STATE OF WISCONSIN

SUPREME COURT

Case No. 2017AP000141-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS L. SCHWIND,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

For Review of a Decision of the Court of Appeals, affirming the Circuit Court for Walworth County, the Honorable James L. Carlson, and the Honorable David M. Reddy, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Dennis Schwind seeks review of a decision of the court of appeals in *State v. Schwind*, no. 2017AP000141-CR (Ct. App. Feb. 14, 2018), that affirmed an order of the Walworth County Circuit Court denying Schwind's motion to reduce the length of his probation. The circuit court held that courts lack inherent authority to reduce the length of probation. The court of appeals did not decide if courts have that inherent authority, but it said that if they do it is limited in the same manner as the inherent authority to modify a sentence. Schwind now asks this court to review so the Court can establish whether courts have that inherent authority, and if so, what standard should they apply when deciding whether to exercise the authority.

STATEMENT OF THE ISSUES

I. Did the circuit court have inherent authority to reduce the length of Schwind's probation?

II. If circuit courts have inherent authority to reduce the length of probation, what standard applies to their exercise of that authority?

HOW THE ISSUES WERE RAISED IN THE COURT OF APPEALS

Schwind argued that the circuit court erred when it determined that it lacked inherent authority to reduce the length of probation. Schwind's Court of Appeals Brief at 5-7. He argued that circuit courts do possess that inherent authority. *Id.* In addition, he argued that the court should adopt a standard of cause, that is, that circuit courts may reduce the length of

probation when that action would effectuate the defendant's rehabilitation and the protection of society. *Id.* at 8-10.

However, Schwind conceded that the court of appeals could not adopt that standard due to its opinion in *State v. Dowdy*, 210 WI App 158, 330 Wis. 2d 444, 792 N.W.2d 230, which held that if circuit courts have inherent authority in this area, that authority is subject to the same limitations as their authority to modify sentences. Schwind's Court of Appeals Reply Brief at 1. Schwind noted that the circuit court did not apply either standard, it decided that there is no inherent authority to reduce the length of probation. *Id.* Therefore, Schwind asked the court of appeals to hold that circuit courts have inherent authority to reduce the length of probation, Schwind's Court of Appeals Brief at 5-7, and remand the matter to the circuit court for application of whatever standard applies. Schwind's Court of Appeals Reply Brief at 2-4.

HOW THE COURT OF APPEALS DECIDED THE ISSUES

The court of appeals did not determine whether circuit courts have inherent authority to reduce the length of probation. Slip op. at 3-4; App. at 3-4. The court found that even if circuit courts have inherent authority to reduce the length of probation, they can do so only when a defendant establishes a clear mistake, a new factor, or undue harshness or unconscionability. *Id.* Because Schwind did not establish a new factor, the court of appeals affirmed the circuit court. *Id.*

STATEMENT OF REASONS THIS CASE MERITS SUPREME COURT REVIEW

I. Whether circuit courts have inherent authority to reduce the length of probation is a novel question which causes uncertainty for every circuit court and probationer, thus it merits review pursuant to Rule 809.62(1r)(c)2.

In 2017 there were 45,054 people on probation in Wisconsin.[1] Whether our circuit courts have inherent authority to reduce the length of probation in any of those cases is an open question. The court of appeals has held that if circuit courts have this authority it is subject to the same limitations as their inherent authority to modify sentences. *State v. Dowdy*, 2010 WI App 158, ¶ 31, 330 Wis. 2d 444, 792 N.W.2d 230 (*Dowdy I*). This issue has reached this Court before, but the Court did not decide the issue at that time. *State v. Dowdy*, 2012 WI 12, ¶ 43, 338 Wis. 2d 565, 808 N.W.2d 691 (*Dowdy II*). A decision to that unanswered question would apply to all current and future probationers, and it would define the inherent authority of every circuit court in this state. Because the uncertainty affects every circuit court in this state, as well as thousands of current and future probationers, this novel question has statewide importance.

[1] Department of Corrections, "Division of Community Corrections-2017 A Year in Review," p. 4 (https://doc.wi.gov/DataResearch/DataAndReports/DCCYearInReview.pdf).

II. These questions of law merit review under Rule 809.62(1r)(c)3 because they will recur and cause uncertainty whenever any probationer asks a court to reduce the length of probation.

The question of a circuit court's inherent authority to reduce the length of probation is a question of law subject to *de novo* review. *Dowdy I*, 330 Wis. 2d 444, ¶ 23. The facts in this case are neither disputed nor are they particularly important to the questions presented. These issues are purely about the law, about the extent of inherent authority possessed by our circuit courts. While the facts are not particularly important to those questions, the fact that they are fully developed and undisputed would allow this court to give examples of how any standard governing the exercise of inherent authority might be properly applied by circuit courts.

