No. 17AP141

# In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

*v.*

DENNIS L. SCHWIND,
DEFENDANT-APPELLANT-PETITIONER

On Appeal From The Walworth County Circuit Court,
The Honorable David M. Reddy, Presiding,
Case No. 2000CF407

## RESPONSE BRIEF OF THE STATE OF WISCONSIN

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## ISSUES PRESENTED

1. Does a circuit court have the inherent authority to reduce a defendant's term of probation without following the strictures of Subsection 973.09(3)(d)?

The circuit court and Court of Appeals answered no.

2. If a circuit court does have inherent authority to reduce a defendant's term of probation beyond that provided in Subsection 973.09(3)(d), is Schwind entitled to relief under that authority?

The circuit court did not answer this question, and the Court of Appeals answered no.

## INTRODUCTION

With Section 973.09, the Legislature authorized circuit courts to give convicted defendants terms of probation in lieu of criminal sentences. Within this statutory scheme is Subsection 973.09(3)(d), which authorizes circuit courts to subsequently reduce a deserving probationer's term of probation under specific circumstances. Those statutorily proscribed circumstances are when the Department of Corrections petitions for a reduction, the probationer has served at least half his term, he has honored all conditions and rules of probation, he has met the financial obligations of his criminal judgment, and he is not required to register as a sex offender. Subsection 973.09(3)(d) expresses the Legislature's considered judgment as to which probationers are deserving of a reduction in probation and, therefore, as to

which probation-reduction claims the court should use its scarce resources to consider. Yet, Petitioner Dennis L. Schwind would have circuit courts ignore the Legislature's reasoned judgment and reduce terms of probation whenever they conclude that "cause" exists, as an exercise of their "inherent authority."

This Court should reject Schwind's invitation to ignore Subsection 973.09(3)(d) and vastly expand circuit courts' inherent authority. Schwind's vision for a near-limitless power to reduce a term of probation "for cause" does not describe a power that is necessary for the courts to fulfill their solemn obligations, as this Court requires for a power to be "inherent." It finds no analogue in the three limited areas that this Court generally recognizes as appropriate for an exercise of inherent authority. And accepting Schwind's boundless position risks flooding the circuit courts with thousands of probation-reduction cases from probationers like Schwind, who are undeserving of such reduction according to the Legislature's conclusion.

## ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument for February 21, 2019, at 9:45 a.m.

## STATEMENT OF THE CASE

### A. Legal Background

Probation is a disposition of a criminal case that orders the "release[ ]" of a convicted defendant "into the community,"

usually "on condition of routinely checking in with a probation officer over a specified period of time" and "subject to [other] stated conditions." Probation, Black's Law Dictionary (10th ed. 2014); *see also State v. Dowdy*, 2012 WI 12, ¶ 28, 338 Wis. 2d 565, 808 N.W.2d 691 (hereinafter "*Dowdy II*"). It is "supervised, conditional freedom," Neil P. Cohen, *The Law of Probation and Parole* § 1:2 (2d ed.), given "in lieu of a prison sentence," *id.* § 1:1. The "dual goals of probation are the rehabilitation of those convicted of crime and the protection of the state and community." *State v. Sepulveda*, 119 Wis. 2d 546, 554, 350 N.W.2d 96 (1984) (citation omitted).

From its origins, probation has been a statutory creation of legislatures, *see* Cohen, *supra*, § 1:3, exercising their power "to prescribe the penalty for a particular crime and the manner of its enforcement," *Dowdy II*, 2012 WI 12, ¶ 27. Probation laws "were unknown to the common law"; indeed, "under the common law the courts had no power to suspend sentence in order to give the defendant a chance to mend his ways." Edwin C. Conrad, *Commentaries on the Wisconsin Law of Probation*, 29 Am. Inst. Crim. L. & Criminology 449, 449 (1938).

The Legislature first enacted Wisconsin's probation regime in 1909, *id.* at 458–59; Laws of Wisconsin 1909, ch. 541, thus "confer[ring] a new power upon the court—the power to suspend the execution of the sentence and place the defendant on probation," *State v. Mun. Court of Milwaukee Cty.*, 179 Wis. 195, 190 N.W. 121, 123 (1922). "Without [that]

statutory authority, a court could not place a defendant on probation." *State v. Horn*, 226 Wis. 2d 637, 648, 594 N.W.2d 772 (1999); *accord Donaldson v. State*, 93 Wis. 2d 306, 310, 286 N.W.2d 817 (1980) ("The courts of this state have no inherent power in criminal cases to stay the execution of a sentence in the absence of statutory authority . . . .").

Today, the authority for circuit courts to give probation is found in Wis. Stat. § 973.09(1)(a). That Subsection authorizes the circuit court to "withhold sentence" or "stay" the "execution" of a sentence for "a person [ ] convicted of a crime," and "place the person on probation to the department [of corrections] for a stated period." Wis. Stat. § 973.09(1)(a). The court "may impose any conditions [on the probation] which appear to be reasonable and appropriate," *id.*, including "perform[ing] community service," *id.* § 973.09(7m)(a), "participat[ing] in sex offender evaluation and treatment," and "hav[ing] no contact with the victim," *Dowdy II*, 2012 WI 12, ¶ 8. Under Wis. Stat. § 973.10(2), if a probationer violates the terms of his probation, "the executive branch [ ] determine[s] whether . . . [the violation] warrant[s] revocation." *Horn*, 226 Wis. 2d at 651.

Three provisions control the length of probation.

First, Section 973.09(2) fixes the "original term of probation" that a court may impose on a convicted defendant. For "misdemeanor" convictions, the original term is generally "not less than 6 months nor more than 2 years." Wis. Stat. § 973.09(2)(a)1. For "felon[y]" convictions, the original term

is generally "not less than one year nor more than either the maximum term of confinement in prison for the crime or 3 years, whichever is greater." *Id.* § 973.09(2)(b)1. If a court "imposes a term of probation in excess of the maximum authorized by statute, the excess is [automatically] void" without need for "further proceedings." *Id.* § 973.09(2m).

Second, under Subsection 973.09(3)(a), "the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof" before "the expiration of any probation period." *Id.*; *see generally id.* § 973.09(3)(b)–(c) (procedure for extending probation or modifying terms). In *Dowdy II*, this Court held that Subsection 973.09(3)(a) grants the circuit court "authority only to extend probation" or "to modify the terms and conditions of probation," *not* to "reduce probation for a stated period." 2012 WI 12, ¶¶ 34, 38, 40 (citations omitted) (defining "term" to refer to a "length of time" and "terms" to be "synonymous" with "conditions").

Third, Subsection 973.09(3)(d) grants limited statutory authorization for a court to reduce a term of probation. This statute provides that the court "may modify a person's period of probation and discharge the person from probation if" six elements are met: (1) the "department [of corrections] petitions the court to discharge the person from probation"; (2) the "probationer has completed 50 percent of his or her period of probation"; (3) the "probationer has satisfied all conditions of probation that were set by the sentencing court";

(4) the "probationer has satisfied all rules and conditions of probation that were set by the department"; (5) the "probationer has fulfilled all financial obligations" resulting from his or her conviction; and (6) the "probationer is not required to register [as a sex offender] under s. 301.45." Wis. Stat. § 973.09(3)(d)1–6.

The primary dispute in this case is "whether a circuit court has *inherent authority* to reduce the length of probation" and, if so, what standard applies—questions this Court "decline[d] to decide" in *Dowdy II*. 2012 WI 12, ¶¶ 42–43 (emphasis added).[1]

### B. Factual And Procedural Background

1. From April 1997 to September 2000, Schwind repeatedly sexually assaulted his son, M.D.S. *See* R.7:1 (Walworth County criminal information); 14:5 (Portage County criminal information); 2:2 (complaint establishing Schwind as the father of M.D.S.); *see generally* R.14:2 (Schwind admitting to facts in both informations and to the use of the "facts in the criminal complaint" to support judgment of guilt). During this period, M.D.S. was between nine and twelve years' old. *See* R.7:1.

