

## NOTE

**THE IMPLICATIONS OF  
STATE EX REL. THOMAS V. SCHWARZ  
FOR WISCONSIN SENTENCING POLICY AFTER  
TRUTH-IN-SENTENCING II**

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This Note explores how the Wisconsin Supreme Court's recent decision in *State ex rel. Thomas v. Schwarz* will impact the future of the state's sentencing policy after Truth-in-Sentencing II. The *Thomas* decision demonstrates the court's continued willingness to shape the state's sentencing policies after Truth-in-Sentencing I (TIS I) and Truth-in-Sentencing II (TIS II)—both to repair ambiguous or unconstitutional statutory provisions and to advance the judicial branch's interests in efficiency and continued authority over criminal penalties. *Thomas* fits squarely into the growing TIS jurisprudence, following recent decisions in *State v. Tucker*, *State v. Trujillo*, and *State v. Stenklyft*.

*Thomas* has returned one offender to prison, exposed other offenders to more prison time, and ensured that the DOC will continue to treat consecutive parole and extended-supervision sentences as one continuous *Ashford* sentence. On another level, *Thomas* may shift the balance of power among the three branches of government in determining which branch shapes future sentencing policy. This will depend largely on the legislature's response, if any, to the court's decision. If the legislature does not act to amend TIS II, the court's role in TIS II litigation will continue as it has in *Thomas*, *Tucker*, *Trujillo*, and *Stenklyft*. If the legislature does act to amend TIS II, the court will likely continue to have to interpret and clarify any subsequent sentencing legislation passed by the legislature. Either way, after *Thomas*, the Wisconsin Supreme Court will continue to play a major role in determining the future of the state's sentencing policies after TIS II.

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#### INTRODUCTION

On March 16, 2004, defendant Kevin Thomas<sup>1</sup> stood before Administrative Law Judge (ALJ) Mayumi M. Ishii to find out whether he would return to prison and, if so, for how long.<sup>2</sup> Thomas had been out of prison since August 2001, after serving time for two separate convictions—a 1999 forgery conviction and a 2000 burglary

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\* JD expected, University of Wisconsin Law School, May 2008; MPA, expected, La Follette School of Public Affairs, May 2008. The author would like to thank Carla McKenzie; Professors Michael Smith and Stephanie Tai; Frank J. Remington Center clinical faculty Ken Streit, William Rosales, and Meredith Ross; and the staff and members of the now-defunct Wisconsin Sentencing Commission—all for their ideas, suggestions, and careful edits that contributed to this Note.

1. Kevin Thomas is also known as Fernando Thomas. *See State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 5, 300 Wis. 2d 381, 732 N.W.2d 1; Case Details for Milwaukee County Case Number 2000CF000604, Wisconsin Circuit Court Access, <http://wcca.wicourts.gov/caseDetails.do?jsessionid=183A4400429DAC0154D65F4AB899983.render1?caseNo=2000CF000604&countyNo=40&cacheId=FBB22A481DFF0A9689ABB0DF8DD49490&recordCount=1&offset=0&mode=details&submit=View+Case+Details> (last visited Jan. 11, 2008) [hereinafter 2000CF000604 Case Details].

2. Decision of Mayumi M. Ishii, Admin. Law Judge, Div. of Hearings and Appeals 1 (Apr. 27, 2004) [hereinafter Ishii Decision] (revocation and sentencing decision), *available in* Brief & Appendix of Respondents-Respondents-Petitioners David H. Schwarz and Matthew J. Frank at 134–39, *State ex rel. Thomas v. Schwarz*, 2007 WI 57, Wis. 2d 381, 732 N.W.2d 1 (No. 2005AP1487) (available at Wisconsin State Law Library).

conviction.<sup>3</sup> Though released from prison, Thomas remained under the supervision of the Community Corrections Division of the Wisconsin Department of Corrections (DOC).<sup>4</sup> For almost two-and-a-half years, Thomas generally complied with the rules of his community supervision without incident.<sup>5</sup> He received drug treatment and otherwise stayed out of trouble.<sup>6</sup>

In December 2003, Thomas possessed and used illegal drugs, sold heroin to an undercover police officer, drove a car without a license, and failed to attend a meeting with his parole agent.<sup>7</sup> Because of this conduct, Thomas found himself before Ishii in March 2004, facing revocation and a return to prison.<sup>8</sup> Ishii ultimately decided that Thomas had violated the rules of his community supervision.<sup>9</sup> She revoked Thomas's status in the community on both the forgery case and the burglary case and recommended that he return to prison for two years and fifteen days.<sup>10</sup>

This scenario is one that occurs every year for thousands of offenders in the Wisconsin criminal-justice system.<sup>11</sup> In most cases, what happens to offenders like Thomas is not unique and warrants little or no attention beyond the perfunctory revocation hearing before an ALJ.<sup>12</sup> However, Thomas's case, which was recently appealed to and decided by the Wisconsin Supreme Court, is different because it occurred alongside significant changes in Wisconsin's sentencing policy.<sup>13</sup>

In June 1998, the Wisconsin Legislature enacted Truth-in-Sentencing I (TIS I), ushering in a determinate-sentencing system that would replace the indeterminate system that had existed since before 1984.<sup>14</sup> However, TIS I was incomplete and required supplemental legislation to fill in important details pertaining to its implementation.<sup>15</sup> The legislature delayed implementation of TIS I until December 1999 to

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3. See *infra* Part II.A.1.

4. See *infra* text accompanying note 150.

5. See *infra* Part II.A.1-2.

6. See *infra* Part II.A.1-2.

7. See *infra* note 154.

8. See *infra* Part II.A.2.

9. Ishii Decision, *supra* note 2, at 4-5.

10. *Id.* at 5-6.

11. See STATE OF WIS., DIV. OF HEARINGS AND APPEALS, RESOURCE BOOK 1 (2002), available at <http://dha.state.wi.us/home/Digest01/Digest%202001.pdf> (7,157 revocation hearings scheduled in 2001).

12. *Id.* at 4.

13. See *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶¶ 14-21, 300 Wis. 2d 381, 732 N.W.2d 1, *rev'g* 2006 WI App 194, 296 Wis. 2d 419, 722 N.W.2d 400.

14. See *infra* Part I.A.2.b.

15. See *infra* Part I.A.2.c.

allow time for a specially appointed committee to make recommendations that the legislature would enact.<sup>16</sup> Partisan gridlock further delayed the enactment of the supplemental legislation, called Truth-in-Sentencing II (TIS II), until February 2003.<sup>17</sup>

Meanwhile, between December 31, 1999, and February 1, 2003, over ten thousand offenders, like Thomas, received prison sentences under the admittedly incomplete TIS I statutes.<sup>18</sup> These offenders faced a confusing matrix of sentencing provisions due to the two-stage implementation of TIS I and TIS II.<sup>19</sup> In particular, those offenders like Thomas, with multiple sentences that fell under both indeterminate- and determinate-sentencing schemes, faced even more uncertainty about how their sentences would fit within Wisconsin's new sentencing regime.<sup>20</sup>

In this case, Thomas challenged the authority of the ALJ to revoke his supervision on two consecutive sentences where the two sentences fell under two distinctly different sentencing regimes—indeterminate and determinate.<sup>21</sup> Because Thomas was serving an indeterminate sentence followed by a consecutive determinate sentence, the dispositive issue in the case was whether the consecutive sentences should be treated as one continuous sentence, as the State argued, or as two distinct sentences, as Thomas argued.<sup>22</sup> If the court ruled for the State that Thomas's two consecutive sentences should be treated as one continuous sentence, then the ALJ had jurisdiction to revoke both sentences, and Thomas faced exposure to more prison time.<sup>23</sup> Alternatively, if the court ruled for Thomas that his two consecutive sentences should be treated as two distinct sentences, then the ALJ would only have jurisdiction to revoke the indeterminate sentence, and

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16. See *infra* Part I.A.2.c.

17. See *infra* Part I.A.2.c.

18. *State v. Trujillo*, 2005 WI 45, ¶ 28, 279 Wis. 2d 712, 694 N.W.2d 933 (“Between . . . December 31, 1999, and . . . February 1, 2003, more than 10,700 adults were admitted into Wisconsin's prison system with one or more TIS-I sentences.”).

19. See, e.g., *Trujillo*, 2005 WI 45; *State v. Tucker*, 2005 WI 46, 279 Wis. 2d 697, 694 N.W.2d 926; *State v. Stenklyft*, 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769.

20. See, e.g., *State ex rel. Thomas v. Schwarz*, 2006 WI App 194, ¶ 2, 296 Wis. 2d 419, 722 N.W.2d 400.

21. *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 2, 300 Wis. 2d 381, 732 N.W.2d 1.

22. *Id.* ¶¶ 2–3.

23. *Id.* ¶¶ 30–33.

under the circumstances of his particular case, Thomas would not face additional prison time.<sup>24</sup>

Offenders with TIS I sentences, like Thomas, have brought numerous cases to challenge provisions in TIS I and TIS II.<sup>25</sup> This litigation has allowed the courts to clarify statutory ambiguity and repair unconstitutional provisions in Wisconsin's new sentencing regime.<sup>26</sup> The *Thomas* case is yet another in this series of cases in which the courts have been asked to clarify statutory ambiguity in the TIS I and II statutes.<sup>27</sup>

The Wisconsin Supreme Court's decision in *Thomas* signals the court's continued willingness to structure the state's sentencing policies through its judicial decisions. It is likely that the court will continue to decide cases brought by offenders sentenced under TIS to clarify statutory silence or ambiguity.

*Thomas* is important because it illustrates the broad implications throughout the criminal-justice system of a seemingly minute, technical change in a statute.<sup>28</sup> For Thomas, the outcome of the case determined whether he would go back to prison for one or both of the offenses.<sup>29</sup> For other offenders with similar sentence structures,<sup>30</sup> the court's decision determined how much exposure to additional prison time they would face after their release.<sup>31</sup> For parole agents, ALJs, and sentencing judges, the outcome of this case affected the amount of discretion they have over offenders in similar situations and how they ultimately impose sentences for revoked offenders.<sup>32</sup> For sentencing

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24. *Id.* ¶¶ 34–37. Of course, other offenders with sentences like Thomas's might return to prison, but they would face less exposure to prison time upon revocation if the ALJ could only revoke one, but not both, of their consecutive sentences.

25. *See, e.g., State v. Trujillo*, 2005 WI 45, 279 Wis. 2d 712, 694 N.W.2d 933; *State v. Tucker*, 2005 WI 46, 279 Wis. 2d 697, 694 N.W.2d 926; *State v. Stenklyft*, 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769.

26. *See, e.g., Thomas*, 2007 WI 57, ¶¶ 47–50; *Trujillo*, 2005 WI 45, ¶ 30; *Tucker*, 2005 WI 46, ¶¶ 17–24; *Stenklyft*, 2005 WI 71, ¶ 82 (Abrahamson, C.J., concurring in part and dissenting in part).

27. *See Thomas*, 2006 WI App 194, ¶ 2.

28. *See infra* Part II.B.

29. *See infra* Part II.A.

30. Even the DOC does not know the number of offenders with sentences like Thomas's. *See* Letter from Christopher G. Wren, State of Wis. Dep't of Justice, to Judges Ted E. Wedemeyer, Jr., Ralph Adam Fine & Joan F. Dessler, Wis. Court of Appeals 2 (June 8, 2006) ("DOC probably cannot provide the information requested" regarding "the number of people who might be affected by the decision in this case."), *available in* Brief & Appendix of Respondents-Respondents-Petitioners, *supra* note 2, at 166–67.

31. *See infra* Part III.B.

32. *See infra* Part III.B.

policymakers, this case further defined the balance of power among the courts, the legislature, and the executive branch, to determine the course of Wisconsin's sentencing policies after TIS II.<sup>33</sup> Finally, as Wisconsin continues to struggle with the financial demands of an ever-expanding correctional system,<sup>34</sup> the outcome of *Thomas* and similar cases have real effects on the cost of prisons because they expose more offenders to more prison time, some of which they will spend in prison, at a high cost to taxpayers.<sup>35</sup>

After *Thomas*, offenders and other criminal-justice-system actors may better understand what to expect from the Wisconsin Supreme Court in future TIS litigation. To that end, this Note's intended audience includes offenders and attorneys contemplating future TIS litigation. This Note should also inform the legislators who pass sentencing statutes, the corrections officials who implement them, and the judges who use and interpret them about how to avoid or better manage the type of problems illustrated by *Thomas*. For sentencing policymakers in Wisconsin and other states, the *Thomas* case exposes the perils of the technical implementation of widespread changes in sentencing regimes, as it affects offenders, corrections officials, and judges, and also suggests how they could avoid these issues in the future. For legal scholars generally, exploration of the *Thomas* case offers insight into statutory interpretation by the courts as well as the balance of power among the three branches of government to shape sentencing policies.

This Note explores the *Thomas* case in detail, including how it continues the trend established by the case law developed in the wake of TIS I and II. Part I provides a brief overview of Wisconsin's sentencing policies during the last twenty-five years, emphasizing the transition from indeterminate to determinate sentencing and the existing TIS jurisprudence. Part II outlines the disposition of the *Thomas* case leading up to and in the Wisconsin Court of Appeals and Wisconsin Supreme Court. Part III analyzes the implications of the *Thomas* decision on Wisconsin's sentencing policy. Finally, this Note concludes that the supreme court's decision in *Thomas* is consistent with earlier TIS jurisprudence and the court will continue to play a major role in shaping Wisconsin's sentencing policy unless the legislature intervenes.

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33. See *infra* Part III.B.

34. See David Callendar, *Spiraling Prison Costs Will Swamp State*, *Lawyers Told*, CAP. TIMES (Madison, Wis.), Mar. 1, 2006, at A1.

35. See *id.*; *infra* Part III.B.

## I. BACKGROUND

This Part explores the transition from indeterminate to determinate sentencing in Wisconsin over the last thirty years. It considers how Wisconsin's "truth-in-sentencing" regime follows the national trend toward tougher sentencing policies and the process by which the Wisconsin Legislature formulated the current regime. Finally, this Part discusses the role of the Wisconsin Supreme Court in interpreting the new determinate-sentencing law.<sup>36</sup>

### A. The Wisconsin Legislature's Sentencing Policies

#### 1. 1984–99: INDETERMINATE SENTENCING

Until December 31, 1999, Wisconsin employed "a conventional indeterminate sentencing" structure.<sup>37</sup> This indeterminate-sentencing scheme, also known as "New Law"<sup>38</sup> sentencing, governs all sentences for offenses committed<sup>39</sup> between June 1, 1984, and December 30, 1999.<sup>40</sup>

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36. As sentencing policy is in itself an inexhaustible topic, this Part will focus on aspects of particular relevance to the *Thomas* decision.

