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-Respondent.

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

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Christopher Kawleski's ongoing extended supervision is unlawful because (1) the Department of Corrections applied the wrong statute to calculate his maximum discharge date and (2) his 2018 reconfinement sentence violated the separation of powers. Wisconsin Stat. § 302.113(9)(c) (1999–2000), the statute in effect at the time of Kawleski's crime, sentencing, and conviction, concerns extended supervision following release from reconfinement.[1] Under that statute, a person released to extended supervision following reconfinement "is subject to all conditions and rules [of extended supervision] until the expiration of the term of extended supervision portion of the bifurcated sentence." *See* 1997 Wis. Act 283; Wis. Stat. § 302.113(9)(c) (1999–2000). The statute's plain language does not exclude previously served periods of extended supervision from contributing to the expiration of the term, so all service of extended supervision is counted. Therefore, Kawleski's maximum discharge date pursuant to Section (9)(c) is February 10, 2028.

The State incorrectly relies on Wis. Stat. § 302.113(9)(am) (1999–2000), concerning the calculation of time available for reconfinement following revocation. That calculation is not at issue in this case. Even more problematic, Section (9)(am) did not take effect until February 1, 2003, *after* Kawleski's sentencing. *See* 2001 Wis. Act 109,

[1] Kawleski's opening brief used the 1997–1998 version of the statutes to anchor the analysis to the Truth-in-Sentencing (TIS) laws, including TIS I, effective with the 1997–1998 statutes, and TIS II, the relevant portions of which took effect February 1, 2003. *See* 1997 Wis. Act 283 & 2001 Wis. Act 109. However, the language is the same regardless of which pre-Act 109 version of the statutes is used. *See* Wis. Stat. § 302.113(9)(c) (1997–1998); Wis. Stat. § 302.113(9)(c) (1999–2000); Wis. Stat. § 302.113(9)(c) (2001–2002). For consistency of reference, and because there is no material dispute over which TIS-I version applies, this brief uses the 1999–2000 version of the statutes cited by the State. *See* State's Br. 11.

§ 9459(1). The retroactive application of this law—whether Wis. Stat. § (9)(am) or (9)(c) (2003–2004), which introduced a more restrictive definition to the extended supervision calculation—violates the *Ex Post Facto* Clauses because it results in a more burdensome sentence.

Finally, an Administrative Law Judge in an executive agency unlawfully imposed Kawleski's 2018 reconfinement, violating the separation of powers. While revocation is clearly within the executive's domain, imposing *a prison sentence* is a core judicial power that the legislature cannot assign to the executive. The State makes no attempt to separate revocation from reconfinement, instead crafting an artificial dispute solely over *revocation* authority. Because Kawleski would have served the time spent in unlawful reconfinement on extended supervision, his extended supervision term has expired, warranting habeas relief.

ARGUMENT

I. Wisconsin Stat. § 302.113(9)(c) (1999–2000) governs the extended supervision calculation.

The State's position that Wis. Stat. § 302.113(9)(am) (1999-2000) governs the maximum discharge date calculation is wrong for two reasons. State's Br. 11.

First, the State's reliance on the 1999–2000 version of Wis. Stat. § 302.113(9)(am) is misplaced: Section (9)(am) did not appear in the statutes until 2003, when it replaced Section (9)(a). *See* 2001 Wis. Act 109, § 397.[2] Therefore, the State is incorrect in claiming that the DOC properly applied Section 302.113(9)(am) (1999–2000). State's Br. 11–17.

[2] The changes to Wis. Stat. § 302.113(9) by Act 109 did not go into effect until February 1, 2003. 2001 Wis. Act 109, § 9459(1) (identifying an effective date of "the first day of the 7th month beginning after publication," with a publication date of July 29, 2002).

Second, even assuming the State intended to cite (9)(am)'s predecessor, Wis. Stat. § 302.113(9)(a) (1999–2000), that statute is irrelevant to the calculation of extended supervision. Accordingly, it does not matter which version of Section (9)(a) or (am) the State cites—neither is applicable here.

