RECEIVED
09-30-2019
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2019AP001244 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD D. TAYLOR,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR SENTENCE MODIFICATION, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT ON JUNE 20, 2019, HON. JOSEPH R. WALL PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Gregory W. Wiercioch
State Bar No. 1091075
Attorney for Defendant-Appellant

John P. Smith
Law Student

Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, Wisconsin 53706
(608) 263-1388

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

STANDARD OF REVIEW 6

ARGUMENT 7

I. MR. TAYLOR'S MOTION IS RIPE FOR REVIEW BECAUSE HE IS EXPERIENCING HARDSHIP CAUSED BY WITHHOLDING JUDICIAL CONSIDERATION OF HIS CLAIM FOR SENTENCE MODIFICATION. 7

A. Mr. Taylor's motion is not based on hypothetical or future facts. 7

B. This Court should analyze ripeness through the lens of the 40-year maximum sentence that Judge DiMotto intended to impose. 8

C. Mr. Taylor's PMR status exposes him to 20 more years in prison than Judge DiMotto intended and is creating hardships for him now..... 9

II. MR. TAYLOR'S PMR STATUS IS A NEW FACTOR THAT JUSTIFIES SENTENCE MODIFICATION. 12

A. The Controlling Law..... 12

B. Mr. Taylor's PMR status is a new factor, because Judge DiMotto was unaware of it when he expressly determined the maximum length of the sentence based on his understanding that Mr. Taylor was subject to MR. 13

C. By refusing to modify Mr. Taylor's sentence to reflect Judge DiMotto's stated intent, the circuit court erroneously exercised its discretion. 17

CONCLUSION..... 21

TABLE OF APPENDICES..... 24

TABLE OF AUTHORITIES

Cases

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 7

Califano v. Sanders,
430 U.S. 99 (1977) 7

Hayes v. State,
46 Wis. 2d 93, 175 N.W.2d 625 (1970) 18

Kutchera v. State,
69 Wis. 2d 534, 230 N.W.2d 750 (1975) 15,16

Olson v. Town of Cottage Grove,
2008 WI 51, 309 Wis. 2d 365, 749 N.W.2d 211 6

Rosado v. State,
70 Wis. 2d 280, 234 N.W.2d 69 (1975) 12,13,15

State v. Armstead,
220 Wis. 2d 626, 583 N.W.2d 444 (Ct. App. 1998) 7

State v. Avery,
2013 WI 13, 345 Wis. 2d 407, 826 N.W.2d 60 17,18

State v. Borrell,
167 Wis. 2d 749, 482 N.W.2d 883 (1992) 14

State v. Franklin,
148 Wis. 2d 1, 434 N.W.2d 609 (1989) 12,13,18

State v. Gallion,
2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197 18

State v. Harbor,
2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828 ...*passim*

State v. Hegwood,
113 Wis. 2d 544, 335 N.W.2d 339 (1983) 6,12

State v. Thiel,
2012 WI App 48, 340 Wis. 2d 654, 813 N.W.2d 709... 7

Statutes and Acts

1993 Wisconsin Act 194 .....*passim*

Wis. Stat. § 302.11(1) 4

Wis. Stat. § 302.11(1g)(a)(2) 5

Wis. Stat. § 302.11(1g)(am) 4,5

Wis. Stat. § 302.11(1g)(b) 5

Wis. Stat. § 304.06(1)(b) 4

Wis. Stat. § 948.02(1) 5

Wis. Stat. § 973.0135(2) 5,6,19

Wis. Stat. Ch. 980 17

Regulations

Wis. Admin. Code DOC § 302.11(2), (3) 9

Wis. Admin. Code DOC § 302.13(2)(a) 10

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2019AP001244 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD D. TAYLOR,

Defendant-Appellant.

ON REVIEW OF A DENIAL OF A MOTION FOR SENTENCE MODIFICATION, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT ON JUNE 20, 2019, HON. JOSPEH R. WALL PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES PRESENTED

1. Is Mr. Taylor's motion for sentence modification, based on the new factor that he is subject to presumptive mandatory release (PMR) after serving two-thirds of his sentence, rather than mandatory release (MR)—as his sentencing judge believed—ripe for judicial determination before he reaches his PMR date?

