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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP001943-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMMIE L. BLOUNT,

Defendant-Appellant-Petitioner.

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# PETITION FOR REVIEW

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## ISSUES PRESENTED

In this case, the circuit court imposed an illegal sentence structure when meting out sentences on multiple case files. Specifically, the court erroneously made a term of probation consecutive to only the confinement portion of a bifurcated prison sentence. The court corrected its error by making the probation consecutive to the entire term of imprisonment, effectively increasing the overall supervision period from what it had originally intended by two years. The questions presented are:

I. Is it an erroneous exercise of discretion when the circuit court corrects an illegal sentence by increasing a period of supervision when it had previously identified a lessor period as the appropriate length for the defendant?

The circuit court and court of appeals both held that the new sentence was legal and justified, but did not address the claim that it is an erroneous exercise of discretion to increase a period of supervision without explaining why, if a shorter period of supervision was previously identified as appropriate, a longer period would be equally appropriate.

II. Does *Cresci v. State*, 89 Wis. 2d 495, 278 N.W.2d 850 (1979), permit sentence modification, rather than resentencing, as a remedy for an erroneous exercise of sentencing discretion?

The circuit court determined it hadn't erroneously exercised discretion and did not address this claim. The court of appeals held that Mr. Blount didn't establish a "new factor" and therefore sentence modification was not warranted.

## CRITERIA FOR REVIEW

This court should take review of this case because the lower court's decision runs afoul of *State v. Gruetzmacher*, 2004 WI 55, 271 Wis. 2d 585, 679 N.W.2d 533. *Gruetzmacher* held that a court may alter component parts of an unlawful global sentence such that the corrected global disposition matches the "disposition that the court originally intended." *Id.,* ¶14. Here, the new, corrected disposition didn't match the stated original intent of the court. Review is warranted under Wis. Stat. (Rule) 809.62(1r)(d) (the court of appeal's decision conflicts with controlling decision of this court).

This court should also take review to clarify how the law on sentencing discretion applies when a court is correcting its sentence. Specifically, this court should take review to clarify whether a court may increase the overall amount of supervision time when it corrects an illegal sentence, and if so, whether the court must explain the justification for the increase on the record. Review is therefore warranted under Wis. Stat. (Rule) 809.62(1r)(c) (a decision from this court will help develop and clarify the law).

This court should further take review to hold that *Gallion's* call for the minimum amount of confinement necessary to achieve sentencing goals should be applied to supervision as well. *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. Supervision, whether in the form of probation or extended supervision, requires a significant amount of governmental resources and also involves a degree of deprivation of liberty. If a court identifies a certain number of years of supervision as appropriate, it should not be able to increase that number, unless there are factors the justify the increase. In addition to clarifying that when correcting an unlawful sentence, a proper exercise of discretion requires a court state the reasons behind any increase, this court should take review to hold that a court must impose the least amount of supervision necessary, whether extended supervision or probation or a combination of the two, that is warranted by the sentencing goals of protection of the public, gravity of the offence and rehabilitation of the defendant. Review is therefore warranted under Wis. Stat. (Rule) 809.62(1r)(c).

Often when a defendant alleges the circuit court erroneously exercises its discretion, the defendant asks for resentencing as a remedy. In this case, Mr. Blount alleged that the circuit court erroneously exercised its discretion but he is asking for sentence modification – which typically requires less time and resources than a full resentencing – rather than a full resentencing hearing as a remedy. This court should take review to clarify, or develop, the statement in

*State v. Cresci,* that a trial court "may review its sentence for abuse of discretion." 89 Wis. 2d 495, 504, *Cresci*'s holding clearly permits sentence modification when the abuse of discretion is based on the sentence being unduly harsh or unconscionable but this court should take review and hold that sentence modification based on an erroneous exercise of discretion is also appropriate the erroneous exercise results in a discrete problem in the sentence that may be fixed through modification. Review is therefore warranted under Wis. Stat. (Rule) 809.62(1r)(c)1., 2. and 3.

