**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 05, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP1487** **Cir. Ct. No. 2004CV5900**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN EX REL. KEVIN THOMAS,**

**PETITIONER-APPELLANT,**

**V.**

**DAVID H. SCHWARZ, ADMINISTRATOR, DIVISION OF HEARINGS AND APPEALS, AND MATTHEW J. FRANK, SECRETARY, DEPARTMENT OF CORRECTIONS,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Reversed and cause remanded for further proceedings consistent with this opinion.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Kevin Thomas appeals from a circuit court order affirming the revocation of his extended supervision. Thomas does not challenge the revocation of his parole, which was revoked at the same time. Rather, he contends that the Department of Corrections ("Department") and the Division of Hearings and Appeals ("Division"), which affirmed the Department's decision, had authority to revoke *only* his parole, because his extended supervision had not yet begun at the time he was on parole.

¶2 At issue is whether one who is sentenced to an indeterminate sentence followed by a consecutive determinate sentence serves periods of parole and extended supervision consecutively, or instead as one continuous sentence. We conclude that in such a case parole and extended supervision are served consecutively, with parole being served first. Therefore, we conclude that the Division lacked jurisdiction to revoke Thomas's extended supervision, and acted contrary to the law when it did so, because at the time Thomas committed violations he was on parole, not extended supervision. We reverse and remand to the Department for further proceedings consistent with this opinion.

## BACKGROUND

¶3 Thomas challenges the Department's decision, which was affirmed by the Division, to simultaneously revoke both his parole on an indeterminate sentence and his extended supervision on a determinate sentence. The Department

and Division (hereafter referred to jointly as "Respondents") urge this court to affirm the revocation.[1]

¶4 The indeterminate sentence in circuit court case number 99CF001664 (the "1999 case") for two crimes was imposed on August 17, 1999. The trial court imposed and stayed a sentence of two years on each count, to be served consecutively, and Thomas was placed on probation. This probation was revoked as a result of behavior that gave rise to his new charges in circuit court case number 00CF000604 (the "2000 case").

¶5 The determinate sentence imposed in the 2000 case was three years' initial confinement and five years' extended supervision, to run consecutive to any other sentence.

¶6 Thomas completed the Challenge Incarceration Program. According to the record, the trial court amended the Judgment of Conviction in the 2000 case because Thomas had completed that program, and added the unserved confinement time to his extended supervision.[2]

¶7 In August 2001, Thomas was released from prison and placed on parole.[3] On February 2, 2004, Thomas was taken into custody due to alleged

[1] The Respondents have indicated that their interests in this litigation are aligned. They filed joint briefs and were represented by the same assistant attorney general in the briefs and at oral argument.

[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.

[3] Whether Thomas was also on extended supervision is the legal issue presented in this case. It is undisputed he was placed on parole. The record contains references supporting and refuting the Department's assertion that it placed Thomas on parole and extended supervision at the same time. For instance, the revocation documents reference both the indeterminate and (continued)

parole violations. The Department of Corrections sought to revoke Thomas's parole in the 1999 case and extended supervision in the 2000 case.

¶8 A revocation hearing took place before an administrative law judge. Thomas's counsel moved to dismiss the revocation proceedings in Thomas's extended supervision case on grounds that parole and extended supervision are not one continuous period of supervision. Thomas argued that parole and extended supervision are two separate sentences, and that his extended supervision had not yet commenced.

