STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2023AP000970 – CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

SCOTT R. DACHELET,

Defendant-Respondent.

On Appeal from an Amended Judgment of Conviction, Entered in the Calumet County Circuit Court, the Honorable Jeffrey S. Froehlich, Presiding

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RESPONSE BRIEF OF DEFENDANT-RESPONDENT

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ISSUE PRESENTED

The Wisconsin Department of Corrections (DOC) revoked Scott R. Dachelet's probation in Calumet County Case Nos. 2020CF33 (this case) and 2022CF44 on November 4, 2022. The circuit court held a sentencing after revocation hearing in this case on November 29, 2022, and sentenced Dachelet to a term of imprisonment. The court ordered the sentence to be served concurrent to the sentence previously imposed-and-stayed in Case No. 2022CF44 and eventually ordered 141 days total sentence credit, to account for time Dachelet spent in custody in connection with the course of conduct for which sentence was imposed in this case, including the 25 days Dachelet spent in jail awaiting sentencing from November 4 to 29, 2022.

The issue presented in this state's appeal is whether the existing connection between Dachelet's custody and the course of conduct for which sentence was imposed in this case was severed on November 4, 2022, when Dachelet's probation was revoked, or on November 29, 2022, when Dachelet was sentenced?

The circuit court agreed with Dachelet and granted 25 days sentence credit to account for time Dachelet spent in pre-sentence custody from November 4 to 29, 2022. This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Dachelet agrees with the state's request for publication. For the reasons set forth below, this Court should clarify that Wis. Stat. § 973.10(2)(b) controls when an imposed-and-stayed sentence that is served in prison begins. Dachelet does not request oral argument, but would welcome the opportunity should the parties' briefs not fully and adequately address the issue presented.

STATEMENT OF THE CASE AND FACTS

Dachelet agrees with the state's statement of the case and therefore will not provide a repetitive statement of facts in this brief.

STANDARD OF REVIEW

The issue presented involves a question of law applied to a set of undisputed facts. "Application of [Wis. Stat.] § 973.155(1)(a) to a particular set of facts presents a question of law" this Court reviews independently. *State v. Fermanich*, 2023 WI 48, ¶10, 407 Wis. 2d 693, 991 N.W.2d 340 (internal quotations omitted).

ARGUMENT

Dachelet is entitled to the sentence credit granted by the circuit court, including the 25 days he spent in custody awaiting sentencing in this case from November 4 to 29, 2022.

Dachelet is entitled to sentence credit for the time he spent in pre-sentence custody from November 4 to 29, 2022, because that custody was factually connected to the course of conduct for which sentence was imposed in this case. *See* Wis. Stat. § 973.155(1)(a); *State v. Slater*, 2021 WI App 88, ¶10, 400 Wis. 2d 93, 968 N.W.2d 740. The only dispute between the parties is whether the revocation of Dachelet's probation on November 4, 2022, severed the connection between his custody and the sentence imposed in this case on November 29, 2022.

For the reasons set forth below, the revocation of Dachelet's probation did not sever the connection between his custody and the sentence imposed in this case. Instead, according to precedent and clear statutory authority, Dachelet remained in pre-sentence custody in connection with this case until his November 29, 2022, sentencing after revocation and he is therefore entitled to the 25 days sentence credit granted by the circuit court.

A. Jail sentences served in prison.

Prior to applying the established severance doctrine to the facts of Dachelet's case, it is necessary to discuss the legal basis and background that resulted in Dachelet serving his imposed-and-stayed jail sentence in prison.

Under most circumstances, "a sentence of less than one year shall be to the county jail" and "a sentence of more than one year shall be to the Wisconsin state prisons…" Wis. Stat. § 973.02. However, "[a] defendant sentenced to the Wisconsin state prisons and to a county jail or house of correction for separate crimes shall serve all sentences whether concurrent or consecutive in the state prisons." Wis. Stat. § 973.03(2). There are important substantive differences between a defendant who serves a jail sentence in prison instead of the county jail.

For example, "[e]very inmate of a county jail is eligible to earn good time," which amounts to a 25 percent reduction in the imposed jail term for good behavior. Wis. Stat. § 302.43. However, defendants who serve their jail sentence in prison, pursuant to Wis. Stat. § 973.03(2), are not entitled to "good time." *See State v. Harris*, 2011 WI App 130, ¶¶1, 9, 337 Wis. 2d 222, 805 N.W.2d 130.

In *Harris*, the court addressed a defendant's claim for sentence credit for the "good time" he claimed he earned on his 10-month jail sentence. *Id.*, ¶¶3-5. Harris, however, had also

been sentenced to a seven-year term of imprisonment, and pursuant to § 973.03(2), the court held that "Harris is serving his sentences as a state prison inmate, not as a county jail inmate." *Id.*, ¶1.

