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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III  
Case No. 2018AP412-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DUSTIN M. YANDA,

Defendant-Appellant.

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On Appeal From a Judgment of Conviction  
and Order Denying Postconviction Relief in the Circuit Court  
for Brown County,  
the Honorable Marc A. Hammer, Presiding.

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REPLY BRIEF OF  
DEFENDANT-APPELLANT

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## TABLE OF CONTENTS

	Page
ARGUMENT .....	1
The Circuit Court Erred as a Matter of Law in Denying Mr. Yanda’s Motion for Sentence Modification By Misapplying the “New Factor” Test. ....	1
CONCLUSION .....	3

## CASES CITED

<i>State v. Harbor</i> , 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.....	2
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## **ARGUMENT**

The Circuit Court Erred as a Matter of Law in Denying Mr. Yanda's Motion for Sentence Modification By Misapplying the "New Factor" Test.

The state agrees that Mr. Yanda's statutory ineligibility for the Challenge Incarceration Program (CIP) and the Substance Abuse Program (SAP) is a new factor. (State's Brief at 6).

The state acknowledges that the circuit court twice stated that the new factor did not frustrate the purpose of the sentence. And the state agrees that the court cannot make frustrating the purpose of the sentence an independent requirement for a new factor sentence modification. (State's Brief at 7).

The state's argument is simply that the court can properly consider whether ineligibility for CIP and SAP frustrated the purpose of the sentence but the court cannot make that consideration an independent requirement. And, according to the state, in Mr. Yanda's case the "frustrate the purpose" language was merely verbiage and not an independent requirement. (State's Brief at 7).

A careful look at what the court said makes it clear that the "frustrate the purpose" statements were not mere verbiage. The court framed the issue as: "The question is: Does it justify a sentence modification? Does it frustrate the purpose of the sentence?" (60:6; App. 104). In reaching its decision to deny the motion, the court again framed the issue in this manner: "I am not satisfied that based on the fact that he was ultimately ineligible for these programs that it frustrated the purpose, the primary purpose of the Court's sentence." (60:10-11; App. 108-109).

The way the court used “frustrate the purpose” shows that it was applying the phrase as a legal standard. The phrase “frustrate the purpose” has legal meaning in the sentence modification context. In *State v. Harbor*, 2011 WI 28, ¶¶36-37, 46, 333 Wis. 2d 53, 797 N.W.2d 828, the Wisconsin Supreme Court noted that there were two divergent lines of cases in Wisconsin regarding the proper test for a new factor: one line that required the new factor to “frustrate the purpose” and one that did not. The *Harbor* court rejected the line of cases that required a “frustrate the purpose” finding, “We conclude that frustration of the purpose of the original sentence is not an independent requirement when determining whether a fact or set of facts alleged by a defendant constitutes a new factor.” *Id.* at ¶48.

The most logical interpretation of the court’s repeated use of “frustrate the purpose” language in Mr. Yanda’s case is that it was applying this legal standard. The “frustrate the purpose” language was not buried within other sentencing comments. The “frustrate the purpose” language was how the court framed the legal standard it believed it needed to apply. This was error.

Mr. Yanda asks this court to remand his case to the circuit court. A remand allows the circuit court to apply the proper legal standard and avoids merely guessing and speculating about whether the court’s multiple references to “frustrate the purpose” were an improper application of the legal standard, as Mr. Yanda argues, or some kind of lesser consideration, as the state theorizes.

## **CONCLUSION**

For the reasons stated above, as well as those in the brief-in-chief, this court should reverse the denial of Mr. Yanda's postconviction motion and remand the case to the circuit court for a determination of whether the new factor evidence warrants sentence modification.

Dated this 8th day of August, 2018.

Respectfully submitted,

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## **CERTIFICATION AS TO FORM/LENGTH**

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in 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 of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 561 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 August, 2018.

Signed:

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