The calculations for time available for reconfinement and for extended supervision after release are divided between two independent statutory subsections. Wisconsin Stat. § 302.113(9)(a), renumbered (9)(am) effective 2003, concerns *reconfinement* following revocation, *i.e.*, the period of time for which the person may be reconfined to prison. Under that statute, if a person whose extended supervision is revoked "is returned to prison, he or she shall be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence." Wis. Stat. § 302.113(9)(a) (1999–2000). Section (9)(a) further defines "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."

By contrast, Wis. Stat. § 302.113(9)(c) (1999–2000) concerns *extended supervision* following release from reconfinement. Section (9)(c) provides only that a person who is released to extended supervision after reconfinement "is subject to all conditions and rules [of extended supervision] until the expiration of the term of extended supervision portion of the bifurcated sentence." Wis. Stat. § 302.113(9)(c) (1999–2000). That section contains no limiting definition.

Section (9)(c)—not Section (9)(a) or (am)—governs the calculation of Kawleski's remaining extended supervision. Section (9)(a) or (am) only applies when determining a reconfinement sentence. The State fails to address this distinction.

The State's attempt to draw a parallel between Wis. Stat. § 302.113(9)(am) and parole is unpersuasive. *See, e.g.*, State's Br. 13 (citing *State ex rel. Ludtke v. Dep't of Corrections, Div. of Prob. and Parole*, 215 Wis. 2d 1, 866, 572 N.W.2d 864 (1997); Wis. Stat. § 302.11(7)(a) (1997-98)) (explaining that prior to TIS, a defendant whose parole was revoked received no credit for the time served on parole). The TIS statutes may use "almost identical language" regarding return to prison after revocation of parole or extended supervision, but this case does not involve that situation. This case pertains to a different scenario under a separate statutory subsection. *See id.* at 14 (citing Wis. Stat. §§ 302.11(7)(am) (1997-98), 302.113(9)(am) (1997-98)); *id.* at 15 (citing Wis. Stat. § 302.113(9)(am)). The dispute here concerns the amount of extended supervision remaining after reconfinement, and Section 9(c) resolves this in Kawleski's favor.

Indeed, Wis. Stat. § 302.113(9)(c) (1999–2000) does not address whether credit for past extended supervision is granted upon revocation. *See* State's Br. 15. The statute, however, also does not state, as the State claims, that "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." *Id.* at 16 (citing Wis. Stat. § 302.113(9)(c) (1999–2000)). Section (9)(c) only states that the person is subject to extended supervision until the term expires. This reinforces the point: Section (9)(c) lacks the limiting definition found in Section (9)(a).

This Court should reject the State's attempt to graft such a definition on Section 9(c). *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 Priorities USA v. Wisconsin Elections Comm'n*, 2024 WI 32, ¶ 23, 412 Wis. 2d 594, 8 N.W.3d 429 ("If a word or words are used in one subsection but are not used in another subsection, we must conclude that the legislature specifically intended a different meaning.") (Citations omitted). "The legislature is presumed to 'carefully and precisely' choose statutory language to express a desired meaning," and it could have added a definition to Section (9)(c) if it had so desired (and *did* add such a definition with Act 109). *Priorities USA*, 412 Wis. 2d 594, ¶ 23 (quoting *Southport Commons, LLC v. DOT*, 2021 WI 52, ¶ 32, 397 Wis. 2d 362, 960 N.W.2d 17).

The State's argument that Wis. Stat. § 302.113(9)(c) "did not change the law," but "merely clarified how the law worked under Wis. Stat. § 302.113(9)(am)" is also incorrect. State's Br. 16. Act 109 introduced a new definition of "the remaining extended supervision portion of the bifurcated sentence" to Section (9)(c). *See* 2001 Wis. Act 109, § 401; Wis. Stat. § 302.113(9)(c) (2003–2004) ("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."). This later version of Section (9)(c) informs the interpretation of the earlier version. Unlike the 2003–04 version, which explicitly excludes previously served periods of extended supervision, the earlier version cannot be read to include such a prohibition as the State suggests.