Notably, the *Harris* court reached this conclusion by examining Harris' situation from the perspective of his prison sentencing, and in spite of the fact that Harris had already spent 316 days in the county jail: "In light of § 973.03(2), Harris was not, nor would he ever become, an inmate of a county jail or house of correction. He did, on the other hand, become an inmate of the state prison system. Therefore, Harris was considered a prison inmate not eligible for any good time credit under county jail rules." *Id.*, ¶9.

The principle that a defendant sentenced to both jail and prison is considered only a prison inmate pre-dates *Harris* and truth-in-sentencing. In *State ex rel. Darby v. Litscher*, 2002 WI App 258, ¶1, 258 Wis. 2d 270, 653 N.W.2d 160, an inmate challenged the DOC's sentence computation related to his misdemeanor jail sentences. However, just as in *Harris*, Darby had been sentenced to prison on separate charges and pursuant to § 973.03(2), he was required to serve "all sentences" in prison. *Id.*, ¶9. Moreover, the court explained that instead of "good time," to which Darby claimed he was entitled, his sentences were controlled by Wis. Stat. § 302.11, "which governs mandatory release on parole and revocation of parole for inmates of the Wisconsin state prisons." *Id.*, ¶¶11-14. As was Harris, "Darby was a prisoner in the state prisons," and subject to the

statutory provisions applicable to state prison inmates. *Id.*, ¶14.

On November 29, 2022, Dachelet became a state prison inmate pursuant to § 973.03(2) and was subject to the statutory provisions and legal authority to which all other prison inmates are bound. According to the relevant precedent and controlling statute, Dachelet was never a county jail inmate and his imposed-and-stayed jail sentence did not begin until he "enter[ed] the prison." Wis. Stat. § 973.10(2)(b). It is within this specific context that Dachelet is entitled to sentence credit for the 25 days he spent in custody at the Calumet County Jail prior to his sentencing in this case.

B. Severance: the act of severing or "uncoupling" an existing factual connection between a defendant's custody and a pending course of conduct.

A defendant is entitled to credit against a sentence so long as two basic elements are established: (1) custody and (2) a factual connection between the custody and the "course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a). In certain circumstances, both elements might be met initially, but as a result of some later event, an existing factual connection between custody and a course of conduct can be "severed." *See State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985).

In *Beets*, the defendant was on probation for drug offenses when he was arrested for a burglary. 124 Wis. 2d at 374-75. The burglary arrest triggered a probation hold and eventually led to the revocation of Beets' probation. *Id.* About a month later, the court sentenced Beets to three years in prison. *Id.* at 375.[1] Beets eventually pled guilty to the burglary charge and was sentenced in the new case, at which time he received a concurrent sentence of three years imprisonment. *Id.* Postconviction, Beets sought credit against the new burglary sentence for the time he spent in custody *after* his sentencing on the drug offenses. *Id.* at 375-76.

Ultimately the Wisconsin Supreme Court affirmed the denial of Beets' request for additional sentence credit because "the *sentencing* on one charge severs the connection between the custody and the pending charges" and because the "trial court correctly credited time only for the period prior to the time Beets' custody commenced on the sentences for the drug offenses." *Id.* at 383. (Emphasis added).

[1] The state mistakenly asserts that "Beets was on probation with an *imposed and stayed sentence*…when he was arrested for committing a burglary." (*See* State's br. at 10) (Emphasis added). As noted by the *Beets* court, after his probation was revoked, Beets returned to court for sentencing. It was this sentencing on September 10, 1982, as opposed to Beets' revocation on August 4, 1982, which severed the connection between Beets' custody and his pending charges. *See Beets*, 124 Wis. 2d at 383 ("We conclude that Beets is not entitled to time credit on the burglary sentence for the period following the sentence on the drug charge.").

Thus, the rule from *Beets* is that "when a defendant begins serving a sentence in a different case," any existing connection between a defendant's custody and a pending case is "severed." *See State v. Slater*, 400 Wis. 2d 93, ¶13.

Since *Beets*, the court of appeals has decided three major severance cases that are particularly relevant to Dachelet's case: *State v. Presley*, 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713, *State v. Davis*, 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488, and *State v. Slater*, 400 Wis. 2d 93. Each of these cases follows *Beets'* lead and supports Dachelet's entitlement to credit for the time he spent in custody after revocation because Dachelet's imposed-and-stayed jail sentence did not begin until after the sentencing after revocation in this case.

