STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP809-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JUNIOR L. WILLIAMS-HOLMES,

Defendant-Appellant-Petitioner.

On Review of a Decision from the Court of Appeals, District II, Affirming a Judgment of Conviction and Order Denying Postconviction Relief in the Kenosha County Circuit Court, the Honorable Bruce Schroeder, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. The condition of supervision must require agent-permission, not court-permission, for Mr. Williams-Holmes to live with particular women or children.

The State concedes that the condition imposed by the circuit court is indefensible, and makes no attempt to defend it. (Respondent's Brief at 5, 12–13.) Instead, it asks this court to affirm a modified version of the condition that was never imposed by the circuit court. And although that modified condition deviates meaningfully from the imposed condition, the State urges this court to give the circuit court no opportunity to weigh-in on whether to impose the modified condition.

This court should reverse because the condition—as actually ordered by the circuit court, or with the State's proposed modifications—impinges on the Department of Corrections' exclusive authority to administer probation and extended supervision. If this court concludes that the modified version of the condition does not intrude upon the DOC's authority, it should remand to the circuit court to decide whether to impose the condition, instead of forcing the condition on the circuit court.

A. The State defends a condition of supervision that the circuit court never actually imposed, but even the rewritten condition calls for the impermissible administration of Mr. Williams-Holmes' supervision by the court.

The State's refusal to defend the condition actually imposed by the circuit court should be deemed a concession. *State ex rel. Blank v. Gramling*, 219 Wis. 196, 262 N.W. 614 (1935) ("Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute."). The circuit court wanted to decide which specific women and children Mr. Williams-Holmes could live with through informal communication with the supervising agent. (64:3–4; App. 20–21.) Recognizing the impermissibility of this scheme,[1] the State asks this court to reinvent the condition—contrary to the circuit court's intent—by replacing the informal communication with the statutory processes for modifying terms of supervision. This court should decline the State's invitation to alter the circuit court's condition and reverse because the condition that was imposed violates the statute.

But even the State's proposed modifications cannot save the condition because the altered version still calls for the impermissible administration of probation by the court. The altered reading of the condition is simply an end-run around the DOC's

[1] A conclusion also reached by the court of appeals. *State v. Williams-Holmes*, 2022 WI App 38, ¶17, 404 Wis. 2d 88, 978 N.W.2d 523.

exclusive authority to administer conditions of supervision. The court cannot use its authority to modify conditions of supervision to usurp the DOC's authority, just as it cannot use informal communication with the DOC to usurp that authority. If the circuit court is using the modification process to pick which women and children Mr. Williams-Holmes can live with, it is still "administering" supervision.

The circuit court's condition—even the modified version that the State seeks to defend—requires the court to make routine decisions about which specific women or children Mr. Williams-Holmes can live with. Mr. Williams-Holmes will have to petition the court, and he will have to convince the judge that he should be allowed to live with a particular woman or child. And he will have to ask again if he wants to live with a different woman or child. This entails "manag[ing] the affairs of" Mr. Williams-Holmes' supervision, and is thus administering the supervision. *Wisconsin Dep't of Tax'n v. Pabst*, 15 Wis. 2d 195, 201, 112 N.W.2d 161 (1961).

The State—possibly recognizing that this still looks too much like administering supervision—proposes a second modification. It argues that "permission" to live with women and children is something the circuit court will grant *once*, and will allow Mr. Williams-Holmes to live with *any* woman or child. (Respondent's Brief at 14–15.) The circuit court would not make individualized determinations about which women or children Mr. Williams-Holmes could live with. Instead, Mr. Williams-Holmes would "obtain a modification to his supervision conditions that will

allow him to live with any women or children he chooses." (Respondent's Brief at 14-15.)

Indeed, this modification minimizes the administration of supervision, but it takes the condition even further from what the circuit court intended. This tortured version of the condition even conflicts with the reading proposed by the court of appeals, which held that "permission" to live with "*any particular*" woman or child had to be obtained through the statutory process for modifying conditions. *Williams-Holmes*, 2022 WI App 88, ¶23 (emphasis added). This modification would also bar Mr. Williams-Holmes from living with specific women or children that the circuit court or his agent might grant permission to live with (e.g., his mother), until he could prove to the court that he should be allowed to live with *any* women or children. The State cannot save the circuit court's illegal condition by forcing an interpretation that is so at odds with the circuit court's intent.

The State complains that the cases cited by Mr. Williams-Holmes don't address the court's authority to modify conditions, noting specifically *Horn*,[2] *Burchfield*,[3] and *Schell*.[4] (Respondent's Brief at 16.) *Horn* and *Burchfield* held that the DOC has exclusive authority to administer supervision. *Horn*, 226 Wis. 2d at 650; *Burchfield*, 230 Wis. 2d at 349. The State has conceded this point: "the authority to administer probation or extended supervision lies exclusively with

[2] 226 Wis. 2d 637, 594 N.W.2d 772 (1999)
[3] 230 Wis. 2d 348, 602 N.W.2d 154 (Ct. App. 1999).
[4] 2003 WI App 78, 261 Wis. 2d 841, 661 N.W.2d 503.

the [DOC]." (Respondent's Brief at 5.) If the DOC's authority is *exclusive*, the circuit court cannot use the power to modify conditions to invade that exclusive authority. Thus, while *Horn* and *Burchfield* do not expressly address the statutory processes for modifying conditions, they recognize the statutory limit on the circuit court's use of that power.