37. Thomas J. Hammer, *The Long and Arduous Journey to Truth-in-Sentencing in Wisconsin*, 15 FED. SENT'G REP. 15, 15 (2002).

38. Meredith Ross, *Sentence Modification and Early Release for TIS Inmates*, 13 WIS. DEFENDER, Winter/Spring 2005, at 4, 4, available at <http://www.wisspd.org/html/publications/WdefWinSpr05/WinSpr2005.pdf>. The revisions to Wisconsin's sentencing law that went into effect in 1984 were called "New Law," in relation to the previous system, then called, appropriately, "Old Law." *Id.* at 14 n.4. Old Law governs sentences for crimes committed before June 1, 1984. *Id.* Old Law sentences, like New Law sentences, were also indeterminate. WIS. STAT. §§ 53.11–.12 (1981–82). Compared to New Law, the Old Law sentencing regime was more complicated. *See* Ross, *supra*, at 14 n.4. Except as very brief background, the nuances of Old Law sentencing are outside the scope of this Note. As a result, this Note will use the term "indeterminate" to refer to both the Old Law and New Law sentencing regimes. This Note will emphasize the mechanics of New Law, but even when discussing features specific to New Law, this Note will use the term "indeterminate," instead of "New Law."

39. Like Thomas, many offenders remain in the Wisconsin criminal-justice system who committed, were convicted of, and were sentenced for New Law crimes, which they committed prior to December 31, 1999. *See, e.g., State ex rel. Thomas v. Schwarz*, 2006 WI App 194, 296 Wis. 2d 419, 722 N.W.2d 400. It is still possible for offenders to receive indeterminate sentences—even today—for crimes committed before December 31, 1999, but not prosecuted until after TIS I and TIS II went into effect. *See* WIS. STAT. §§ 973.01(1), .013(1)(a) (2005–06). Furthermore, offenders on probation or parole for crimes committed before December 31, 1999, continue to receive indeterminate sentences when their probation or parole status is revoked.

40. *See* WIS. STAT. § 973.01(1). All subsequent references to the WISCONSIN STATUTES cite the 2005–06 edition, unless otherwise indicated.

Under New Law indeterminate sentencing, the trial-court judge set the length of the offender's sentence at the sentencing hearing, up to the statutory maximum.<sup>41</sup> The sentencing dispositions could include probation<sup>42</sup> or immediate confinement in prison.<sup>43</sup> If confined in prison, most offenders were eligible for parole after serving the greater of 25 percent or six months of the sentence.<sup>44</sup> Upon serving two-thirds of the sentence, most offenders<sup>45</sup> reached their mandatory-release date and were released from prison into the community under the supervision of the DOC.<sup>46</sup> Between the parole-eligibility date and the mandatory-release date, the Wisconsin Parole Commission had the discretion to release inmates by granting parole.<sup>47</sup> After release to parole, either by a parole grant or upon reaching the mandatory-release date, an offender remained on parole until the remainder of the total sentence had elapsed.<sup>48</sup> During this time, an offender could be returned to prison for up to the remaining time left in the sentence<sup>49</sup> if a violation of the terms of parole led to revocation of parole.<sup>50</sup>

This system was an indeterminate-sentencing scheme because the amount of time an offender actually spent in prison was unknowable, both at sentencing and while the offender served the time.<sup>51</sup> Though the offender would be under the supervision of the DOC for the length of the sentence set by the judge,<sup>52</sup> the actual amount of time the offender initially spent confined in prison could range from one-fourth to two-

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41. *Id.* § 973.013(1)(a)–(b).

42. *Id.* § 973.09(1)(a). If an offender receives probation, the sentencing judge may either impose and stay a prison sentence at sentencing or the sentencing judge may withhold sentencing until after revocation. *Id.*

43. *Id.* § 973.15(1).

44. *Id.* § 304.06(1)(b). Offenders serving life sentences under New Law are eligible for parole after serving at least twenty years. *Id.* The sentencing judge may elect to set an offender's parole-eligibility date for serious felonies committed between April 21, 1994, and December 31, 1999, and not punishable by life imprisonment. *Id.* § 973.0135(2)–(3). If so, the sentencing judge could set an offender's parole-eligibility date on the offender's mandatory-release date at two-thirds of the sentence, thus eliminating any chance of an earlier parole. *Id.* § 2(b).

45. *See, e.g., id.* § 302.11(1g) (offender convicted of a "serious felony" has a presumptive mandatory-release date, subject to review by the Parole Commission); *id.* § 302.11(2) (offender who violates prison regulations subject to extension of mandatory-release date).

46. *Id.* §§ 302.11(1), 304.06(3).

47. *Id.* §§ 304.01, 304.06(1)(b), 302.11(1).

48. *Id.* § 373.013(1)(b).

49. *Id.* §§ 304.06(3), 302.11(7)(am)–(c).

50. *Id.* § 304.06(3).

51. Hammer, *supra* note 37, at 15.

52. WIS. STAT. § 304.06(3).

thirds of the total sentence.<sup>53</sup> In addition, the offender could serve more prison time than the initial-confinement period if the offender's parole was revoked and the offender was returned to prison after revocation.<sup>54</sup> As a result, no one—including the sentencing judge, attorneys, victims, public, or offender—knew for certain how much time the offender would actually spend in prison.<sup>55</sup>

Indeterminate sentencing is also a highly discretionary system, with discretion shared by multiple actors at multiple points in the criminal-justice system.<sup>56</sup> Such a system has several advantages, including facilitating individualized treatment for offenders and allowing flexibility for corrections officials to manage prison resources.<sup>57</sup> Indeterminate systems also pose several disadvantages, including a reduction in a judge's absolute power to impose a long sentence,<sup>58</sup> public frustration and confusion (largely media driven) over perceived leniency on criminals released to parole,<sup>59</sup> and the use of race

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53. *Id.* §§ 302.11(1), 304.06(1)(b). For instance, if a trial judge sentenced an offender to prison for ten years, after two-and-a-half years, the offender could be released immediately to parole. Then, at any point between two-and-a-half years and six years, eight months, the Parole Commission could grant parole and a release from confinement in prison. At most, an offender sentenced to prison for ten years would only be in prison for six years and eight months, unless the offender is returned to prison after a parole revocation. The offender would spend at least the remaining three years and three months of the sentence in the community, under parole supervision. With an earlier discretionary parole grant, the offender could spend anywhere from three years and three months to seven years and six months of the ten-year sentence outside of prison. *See id.* §§ 302.11(1), 304.06(1)(b). Conceivably, though, an offender could spend the entire length of the sentence in prison during the initial confinement period if the offender and DOC agreed to waive mandatory release or the offender had chronic disciplinary problems that extended the mandatory-release date to the offender's maximum-discharge date. *See id.* § 302.11(2), (4).

54. *See id.* § 304.06(3).

55. Hammer, *supra* note 37, at 15.

56. This includes the judge setting the length and disposition (probation or prison) of the sentence, the Parole Commission granting parole, the parole agent recommending revocation, and the ALJ deciding whether to revoke and impose additional prison time. *See supra* notes 28–38 and accompanying text; *see also* Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 74 (1999) (“[S]entencing [is] as an exercise in shared authority, seeking to achieve a workable and stable balance between the roles and influence of a wide variety of public and private parties.”).

57. *See* Frase, *supra* note 56, at 69.

58. *Id.* at 74 (judges have “very little effect over how long offenders stay in prison” under indeterminate-sentencing schemes). A judge who intended a long sentence for a particularly dangerous offender or heinous offense may find his or her efforts later undercut by a Parole Commissioner seeking only to reduce prison overcrowding. *See id.*

59. *See, e.g.*, Todd R. Svano, *Brutal Crimes Raise Penalty Issues Here*, CAP. TIMES (Madison, Wis.), Feb. 4, 1998, at 1A (noting that the indeterminate-

or other impermissible factors in discretionary sentencing decisions.<sup>60</sup> Attention to the confusion and problems posed by discretionary-sentencing regimes caused many states to enact determinate-sentencing policies.<sup>61</sup>

## 2. DETERMINATE SENTENCING

### *a. National trends in sentencing policy*

By the late 1990s, following a national trend in sentencing policy, many states had adopted some type of sentencing reform.<sup>62</sup> Half of the states adopted guideline systems, influenced by the federal sentencing system.<sup>63</sup> The availability of federal funding for prison construction also motivated several states, including Wisconsin, to enact determinate-sentencing schemes.<sup>64</sup> In addition, more than half the states also adopted some variation of truth-in-sentencing policies, which required felons to serve more of their actual sentences in prison as opposed to being released on parole.<sup>65</sup>

The phrase “truth in sentencing” initially meant sentencing regimes that would keep offenders in prison for a higher percentage of their actual sentence, instead of releasing them earlier on parole, and typically involved a guideline system to curtail judicial discretion and sentencing discrepancies.<sup>66</sup> However, the meaning of truth in sentencing evolved beyond this concept to encompass sentencing schemes that

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sentencing regime is “deceptive to the public because criminals never complete a full sentence”); Michael B. Brennan & Donald V. Latorraca, *Truth-in-Sentencing*, WIS. LAW., May 2000, at 14, 14, available at [http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin\\_Lawyer&template=/CM/ContentDisplay.cfm&contentid=49911](http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&contentid=49911) (“[M]any citizens have become concerned that parole and . . . early release have resulted in a criminal justice system in which many offenders serve less than one-half of their sentences.”). *But see* Richard P. Jones, *Inmates Can’t Expect Early Prison Exit*, MILWAUKEE J. SENTINEL, Feb. 7, 2000, at 1B (“[T]he chances of getting out early on parole are virtually nil, and it has little to do with the new truth-in-sentencing law.”).

60. *See, e.g.*, Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, in 32 CRIME & JUST. 131, 131 (Michael Tonry ed., 2005).

61. *See supra* notes 55–60 and accompanying text.

62. Marc L. Miller, *Sentencing Reform “Reform” through Sentencing Information Systems*, in THE FUTURE OF IMPRISONMENT, 121, 121 (Michael Tonry ed., 2004).

63. *See id.*

64. *See, e.g.*, Richard P. Jones, *Governor May Delay Plan on Sentencing*, MILWAUKEE J. SENTINEL, May 13, 1997, at 1 (“Once truth-in-sentencing takes effect, Wisconsin could be eligible for federal funding for prison construction, another factor in [then-Governor] Thompson’s eagerness to enact truth-in-sentencing.”).

65. Miller, *supra* note 62, at 121–22.

66. *See* Frase, *supra* note 56, at 72–73.

eliminated any type of discretionary parole, whether or not they involved guidelines for judges' sentences.<sup>67</sup> Furthermore, the "truth" in "truth in sentencing" also became more about increasing "honesty" in the overall criminal-justice system, mostly by establishing sentences with fixed and purportedly nonchangeable release dates and making sentence lengths harsher for most offenses.<sup>68</sup>

*b. Truth-in-sentencing I*

In June 1998, Wisconsin joined the truth-in-sentencing trend by adopting a determinate-sentencing regime with the passage of Act 283.<sup>69</sup> The legislature's motivation in shifting from indeterminate to determinate sentencing was to increase public safety and "restore confidence" in a criminal-justice system that allowed too many offenders to serve too little of their sentences.<sup>70</sup> The new system would ensure certainty in how much time an offender would actually spend in prison.<sup>71</sup>

The main feature of TIS I<sup>72</sup> was the abolition of discretionary parole for the early release of offenders from prison.<sup>73</sup> By eliminating the uncertainty over an inmate's release date, TIS I established a determinate-sentencing regime, replacing the discretionary and somewhat unpredictable indeterminate scheme under the New Law regime.<sup>74</sup> Now, corrections officials and sentencing judges, along with

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67. *Id.* at 73.

68. *Id.* at 73, 80 (arguing that "the emphasis has shifted from disparity-reduction to systemic 'honesty' and increased sentence severity"; arguing that "systemic 'honesty'" is achieved by reducing mechanisms by which a convicted offender may reduce the time served in prison; and suggesting that truth in sentencing may "openly cater to the public's fear of dangerous criminals" without actually improving the public's safety).

69. Hammer, *supra* note 37, at 15; *see also* Walter J. Dickey, *Thinking Strategically about Correctional Resources*, 2000 WIS. L. REV. 279, 279 ("Wisconsin, once progressive and innovative in the field of corrections, has fallen prey to every fad that has swept the country, from boot camps to supermax prisons to 'three strikes and you're out' laws.").

70. Brennan & Latorraca, *supra* note 59, at 14.

71. Ross, *supra* note 38, at 4.

72. To avoid confusion, in this Note the term "TIS I" refers to the determinate-sentencing scheme that applies to offenses committed between December 31, 1999, and February 1, 2003. The term "TIS II" refers to the determinate-sentencing scheme that applies to offenses committed on or after February 1, 2003. The terms "TIS" or "determinate" are used interchangeably to refer to the determinate-sentencing scheme that applies to offenses committed after December 31, 1999, that is, to both TIS I and TIS II. As stated earlier, the term "indeterminate" refers to any pre-TIS sentence, under either Old Law or New Law. *See supra* note 38.

73. Ross, *supra* note 38, at 4.

74. *Id.*

victims, attorneys, the public, and the offender, would know at the time of sentencing the exact length of the offender's prison time.<sup>75</sup>

Under TIS I, which applies to all offenses committed on or after December 31, 1999, an offender's sentence must contain two distinct parts.<sup>76</sup> In this bifurcated sentence, the first component is a term of prison confinement, set by the sentencing judge.<sup>77</sup> The offender must serve this entire confinement term; TIS I offered no mechanisms for any type of early release for adult offenders.<sup>78</sup> The second component of the sentence is a term of extended supervision, also set by the sentencing judge.<sup>79</sup> If an offender violates the terms of extended supervision, he or she may be sentenced back to prison for a term up to the length of the extended-supervision term.<sup>80</sup>

*c. Truth-in-sentencing II*

Even if TIS I, as passed in Act 283, succeeded in doing away with the previous indeterminate-sentencing scheme and establishing a new framework for determinate sentencing, Act 283 itself was, by design, incomplete.<sup>81</sup> TIS I did not take effect until December 31, 1999, even though Act 283 passed in June 1998.<sup>82</sup> The legislature delayed TIS I to

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75. Hammer, *supra* note 37, at 15.