## STATEMENT OF FACTS

While incarcerated because he was unable to post bond in another case, Racine County Case No. 20CF329, Mr. Blount was charged in this case with one count of felony stalking, domestic abuse, as party to a crime, for alleged communications with his ex-girlfriend. (2). As part of a plea deal, the state reduced the stalking charge to three counts of disorderly conduct, each with the domestic abuse enhancer and agreed to recommend concurrent time on the two files. (48:2-3). Mr. Blount accepted the offer and entered a guilty plea to the three disorderly conduct charges in this case as well as a guilty plea to a recklessly endangering safety charge in 20CF329. (48:7).

At sentencing on both cases, the court reviewed the *Gallion* factors and Mr. Blount's needs. (69:23-27). After imposing a four-year imprisonment consisting of

two years confinement followed by two years extended supervision in 20CF329, the court sentenced Mr. Blount to 90 days on each disorderly conduct count which were to run consecutively to each other, but stayed and imposed these sentences in favor of a three-year probationary period. (69:27; App. 18). After the sentence was meted out, the prosecutor asked if the probationary period in this case was to be consecutive or concurrent to the sentence in 20CF329. (69:29; App. 20). The court responded "it will be concurrent with his ES, but then it [will] last farther than his ES. Its one more year than his ES is going to go. Because his ES will be two years." (69:29; App. 20)

Defense counsel pointed out to the court that it was not legal to make a probation term concurrent to just the extended supervision portion of the sentence. (69:29; App. 20). Conceding this was true, the court reimposed the three-years probation term, this time making it consecutive to the entire sentence in 20CF329. (69:30; App. 21). The effect of this change was to give Mr. Blount five years of supervision following the confinement portion of his sentence in 20CF329, rather than the three it had originally deemed appropriate.

Mr. Blount brought a postconviction motion requesting sentence modification arguing the court erroneously exercised its discretion when it increased the supervision period by two years without explaining why that was warranted and also that the court unknowingly overlooked a sentence structure that would have achieved the global sentence of two-years

confinement followed by three-years supervision that it had originally deemed appropriate under *Gallion.*[1] (55). The circuit court denied the motion, but did not address or explain how, if it had deemed three years supervision appropriate, five years equally appropriate. (58).

Mr. Blount appealed and the court of appeals affirmed. The court of appeals held that because the error in the first sentence was quickly corrected, Mr. Blount didn't have a "permanent expectation" in the original sentence. *State v. Blount,* 21AP1943-CR, ¶10, unpublished slip op. (Jun. 8 2022) (App. 3-13). But Mr. Blount never argued that the second sentence violated any kind of expectation; he argued that the court never articulated on the record why, if it had just determined three years supervision was appropriate, was five years equally appropriate.

The court of appeals decision also emphasized that a circuit court is allowed to correct a sentencing error. Again, Mr. Blount never argue that a court cannot correct a sentencing error. *Id.,* ¶11. Nor did Mr. Blount also argue, as the court of appeals decision implies, that a circuit court can only correct a sentence "in his favor." *Id.,* ¶13. Rather, he argued under *State v. Gruetzmacher*, Wis. 2d 585, the corrected sentence should match the original sentencing goals and the court erred by failing to explain why an increase in the global term of supervision was warranted.

[1] Mr. Blount also raised a sentence modification claim based on a new factor related to 20CF329. He did not renew that claim on appeal.

## ARGUMENT

**The circuit court erroneously exercised its discretion when it denied Mr. Blount's motion for sentence modification based on a new factor.**

The facts and procedural histories of crimes involved in this case are not important because the issue at the heart of this appeal boils down to the simple legal question: when correcting an unlawful sentence, may a court increase the overall length of supervision in global disposition when it had previously identified that a shorter period was appropriate under *Gallion*? The court of appeals did not answer this legal question. Because of the need for a clear pronouncement of law governing the exercise of sentencing discretion when correcting a sentence, this court should take review to address the legal questions skirted by the court of appeals.