State v. Presley presented a severance issue, but involved a defendant who was on extended supervision instead of probation. 292 Wis. 2d 734, ¶2. Like Beets, Presley was arrested on new charges while on supervision. *Id.* The new charges, to which Presley later pled, led to the revocation of his supervision. *Id.* Whereas Beets returned to court for sentencing after the revocation of his probation, Presley returned to court for a "reconfinement hearing." *Id.*, ¶10. By the time of Presley's reconfinement hearing, he had pled guilty to the new charge, and the court sentenced Presley on both cases at the same hearing. *Id.*, ¶2. Presley sought credit against his new sentence for the time he spent in

custody between the revocation of his extended supervision and his sentencing hearing. *Id.* The circuit court denied his request and granted credit only from Presley's arrest on the new charges until the revocation of his extended supervision. *Id.*

On appeal, the state relied on *Beets* to argue that "once the extended supervision was revoked, he was serving a sentence, although the exact length was unknown." *Id.*, ¶10. The state further argued that the reconfinement hearing was not a sentencing, as in *Beets*, and that upon the revocation of extended supervision, Presley "had been revoked and sentenced." *Id.*

The *Presley* court rejected the state's position because, "while his extended supervision was revoked, his 'resentencing' had not yet occurred," and "the lynchpin to the uncoupling of the connection between the new and old charges was the *act of sentencing, not the revocation determination*." *Id.*, ¶¶9, 15. (Emphasis added). The court further noted that the state's position on severance would conflict with Wis. Stat. § 304.072(4),[2] which states that "[t]he sentence of a revoked parolee or person on extended supervision resumes running on the day he or she is received at a correctional institution…" *Id.*, ¶14. As a

[2] Wis. Stat. § 304.072(4) provides in full: "The sentence of a revoked parolee or person on extended supervision resumes running on the day he or she is received at a correctional institution subject to sentence credit for the period of custody in a jail, correctional institution or any other detention facility pending revocation according to the terms of s. 973.155."

result, Presley, like Beets, received sentence credit against his new sentence for the time he spent in custody after revocation and until sentencing on a different case. *Id.*, ¶15.

In *State v. Davis*, the court again addressed severance in the context of a defendant who is held in custody pending revocation on the basis of new charges. 377 Wis. 2d 678, ¶¶8-10. Unlike Beets and Presley, however, Davis never returned to court for any sort of sentencing hearing after revocation. *Id.* Instead, after the revocation of Davis' extended supervision, and because of statutory changes that took effect after *Presley*, Davis was returned to prison without any sort of sentencing hearing. *Id.*, ¶9. After Davis' return to prison, he pled guilty and was sentenced on the new charges.

In light of *Presley* and Wis. Stat. § 304.072(4), the court agreed with the state's concession that Davis was entitled to sentence credit against the new sentence for the time he spent in custody after revocation and until Davis was "received at a correctional institution." *Id.*, ¶¶9-10. "With his reception at the institution, his custody was no longer "in connection with" the course of conduct for which he was sentenced in this case; rather, his custody was then solely "in connection with" his earlier conviction." *Id.*, ¶10.

Just as in *Beets* and *Presley*, the *Davis* court explained that revocation itself does not sever the existing connection between a defendant's custody and

pending charges and that where a statute provides for the start or resumption of a sentence, that date controls and results in severance of an existing connection between custody and any unresolved course of conduct.

Finally, severance was most recently addressed in *State v. Slater*, 400 Wis. 2d 93. Again, the question presented involved a defendant on supervision, this time on probation with an imposed-and-stayed prison sentence, who picked up new charges, was later revoked, and was then convicted and sentenced on the new charges. *Id.*, ¶1. After Slater's probation was revoked, he remained in the county jail on the pending charges for over three years, and was only transferred to prison after sentencing in the new case. *Id.*

Slater sought credit against his new sentence for the three years he spent in custody after revocation and until his sentencing in the new case. In support of his claim, Slater relied on Wis. Stat. § 973.10(2)(b), which provides that upon revocation of probation, and "[i]f the probationer has already been sentenced," the DOC shall "order the probationer to prison, and the term of the sentence *shall begin on the date the probationer enters the prison*." *Id.*, ¶2 (emphasis added). Moreover, Slater relied on *Beets* for the proposition that "the connection between a defendant's presentence custody and the course of conduct for which sentence is imposed is severed when the defendant begins serving a sentence in a different case." *Id.*, ¶13.