76. WIS. STAT. § 973.01(1)–(2); *see also* Hammer, *supra* note 37, at 15.

77. WIS. STAT. § 973.01(2)(b).

78. *Id.* § 973.01(4), (6)–(7). Also, misconduct in prison may add time to the confinement period but does not affect the overall sentence length, as this additional confinement time is subtracted from the extended-supervision term. *Id.* § 302.113(3)(a). TIS I also eliminated credit for “good time,” another mechanism previously available under New Law that shortened sentences and contributed to uncertainty about actual confinement time. *Id.* § 973.01(4).

79. *Id.* § 973.01(2)(d).

80. *Id.* § 302.113(9)(am). Under TIS I, a typical sentence might look like this: The sentencing judge sentences an offender for ten years. Whereas before under New Law the actual length of imprisonment would effectively be left to the Parole Commission, under TIS I the judge must specify the length of the prison term and the length of the extended-supervision term. In this case, for instance, the judge might give a sentence of five years of confinement and five years of extended supervision, for a total sentence of ten years. Under TIS I, the offender would be in prison for five years, and possibly more, if prison officials added time for conduct violations. Upon release, the offender would continue to be under the supervision of the DOC for five years of extended-supervision time. If the offender violated the terms of his extended supervision, at any point, the offender could be sentenced for up to five years of reconfinement. This is even if the offender had successfully completed four years, eleven months of extended supervision, without incident. Thus, under TIS I, it is possible for inmates to spend more, but never less, time in prison than the initial sentence requires. *See supra* notes 54–60 and accompanying text.

81. Hammer, *supra* note 37, at 15.

82. *Id.*

ensure that the new system could be adequately amended and supplemented before it took effect.<sup>83</sup> To this end, the legislature created the Criminal Penalties Study Committee (CPSC), tasked with developing additional legislation that would fill in the necessary details left blank by Act 283.<sup>84</sup>

The CPSC completed its report on August 31, 1999,<sup>85</sup> in time for the legislature to translate its recommendations into law before TIS I went into effect.<sup>86</sup> Among other things, the CPSC report offered statutory language to deal with some of the administrative complications caused by the transition to determinate sentencing.<sup>87</sup> However, due to partisan gridlock, the supplemental legislation failed to pass both the Assembly and the Senate before December 31, 1999.<sup>88</sup> Thus, TIS I went into effect as an incomplete sentencing scheme, with many important details left unresolved.<sup>89</sup> Meanwhile, thousands of offenders, like Thomas, were sentenced under this new, but incomplete, sentencing regime.<sup>90</sup>

For the next two and a half years, the legislature struggled to pass legislation that would complete the sentencing framework established by TIS I in Act 283. Finally, in July 2002 the legislature passed Act 109, an emergency budget bill that included most of the CPSC's recommendations.<sup>91</sup> This legislation, TIS II, took effect in February 2003.<sup>92</sup> To break the partisan gridlock hindering the passage of TIS II, the legislature compromised and added several provisions that would reduce the certainty of inmates serving the full sentence imposed by the sentencing judge.<sup>93</sup> TIS II included several mechanisms allowing inmates to petition for early release from what otherwise would have been determinate sentences.<sup>94</sup> TIS II also created a uniform felony-

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83. *Id.*

84. *Id.*

85. CRIMINAL PENALTIES STUDY COMM., STATE OF WIS., FINAL REPORT (1999), available at [http://www.doa.state.wi.us/docs\\_view2.asp?docid=42](http://www.doa.state.wi.us/docs_view2.asp?docid=42).

86. Hammer, *supra* note 37, at 15.

87. *Id.* at 16. For example, the CPSC also created a uniform classification system for felony offenses and converted New Law statutory-maximum sentences into maximum sentence lengths under TIS. *See id.*

88. *Id.* at 17.

89. *Id.*

90. *See supra* note 18 and accompanying text.

91. *See* 2001 Wis. Act 109, §§ 535–1146.

92. *See* Ross, *supra* note 38, at 4.

93. Hammer, *supra* note 37, at 17 (“The compromise removes some of the ‘truth’ from the original truth-in-sentencing law.”).

94. TIS II included several provisions that would allow inmates to petition for early release from prison after serving 75 or 85 percent of their confinement term, for geriatric release or for having a terminal illness. *Id.*; Ross, *supra* note 38.

classification system that resulted in reduced maximum penalties for many offenses, compared to the statutory maximum imposed by TIS I.<sup>95</sup>

Many of the provisions contained in TIS II were ambiguous or confusing, particularly relating to offenders sentenced under the inchoate TIS I regime. As a result, the implementation of TIS II spawned significant litigation.

### *B. Judicial Interpretation Before Thomas*

The passage of Act 109 and the implementation of TIS II left many questions unanswered regarding offenders serving TIS I sentences and how New Law, TIS I, and TIS II would interact when offenders had sentences spanning multiple regimes.<sup>96</sup> The Wisconsin Supreme Court addressed some of these issues in a recent series of cases. The *Thomas* case continues the trend established by these cases, indicating the court's consistent willingness to interpret the TIS statutes to have a significant impact on Wisconsin's sentencing policy.

#### 1. *STATE V. TRUJILLO*:

##### EXTENDING THE TIS II SENTENCE-ADJUSTMENT PROVISION TO TIS I INMATES

In *State v. Trujillo*,<sup>97</sup> the court addressed what opportunities TIS I inmates had to reduce their sentence lengths, given changes to the state's sentencing laws after the passage of TIS II.<sup>98</sup> Jose Trujillo argued that reduced sentenced lengths under TIS II<sup>99</sup> constituted a

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95. Hammer, *supra* note 37, at 16 ("To place offenses into the new classification system, the committee used a conversion process that began with a determination of the maximum amount of time that could be served in prison in the old indeterminate system prior to mandatory release on parole if a maximum sentence were imposed. Once this number was identified, the committee used it to locate each crime in the new classification system by searching for a category with a similar maximum initial term of confinement in prison. After this conversion was done, some upward and downward adjustments were made to keep crimes of roughly similar severity in the same category."); *see also State v. Trujillo*, 2005 WI 45, ¶¶ 7-8, 279 Wis. 2d 712, 694 N.W.2d 933; *State v. Tucker*, 2005 WI 46, ¶ 5, 279 Wis. 2d 697, 694 N.W.2d 926.

96. Ross, *supra* note 38, at 9.

97. *Trujillo*, 2005 WI 45.

98. *Id.* ¶¶ 1-2.

99. Under TIS I, Trujillo's burglary offense was a Class C felony, with a maximum penalty of fifteen years, of which up to the first ten years could be ordered as the initial-confinement term in prison. *Id.* ¶ 8. Trujillo received eight years of initial confinement and five years of extended supervision. *Id.* ¶ 7. Under TIS II, burglary dropped to a Class F felony with a maximum penalty of twelve and a half years, which included a maximum initial-confinement term of seven and one half years. *Id.* ¶ 8.

common-law “new factor” that warranted a sentence modification.<sup>100</sup> The court found that the reduction in sentence lengths from TIS I to TIS II was not a new factor.<sup>101</sup> First, the courts had previously ruled that a reduction in maximum penalty for the same offense did not constitute a new factor.<sup>102</sup> Second, the court noted that “[i]f the legislature wanted the reduced maximum penalties to be considered [as new factors] in TIS-I sentence modification hearings, it could have provided that the reduced penalties in TIS-II shall have retroactive application.”<sup>103</sup> The TIS II legislation, however, did not expressly identify the reduced TIS II penalties as new factors that courts could or must consider in sentence-modification requests.<sup>104</sup> Nor did the legislature specify that TIS II penalties applied retroactively to TIS I offenders.<sup>105</sup> The court held “that the omission by the legislature of retroactive language in enacting TIS-II is significant” and that this decision by the legislature deserved deference.<sup>106</sup>

According to the court, if the legislature wanted the reduced TIS II penalties to be considered new factors, it could have written these retroactive applications into the TIS II statute.<sup>107</sup> Because the legislature did not, the court declined to overrule its previous decisions and determined that TIS I offenders, like Trujillo, could not argue that penalty reductions from TIS I to TIS II were new factors warranting a sentence modification.<sup>108</sup>

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Because Trujillo was sentenced under TIS I, his sentence now exceeded the maximum allowable under TIS II by six months. *Id.*

100. *Id.* ¶ 1. A sentence modification is a common-law mechanism, available to inmates sentenced under determinate or indeterminate sentencing, that recognizes a trial court’s “inherent authority to modify a sentence that the court has imposed” on the basis of either the showing of a “new factor” or the trial court’s abuse of discretion. Ross, *supra* note 38, at 5–6 (“The term ‘new factor’ has a narrow legal definition.”); *see also Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975) (“[T]he phrase ‘new factor’ refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing . . .”).

101. *Trujillo*, 2005 WI 45, ¶¶ 1–2.

102. *Id.* ¶¶ 18–19 (“[R]eduction in the maximum penalty . . . is not highly relevant to the imposition of sentence and, therefore, does not constitute a ‘new factor.’” (quoting *State v. Hegwood*, 113 Wis. 2d 544, 547, 335 N.W.2d 399, 401 (1983))); *id.* ¶ 20 (“[C]hange in the classification of a crime . . . is not a ‘new factor’ . . .” (quoting *State v. Torres*, 2003 WI App 199, ¶ 7, 267 Wis. 2d 213, 670 N.W.2d 400)).

103. *Trujillo*, 2005 WI 45, ¶ 22.

104. *Id.* ¶¶ 1–2, 22.

105. *Id.* ¶ 2.

106. *Id.* ¶ 23.

107. *Id.* ¶ 22.

108. *Id.* ¶¶ 21–23. The court was also concerned with “the possibility of opening the floodgates” on potentially thousands of sentence-modification motions from

The court further ruled that although the penalty reductions from TIS I to TIS II were not new factors for TIS I inmates, the sentence-adjustment procedure created by Wisconsin Statutes section 973.195 in TIS II provided “an adequate remedy” for TIS I inmates to request a reduction in sentence.<sup>109</sup> Section 973.195(1r)(b)(3) explicitly provided that “[a] change in law . . . effective after the inmate was sentenced that would have resulted in a shorter term of confinement in prison” was one reason the court could consider in a sentence-adjustment petition.<sup>110</sup> The court effectively extended the sentence-adjustment procedure in section 973.195 to apply to TIS I inmates,<sup>111</sup> even though the language of section 973.195 was ambiguous as to whether it applied to TIS I inmates.<sup>112</sup> After *Trujillo*, though it was clear that TIS I inmates could apply for a sentence adjustment under section 973.195, it was unclear how or when TIS I inmates could apply.<sup>113</sup>

## 2. *STATE V. TUCKER*:

### CLARIFYING AMBIGUITY IN TIS II FOR TIS I INMATES

In *State v. Tucker*,<sup>114</sup> the court addressed the questions left unanswered by *Trujillo* regarding when and how TIS I offenders could apply for sentence adjustments given the ambiguity of Wisconsin Statutes section 973.195.<sup>115</sup> Though *Trujillo* declared that sentence

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TIS I inmates. *Id.* ¶ 28. By contrast, sentence-adjustment petitions do not require a hearing or overly burden the resources of the courts. *See* WIS. STAT. § 973.195.

109. *Trujillo*, 2005 WI 45, ¶¶ 24–25.

110. WIS. STAT. § 973.195(1r)(b)(3). *Trujillo* argued that this remedy was inadequate, likely because he would have to serve the “applicable percentage” of his confinement time before he was eligible to file. *See Trujillo*, 2005 WI 45, ¶ 25; WIS. STAT. § 973.195(1g)–(1r).

111. *Trujillo*, 2005 WI 45, ¶ 30.

112. Ross, *supra* note 38, at 11 (“*Are TIS I inmates eligible to apply for sentence adjustment?* The answer to this question is ‘maybe.’”).

113. *See Trujillo*, 2005 WI 45, ¶ 30.

114. *State v. Tucker*, 2005 WI 46, 279 Wis. 2d 697, 694 N.W.2d 926. Like *Trujillo*, James Hubert Tucker argued that the reduction in penalties for his crime under TIS II constituted a new factor warranting a sentence modification. *Id.* ¶ 6. Under TIS I, Tucker received consecutive sentences of fifteen years, comprised “of ten years of initial confinement and five years of extended supervision for [an] unclassified [cocaine] possession conviction,” and ten years, comprised of “five years . . . initial confinement and five years extended supervision for . . . bail jumping,” a Class D felony. *Id.* ¶¶ 3–4. Like *Trujillo*, the maximum sentences for both of Tucker’s offenses decreased under TIS II, and Tucker received “four years and six months more initial confinement than” would have been possible under TIS II. *Id.* ¶ 5. The court rejected Tucker’s argument for a new-factor sentence modification, citing its recent ruling in *Trujillo* that a reduction in penalty did not constitute a new factor. *Id.* ¶ 13.

115. *Id.* ¶¶ 1–2, 14–17 (“Therefore, as the text of Wis. Stat. § 973.195 leads to two equally reasonable interpretations, we conclude that the statute is

adjustments were an “adequate remedy” for TIS I inmates seeking a sentence reduction, in *Tucker* the court clarified that TIS I offenders could indeed apply for sentence adjustments under section 973.195.<sup>116</sup>

Next, the court had to determine when TIS I inmates could apply for sentence adjustments, as the TIS II felony classifications used to determine eligibility did not readily apply to TIS I inmates.<sup>117</sup> The court remedied this problem by declaring that TIS I inmates should apply the TIS II felony classification “for the limited purpose of determining the ‘applicable percentage’” for eligibility to apply for sentence adjustments under section 973.195.<sup>118</sup> With this holding, alongside *Trujillo*, the court repaired the statutory ambiguity in section 973.195: first, by applying the sentence-adjustment provision to TIS I offenders, and second, by declaring the procedure by which TIS I offenders could determine when they were eligible to file.<sup>119</sup> After *Tucker* and *Trujillo*, the Wisconsin Supreme Court had altered the TIS II sentencing regime—by allowing TIS I inmates to apply for sentence adjustments<sup>120</sup> (and sooner, in most cases) using TIS II eligibility standards<sup>121</sup>—without any additional legislative input.