¶9 The administrative law judge rejected this argument, concluding that changes to the statutes due to the introduction of Truth-In-Sentencing ("TIS") had not been intended to change the existing law that all consecutive sentences are served as one continuous sentence. The administrative law judge found that Thomas had committed the alleged violations, and revoked both his parole and his extended supervision. The administrative law judge did not order any reincarceration time for the parole revocation in the 1999 case, but recommended that the trial court order two years and fifteen days of reconfinement in the 2000 case. *See* WIS. STAT. § 302.113(9)(am) (2003-04)[4] (trial court determines length

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determinate cases, suggesting the Department considered Thomas to be on both parole and extended supervision. Conversely, the Department's Court Memo that was submitted to the administrative law judge indicated that Thomas's discharge date for extended supervision was August 2, 2012—exactly eight years after the indicated discharge date of August 2, 2004, for Thomas's parole, suggesting that the Department assumed Thomas's eight years of extended supervision would begin when his parole ended. Whether the Department itself considered Thomas to be on both parole and extended supervision is not a factual determination that requires resolution, because in this case we must decide whether, as a matter of law, Thomas could be placed on both parole and extended supervision at the same time in the circumstances of these sentences.

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

of reconfinement when extended supervision is revoked); § 302.113(9)(at) ("When a person is returned to court … after revocation of extended supervision, the reviewing authority shall make a recommendation to the court concerning the period of time for which the person should be returned to prison.").

¶10 Thomas appealed the administrative law judge's decision to the Division, challenging only the decision to revoke his extended supervision. David H. Schwarz, Administrator of the Division, sustained the administrative law judge's decision. He explained:

> Wis. Stat. § 302.113(4) plainly indicates the legislature's intent to continue the longstanding practice of having consecutive sentences treated as one single continuous sentence for Truth in Sentencing cases. Nothing in the plain language of the statute reasonably leads to the conclusion that the legislature intended to create an exception whereby offenders in Thomas's position would have their consecutive sentences treated separately, subjecting them to confinement and release multiple times before the sentence is finally discharged.[5]

¶11 Thomas appealed via a *writ of certiorari*, which the trial court granted to review the decision. After the matter was fully briefed by the parties, the trial court affirmed the Division's decision, concluding that Thomas was asking the trial court "to interpret the statutes to create a rule that has never existed before." The trial court stated: "Even if there is some ambiguity concerning application of the statutes to the present set of facts, [Thomas] has failed to point

[5] There was confusion at each level of appeal as to whether Thomas was arguing that he should serve his indeterminate confinement, then parole, then determinate confinement, then extended supervision, or whether he was contending he would serve all periods of confinement, then parole, then extended supervision. As discussed in this opinion, Thomas relies on the latter argument, based on his recognition that WIS. STAT. § 973.15(2m)(c)2. requires a defendant to serve all periods of confinement before being released on parole or extended supervision.

to any reason that the Court should find that the 1999 case had to be completed before the 2000 case started to run." This appeal followed.

## LEGAL STANDARDS

¶12 It is well-settled that:

> [c]ertiorari review for parole revocation is limited to four questions: "(1) whether the agency stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable, representing its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question."

***State ex rel. Riesch v. Schwarz***, 2005 WI 11, ¶13, 278 Wis. 2d 24, 692 N.W.2d 219 (citation omitted). In ***Riesch***, the supreme court considered whether the Division had acted outside its jurisdiction and contrary to law in revoking the defendant's parole status where the defendant claimed he was not on parole at the time of revocation. ***Id.***, ¶14. Likewise, we consider the first two inquiries of *certiorari* review: whether the Division stayed within its jurisdiction and whether it acted according to law. *See* ***id.***

¶13 The court in ***Riesch*** considered the issue presented to be a question of law subject to independent appellate review. *See* ***id.*** In the briefs filed with this court, both parties likewise agreed that our review is *de novo*. At oral argument, however, the Respondents argued that this court should accord great weight deference to the Respondents' interpretation of the statutes governing parole and extended supervision. Under the facts of this case, we disagree. This case involves the interpretation of statutes enacted in 2001 that do not appear to have been previously challenged in the manner Thomas is challenging them. Neither party could point to any Department, Division, court of appeals or supreme court

opinion addressing this issue. This is clearly a case of first impression for which no deference is required.[6] *See* ***Zignego Co. v. DOR***, 211 Wis. 2d 819, 824, 565 N.W.2d 590 (Ct. App. 1997) ("We review an agency's interpretation of a statute *de novo* only when the issue before the agency is clearly one of first impression….").