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[1] *Dowdy II* considered whether Subsection 973.09(3)(a) gave circuit courts authority to reduce probation. 2012 WI 12, ¶ 42. That case was decided under the probation scheme as it existed prior to the Legislature adding the provision in Subsection 973.09(3)(d) for the court to reduce a term of probation under specific circumstances. *Id.* ¶ 41 n.8.

The criminal complaint recounts Schwind's horrific crimes. "[O]n a regular basis at least four to five times a week," Schwind "would come into [M.D.S.'s] bedroom" and sexually abuse him. R.2:2. This abuse included Schwind forcing M.D.S. to "touch him on his penis by method of masturbation," forcing M.D.S. to "masturbate" him, R.2:2, and forcing M.D.S. to "touch himself." R.2:3. These assaults included both "touch[ing] [ ] over the clothing as well as under the clothing." R.2:2. The majority of these assaults occurred in Walworth County, but at least one occurred in Portage County. *See* R.2:2–3; 14:5.

2. In 2000, the State charged Schwind with five crimes: four in Walworth County, R.7:1, and one in Portage County, R.14:5. The first and second charges were "[e]ngaging in repeated acts of sexual assault of the same child," a child whom the defendant "is responsible for the welfare of," Wis. Stat. § 948.025(1), (2m) (1999–2000). R.7:1 (limiting the first charge to April 1997–April 1999, and the second charge to August 2000–September 2000). The third and fourth charges were "[i]ncest with a child," Wis. Stat. § 948.06(1) (1999–2000). R.7:1 (limiting the third charge to April 1997–April 1999, and the fourth charge to August 2000–September 2000). The fifth charge (and the only charge from Portage County) was a single "[s]exual assault of a child." Wis. Stat. § 948.02(1) (1999–2000); R.14:5; *see generally* R.16:1 (amended information reflecting consolidation of the Walworth and Portage charges).

Schwind pleaded guilty to the first, third, and fifth charges in 2001. *See* R.14:2. Together, these three charges exposed Schwind to 105 years in prison and $10,000 in fines. R.14:1. The State dismissed the second and fourth charges, but read them in at sentencing. R.14:2. The circuit court accepted the pleas and entered judgments of conviction in January 2001. App. 1 (judgment for count one); App. 3 (judgment for counts three and five). This plea required Schwind to register as a sex offender under Wis. Stat. § 301.45. *E.g.*, App. 2.

3. The circuit court sentenced Schwind to ten years in prison, which it immediately stayed, and to 25 years of probation. App. 1, 3; *see generally* R.24:2; 28:2 (amended judgments clarifying terms not relevant here). The judgments imposed various conditions on Schwind's probation, including one year of jail time, with work release, App. 1; "sexual assault offender treatment"; "[r]egist[ration] as a sex offender"; "[n]o unsupervised contact with minors"; and "[n]o contact with [the] victim unless" the "victim consents," the "[a]gent approves," and "it is consistent with any CHIPS Order." App. 2. The judgments also noted that "[the] Court would consider early termination of supervision after [the] def[endant] has served a minimum of 15 years, upon recommendation of the [probation] Agent." App. 2, 4.

Schwind served the first year of his probation term without incident, *see generally* R.26 (report noting Schwind's release from initial one-year jail term), but in 2002, Schwind

violated the conditions of his probation by "having [unauthorized] physical contact with his victim," having "sexual contact with an animal," having "unsupervised contact with children," and "fail[ing] an intensive sex offender treatment program at Racine Correctional Institution." R.27:1. Schwind "admit[ted]" to these violations and "accept[ed]" another one-year term in prison "[i]n lieu of" the State "initiat[ing]" "probation revocation proceedings." R.27:1–2; *see generally* R.30 (report noting Schwind's release from this one-year jail term).

4. In 2014, thirteen years after his probation began, Schwind filed a motion for early termination of probation with the circuit court, R.31; 32, purportedly under "the inherent powers of th[e] court" to reduce probation, R.49:5.

At a hearing on the motion, Schwind admitted that he "certainly [ ] did get off to a bad start" to his probation, but claimed that "over the following 13 years[ ] there's nothing left for him to be supervised for." R.49:10. He claimed that his continued probation would not "effectuate the dual purposes of probation," "[n]amely, rehabilitating the defendant and protecting society." R.49:13. As to the circuit court's alleged "inherent powers" to reduce probation, Schwind argued that, despite Subsection 973.09(3)(d)'s enumeration of the circumstances when a court may "modify a person's period of probation and discharge the person from probation," Wis. Stat. § 973.09(3)(d); *supra* pp. 5–6, the court may reduce probation for defendants not meeting

Subsection 973.09(3)(d)'s requirements, *see* R.49:11–12. He admitted that he could not meet Subsection 973.09(3)(d)'s terms and so was not seeking a reduction under the statute. *See* R.49:12.

Schwind's current probation agent—who had monitored Schwind for the previous six months—did not formally "petition[ ] the court for early termination." R.49:2, 6. Instead, the agent informed the court that the Department of Corrections ("Department") has a policy of "no longer mak[ing] [such] recommendation[s]" in these types of cases. R.49:5. Schwind's current agent did state that, in his personal view, Schwind "had completed everything that was required of him," "has not had any violations," and was "doing exemplary" in "the six months that [he] ha[d] supervised him." *See.* R.49:6. Accordingly, in his view, Schwind "should be discharged early." R.49:6.[2]

The State "object[ed] to early discharge" because Schwind did not "meet many of the criteria" of Subsection 973.09(3)(d). R.49:7. Schwind was "required to register under [Wis. Stat. §] 301.45" as a sex offender, R.49:7; the "department" had not "petition[ed]" for "discharge," Wis. Stat. § 973.09(3)(d)1; *compare* R.49:7 (prosecutor saying he did not "want to quibble about what [the Department's] policy [of

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[2] Schwind's previous probation agent had "prepared a letter . . . asking the court to terminate his probation," R.49:3, but that letter "never went to the court" due to complications with this agent's "retirement process," R.49:5; *see generally* R.54:10 (Schwind saying he "ha[s] never seen the physical letter").

giving recommendations] is"); and he had violated multiple "rules and conditions" of probation in 2002, as noted above, *see* Wis. Stat. § 973.09(3)(d)4; R.27:2. Additionally, the State explained that the original judgment of conviction stated that the court would consider early termination only "after [the] defendant has served a minimum of 15 years," which had not yet elapsed. R.49:7.

The circuit court denied Schwind's motion. R.49:15. While the court did not decide "whether [it] do[es] or do[es not] have the inherent authority to" reduce probation, it ruled that, "[e]ven if [it] had the power," it would "not [ ] exercise it" here. R.49:14–15. Indeed, "once you start utilizing some of those inherent powers, that[ ] [is] a slippery slope that this court is not willing to go down." R.49:11. Further, the circuit court mentioned that Schwind had not yet met the 15-year benchmark for reconsideration of the probation term that was set in the original convictions. R.49:9. Finally, the court concluded that Schwind was not entitled to termination of probation under Subsection 973.09(3)(d) because the Department had not formally petitioned for discharge and because Schwind was required to register as a sex offender. *See* R.49:8 (noting Subsections (d)1 and (d)6); 49:17 (noting noncompliance with Section 973.09(3)); *see also* Wis. Stat. § 973.09(3)(d)4 (requiring probationers seeking a reduction to not violate "rules and conditions" of probation); R.27:2 (Schwind violating "rules and conditions" of probation).

In 2016, Schwind again moved the court for early termination under the court's purported inherent authority. R.33; 54:3.