### A. This case involved a global sentencing disposition.

The court of appeals curiously stated that this case did not involve a global[2] sentencing. *Blount,* slip op., ¶14 and n.4. This is factually wrong. The two files were not only resolved by plea on the same day and went to sentencing on the same day, they were also interconnected because a negotiated term of the plea

[2] By the word "global," Mr. Blount is referring to the common definition, "of, relating to, or applying to a whole." *See* https://www.merriam-webster.com/dictionary/global.

agreement included the state's recommendation that any sentence in this case should run concurrently to the any sentence in the felony case. (48; 69; 27:2). This "extremely important" negotiated term of the plea deal makes the resolution of these cases unquestionably global. *State v. Howard,* 2001 WI App 137, ¶18, 246 Wis. 2d 475, 630 N.W.2d 244; *see also Gruetzmacher*, 271 Wis. 2d 585, ¶¶7, 14 (addressing the "overall" confinement and supervision time when four separate case files were before the judge for sentencing on the same day).

Although the circuit court made a legal error when fashioning its original disposition on the multiple files, it was clear about how much global supervision it intended for Mr. Blount. After considering the *Gallion* factors, including protection of the community, punishment of the defendant, and rehabilitation of the defendant, and applying these factors to Mr. Blount, the circuit court exercised its discretion and globally determined that Mr. Blount should be supervised for three years following his confinement time. (69:23-27). In order to achieve the global sentencing goal of three years supervision after confinement, the court made the three-year probation sentence in this case concurrent to the two-years extended supervision in 20CF329. (69:29). The court was specific: "it is concurrent with his ES, but then it [will] last farther than his ES [on 20CF329]. *Its one more year than his ES…."* (69:29) (emphasis added). In other words, after considering both crimes and Mr. Blount's rehabilitative needs, the court

established a clear sentencing goal for both files: two years confinement followed by three years supervision.

B. The circuit court erroneously exercised its discretion when it corrected the original illegal sentence structure.

But Chapter 973 does not allow probation to run concurrently with only the extended supervision portion of another sentence and the court's original disposition was unlawful. *See* Wis. Stat. § 973.09(1)(a). When a court makes a legal error such as this, a court "should be allowed to correct obvious errors … where the court … seeks to impose a lawful structure sentence that achieves the overall disposition that the court originally intended." *Gruetzmacher*, 271 Wis. 2d 585, ¶14. But that is not what happened here. After the illegality of the sentence imposed was pointed out, instead of reimposing a lawful structure that matched "the overall disposition the court originally intended," the court corrected the sentence by increasing the overall supervision period by two years.[3] *Id.*

The court of appeals states "the court did not increase the sentence in this case" apparently because it didn't increase the three-year probation period.

[3] For example, the court could have imposed a one-year probation sentence consecutive to the prison sentence in 20CF329, as Mr. Blount proposed in his post-conviction motion, or it could have made a longer period of ES on the felony case and imposed a concurrent sentence as the state had recommended. (55:10).

*Blount,* slip op. ¶19. This is incorrect. [4] Under the original, unlawful disposition the supervision period was three years past confinement and under the new, lawful disposition, it became five years past confinement. That is an increase. The fact that the increase was achieved by making the probationary period consecutive to the imprisonment rather than a numerical increase of the term supervision period doesn't change the fact that there was an increase. This court has long recognized designation of concurrent or consecutive time "can affect the actual amount of time served, the application of pre-sentence credit, parole eligibility dates, the date a defendant is allowed access to rehabilitative services, and other factors." *Howard,* 246 Wis. 2d 475, ¶18,

The issue is not that the new sentence is illegal; rather it's that the circuit court failed to exercise discretion when it corrected its illegal sentence. That the new sentence was a "valid sentence" and that the circuit court pointed to facts in the record postconviction to justify the sentence is irrelevant to the legal claim. (62:9; App. 9; *Blount,* slip op., ¶20). This merely demonstrates that upon reflection, the court had second thoughts about the original sentence