¶14 Statutory interpretation "'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; [and] in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46 (citations omitted).

¶15 "While the traditional rule is that resort to legislative history is not appropriate in the absence of a finding of ambiguity," our supreme court has "recognized that on occasion we consult legislative history to show how that history supports our interpretation of a statute otherwise clear on its face." ***Megal Dev. Corp. v. Shadof***, 2005 WI 151, ¶22, 286 Wis. 2d 105, 705 N.W.2d 645 (citations, internal quotation marks and ellipsis omitted).

## DISCUSSION

¶16 The statutes at issue in this case were amended or created as part of Wisconsin's two-step implementation of TIS. To best understand the issue

[6] When asked at oral argument how many individuals might be affected by this issue of first impression, both parties indicated they were unsure, but suspected the number would be low.

presented, our analysis must start with a look at the relevant case law and statutes that were in effect prior to TIS. Specifically, we begin with ***Ashford v. Division of Hearings and Appeals***, 177 Wis. 2d 34, 501 N.W.2d 824 (Ct. App. 1993), where we considered "whether a person serving consecutive sentences is subject to parole revocation and reimprisonment for the remainder of both sentences if he or she commits a parole violation prior to discharge of the first sentence." ***Id.*** at 38.

¶17 Ashford argued that he could not be revoked on two sentences because he could only be on parole for one crime at a time. ***Id.*** at 39. The court rejected this argument, holding that "the statutory language unambiguously requires revocation on all sentences if a parole violation is committed." ***Id.*** at 38. The statutory language ***Ashford*** relied on was WIS. STAT. § 302.11 (1991-92), which provided in relevant part:

> **(3)** All consecutive sentences shall be computed as one continuous sentence.
>
> ….
>
> **(7)** (a) The division of hearings and appeals in the department of administration, upon proper notice and hearing … may return a parolee released under … [mandatory release] to prison for a period up to the remainder of the sentence for a violation of the conditions of parole. The remainder of the sentence is the entire sentence, less time served in custody prior to parole.

*See* ***Ashford***, 177 Wis. 2d at 43.

¶18 ***Ashford*** rejected the defendant's argument that parole should be viewed as two distinct time periods, with parole on one sentence expiring before parole on the other sentence begins. ***Id.*** at 41-42. The court concluded that the statutes were not ambiguous, and that the cited statutes gave the Department "the

authority to revoke Ashford's parole on both the theft and the robbery convictions and to reincarcerate him for the time remaining on both convictions." ***Id.*** at 42.

¶19 Thomas does not dispute the holding in ***Ashford***. Rather, he contends that the subsequent amendments to several statutes signaled a legislative intent to treat differently a person who had both pre-TIS and TIS sentences that were ordered to be served consecutively, and that the holding of ***Ashford*** is therefore not applicable. Specifically, the legislature has eliminated the language in WIS. STAT. § 302.11(3) (1999-2000) that stated "All consecutive sentences shall be computed as one continuous sentence" and replaced it with "All consecutive sentences imposed for crimes committed before December 31, 1999, shall be computed as one continuous sentence." *See* § 302.11(3). In addition, the legislature created WIS. STAT. § 302.113(4), which provides: "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."[7]

¶20 Thomas argues that these changes signal an intention to treat all consecutive pre-TIS sentences as one continuous sentence, and all consecutive TIS sentences as one continuous sentence, but not to have "consecutive determinate and indeterminate sentences … run as one continuous sentence."

[7] WISCONSIN STAT. § 302.113(4) (1997-98), created as part of the first round of Truth-In-Sentencing legislation (TIS-I), provided: "All consecutive sentences shall be computed as one continuous sentence. The person shall serve any term of extended supervision after serving all terms of confinement in prison." This language was amended by the second round of Truth-In-Sentencing legislation (TIS-II). It is the version created by TIS-II that is applicable in this case.

