STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2021AP001943-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMMIE L. BLOUNT,

Defendant-Appellant.

On Appeal from an Order Denying Postconviction Relief and a Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Maureen M. Martinez, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

FRANCES REYNOLDS COLBERT
Assistant State Public Defender
State Bar No. 1050435

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
colbertf@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

The circuit court erroneously exercised its discretion when it modified Mr. Blount's sentence in a way that did not achieve the original sentencing goals.

The state's arguments on forfeiture and the court's authority to "reduce" probation (Resp. Br. at §§ I and IV) are red herrings. Mr. Blount squarely raised a postconviction sentence modification claim pursuant to Wis. Stat. § 809.30(2)(h), as he is permitted to do, and if he establishes that sentence modification is warranted, the court clearly has authority to correct its sentence so that it matches the original sentencing goals. *See State v. Gruetzmacher*, 2004 WI 55, 271 Wis. 2d 585, 679 N.W.2d 533. The only question for this Court is whether Mr. Blount has established that there is a new factor and/or whether sentence modification is warranted. For the reasons explained in the opening brief, and below, because the circuit court corrected an error in its original sentence in a manner inconsistent with its original sentencing goals, sentence modification is warranted.

A. Mr. Blount did not forfeit his sentencing error claim because he filed a postconviction motion pursuant to Wis. Stat. § 809.30(2)(h).

Mr. Blount "did not [forfeit][1] the issues presented because he filed a postconviction motion pursuant to Wis. Stat. § 809.30(2)(h). Filing a postconviction motion is a timely means of raising an alleged error by the circuit court during sentencing." *State v. Counihan*, 2020 WI 12, ¶36, 390 Wis. 2d 172, 938 N.W.2d 530 (*quoting State v. Grady,* 2007 WI 81, ¶14 n.4, 302 Wis. 2d 80, 734 N.W.2d 364 and *citing State v. Gallion,* 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197).

The state's cite to *State v. Coffee,* 2020 WI 1, ¶19, 389 Wis. 2d 627, 937 N.W.2d 579 is inapposite. Mr. Blount's request for sentence modification is rooted in the circuit court's erroneous exercise of sentencing discretion. This type of challenge is never brought through the ineffective assistance of counsel rubric. *See e.g. State v. Harris,* 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409; *State v. Gallion,* 270 Wis. 2d 535, ¶44; *State v. Bolstad,* 2021 WI App 81, 399 Wis. 2d 815, 967 N.W.2d 164 and countless others. Defense counsel is not expected – nor would it

[1] Mr. Blount replaced the word "waive" with "forfeit" in the reproduced quotation above. *State v. Grady,* 2007 WI 81, ¶14 n.4, 302 Wis. 2d 80, 734 N.W.2d 364 improperly used the word "waiver" instead of "forfeiture." *See State v. Counihan*, 2020 WI 12, ¶36, 390 Wis. 2d 172, 938 N.W.2d 530 ("[w]hen [*Grady*] spoke of 'waiver,' it was actually referring to 'forfeiture'").

be permitted – to argue with the court about the rationale of the sentence after it is pronounced. The time for a challenge to the exercise of sentencing court's discretion is postconviction, pursuant to Wis. Stat. § 809.30. There is no merit to the argument that Mr. Blount waived his claim.

B. The trial court has authority to restructure Mr. Blount's global sentence.

The state's argument that the circuit court lacked authority to reduce Mr. Blount's probation is also inapt. *State v. Schwind,* 2019 WI 48, 386 Wis. 2d 526, 926 N.W.2d 742 addressed a situation in which the defendant petitioned the court for an early termination of his lawfully imposed period of probation. Schwind did not base his petition on clear mistake, a new factor, undue harshness or unconscionability. Rather, he simply wanted early termination of his lawfully imposed period of probation–despite having not met the conditions set forth in Wis. Stat. § 973.09(3)(d). (Wis. Stat. § 973.09(3)(d) permits a court to reduce a probation period when certain enumerated conditions are met). *Schwind* held that a circuit court may not do this. *Id.*

Mr. Blount, on the other hand, has alleged that the probation disposition in his case was based on an erroneous exercise of discretion and that the court unknowingly overlooked a disposition that would have achieved the original sentencing goals. Mr. Blount has proposed one solution that would meet the original global sentencing objective – shortening the consecutive probation period – but the relief he is

requesting is not limited to that particular solution. He asks only that whatever global disposition is imposed, it achieves the original sentencing objective of two years confinement followed by three years supervision.