In the circuit court, and reminiscent of *Presley*, Slater was denied the credit he sought because the court concluded that "Slater began serving his previously imposed-and-stayed sentence in the drug case when his probation in that case was revoked." *Id.*

The *Slater* court reversed and agreed that Wis. Stat. § 973.10(2)(b), *Beets*, *Presley*, and *Davis* supported Slater's credit claim. *Id.*, ¶¶14-17. The court reasoned that § 973.10(2)(b) was the probation equivalent of § 304.072(4)'s extended supervision provision. *Id.*, ¶¶19-20. Similar to § 304.072(4)'s "received at a correctional institution" language, § 973.10(2)(b) provides that a probationer's imposed-and-stayed "shall begin on the date the probationer enters the prison." *Id.*

Thus, regardless of when probation is revoked, a defendant that is later transferred to prison does not begin serving an imposed-and-stayed sentence until the date they enter the prison. As a result, and as was the outcome in *Beets*, *Presley*, *Davis*, and *Slater*, the revocation of Dachelet's probation did not sever the existing connection between Dachelet's custody and the course of conduct for which sentence was imposed in this case.

C. Dachelet is entitled to the sentence credit granted by the circuit court because the connection between his custody and the course of conduct for which sentence was imposed in this case was not severed until his sentencing after revocation on November 29, 2022.

Simply put, the revocation of Dachelet's probation on November 4, 2022, did not sever the existing connection between his custody and the course of conduct for which sentence was imposed in this case on November 29, 2022. As in *Beets*, *Presley*, *Davis*, and *Slater*, it is not the revocation of probation or extended supervision that severs an existing sentence credit connection. Instead, it is either an act of sentencing, as in *Beets* and *Presley*, or the statutorily provided start or resumption of a sentence, as in *Davis* and *Slater*, that severs the connection. Dachelet is entitled to the 25 days credit granted by the circuit court because he did not begin serving the imposed-and-stayed sentence on November 4, 2022, and remained in custody in connection with the course of conduct for which sentence was imposed in this case until his sentencing on November 29, 2022.

While the state hinges its entire argument on the fact that the court imposed-and-stayed a *jail* sentence in Calumet County Case No. 2022CF44, the state does not meaningfully dispute the following principles upon which Dachelet's credit claim is based.

First, Dachelet is a prison inmate who must serve *all* of his sentences, including the imposed-and-stayed jail sentence, in prison. According to clear precedent, this means that Dachelet is not and never was a county jail inmate for the purposes of sentence computation, good time, or sentence credit. Second, the plain text of Wis. Stat. § 973.10(2)(b) applies to any probationer sent to prison to serve an imposed-and-stayed sentence and is not limited to imposed-and-stayed *prison* sentences. Third, no authority supports the position that revocation alone severs an existing connection between a defendant's presentence custody and the course of conduct for which sentence is eventually imposed.

First, on November 29, 2022, the court imposed a prison sentence in this case. Pursuant to § 973.03(2), Dachelet was required to "serve all sentences whether concurrent or consecutive in the state prisons." Just as Harris was not entitled to the good time he would have earned as a county jail inmate, regardless of the fact that he spent 316 days in the jail prior to sentencing, Dachelet was never a county jail inmate despite having been revoked from probation on November 4, 2022. *See Harris*, 337 Wis. 2d 222, ¶3. Further, just as Darby was subject to the mandatory release provisions of Wis. Stat. § 302.11 as a state prison inmate, so too is Dachelet. *See State ex rel. Darby*, 258 Wis. 2d 270, ¶¶11-13. The law is clear that defendants "sentenced to the Wisconsin state prisons and to a county jail" serve *all* sentences in prison and are treated exclusively as state prison inmates for sentence computation purposes.

Second, the text of § 973.10(2)(b) is clear: the sentence of a revoked probationer, who has already been sentenced, "shall begin on the date the probationer enters the prison." Wis. Stat. § 973.10(2)(b). Reading § 973.10(2)(b) in proper context reveals why there is no need for § 973.10(2)(b) to distinguish imposed-and-stayed *prison* sentences from imposed-and-stayed *jail* sentences. Both jail and prison sentences may be served in prison. Thus, if a probationer who has already been sentenced is revoked, and if that probationer is sent to prison to serve "all sentences," the imposed-and-stayed sentence begins on the date the revoked "probationer enters the prison."

Third, the caselaw is clear that (1) revocation is not a sentencing, (2) revocation does not equate to a sentence begins date, and (3) revocation alone does not sever an existing connection for sentence credit purposes.

In *Beets* and *Presley* severance occurred not at revocation, but at the subsequent sentencing after revocation. In *Davis*, which concerned a defendant returned to prison after revocation and did not include any specific sentencing act, the court relied on § 304.072(4), to determine when the defendant began serving a sentence and, correspondingly, when severance occurred. Regardless of the fact that sentence had already been imposed, and the initial confinement and extended supervision had been running, the court held that revocation itself did not mean the defendant was serving a sentence for

severance purposes. Instead, where the applicable statute set a date on which the defendant's previously imposed sentence resumes running, that date controlled.