The circuit court again denied Schwind's motion. App. 18–19 (hearing); App. 25 (written order). This time, the court concluded that it did not possess the inherent power "to reduce [a] period of probation." App. 12. It explained that Subsection 973.09(3)(d) "lists six requirements that must be met in order for a circuit court to discharge a probationer" early. App. 11. So if a circuit court "had broad discretionary authority" to "reduce the length of probation," this statute "would be meaningless." App. 11. As before, the court concluded that Schwind did not meet Subsection 973.09(3)(d) because the Department did not formally recommend probation reduction. App. 18–19. Finally, the State noted at this hearing that "even if there w[ere] some sort of inherent authority," "under the facts of this case . . . early termination would [not] be appropriate . . . because . . . there were very serious violations of probation in this case that led to alternatives to revocation," although those violations were "several years ago." App. 21–22; *supra* pp. 8–9.

5. Schwind appealed the circuit court's denial to the Court of Appeals, but the Court of Appeals affirmed the circuit court's judgment based on its own prior decision in *State v. Dowdy*, 2010 WI App 158, 330 Wis. 2d 444, 792 N.W.2d 230 (hereinafter "*Dowdy I*"), a decision this Court affirmed on other grounds in *Dowdy II*. App. 28–30. In *Dowdy I*, the

Court of Appeals had held that, if the inherent authority to reduce a term of probation exists, such authority is coextensive with the court's inherent authority to reduce a sentence. App. 28. Specifically, it could only be exercised in limited circumstances to correct a "clear mistake," consider a "new factor," or remedy "undue harshness or unconscionability." App. 28. Under this narrow standard, "post-sentence [or probation] conduct," like "successful—even 'exemplary'–rehabilitation," categorically does not qualify. App. 28–29. Since, relevant here, Schwind asked only for modification based on such conduct, he failed to meet *Dowdy I*'s standard. *See* App. 29. The Court of Appeals noted that, while this Court had affirmed *Dowdy I* on other grounds, its precedential force on the probation-reduction point "remains intact." App. 29.

This Court then granted Schwind's petition for review.

## STANDARD OF REVIEW

Whether a circuit court possesses inherent authority to reduce a term of probation is a "question of law" that this Court "review[s] de novo." *See Dowdy II*, 2012 WI 12, ¶ 25. If a circuit court does possess such authority, the proper legal standard governing that authority is also a question of law, subject to de novo review, *see State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828, while the application of that standard would be reviewed for an erroneous exercise of discretion, *see id.*

## SUMMARY OF ARGUMENT

I. Subsection 973.09(3)(d) provides the exclusive basis for a circuit court to reduce a probationer's term of probation. The circuit courts may not reduce a probationer's term as an exercise of their inherent authority.

A. The Wisconsin Constitution grants circuit courts the limited inherent powers needed to enable the court to accomplish its constitutionally and legislatively mandated functions. This Court has recognized that circuit courts generally may exercise their inherent authority in three areas: first, to run their internal operations; second, to regulate the bench and bar; and third, to ensure their efficient and effective functioning. Included within this third area is the circuit court's power to correct clerical errors at any time.

The power to reduce a term of probation is not necessary for the circuit courts to accomplish their functions. Indeed, this power operates *after* the court has completed its duty of disposing of criminal cases, inviting the court to unsettle those criminal cases it has properly decided. Moreover, this power is absent from the historical record, and it is not required as a matter of justice, given that the courts give probation in lieu of the harsher criminal sentence.

The power to reduce probation also does not fit within the three areas where circuit courts have generally exercised their inherent authority. First, it plainly does not relate to internal court operations. Second, it has nothing to do with the regulation of the bench or bar. Third, reducing a term of

probation does not contribute to the efficient and effective functioning of the court. Rather, this power would *add* matters to the circuit court's docket that were not contemplated by the Legislature. This necessarily displaces other matters central to the circuit court's purposes, including bail hearings, criminal trials, and sentencing. Of course, this does not mean that circuit courts may not correct clerical errors in judgments of probation, since they possess such error-correcting power with respect to *all* of their judgments, regardless of the subject matter.

Schwind primarily argues that the circuit courts must possess this inherent power because they possess the inherent authority to reduce criminal sentences under *Hayes v. State*, 46 Wis. 2d 93, 175 N.W.2d 625 (1970), *overruled on other grounds by State v. Taylor*, 60 Wis. 2d 506, 210 N.W.2d 873 (1973). However, the Court should not extend the holding of *Hayes* to probation for a variety of reasons: *Hayes* itself suggests it is inapplicable to probation, since that is purely a statutory creation. 46 Wis. 2d at 101–02. This Court has already refused to extend *Hayes* to one aspect of probation and confined it to its facts in *Drinkwater v. State*, 69 Wis. 2d 60, 66 n.1, 230 N.W.2d 126 (1975), and it again refused to extend *Hayes* beyond sentencing in *State v. Machner*, 101 Wis. 2d 79, 83, 303 N.W.2d 633 (1981). Finally, *Hayes* does not align with this Court's modern inherent-authority jurisprudence.

B. Even if circuit courts once had the inherent authority to reduce probation, the Legislature enacted a reasonable

regulation of that authority with Subsection 973.09(3)(d). Circuit courts must follow that statute.

This Court recognizes that a circuit court's inherent authority is often a shared power with the Legislature, subject to the Legislature's reasonable regulation. Subsection 973.09(3)(d) is such a regulation—it provides that the courts may grant reductions in probation only where: (1) the Department first petitions the circuit court, (2) the probationer has completed 50 percent of his probation, (3) the probationer has satisfied all of the court's conditions of probation, (4) the probationer has satisfied all of the Department's rules and conditions of probation, (5) the probationer has paid the conviction's financial obligations, and (6) the probationer is not required to register as a sex offender. This Subsection ensures that only the most deserving of probationers apply for, and receive, a reduction—and it leaves the ultimate decision of whether to reduce a term with the circuit courts.

II. If the circuit courts do have the inherent authority to reduce a term of probation beyond Subsection 973.09(3)(d)'s limits, *Hayes*' strict standard for modifying sentences should govern the exercise of that authority.

A. Under *Hayes* and its progeny, a circuit court may modify a sentence under limited circumstances to correct an illegal sentence or a clerical error, to modify a sentence in light of a new factor, or to remedy an unduly harsh or unconscionable sentence. These limits are necessary to

respect the principle of finality, since unsettling sentences harms the State, crime victims, and others. Further, these strict limits avert a flood of sentence-modification litigation that would prevent circuit courts from fulfilling their more pressing duties.

These same concerns apply with equal, if not greater, force to reductions in probation. Probation reduction invokes strong finality concerns, like sentencing, since probationers too have harmed the community with their crimes. There are more defendants on probation than serving sentences, thus the floodgates concern here is even more acute than in sentence modification. And application of *Hayes*' settled jurisprudence would provide clear guidance to the circuit courts should they have to consider these probation-reduction claims.

Schwind's arguments in favor of a "for cause" standard to govern probation-reduction claims—instead of *Hayes*' standard—are unpersuasive. The "for cause" standard provides no guidance to the circuit courts, inviting them to reduce a probation term, no matter the length, whenever a probationer says he no longer benefits from probation. Further, Schwind's boundless standard expressly ignores bedrock finality concerns and misunderstands the relationship between probation and sentencing.

B. As the Court of Appeals held, and as Schwind impliedly concedes, Schwind cannot meet the *Hayes* standard, should it apply to probation-reduction claims. Thus, if this

Court concludes that this standard applies, it should affirm the denial of Schwind's probation-reduction motion.

III. If the Court believes that circuit courts have the inherent authority to reduce a term of probation beyond Subsection 973.09(3)(d), and that a standard more lax than the *Hayes* sentence-reduction standard applies, then a remand to the circuit court to apply that lax standard is required. On remand, the State can present powerful arguments against reducing Schwind's probation: Schwind committed horrific crimes against his own child, he flagrantly violated the terms of his probation, and his current probation conditions are not unduly burdensome.