Even if this court holds that the circuit court doesn't have authority to modify the term of probation under *Schwind* – which it should not since *Schwind* was addressing a wildly different factual scenario – there are many other ways in which the circuit court could restructure the global disposition in order to achieve its original goals. For example, the court could make the probation disposition in this case concurrent to the sentence in 20CF329 and increase the term of extended supervision in 20CF329 by one year. Or the court could eliminate probation on this case entirely and instead of staying the sentences, impose concurrent jail time, but also add a third year to the extended supervision in 20CF329. These sentence structures would achieve the stated goal of having Mr. Blount's supervision last three years past his confinement time, without technically "reducing" the probation time.

As set forth in more detail below, *Gruetzmacher*, 271 Wis. 2d 585, stands for the proposition that courts may alter dispositions in various files to achieve the intended overall global disposition, even when it includes reducing an otherwise lawfully imposed probation sentence:

> Circuit courts should be allowed to correct obvious errors in sentencing where it is clear that a good faith mistake was made in an initial sentencing pronouncement, where the court promptly recognizes the error and where the court, by reducing an erroneous original sentence on one count and increasing the original sentence on another, seeks to impose a lawfully structure sentence that achieves the overall disposition that the court originally intended. *Id.,* ¶14.

Notably, *Gruetzmacher* involved a reduction of probation on Case 2 as well as the elimination of a 12 year probation disposition in exchange for concurrent prison time. *See infra* at Note 2. This Court should hold circuit courts have inherent authority to modify global dispositions to match the originally intended sentencing goals, even when if doing so includes a shortening of a probation term. But even if this Court declines to so hold, the circuit court unquestionably has inherent authority to alter the consecutive or concurrent nature of the sentence in this case as well as the ability to eliminate probation altogether in exchange for concurrent jail time (while at the same time lengthening the period of the period of extended supervision in 20CF329). *See State v. Harbor,* 2011 WI 48, 386 Wis. 2d 526, 926 N.W.2d 742 (courts have inherent authority to modify sentences). Because the circuit court has authority to restructure the disposition in a manner that would achieve the sentencing goals, the state's argument that the circuit court can't "reduce" probation is inapposite.

C. Sentence modification is warranted under *Gruetzmacher*.

The state argues *Gruetzmacher*, 271 Wis. 2d 585, "a case directly on point," supports its position that the current disposition in this case should stand. (Resp. Br. at 7). But far from supporting the state's position, *Gruetzmacher* exactly illustrates Mr. Blount's position that the global disposition he ultimately receives should reflect the original sentencing pronouncement.

Like the instant case, *Gruetzmacher* involved a sentencing on multiple cases wherein the original pronouncement of the sentence contained a legal impermissibility. At the original sentencing on four files, the circuit court explicitly identified 40 months as the minimum period of confinement appropriate for Mr. Gruetzmacher and then imposed a term of 40 months initial confinement followed by 20 months extended supervision on Case 1 as well as lengthy periods of probation on Cases 2, 3, and 4. *Id.*, ¶7, 10. Shortly after the sentencing hearing concluded, however, the circuit court realized that the maximum possible confinement time on Case 1 was 24 months. *Id.* The circuit court notified the parties and held a hearing to correct the error. *Id.*

At the hearing to correct the errors, the court imposed a sentence of 24 months initial confinement followed by 3 years of extended supervision on Case 1, a slightly shorter period of probation on Case 2, the same lengthy period of supervision on Case 3 and rather than the lengthy period of supervision on

Case 4, it instead sentenced Mr. Gruetzmacher to 40 months initial confinement followed by 20 months extended supervision, concurrent to Case 1. The effect of the new sentence was to create "a lawfully structure[d] sentence that achieve[d] the overall disposition that the court originally intended." *Id.*

Although the effect of the new global disposition was identical to the first one, Mr. Gruetzmacher filed a motion to vacate the new sentence alleging that the change from probation to a prison sentence on Case 4 violated double jeopardy. *Id.* The circuit court agreed with Mr. Gruetzmacher, vacated the second disposition and imposed a third global disposition sentence, this time with the correct maximum confinement on Case 1 and a reimposition of the lengthy probation disposition on Case 4. The effect of the third disposition was "Gruetzmacher's actual term of confinement was shortened from 40 months to 24 months." *Id.,* ¶13. The state appealed the imposition of the third sentence.

Our supreme court held that the global second sentence was not violative of double jeopardy concerns and that the change from probation to prison on Case 4 was proper because the global disposition matched the original sentencing goals. *Id.* The court emphasized that the stated goal of the court was that Mr. Gruetzmacher be confined for a minimum of 40 months. *Id.* The supreme court vacated the third sentence as an abuse of discretion reimposed second sentence.