The State's argument is even more directly contradicted by *Schell*, where the court specifically addressed a circuit court attempting to alter a condition of supervision. There, the court was prohibited from modifying its order for condition time to require that the time be served in the jail, as opposed to home monitoring. The appellate court held that the sheriff had the exclusive authority to decide how the condition time would be served, regardless of the circuit court's intent, so the circuit court could not order the modification. 2003 WI App 78, ¶¶5, 16, 18.

The circuit court in *Schell* could not modify the condition of probation to circumvent the sheriff, just as the circuit court here cannot modify the condition to circumvent the DOC. The statutes require the DOC to administer supervision, just as they required the sheriff in *Schell* to decide where the defendant would serve her condition time. In both *Schell* and this case, the circuit court is prohibited from using its statutory authority to usurp the exclusive authority of those agencies tasked with administering the conditions of supervision.

Finally, although the state concedes at the outset that this case involves a legal issue to be reviewed de novo (Respondent's Brief at 9), it

repeatedly invokes the circuit court's discretion, and asks this court to affirm the circuit court's exercise of discretion. (Respondent's Brief at 5, 9, 10, 16, 18). But to reiterate, this appeal has nothing to do with the circuit court's discretion. The issue on appeal is solely whether the circuit court erred—as a matter of law—by empowering itself, instead of the DOC, to make the day-to-day decisions about which women or children Mr. Williams-Holmes can live with.

B. This court should remand to the circuit court if it finds a basis to affirm a condition of supervision that the circuit court never imposed, and reasonably may have elected not to impose.

The State asks this court to affirm a condition that was never imposed by the circuit court, and that the circuit court might reasonably have not imposed. The condition, as modified by the court of appeals and the State, carries with it a series of other consequences that the circuit court may not have wanted to impose. *See State v. Hays*, 173 Wis. 2d 439, 496 N.W.2d 645 (Ct. App. 1992) (discussing the procedural requirements at a hearing to modify supervision conditions); Wis. Stat. § 302.113(7m)(e)2 (limiting a defendant to one annual petition to modify conditions of extended supervision). Therefore, if this court concludes that "permission" could be granted through the statutory process for amending conditions of supervision, it should remand for the circuit court to determine whether to impose a condition consistent with this court's opinion.

The record reflects the circuit court's intent to communicate informally with Mr. Williams-Holmes' agent to decide which particular women or children he could live with. (64:3–4.) The State's second modification—that "permission" be granted once as to all women and children—is plainly incompatible with the circuit court's intent to make case-by-case determinations of Mr. Williams-Holmes housemates. The court also did not envision that every time Mr. Williams-Holmes asked for "permission" to live with a woman or child, it would have to hold a hearing and potentially take testimony. *Hays*, 173 Wis. 2d at 446-47. It is entirely unclear from the record that the circuit court would have imposed the condition as modified by the State, and this court should decline the invitation to force the condition on the circuit court.

The State brushes aside the procedural hurdles involved in formally modifying a condition of supervision. (Respondent's Brief at 17-18.) The State suggests—without any argument—that the procedural protections required a hearing to modify conditions would not apply in many cases. (Respondent's Brief at 17–18.) But *Hays* does not include a carve-out for certain modifications; the procedural protections apply in all cases where a party seeks to modify a condition of supervision. It would be unrealistic for a circuit court to make a threshold decision—*before* knowing what the evidence will show—about which procedural protections apply to each modification hearing.

The state's accusation of "gamesmanship" in Mr. Williams-Holmes' alternative request for remand is

irrational. (Respondent's Brief at 19.) Mr. Williams-Holmes challenged the circuit court's actual condition of supervision, not expecting that the court of appeals would unilaterally modify that condition in contradiction with the circuit court's apparent intent. The condition—as imposed—did not appear to violate Mr. Williams-Holmes rights, as there was no universal ban on his living with women or children. The only defect was that the circuit court was seeking to overstep into the DOC's role. If the condition were properly amended to respect the statutory separation of powers, the condition would be proper because agents are presumed to enforce conditions reasonably. *State v. King*, 2020 WI App 66, ¶55, 394 Wis. 2d 431, 950 N.W.2d 891. But as unexpectedly modified by the court of appeals (and as the State urges the court to affirm), the condition has been rewritten into a ban on living with any women or children. Thus, Mr. Williams-Holmes has not engaged in gamesmanship; he challenged the condition that was actually imposed, and suggests that the circuit court be permitted to weigh-in before its condition is modified by the appellate courts.

The State closes by asking this court to deny remand, so as not to clutter the circuit court's "already overloaded docket." The State ignores that its proposed modification of the circuit court's condition will clutter the circuit court's docket even further with unnecessary hearings to modify conditions of supervision. Instead, the condition should be modified to properly delegate authority between the circuit court and the DOC, as the statutes have already done. The DOC has exclusive authority to administer supervision, and the condition of supervision in this

case should be amended to allow the DOC to exercise that authority.

CONCLUSION

For the reasons stated above, Mr. Williams-Holmes asks that the court reverse, and remand with instructions that the judgment of conviction be modified to require Mr. Williams-Holmes to obtain agent permission to live with any particular women or unrelated children.

If the court concludes the circuit court can choose the particular women or unrelated children Mr. Williams-Holmes can live with through the statutory processes for modifying conditions of probation or extended supervision, he asks that the court reverse and remand for the circuit court to choose whether it wishes to impose a condition consistent with this court's opinion.

Dated this 8th day of February, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in §§ 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,056 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of February, 2023.

Signed:

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