## ARGUMENT

### I. Subsection 973.09(3)(d) Provides The Exclusive Basis For Reducing A Term Of Probation[3]

The Wisconsin Constitution grants the circuit courts certain inherent powers, which enable these courts to fulfill their constitutional or statutory duty. Some powers within the circuit courts' inherent authority are "shared powers" with the Legislature, as that term is used in this Court's

[3] In *Dowdy II*, the State conceded that circuit courts "probably" have inherent authority to reduce a sentence of probation, Br. of Plaintiff-Respondent, *Dowdy II*, 2011 WL 1867887, at *8, but this Court declined to decide the issue because it had not been briefed and argued before the circuit court, *Dowdy II*, 2012 WI 12, ¶ 43. In this case, the State argued below that circuit courts lack such inherent authority, consistent with this Court's conclusion in *Dowdy II* that this remains an unsettled issue. Br. of Plaintiff-Respondent at 5, *State v. Schwind*, No. 17AP141 (Ct. App. filed Sept. 7, 2017); *see* R.49:7.

separation-of-powers jurisprudence. Under those circumstances, the courts must follow statutes governing the courts' inherent authority, so long as those statutes are "reasonable regulations." As relevant here, the circuit courts' inherent authority never included the power to reduce a term of probation. But even if the courts did once have this inherent power, Subsection 973.09(3)(d)'s limitations on when courts may exercise that power is a "reasonable regulation" that binds the circuit courts.

### A. The Circuit Courts Never Had The Inherent Authority To Reduce A Term Of Probation

1. The Wisconsin Constitution grants to circuit courts those "inherent, implied, and incidental powers" that "are necessary to enable [them] to accomplish their constitutionally and legislatively mandated functions." *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350 (citations omitted). These are the powers "needed to maintain the courts' dignity, transact their business, and accomplish the purposes of their existence." *Id.* (citation omitted). They are the powers "without which a court cannot properly function." *Id.* (citation omitted).

The court's inherent authority "arises by implication from the very act of creating [a] court" in the Constitution. *Smith v. Burns*, 65 Wis. 2d 638, 645, 223 N.W.2d 562 (1974) (citation omitted). That is, "when the term 'court' is used in the Constitution[,] it is plain that the framers had in mind that governmental institution known to the common law

possessing powers characterizing it as a court and distinguishing it from all other institutions." *In re Kading*, 70 Wis. 2d 508, 518, 235 N.W.2d 409 (1975) (citation omitted). For this reason, this Court will often look to historical practice when considering whether a particular power inheres in the court. *See Barland v. Eau Claire Cty.*, 216 Wis. 2d 560, 590, 592, 575 N.W.2d 691 (1998) (looking to "[e]arly in the history of this state" and "historical custom"); *State v. Braunsdorf*, 98 Wis. 2d 569, 573, 584–85, 297 N.W.2d 808 (1980) (looking to whether a practice was "inherited from English common law" or was "only recently . . . articulated in American jurisprudence").

2. This Court has recognized that the circuit courts "generally" may exercise their inherent authority in "three areas." *Henley*, 2010 WI 97, ¶ 73.

First, circuit courts have the inherent authority to run the "internal operations of the court." *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749, 595 N.W.2d 635 (1999); *see Henley*, 2010 WI 97, ¶ 73. For example, this Court has recognized the inherent power of a circuit court to "retain its judicial assistant" and "its janitor," *Sun Prairie*, 226 Wis. 2d at 749 (citing *Barland*, 216 Wis. 2d 560, and *In re Janitor*, 35 Wis. 410 (1874)), "to appoint [a] bailiff," "to order installation of an air conditioner," *Barland*, 216 Wis. 2d at 583, and to "refuse . . . facilities [that are] inadequate," *Sun Prairie*, 226 Wis. 2d at 749.

Second, because courts have the power "to regulate the bench and bar," *Henley*, 2010 WI 97, ¶ 73, this Court has recognized the circuit courts' inherent authority to "determine whether attorneys' fees are reasonable," *Sun Prairie*, 226 Wis. 2d at 749; to "discipline members of the bar," *State ex rel. Fiedler v. Wis. Senate*, 155 Wis. 2d 94, 103, 454 N.W.2d 770 (1990); and to "decide a question of representation," *Koschkee v. Evers*, 2018 WI 82, ¶ 11, 382 Wis. 2d 666, 913 N.W.2d 878 (per curiam).

Third, and most relevant to the issues in dispute here, circuit courts have the power "to ensure the efficient and effective functioning of the court" or "to fairly administer justice." *Henley*, 2010 WI 97, ¶ 73. Circuit courts thus have authority "to hold a person in contempt," *Smith*, 65 Wis. 2d at 645, to "vacate a void judgment" due to lack of jurisdiction, *see Sun Prairie*, 226 Wis. 2d at 750, and to "appoint counsel for indigent parties," *id.* This Court has also recognized that circuit courts have the inherent authority to "dispos[e] of a criminal case" by "impos[ing]" the "penalt[ies]" that the Legislature has "prescribe[d]," "including imposing and revoking probation" when that disposition is authorized first by the Legislature. *Horn*, 226 Wis. 2d at 640, 645–46; *infra* p. 33 (explaining this Court's holding that this is "shared power").

Further, within this third area, this Court recognizes the "clear" rule that circuit courts possess inherent authority "to correct clerical errors at any time." *State v. Prihoda*, 2000

WI 123, ¶ 17 & n.9, 239 Wis. 3d 244, 618 N.W.2d 857 (citing *Hayes*, 46 Wis. 2d at 101–02); *e.g.*, 21 *Corpus Juris Secundum*, Courts § 248 & n.8 (2018). These are errors that fail "to preserve o[n] record . . . the actual decision of the court." *Prihoda*, 2000 WI 123, ¶ 15 n.6 (citation omitted). For example, a written judgment's failure to accurately reflect a sentence that the court pronounced orally is such an error. *See id.* ¶ 15; CJS, *supra*, § 248 ("scrivener's errors"). Clerical errors are contrasted with "judicial error[s]," which are errors flowing from a court's "deliberate," yet erroneous, resolution of an issue. *Prihoda*, 2000 WI 123, ¶ 15 n.6 (citation omitted).

3. Here, the court's inherent authority does not include the power to reduce a term of probation. This power does not fit within the definition of inherent authority that this Court accepts, nor does it fall within the "three areas" where circuit courts have "generally exercised inherent authority." *Henley*, 2010 WI 97, ¶ 73.

The authority to reduce probation is not a power "necessary to enable" the court to "accomplish [its] constitutionally and legislatively mandated functions." *Id.* Rather, this power would necessarily operate *after* the court has completed its duty: the disposing of a criminal case brought by the State. *See Horn*, 226 Wis. 2d at 640; *Henley*, 2010 WI 97, ¶ 75. Once "a convicted defendant is sentenced to prison or the circuit court imposes probation, the adversary system" of the judiciary "has terminated," and "the executive branch['s]" administration of parole "has been substituted in

its place." *Horn*, 226 Wis. 2d at 650 (citations omitted). For the same reason, the power to reduce probation is not a power "without which a court cannot properly function," as it invites the court to *unsettle* those cases that it has properly decided. *Henley*, 2010 WI 97, ¶ 73 (citation omitted). In short, "[t]here is simply no case law, statutory authority, or basis in the constitution to show that without [this power], a court will cease to exist or it will not be able to exercise its jurisdiction in an orderly and efficient manner." *Sun Prairie*, 226 Wis. 2d at 754. Moreover, the power of the court to reduce probation is not found in history and so cannot be a part of the power a "court" is understood to necessarily have, as the Constitution uses that term, *Barland*, 216 Wis. 2d at 590, 592; *see Braunsdorf*, 98 Wis. 2d at 573. "Probation [itself] was unknown to Wisconsin law when the language of sec. 973.15(1) came into our statutes" in 1909. *Drinkwater*, 69 Wis. 2d at 68; Conrad, *supra*, at 458–59. Thus, *a fortiorari*, reducing a term of probation could not be a part of Wisconsin law at the time "the framers" wrote the Constitution. *Kading*, 70 Wis. 2d at 518.