These issues are likely to recur. Considering that these questions already came to the Court in *Dowdy II*, this case illustrates that this is a recurring issue. Further, it is quite logical to presume that an issue affecting thousands of current and future probationers will recur until this Court provides guidance.

STATEMENT OF THE CASE

Schwind's appeal arose from the circuit court's denial of his motion requesting that the circuit court exercise its inherent authority to reduce the length[2] of his probation. (R.36 and 42; App. at 21-22.) In denying Schwind's motion, the circuit court held that it had no inherent authority to reduce the length of a

[2] Schwind asked the circuit court to terminate his probation by reducing its length to the time already served.

probation term. (R.54:10-12, 18-19; App. at 10-12, 18-19.) The decision of the court of appeals adequately summarizes, for the purposes of this petition, the facts and disposition in the circuit court. Slip. op. at 2-3; App. at 2-3. On appeal, Schwind argued that circuit courts possess inherent authority to reduce the length of probation for cause. Schwind's Court of Appeals Brief at 5-10.

The court of appeals affirmed the circuit court in a summary opinion and order. Slip op.; App. at 1. The court explained that it is bound by its decision in *Dowdy I*, which held that if circuit courts have inherent authority in this area, that authority is subject to the same limitations as the circuit courts' inherent authority to modify sentences. Slip op. at 3-4; App. at 3-4 (citing *Dowdy I*, 330 Wis. 2d 444, ¶¶ 31-32). Those limitations allow courts to modify only in limited situations: clear mistake, a new factor, and undue harshness or unconscionability. Slip op. at 3-4; App. at 3-4 (citing *Dowdy I*, 330 Wis. 2d 444, ¶ 28). The court stated that while Schwind's arguments were "not without weight," it did not have the power to overrule or modify its language in *Dowdy I*. Slip op. at 4; App. at 4 (citing *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997)). The court held that Schwind did not establish the existence of a new factor; therefore, even if the circuit court had inherent authority to reduce the length of probation it would not have been able to do so in this case. Slip op. at 4, n. 3.

ARGUMENT

I. This Court should accept review to determine whether circuit courts have inherent authority to reduce the length of probation because the lack of an answer causes uncertainty, absurd results, waste, and it impedes the achievement of probation's goals.

Wisconsin courts have both enumerated and inherent powers. *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 16, 531 N.W.2d 32 (1995). Inherent powers are those powers that are necessary to enable courts to accomplish their constitutionally and legislatively mandated functions. *Id.* One of these inherent powers is the power to modify or even reduce a sentence. *State v. Harbor*, 11 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828.

The circuit courts have no guidance as to whether they have that authority with regard to probationary terms. *See Dowdy II*, 338 Wis. 2d 565, ¶ 5 (declining to decide the issue because the defendant failed to raise it in the circuit court). They clearly have authority modify the terms of probation when modification would effectuate the purposes of probation, namely, rehabilitating the defendant and protecting the public. *See State v. Gray*, 225 Wis. 2d 39, 68, 590 N.W.2d 918 (1999). Yet the question remains whether courts have inherent authority to reduce the length of probation.

This uncertainty can produce absurd results. A court that tries to avoid wasting supervisory resources on already-rehabilitated defendants but is wary of exercising unsettled authority can instead modify probation by removing all conditions. The result is the mere illusion of supervision. This

undermines the integrity of supervision and the public's confidence in it.

In addition, the uncertainty obstructs the rehabilitation of offenders and protection of society. Early discharge can encourage a probationer's rehabilitative efforts. Also, not all probation can be transferred to another state, so a court's inability to end probation can prevent probationers from accepting employment or attending any out-of-state university. *See* Interstate Compact for Adult Offender Supervision, sec. 3.101. In addition, wasting the public's limited supervisory resources on rehabilitated probationers means that those resources will not be directed to more dangerous offenders.

This issue affects every circuit court in this state as well as thousands of probationers and the agents who supervise them. The current status is one of uncertainty about the inherent authority of the circuit courts, and this uncertainty leads to waste, absurd results, and it impedes the goals of probation. Regardless of the standard the Court may choose to apply to the exercise of this power, a decision by this Court is necessary to provide certainty to the courts and everyone involved in probation.

II. The Court should review the standard applicable to the exercise of this inherent authority because the standards applicable to sentence modification cannot effectuate the purposes of probation.