There is no dispute that when the circuit court imposed a probation disposition consecutive to only the prison time in Mr. Blount's other case, this was an legal impermissibility. Just as in *Gruetzmacher,* it was necessary to modify the sentence to correct the legal error. But unlike *Gruetzmacher,*[2] the newly modified sentence, though lawful, doesn't match the original global pronouncement. Mr. Blount is simply requesting a modification of the global disposition to match the original sentencing objectives, just as the restructuring of the global disposition in the second sentence *Gruetzmacher* matched the original sentencing objectives. The court has authority to do so, and the "fair administration of justice" requires it. *See State v. Henley,* 2010 WI 97, ¶73, 328 Wis. 2d 544, 787 N.W.2d 350.

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[2] A summary of the *Gruetzmacher* dispositions is below:

	Original	**Second (Upheld)**	**Third (Vacated)**
Case 1	40 months IC / 20 months ES (illegal confinement period)	24 months IC / 3 years ES (legal confinement period)	24 months IC / 3 years ES (legal confinement period)
Case 2	4 years probation	3 years probation	3 years probation
Case 3	12 years probation	12 years probation	12 years probation
Case 4	12 years probation	40 months IC / 20 months ES concurrent to Case 1	12 years probation
Global Dispo	***40 months IC / 20 months ES followed by probation***	***40 months IC / 20 months ES followed by probation***	24 months IC / 3 years ES followed probation

D. Mr. Blount presented a new factor.

The real point of dispute in this case appears to be over what the original sentencing goal was. The state seems to be arguing that when the court stated that it wanted Mr. Blount's probation to run one year past his extended supervision in his other case, it did not really mean that. But the state offers no other explanation for those words or why the court would have said that if it did not intend it. The transcript is clear that the court believed the sentencing objectives it identified under *Gallion* would be achieved if Mr. Blount spent three years being supervised after two years of confinement. (69:23-27).

To the extent that the state is arguing that the original sentencing objective was to make the probation sentence consecutive to the entire period of imprisonment on 20CF329, this is meritless and belied by the court's explanation of what it meant when it said "it is consecutive to the prison." Legally speaking, "'[i]mprisonment' and 'confinement in prison' are … not synonymous." *See State v. Finley*, 2016 WI 63, ATTACHMENT A: GLOSSARY, ¶2, 370 Wis. 2d 402, 882 N.W.2d 761 (explaining "imprisonment" refers to both the confinement portion and extended supervision portions of a sentence whereas references to "prison" refers to the confinement portion of a bifurcated sentence). But more importantly, the court was explicit that when it said "it is consecutive to the prison," it meant consecutive to the confinement portion only. (69:29). The record unequivocally reveals that the original sentencing objective was for

Mr. Blount to spend two years confined in prison followed by three years supervision.

The problem in this case is that when the circuit imposed the three years of consecutive probation – effectively five years of supervision following confinement – it failed to explain why five years total supervision was warranted when it had just deemed three years sufficient. When this inconsistency was pointed out postconviction, the circuit court again failed to explain its rationale. Because the court didn't explain its rational for the increase in the necessary probationary period on the record, it was an abuse of discretion. Abuse of sentencing discretion warrants sentence modification. *Cresci v. State*, 89 Wis. 2d 495, 504-506, 278 N.W.2d 850, 854 (1979).

The circuit court's response to Mr. Blount's new factor/erroneous exercise of discretion claim was simply that the probation disposition it ultimately imposed was lawful. (62:9). But Mr. Blount has never argued that a period of three-years consecutive probation is unlawful – only that it doesn't match the original sentencing goals. Because this circuit court erroneously exercised its sentencing discretion, it refused to consider other lawful dispositions that would achieve the original sentencing goals. This Court should therefore conclude other lawful dispositions matching the original sentencing goals were unknowingly overlooked. Sentence modification is therefore warranted.

CONCLUSION

For the reasons stated above and in the brief-in-chief, Mr. Blount respectfully requests that this Court vacate his sentence and remand to the circuit court with directions to modify the sentence such that the original global sentence of two years confinement followed by three years supervision is achieved.

Dated this 10th day of May, 2022.

Respectfully submitted,

Electronically signed by
Frances Reynolds Colbert
FRANCES REYNOLDS COLBERT
Assistant State Public Defender
State Bar No. 1050435

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8374
colbertf@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,377 words.

Dated this 10th day of May, 2022.

Signed:
Electronically signed by
Frances Reynolds Colbert
FRANCES REYNOLDS COLBERT
Assistant State Public Defender