¶21 At the same time, Thomas acknowledges that he must serve all periods of confinement in both indeterminate and determinate cases prior to being released on parole or extended supervision. He explains:

> If the Court finds in favor of Mr. Thomas in this case, it would not result in Mr. Thomas or other defendants being released to serve the parole portion of his indeterminate sentence prior to serving the confinement time in the determinate sentence.

This is because WIS. STAT. § 973.15(2m)(c)2. dictates that *all* periods of confinement be served before *any* release. It states: "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." ***Id.***

¶22 At oral argument, an analogy of beads on a string was used to clarify what Thomas is seeking. The first bead is the confinement for the indeterminate sentence. The next bead is confinement for the determinate sentence. Thereafter, Thomas seeks to serve the parole bead, and then the extended supervision bead in the sentence chain. In contrast, the Respondents appear to contend that there are only two beads: (1) confinement periods under indeterminate sentences plus confinement periods under determinate sentences, followed by (2) parole plus extended supervision. The Respondents explain:

> In effect, Schwarz views consecutive pre-TIS and TIS sentences as merged into a continuous sentence, with all periods of pre-TIS and TIS confinement served before the inmate begins any nonconfinement period of parole plus extended supervision. This view comports with Wis. Stat. § 973.15(2m)(c)2. This view also carries into the TIS era this court's interpretation of parole-revocation authority in pre-TIS consecutive-sentences scenarios. *See generally* ***Ashford*** … [and] ***State v. Borrell***, 167 Wis. 2d 749, 765,

> 482 N.W.2d 883 (1992) ("Where consecutive sentences are imposed, the defendant would not be eligible for parole until he or she had served the minimum amount of time required under both sentences.").

¶23 Having reviewed the law prior to TIS and summarized the parties' arguments, we now turn to the existing statutes. It is clear that WIS. STAT. § 302.11(3) dictates that all consecutive indeterminate sentences be one continuous sentence, and that WIS. STAT. § 302.113(4) dictates that all consecutive determinate sentences be one continuous sentence. However, there is not a specific statute providing that indeterminate and determinate sentences be served as one continuous sentence. Indeed, the statute that does address cases involving both indeterminate and determinate sentences, WIS. STAT. § 973.15(2m), refers to sentences being served consecutive to one another, rather than as a single continuous sentence. When we consider the specific language of all of these statutes "as part of a whole," *see* ***Kalal***, 271 Wis. 2d 633, ¶46, we find no statutory requirement that indeterminate and determinate sentences be served as one continuous sentence.

¶24 WISCONSIN STAT. § 973.15(2m)(c) and (d) also are illuminating. They provide in their entirety:

> (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.
>
> (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 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.

These provisions dictate how *concurrent* sentences are handled both while a defendant is confined and while released on parole and extended supervision. *See* § 973.15(2m)(c)1. and (d)1. They further outline how the confinement portions of *consecutive* sentences are to be served. *See* § 973.15(2m)(c)2. and (d)2. What is missing from § 973.15(2m)(c)2. and (d)2. are sentences that would mirror the parole and extended supervision provisions in § 973.15(2m)(c)1. and (d)1.

¶25 At this point in the analysis, the legislative history, which the parties discussed at length at oral argument, provides insight into the lack of a provision in WIS. STAT. § 973.15(2m)(c)2. and (d)2. explaining how consecutive parole and extended supervision are to be handled. The lack of this provision is conspicuous by its absence. Although we have not concluded that the statutes are ambiguous, we may "consult legislative history to show how that history supports our interpretation of a statute otherwise clear on its face," *see* ***Shadof***, 286 Wis. 2d 105, ¶22, and we elect to do so here.

