STATE OF WISCONSIN
IN THE SUPREME COURT

Appeal No. 2019AP1244-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GERALD D. TAYLOR,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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PETITION FOR REVIEW

Gerald D. Taylor, through undersigned counsel, asks this Court, pursuant to Wis. Stat. § 809.62, to review the January 7, 2021 decision of the Wisconsin Court of Appeals, District I, denying a motion for reconsideration of its December 15, 2020 decision affirming the circuit court's denial of his motion for sentence modification based on the new factor that his presumptive mandatory release (PMR) status—which was unknown to his sentencing judge—extends the maximum amount of time he could serve in prison 20 years beyond the maximum time his sentencing judge intended.

STATEMENT OF THE ISSUE

> Does the decision of the Court of Appeals upholding the circuit court's refusal to modify a sentence that permits a person to serve up to 20 years—50 percent—longer than the maximum time the sentencing court intended violate this Court's often-repeated requirement that "the sentence imposed shall 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, ¶ 44, 270 Wis. 2d 535, 678 N.W.2d 197 (internal quotation marks omitted)?

The circuit court denied Mr. Taylor's motion for sentence modification. App. 3. The court ruled that the motion was premature because Mr. Taylor has not yet reached his PMR date, and he may be released on or before his PMR date. *Id*. at 3. The court acknowledged that the sentencing judge 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.

The Court of Appeals affirmed the decision, explaining that "[t]he postconviction court reasonably inferred that the circuit court was not concerned with the endpoint of Taylor's sentence." App. 1 at ¶ 18. Therefore, the Court of Appeals concluded that Mr. Taylor's parole date was not "highly relevant" to his original sentence. *Id*. Because Mr. Taylor's PMR status, which extended the date at which he must be released from prison from 40 years to 60 years, was not

"highly relevant," the Court of Appeals held, as a matter of law, that it is not a new factor under *Rosado v. State*, 70 Wis. 2d 280, 234 Wis. 2d 69 (1975), and sentence modification is unavailable. App. 1 at ¶ 18. Without further discussion of the merits, the Court of Appeals denied Mr. Taylor's motion for reconsideration. App. 2.

CRITERIA FOR REVIEW

The decision of the Court of Appeals conflicts with several controlling decisions of this Court. Wis. Stat. § 809.62(1r)(d).

At Mr. Taylor's sentencing, the judge stated that he "could serve up to a maximum time of forty years." App. 4 at 104. Yet his current sentence allows Mr. Taylor to serve 60 years in prison, 20 years more than the sentencing judge concluded was necessary. Fundamentally, the decision of the Court of Appeals conflicts with this Court's long line of cases requiring the sentence imposed be the minimum amount of confinement necessary to serve the three main sentencing factors. *Gallion*, 270 Wis. 2d 535, ¶44; *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971); *State v. Borrell*, 167 Wis. 2d 749, 764, 482 N.W.2d 883 (1992); *State v. Setagord*, 211 Wis. 2d 397, 416, 565 N.W.2d 506 (1997).

The decision of the Court of Appeals also conflicts with several of this Court's decisions recognizing that a change in parole policy or parole law can be a new factor that justifies sentence modification. *State v. Franklin*, 148 Wis. 2d 1, 15, 434 N.W.2d 609 (1989); *Kutchera v. State*, 69 Wis. 2d 534, 553, 230 N.W.2d 705 (1975). If the sentencing judge

"expressly relie[d]" on parole eligibility at the original sentencing, a change in parole policy may be a new factor. *Franklin*, 148 Wis. 2d at 15. Despite the sentencing judge's explanation that he was "tak[ing] into account how parole works" when he determined Mr. Taylor's sentence, App. 4 at 101, the Court of Appeals concluded Mr. Taylor's parole date was not relevant to the sentence imposed. App. 1 at ¶ 18. The decision is at odds with both *Kutchera* and *Franklin*.

STATEMENT OF THE CASE

In 1999, Mr. Taylor pled no contest to two counts of first degree sexual assault of a child. He faced a maximum sentence of 80 years in prison (40 years on each count). In exchange for his pleading no-contest 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. However, Judge John J. DiMotto rejected the State's recommendation and sentenced Mr. Taylor to 30 years on each count, to be served consecutively.