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ambiguous . . .”). *Compare* WIS. STAT. § 973.195(1r) (specifying that sentence adjustment is available to “[a]n inmate who is serving a sentence imposed under s. 973.01 for a crime other than a Class B felony,” which includes TIS I inmates), *with* WIS. STAT. § 973.195(1g) (using TIS II felony classifications only to determine when inmates are eligible to apply for a sentence adjustment under § 973.195 and thus excluding TIS I inmates). *Tucker* did not even apply for a sentence adjustment because he believed that section 973.195 did not apply to TIS I offenders, particularly TIS I offenders like himself with unclassified drug felonies. *Tucker*, 2005 WI 46, ¶¶ 3–6.

116. *Tucker*, 2005 WI 46, ¶¶ 17–22 (examining various sources for legislative history and “conclud[ing] that the legislature intended the sentence adjustment provision to apply to TIS-I offenders”).

117. *Id.* ¶¶ 22–23. *Tucker*’s felony-bail-jumping offense, for instance, dropped from a Class D felony under TIS I to a Class H felony under TIS II. *Id.* ¶ 23. *Tucker*’s drug-possession charge was “unclassified” under TIS I and had no obvious equivalent under TIS II. *Id.* ¶ 24. Since Wisconsin Statutes section 973.195(1g) used felony classification to determine whether an inmate could apply at 85 percent (for Class C, D, and E felonies) or 75 percent (for Class F, G, H, and I felonies), section 973.195(1g) did not address whether TIS I inmates like *Tucker* were eligible to apply after serving 75 or 85 percent of their sentences. *Id.* ¶ 22.

118. *Id.* ¶ 23 (quoting WIS. STAT. § 973.195(1g)–(1r)).

119. *Id.* ¶¶ 22–24.

120. If the court had accepted the State’s argument in *Tucker*, no TIS I inmates would be eligible to apply for sentence adjustments under section 973.195. *Id.* ¶ 14. This also would have represented a significant change to TIS II—again, without any legislative action.

121. For many inmates, the court’s decision in *Tucker* made them eligible to apply for a sentence adjustment sooner than they otherwise would have been. *Tucker*, for instance, could now file for a sentence adjustment after serving 75 percent of his confinement time for his felony-bail-jumping offense, which was now a Class H felony under TIS II. Under TIS I, *Tucker*’s offense was a Class D felony, for which he would

3. *STATE V. STENKLYFT*:

## REPAIRING AN UNCONSTITUTIONAL PROVISION IN TIS II

In *State v. Stenklyft*,<sup>122</sup> the Wisconsin Supreme Court modified the meaning of unambiguous but unconstitutional statutory language in a provision of TIS II “to save its constitutionality.”<sup>123</sup> *Stenklyft* concerned whether a circuit court must dismiss a sentence-adjustment petition if the district attorney objects.<sup>124</sup> The court found that Wisconsin Statutes section 973.195(1r)(c) is “unconstitutional if read to grant a district attorney veto power” over a sentence-adjustment petition.<sup>125</sup> Rather than striking all of section 973.195,<sup>126</sup> the court determined that section 973.195(1r)(c) should be interpreted as “directory” and not “mandatory.”<sup>127</sup> Thus, despite the plain language of the statute, the court held that the circuit court may consider, but is not bound by, the objection of the district attorney in considering whether to grant a

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have been eligible to file for a sentence adjustment after serving 85 percent of his prison time. *See id.* ¶ 23; WIS. STAT. § 973.195(1g).

122. 2005 WI 71, 281 Wis. 2d 484, 697 N.W.2d 769. David Stenklyft received a seven-and-a-half year sentence under TIS I, comprised of “two years and six months initial confinement and five years [of] extended supervision.” *Id.* ¶ 10. After serving 75 percent of his initial-confinement term, Stenklyft filed a sentence-adjustment petition under section 973.195 in accordance with *Trujillo* and *Tucker*. *Id.* ¶ 11. The district attorney objected to Stenklyft’s petition. *Id.* ¶ 12.

123. *Id.* ¶ 82 (Abrahamson, C.J., concurring in part and dissenting in part). In this case, portions of the concurring-dissenting opinions actually form the case’s holding. *See* William E. Rosales, *Sentence Adjustment Petitions: An Update*, WIS. DEFENDER, Winter/Spring 2007, at 4, 6 (“From casual observation, *State v. Stenklyft* is [an] odd case for any legally trained attorney to read. . . . The lead opinion, though, does not lead the day.”).

124. *Stenklyft*, 2005 WI 71, ¶ 31; *see also* WIS. STAT. § 973.195(1r)(c) (“If the district attorney objects to adjustment of the inmate’s sentence within 45 days . . . the court *shall deny* the inmate’s petition.”) (emphasis added).

125. *Stenklyft*, 2005 WI 71, ¶ 85 (Abrahamson, C.J., concurring in part and dissenting in part) (“[The] district attorney veto . . . [is unconstitutional because it] invades the exclusive core constitutional power of the judiciary to impose a criminal penalty. It empowers an executive branch officer to direct a court decision on the merits of a case, thereby violating the doctrine of separation of powers under the state constitution.”).

126. *See id.* ¶ 122 (Crooks, J., concurring in part and dissenting in part) (“If at all possible, we should construe a statute in a way that will save it as constitutional.”).

127. *Id.* ¶ 125 (Crooks, J., concurring in part and dissenting in part) (“If ‘shall’ and ‘may’ are used by the legislature in the same statutory provision, a court should consider the other factors . . . before determining whether the use of the word ‘shall’ was intended to be mandatory or directory, especially where such determination involves the question of whether the statute is constitutional. Here the most significant factor is the one that acknowledges the legislative objective and furthers it by construing the statute in a manner that preserves its constitutionality.”).

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sentence-adjustment petition.<sup>128</sup> With this holding, the court essentially changed the meaning of “shall” in the statute from mandatory to directory to save an otherwise-unconstitutional statute.<sup>129</sup>

After *Trujillo*, *Tucker*, and *Stenklyft*, the Wisconsin Supreme Court had demonstrated its willingness in three separate cases to repair problems in the state’s TIS II sentencing statutes—either due to statutory ambiguity or unconstitutionality. Against this backdrop,<sup>130</sup> the court turned to the issues presented by the *Thomas* case.

## II. THE THOMAS CASE

This Part details the procedural history of the *Thomas* litigation, including sentencing, revocation, appeal, and decision by the Wisconsin Supreme Court. This Part also considers the arguments made by Thomas and the State before the appellate courts and how the Wisconsin Supreme Court reached its decision.

### A. Factual and Procedural Background

#### 1. CONVICTION, SENTENCING, AND CONFINEMENT

On June 30, 1999, Kevin Thomas pleaded guilty to two counts of forgery.<sup>131</sup> Under indeterminate sentencing, Thomas received two consecutive two-year sentences, imposed and stayed, and five years of probation at his sentencing hearing on August 17, 1999.<sup>132</sup> Thomas then began serving this five-year probation period, with the threat of a four-

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128. *Id.* ¶ 82 (Abrahamson, C.J., concurring in part and dissenting in part).

129. *Id.* ¶ 83 (Abrahamson, C.J., concurring in part and dissenting in part); *id.* ¶ 128 (Crooks, J., concurring in part and dissenting in part); *see also* Letter from Peggy A. Lautenschlager, Attorney General, State of Wis., to Michael D. Connelly, Executive Dir., State of Wis. Sentencing Comm. 2 (Jan. 4, 2006) (available at Wisconsin Department of Justice Law Library) (“Admittedly, Wisconsin courts have, in several instances, construed the term ‘shall’ as directory rather than mandatory.”).

130. Before *Thomas*, the Wisconsin Supreme Court also decided *State v. Brown*, 2006 WI 131, 298 Wis. 2d 37, 725 N.W.2d 262. Unlike *Trujillo*, *Tucker*, and *Stenklyft*, *Brown* concerned the application of Wisconsin’s constitutional sentencing principles to postrevocation-reconfinement sentencing. *Id.* ¶¶ 7–8. Because *Brown* did not involve the court’s interpretation of the TIS II statutes and the deference accorded by the court to the legislature’s stated sentencing policy, further exposition is outside the scope of this Note.

131. *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 5, 300 Wis. 2d 381, 732 N.W.2d 1.

132. *Id.*

year indeterminate prison term looming.<sup>133</sup> He would begin serving this sentence if the DOC revoked his probation status due to a violation.<sup>134</sup>

On April 6, 2000, Thomas pleaded guilty to a burglary charge, stemming from an incident that took place on February 4, 2000.<sup>135</sup> Subsequently, on April 21, 2000, the DOC revoked Thomas's probation status from his 1999 forgery case (due to the burglary charges), and Thomas entered prison to begin serving his four-year indeterminate sentence for the forgery.<sup>136</sup> On May 8, 2000, Judge Bonnie Gordon sentenced Thomas to an eight-year determinate sentence under TIS I for the 2000 burglary conviction, comprised "of three years [of] initial confinement and five years . . . extended supervision" consecutive to the four-year indeterminate sentence for the 1999 forgery case.<sup>137</sup> Gordon's sentence also made Thomas eligible for the Challenge Incarceration Program (CIP), a boot-camp-style program that allows offenders to secure an earlier release to extended supervision after completion.<sup>138</sup>

At this point, Thomas had two sentences—one for the 1999 forgery case and one for the 2000 burglary case.<sup>139</sup> This, by itself, was not unique; many offenders have multiple sentences for multiple crimes.<sup>140</sup> However, Thomas's case is different and more complicated because his two sentences spanned the major change in Wisconsin's sentencing

133. *Id.*

134. *See id.*

135. *Id.* ¶¶ 5–8; Charge Details for Milwaukee County Case Number 2000CF000604, Wisconsin Circuit Court Access, <http://wcca.wicourts.gov/caseDetails.do?jsessionid=98B3D2969B840FF4FDCE973F2516AB61.render1?caseNo=2000CF000604&countyNo=40&cacheId=FBB22A481DFF0A9689ABB0DF8DD49490&recordCount=1&offset=0&mode=charges&submit=Charge+History> (last visited Jan. 11, 2008) [hereinafter 2000CF000604 Charge Details].

136. *Thomas*, 2007 WI 57, ¶ 6. Conviction of a subsequent crime is nearly certain to result in revocation of probation or parole status for any previous convictions, as it did here. *See, e.g.*, Wis. ADMIN. CODE § DOC 328.04(3)(a), (5) (2006).

137. *Thomas*, 2007 WI 57, ¶ 6; Court Record Events for Milwaukee County Case Number 2000CF000604, Wisconsin Circuit Court Access, <http://wcca.wicourts.gov/courtRecordEvents.xsl?jsessionid=98B3D2969B840FF4FDCE973F2516AB61.render1?caseNo=2000CF000604&countyNo=40&cacheId=FBB22A481DFF0A9689ABB0DF8DD49490&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=ASC> (last visited Jan. 11, 2008) [hereinafter 2000CF000604 Court Record Events].

138. *See Thomas*, 2007 WI 57, ¶ 7; *see also* Ross, *supra* note 38, at 6 ("[CIP] 'Boot Camp' . . . is a rigorous 6-month program, focusing on physical activity, discipline, and substance abuse treatment."); Wis. STAT. § 302.045(3m)(b)(1)–(2) ("The court shall reduce the term of confinement in prison portion of the inmate's bifurcated sentence in a manner that provides for the release of the inmate to extended supervision within 30 days of [completion of CIP].").

139. *Thomas*, 2007 WI 57, ¶¶ 5–6.

140. Ross, *supra* note 38, at 4.

regime from indeterminate to determinate sentencing.<sup>141</sup> The 1999 forgery-case sentence was an indeterminate sentence while the 2000 burglary-case sentence was a determinate sentence under TIS I.<sup>142</sup>

Thomas, now in prison, would have to serve the confinement portions of each sentence, with the determinate sentence consecutive to the indeterminate sentence.<sup>143</sup> Presumably, Thomas would first serve the confinement portion of the four-year indeterminate sentence.<sup>144</sup> On this case, Thomas would serve at least 25 percent (one year) and up to two-thirds (two years, eight months) of the four-year sentence, until the Parole Commission released him to begin serving the three-year determinate sentence.<sup>145</sup>

However, after Thomas completed the CIP, the circuit-court judge amended Thomas's determinate sentence in his 2000 burglary case to a "sentence . . . of zero years of confinement [plus] eight years of extended supervision."<sup>146</sup> Thus, Thomas had no confinement time left to serve in his determinate sentence.<sup>147</sup> Thomas only had to serve the remaining confinement time from his four-year indeterminate sentence.<sup>148</sup>

As of August 2001, Thomas had served well over 25 percent (at least one year) of his indeterminate sentence for the 1999 forgery case, and he was eligible for parole.<sup>149</sup> Thomas received a parole grant and

141. See *supra* Part I.A.2b-B.

142. *State ex rel. Thomas v. Schwarz*, 2006 WI App 194, ¶¶ 4-5, 296 Wis. 2d 419, 722 N.W.2d 400.

143. Ishii Decision, *supra* note 2, at 2.

144. WIS. STAT. § 973.15(2m)(c)(2).

145. *Id.* §§ 302.11(1), 304.06(1)(b).

146. *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 7, 300 Wis. 2d 381, 732 N.W.2d 1. Thomas completed CIP while he was still serving the indeterminate sentence for the 1999 forgery case and before he had begun serving any confinement time on the 2000 burglary case. Ishii Decision, *supra* note 2, at 2. As a result, after completing CIP, Judge Conen amended Thomas's sentence to "zero years . . . confinement and eight years . . . extended supervision," and Thomas did not serve any initial-confinement time for the 2000 burglary case; Thomas's entire time in prison counted toward the 1999 forgery case. See *id.* Thomas was not immediately released to extended supervision, however, because he still had to serve the indeterminate sentence for the 1999 forgery case until he received a grant of parole. See *id.* The fact that Thomas did not serve any confinement time on the 2000 burglary case—either before or during his completion of CIP—and that Conen amended his sentence in that case to "zero years of confinement and eight years of extended supervision" was not raised by either party during the subsequent litigation. See Ishii Decision, *supra* note 2, at 2; *State ex rel. Thomas*, 2006 WI App 194, ¶ 6 n.2 ("The parties do not suggest that Thomas's participation in the Challenge Incarceration Program or the corresponding amendment of his sentence had any effect on the legal issue presented.").