¶26 Our supreme court has described the history of TIS legislation in Wisconsin:

> TIS-I was the first of two truth-in-sentencing acts passed by the Wisconsin Legislature. The second act, TIS-II, became effective on February 1, 2003, and has modified TIS-I….
>
> After TIS-I was drafted, the legislature established the Criminal Penalties Study Committee (CPSC) to make recommendations and to propose additional TIS legislation. In order to give the CPSC enough time to complete its task, the legislature created an 18-month window between the date the legislature passed TIS-I and the date it was to go into effect. Although the CPSC finished its report on the necessary supplementation of TIS-I, the legislature did not enact these suggestions until after TIS-I became effective.
>
> TIS-II adopted many of the proposals from the CPSC report.

***State v. Trujillo***, 2005 WI 45, ¶¶4-6, 279 Wis. 2d 712, 694 N.W.2d 933 (citations and footnotes omitted).

¶27 One of the recommendations of the CPSC concerned persons subject to both pre-TIS (indeterminate) and TIS (determinate) sentences. The CPSC stated:

> If the same offender commits crimes, one on each side of the effective date [of TIS], the law needs a mechanism which governs the service of sentences for those crimes, whether concurrent or consecutive. The Committee recommends that in either sequence (indeterminate sentence followed by determinate sentence, or determinate followed by indeterminate), and regardless of whether the sentences are run concurrent with or consecutive to each other, all confinement time should be served together, either concurrently or consecutively in whatever sequence ordered by the courts; *and extended supervision should always precede any parole time. This recommendation is based [o]n the Committee's conclusion that [extended]*

> *supervision will involve stricter community supervision than currently available through parole.*[8]

Criminal Penalties Study Comm., Final Report on 1997 Wis. Act 283, Truth In Sentencing, at 102 (Aug. 31, 1999) (emphasis supplied). The CPSC was obviously construing parole and extended supervision separately, and considered their sequencing important.

¶28 The italicized portion of the recommendation appears to have been reflected in 2001 Wis. Act 109, which created § 973.15(2m)(c) and (d) and provided, in relevant part:

> (c) *Determinate sentences imposed to run concurrent with or consecutive to indeterminate sentences.*
>
> ….
>
> 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 *and the parole portion of the indeterminate sentence consecutive to the term of extended supervision under the determinate sentence*.
>
> (d) *Indeterminate sentences imposed to run concurrent with or consecutive to determinate sentences.*
>
> ….
>
> 2. If a court provides that an indeterminate sentence is to run consecutive to a determinate sentence, the person

[8] One circuit court judge has observed that "[w]hile the CPSC envisioned that [extended supervision] would consist of differing levels of supervision based upon an offender's behavior, cost constraints have resulted in [extended supervision] appearing similar to parole." Hon. Michael B. Brennan, *Truth-in-Sentencing, part II*, THE THIRD BRANCH, Summer 2002. At oral argument, the parties agreed that extended supervision and parole are very similar. Thomas's counsel did represent that they are different because one who performs well on parole may be eligible for early discharge from parole.

> 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 *and the parole portion of the indeterminate sentence consecutive to the term of extended supervision under the determinate sentence*.

*See* 2001 Wis. Act 109, § 1142 (emphasis added).

¶29 The language italicized above was vetoed by Governor Scott McCallum. The Governor provided a veto message that explained his decision to veto the italicized language:

> I am partially vetoing these provisions because they needlessly complicate existing procedures and place an administrative burden on the Department of Corrections that could lead to increased errors in sentence calculation and offender litigation. Consecutive sentences are currently served in the order they are handed down from the court, which means parole is generally served before extended supervision. These provisions require that when sentences are to be served consecutively, sentences with extended supervision are served first. If an offender has a sentence with a parole provision and receives a consecutive sentence with an extended supervision provision, the extended supervision must be served first, requiring the shifting of the dates for serving the first sentence. The dates for serving all other sentences will need to be adjusted, resulting in an increased potential for errors and litigation if an offender is held longer than the sentence that was imposed.