In February 2019, Mr. Taylor filed a motion for sentence modification. He argued that Judge DiMotto and the parties were unaware that he did not have a mandatory release (MR) date after serving two-thirds of his sentence. Instead of an MR date, Mr. Taylor has only a presumptive mandatory release (PMR) date. In June 2019, the circuit court denied Mr. Taylor's motion. App. 3.[1] Mr. Taylor appealed the circuit court's decision.

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

On December 15, 2020, the Court of Appeals affirmed the circuit court's denial of the motion for sentence modification. App. 1. Although the Court of Appeals determined that the motion was ripe for adjudication, *id.* at ¶ 10, the court concluded that Mr. Taylor's parole date was not relevant to his sentence. *Id*. at ¶ 18. On January 4, 2021, Mr. Taylor asked the Court of Appeals to reconsider its decision. The Court of Appeals denied the motion to reconsider on January 21, 2021. App. 2.

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." App. 4 at 105.

Before announcing Mr. Taylor's sentence, Judge DiMotto stated, "[J]udges when they impose sentence now, they take into account how parole works." *Id*. at 101. He then explained that Mr. Taylor would have to serve at least one-quarter of his sentence before he would reach his "mandatory release date." *Id.* Judge DiMotto reiterated his understanding 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." *Id*. at 104.

Due to the nature of his offenses, Mr. Taylor does not have a mandatory release date to parole once

he was served two-thirds of his sentence. Wis. Stat. § 302.11(1g)(am). Instead, he has only a presumptive mandatory release date after serving two-thirds of his sentence. *Id*.

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 after April 21, 1994, but before December 31, 1999, has a 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 release on parole to those who have reached their PMR dates. Wis. Stat. § 302.11(1g)(b). Ultimately, unlike someone with an MR date who will not serve more than two-thirds of the sentence in prison, 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. *Id*.

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, the 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 sentence. *Id*.

REASONS FOR GRANTING REVIEW

THIS COURT SHOULD GRANT REVIEW TO REAFFIRM ITS REQUIREMENT THAT THE SENTENCE IMPOSED BE THE "MINIMUM AMOUNT OF CUSTODY OR CONFINEMENT" NECESSARY, AND TO CLARIFY THAT THE ENDPOINT OF A SENTENCE IS ALWAYS "HIGHLY RELEVANT" TO THE SENTENCE IMPOSED.

This Court has long required that the sentence imposed be "the minimum amount of custody or confinement" necessary to serve the three main purposes of sentencing. *McCleary*, 49 Wis. 2d at 276. Mr. Taylor's sentencing judge understood this and determined Mr. Taylor needed to serve at least 15, but not more than 40 years in prison. App. 4 at 104. Therefore, he sentenced Mr. Taylor to 60 years. Based on his understanding of the parole laws, the judge believed that Mr. Taylor would have to serve one-quarter of his sentence (15 years) before reaching parole eligibility, and would have a mandatory release date after serving two-thirds of his sentence (40 years). *Id*. at 101, 104. However, Mr. Taylor's PMR status means he does not have an MR date at two-thirds of his sentence, so he may have to serve the full 60 years in prison—20 years more than the sentencing judge concluded might be necessary. This violates the requirement of *McCleary* and *Gallion*.

Sentence modification based on a new factor—Mr. Taylor's PMR status—provides the way to correct this violation. This Court has recognized that a change in parole eligibility, whether due to a change in the law or policy, may be a new factor that justifies sentence modification, if the sentencing court "expressly relie[d]" on parole eligibility. *Franklin*, 148 Wis. 2d at 15, *see also Kutchera*, 69 Wis. 2d at 553. Because Mr.

Taylor's sentencing court expressly relied on parole eligibility to determine its sentence, and because his PMR status was unknown at the time of sentencing, his PMR status is a new factor. *Gallion* and *McCleary* require sentence modification to correct Mr. Taylor's unjust sentence and to ensure that he does not serve more time in prison than the sentencing court concluded was necessary.

A. The requirement that the sentence imposed be the minimum amount of confinement necessary means that a person's maximum prison term cannot be extended 20 years beyond what the sentencing judge expressly intended.