147. *Thomas*, 2007 WI 57, ¶ 7.

148. See WIS. STAT. § 302.045; Ross, *supra* note 38, at 6-7.

149. See Ishii Decision, *supra* note 2, at 2.

was released from prison on August 27, 2001, to supervision by the Division of Community Corrections of the DOC.<sup>150</sup> Whether the DOC released Thomas to parole, extended supervision, or both is the dispositive issue in this case, not because it affected the terms or level of monitoring, but because it determined his exposure to additional prison time should he face revocation again.<sup>151</sup>

## 2. RELEASE AND REVOCATION

Thomas, like all offenders released to supervision by the Division of Community Corrections, signed and agreed to follow his Rules of Community Supervision.<sup>152</sup> A violation of these rules is likely grounds for revocation and a return to prison.<sup>153</sup> From December 2003 until February 2004, Thomas engaged in conduct clearly forbidden by his supervision rules.<sup>154</sup> After his revocation hearing in March 2004, ALJ Ishii determined that Thomas's violations were sufficient to require revocation of his community-supervision status.<sup>155</sup>

After determining that Thomas's conduct warranted revocation, the question then became whether Ishii had the authority to revoke both Thomas's parole status from the 1999 forgery case and extended supervision status from the 2000 burglary case or only his parole status.<sup>156</sup> Ishii's authority at this point mattered because it would determine Thomas's exposure to additional prison time. If Ishii had

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150. *Thomas*, 2007 WI 57, ¶ 8.

151. *See id.* ¶ 9; *Thomas*, 2006 WI App 194, ¶ 2.

152. *See* Ishii Decision, *supra* note 2, at 1. These rules serve as guidelines for the offender during his supervision. *Id.*; WIS. ADMIN. CODE § DOC 328.04(2)(d)–(f) (2006). Each offender, like Thomas, has his own individualized set of rules, patterned after the DOC's standard set of rules that apply to all offenders. Ishii Decision, *supra* note 2, at 1; WIS. ADMIN. CODE § DOC 328.04(2)(d), (3). The DOC's standard rules include prohibitions on drug and alcohol use and requirements for employment, treatment, and meetings. WIS. ADMIN. CODE § DOC 328.04(3). In addition, sentencing judges and parole agents may add or modify conditions as appropriate for the duration of the supervision. WIS. ADMIN. CODE § DOC 328.04(2)(d), (3)(L).

153. *See, e.g.*, Ishii Decision, *supra* note 2, at 1.

154. Thomas sold heroin to an undercover police officer; possessed and used heroin; bought, possessed, and consumed methadone without a prescription; drove a car without permission from his agent and without a valid driver's license; and failed to appear for a scheduled meeting with his agent. *Id.* at 1–2.

155. *Id.* at 1–5. Revocation hearings are administrative proceedings, and revocation determinations are made by ALJs, not circuit-court judges. *See* Division of Hearings and Appeals, <http://dha.state.wi.us/home> (last visited Mar. 1, 2007). ALJs are lawyers employed by the Corrections Unit in the Division of Hearings and Appeals in the Department of Administration who preside over all revocation hearings, whether for probation, parole, or extended supervision. *See id.*

156. Ishii Decision, *supra* note 2, at 60.

authority to revoke both, Thomas faced up to eight years for the 2000 burglary case plus two years, three months, and eleven days for the 1999 forgery case for reconfinement to prison.<sup>157</sup> If Ishii only had authority to revoke Thomas's parole, Thomas only faced up to two years, three months, and eleven days in prison for the 1999 forgery case.<sup>158</sup> If so, he did not risk exposure to an additional eight years in prison for the 2000 burglary case.<sup>159</sup>

The DOC sought "revocation of both [the] parole and extended supervision."<sup>160</sup> If Ishii revoked both sentences, Thomas would potentially face more prison time than if Ishii only revoked one sentence.<sup>161</sup> Thomas argued that the ALJ did not have jurisdiction to revoke his extended supervision from the 2000 burglary case because he had not yet begun serving the extended supervision for that case.<sup>162</sup> Thomas also argued that the DOC did not have the authority to treat the consecutive parole and extended-supervision components as one continuous sentence and that as a result the DOC should consider each component of parole and extended supervision "as separate and distinct sentences."<sup>163</sup>

Ishii rejected Thomas's argument.<sup>164</sup> Though Ishii agreed with Thomas that the statutes did not directly address whether consecutive parole and extended supervision act as one continuous sentence, she decided that treating parole and extended supervision as discrete sentences "would lead to an absurd result."<sup>165</sup> Furthermore, "[a] more harmonious and consistent interpretation of" the statutes dictated "that all consecutive sentences be [considered] one continuous sentence," even when one is an indeterminate sentence and the other determinate.<sup>166</sup> Thus, Ishii determined that the DOC released "Thomas to both parole and extended supervision" upon his release from prison

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157. *Id.* at 2, 4. Even with the authority to revoke an offender's community-supervision status in multiple cases, there is no requirement to do so; the DOC has discretion to revoke only one or some cases. *See* WIS. STAT. § 973.10(2) (no requirement to revoke all probation cases); WIS. ADMIN. CODE § DOC 331.03 (same).

158. Ishii Decision, *supra* note 2, at 4.

159. *Id.* at 2.

160. *Id.*

161. *Id.*; *see also supra* text accompanying note 157.

162. Ishii Decision, *supra* note 2, at 2.

163. *Id.*

164. *Id.* at 2-5.

165. *Id.* at 2-3.

166. *Id.* at 3.

in August 2002.<sup>167</sup> Ishii revoked Thomas on both his parole and extended supervision.<sup>168</sup>

Next, Ishii turned to the question of sentencing Thomas for reincarceration in prison after his revocation.<sup>169</sup> Ishii had two years, three months, and eleven days of unserved time from the 1999 forgery case available from which to set a reincarceration term.<sup>170</sup> In addition, she could make a recommendation to the sentencing judge regarding a reconfinement term from the eight years in the 2000 burglary case.<sup>171</sup> After considering the DOC's recommendation,<sup>172</sup> Ishii did not order any reincarceration time for the 1999 forgery case under indeterminate sentencing.<sup>173</sup> However, she did recommend to the sentencing judge a sentence of two years and fifteen days for the 2000 burglary case under determinate sentencing.<sup>174</sup>

After this revocation hearing, Thomas received a sentence of zero days in the 1999 forgery case and a mere recommendation of a sentence of two years and fifteen days in the 2000 burglary case.<sup>175</sup> On August 19, 2004, Judge Timothy G. Dugan sentenced Thomas to thirty-months

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167. *Id.*

168. *Id.* at 5.

169. *Id.* at 4–5. For indeterminate sentences, ALJs determine both whether to revoke and what sentence to impose for reconfinement. WIS. STAT. § 302.11(7)(ag)–(am). However, after the passage of TIS II, authority for sentencing revoked TIS I and TIS II offenders moved back to the sentencing judge. *See id.* The ALJ still determines whether to revoke, and then if the offender's probation is revoked, the ALJ makes a recommendation to the sentencing judge regarding the sentence. *Id.* § 302.113(9)(am)–(at). Under TIS I, ALJs had the authority to revoke and to sentence TIS offenders after revocation. WIS. STAT. § 302.113(9)(ag)–(b) (2001–02).

170. Ishii Decision, *supra* note 2, at 2, 4; *see also* WIS. STAT. § 302.11(7)(am).

171. Ishii Decision, *supra* note 2, at 4–5; *see also* WIS. STAT. § 302.113(9)(am)–(at). Using Ishii's recommendation, the sentencing judge ultimately imposed a reconfinement sentence of thirty months from the eight years available in the 2000 burglary case. *See* 2000CF000604 Court Record Events, *supra* note 137; WIS. STAT. § 302.113(9)(ag)–(am). Had Thomas's revocation for the 2000 burglary case occurred before the passage of TIS II, Ishii also would have imposed, and not just recommended, sentence for the 2000 burglary case as well. *See* WIS. STAT. § 302.113(9)(a)–(b) (2001–02).

172. The DOC recommended a reconfinement term of eight months and six days for the 1999 forgery case plus two years, four months, and twenty-four days for the 2000 burglary case. Ishii Decision, *supra* note 2, at 4–5.

173. *Id.* at 2, 5 (sentencing Thomas to “zero years, zero months, zero days” for the 1999 forgery case under indeterminate sentencing).

174. *Id.* at 2, 5–6 (ordering in the 2000 burglary case that “Thomas shall be returned to court for a determination of his confinement time” and recommending “2 years, zero months, 15 days” reconfinement).

175. *Id.*

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reconfinement in the 2000 burglary case, but this sentence was stayed pending the outcome of the appeal of the revocation decision.<sup>176</sup>

### 3. ADMINISTRATIVE REVIEW BY THE DHA ADMINISTRATOR

Thomas immediately petitioned for administrative review of the revocation decision with Division Administrator David H. Schwarz.<sup>177</sup> Arguing again that the DOC lacked statutory authority to treat the supervision portions of his indeterminate and determinate sentences as one continuous sentence, Thomas asked Schwarz to reverse Ishii's decision to revoke his extended supervision for the 2000 burglary case.<sup>178</sup> Thomas also argued that the DOC had erred in applying the holding of *Ashford v. Division of Hearings & Appeals*.<sup>179</sup>

In *Ashford*,<sup>180</sup> a pre-TIS case, the court of appeals decided that an offender serving consecutive sentences is subject to revocation and imprisonment for all sentences if a parole violation occurs.<sup>181</sup> The court of appeals construed the plain language of Wisconsin Statutes section 302.11 and rejected *Ashford*'s argument that consecutive parole periods should be viewed as two distinct periods.<sup>182</sup> Instead, *Ashford* serves as the basis for the longstanding DOC practice of computing consecutive sentences as one continuous sentence.<sup>183</sup> Thomas argued here that because sentencing law had radically changed with the passage of TIS, current law did not accommodate continued application of the *Ashford* holding.<sup>184</sup>

Despite these arguments, on May 24, 2004, Schwarz sustained the decision of the ALJ, reasoning that "[Wisconsin Statutes section] 302.113(4) (2003–04) plainly indicates the legislature's intent to

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176. 2000CF000604 Court Record Events, *supra* note 137.

177. Petition for Administrative Review of Decision in 00CF000604 at 1–4 (May 11, 2004) [hereinafter Petition to Schwarz], *available in* Brief & Appendix of Respondents-Respondents-Petitioners, *supra* note 2, at 130–33. This is the first step in the appeals process of an administrative decision, such as a revocation determination. WIS. ADMIN. CODE § HA 2.05(8) (Sept. 2001) (requiring request for administrative review within ten days of ALJ decision).

178. Petition to Schwarz, *supra* note 177, at 1, 3. Thomas did not challenge Ishii's revocation decision regarding the 1999 forgery case under indeterminate sentencing, for which Thomas received no prison time. *Id.* at 1.

179. *Id.* at 2–3.

180. *Ashford v. Div. of Hearings & Appeals*, 177 Wis. 2d 34, 501 N.W.2d 824 (Ct. App. 1993).

181. *Id.* at 37, 38, 45, 501 N.W.2d at 825, 828.

182. *Id.* at 41, 501 N.W.2d at 826–27.

183. *Id.* at 43–44, 501 N.W.2d at 827.

184. Petition to Schwarz, *supra* note 177, at 2–3.

continue the longstanding practice of having consecutive sentences treated as one single, continuous sentence for TIS cases.”<sup>185</sup>

#### 4. JUDICIAL REVIEW BY THE CIRCUIT COURT

Next, Thomas filed a petition for a writ of certiorari to the circuit court in Milwaukee County.<sup>186</sup> The circuit court granted review of the revocation decision.<sup>187</sup> Like Schwarz, the circuit court rejected Thomas’s argument and affirmed the revocation decision.<sup>188</sup> The court suggested that Thomas sought an interpretation that would “create a rule that has never existed before.”<sup>189</sup> The court held,

Even if there is some ambiguity concerning application of the statutes to the present set of facts, [Thomas] has failed to point to any reason that the Court should find that the 1999 case had to be completed before the 2000 case started to run. There simply is no reason to interpret any of the cited statutes to require the results requested by [Thomas.]<sup>190</sup>

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185. Appeal Decision No. 021804-374071-A, David H. Schwarz, Adm’r, Div. of Hearings and Appeals 1 (May 24, 2004) [hereinafter Schwarz Decision], *available in* Brief & Appendix of Respondents-Respondents-Petitioners, *supra* note 2, at 127–29. Schwarz also noted that “[n]othing in the plain language of the statute reasonably leads to the conclusion that the legislature intended to create an exception” for offenders like Thomas, who would likely serve multiple periods of confinement and release before their discharge. *Id.*

186. *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 12, 300 Wis. 2d 381, 732 N.W.2d 1; *State ex rel. Thomas v. Schwarz*, 2006 WI App 194, ¶ 11, 296 Wis. 2d 419, 722 N.W.2d 400. This is the next step in the appeals process for an administrative decision, such as a revocation, after administrative review. WIS. STAT. §§ 801.50(5), 893.735. The offender must file a writ of certiorari within forty-five days of the decision in the county in which the offender was last convicted of an offense for which he was serving supervision. WIS. STAT. §§ 801.50(5), 893.735. The standard of review for a circuit court of an administrative decision, such as a revocation decision, is limited to (1) whether the decision was within the jurisdiction of the Division of Hearings and Appeals (DHA); (2) “[w]hether [the DHA] acted according to law”; (3) whether the DHA’s decision was “arbitrary, oppressive, or unreasonable”; and (4) whether the evidence did not reasonably meet the decision made. *State ex rel. Thomas v. Schwarz*, No. 04-CV-005900, Decision and Final Order at 4 (Wis. Cir. Ct. Milwaukee County, Mar. 24, 2005) (quoting *State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶ 13, 278 Wis. 2d 24, 692 N.W.2d 219), *available in* Brief and Appendix of Respondents-Respondents-Petitioners, *supra* note 2, at 121–26.

187. *Thomas*, 2006 WI App 194, ¶ 11.

188. *State ex rel. Thomas v. Schwarz*, No. 04-CV-005900, Decision and Final Order at 6 (Wis. Cir. Ct. Milwaukee County, Mar. 24, 2005).

189. *Id.* at 5.

190. *Id.* at 5–6.

