Stat. § 302.113, Kawleski is not entitled to credit for the time he served on extended supervision before revocation. Accordingly, DOC properly calculated Kawleski's maximum discharge date. And third, Kawleski did not assert in the circuit court that Wis. Stat. § 302.113(9)(c) is an ex post facto law or that Wis. Stat. § 302.113(9)(am) violates the separation of powers, so those issues are not properly before this Court. In any event, his arguments on those issues are meritless.

ISSUES PRESENTED

1. Has Kawleski shown that he is being illegally detained and is therefore entitled to habeas corpus relief?

   The circuit court answered "no."

   This Court should affirm.

2. What version of the Wisconsin statutes applies to the calculation of Kawleski's maximum discharge date?

   The circuit court did not answer.

   This Court should conclude that the 1999-2000 TIS-I statutes apply because Kawleski committed his crime in 2000, and he was sentenced in 2001.

3. What is the correct determination of Kawleski's maximum discharge date?

   The circuit court relied on DOC's calculation and determined that Kawleski's maximum discharge date is May 14, 2033.

   This Court should affirm, regardless of which version of TIS applies.

4. Is the TIS-II version of Wis. Stat. § 302.113(9)(c) unconstitutional because it is an ex post facto law?

   Kawleski did not raise this issue in the circuit court, so the circuit court did not answer.

   If this Court addresses this issue, it should answer "no."

5. Is Wis. Stat. § 302.113(9)(am) unconstitutional because it improperly vests judicial sentencing authority with the executive branch?

   Kawleski did not raise this issue in the circuit court, so the circuit court did not answer.

   If this Court addresses this issue, it should answer "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the State's brief, and the issues presented require only the application of well-established principles to the facts presented.

STATEMENT OF THE CASE

Kawleski was convicted of first-degree sexual assault of a child in 2001 after he pled guilty to the charge. (R. 26.) The circuit court imposed a 20-year sentence, consisting of 2.5 years of initial confinement and 17.5 years of extended supervision. (R. 32:37.) Kawleski was released to extended supervision after he served 2 years, 5 months, and 27 days of initial confinement. (R. 83:6–7.) His extended supervision was revoked, and he was ordered reconfined for two years in 2005. (R. 56:30.) After he was released to extended supervision again, Kawleski's extended supervision was revoked again in 2018, and he was ordered reconfined for 4 years, 7 months, and 26 days. (R. 87:33.) Kawleski's discharge date to extended supervision was extended to July 2, 2022. (R. 83:6.) He had 10

years, 10 months, and 12 days of extended supervision remaining, so his maximum discharge date was extended to May 14, 2033. (R. 83:6, 8.)

On October 7, 2021, Kawleski filed a petition for a writ of habeas corpus in this Court. (R. 132.) This Court referred the petition to the circuit court. (R. 76.) The circuit court held a hearing on the petition. (R. 83.) The prosecutor explained at the hearing that the issue was Kawleski's claim "that he should have already been discharged on this case and that he is being illegally detained past his release date." (R. 83:6.) The Offender Records Supervisor at Oshkosh Correctional Institution (OSCI) explained that due to Kawleski's two revocations, his discharge date to extended supervision was July 2, 2022, and he had 10 years, 10 months, and 12 days remaining on his sentence, so his maximum discharge date is May 14, 2033. (R. 83:6–8.) The circuit court concluded that the offender records supervisor's explanation was "clear," and that Kawleski is not entitled to relief. (R. 83:9.) The court later signed a written order denying Kawleski's petition. (R. 116:1.)

Kawleski appealed. (R. 88; 116.) After briefing, this Court appointed counsel for Kawleski and ordered supplemental briefing to address two issues: (1) "in setting Kawleski's discharge date from extended supervision, should the calculation be based on the law as it exists today, at the time of the crimes, or at some intermediate time?" and (2) "if the law as it existed in 2000 is applied, what is the correct determination of Kawleski's discharge date from extended supervision?" (Dec. 15, 2023 order) Kawleski now argues that his maximum discharge date is February 10, 2028, rather than May 14, 2033, that DOC and the circuit court incorrectly used the TIS-II version of Wis. Stat. § 302.113 in calculating his maximum discharge date, that the current version of Wis. Stat. § 302.113(9)(c) is an ex post facto law, and that Wis. Stat. § 302.113(9)(am) violates the separation of powers doctrine.