In a long line of cases, this Court repeatedly has emphasized that "the sentence imposed shall '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.'" *Gallion*, 270 Wis. 2d 535, ¶ 44 (quoting *McCleary*, 49 Wis. 2d at 276); *see also Borrell*, 167 Wis. 2d at 764; *Setagord*, 211 Wis. 2d at 416. Mr. Taylor's sentencing judge recognized this requirement, noting that the sentence must be "the minimum amount of time necessary to obtain the goals of rehabilitation, protection, and punishment." App. 4 at 97. The Court of Appeals recognized it too when it determined that Mr. Taylor's motion was ripe for adjudication. App. 1 at ¶ 10; *see McCleary*, 49 Wis. 2d at 276 ("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."). However, both the circuit court

and the Court of Appeals overlooked this requirement when making their rulings.

Judge DiMotto concluded that a term of 15 to 40 years was the minimum amount of time necessary for Mr. Taylor to serve. App. 4 at 104. When he sentenced Mr. Taylor, he explained that he was "tak[ing] into account how parole works," and he believed that "in essence, a sentence is somewhere between one-quarter and two thirds of the judge's proclamation." *Id*. at 101. Based on his understanding of parole law, the judge imposed a 60-year sentence to ensure that, as he explained to Mr. Taylor, "you're going to end up serving a minimum of fifteen years, and you could serve up to a maximum time of forty years. *Id*. at 104.

However, Mr. Taylor's PMR status means that he could remain in prison 20 years longer than the sentencing court intended. Because he has a PMR date, not an MR date, he does not have to be released on parole after serving two-thirds of his sentence. He could be confined in prison for the entire 60-year term.

This 20-year increase in Mr. Taylor's maximum prison term violates *Gallion*. The sentence must be the minimum amount of confinement necessary to serve the three primary sentencing objectives. Judge DiMotto understood this and concluded that it was not necessary for Mr. Taylor to serve more than 40 years in prison. Yet, because of his PMR status, which was unknown to the judge, his current sentence sets his maximum prison term at 60 years. Judge DiMotto concluded it was necessary for Mr. Taylor to serve 15 to 40 years in prison, but his current sentence is 15 to 60 years in prison.

The Court of Appeals held that "[t]he postconviction court reasonably inferred that the circuit court was not concerned with the endpoint of Taylor's sentence." App. 2 at ¶ 18. *Gallion* and *McCleary* require not only that the sentencing court be concerned with a sentence's endpoint but also that the endpoint not be longer than is necessary. This 20-year—50 percent—increase in the endpoint of the prison term violates *Gallion* and *McCleary*. Sentence modification provides the method to remedy this violation.

B. This Court has recognized that sentence modification is an appropriate method to correct an unjust sentence when the parole system does not work as the sentencing judge believed it would.

1. Controlling New Factor Law

The purpose of sentence modification is "the correction of unjust sentences." *Franklin*, 148 Wis. 2d at 9. A circuit court has the inherent authority to modify a sentence at any time based on a new factor. *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 339 (1983). 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. *Rosado*, 70 Wis. 2d at 288.

To determine if a fact was a relevant factor at sentencing, courts consider whether the sentencing court "expressly relie[d] on it." *Franklin*, 148 Wis. 2d at 15. While a new factor does not have to "frustrate

the purpose of the original sentence," a fact that does so "would generally be a new fact that is 'highly relevant to the imposition of sentence.'" *State v. Harbor*, 2011 WI 28, ¶49, 33 Wis. 2d 53, 797 N.W.2d 828 (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 that a new factor exists by clear and convincing evidence. *Franklin*, 148 Wis. 2d at 8–9. Second, if the defendant has shown that a new factor exists, the circuit court exercises its discretion to determine whether the new factor justifies sentence modification. *Id*. at 8.

2. The Court of Appeals overlooked this Court's decisions recognizing that a change in parole eligibility can be a new factor that justifies sentence modification.