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*B. Reversal by the Wisconsin Court of Appeals*

Thomas then appealed the circuit court's decision to the Wisconsin Court of Appeals.<sup>191</sup> The Wisconsin Court of Appeals considered only whether the Department of Hearings and Appeals (DHA) stayed within its jurisdiction and "whether it acted according to law" when it revoked Thomas's extended supervision for the 2000 burglary case.<sup>192</sup> Because the case presented an issue of first impression regarding an agency's interpretation of a statute, the court employed a de novo standard of review.<sup>193</sup> The main issue faced by the Wisconsin Court of Appeals, like the circuit court and the DHA, was how to treat Thomas's indeterminate and determinate consecutive sentences after the confinement portion had ended when Wisconsin Statutes sections 302.113(4) and 973.15(2m) did not address this specific scenario.<sup>194</sup>

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191. *Thomas*, 2006 WI App 194, ¶ 1.

192. *Id.* ¶ 12 (quoting *State ex rel. Riesch v. Schwarz*, 2005 WI 11, ¶¶ 13–14, 278 Wis. 2d 24, 692 N.W.2d 219).

193. *Id.* ¶ 13. The State argued the standard of review should be "great weight deference to the" decision made by DHA. *Id.* The Court of Appeals rejected this argument and proceeded under a de novo standard. *Id.*

194. *Id.* ¶ 23. The relevant statute sections follow:

WIS. STAT. § 302.113(4):

All consecutive sentences imposed for crimes committed on or after December 31, 1999, shall be computed as one continuous sentence. The person shall serve any term of extended supervision after serving all terms of confinement in prison.

WIS. STAT. § 973.15(2m)(c):

*Determinate sentences imposed to run concurrent with or consecutive to indeterminate sentences.*

1. If a court provides that a determinate sentence is to run concurrent with an indeterminate sentence, the person sentenced shall serve the period of confinement in prison under the determinate sentence concurrent with the period of confinement in prison under the indeterminate sentence and the term of extended supervision under the determinate sentence concurrent with the parole portion of the indeterminate sentence.

2. If a court provides that a determinate sentence is to run consecutive to an indeterminate sentence, the person sentenced shall serve the period of confinement in prison under the determinate sentence consecutive to the period of confinement in prison under the indeterminate sentence.

WIS. STAT. § 973.15(2m)(d):

*Indeterminate sentences imposed to run concurrent with or consecutive to determinate sentences.*

1. If a court provides that an indeterminate sentence is to run concurrent with a determinate sentence, the person sentenced shall serve the period of confinement in prison under the indeterminate sentence concurrent with the period of confinement in prison under the determinate sentence and

The majority's opinion, written by Judge Joan F. Kessler, reversed the decision of the circuit court.<sup>195</sup> The court accepted Thomas's argument<sup>196</sup> that there was "no statutory requirement" to treat a combination of indeterminate and determinate consecutive sentences as one continuous sentence after incarceration.<sup>197</sup>

Because the dispositive issue in this case required interpretation of the relevant sentencing statutes, the court "beg[an] with the language of the statute."<sup>198</sup> The court interpreted statutes "in . . . context . . . not in isolation but as part of a whole . . . and reasonably, to avoid absurd or unreasonable results."<sup>199</sup> The court examined Wisconsin Statutes section 973.15(2m)(c)–(d) to determine whether the statute offered guidance for a combination of indeterminate and determinate consecutive sentences after release from prison.<sup>200</sup> The court noted that section 973.15(2m)(c)–(d) explicitly stated how concurrent sentences are computed during both confinement and release when the offender has a combination of indeterminate and determinate consecutive sentences.<sup>201</sup> Section 973.15(2m)(c)–(d) also explicitly stated that consecutive indeterminate and determinate sentences are served consecutive to each other, during the confinement period only.<sup>202</sup> The court found, however, that section 973.15(2m)(c)–(d) did not address how consecutive indeterminate and determinate sentences interact after the

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the parole portion of the indeterminate sentence concurrent with the term of extended supervision required under the determinate sentence.

2. If a court provides that an indeterminate sentence is to run consecutive to a determinate sentence, the person sentenced shall serve the period of confinement in prison under the indeterminate sentence consecutive to the period of confinement in prison under the determinate sentence.

195. *Thomas*, 2006 WI App 194, ¶ 33.

196. Thomas asked the court of appeals "to make a plain reading of the statutes and not make any attempts to interpret them as they are unambiguous." Brief and Appendix of Petitioner-Appellant, *supra* note 2, at 8. He used an analogy of "beads on a string" to illustrate that each portion of each sentence was distinct and separate. *Thomas*, 2006 WI App 194, ¶ 22 ("The first bead is the confinement for the indeterminate sentence. The next bead is confinement for the determinate sentence. Thereafter, [there is] the parole bead, and then the extended supervision bead in the sentence chain.").

197. *Thomas*, 2006 WI App 194, ¶¶ 23, 31–33.

198. *Id.* ¶ 14 (quoting *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110)

199. *Id.* (quoting *Kalal*, 2004 WI 58, ¶ 46).

200. *Id.* ¶ 24.

201. *Id.*

202. *Id.*

confinement period, when an offender has been released,<sup>203</sup> noting that “[t]he lack of this provision is conspicuous by its absence.”<sup>204</sup>

The court of appeals could have ended its analysis at this point, finding that section 973.15(2m)(c)–(d) did not explicitly require nor authorize the DOC to consider a combination of indeterminate and determinate consecutive sentences as one continuous sentence<sup>205</sup> and that “[p]enal statutes are generally construed strictly to safeguard a defendant’s rights.”<sup>206</sup> For Thomas, “in the absence of an explicit provision requiring parole and extended supervision to be served as a continuous sentence in cases where they were imposed as components of consecutive sentences,” the court “conclude[d] that the plain, ordinary meaning of the relevant statutory provisions [section 973.15(2m)(c)–(d)] does not require that parole and extended supervision be served as a continuous sentence.”<sup>207</sup>

Despite its plain-language analysis of section 973.15(2m)(c)–(d), the court inquired further into other legislative sources to determine the legislature’s intent, if any, in omitting provisions that would have directly addressed Thomas’s situation.<sup>208</sup> In addition to the text of the section 973.15(2m)(c)–(d), the court of appeals found ample support for Thomas’s position in supplemental materials,<sup>209</sup> including recommendations made by the CPSC,<sup>210</sup> the original TIS II bill passed by the legislature,<sup>211</sup> and Governor Scott McCallum’s veto message.<sup>212</sup>

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203. *Id.* ¶¶ 24–25.

204. *Id.* ¶ 25.

205. *See id.* ¶ 31.

206. *Id.* ¶ 32 (quoting *State v. Baye*, 191 Wis. 2d 334, 340, 528 N.W.2d 81, 83–84 (Ct. App. 1995)).

207. *Id.*

208. Only if the meaning of the statute is ambiguous—and not “plain”—does the court consider other sources for legislative history. *Id.* ¶¶ 14–15 (quoting *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). Though the court did not conclude that the statutes were ambiguous, it did decide that consulting other sources beyond the text of the statute was appropriate to ascertain how legislative history might support the court’s interpretation. *Id.* ¶ 25.

209. *Thomas*, 2006 WI App 194, ¶¶ 25–30.

210. *Id.* ¶¶ 26–27. The CPSC suggested that for both consecutive and concurrent sentences, regardless of whether the determinate or indeterminate sentence came first, extended-supervision should always precede parole. This indicates that the CPSC envisioned extended supervision and parole as distinct periods—not as one continuous sentence—during the release portion of the sentence. *See id.*

211. *Id.* ¶ 28 (noting that the legislature, when it passed the TIS II legislation, incorporated the CPSC’s recommendation that extended supervision and parole were distinct periods and not one continuous sentence after an offender’s release from prison).

212. *See id.* ¶ 29 (quoting KAREN M. GILFOY, LEGISLATIVE REFERENCE BUREAU, WISCONSIN BRIEFS: EXECUTIVE VETOES OF BILLS PASSED BY THE 2001

Specifically, because McCallum vetoed language in the TIS II bill that explicitly addressed in section 973.15(2m)(c)–(d) how the DOC should handle a combination of indeterminate and determinate consecutive sentences after release, the court found that the legislative history of TIS II did not support the State’s argument that consecutive parole and extended supervision sentences must be served as one continuous sentence.<sup>213</sup>

In the absence of explicit statutory authority allowing the DOC to treat consecutive parole and extended-supervision sentences as one continuous sentence, the court of appeals declined to extend that authority to the state.<sup>214</sup> The majority agreed with Thomas’s interpretation of section 973.15(2m)(c)–(d) and reversed the circuit court, determining that the DHA did not have jurisdiction over Thomas’s extended-supervision period on the determinate sentence and thus could not revoke his extended supervision or sentence him to reconfinement for up to the eight remaining years in the 2000 burglary case.<sup>215</sup>

Judge Ralph Adam Fine filed a dissenting opinion that relied on other statutory language in Wisconsin Statutes section 302.113(2), which supported the State’s position that an offender was “entitled to” release to extended supervision after serving the entire confinement term.<sup>216</sup> An offender, such as Thomas, entitled to extended supervision would have the status of being on extended supervision.<sup>217</sup> If an offender’s status included extended supervision, then the DOC would have the authority to revoke it.<sup>218</sup>

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WISCONSIN LEGISLATURE FROM MAY 3, 2002, THROUGH AUGUST 16, 2002, at 54 (Supp. 02-2, Aug. 2002)). Governor McCallum did not indicate in his veto message that he intended consecutive parole and extended-supervision sentences to be served as one continuous sentence. *Id.* ¶ 30. McCallum vetoed the language because he feared that forcing some offenders to shift the order that they served parole and extended supervision would “needlessly complicate existing procedures,” “burden” the DOC administratively, and “lead to increased errors in sentence calculation and offender litigation.” *Thomas*, 2006 WI App 194, ¶ 29 (quoting GILFOY, *supra*, at 54). McCallum preferred to preserve the custom of offenders serving consecutive sentences in the order that they were sentenced by the courts. *See id.* This meant that parole would generally precede extended supervision. *Id.* (quoting GILFOY, *supra*, at 54).

213. *Thomas*, 2006 WI App 194, ¶¶ 28–31.

214. *Id.* ¶ 33.

215. *Id.* ¶¶ 32–33.

216. *Id.* ¶¶ 34–38 (Fine, J., dissenting) (“[A]n inmate . . . is entitled to release to extended supervision after he or she has served the term of confinement in prison.” (quoting WIS. STAT. § 302.113(2))).

217. *Id.* ¶ 37 (Fine, J., dissenting) (quoting WIS. STAT. § 302.113(2)).

218. *Id.* ¶¶ 37–38 (Fine, J., dissenting).

*C. Another Reversal by the Wisconsin Supreme Court*

The State of Wisconsin, via its named respondents Schwarz and DOC Secretary Matthew Frank,<sup>219</sup> appealed the ruling of the court of appeals to the Wisconsin Supreme Court.<sup>220</sup> On appeal, the court addressed two questions. First, the court determined whether to apply great-weight deference, due-weight deference, or no deference to an administrative agency's interpretation of a statute.<sup>221</sup> Second, after determining that it owed no deference to the administrative agency's interpretation,<sup>222</sup> by a vote of five to two, the court nevertheless reversed the court of appeals and found that the DHA did have jurisdiction to revoke both Thomas's parole and extended supervision.<sup>223</sup>

The Wisconsin Supreme Court agreed with Thomas that *de novo* was the proper standard of review and therefore gave no deference to the DHA's decision.<sup>224</sup> The State had argued for a more deferential great-weight standard of review, given the longstanding experience of both the DHA and DOC in applying the state's sentencing laws.<sup>225</sup> But the court rejected the State's argument because, given the recent changes in the law, the DHA had little experience interpreting both determinate- and indeterminate-sentencing schemes together.<sup>226</sup>

The Wisconsin Supreme Court reviewed the decisions below *de novo* and reversed the court of appeals, ruling in the State's favor.<sup>227</sup>

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219. See *State ex rel. Thomas v. Schwarz*, 2007 WI 57, ¶ 2, 300 Wis. 2d 381, 732 N.W.2d 1. While only the authority of Schwarz, as DHA Administrator, is at issue in this case, the DOC also has an obvious interest in the outcome of the case because of the effect it will have on offenders, parole agents, and administrative sentence-calculation procedures. See *id.* ¶ 29.

220. *Id.* ¶ 2.

221. *Id.* ¶ 25.

222. *Id.* ¶ 29.

223. *Id.* ¶ 52.

224. *Id.* ¶¶ 27–29.

225. *Id.* ¶ 26. Though the State argued that “the DOC had had nearly two decades of experience in computing sentences subject to parole release, nearly six years of experience with extended supervision, and one year of experience dealing with consecutive pre-TIS [indeterminate] and TIS sentences,” the court focused on the DHA's experience to determine which level of deference applied, noting the distinct roles of the DOC (computing sentences) versus the DHA (determining whether to revoke). *Id.* ¶¶ 26 & n.9, 29 & n.10 (“The entity we must focus on, in regard to the issue of deference, is the [DHA] since it is the decisionmaker on the question of revocation, but we recognize that Schwarz has argued for deference to the DOC, as well as the [DHA].” (citations omitted)).

226. *Id.* ¶¶ 27–29 (agreeing with Thomas that the DHA has “no long-standing interpretation of the TIS statutes”).

227. *Id.* ¶¶ 29, 52.

Thomas again argued that Wisconsin Statutes section 973.15(2m)(c)(2) did not explicitly give the DHA permission to treat consecutive determinate and indeterminate sentences as one continuous sentence.<sup>228</sup> Rather, the provision that would have addressed this situation was vetoed by the governor.<sup>229</sup> McCallum's veto indicated "that there was never any intent for parole and extended supervision to be treated as one continuous period of supervision."<sup>230</sup> The State, however, pointed to another section of the statute, section 302.113(2), that made offenders "entitled to release to extended supervision after" serving the confinement portion of their sentence.<sup>231</sup> The State argued that the Wisconsin Supreme Court should reverse the court of appeals "because it relied on statutory silence and ignored unambiguous statutory language that allows the Division to revoke Thomas's parole and extended supervision simultaneously."<sup>232</sup> Thomas countered, arguing "that the plain language of § 302.113(2) merely makes a person eligible for extended supervision. . . . [but] does not say that the person's term of extended supervision begins as soon as the person finishes serving confinement."<sup>233</sup>

Noting the two conflicting sections of the statute—section 973.15(2m)(c)–(d) versus section 302.113(2)—the court determined "that the sentencing statutes do not answer directly" whether the DHA had the authority to revoke both Thomas's parole and extended supervision.<sup>234</sup> Thus, finding that sections 973.15(2m)(c)–(d) and 302.113(2) did not clearly resolve the issue, the court turned to other sources of legislative history to reconcile the meaning of the two sections.<sup>235</sup> Then, examining the same legislative history that the court of appeals analyzed, the Wisconsin Supreme Court reached the opposite conclusion, that the DHA did have the authority to treat Thomas's sentence as one continuous sentence.<sup>236</sup>

The court found that, even though *Ashford* applied only to pre-TIS sentences and section 302.11(3) did not explicitly address consecutive-parole and extended-supervision sentences, *Ashford's* "reasoning

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228. *Id.* ¶ 34.