More broadly, there can be no claim that justice *requires* reductions in probation outside of circumstances contemplated by the Legislature. "Probation" itself "comes as an act of [legislative] grace to one convicted of a crime." *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 547, 185 N.W.2d 306 (1971). It is "not a matter of right, rather it is a privilege." *Edwards v. State*, 74 Wis. 2d 79, 83, 246 N.W.2d 109 (1976);

*see also State ex rel. Greer v. Wiedenhoeft*, 2014 WI 19, ¶ 39, 353 Wis. 2d 307, 845 N.W.2d 373. Indeed, the "legislature not only can specify when a person convicted of a particular crime may be eligible for [probation] but can also disallow or abolish the right to [probation] for any or all crimes." *State v. Borrell*, 167 Wis. 2d 749, 764, 482 N.W.2d 883 (1992) (considering related concept of parole). Accordingly, a defendant receiving a term of probation—of any duration—instead of a sentence of confinement is receiving not "his due," but society's mercy. *See generally* David Miller, *Justice*, Stanford Encyclopedia of Philosophy (Fall 2017), https://plato.stanford.edu/archives/fall2017/entries/justice/.

Nor does the power to reduce probation fall within the "three areas" of inherent authority that this Court has "generally" recognized. *Henley*, 2010 WI 97, ¶ 73. As for the first "area," reducing the term of probation does not help the judiciary "guard against actions that would impair [its] powers or efficacy," *id.*, since probation is unrelated to such matters, unlike court-personnel or facilities issues. It also does not relate to the second "area," "regulat[ion] [of] the bench and bar," *id.*, like judging the reasonableness of attorneys' fees.

The power to reduce probation also falls outside of the third area—"the efficient and effective functioning of the court," or the "fair[ ] administ[ration] [of] justice." *Id.* Reducing a term of probation does not assist the court in disposing of cases like the contempt power, *Smith*, 65 Wis. 2d

at 645, the power to dismiss complaints under certain circumstances, or the power to appoint counsel for indigent parties, *Sun Prairie*, 226 Wis. 2d at 750. Each of those powers enables the courts to "efficient[ly] and effective[ly]" resolve cases by, for example, removing an impediment like an obstructionist party or witness. Rather, the purported inherent power to reduce a term of probation *adds* new matters to the court's docket not contemplated by the Legislature. *Compare* Wis. Stat. § 973.09(3)(d). These additions would delay other matters core to the courts' purpose and specifically authorized by the Legislature, such as bail hearings, *id.* § 969.01, criminal trials, *id.* § 972.02, and sentencing, *id.* § 973.01.

In this way, the power to reduce probation fails to be "inherent" for the same reason as the "power to order a new trial in the interest of justice" that the Court considered in *Henley*. 2010 WI 97, ¶ 76. Both powers would "open the courts to claim after claim," invite "unlimited [and] duplicative hearings," and inevitably delay the "fair administration of justice" for other litigants. *See id.* ¶¶ 75–76. And while this Court has said generally that "probation . . . [is] within powers constitutionally granted to the judiciary," *Horn*, 226 Wis. 2d at 647–48, this must be understood as the power to impose probation as it "exists" in the "statutes," *id.* at 646, 648 ("Without [] statutory authority, a court could not place a defendant on probation." (citation omitted)). That is, the courts have the inherent

authority to resolve individual cases within the criminal disposition "prescribe[d]" by the Legislature. *Id.* at 640; *see also id.* at 646 ("[t]he fashioning of a criminal disposition is not an exercise of broad, inherent court powers" (citation omitted)); *accord Henley*, 2010 WI 97, ¶ 75 n.29 ("the legislature can impose reasonable limitations upon the remedies available to parties" (citation omitted)).

Finally, that the circuit courts lack inherent authority to *reduce* a term of probation does not mean that the court lacks the inherent authority to correct "clerical errors" in judgments of probation, even if such corrections "reduce" the probationer's term. Circuit courts possess the inherent authority to "correct clerical errors [in their judgments] at any time," in any type of case. *See Prihoda*, 2000 WI 123, ¶ 17, n.9 (citing a sentencing judgment, a foreclosure judgment, and a criminal judgment as examples); *accord Greer*, 2014 WI 19, ¶ 53 (holding that a "mere clerical error by an agency" with respect to a probation term could not "undermine[ ]" the circuit court's judgment of probation). The correction of a clerical error in a judgment of probation, even one that purports to impose a longer term of probation than the court desired, is not a *reduction* of the term of probation at all. Rather, it is a "correcti[on]" that brings the written manifestation of the judgment in line with the court's actual, original judgment itself. *See Prihoda*, 2000 WI 123, ¶ 15.

4. Schwind's counterarguments are mistaken.

*First*, Schwind primarily argues that circuit courts have the inherent power to reduce probation because they have the inherent power, under *Hayes*, to reduce sentences. 46 Wis. 2d at 101; Opening Br. 7. In that case, this Court held that "a trial court may exercise its inherent power to change and modify its judgments after the execution of the sentence has commenced and the term [of court has] ended," so that "unjust sentence[s]" may "be corrected." *Hayes*, 46 Wis. 2d at 101, 105; *see infra* Part II (detailing post-*Hayes* jurisprudence defining the limited circumstances under which sentences may be reduced).

*Hayes* should not be extended to probation for a variety of reasons. As an initial matter, *Hayes* itself suggests that its reasoning is limited to sentences, not to probation. The *Hayes* Court set out to interpret "the implied powers of a trial court over its judgment[s] [imposing criminal sentences]," which it contrasted with "a statutory power to grant probation conferred by [the Legislature]." 46 Wis. 2d at 101. This distinction makes sense as a matter of history: "the authority to prescribe penalties for crimes was not exclusively a legislative power at the time of the adoption of the constitution," but rather it was shared with the judiciary. *Borrell*, 167 Wis. 2d at 769–70. Probation, on the other hand, is purely statutory. *See Horn*, 226 Wis. 2d at 648.

In any event, this Court made this suggestion an explicit holding in *Drinkwater*, where it declined to extend *Hayes* to the probation context. 69 Wis. 2d 60. There, this

Court considered whether a court had the inherent authority to order that a probationer, who had violated his probation by committing a second crime, serve the sentence for his first crime consecutive to, rather than concurrent with, the sentence for that second crime. *Id.* at 63, 65–66. In holding that courts lack such inherent authority, this Court held "that the inherent powers of a trial court recognized in [*Hayes*] are inapplicable to the probation situation." *Id.* at 66 n.1. It further explicitly "confined" the "holding[ ]" of *Hayes* "to the factual framework in which the case[ ] arose," specifically to the modification of sentences. *Id.*

Further, subsequent to *Drinkwater*, this Court in *Machner* again declined to extend *Hayes* beyond sentencing. 101 Wis. 2d at 83. There, the Court refused to grant the circuit courts the inherent authority to "vacate a sex crimes commitment [judgment]" and impose a sentence of confinement. 101 Wis. 2d at 82–83. According to the Court, *Hayes* applies only to "correct errors . . . in invalid *sentences*" or to take account of "[new] factors not known or overlooked at the time of the imposed *sentencing*." *Id.* at 83 (emphases added). Yet, the "commitment" at issue "was *not* a sentence," thus the Court "did not think the rule of *Hayes* [was] applicable." *Id.* (emphasis added). Like the commitment in *Machner*, "[p]robation itself is generally not a sentence." *Horn*, 226 Wis. 2d at 647. "While it is true that the word 'sentence' or 'sentencing' may be . . . used in a more general sense" to include probation, "'sentence' is a legal term and

should be given its legal meaning when used in the statutes and the law unless there are strong indications the term was used in [this] general sense." *Prue v. State*, 63 Wis. 2d 109, 116, 216 N.W.2d 43 (1974). No such "strong indications" exist here to suggest that *Hayes*' use of "sentence" includes probation.