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 v. Pozo*, 2002 WI App 279, ¶ 6, 258 Wis. 2d 796, 654 N.W.2d 12 (citing *State ex rel. McMillian v. Dickey*, 132 Wis. 2d 266, 276, 392 N.W.2d 453 (Ct. App. 1986). Factual determinations will not be reversed unless clearly erroneous. *Id.* (citing *McMillan*, 132 Wis. 2d at 276). The circuit court's legal conclusions are subject to independent review, *McMillan*, 132 Wis. 2d at 276 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980)) (citations omitted).

ARGUMENT

I. This Court should affirm the circuit court's order denying Kawleski's petition for a writ of habeas corpus because he has not shown that he is being illegally detained.

A defendant petitioning for a writ of habeas corpus has the burden "of showing that his detention is illegal by a preponderance of the evidence." *McMillian*, 132 Wis. 2d at 278 (*abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, ¶ 29, 290 Wis.2d 352, 714 N.W.2d 900) (citing *Walker v. Johnston*, 312 U.S. 275, 286 (1941)); *State ex rel. Alvarez v. Lotter*, 91 Wis. 2d 329, 334, 283 N.W.2d 408 (Ct. App. 1979). Here, while Kawleski argued in the circuit court that his maximum discharge date was June 19, 2021, so he is being illegally detained, he has abandoned that argument on appeal. Kawleski now argues that his maximum discharge date should have been calculated as February 10, 2028. As the State will explain, Kawleski is wrong—as DOC calculated and the circuit court found, his maximum discharge date is May 14, 2033. But even if Kawleski were correct, he would not be entitled to habeas corpus relief

because he would not be illegally detained until after February 10, 2028.

Since Kawleski now admits his maximum discharge date has not passed, he is no longer claiming that he is being illegally confined (except for his separation of powers argument that is both not properly before this court and meritless), and he is therefore not entitled to habeas corpus relief. This Court should therefore affirm the circuit court's order denying his petition for a writ of habeas corpus without addressing the alleged miscalculation of his maximum release date.

Kawleski's remedy to challenge DOC's calculation of his maximum release date as such (in a case where he does not allege that date has passed) is not a petition for a writ of *habeas corpus* but a petition for a writ of *certiorari*. *See, e.g.*, *State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 517 N.W.2d 449 (1994); *State ex rel. Gendrich v. Litscher*, 2001 WI App 163, 246 Wis. 2d 814, 632 N.W.2d 878. But it would not aid Kawleski for this Court to construe this action as being in the nature of certiorari, because then it would simply fail for lack of jurisdiction. Kawleski did not file this action until October 7, 2021 (R. 132), which is well over a year after he admittedly discovered the issue and complained about it to DOC personnel, who then explained the calculations to him in July 2020, according to the allegations in the petition itself. (R. 132:13). The jurisdictional deadline to challenge the calculation judicially in the circuit court ran 45 days after he discovered the alleged error. *See* Wis. Stat. § 893.735(2); *State ex rel. Collins v. Cooke*, 2000 WI App 101, ¶ 5, 235 Wis. 2d 63, 611 N.W.2d 774.

II. Kawleski's maximum discharge date is properly calculated using Wisconsin Stat. § 302.113(9)(am) (1999–2000).

This Court has instructed the parties to address the issue of which version of Wis. Stat. § 302.113 applies to the calculation of Kawleski's maximum discharge date. Kawleski argues that the 1997–98 statutes apply (Kawleski's Br. 9, 19.) But they don't apply because Kawleski sexually assaulted a child in 2000 (R. 8:1–2), and he was sentenced in 2001 (R. 26:1). The 1999–2000 statutes therefore apply. However, as the State will explain, it makes no difference whether TIS-I or TIS-II applies, or whether the 1997–98 version or the 1999–2000 version of TIS-I applies. Under any version of the statutes, Kawleski forfeited the time he spent on extended supervision before each of his two revocations and reconfinements, and his maximum discharge date was properly calculated to be May 14, 2033.