The circuit court denied Mr. Taylor's motion, concluding it is premature, because he has not yet reached his PMR date, and he may be paroled on or before that date.

2. Is Mr. Taylor's PMR status a new factor that justifies modifying Mr. Taylor's sentence from 60 years to 40 years, to conform to the sentencing court's stated intent to impose a sentence with a maximum of 40 years in prison?

   The circuit court found that, even if Mr. Taylor's motion were ripe, his PMR status does not justify modifying his sentence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Taylor seeks oral argument so that he may address any questions the Court may have. He asks for publication because no precedent has addressed these issues.

STATEMENT OF THE CASE

On September 30, 1999, Mr. Taylor pled no contest to two counts of first degree sexual assault of a child. 18 (App. A). He faced a maximum sentence of 80 years in prison (40 years on each count). 117:21 (App. B). In exchange for his no-contest pleas to both counts, the State recommended 15 years in prison on the first count and 25 years in prison, imposed and stayed, with 12 years of probation, on the second count, to run consecutively to the first count. *Id.* at 22–23. However, Judge John J. DiMotto rejected the State's recommendation and, on November 12, 1999,

sentenced Mr. Taylor to 30 years for each count, to be served consecutively. *Id.* at 103–04.

On February 28, 2019, Mr. Taylor filed a Motion for Sentence Modification and Amended Judgment of Conviction. He argued that Judge DiMotto and the parties were unaware that Mr. Taylor was subject to PMR after serving two-thirds of his sentence, rather than MR. 104.

On June 20, 2019, the circuit court denied Mr. Taylor's motion. 112 (App. C).[1] The court ruled that Mr. Taylor's motion is premature because he has not yet reached his PMR date, and he may be granted parole on or before his PMR date. *Id.* at 3. The court acknowledged that Judge DiMotto was not aware of Mr. Taylor's PMR status but concluded that his PMR status does not justify modifying his sentence. *Id.* at 2–3.

STATEMENT OF FACTS

Judge DiMotto could have sentenced Mr. Taylor to 80 years in prison. However, he concluded that Mr. Taylor did not deserve the maximum sentence, based on his "total character." 117:105.

Before announcing Mr. Taylor's sentence, Judge DiMotto explained, "[J]udges when they impose sentence now, they take into account how parole works." *Id.* at 101. He then stated that Mr. Taylor would have to serve at least one-quarter of his sentence and that he could serve up to a maximum of

[1] Judge DiMotto had retired by the time Mr. Taylor filed his motion for sentence modification. Judge Joseph R. Wall ruled on the motion.

two-thirds of his sentence before he would reach his "mandatory release date." *Id*. Judge DiMotto reiterated his belief that "in essence, a sentence is somewhere between one-quarter and two thirds of the judge's proclamation." *Id*.

After sentencing Mr. Taylor to a total of 60 years on the two counts, Judge DiMotto explained, "[Y]ou're going to end up serving a minimum of fifteen years, and you could serve up to a maximum of forty years. So in essence this is a fifteen to forty-year sentence." 117:104.

Due to the nature of his offenses, Mr. Taylor does not have a mandatory release date to parole once he has served two-thirds of his sentence. Wis. Stat. § 302.11(1g)(am).[2] Instead, he has only a presumptive mandatory release date after serving two-thirds of his sentence. Wis. Stat. § 302.11(1g)(am).

Generally, a person sentenced for an offense committed before Truth-In-Sentencing (TIS) was implemented on December 31, 1999, becomes eligible for parole after the person has served one-quarter of the sentence. Wis. Stat. § 304.06(1)(b). Such a person is entitled to mandatory release on parole after serving two-thirds of the sentence. Wis. Stat. § 302.11(1).