Finally, *Hayes* is at odds with this Court's modern inherent-authority jurisprudence and thus should not be extended to the context of probation. *Accord Henley,* 2010 WI 97, ¶ 74 & n.28 (recognizing shift in inherent-authority jurisprudence from a "broad view" some "decades" ago to the current "more modest" view). As explained above, this Court recognizes a power as inherent in the circuit courts when it is "needed to maintain the courts' dignity, transact their business, and accomplish the purposes of their existence." *Id.* ¶ 73 (citation omitted). Yet *Hayes* made no mention of this inherent-authority standard—instead, it began its analysis with the "question [of] what limitation should be placed upon [the] power [to reduce sentences] in the interest of promoting justice in the administration of criminal law." 46 Wis. 2d at 101.

*Second*, Schwind attempts to frame this case as simply a question of "the power of the courts to modify their own judgments when necessary to accomplish their judicial functions." Opening Br. 6. But the question here is *whether* a circuit court has the inherent authority to modify a judgment of probation without express statutory

authorization, despite the fact that its power to issue such judgments depends solely on "statutory authority." *Horn*, 226 Wis. 2d at 648. Schwind never attempts to explain how a court's reducing a probation term without statutory authorization somehow accomplishes a "judicial function," when "fashioning . . . criminal disposition[s] is not an exercise of broad, inherent court powers." *Id.* at 646 (citation omitted).

*Third*, Schwind argues that the lack of inherent power to reduce a probation term leads to absurd results, since the court has the statutory authority to modify the "terms and conditions" of probation. Opening Br. 9; *see* Wis. Stat. § 973.09(3)(a). Far from absurd, that statutory authority confirms that the power to reduce a probation term cannot possibly be one "without which a court cannot properly function." *Henley*, 2010 WI 97, ¶ 73 (citation omitted). Specifically, with Subsection 973.09(3)(a), the Legislature has expressly authorized a court to eliminate "terms and conditions" on a probationer's probation. That statutory authority functionally performs the same "proper[ ] function" as the purported power to reduce a term of probation: alleviating the burden of probation on deserving probationers. Schwind characterizes this power as allowing the courts to impose "merely the illusion of supervision," Opening Br. 9, but that is obviously not true, since a circuit court retains the power to subsequently add "terms and conditions" in an appropriate case, *see* Wis. Stat. § 973.09(3)(a).

*Fourth*, and relatedly, Schwind argues that this inherent power is necessary because some probationers may be required to travel out-of-state for their employment, which requires the consent of "another state" while the probationer is on probation, under the Interstate Compact for Adult Offender Supervision. Opening Br. 8–9 (citing Interstate Commission for Adult Offender Supervision Rule § 3.101).[4] A court reducing the probationer's term and releasing him from probation in these circumstances would make achieving this out-of-state employment easier, Schwind argues. *See* Opening Br. 8–9. But this Compact already makes some provision for "[e]mployment transfer[s] of the offender to another state," Int'l Comm'n for Adult Offender Supervision Rule § 3.101-1(a)(4), and, as noted above, Subsection 973.09(3)(a) allows the court to modify the "terms and conditions" of a deserving probationer's probation, which would include employment-related conditions.

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[4] The "Interstate Commission for Adult Offender Supervision" (ICAOS) oversees the operations of the Interstate Compact for Adult Offender Supervision, a formal agreement between "[a]ll 50 states" and other federal territories generally governing the coordination of supervision of probationers across state lines. *See* Wis. Dep't Corrections, *About the Interstate Commission for Adult Offender Supervision*, https://doc.wi.gov/Pages/AboutDOC/CommunityCorrections/InterstateCompact.aspx. The Rules of the ICAOS are binding in Wisconsin. Wis. Stat. § 304.16(14)(b)1; *see generally* Int'l Comm'n for Adult Offender Supervision, *ICAOS Rules* (Mar. 2018) (current version), https://www.interstatecompact.org/sites/interstatecompact.org/files/pdf/legal/ICAOS-2018-Rules-ENG.pdf.

*Fifth*, Schwind makes reference to "clerical error[s]," Opening Br. 8, but courts always have the inherent authority to correct such errors, wherever it makes them, *supra* p. 26. Accordingly, that a court may make such an error in a judgment of probation that, upon correction, "reduces" the erroneously high probation term in the judgment provides no support to Schwind. That correction merely brings the written judgment in line with the court's actual pronouncement, *Prihoda*, 2000 WI 123, ¶ 17 n.9—it is not the court reconsidering and then reducing the probation term in light of a defendant's rehabilitation. *Compare* Opening Br. 6.

### B. Even If The Circuit Courts Once Had Inherent Authority To Reduce Probation, Subsection 973.09(3)(d) Is A "Reasonable Regulation" That Must Be Followed

1. When this Court recognizes a power as inherent, it does not then automatically invalidate all legislative or executive action purporting to regulate that power. Rather, under the "separation of powers doctrine," this Court recognizes that some of the judiciary's inherent authority is a "shared power[ ]," which means that the Legislature or Executive may regulate the exercise of the power so long as such regulation does "not unduly burden or substantially interfere with the judiciary." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 546–47, 576 N.W.2d 245 (1998); *see generally* Lynn Laufenberg & Geoffrey Van Remmen, *Courts: Inherent Power and Administrative Court Reform*, 58 Marq. L. Rev.

133, 135 (1975) ("[t]he source of [inherent] power is found in the constitutional separation of powers principle").[5] Restated, another branch may "subject" the Court's shared inherent authority to "reasonable regulation," so long as it does "not withdraw the power." *Horn*, 226 Wis. 2d at 651 (citation omitted); *see also Sun Prairie*, 226 Wis. 2d at 748.

So, most relevant to the case here, this Court has held that the power to *revoke* probation upon a probationer's violation of a condition is such a "shared power[ ]." *Horn*, 226 Wis. 2d at 647–48. The power to revoke probation "falls within" the judiciary's broader "constitutionally granted" power to "impose a criminal penalty" or "impose criminal dispositions." *Horn*, 226 Wis. 2d at 647, 651–52. Yet, "[b]ecause probation is so closely related to sentencing as a possible criminal disposition," "administration of probation revocation [is also] within powers constitutionally granted to the legislature." *Id.* at 647. For this reason, this Court upheld the Legislature's "vesting the administration of . . . probation revocation in the executive branch," since it did not "unduly burden or substantially interfere with [ ] the judiciary's [broader] constitutional function to impose criminal

[5] If the Court concludes that a particular aspect of inherent authority is "exclusive inherent authority" not shared with the other branches, the "court may" still "abide by [a] statute" purporting to regulate within that zone "if it furthers the administration of justice." *Flynn*, 216 Wis. 2d at 546–47, 550. However, recognition under those circumstances is "as a matter of comity and courtesy rather than acknowledgment of power." *Id.* at 546.

penalties." *Id.* at 651. Further, the Legislature had not completely withdrawn the specific power of probation revocation, given that the courts still retained "certiorari" review of the Department's decision. *See id.* at 652.

2. Even if the power to reduce a term of probation did fall within the circuit courts' inherent authority, this power would be a "shared power[ ]" with the Legislature, and Subsection 973.09(3)(d)'s limitation is a "reasonable regulation" that does not "withdraw the power" from the judiciary, *Smith*, 65 Wis. 2d at 645, or "unduly burden or substantially interfere with [it]," *Flynn*, 216 Wis. 2d at 546–47.

As the Court recognized in *Horn*, the Legislature has the power to define the "possible criminal disposition[s]" for "criminal defendants," which includes "sentencing" and "probation." 226 Wis. 2d at 647. Accordingly, "probation and administration of probation revocation are within powers constitutionally granted to the legislature." *Id.* This constitutional power over "probation" necessarily includes power over defining when a term of probation may be reduced. *See Dowdy II*, 2012 WI 12, ¶ 42 (considering whether the Legislature granted courts this power in Subsection 973.09(3)(a)).