229. *Id.* ¶ 37.

230. *Id.*

231. *Id.* ¶ 30 & n.11 (quoting WIS. STAT. § 302.113(2)).

232. *Id.* ¶ 30.

233. *Id.* ¶ 36.

234. *Id.* ¶ 39. Compare WIS. STAT. § 973.15(2m)(c)–(d) (statutory silence regarding the treatment of consecutive determinate and indeterminate sentence as one continuous sentence), with WIS. STAT. § 302.113(2) (offenders "entitled to release to extended supervision after" serving the confinement portion of their sentence).

235. *Thomas*, 2007 WI 57, ¶¶ 39–40.

236. *Id.* ¶ 50.

remain[ed] sound.”<sup>237</sup> Thus, the court extended the *Ashford* practice of treating consecutive sentences as one continuous sentence to the consecutive indeterminate and determinate sentences in Thomas’s case.<sup>238</sup> The supreme-court majority focused on other parts of McCallum’s veto message than the court of appeals.<sup>239</sup> Instead of emphasizing McCallum’s desire to treat pre-TIS and TIS sentences distinctly and in the order in which they were imposed, the supreme court noted that McCallum intended to keep sentence computations simple and unchanged from current DOC practice, hence the vindication and extension of *Ashford* to TIS sentences.<sup>240</sup>

In their dissenting opinion, Justice Ann Walsh Bradley and Chief Justice Shirley S. Abrahamson agreed with the Court of Appeals’ analysis of the legislative history, noting that McCallum’s veto indicated that parole and extended supervision were intended to be treated as distinct periods.<sup>241</sup> The dissent also argued that any statutory ambiguity, such as the conflict between sections 973.15(2m)(c)–(d) and 302.113(2), should be construed to the offender’s benefit, a tenet of statutory interpretation ignored by the majority.<sup>242</sup>

### III. ANALYSIS OF *THOMAS*

The outcome of *Thomas* offers some insight into how the Wisconsin Supreme Court will continue to interpret the TIS statutes in future litigation. In *Thomas*, the court demonstrated its continued willingness to interpret TIS statutes. This Part explores how *Thomas* fits into the existing TIS jurisprudence and how this decision will affect the future of Wisconsin sentencing policy.

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237. *Id.* ¶ 47.

238. *Id.* (“Although § 302.11(3) does not specify how consecutive determinate and indeterminate sentences are to be treated, it is reasonable to conclude, following the reasoning of the court of appeals in *Ashford*, that parole and extended supervision should not be viewed as two distinct time periods, with parole expiring before extended supervision can begin.”).

239. *Id.* ¶ 48.

240. *Id.* ¶¶ 48–49.

241. *Id.* ¶¶ 63–65 (Bradley, J., dissenting) (“Nothing in Governor McCallum’s veto message can be construed as intending that consecutive sentences of parole and extended supervision are to be served as a single continuous period. Rather, the intention is clear that consecutive sentences of parole and extended supervision should be served, one after the other, in the order that they are handed down.”).

242. *Id.* ¶ 76 (“It is fundamental that ‘[p]enal statutes are generally construed strictly to safeguard a defendant’s rights unless doing so would contravene the legislative purpose of a statute.’” (quoting *State v. Baye*, 191 Wis. 2d 334, 340, 528 N.W.2d 81, 83–84 (Ct. App. 1995))).

*A. Fitting Thomas into the TIS Jurisprudence*

The Wisconsin Supreme Court's decision in *Thomas* represents a continuation of the pattern established by *Trujillo*, *Tucker*, and *Stenklyft*. The court has continued to play a significant role in shaping the state's sentencing policy by stepping in to interpret and repair the TIS statutes, without additional legislative action. In each of these decisions, the court has also continued to protect the authority of the judicial branch to determine criminal penalties from further encroachment.

## 1. JUDICIAL INTERVENTION AND REPAIR

In the three pre-*Thomas* cases, the court showed its willingness to repair statutory ambiguity or unconstitutionality by interpreting the TIS statutes away from either an absurd or unconstitutional result. In each case, the court attempted to rationalize and harmonize the otherwise incoherent and conflicting sentencing laws resulting from the two-stage and politically contentious passage of TIS I and TIS II.

In *Trujillo* and *Tucker*, the Wisconsin Supreme Court confronted an ambiguous statute regarding whether and how TIS I inmates could apply for sentence adjustments under Wisconsin Statutes section 973.195.<sup>243</sup> In light of statutory ambiguity, the court intervened, allowing TIS I inmates to apply for sentence adjustments under section 973.195 and declaring that TIS I inmates should use equivalent TIS II felony classifications to determine when they were eligible to file.<sup>244</sup>

In *Stenklyft*, the court confronted an unconstitutional statutory provision that gave the district attorney, an executive-branch official, an effective veto over the court's authority to determine a criminal penalty.<sup>245</sup> Again, the court intervened, determining that the circuit court could consider, but was not bound by, the district attorney's input on an inmate's sentence-adjustment petition.<sup>246</sup>

In any of the three cases, it is conceivable that the court could have refused to intervene. The court could have refused to interpret the affected statutes as it did, or at all. If it had, TIS I offenders, prosecutors, judges, and DOC officials would have continued to operate under a cloud of uncertainty and unconstitutionality with respect to section 973.195, unless the legislature stepped in to repair the

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243. See *supra* Part I.B.1–2.

244. See *supra* Part I.B.1–2.

245. See *supra* Part I.B.3.

246. See *supra* Part I.B.3.

ambiguity and unconstitutionality inherent in the TIS II statutes it had recently passed.

The court, however, did intervene. By doing so, the court fulfilled its role as the branch of government charged with interpreting statutes. In each case, the court interpreted provisions of section 973.195 to bring coherence to the entirety<sup>247</sup> or to preserve the constitutionality of the statute.<sup>248</sup> The court's intervention in these three cases effectively absolved the legislature of any additional responsibility for fixing the problems incurred by its new determinate-sentencing policies.

The *Thomas* decision continues the intervention trend by the court to repair problems inherent in the TIS II statutes. Again, in *Thomas*, the court confronted unclear and conflicting statutory provisions.<sup>249</sup> And, as it did in *Trujillo*, *Tucker*, and *Stenklyft*, the court again intervened, deciding that the language of section 302.113(2)<sup>250</sup> and the longstanding *Ashford* practice of computing consecutive sentences as one continuous sentence<sup>251</sup> prevailed in light of the statutory ambiguity.<sup>252</sup> With this decision, the court interpreted sections 302.113(2) and 973.15(2m)(c)–(d) in a way consistent with its decision in *Tucker*, avoiding incoherence and absurdity in the TIS II statutes as a whole.<sup>253</sup> Again, it is conceivable that the court could have refused to intervene in *Thomas* and left offenders and other criminal-justice actors to continue to operate with uncertainty and confusion. Because the court did not, *Thomas* is yet another example of how the court's decisions in recent TIS litigation have effectively removed responsibility from the legislature for resolving the problems created by the passage of determinate-sentencing policies.

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247. See *State v. Tucker*, 2005 WI 46, ¶ 11, 279 Wis. 2d 697, 694 N.W.2d 926 (“When interpreting a statute, the primary objective ‘is to determine what the statute means so that it may be given its full, proper, and intended effect.’” (quoting *Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110)).

248. See *State v. Stenklyft*, 2005 WI 71, ¶ 122, 281 Wis. 2d 484, 697 N.W.2d 769 (Crooks, J., concurring in part and dissenting in part) (“If at all possible, we should construe a statute in a way that will save it as constitutional.”).

249. See text accompanying *supra* note 236.

250. WIS. STAT. § 302.113(2) (making offenders “entitled to release to extended supervision after” serving the confinement portion of their sentence).

251. See *supra* notes 239–40 and accompanying text.

252. See *supra* Part II.C.

253. See *supra* note 249 and accompanying text. Since constitutionality was not at issue in *Thomas*, the comparison to *Stenklyft* is less apt, except for the court's consistent willingness in both cases to interpret TIS II statutes for the purpose of repairing a glaring problem—constitutional or otherwise—arising from a plain-language reading of the statutory text.

## 2. PROTECTION OF JUDICIAL INTERESTS

In the three pre-*Thomas* cases, the court also consistently protected its own interests and resisted attempts by the legislature and executive branches to restrict judicial authority and discretion in assigning criminal penalties. The *Thomas* decision is also a continuation of this trend.

In *Trujillo*, the court declined to overturn its decision in *State v. Hegwood*<sup>254</sup> and allow TIS I inmates to use reduced penalties under TIS II as new factors in sentence-modification motions.<sup>255</sup> The court's decision was due, at least partly, to a concern that allowing TIS I inmates to use reduced penalties under TIS II as new factors in sentence modifications would flood circuit-court dockets with thousands of motions from TIS I inmates.<sup>256</sup> By shutting down this avenue for TIS I inmates, the court effectively protected the judicial branch's interest in efficiency by preventing possibly thousands of sentence-modification motions from ever reaching the dockets of its circuit courts.<sup>257</sup>

In *Tucker*, the court retained its ability to decide whether TIS I offenders can receive an earlier release by extending the section 973.195 sentence-adjustment provision, which circuit courts ultimately grant or deny, to TIS I offenders.<sup>258</sup> Similarly, in *Stenklyft*, by declaring the district-attorney veto unconstitutional, the court fended off an attempt by the executive branch to encroach on judicial discretion in sentencing decisions.<sup>259</sup> Because only the circuit courts decide whether to grant sentence-adjustment petitions, after *Tucker* and *Stenklyft*, the judicial branch preserved its sole authority among the three branches of government to release TIS I and TIS II inmates from prison.<sup>260</sup>

*Thomas* continues the trend established by *Trujillo*, *Tucker*, and *Stenklyft* in which the Wisconsin Supreme Court defends the interests of the judicial branch. In *Thomas*, by vindicating the *Ashford* practice of computing consecutive sentences as one continuous sentence, which the State argued will likely be simpler and thus more efficient, *Thomas*

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254. 113 Wis. 2d 544, 335 N.W.2d 399 (1983).

255. See *supra* Part I.B.1.

256. *State v. Trujillo*, 2005 WI 45, ¶¶ 28–29, 279 Wis. 2d 712, 694 N.W.2d 933.

257. See *id.* ¶¶ 28, 30.

258. See *supra* Part I.B.2. The *Tucker* decision is still in line with *Trujillo*'s concern for judicial efficiency because sentence-adjustment petitions do not require hearings and thus allow courts to decide them and retain authority without taking up valuable docket time. See *Trujillo*, 2005 WI 45, ¶¶ 25, 28; *State v. Tucker*, 2005 WI 46, ¶¶ 17, 25, 279 Wis. 2d 697, 694 N.W.2d 926; WIS. STAT. § 973.195.

259. See *supra* Part I.B.3.

260. See *supra* Part I.B.2–3.

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represents a victory for administrative simplicity and efficiency.<sup>261</sup> Thus, the *Thomas* decision should increase administrative simplicity and efficiency for the DOC and DHA in calculating sentence lengths and perhaps, indirectly, for the courts. More importantly, *Thomas* increases the amount of prison time offenders face upon revocation and preserves a role for the circuit courts in determining reconfinement time.<sup>262</sup> Because TIS offenders must return to the sentencing judge for sentencing after revocation and, after *Thomas*, potentially face revocation for all consecutive determinate and indeterminate sentences, the *Thomas* decision effectively guarantees the judicial branch a role in determining at least the determinate portion of an offender's reconfinement sentence upon revocation.<sup>263</sup> In this sense, *Thomas* continues the trend established by *Tucker* and *Stenklyft* in which the court protects the judicial branch as the sole authority for TIS sentencing decisions.

### *B. Implications of the Thomas Decision*

The Wisconsin Supreme Court's decision in *Thomas* has implications on several levels. First, Thomas eventually returned to prison for his March 2004 revocation and served the thirty-month reconfinement sentence imposed by the circuit-court judge.<sup>264</sup> Second, offenders with sentences similar to Thomas's now face more exposure

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261. See *supra* note 242 and accompanying text.