However, 1993 Wisconsin Act 194, which became effective on April 21, 1994, created parole eligibility exceptions for anyone convicted of a "serious felony." Under Wis. Stat. § 302.11(1g)(am), a person convicted of a "serious felony" committed on or after April 21, 1994, but before December 31, 1999, has a

[2] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

PMR date—not an MR date—at two-thirds of the sentence. While those with MR dates must be paroled on or before they reach their MR dates, the Parole Commission can deny parole to those who have reached their PMR dates. Wis. Stat. § 302.11(1g)(b). Ultimately, a person with a PMR date may serve the entire sentence in prison.

In addition to giving the Parole Commission discretion to hold a person convicted of a "serious felony" in prison beyond the PMR date, 1993 Wisconsin Act 194 gave sentencing courts discretion to set the initial parole eligibility date for a person convicted of a "serious felony." Wis. Stat. § 973.0135(2). When sentencing a person who committed a "serious felony" between April 21, 1994, and December 31, 1999, the court may set the person's initial parole eligibility date any time after one-quarter, but not later than two-thirds, of the sentence imposed. Wis. Stat. § 973.0135(2).

Because Mr. Taylor's offenses, violations of Wis. Stat. § 948.02(1), are "serious felonies" under Wis. Stat. § 302.11(1g)(a)(2), the parole eligibility exceptions that 1993 Wisconsin Act 194 created apply to him. He is subject to PMR, not MR, at two-thirds of his sentence. Wis. Stat. § 302.11(1g)(am). Rather than being guaranteed release on parole once he serves 40 years (two-thirds of his 60-year sentence), Mr. Taylor is guaranteed release from prison only after he has served his entire 60-year sentence. Additionally, Mr. Taylor's sentencing court was not required to make him initially eligible for parole after he served one-quarter of his total sentence. Wis. Stat. § 973.0135(2). The court could have set his initial parole eligibility

date at any time between one-quarter and two-thirds of his total sentence. Wis. Stat. § 973.0135(2).

STANDARD OF REVIEW

Ripeness is a threshold jurisdictional question. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 32, 309 Wis. 2d 365, 749 N.W.2d 211. Therefore, whether an issue is ripe for judicial review is a question of law that this Court reviews *de novo*. *Id.* at ¶¶ 37–38.

Whether the facts offered by the defendant constitute a new factor is a question of law that this Court reviews *de novo*. *State v. Harbor*, 2011 WI 28, ¶ 33, 333 Wis. 2d 53, 797 N.W.2d 828 (citing *State v. Hegwood*, 113 Wis. 2d 544, 547, 335 N.W.2d 339 (1983)). If a new factor exists, the circuit court exercises its discretion to determine if the new factor justifies sentence modification. *Id.* This Court reviews such decisions for erroneous exercise of discretion. *Id.*

ARGUMENT

I. MR. TAYLOR'S MOTION IS RIPE FOR REVIEW BECAUSE HE IS EXPERIENCING HARDSHIP CAUSED BY WITHHOLDING JUDICIAL CONSIDERATION OF HIS CLAIM FOR SENTENCE MODIFICATION.

A. Mr. Taylor's motion is not based on hypothetical or future facts.

"The two fundamental considerations in a ripeness analysis are 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *State v. Thiel*, 2012 WI App 48, ¶ 7, 340 Wis. 2d 654, 813 N.W.2d 709 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). Additionally, a claim is not ripe for adjudication when it is based on hypothetical or future facts. *See State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998) (finding that the defendant's claims of ineffective assistance of counsel, cruel and unusual punishment, and equal protection violation were not ripe for review because the defendant had not yet been tried and convicted).

Unlike the defendant's claims in *Armstead*, Mr. Taylor's motion is not based on hypothetical or future facts. Mr. Taylor's motion is based on his PMR status, which extends his mandatory release date by 20 more years than Judge DiMotto intended. While Armstead's claims depended upon a hypothetical and future fact—that she would be convicted of the offense for which

she had not yet been tried—Mr. Taylor's motion rests on his PMR status, which is not a hypothetical or future fact. It is a status to which he was subjected by statute in 1999. While it is possible that he may be paroled before his MR date, the additional 20 years in prison he currently faces because of his PMR status are very real.

B. This Court should analyze ripeness through the lens of the 40-year maximum sentence that Judge DiMotto intended to impose.