Exercising this shared power, the Legislature in Subsection 973.09(3)(d) reasonably required that six elements be present before a court may reduce probation. Specifically, (1) the "department" must "petition[ ]" the court;

(2) the "probationer" must have "completed 50 percent" of the term of probation; (3) the "probationer" must have "satisfied all [of the court's] conditions of probation"; (4) the "probationer" must have "satisfied all [of the department's] rules and conditions of probation"; (5) the "probationer" must have paid the conviction's "financial obligations"; and (6) the "probationer" must not be " required to register [as a sex offender]." Wis. Stat. § 973.09(3)(d)1–6. When these conditions are met, the "court may modify a person's period of probation" in its discretion. *Id.* § 973.09(3)(d).

Subsection 973.09(3)(d) is a "reasonable regulation" of the power to reduce a term of probation that ensures that only the most deserving of probationers apply for, and receive, a reduction. By conditioning the reduction on the Department's petition, *id.* § 973.09(3)(d)1, the Legislature ensures that the officials most familiar with a probationer's record of compliance agree that it merits a reduction. *Accord Horn*, 226 Wis. 2d at 648 ("the executive branch has the authority to administer probation"). By limiting reductions to probationers with at least a 50% completion of their term, Wis. Stat. § 973.09(3)(d)2, the Legislature prevents the award of a reduction before some meaningful "rehabilitation" could occur or before the community is adequately "protect[ed]." *See Sepulveda*, 119 Wis. 2d at 554 (citation omitted). By requiring compliance with the court's "conditions of probation," the Department's "rules and conditions" of probation, and the "financial obligations" of the conviction, Wis. Stat.

§ 973.09(3)(d)3–5, the Legislature prevents an award of a reduction to probationers who have not honored their probation requirements. Finally, by categorically excluding sex-offender registrants from obtaining a reduction, *id.* § 973.09(3)(d)6, the Legislature ensures that the community receives the full protection of probation, while the probationer experiences its full rehabilitative effects, when the probationer's crime is particularly serious, *see Sepulveda*, 119 Wis. 2d at 554 (citation omitted); *accord* Wis. Stat. § 973.09(1)(c) (probation statutorily unavailable for those "convicted of any crime which is punishable by life imprisonment"). These six requirements, far from "unduly burden[ing] or substantially interfer[ing] with" the judiciary's power, facilitate the state resources needed to consider a reduction to the most deserving of probationers.

Plainly, Subsection 973.09(3)(d) does "not withdraw the power" to reduce a term of probation from the court, *Horn*, 226 Wis. 2d at 651 (citation omitted); rather, it leaves the ultimate decision to reduce probation with the court itself, Wis. Stat. § 973.09(3)(d) ("court may modify"). Indeed, this probation regulation is less restrictive of the court's power than the probation-revocation regulation this Court upheld in *Horn*. 226 Wis. 2d at 650. The regulation there allowed the court only certiorari review of the Department's decision to revoke probation. *Id.* at 652.

## II. If The Circuit Courts Have Authority Beyond Subsection 973.09(3)(d) To Reduce Probation, The Standard Governing Sentence Modification Should Apply, And Schwind Cannot Meet That Standard

If the Court concludes that the circuit courts have the inherent authority to reduce a term of probation outside of Subsection 973.09(3)(d), *but see supra* Part I, it should hold that the standard governing the proper exercise of that authority is the same standard governing circuit courts' inherent authority to modify sentences under *Hayes*.

### A. The Strict Standard For Modifying A Sentence Should Apply To Probation Reduction

1. As discussed above, this Court has held that the "inherent authority" of "circuit court[s]" includes the power "to modify a sentence," *State v. Crochiere*, 2004 WI 78, ¶ 12, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by Harbor*, 2011 WI 28 (citing *Hayes*, 46 Wis. 2d at 101–02), but that this power may only be "exercised within defined parameters," *id.*, or "certain constraints," *Harbor*, 2011 WI 28, ¶ 35.

This Court has identified three such "defined parameters" or "certain constraints" within which a court may modify a sentence: First, a court may "correct formal or clerical errors or an illegal or a void sentence." *Crochiere*, 2004 WI 78, ¶ 12 (citations omitted). Second, a court may "modify a sentence if a new factor is presented." *Id.* And

third, a court may modify a sentence that is "unduly harsh or unconscionable," *id.* (citations omitted), if it "set[s] forth its reasons why it concludes the sentence originally imposed was unduly harsh or unconscionable," *Cresci v. State*, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979). In all, these limitations exclude the court from modifying a sentence based on "reflection alone or simply because it has thought the matter over and has second thoughts." *State v. Kluck*, 210 Wis. 2d 1, 6–7, 563 N.W.2d 468, 470 (1997).

The Court's strict limitation of the inherent power to modify sentences is necessary "in the interest of promoting justice in the administration of criminal law." *Hayes*, 46 Wis. 2d at 101. Specifically, these limitations promote the bedrock principle of finality—the reality that "[a]t some point the judicial system must close old files and turn to the future." *United States v. Keane*, 852 F.2d 199, 203, 206 (7th Cir. 1988); *accord Henley*, 2010 WI 97, ¶ 75 ("the circuit court's authority to revisit old arguments must end somewhere"). In any system of justice, "there must be some finality to the imposition of a sentence," *Crochiere*, 2004 WI 78, ¶ 12, lest "the State, crime victims, and others" suffer the "inequitable results" that come from "open[ing] cases that have long been thought . . . to have been final," *State ex rel. Brown v. Bradley*, 2003 WI 14, ¶ 25, 259 Wis. 2d 630, 658 N.W.2d 427. Too lax a standard to modify sentences directly harms this essential interest. *See Crochiere*, 2004 WI 78, ¶ 12.

Further, a standard that is too easily met creates "the possibility of opening the floodgates" of sentenced defendants petitioning for meritless modification. *State v. Trujillo*, 2005 WI 45, ¶ 28, 279 Wis. 2d 712, 694 N.W.2d 933. This flood of sentence-modification litigation would divert the court's "scarce time" from its more fundamental duty: "resolv[ing] the claims of those who have yet to receive their *first* decision." *Keane*, 852 F.2d at 203; *accord Henley*, 2010 WI 97, ¶ 75 ("defendants do not deserve unlimited, duplicative hearings"). This same concern has previously motivated the Court to adopt a "more modest . . . inherent authority" that does not "open the courts to claim after claim." *Henley*, 2010 WI 97, ¶¶ 74, 76.

2. Here, this Court should hold that the same strict standard governing the inherent authority to modify sentences governs the inherent authority to reduce a term of probation outside of Subsection 973.09(3)(d)'s limitations (should the Court conclude, contrary to Part I, *supra*, that such inherent authority exists).

Probation reduction involves the same finality concerns as sentence modification. *See Henley*, 2010 WI 97, ¶ 75 ("principle of finality" essential to "any conception of the fair administration of justice"); App. 28 ("the policy favoring finality in sentencing logically applies to the probationary component as well" (citation omitted)). Defendants placed on probation, like defendants sentenced to imprisonment, have harmed the "the State, crime victims, and others" through

their proven criminal conduct. *Bradley*, 2003 WI 14, ¶ 25; *e.g.*, *supra* pp. 6–7 (documenting Schwind's sexual assaults of the victim here). Accordingly, unsettling the finality of a probationer's criminal judgment to consider a reduction of probation causes the same "inequitable results" that come from modifying sentences. *Bradley*, 2003 WI 14, ¶ 25. Indeed, probation reduction implicates *stronger* finality interests than sentence modification, given that probationers enjoy "supervised, conditional freedom," Cohen, *supra*, § 1:2, unlike those sentenced to incarceration, *see Keane*, 852 F.2d at 202 (prison's "ongoing deprivation of liberty" "justifies" "relaxation of the finality rules").