III. The circuit court properly found that Kawleski's maximum discharge date was correctly calculated by DOC as May 14, 2033.

At the hearing on Kawleski's petition for a writ of habeas corpus, Heath Tomlin, the Offender Records Supervisor at OSCI, testified about the calculation for Kawleski's maximum discharge date. (R. 83:6–8.) Tomlin explained the following: Kawleski was originally sentenced to 20 years of imprisonment, consisting of 2 years and 6 months of initial confinement and 17 years and 6 months of extended supervision. (R. 83:6.) He was released to extended supervision after 2 years, 5 months, and 27 days. (R. 83:6.)[1]

[1] Kawleski served less than the full 2 years and 6 months of initial confinement because under Wis. Stat. § 302.113(8), "Releases to extended supervision from prison shall be on the Tuesday or Wednesday preceding the date on which he or she completes the term of imprisonment."

When Kawleski was released to extended supervision, the remaining time on his sentence was 17 years, 6 months, and 3 days. (R. 83:6.)

When Kawleski's extended supervision was revoked on August 5, 2005, the time remaining on his sentence for which he could be reconfined was 17 years, 6 months, and 3 days. (R. 83:6.) Kawleski was reconfined for 2 years. When he was released to extended supervision the second time, the time remaining on his sentence was 15 years, 6 months and 8 days. (R. 83:7.)

When Kawleski's extended supervision was revoked the second time on November 15, 2018, the time remaining on his sentence for which he could be reconfined was 15 years, 6 months, and 8 days. (R. 53:7–8.) Kawleski was reconfined for 4 years, 7 months, and 26 days, beginning on November 6, 2017. (R. 53:7.) When he was released to extended supervision the third time on July 2, 2022, the remaining time on his sentence was 10 years, 10 months, and 12 days. (R. 53:8.) Kawleski's maximum discharge date is therefore currently May 14, 2033. (R. 53:6.)

The circuit court found the offender records supervisor's explanation "clear," and concluded that Kawleski was not being illegally detained. (R. 83:9.) The court therefore denied Kawleski's petition for writ of habeas corpus. (R. 83:8–9.)

On appeal, Kawleski argues that the offender records supervisor erred because his "calculation fails to account for the periods of extended supervision Kawleski had already served before his first and second revocations." (Kawleski's Br. 28.) Kawleski asserts that DOC applied the TIS-II statutes, but "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 Br. 27–28.)

Kawleski does not point to any evidence demonstrating that DOC applied the TIS-II statutes in calculating his maximum discharge date. Nor does he point to any case or statute providing that a defendant received credit under TIS-I for time he spent on extended supervision before revocation and reconfinement. He essentially argues that under TIS I, one is due credit for time served on extended supervision before revocation. (Kawleski's Br. 28.) His argument is wrong under any version of the statutes.

Under Wisconsin's 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. Department of Corrections, Division of Prob. and Parole*, 215 Wis. 2d 1, 866, 572 N.W.2d 864 (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.* This Court recognized that a person whose parole is revoked is not credited the time he served on parole before revocation. *Id.* at 867. 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.* As this Court explained, since Ludtke was reincarcerated for less than the remainder of his sentence that had been available for

forfeiture, "[t]he remainder of the unforfeited time was added on to his future parole supervision period and used to calculate his new maximum discharge date." *Id.*

As *Ludtke* makes clear, if Kawleski's revocations had been of parole, rather than extended supervision, he would have received no credit for the time he spent on parole before his revocations, and his maximum discharge date would have been extended by the amount of time he had spent on parole before the revocations. The same is true of a person whose extended supervision is revoked under TIS-I or TIS-II.

In *Ludtke*, this Court relied on Wis. Stat. § 302.11(7)(a) (1997–98) as providing that the maximum discharge date of a person who was reincarcerated after his parole was revoked is extended by the amount of time the person spent on parole before revocation. In the same version of the statutes, and in the 1999–2000 version, the Legislature used almost identical language to explain that the same is true of a person who is reconfined after his extended supervision was revoked.