Judge DiMotto intended to impose a sentence with a mandatory release at 40 years, but because of Mr. Taylor's PMR status, his actual mandatory release comes only after he has served his entire 60-year sentence. Based on Judge DiMotto's intent that he serve a maximum of 40 years, Mr. Taylor would reach PMR after serving 26 years and 8 months in prison (two-thirds of 40 years). Because Mr. Taylor had 138 days of jail credit when he was sentenced on November 12, 1999, his sentence began on June 24, 1999. 18. Therefore, his PMR date based on Judge DiMotto's intended sentence is February 24, 2026, more than 13 years sooner than his current PMR date of June 24, 2039.

If this Court withholds consideration of Mr. Taylor's motion until he reaches his current PMR date (upon serving 40 years), then he will have lost any benefit accruing to him under his intended PMR date. Ripeness will turn to mootness. Should the circuit court determine at that time that Mr. Taylor's overlooked PMR status constitutes a new factor justifying sentence modification, the damage will have

long ago been done, and he will be without a remedy. Mr. Taylor would have served more than 13 years past his PMR date based on the 40-year maximum sentence Judge DiMotto intended. Extending the upper range of Mr. Taylor's sentencing range to a never-intended 60 years is causing Mr. Taylor hardships now, because neither the Parole Commission nor the Department of Corrections (DOC) is aware that he is quickly approaching his intended PMR date. These hardships weigh in favor of deciding the motion now so that the DOC and the Parole Commission can base their decisions on Mr. Taylor's intended PMR and MR dates, and Mr. Taylor is not left without a remedy.

C. Mr. Taylor's PMR status exposes him to 20 more years in prison than Judge DiMotto intended and is creating hardships for him now.

The circuit court concluded that Mr. Taylor's motion was premature because he may be paroled on or before his PMR date. 112:3. However, Mr. Taylor is experiencing hardship from his PMR status now, even before he reaches his intended PMR date. His 40-year PMR reduces his chances of participating in DOC treatment programs, being approved for a lower-security classification, and getting paroled, than if his PMR were only 26 years and 8 months, as Judge DiMotto intended.

The DOC considers "length of the sentence being served" and "time remaining to serve" when making classification decisions. Wis. Admin. Code DOC § 302.11(2), (3). Therefore, the longer the possible prison sentence, the more difficult it is for a person to achieve a lower security classification. Custody at a lower

security classification is both a benefit itself—it provides an incarcerated person greater freedom—and a factor that the Parole Commission considers when it determines parole eligibility. Notice of Parole Consideration (App. D). In addition, the DOC may consider sentence length and time remaining to serve when it assigns persons to treatment programs. Wis. Admin. Code DOC § 302.13(2)(a). Like security classification, program participation is a benefit itself and another factor the Parole Commission reviews when it determines parole eligibility. App. D.

The possibility that Mr. Taylor may spend up to 60 years in prison, a result of his 40-year PMR status, is making it more difficult for him to reach a lower security classification, gain access to needed treatment programs, and achieve release on parole. For example, in his most recent Inmate Classification Report, the Program Review Committee declined to recommend Mr. Taylor for minimum security, despite his "appropriate" institutional adjustment, because of his "lengthy sentence structure," "unmet programming need," and "significant amount of time remaining to serve." Inmate Classification Report (App. E) at 5.

Mr. Taylor's inability to achieve a minimum-security classification makes it unlikely that he will be paroled, because the Parole Commission bases its decision in part on the person's security classification. App. D. In its report on Mr. Taylor's most recent parole hearing, held on October, 18, 2018, the Parole Commission commented, "Your institution conduct has been satisfactory, noting just 4 CR's [Conduct Reports] since reception, with 1 Minor CR within the past year (01/2018), and your last Major CR occurring

in 10/2007." Parole Commission Action Report (App. F) at 1. Nevertheless, the Commission was clear that, despite Mr. Taylor's "satisfactory" institutional adjustment, it is not willing to consider granting him parole until he has reached minimum-security, noting that "eventual transition through reduced security" would help reduce his risk to a level where he might be paroled. *Id.* at 2.