Legislative Reference Bureau, Wisconsin Briefs 02-2 (Supplement): *Executive Vetoes of Bills Passed by the 2001 Wisconsin Legislature from May 3, 2002, through August 16, 2002*, August 2002, at 54.

¶30 The Governor's veto message for the latter portions of WIS. STAT. § 973.15(2m)(c)2. and (d)2. explains why there is not an explicit provision in § 973.15(2m) that explains how parole and extended supervision are to be served. The Governor's veto message, contrary to the position the Respondents take on

appeal, did not assume that parole and extended supervision would be served as a continuous sentence in cases where the sentences were ordered to be served consecutively. Indeed, the veto message explicitly states that "parole is generally served before extended supervision."

¶31 This legislative history confirms our conclusion that the statutes do not mandate that consecutive sentences involving parole and extended supervision be served as a continuous sentence.

¶32 "Penal statutes are generally construed strictly to safeguard a defendant's rights unless doing so would contravene the legislative purpose of a statute." ***State v. Baye***, 191 Wis. 2d 334, 340, 528 N.W.2d 81 (Ct. App. 1995). Applying this rule here, 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, we conclude that the plain, ordinary meaning of the relevant statutory provisions, *i.e.*, §§ 302.11(3), 302.113(4) and 973.15(2m)(c)2. and (d)2., does not require that parole and extended supervision be served as a continuous sentence.

¶33 It follows that Thomas, who was serving his determinate sentence consecutive to his indeterminate sentence, was serving parole first, and was not yet on extended supervision at the time he committed violations on parole. Therefore, the Division acted outside its jurisdiction and contrary to law when it revoked Thomas's extended supervision, since he was not yet on extended supervision.

We reverse the circuit court's order and remand to the Department for further proceedings consistent with this opinion.[9]

*By the Court.*—Order reversed and cause remanded for further proceedings consistent with this opinion.

Recommended for publication in the official reports.

[9] At oral argument counsel for Thomas indicated that Thomas, who is still serving a determinate sentence, would likely seek credit for time served as a result of the extended supervision revocation. We do not consider whether Thomas would be entitled to credit, or dictate how that question should be determined on remand.

¶34 FINE, J. (*dissenting*). Why? As Hamlet reflected in another context, that is the question. The Majority does not, however, give us an answer.

¶35 The issue here is whether the Department of Corrections had "jurisdiction" (the Majority's word, Majority, ¶2) to simultaneously revoke Kevin Thomas's parole and extended supervision. The Majority says that it does not, but does not tell us why. Respectfully, I see the Majority's reliance on the absence of legislative history and a supposed distinction between "consecutive" and "continuous" as beside the point.

¶36 As I see it, two things are clear. First, simultaneous revocation is permitted by the statute. Second, former governor Scott McCallum was right in seeking to avoid layers of Rube-Goldberg mechanisms that "needlessly complicate procedures" attending the revocation of parole and extended supervision. In my view, the Majority ignores the former fact, and has added another complicated mechanism to the process.

¶37 When Thomas was placed on parole in the pre-Truth-In-Sentencing case, he had already completed (apparently because of his participation in and completion of the Challenge Incarceration Program, *see* WIS. STAT. § 302.045(3m)), his period of "initial confinement" in the post-Truth-In-Sentencing case. All persons sentenced under the Truth-In-Sentencing scheme, *see* WIS. STAT. § 973.01, are "subject to" WIS. STAT. § 302.113, *see* § 302.113(1). Section 302.113(2) says that "an inmate subject to this section is entitled to release to extended supervision after he or she has served the term of confinement in prison portion of the sentence imposed under s. 973.01, as modified by the

sentencing court under … s. 302.045 (3m) (b) 1. … if applicable." (Immaterial references omitted.) Accordingly, having "served the term of confinement in prison portion of the sentence" in his post-Truth-In-Sentencing case, Thomas was thus "release[d] to extended supervision."[1] He therefore remained "in the legal custody" of the Department, § 302.113(8m)(a), and could, at any time thereafter, have his extended supervision revoked, *see* § 302.113(9)(am) ("If a person released to extended supervision under this section violates a condition of extended supervision, the reviewing authority may revoke the extended supervision of the person."). That is precisely what happened here.