II. The retroactive application of the post-Act 109 statutes violates the *Ex Post Facto* Clauses.

Contrary to the State's assertions, Kawleski's *ex post facto* argument is properly before this Court. *See* State's Br. 17. Even if the *ex post facto* issue was not raised in the circuit court, this case presents an exception to the general prohibition against raising issues on appeal. "When an issue involves a question of law rather than of fact, when the question of law has been briefed by both parties and when the question of law is of sufficient public interest to merit a decision, this court may exercise its discretion to address the issue." *See Marotz v. Hallman*, 2007 WI 89, ¶ 16, 302 Wis. 2d 428, 734 N.W.2d 411 (quoting *Apex Elecs. Corp. v. Gee,* 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998)). Each element is satisfied here: the issue involves only statutory interpretation, has been briefed by both parties, and holds sufficient public interest because it implicates the deprivation of liberty.

As explained above, Wis. Stat. § 302.113(9)(c) (2003–2004) is an *ex post facto* law because its new definition increased the amount of time Kawleski must serve on extended supervision. Because the later law "inflicts a greater punishment than the law annexed to the crime, when committed," its retroactive application to Kawleski violates the *Ex Post Facto* Clauses of the federal and state constitutions. *See Calder v. Bull*, 3. U.S. 386, 390 (1798) (Opinion of Chase, J.); *State v. White*, 97 Wis. 2d 517, 518-19, 294 N.W.2d 36 (Ct. App. 1979); *State ex rel. Singh v. Kemper*, 2016 WI 67, ¶ 28, 371 Wis. 2d 127, 883 N.W.2d 86; Wis. Const. Art. I, § 12; U.S. Const. Art. I, § 10, cl. 1.

The State's main responsive argument is that Section (9)(am) applies instead. *See* State's Br. 18.[3] The State, however, fails to clarify the distinction between the reconfinement focus of (9)(am) and the extended supervision focus of (9)(c), particularly considering the new definition introduced by Act 109, which aligns it more closely with (9)(am). The State further claims that Kawleski fails to cite any authority to support his statutory argument. *See id.* at 19, 20. If the State is referring to case law, that is not essential for a plain language analysis, where the statutory text can stand on its own. *See, e.g., Stafford Trucking, Inc. v. State, Dep't of Indus., Lab. & Hum. Rels.*, 102 Wis. 2d 256, 265–66, 306 N.W.2d 79 (Ct. App. 1981) ("When the plain meaning of the words in a statute are apparent, a court need not resort to either construction or case law to bolster its recognition of that plain meaning.") (citations omitted). At any rate, the abbreviated time frame between TIS-I and TIS-II naturally results in limited case law interpreting the TIS-I statutes.

The State's position on this issue is untenable. At the time Kawleski was convicted and sentenced, the law 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." Wis. Stat. § 302.113(9)(c) (1999–2000). The most reasonable interpretation is that the term expires when the extended supervision portion of the bifurcated sentence concludes, regardless of whether it was

[3] The article addressing TIS-I (Michael B. Brennan & Donald v. Latorraca, *Truth-in-Sentencing*, 73 Wis. Law. 5 (May 2000)), *see* State's Br. 19, is not law and this Court is in no way bound to follow it.

served before or after reconfinement and irrespective of the duration of reconfinement. Under the pre-Act 109 law, by his release from confinement on July 2, 2022, Kawleski had served 11 years, 10 months, and 22 days of his 17.5-year extended supervision term, leaving 5 years, 7 months, and 8 days until expiration.

Section (9)(c) was later amended to define the "extended supervision portion of the bifurcated sentence" as "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)(c) (2003–2004); 2001 Wis. Act 109. Under the amended law, upon his release from reconfinement on July 2, 2022, Kawleski had 10 years, 10 months, and 12 days of extended supervision remaining—nearly double the amount compared to the previous statute. *See* State's Br. 16–17.