[4] The court of appeals also erred by misquoting from Mr. Blount's postconviction motion and making repeated references to Mr. Blount requesting a maximum supervision of "five years." *State v. Blount,* 21AP1943-CR, ¶¶5, 10, 13, 19, 21 unpublished slip op. (Jun. 8 2022) (App. 3-13). Five-years maximum is *not* what Mr. Blount is requesting; rather he is requesting the time period originally articulated by the circuit court – "one more year than his ES" or three years.

and does not create a legal basis to alter a sentence. *See State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 72, 797 N.W.2d 828.

This court has long held that the sentencing court's "rationale must … be set forth on the record" because the sentencing "decision will not be understood by the people and cannot be reviewed by the appellate courts unless the reasons for decisions can be examined." *State v. Gallion,* 2004 WI 42, ¶38, 270 Wis. 2d 535, 560, 678 N.W.2d 197, 208 (quotation marks and citation omitted); *see also State v. Bolstad,* 2021 WI App 81, ¶27, —— Wis. 2d ——, —— N.W.2d ——— . This obligation is also codified by statute. "The court shall state the reasons for its sentencing decision and … shall do so in open court and on the record." Wis. Stat. § 973.017 (10m)(a).

When the circuit court increased the global length of supervision from three to five years, it did not explain why the goal of three years total supervision became inadequate. And there is no reason that justifies this increase. The only thing that had changed was the court's understanding of the legal impermissibly of the sentence structure it had imposed, not the gravity of the offense, Mr. Blount's rehabilitative needs or any other factor that suggested Mr. Blount required a longer term of supervision.

This court should take review to clarify that when meting out corrected sentences, courts must exhibit the same exercise of discretion that any sentencing requires, including stating the rationale for any corrected sentence on the record. This court

should further hold that when a court corrects an unlawful sentence, it may not increase either confinement time or supervision time without justification and must "… seek to impose a lawful structure sentence that achieves the overall disposition that the court originally intended." *Gruetzmacher*, 271 Wis. 2d 585, ¶14.

### C. This court should take review and hold that a court must impose the minimum amount of supervision warranted under the sentencing goals.

Though not as extreme as incarceration, supervision through the criminal justice system is a deprivation of liberty. *See* Wis. Stat. § 973.10 ("[i]mposition of probation shall have the effect of placing the defendant in the custody of the department"). Supervisees are required to follow rules and regulations that directly affect the manner in which they live. *See State v. Tarrell,* 74 Wis. 2d 647, 654, 247 N.W.2d 696, (1976) (*abrogated on other grounds*). Supervisees are subjected to a relaxation of their constitutional protections, and the department is entitled to supervise and scrutinize all that they do. *Id.* As such, though the liberty interest at stake may be less than confinement, *Gallion's* call for the "minimum amount of custody … which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant" is equally relevant when deciding the appropriate term of supervision. *Gallion*, 270 Wis. 2d 535, ¶44

(*quoting State v. McCleary*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971)).

In addition to unnecessary infringement on liberty interests, requiring the minimum amount of supervision necessary to achieve sentencing objectives also makes sense from the perspective of allocating governmental resources. Supervision is expensive[5] and many probation offices are battling staffing shortages.[6] Thus, minimal supervision will help ensure that those who truly need it will receive the services that they and society need them to receive. This court should take review and hold that courts should impose the minimum amount of supervision, whether in the form of extended supervision or probation, that is necessary to ensure the goals of protection of the public and rehabilitation of the defendant.

D. Sentence modification should be an available remedy when the sentence doesn't match the court's original sentencing objectives.