Two reasons the Parole Commission cited in its most recent decision to deny Mr. Taylor parole were that he "ha[s] NOT served sufficient time for punishment" and his "program participation has NOT been satisfactory." *Id.* at 1 (emphases in original). If the maximum prison sentence Mr. Taylor faced were 40 years, then "sufficient time for punishment" would be well less than it is under his current 60-year maximum sentence, and he would have a greater chance of being paroled sooner. Mr. Taylor already has served more than 20 years of the 26 years and 8 months that constitute his PMR on Judge DiMotto's intended maximum sentence. Additionally, because the DOC considers time remaining to serve and sentence length when it assigns limited space in treatment programs, the DOC is less likely to place Mr. Taylor into required treatment programs in the foreseeable future while he continues to serve a 60-year maximum sentence.

II. MR. TAYLOR'S PMR STATUS IS A NEW FACTOR THAT JUSTIFIES SENTENCE MODIFICATION.

A. The Controlling Law

Wisconsin circuit courts have the inherent authority to modify criminal sentences based on a new factor. *Hegwood*, 113 Wis. 2d at 546. 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, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

To determine if a fact was a relevant factor at sentencing, courts consider whether the sentencing court "expressly relie[d]" on it. *State v. Franklin*, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989) (finding that, "[b]ecause it was not expressly considered by the court in sentencing, parole policy was not relevant to the imposition of this sentence").

In *Harbor,* the Wisconsin Supreme Court clarified that a new factor does not have to "frustrate the purpose of the original sentence." 2011 WI 28, ¶ 49. The Wisconsin Supreme Court noted, however, that, "[c]ertainly, a fact that frustrates the purpose of the original sentence likely satisfies the *Rosado* test, provided that the fact was also unknown to the circuit court at the time of sentencing." *Id.* A fact that frustrates the purpose of the original sentence, *Harbor* explained, "would generally be a new fact that is

'highly relevant to the imposition of sentence.'" *Id.* (quoting *Rosado*, 70 Wis. 2d at 288).

Courts follow a two-step process to determine whether to modify a sentence based on a new factor. First, the defendant must demonstrate by clear and convincing evidence the existence of a new factor. *Franklin*, 148 Wis. 2d at 8–9. Second, if the defendant has shown the existence of a new factor, the circuit court must exercise its discretion to determine whether the new factor justifies sentence modification. *Id.* at 8.

B. Mr. Taylor's PMR status is a new factor, because Judge DiMotto was unaware of it when he expressly determined the maximum length of the sentence based on his understanding that Mr. Taylor was subject to MR.

Mr. Taylor's PMR status is highly relevant to the imposition of his sentence, because Judge DiMotto intended the maximum length of the sentence to be two-thirds of the 60-year sentence he imposed. At sentencing, Judge DiMotto focused on two specific aspects of the parole law—the initial parole eligibility date and the MR date:

> [J]udges when they impose sentence now, they take into account how parole works. I know everyone in the criminal justice system knows whatever sentence I impose, you will have to serve one-quarter of that sentence and then you will be eligible for parole, and you could serve up to two-

> thirds of the time imposed. That's when you would reach your mandatory release date.
>
> So in essence, a sentence is somewhere between one-quarter and two-thirds of the judge's proclamation.

117:101. Judge DiMotto used these two fractions of the total length of the sentence to determine the actual upper and lower range of Mr. Taylor's sentence. Therefore, both Mr. Taylor's initial parole eligibility date and his MR date—the maximum amount of time he could spend in prison—are "highly relevant" to his sentence. Because 1993 Wisconsin Act 194 established that Mr. Taylor is subject to PMR not MR, and the Parole Commission does not have to release him at his PMR date, his PMR status moves his mandatory release from two-thirds of his sentence to the end of his entire sentence.