262. See, e.g., *supra* notes 176–77 and accompanying text.

263. See *infra* Conclusion; *supra* notes 176–77 and accompanying text.

264. See *supra* note 178 and accompanying text. While the circuit court stayed Thomas's thirty-month reconfinement sentence during the appeal, the stay was removed on September 26, 2006. See 2000CF000604 Court Record Events, *supra* note 137. Thomas also incurred a new charge and sentence, after pleading guilty to another drug charge on April 9, 2004, while his revocation in the 2000 burglary case was pending appeal. See Petition to Schwarz, *supra* note 177, at 4; Court Record Events for Milwaukee County Case Number 2004CF000672, Wisconsin Circuit Court Access, <http://wcca.wicourts.gov/courtRecordEvents.xml?jsessionid=33B443B23E0993E1CF53A533E656D9AD.render1?caseNo=2004CF000672&countyNo=40&cacheId=E6EB6EB673A5632F39272D6E52037D87&recordCount=202&offset=78&linkOnlyToForm=false&sortDirection=ASC> (last visited Jan. 11, 2008) [hereinafter 2004CF000672 Court Record Events]. On May 18, 2004, Thomas received a forty-six-month sentence, with sixteen months confinement followed by thirty months of extended supervision, consecutive to any other sentence, for the 2004 drug case. 2004CF000672 Court Record Events, *supra*. Presumably, Thomas served the sixteen months for the 2004 drug case, followed by the thirty-month reconfinement sentence for the 2000 burglary case. See *id.*; 2000CF000604 Court Record Events, *supra* note 137. Thomas was released from prison to community supervision on October 16, 2007. VINELink Offender Record, <https://www.vinelink.com/vinelink/detailsAction.do?siteId=50001&agency=26&id=00374071&searchType=offender> (last visited Jan. 11, 2008).

to prison time upon revocation.<sup>265</sup> Third, parole agents supervising offenders and ALJs deciding whether to revoke offenders will have more possible prison time to use as a threat to induce compliance from these offenders.<sup>266</sup> Finally, the DOC can continue its administrative practice of calculating consecutive sentences as one continuous sentence without interruption.<sup>267</sup>

However, whether and how the legislature responds to the court's decision in *Thomas* will indicate the implications of the case on the balance of power among the legislative, executive, and judicial branches in charting the course of future Wisconsin sentencing policy. How this case will shape the future relationships regarding sentencing policy among the three branches will depend largely on the legislature's reaction to the supreme court's ultimate decision in *Thomas*. There are two distinct possibilities: (1) maintenance of the status quo and (2) direct legislative policy change and statute revisions. Each possibility would signal the future balance of power among the three branches in shaping Wisconsin's sentencing policy.<sup>268</sup>

#### 1. MAINTENANCE OF THE STATUS QUO

Maintaining the status quo would preserve the court's current prominence in determining Wisconsin's sentencing policies in the wake of TIS II. The legislature would take no action in light of the *Thomas* decision and allow the court's ruling to stand, as it did after *Tucker*, *Trujillo*, and *Stenklyft*.<sup>269</sup> The TIS II statutes would remain exactly as they were enacted with Act 109 in 2002 and subsequently modified by recent case law.<sup>270</sup> The DOC and offenders would continue to resolve any future conflicts in implementation of statutory ambiguities via litigation. The case law of *Thomas*, *Tucker*, *Trujillo*, and *Stenklyft* would continue to grow and develop as more offenders challenged the provisions of TIS II.

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265. See *supra* text accompanying notes 162–64.

266. See *supra* text accompanying notes 162–64.

267. See *supra* notes 239–40 and accompanying text.

268. See, e.g., *State v. Trujillo*, 2005 WI 45, ¶ 30, 279 Wis. 2d 712, 694 N.W.2d 933; *State v. Tucker*, 2005 WI 46, ¶ 25, 279 Wis. 2d 697, 694 N.W.2d 926; *State v. Stenklyft*, 2005 WI 71, ¶ 76, 281 Wis. 2d 484, 697 N.W.2d 769; *State ex rel. Thomas v. Schwarz*, 2006 WI App 194, ¶ 32, 296 Wis. 2d 419, 722 N.W.2d 400. This, of course, assumes that the basic framework of TIS II and determinate sentencing are here to stay in Wisconsin. If not, then the possibilities are almost infinite.

269. See, e.g., *Trujillo*, 2005 WI 45, ¶ 30; *Tucker*, 2005 WI 46, ¶ 25; *Stenklyft*, 2005 WI 71, ¶¶ 76, 79.

270. See, e.g., *Trujillo*, 2005 WI 45, ¶ 30; *Tucker*, 2005 WI 46, ¶¶ 24–25; *Stenklyft*, 2005 WI 71, ¶¶ 76–77; *Thomas*, 2006 WI App 194, ¶¶ 31–32.

The next battlegrounds for litigation would likely include whether the victim's objection to a sentence-adjustment petition is mandatory<sup>271</sup> and whether TIS I inmates may utilize the geriatric and terminal-illness early-release mechanisms created by TIS II.<sup>272</sup> It seems likely that inmates will continue to bring lawsuits to challenge provisions of TIS II where opportunity and resources allow.

This jurisprudence would serve as Wisconsin's evolving sentencing policy without legislative action. The courts would continue to play a major role, as they have in *Thomas*, *Tucker*, *Trujillo*, and *Stenklyft*, in shaping TIS II. The executive branch, particularly the DOC and possibly the DHA, would also play a more prominent role than the legislature by continuing to interpret and implement the TIS statutes in practice as well as participating in litigation. The legislature would have little or no role in shaping sentencing policy in this scenario.

This approach has several advantages. First, because it is the situation currently in place, it is the system in which the principal actors—judges, lawyers, criminal defendants, and DOC and DHA staff—are accustomed to operating. There would be no costs incurred in the inefficiencies of transitioning to yet another new system. In fact, given the drastic changes Wisconsin's sentencing policy has witnessed in the last eight years, consistency and staying with the same system so that the main actors can develop even more familiarity might prove more beneficial than additional changes.

Second, staying with TIS II would avoid creating even more problems—as of now unknown—with yet another iteration of TIS II, perhaps Truth-in-Sentencing III (TIS III). While TIS II was intended to supplement and fix the problems of TIS I, it may have created just as many or more complications than it solved.<sup>273</sup> The cases discussed earlier are certainly evidence of the unintended and unnecessary complications caused by continued legislative- and executive-branch tinkering with the sentencing laws.<sup>274</sup>

Finally, in this same vein, a litigation-based approach would mean that only the real problems of TIS II that need fixing would actually rise to the level where the Wisconsin Court of Appeals and Wisconsin Supreme Court must address them. The filings of both sides in the *Thomas* case certainly show that it is possible to dream up infinite

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271. See Ross, *supra* note 38, at 10. Compare WIS. STAT. § 973.195(d), with *Stenklyft*, 2005 WI 71, ¶¶ 31–39.

272. See Ross, *supra* note 38, at 13. Compare WIS. STAT. § 302.113(9g), with *Trujillo*, 2005 WI 45, and *Tucker*, 2005 WI 46.

273. See, e.g., *Trujillo*, 2005 WI 45; *Tucker*, 2005 WI 46; *Stenklyft*, 2005 WI 71; *Thomas*, 2006 WI App 194.

274. See, e.g., *Trujillo*, 2005 WI 45, ¶¶ 4–6; *Tucker*, 2005 WI 46, ¶¶ 16–17; *Stenklyft*, 2005 WI 71, ¶¶ 16–18; *Thomas*, 2006 WI App 194, ¶¶ 16, 19, 25–26.

scenarios to expose the cracks of TIS II or to shore up either side of the argument.<sup>275</sup> Certainly, the legislature need not spend time writing legislation to address every scenario that might come up in future sentencing cases. Where an issue rising to the level of *Thomas* exists, the courts are well suited to decide these matters, particularly if they principally rely on the statutory text, canons of statutory construction, and legislative history.<sup>276</sup> In particular, where constitutional issues come into play, these policy choices do squarely belong to the courts, as *Stenklyft* demonstrates.<sup>277</sup>

However, disadvantages exist as well. First, the uncertainty that remains when known issues continue unresolved or bogged down by litigation negatively affects all the actors involved. The uncertainty also has a particularly negative impact on the offenders who, despite TIS, do not know the full scope of their options under the TIS II regime. Second, the litigation-based approach takes time and may result in consequences not intended by the legislature. As the supreme court held in *Trujillo*, if the legislature wanted TIS I or TIS II to operate a certain way, the legislature simply could have written the statute exactly that way.<sup>278</sup> By doing nothing and allowing the courts to fill in the gaps of TIS II, the legislative policymakers risk that the court, despite its best efforts to divine legislative intent from committee reports, bills, omissions, agency recommendations, and cryptic veto messages, will make a policy choice that the legislature does not want. When something like the conflicting statutory language in *Thomas* is imminently fixable with additional legislation, it seems wrong to let it remain unfixed.

## 2. DIRECT LEGISLATIVE POLICY CHANGE

Direct legislative policy change would involve the legislature directly addressing the problems and ambiguities of TIS II with new legislation. Instead of delegating statutory interpretation to the courts, this scenario would force the legislature to directly and explicitly state

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275. See, e.g., Brief of Petitioner-Appellant Kevin Thomas at 20–21, *State ex rel. Thomas v. Schwarz*, 2007 WI 57, 300 Wis. 2d 381, 732 N.W.2d 1 (No 2005-AP-1487) (available at Wisconsin State Law Library) (Thomas suggested a hypothetical offender with a forty-year indeterminate sentence consecutive to a four-year determinate sentence to demonstrate the absurdity of the State's argument to the Wisconsin Supreme Court.).

276. See, e.g., *Trujillo*, 2005 WI 45, ¶ 12; *Tucker*, 2005 WI 46, ¶ 11; *Stenklyft*, 2005 WI 71, ¶ 122 (Crooks, J., concurring in part and dissenting in part).

277. See *Stenklyft*, 2005 WI 71, ¶ 122 (Crooks, J., concurring in part and dissenting in part).

278. See, e.g., *Trujillo*, 2005 WI 45, ¶ 22.

its purposes, policies, and value choices in the detailed implementation of TIS, where it has previously failed to do so.<sup>279</sup> This approach would restore the legislature as the preeminent decision maker in Wisconsin's sentencing policy. The court's role in TIS II litigation would be diminished compared to its prominence recently in *Thomas, Tucker, Trujillo*, and *Stenklyft*. Of course, a new wave of litigation challenging the new statutes may actually increase the role of the courts, perhaps after a few years of decreased activity. The executive branch would likely play a significant role, but secondary to the legislature, in implementing the new statutes and participating in any subsequent rounds of litigation.

Direct legislative policy change could take several forms. First, the legislature could act directly and enact a comprehensive set of new statutes—perhaps TIS III—amending and fixing all of the problems in TIS II. This would place responsibility for Wisconsin's sentencing policies squarely back on the legislative branch. Alternatively, the legislature could appoint an entity, modeled perhaps on the CPSC, to make recommendations that the legislature would then pass into law. The advantage of delegating the authority to an independent committee is that legislators gain some insulation from the politically tough policy choices required in making sentencing policy. This structure also allows experts and principal actors in the criminal-justice system to give direct input. They may have more expertise than legislators, and such a committee also lends credibility to the new sentencing regime. Because these experts could consider the system more holistically and without direct political pressure, offenders might fare better under this model than under direct legislative change. However, for this option to work, the legislature would have to commit to passing the committee's recommendations, without amendment. Furthermore, the governor would have to refrain from vetoes, such as the one that precipitated the *Thomas* case.

Immediate legislative change would reduce the current uncertainty and decrease the amount of litigation over TIS II sentencing issues. A potential problem is, again, the creation of additional statutory ambiguity in the new statutes. Since TIS II promulgated new ambiguities from TIS I, it is likely that TIS III would bring additional challenges. Furthermore, there would be costs incurred again in the transition to yet another new sentencing system—the third in ten years. The creation of another unique class of inmates, in addition to those sentenced under TIS I and TIS II, would likely cause additional implementation problems for the DOC.

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279. See, e.g., *id.*

The legislature could avoid these problems with less ambitious, but equally effective, changes to the TIS statutes. First, the legislature could pass technical amendments to codify the decisions in *Trujillo*, *Tucker*, *Stenklyft*, and *Thomas*. In addition, the legislature could go slightly further and amend sections where future TIS litigation is anticipated, namely, the geriatric, terminal-release, and victim-veto provisions.<sup>280</sup> Alternatively, the legislature could reject the court's decision in *Thomas* and restore the original language, suggested by the CPSC and vetoed by McCallum, to specify that offenders always serve extended supervision before parole.<sup>281</sup>

The legislature could also address the confusion and problems caused by another set of changes to the state's sentencing laws by allowing offenders sentenced under previous sentencing regimes to opt in to the newest sentencing regime. When Wisconsin transitioned from Old Law sentencing to New Law sentencing in 1984, Old Law inmates could elect to convert their sentences to the New Law system.<sup>282</sup> Most Old Law offenders opted in to the New Law sentencing regime because they benefited under New Law with a shorter and simplified sentence.<sup>283</sup> The legislature could offer a similar option to New Law and TIS I inmates now. However, it is unlikely that many New Law offenders would choose to opt in to TIS if doing so meant they would give up their right to discretionary parole and would almost certainly spend more time in prison.<sup>284</sup> Thus, to entice inmates to opt in to TIS, the legislature would almost certainly have to reduce confinement time, perhaps by setting an inmate's mandatory-release date at parole eligibility.<sup>285</sup> Given the current political climate, it is unlikely that such a law reducing prison time for thousands of inmates would pass.<sup>286</sup> However, as the cost of corrections continues to rise and place pressure on other areas of the state's budget, it is possible that political sentiments toward truth in sentencing may reverse.<sup>287</sup>

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280. See, e.g., Ross, *supra* note 38, at 11, 13.

281. See *supra* text accompanying notes 213–14.

282. 1983 Wis. Act 528 § 29(3).

283. *Id.*

284. Compare *supra* Part II.A.1, with Part II.A.2.

285. See, e.g., WIS. STAT. §§ 302.11(1), 304.06(3).

286. Joel McNally, *Ex-Cop Refused to Flinch from Tough Parole Duty*, CAP. TIMES (Madison, Wis.), June 3, 2006, at A10 (noting “today’s mean-spirited, tough-on-crime political climate”); see also Rosales, *supra* note 123, at 4 (noting the failed proposal in Governor Doyle’s 2007 budget for an Earned Release Review Commission, which would take some authority for granting sentence adjustments away from the circuit courts).

287. See *supra* text accompanying note 35.

## CONCLUSION

The Wisconsin Supreme Court's decision in *Thomas* will have a significant impact on the state's ever-evolving sentencing policy. The decision demonstrates the court's continued willingness to shape the state's sentencing policies after TIS I and TIS II—both to repair ambiguous or unconstitutional statutory provisions and to advance the judicial branch's interests in efficiency and continued authority over criminal penalties. Regardless, following *Tucker*, *Trujillo*, and *Stenklyft*, *Thomas* will fit squarely into the growing TIS jurisprudence as litigation continues.

*Thomas* has returned one offender to prison, exposed other offenders to more prison time, and ensured that the DOC will continue to treat consecutive parole and extended-supervision sentences as one continuous *Ashford* sentence. On another level, *Thomas* may shift the balance of power among the three branches of government in determining which branch shapes future sentencing policy. This will depend largely on the legislature's response, if any, to the court's decision. If the legislature does not act to amend TIS II, the court's role in TIS II litigation will continue as it has in *Thomas*, *Tucker*, *Trujillo*, and *Stenklyft*. If the legislature does act to amend TIS II, the court will likely continue to have to interpret and clarify any subsequent sentencing legislation passed by the legislature. Either way, after *Thomas*, the Wisconsin Supreme Court will continue to play a major role in determining the future of the state's sentencing policies after TIS II.