¶38 WISCONSIN STAT. § 302.113 gives to the Department the specific authority to revoke an inmate's extended supervision once that inmate has, as provided for in § 302.113(2), "served the term of confinement in prison portion of the sentence imposed under s. 973.01." That is what the Department did here. Moreover, every administrative agency has those "necessarily implied" powers to effectuate its legislatively imposed mandate, unless the scope of those powers are clipped by statute. ***State ex rel. Treat v. Puckett***, 2002 WI App 58, ¶10, 252 Wis. 2d 404, 413–414, 643 N.W.2d 515, 520–521. There is nothing in the statutes that forces the Department to wait until after an inmate has served his or her parole-revocation time in a pre-Truth-In-Sentencing case before revoking the inmate's extended supervision. Indeed, forcing the Department to wait—and the

[1] On its face, WIS. STAT. § 302.113(2)'s use of the word "entitled" could imply that an inmate sentenced in a post-Truth-In-Sentencing case could decide to remain incarcerated even though he or she completed the confinement part of the sentence. Whatever would be the resolution of that potentially interesting question, there is nothing in the Record indicating that Thomas either opted or wanted to remain incarcerated under his post-Truth-In-Sentencing case. Indeed, as we have seen, he was released on parole in the pre-Truth-In-Sentencing case, and was in the community when he violated the conditions of both his parole and extended supervision.

waiting period could be many years, resulting in loss of either witnesses to, or memories of, the alleged violations—before starting revocation-of-extended-supervision procedures is contrary not only to the statutory scheme but antithetical to the public good as well. Accordingly, I respectfully dissent.[2]

[2] Although there is no need to get into an angels-on-the-head-of-a-pin parsing of the words "consecutive" and "continuous," the two are largely synonymous, and would, most likely, be so construed by a majority of the legislators voting on the very complex Truth-In-Sentencing scheme. Thus, for example, WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1954), defines, as relevant here, "consecutive" as: "Following in a train; succeeding one another in a regular order, or with uninterrupted course or succession; having no interval or break; successive; sequent; as fifty *consecutive* years." ***Id.*** at 567 (italics in original). The dictionary defines "continuous" as: "Having continuity of parts; without break, cessation, or interruption; without intervening space or time; uninterrupted; unbroken; continued; as a *continuous* road or murmur." ***Id.*** at 577 (italics in original). The dictionary's third edition gives similar near synonymous definitions of the two words, defining "consecutive" as "1 a : following esp. in a series : one right after the other often with small intervening intervals : successive, sequent <four ~ terms in office> <the coastal battery scored several ~ hits> b : having no interval or break : continuous <the most important cause … has run throughout post-Conquest history like a ~ thread –C.G. Coulton> <a ~ conversation>," and "continuous" as "1 a : characterized by uninterrupted extension in space : stretching on without break or interruption <a ~ and rather spacious channel –C.H. Grandgent> b : characterized by uninterrupted extension in time or sequence : continuing without intermission or recurring regularly after minute interruptions <humanism has been sporadic, but Christianity ~ –T.S. Elliot> <a ~ rearrangement of electrons in the solar atoms results in the emission of light –James Jeans>." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 482, 493–494 (1993).

The distinction between "consecutive" and "continuous" is like the difference between twilight and dusk; it is a fragile and, in my view, irrelevant thread on which to hang a decision that will overly complicate the Department's ability to fulfill its statutory mandates. As I have explained in the main body of this dissent, the Majority's decision may even permit inmates whose violations of the terms of their extended supervision are serious from being revoked at all because of the passing of time, the dimming of memories, or the dying of essential witnesses.