[5] The United States spends over 5 billion dollars on supervision annually. *See e.g.* The Council of State Governments Justice Center's "50 State Report on Public Safety," available at *https://50statespublicsafety.us/part-3/strategy-1/action-item-1/*

[6] *See* Cornelius, Gary, "Fallout: The Stress of 'Working Short' in Corrections" April, 20, 2022 *available at* https://www.lexipol.com/resources/blog/fallout-the-stress-of-working-short-in-corrections/

Courts have those inherent powers that are necessary "to enable the judiciary to accomplish its constitutionally or legislatively mandated functions." *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis.2d 1, 16, 531 N.W.2d 32 (1995). One such inherent power is the power to modify – or reduce – a sentence. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 72, 797 N.W.2d 828. Generally speaking, sentence modification claims "relate to modification of the sentence to correct specific problems, not … to completely re-do the invalid sentence." *State v. Wood*, 2007 WI App 190, ¶ 6, 305 Wis. 2d 133, 139, 738 N.W.2d 81.

The most common sentence modifications are based on "new factor" claims. A new factor is "[a] fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because . . . it was unknowingly overlooked by all of the parties." *Harbor*, 333 Wis. 2d 53, ¶35 (citations and quotations omitted).

A lesser-used basis for sentence modifications are claims rooted in the sentencing court's erroneous exercise of discretion. *Cresci,* 89 Wis. 2d at 504 (discussing the power to modify sentences when there is an "abuse of discretion").[7] Although erroneous

[7] When referring to the court's discretionary decision making, the preferred term is "erroneous exercise of discretion" as opposed to the formally used "abuse of discretion." *King v. King,* 224 Wis. 2d 235, 248, n. 9, 590 N.W.2d 480 (1999). The standards for assessing whether a circuit court "erroneously

exercise of discretion sentence modification claims are primarily limited to extremely narrow situations where the result is an unduly harsh or unconscionable sentence, *see e.g. State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507, the primary concern in *Cresci* was an interest in finality which could only be achieved if circuit courts were prohibited from revises a sentences "merely upon reflection." 89 Wis. 2d at 504; *see also State v. Wuensch*, 69 Wis.2d 467, 480, 230 N.W.2d 665 (1975).

This case presents a situation where an erroneous exercise of discretion situation doesn't result in a sentence that is unduly harsh under *Grindemann,* but it did create an injustice in that the ultimate disposition was in excess of what the court originally stated was necessary to achieve the sentencing objectives. This court should take review to hold that sentence modification based on an erroneous exercise of discretion is appropriate, in cases such as this one, where a sentencing court erroneously exercises its discretion by failing to explain how a corrected sentence meets the original sentencing objectives and/or when a corrected sentence in any way exceeds the original sentencing objectives.

Mr. Blount argued below that the circuit court unknowingly overlooked a new factor – specifically that there were legal sentence structures available that would meet the original sentencing goals – but

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exercised" its discretion are the same as those for assessing whether the circuit court "abused" its discretion. *Id.*

the real issue here is that the court erroneously exercised its discretion when it did not explain how the corrected sentence would meet the original sentencing goals. While arguing a new factor is possible and meritorious, it would be cleaner and more straight forward to simply argue that sentence modification is warranted because of the erroneous exercise of discretion. Not only would this allow for a more straight forward legal claim, it would also streamline postconviction proceedings.

A resentencing hearing – the typical remedy for erroneous exercise of discretion – is a full "do-over." *State v. Wood*, 2007 WI App 190, ¶ 6, 305 Wis. 2d 133, 139, 738 N.W.2d 81. A resentencing hearing requires the appointment of new trial counsel and the parties and the court must start the sentencing from scratch. *Id.* ("[w]hen a resentencing is required for any reason, the initial sentence is a nullity; it ceases to exist"). But in a situation such as this one, where Mr. Blount isn't challenging the original sentencing objectives, a remedy designed to "correct a specific problem" makes more sense. *Id.* This court should take review and allow sentence modification when a court erroneously exercises its discretion and a corrected sentence doesn't match the original sentencing goals.

## CONCLUSION

For the reasons stated in this brief, 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 8th day of July, 2022.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 3,798 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

Dated this 8th day of July, 2022.

Signed:

FRANCES REYNOLDS COLBERT
Assistant Public Defender