During sentencing, Judge DiMotto recognized that the sentence he imposed had to be "the minimum amount of time necessary to obtain the goals of rehabilitation, protection, and punishment." 117:97. He concluded that a prison term between 15 and 40 years met this requirement. *Id.* at 104. Based on his understanding of how parole law worked, Judge DiMotto imposed a 60-year sentence to craft this sentencing range. *Id.* However, Mr. Taylor's PMR status means that he could remain in prison 20 years longer than Judge DiMotto ever intended. That fact is "highly relevant" to Mr. Taylor's sentence. *See State v. Borrell*, 167 Wis. 2d 749, 767, 482 N.W.2d 883 (1992) (recognizing that the parole eligibility determination is an "essential and integral part" of the court's sentencing decision).

In denying Mr. Taylor's motion for sentence modification, the circuit court conceded that Mr. Taylor's PMR status was unknown to Judge DiMotto. 112:2. But the circuit court held that Judge DiMotto would not have "lessened his sentences" even if he had known Mr. Taylor could remain in prison beyond his MR date. *Id.* at 2–3. The circuit court explained that "[t]he PMR law may have been relevant to [Judge DiMotto] for purposes of explaining to the defendant what he was facing, but it is not likely to have altered his sentences based on the nature of the offenses, which the court found to be 'horrific.'" *Id.* at 3 (footnote omitted).

The record does not support the circuit court's explanation. If Judge DiMotto believed that the upper range of Mr. Taylor's sentence should have been greater, then he could have sentenced him to 80 years in prison, under the impression that Mr. Taylor would be subject to MR only after serving a maximum of 53 years (two-thirds of 80 years). Yet, Judge DiMotto explicitly stated that Mr. Taylor did not deserve the maximum punishment. 117:105. Instead, Judge DiMotto used his understanding of "how parole works," *id.* at 101, to create the sentencing range—the minimum fixed by the initial parole eligibility date and the maximum fixed by the MR date. Therefore, Mr. Taylor's PMR status—which increased his maximum possible sentence by 20 years—was "highly relevant to the imposition of sentence." *Rosado*, 70 Wis. 2d at 288.

Mr. Taylor's new factor—his PMR status—is analogous to the change in parole law that the Wisconsin Supreme Court affirmed as a new factor justifying sentence modification in *Kutchera v. State*, 69 Wis. 2d 534, 552, 230 N.W.2d 750 (1975). In

Kutchera, the defendant moved for sentence modification based on the new factor that his parole eligibility had changed since he was sentenced. *Id*. at 552. He argued that, when the circuit court imposed his sentences, he was eligible for "instant parole." *Id.* Subsequently, however, the Wisconsin Supreme Court held that each sentence had a minimum parole eligibility of one year. *Id*. *Kutchera* upheld the circuit court's modification of the sentence, finding that the change in parole law was a new factor, because parole eligibility was discussed at sentencing, and the new factor justified modifying the sentence. *Id*. at 553.

Like Kutchera's parole eligibility, Mr. Taylor's PMR status resulted from a change in parole law.[3] Moreover, just as the circuit court in *Kutchera* used the defendant's parole eligibility to determine its sentence, Judge DiMotto expressly relied on the length of time Mr. Taylor had to serve before his mandatory release to parole to establish the upper limit of his sentence.

Even though 1993 Wisconsin Act 194 had taken effect more than five years before Mr. Taylor was sentenced, his PMR status was not known to Judge DiMotto at sentencing, because it was unknowingly overlooked by all of the parties. At no point during sentencing did any of the parties voice the understanding that Mr. Taylor could serve more than

[3] In its sentence modification ruling, the circuit court referred to Mr. Taylor's PMR status as resulting from a "new parole policy." 112:2. Mr. Taylor's PMR status resulted from a change in the parole statute, the passage of 1993 Wisconsin Act 194. This Act was not "new." It took effect over five years before Mr. Taylor's sentencing. This Act was not a "policy." It was a statutory change with the force of law.

40 years in prison.[4] Indeed, Judge DiMotto four times asserted his understanding that the sentence he imposed for Mr. Taylor had a mandatory release date at 40 years. 117:101, 102.

Finally, Mr. Taylor's PMR status is a new factor because it frustrates the purpose of his original sentence—that he serve at least 15, but not more than 40, years in prison. *Id.* at 104. While a new factor does not have to "frustrate the purpose of the original sentence," a fact that does so likely is a new factor if it was "unknown to the circuit court at the time of the sentencing." *Harbor*, 2011 WI 28, ¶ 49. Because Mr. Taylor's PMR status was unknown to Judge DiMotto and frustrates the purpose of his sentence, it is a new factor.