Finally, in *Slater*, the court again held that revocation, this time of probation on which the defendant has received an imposed-and-stayed sentence, did not sever an existing sentence credit connection. Instead, the court held that § 973.10(2)(b) controlled when the defendant's imposed-and-stayed sentence began: "the date the probationer enters the prison." *Slater*, 400 Wis. 2d 93, ¶¶14, 21. Because the defendant was sentenced on the new charges prior to being sent to prison, severance did not occur until the defendant's sentencing and the defendant was entitled to sentence credit on the new sentence for all of the time he spent in presentence custody, including the more than three years he spent in jail after revocation.

Slater, along with *Beets*, *Presley*, and *Davis* and Wis. Stat. §§ 973.10(2)(b) and 973.03(2), control the outcome of Dachelet's sentence credit claim. While no statute or prior case explicitly addresses when an imposed-and-stayed *jail* sentence begins, the relevant statutory authority and controlling precedent yield a clear answer: because Dachelet's imposed-and-stayed sentence did not begin until after his sentencing date in this case, he is entitled to the 25 days sentence credit granted by the circuit court.

The state's arguments to the contrary should be rejected. First, as noted above, the state's primary

argument against Dachelet's claim for credit is that *Slater* is distinguishable because it involved an imposed-and-stayed *prison* sentence. (State's br. at 11-17). But, neither *Slater* nor § 973.10(2)(b) apply only to imposed-and-stayed *prison* sentences. Further, the state does not dispute that § 973.03(2) applies to Dachelet's case or that he must serve the imposed-and-stayed jail sentence in prison. And, while the state worries about a "special rule" that would apply only to defendants with imposed-and-stayed jail sentences who are later sentenced to prison, to the extent there is any "special rule," it is provided for by statute, not Dachelet. (*Contra* State's br. at 16).

Moreover, neither party is free to disregard the undisputed facts in this case because the law may apply differently to a different set of facts. Had Dachelet never been sentenced to prison in this case on November 29, 2022, then he would have no basis to rely on § 973.10(2)(b) or *Slater*. This statute and *Slater* clearly apply to defendants who are sentenced to prison and who serve an imposed-and-stayed sentence in prison pursuant to § 973.03(2). Had Dachelet not received a prison sentence in this case, then he would agree with the state's position that his imposed-and-stayed jail sentence in Case No. 2022CF44 would have began on November 4, 2022, when the DOC revoked his probation. However, that is not what happened and that is not this case.

Next, the state imprecisely argues that once Dachelet's probation was revoked, he was "serving" a sentence and that under *Beets* the existing connection

between Dachelet's custody and this case was severed. Again, *Beets*, *Presley*, *Davis*, and *Slater* very explicitly define and explain when and why an existing connection is severed: either an act of sentencing, as in *Beets* and *Presley*, or when the sentence resumes or begins pursuant to statute, as in *Davis* and *Slater*. Indisputably, revocation alone does not result in the commencement of sentence.

While there may be some surface-level logic to the theory that once Dachelet's probation was revoked, the imposed-and-stayed sentence began immediately, that theory is simply not consistent with precedent or the applicable statutes. The state put forth a similar theory in *Presley*: revocation of extended supervision meant that Presley resumed serving the confinement portion of his sentence and revocation therefore severed the connection between Presley's custody and the pending case. 292 Wis. 2d 734, ¶10. As explained above, the *Presley* court rejected the state's argument based on *Beets* and the applicable statute, § 304.072(4). The court should similarly reject the state's theory opposing credit in Dachelet's case.

No statute or precedent supports the state's theory that Dachelet began serving the imposed-and-stayed sentence on November 4, 2022. Instead, §§ 973.10(2)(b) and 973.03(2), along with *Beets*, *Presley*, *Davis*, *Slater*, *Harris*, and *Darby* support Dachelet's position that his imposed-and-stayed did not begin until he entered the prison. As a result, the 25 days he spent in custody at the Calumet County Jail between November 4 and 29, 2022, we factually

connected to the course of conduct for which sentence was imposed in this case.

CONCLUSION

For the reasons set forth above, Scott R. Dachelet respectfully asks this Court to affirm the 141 days sentence credit granted by the circuit court.

Dated this 18th day of October, 2023.

Respectfully submitted,

Electronically signed by Jeremy A. Newman

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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 3,918 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of October, 2023.

Signed:
Electronically signed by
Jeremy A. Newman
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