A change in parole eligibility, whether by policy or by law, may be a new factor if the original sentencing court "actually considered" parole eligibility. *Franklin*, 148 Wis. 2d at 14. For example, in *Kutchera*, the defendant argued he was entitled to sentence modification because his parole eligibility had changed since he was sentenced. 69 Wis. 2d at 552. When he was sentenced, the circuit court believed that the defendant would be eligible for "instant parole," *id*., so the court imposed a ten-year sentence on the first count and made the sentences on the remaining two counts consecutive to the first. *Id*. at 539. Subsequently, however, the Supreme Court of Wisconsin held that the parole eligibility statute required a person to serve a minimum of one year in

prison before becoming eligible for parole. *Id*. at 552 (citing *Edelman v. State*, 62 Wis. 2d 613, 215 N.W.2d 386 (1974)). Due to this change in parole eligibility, the circuit court modified the sentences to be shorter and to run concurrently. *Id*. at 540. *Kutchera* upheld the circuit court's modification of the sentence, concluding that the change in parole law was a new factor that justified modifying the sentence. *Id*. at 553. As *Franklin* noted, "the circuit court [in *Kutchera*] *did* expressly discuss parole policy when making its sentencing decision." 148 Wis. 2d at 14–15 (emphasis in original).

The decision of the Court of Appeals that Mr. Taylor's "parole date was not highly relevant to the sentence imposed" ignores this Court's decisions in *Kutchera* and *Franklin*. App. 1 at ¶ 18 (internal quotation marks omitted). Like *Kutchera*, Mr. Taylor's PMR status resulted from a change in the parole law—the passage of 1993 Wisconsin Act 194. Like *Kutchera*, the circuit court in Mr. Taylor's case *expressly* considered parole eligibility to determine the minimum and maximum range of its sentence. Even though 1993 Wisconsin Act 194 had taken effect more than five years before Mr. Taylor's sentencing, his PMR status was not known to Judge DiMotto because it was unknowingly overlooked by all of the parties. Thus, the court sentenced Mr. Taylor under the mistaken impression that he was subject to mandatory release after serving two-thirds of his 60-year sentence. Mr. Taylor's PMR status extends the date on which he must be released to parole (his true MR date) from 40 to 60 years. This change in parole eligibility is "highly relevant" to his sentence because the court based its sentence on "how parole works," and it recognized that its indeterminate sentence would

establish both the minimum and maximum prison terms Mr. Taylor would be required to serve. App. 4 at 101.

Furthermore, 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. App. 4 at 104. This Court has recognized that a fact which frustrates the purpose of the original sentence, if unknown to the court at sentencing, "would generally be a new fact that is 'highly relevant to the imposition of sentence,'" and therefore a new factor. *Harbor*, 333 Wis. 2d 53, ¶ 49 (quoting *Rosado*, 70 Wis. 2d at 288).

Therefore, Mr. Taylor's PMR status—which extends his maximum prison term by 20 years—is a new factor. He faces an additional 20 years in prison, beyond the maximum his sentencing judge concluded was necessary for him to serve. This sentence violates *Gallion* and is unjust. The new factor, his PMR status, justifies modifying his sentence to 40 years, to reflect Judge DiMotto's express intent.

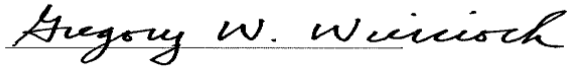
CONCLUSION

This Court has long emphasized that the sentence imposed must be the minimum amount of confinement necessary. The sentencing judge understood this requirement and concluded that Mr. Taylor needed to serve between 15 and 40 years in prison. Yet, Mr. Taylor's current sentence means he may be required to serve up to 60 years in prison, 20 more years than his sentencing judge concluded was necessary. This sentence violates *Gallion*. The sentencing court relied on parole eligibility to determine the sentence, but Mr. Taylor's PMR

status—which extends his possible prison term—was unknown to the parties and the judge at the time of sentencing. His PMR status is a new factor, and *Gallion* demands sentence modification to correct Mr. Taylor's unjust sentence.

This Court should grant Mr. Taylor's Petition for Review to reaffirm the requirement that the sentence imposed be the "minimum amount of custody or confinement" necessary, and to clarify that the endpoint of a sentence is always "highly relevant" to the sentence imposed.

Respectfully Submitted,



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CERTIFICATION AS TO FORM AND LENGTH

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 3,566 words.

Gregory W. Weirich

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. Weirich

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.

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