C. By refusing to modify Mr. Taylor's sentence to reflect Judge DiMotto's stated intent, the circuit court erroneously exercised its discretion.

While the circuit court ultimately denied Mr. Taylor's motion on ripeness grounds, the court erroneously exercised its discretion when it concluded, in the alternative, that Mr. Taylor's PMR status does not justify modifying his sentence. 112:2–3. A court "erroneously exercises its discretion when it applies the wrong legal standard or makes a decision not reasonably supported by the facts of record." *State v. Avery*, 2013 WI 13, ¶ 23, 345 Wis. 2d 407, 826 N.W.2d

[4] Judge DiMotto thought that the only way Mr. Taylor could be held for more than 40 years was if he were found to be a sexually violent person under Wis. Stat. Ch. 980. 117:102. But Judge DiMotto understood that, if Mr. Taylor were committed under Chapter 980, such a commitment would not be a prison sentence. *Id.*

60 (citations omitted). The purpose of sentence modification is to correct unjust sentences. *Franklin*, 148 Wis. 2d 1 at 9 (citing *Hayes v. State*, 46 Wis. 2d 93, 105, 175 N.W.2d 625 (1970)). Mr. Taylor's PMR status, which gives the Parole Commission discretion to keep him in prison 20 years longer than Judge DiMotto intended, is a new factor that justifies modifying the sentence to 40 years. The circuit court's decision to the contrary ignores well-established sentencing law and is "not reasonably supported by the facts of record." *Avery*, 2013 WI 13, ¶ 23.

The Wisconsin Supreme Court has repeatedly held that "the sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." *State v. Gallion*, 2004 WI 42, ¶23, 270 Wis. 2d 535, 678 N.W.2d 197 (internal quotation marks omitted). Judge DiMotto abided by this principle at Mr. Taylor's sentencing hearing. He noted that the length of the sentence must be "the minimum amount of time necessary to obtain the goals of rehabilitation, protection, and punishment." 117:97. Judge DiMotto then determined that Mr. Taylor needed to serve a minimum of 15 years and calculated that a 60-year sentence would ensure that, because (prior to the passage of 1993 Wisconsin Act 194) incarcerated persons became initially eligible for parole after serving one-quarter of their sentence. 117:104. Judge DiMotto emphasized that the minimum range of the sentence would ensure that the victim had "fifteen years to grow, fifteen years to adjust, and, hopefully, fifteen years to flower into the wonderful person that she was on the road to becoming...." *Id.*

Judge DiMotto specifically declined to impose the maximum penalty because he concluded, based on Mr. Taylor's "total character," that the sentence he imposed "is a fair sentence, is a reasonable sentence, and is a just sentence for everyone involved." 117:105. However, because Mr. Taylor's offenses are "serious felonies," the 60-year sentence Judge DiMotto imposed does not ensure that Mr. Taylor will serve no more than 40 years.

Unknown to Judge DiMotto and unknowingly overlooked by the parties, Wis. Stat. § 973.0135(2) gave him the power to set Mr. Taylor's initial parole eligibility date beyond one-quarter of his sentence. If Judge DiMotto had known about the changes in the parole statute that resulted from the passage of 1993 Wisconsin Act 194, he would have sentenced Mr. Taylor to a total of 40 years in prison with an initial parole eligibility date after he served 15 years. In that case, Mr. Taylor's PMR would be 26 years and eight months, and his MR would be at 40 years. Yet, because Judge DiMotto was unaware of Mr. Taylor's PMR status, Mr. Taylor's current sentence allows for him to be confined in prison for up to 60 years—20 years longer than Judge DiMotto intended.

Mr. Taylor's sentence violates the *Gallion* requirement that the sentence imposed be the minimum amount of confinement necessary. Because Mr. Taylor's PMR status is a new factor, this Court should remand the case to the circuit court with instructions to modify Mr. Taylor's unjust sentence to 40 years to satisfy the intent of Judge DiMotto and the requirements of *Gallion*.