Wisconsin Stat. § 302.11(7)(am) (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."

Wisconsin Stat. § 302.113(9)(am) (1997–98) provided that a person whose extended supervision 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 confinement under the sentence before release to extended supervision."

Under both indeterminate sentencing and TIS-I, a person who is revoked receives credit only for time "in custody" before release to parole or extended supervision, not for time spent on parole or extended supervision before reincarceration or reconfinement.

And the same its true under TIS-II. Wisconsin Stat. § 302.113(9)(am) provides that if a person's extended supervision is revoked, he shall "be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence." And "[t]he time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the sentence." Wis. Stat. § 302.113(9)(am).

Kawleski argues that under TIS-I, a person whose extended supervision is revoked and who is reconfined receives credit for the time he spent on extended supervision before revocation. But no version of the statutes supports that result.

Kawleski relies on Wis. Stat. § 302.113(9)(c) (1999–2000), which he claims, "subjected [him] 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 Br. 28.) But that provision only means that a person is subject to conditions of supervision so long as he is on extended supervision and no longer. It says nothing about when extended supervision starts or ends, much less anything about whether credit for extended supervision is given against a total sentence when revoked. Kawleski points to nothing suggesting that the provision means that a person is credited for time on extended supervision before revocation and reconfinement.

Kawleski argues that TIS-II changed the law by providing in Wis. Stat. § 302.113(9)(c) that after revocation and reconfinement, "The remaining extended supervision portion of the bifurcated sentence is the total length of the bifurcated sentence," minus "the time served by the person in confinement under the bifurcated sentence before release to extended supervision under sub. (2)" and minus "time served in confinement for previous revocations of extended supervision under the bifurcated sentence." (Kawleski's Br. 14) (citing 2001 Wis. Act 109, § 401.) However, Wis. Stat. § 302.113(9)(c) did not change the law. It merely clarified how the law worked under Wis. Stat. § 302.113(9)(am). Since a bifurcated sentence consists of initial confinement and extended supervision, and the person has served his term of reconfinement, the remainder of his sentence is necessarily his term of extended supervision (unless he is revoked and reconfined yet again).

Kawleski argues that when a person's extended supervision is revoked and he is reconfined for less than the time remaining on his sentence, upon return to extended supervision the person need only serve what remains of his original term of extended supervision after he is credited for the time he served on extended supervision before revocation. (Kawleski's Br. 27–28.) But that cannot be right. After all, under TIS-I when a person is returned to extended supervision after revocation and reconfinement, the time remaining on his sentence is the total length of his bifurcated sentence less time served in custody. Wis. Stat. § 302.113(9)(c) (1999–2000). Here, when Kawleski was released to extended supervision after his most recent reconfinement, the remaining time on his sentence was 10 years, 10 months, and 12 days. If his extended supervision were revoked again, he could be reconfined for that entire period, whether under TIS-I, Wis. Stat. § 302.113(9)(am) (1999–2000), or under TIS-II, Wis. Stat. § 302.113(9)(am). Kawleski's term of extended

supervision cannot be only 5 years, 7 months, and 8 days (as Kawleski argues) when if revoked he could be reconfined for 10 years, 10 months, and 12 days.

Kawleski argues that under TIS-I, a person must serve his entire term of extended supervision "without limitation to confinement." (Kawleski's Br. 28.) It is not clear where Kawleski obtained that phrase. It appears nowhere in the Wisconsin Statutes. Presumably, it is his own phrase, and he means that credit against time served after revocation should not be limited to time spent in confinement. But again, a plain reading of all versions of the statute is to the contrary.

Under any version of the statutes, Kawleski's argument about the calculation of his maximum discharge date is wrong. He has not shown that the offender records supervisor miscalculated his maximum discharge date, or that the circuit court erred in accepting the calculation. He therefore has not shown that he is entitled to habeas corpus relief.

IV. Kawleski's argument that Wisconsin Stat. § 302.113(9)(am) under TIS-II is an ex post facto law is not properly before this Court and is incorrect.

Kawleski argues that the TIS-II version of Wis. Stat. § 302.113(9)(c) is an 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." (Kawleski's Br. 21.)