III. Only the Judiciary can impose a reconfinement sentence in prison.

Kawleski's 2018 reconfinement sentence of four years, seven months, and 26 days violated the separation of powers because it was imposed by an executive agency, not the judiciary. The State's contrary arguments are unconvincing.

As a threshold matter, the State is incorrect that Kawleski did not raise the separation-of-powers argument below. *See* State's Br. 20. Kawleski expressly raised the separation-of-powers issue in his petition for writ of habeas corpus. *See* R.132:5. Even if he had not, the same exceptions apply as with the *ex post facto* argument: the issue presents a question of law, was fully briefed by the parties, and holds

sufficient public interest to merit a decision. *See Marotz*, 302 Wis. 2d 428, ¶ 16.

On the merits, the State's arguments fare no better. The State asserts that revocation and reconfinement have long been vested in the executive branch, and that both the supreme court and this Court have *rejected* the argument that vesting the reconfinement decision in the executive branch violates the separation of powers. State's Br. 21–22 (citing *State ex rel. Bieser v. Percy*, 97 Wis. 2d 702, 295 N.W.2d 179 (Ct. App. 1980); *State v. Horn*, 226 Wis. 2d 637, 645–46, 594 N.W.2d 772 (1999); *State v. Burchfield*, 230 Wis. 2d 348, 353–54, 602 N.W.2d 154 (Ct. App. 1999)). But the cases relied on by the State do not stand for that proposition.

Bieser, *Horn*, and *Burchfield* addressed *revocation*, not reconfinement. *See id.* Kawleski does not dispute that the executive branch has authority over revocation, which falls within the shared sentencing powers. *See* Kawleski's Br. 23–24 (citing *Horn*, 226 Wis. 2d at 640). The State is conflating revocation with the imposition of a term of reconfinement. These are two distinct powers; the executive branch can impose revocation but lacks the independent authority to impose a prison sentence following it. The power to impose a term of confinement in prison "is 'within the judiciary's core zone of exclusive power,'" meaning that "[*a*]*ny* exercise of power by the legislature or executive branch within such an area is an unconstitutional violation of the separation of powers." *State v. Stenklyft*, 2005 WI 71, ¶ 37, 281 Wis. 2d 484, 697 N.W.2d 769 (quoting *Horn,* 226 Wis. 2d at 645).

As explained in Kawleski's opening brief, the legislature's transfer of the reconfinement authority from the circuit court to "the reviewing authority" improperly combined the judicial role in the deprivation of liberty with the executive authority over revocation, thus violating the separation

of powers. The State fails to address this point. *See* Kawleski's Br. 20–26; 2009 Wis. Act 28, § 2726.

IV. Habeas relief is warranted.

Kawleski is entitled to habeas corpus relief because his continued custody is unlawful. Kawleski's maximum discharge date, following two revocations and reconfinements, is February 10, 2028. Since one of those reconfinements was unlawfully imposed in an amount greater than the time remaining, however, Kawleski is entitled to release. The State's overly narrow view of Kawleski's claim overlooks the jurisdictional defect in his reconfinement sentence. *See* State's Br. 9; *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.").

CONCLUSION

The Court should reverse the circuit court's denial of the petition for writ of habeas corpus. If the Court disagrees that the second reconfinement was unlawfully imposed contrary to the separation of powers, Kawleski's maximum discharge date should be reduced in accordance with Wis. Stat. § 302.113(9)(c) (1999–2000).

Dated this 22nd day of November, 2024.

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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 produced with a proportional serif font. The length of this brief, including the Introduction, Argument, and Conclusion, is 2,857 words.

Dated this 22nd day of November, 2024.

Electronically signed by
Samuel M. Mitchell

CERTIFICATE OF SERVICE

I certify that on November 22, 2024, I electronically filed this brief using the Court's E-filing system, which will provide electronic service to all parties of record.

Dated this 22nd day of November, 2024.

Electronically signed by
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