Modifying Mr. Taylor's sentence to 40 years would ensure that he is released from prison no later than the maximum term Judge DiMotto intended him to serve. Modifying his sentence to 40 years would not affect the 15-year minimum sentence Judge DiMotto intended him to serve: Mr. Taylor already has served 20 years in prison. The sentence modification Mr. Taylor seeks does not require this Court to speculate how the original sentencing court would view this new factor. Mr. Taylor simply asks that his sentence be modified to the term explicitly pronounced by Judge DiMotto at sentencing.

Modifying Mr. Taylor's sentence to 40 years also would allow the Parole Commission to determine whether he should be paroled on (or before) his intended PMR date. Based on a 40-year sentence, Mr. Taylor will reach his PMR date in seven years.

The circuit court concluded that, even if Judge DiMotto had known about the PMR statute, he would still have imposed the same sentence, because Judge DiMotto found Mr. Taylor's offenses to be "horrific." 112:2–3. The circuit court's ruling that Mr. Taylor's PMR status does not justify modifying his sentence is "not reasonably supported by the facts of record" and fails to apply several important legal standards.

First, although both Judge DiMotto and the State characterized Mr. Taylor's offenses as "horrific," neither believed that Mr. Taylor deserved the maximum sentence. 117:22, 105. Indeed, the State recommended a sentence of 15 years in prison, saying: "While this crime is a horrific offense, I don't believe Mr. Taylor falls in the worse [*sic*] offenders' category. He needs prison, and that's why I'm recommending

fifteen years." *Id.* at 22. Second, the circuit court ignored Judge DiMotto's explicit intention to sentence Mr. Taylor to at least 15—but not more than 40—years in prison. *Id.* at 104. Third, the circuit court failed to recognize that Mr. Taylor's PMR status is a new factor because it frustrates the purpose of the sentence Judge DiMotto intended to impose—that Mr. Taylor serve between 15 and 40 years in prison. *See Harbor*, 2011 WI 28, ¶49. Fourth, the circuit court did not apply the *Gallion* requirement that the sentence imposed be the minimum period of confinement necessary to satisfy the purposes of punishment. Judge DiMotto explicitly recognized this requirement when he sentenced Mr. Taylor. 117:97. For these reasons, the circuit court exercised its discretion erroneously when it concluded that Mr. Taylor's PMR status does not justify modification of his sentence.

CONCLUSION

This Court should reach the merits of Mr. Taylor's motion for sentence modification. The motion is ripe for judicial determination, because Mr. Taylor is currently experiencing hardships caused by his overlooked PMR status. Mr. Taylor's PMR status is a new factor that justifies modifying his sentence. Therefore, this Court should remand the case to the circuit court with instructions to modify Mr. Taylor's sentence to reflect both Judge DiMotto's intent that he serve no more than 40 years in prison, and the *Gallion* requirement that the sentence imposed be the minimum amount of confinement necessary to satisfy the purposes of punishment.

Respectfully submitted this 30th day of September 2019.

Gregory W. Wiercioch
State Bar No. 1091075
Attorney for Mr. Taylor

Frank J. Remington Center
975 Bascom Mall
Madison, WI 53706-1399
(608) 263-1388
wiercioch@wisc.edu

John P. Smith
Law Student

CERTIFICATION AS TO FORM

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4,902 words.

Gregory W. Wiercioch

ELECTRONIC CERTIFICATION

I certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Gregory W. Wiercioch

CERTIFICATION AS TO APPENDICES

I certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 first names and last initials 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.

_____

Gregory W. Wiercioch

TABLE OF APPENDICES

App. A Judgment of Conviction (Nov. 15, 1999)

App. B Excerpts from Sentencing Hearing Transcript (Nov. 12, 1999)

App. C Circuit Court Decision and Order (June 20, 2019)

App. D Notice of Parole Consideration (Sept. 4, 2018)

App. E Inmate Classification Report (Feb. 21, 2019)

App. F Parole Commission Report (Oct. 18, 2018)