The standard should allow courts to fulfill the function of effectuating the purposes of probation. Unfortunately, the sentence-modification standard adopted in *Dowdy I* is not suited to this task. It allows modification only in cases involving clear mistake, a new factor, or undue harshness or unconscionability. *Dowdy I*, 330 Wis. 2d 444, ¶¶ 28-31. Those limitations exist to further the purposes of sentencing. But probation has different purposes than sentencing, and effectuating its goals requires an ongoing evaluation of the defendant's rehabilitation and the need to protect society. To achieve these goals, the better alternative is a standard of "cause" that permits circuit courts to consider all of the circumstances to decide whether reducing the length of probation would effectuate the purposes of probation.

The goal of sentence modification is backward-looking, to correct errors. *See State v. Kluck*, 210 Wis. 2d 1, 8-9, 563 N.W.2d 468 (1997). The limitations exist because finality is essential to effectuate the purposes of sentencing. *See Dowdy I*, 330 Wis. 2d 444, ¶ 32. Those purposes are deterrence, rehabilitation, retribution, and segregation. *State v. Loomis*, 2016 WI 68, ¶ 96, 371 Wis. 2d 235, 881 N.W.2d 749. Finality is needed to achieve deterrence and retribution. *See Dowdy II*, 338 Wis. 2d 565, ¶¶99-100 (Abrahamson, C.J., dissenting).

A standard designed to correct errors and promote finality is inconsistent with probation's forward-looking purposes. The purposes of probation are rehabilitation and protection of the

public. Unlike deterrence and retribution, these goals are not achieved at the time of sentencing. They are achieved while the defendant is on probation. A standard aimed at correcting past errors would not allow courts to address a defendant's ongoing rehabilitative needs, and it would not allow courts to consider how ongoing developments affect the need to protect the public. To effectuate the forward-looking goals of probation, the Court should adopt a standard that allows courts to consider a defendant's then-existing rehabilitative needs and how post-sentencing events affect public safety.

The "cause" standard would enable courts to effectuate probation's goals. It gives courts discretion to decide whether reducing the length of probation would promote a defendant's rehabilitation and the protection of the public. Rehabilitation and public protection are ongoing processes, so it allows courts to consider the totality of the circumstances, including the defendant's rehabilitative progress, the defendant's ongoing needs, how the defendant's performance on probation affects the need to protect the public, the nature of the offense, the defendant's prior history, and any other factor relevant to the goals of probation.

In addition, the "cause" standard is consistent with the standard for other forms of probation modification. A court may extend or modify the terms and conditions of probation at any time "for cause." Wis. Stat. § 973.09(3)(a). That same standard should apply to reducing the length of probation because the purpose of any modification, extension, or reduction is the same—to effectuate the dual purposes of probation.

A decision by this Court is necessary to ensure a consistent standard that effectuates the purposes of probation. With its focus on finality, the sentencing-modification standard actually prevents courts from effectuating the ongoing goals of rehabilitation and protection of the public. In contrast, the "for cause" standard is well-suited to effectuating those goals, and it provides a consistent standard that applies to all changes to the length, terms, and conditions of probation.

CONCLUSION

These issues affect every circuit court in this state, thousands of probationers, and anyone involved in administering probation. The lack of a decision by this or any other appellate court regarding whether the circuit courts have inherent authority to reduce the length of probation leaves circuit courts unsure about the limits of their authority, produces inconsistent and potentially absurd results, and undermines the achievement of probation's purposes. In addition, the court of appeals' adoption of a sentence modification standard rather than the same "cause" standard that applies to all other probation modifications introduces inconsistency and impedes ongoing rehabilitation and the protection of society. For these reasons the Court should review this case to determine whether the circuit court had inherent authority to reduce the length of Schwind's probation, and if so, what standard the circuit court should have applied when deciding whether to grant Schwind's request. On review, Schwind will request that the Court hold that the circuit court had inherent authority to reduce the length of his probation for cause and remand the matter to the circuit court to determine whether cause exists in this case.

Dated this 14th day of March, 2018.

_____
Andrew R. Walter
Attorney for the Defendant-Appellant-Petitioner
State Bar No. 1054162

CERTIFICATION AS TO FORM AND LENGTH

I certify that this petition meets the form and length requirements of Rule 809.19(8)(b) and (c) and that it is proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11 point for quotes and footnotes, leading a minimum of 2 points and maximum of 60 characters per line of body text. The length of this petition is 2,480 words.

Dated this 14th day of March, 2018.

_____
Andrew R. Walter
Attorney for the Defendant-Appellant-Petitioner
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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, which complies with the requirements of Rule 809.19(12). I further certify that the

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 14th day of March, 2018.

_____

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