Probation reduction also implicates a stronger "floodgates" concern than sentencing modification. As of 2017, there are 45,054 probationers in Wisconsin, including 10,689 new probationers added in that year alone. Div. of Community Corrections, Wis. Dep't of Corrections, *2017 A Year in Review* 4–5 (Jan. 2018), https://doc.wi.gov/DataResearch/DataAndReports/DCCYearInReview.pdf.[6] Each of these probationers could conceivably petition the circuit court for a reduction in his term of probation, which significantly outnumbers the 23,519 current inmates in Wisconsin

[6] This Court may take judicial notice of reports from the Department of Corrections. *See Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶¶ 18–28 & n.7, 328 Wis. 2d 469, 787 N.W.2d 22 (taking judicial notice of Legislative Audit Bureau report).

conceivably eligible to petition for sentence modification. Wis. Dep't of Corrections, *Inmate Profile 2017* at 2 (May 2018), https://doc.wi.gov/DataResearch/DataAndReports/InmateProfile.pdf.[7] This Court holding that sentence modification's strict standard applies equally to probation-reduction claims would avoid this potential floodgates concern. Additionally, application of this settled body of law to this area would also relieve the lower courts of the burden of developing a new jurisprudence to govern these claims.

3. Schwind argues that the standard governing probation reduction is simply "for cause," which means "reducing the length of probation" is justified when it "will advance the defendant's rehabilitation and the protection of society." Opening Br. 11–12. His arguments in favor of this standard are unpersuasive.

*First*, Schwind's "for cause" standard provides no guidance to the circuit courts to exercise their inherent authority. *Harbor*, 2011 WI 28, ¶ 35 ("certain constraints"); *accord Henley*, 2010 WI 97, ¶¶ 75–76 (no inherent authority to "order a new trial in the interest of justice at any time for any reason"). Rather, it simply parrots the dual purposes of probation—rehabilitation and protection of the public. *Sepulveda*, 119 Wis. 2d at 554. Like the inherent-authority standard this Court rejected in *Henley*, Schwind's standard "effectively [ ] extend[s] an ongoing invitation to litigants to

[7] *See supra*, p. 40 n.6.

keep asking the circuit courts to revisit the same arguments over and over again, with no stopping point, much less a sensible one." 2010 WI 97, ¶ 74.

*Second*, Schwind claims that his boundless "for cause" standard is appropriate because probation does not implicate *any* finality interests, asserting that "[f]inality is unimportant" in this context. Opening Br. 12. This Court has taken the exact opposite view: "*any* conception of the fair administration of justice *must* include the principle of finality." *Henley*, 2010 WI 97, ¶ 75 (emphases added). The court imposing a term of probation is part of "the fair administration of justice," thus probation also "must include the principle of finality."

*Third*, Schwind argues that the "sentence modification standard is unsuitable" for reductions in probation because "[s]entencing and probation have different purposes." Opening Br. 11. Specifically, the purposes of sentencing are "deterrence, retribution, rehabilitation, and segregation," while the purposes of probation are "rehabilitation" and "protecting the public without imprisoning the defendant." Opening Br. 12. But the "purposes" of probation are in line with the purposes of sentencing. A court orders probation with the hope that the probationer will "alter old behavior patterns and lead a law-abiding life," *Huggett v. State*, 83 Wis. 2d 790, 798, 266 N.W.2d 403 (1978), without having to experience the full effects of sentencing, *see* Wis. Stat. § 973.09(1)(a) (court "withhold[s]" or "stay[s]" full criminal

sentence in favor of probation). Given the harmony between the purposes of these two dispositions, the "sentence modification standard" cannot be "unsuitable" for probation-reduction claims. *Accord State v. Evans*, 77 Wis. 2d 225, 231, 252 N.W.2d 664 (1977) (characterizing "imprisonment" as a "more severe punishment" than probation), *abrogated on other grounds by State v. Spaeth*, 2012 WI 95, 343 Wis. 2d 220, 819 N.W.2d 769.

*Finally*, Schwind argues that a defendant's successful rehabilitation from a probation term justifies cutting short that term. Opening Br. 13–14. This Court has squarely rejected such an argument before: "[I]t flies in the face of reason and logic to modify a [disposition] that is achieving its purpose." *Kluck*, 210 Wis. 2d at 10. Probationers that "mak[e] rehabilitative progress" are "achieving [the] purpose" of probation, and "[p]olicy does not dictate modifying a [disposition] that is successfully achieving rehabilitation." *Id.* at 10–11.

### B. As The Court Of Appeals Held, And As Schwind Impliedly Concedes, He Cannot Satisfy This Strict Standard

As the Court of Appeals held, *see* App. 28–29 & n.3, and as Schwind impliedly concedes, *see* Opening Br. 5, 14 (failing to challenge Court of Appeals' holding on this score), he cannot satisfy *Hayes*' standard for modifying sentences, should it apply to probation reductions. He is not complaining that his judgment of probation contains a "clerical error[ ]" or

is "illegal," *Crochiere*, 2004 WI 78, ¶ 12. Neither could he show that a "new factor is present[ ]," *id.*—his only claim for probation reduction is based on his rehabilitation since his probation term began, *see* R.49:10–14, but "courts of this state have repeatedly held that rehabilitation is not a 'new factor' for purposes of sentence modification," *Kluck*, 210 Wis. 2d at 7. And, finally, he has made no argument at any stage of this proceeding that his judgment of probation is "unduly harsh or unconscionable." *Crochiere*, 2004 WI 78, ¶ 12 (citation omitted). Therefore, if the standard for modifying sentences applies to probation-reduction claims, Schwind's claim easily fails.

## III. If The Circuit Courts Have Authority Beyond Subsection 973.09(3)(d), And A Standard Lower Than The Sentence-Modification Standard Applies, A Remand Is Required

If the Court concludes that circuit courts have the authority to reduce probation beyond that provided in Subsection 973.09(3)(d), *but see supra* Part I, and that a standard lower than the sentence-modification standard applies (like Schwind's proposed "for cause" standard), *but see supra* Part II, then this Court will have authorized circuit courts to reduce a probationary term guided by only an exceedingly lax, discretionary standard, *but see Henley*, 2010 WI 97, ¶¶ 75–76. That holding would be particularly inappropriate here, given that the Legislature already clearly defined in Subsection 973.09(3)(d) the limited circumstances

under which a circuit court may reduce a probation term. *Accord Henley*, 2010 WI 97, ¶ 75 n.29 ("the legislature can impose reasonable limitations upon the remedies available to parties" (citation omitted)).

Nevertheless, if the Court authorizes the adoption of such a lax standard, then a remand to the circuit court to first apply this standard in its discretion would be required. *See Hayes*, 46 Wis. 3d at 106 ("the inherent power of the court must be exercised within the limits of sound [ ] discretion"). On remand, the State would have powerful arguments to support a denial of Schwind's request for a reduction in his term of probation. As Schwind "concede[s]," he was convicted of "very serious offenses," Opening Br. 2—repeated sexual assault of a child in his care, *see* Wis. Stat. § 948.025(1), (2m) (1999–2000); incest with a child, *id.* § 948.06(1) (1999–2000); and sexual assault of a child, *id.* § 948.02(1) (1999–2000). Further, Schwind committed material violations of his probation conditions by having unauthorized "physical contact with his victim," having "sexual contact with an animal," having "unsupervised contact with children," and "fail[ing] an intensive sex offender treatment program." R.27:1. Finally, Schwind's current probation conditions are not unduly burdensome, given that he must only meet with a probation agent "[o]nce a month" for "[l]ess than five minutes," and that he is no longer required to attend therapy. R.54:5–6. In light of these arguments, the circuit court would

be well within its discretion to deny Schwind's motion on remand, should the Court conclude that a remand is required.

## CONCLUSION

This Court should affirm the decision of the Court of Appeals.

Dated: November 30, 2018.

Respectfully submitted,

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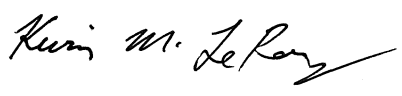

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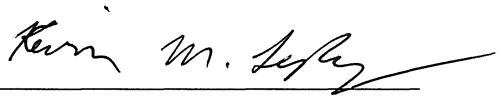
## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,792 words.

Dated: November 30, 2018.



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