Kawleski's claim fails for three reasons. First, he did not raise this claim in the circuit court. (R. 132.) "As a general rule, issues not raised in the circuit court will not be considered for the first time on appeal." *State v. VanderGalien*, 2024 WI App 4, ¶ 13, 410 Wis. 2d 517, 2 N.W.3d 774 (quoting *State v. Dowdy*, 2012 WI 12, ¶ 5, 338

Wis. 2d 565, 808 N.W.2d 691). "It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *Id.* (quoting *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727). Since Kawleski did not raise this claim in the circuit court it is not properly before this Court.

Second, Kawleski claims that the TIS-II version of Wis. Stat. § 302.113(9)(c) is an ex post facto law, but that version of the law does not apply in this case. His claim is therefore not properly before this Court.

Third, Kawleski's claim is meritless. Contrary to Kawleski's assertion, the TIS-II version of Wis. Stat. § 302.113(9)(am) is not an ex post facto law because it did not change how much time a defendant may serve on extended supervision. As explained above, under Wisconsin's indeterminate sentencing structure, a person could serve more time on parole than he was initially given if his parole was revoked and he was reincarcerated because upon return to parole, a person was not credited for time spent on parole before revocation. The same was true under TIS-I. A person could serve more time on extended supervision than he was initially given if his extended supervision was revoked and he was reconfined because upon return to extended supervision, a person was not credited for time spent on extended supervision before revocation. And the same is true under TIS-II.

Kawleski does not cite a single case even suggesting that under TIS-I, a defendant who was reconfined after his extended supervision was revoked was entitled to credit for the time he served on extended supervision before revocation. He cites a federal case, *Schuenke v. Kostrzewa*, Case No. 21-C-1353, 2021 WL 8016750 (E.D. Wis. Dec. 7, 2021) for the proposition that under TIS-II, "the execution of a bifurcated

sentence may lawfully span a longer period of calendar time than is specified in the judgment of conviction." (Kawleski's Br. 23.) But *Schuenke* did not say that this was somehow a change from the law under TIS-I.

Kawleski cites an article explaining TIS-II which said that under Wis. Stat. 302.113(9)(c) "[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.") (Kawleski's Br. 23–24 (citing Michael B. Brennan, Thomas J. Hammer, & Donald v. Latorraca, *Fully Implementing Truth-in-Sentencing*, 75 Wis. Law. 11 (Nov. 2002)).) But that says nothing about any change from TIS-I. Kawleski does not cite another article by two of the same authors explaining TIS-I, which explained that the law under TIS-I worked the same way. The article explains that under TIS-I, when a defendant is revoked and reconfined he "may end up serving more time on ES than provided for in the original circuit court sentence. That is because Act 283 does not change statutory and administrative code sections which provide that an offender receives no 'credit' for time not in confinement (also known as 'street time')." Michael B. Brennan & Donald v. Latorraca, *Truth-in-Sentencing*, 73 Wis. Law. 5 (May 2000)). The article further explains that if, for instance, a person is sentenced to two years of initial confinement and two years of extended supervision, serves the initial confinement and is revoked after serving nearly completing the two years of extended supervision, the administrative law judge (ALJ) could reconfine him for up to two years. *Id.* If the ALJ reconfines him for one year, he still has one year of extended supervision left. *Id.* If he is revoked on the final day of extended supervision, the ALJ could reconfine him for one year. *Id.* "In this example the offender served the entire four-year term of imprisonment in confinement, but also spent three years on ES - one more year than the two-year ES term in the original circuit court sentence. Again, this is because the statutes and administrative code only grant credit for time spent in custody, and Act 283 does not alter those provisions." *Id.*

Kawleski points to no authority supporting his assertion that under the TIS-I version of Wis. Stat. § 302.113, a defendant who was reconfined after his extended supervision was revoked received credit for the time he spent on extended supervision before the revocation. He therefore has not shown that the TIS-II version of Wis. Stat. § 302.113, under which a person does not receive credit for the time he spent on extended supervision before the revocation (and which does not even apply in this case), is an ex post facto law.

V. Kawleski has not shown that Wis. Stat. § 302.113(9)(am) is unconstitutional because it violates the separation of powers.

Kawleski argues that Wis. Stat. § 302.113(9)(am) is unconstitutional because it vests the reconfinement decision after revocation with the executive branch rather than the judicial branch. (Kawleski's Br. 29–35.) He further argues that the Division of Hearings and Appeals lacked jurisdiction to reconfine him, so habeas corpus relief is warranted. (Kawleski's Br. 34–35.)

Kawleski's arguments fail for two reasons. First, he did not raise this claim in the circuit court. (R. 132.) Since the issue is not reserved, this Court should decline to address it on appeal. *VanderGalien*, 410 Wis. 2d 517, ¶ 13; *Huebner*, 235 Wis. 2d 486, ¶ 10.

Second, Kawleski's claim is meritless. Kawleski argues that "for all revocation proceedings between February 2003 and October 2009" the circuit court determined a person's period of reconfinement, pursuant to Wis. Stat. § 302.113(9)(am), but for revocations after October 1, 2009, "the reviewing authority"—either the Division of Hearings and Appeals or the Department of Corrections imposes reconfinement sentences. (Kawleski's Br. 28–29.) He argues that "the power to impose a sentence is exclusive to the

judiciary," so the newer statute violates the separation of powers. (Kawleski's Br. 30.)

However, the Wisconsin Supreme Court has recognized that sentencing is a power shared between the legislative, judicial, and executive branches. *State v. Horn*, 226 Wis. 2d 637, 645–46, 594 N.W.2d 772 (1999) ("It is settled that sentencing in Wisconsin is an area of shared powers."). And over the course of decades, the legislature has generally vested the reconfinement decision in the executive branch, not the judiciary.

Before truth-in-sentencing, Wisconsin's indeterminate sentencing laws vested the reincarceration decision with the executive branch, as well. In *State ex rel. Bieser v. Percy*, 97 Wis. 2d 702, 295 N.W.2d 179 (Ct. App. 1980), this Court rejected an argument that the forfeiture of good time by the executive branch violated the separation of powers and interfered with judicial power. The court noted that "The sentence imposed by the court is subject to the statutory parole and good time provisions which are administered by the executive," so by ordering revocation of parole and forfeiture of street time, the executive branch "did no more than exercise its executive authority." *Id.* at 711.

In *Horn*, the Wisconsin Supreme Court held that "the administrative revocation of probation," falls within shared powers, and that the delegation of probation revocation to the executive branch did not violate the separation of powers. *Horn*, 226 Wis. 2d at 653.

And in *State v. Burchfield*, 230 Wis. 2d 348, 353–54, 602 N.W.2d 154 (Ct. App. 1999), this Court concluded that since the Legislature vested the executive branch with probation revocation decisions, it was improper for a court to revoke a person's probation.

When the Legislature enacted TIS-I, it continued to vest the decision on revocation of extended supervision and reconfinement to the executive branch. Wis. Stat. § 302.113(9)(am) (1978). When the Legislature enacted TIS-II, it took the reconfinement authority away from the executive branch 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.

Other than the six years between 2003 and 2009, the decision to revoke and reincarcerate or reconfine a person has been vested in the executive branch. Kawleski argues that vesting that decision in the executive branch violates the separation of powers. But he does not cite a single case in which any court has agreed. And in cases such as *Bieser*, *Horn*, and *Burchfield*, the supreme court and this Court have rejected that argument.

Kawleski argues that he was unlawfully confined for 4 years, 7 months, and 26 days because the Division of Hearings and Appeals revoked his extended supervision and reconfined him. (Kawleski's Br. 26–27.) He is plainly wrong. The Legislature could properly vest the power to revoke and reconfine a person on extended supervision in either the executive or the judicial branch. It chose to vest that power in the executive branch. The Division of Hearings and Appeals had jurisdiction to revoke Kawleski's extended supervision and reconfine him, so Kawleski is not entitled to habeas corpus relief. –

CONCLUSION

This Court should affirm the circuit court's order denying Kawleski's petition for writ of habeas corpus.

Dated this 8th day of October 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5153 words.

Electronically signed by:

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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 8th day of October 2024.

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