STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2021AP0027 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS M. PARKMAN,

Defendant-Appellant.

Appeal from a Judgment of Conviction
Entered in the Circuit Court for Dane County,
the Honorable Jill J. Karofsky Presiding, and from Denial of
Postconviction motion, the Honorable Chris Taylor Presiding
Circuit Court Case No: 2019CF513

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF THE ISSUES

I. Is the COVID-19 pandemic, and the increased dangers it poses to incarcerated individuals, a new factor that justifies the modification of Mr. Parkman's jail sentence?

Trial Court Answered: The court denied Mr. Parkman's motion to modify his sentence on the basis that COVID-19 was not a new factor. Because the court found the legal requirements of a new factor were not met, it did not exercise its discretion to determine whether the COVID-19 pandemic justified the sentence modification sought by Mr. Parkman.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue in this case involves the application of well-settled law to the facts of this case, therefore neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the final order entered on December 14, 2020, in the Circuit Court for Dane County, the Honorable Chris Taylor presiding, wherein the Court denied the postconviction motion of the defendant, Thomas M. Parkman, seeking sentence modification. (44; App.117.) Mr. Parkman had previously pled guilty to three misdemeanor counts with domestic abuse enhancers: intentional use of oleoresin device causing bodily harm, contrary to Wis. Stat. § 941.26(4)(b), criminal damage to property, contrary to Wis. Stat. § 943.01(1), and disorderly conduct, contrary to Wis. Stat. § 947.01(1), and was sentenced to a total of six months jail by

the Honorable Jill J. Karofsky. (20; App.101-02.) He sought to modify his sentence by staying it for a term of probation, on the basis that the COVID-19 pandemic was a new factor highly relevant to his jail sentence. (35.) Mr. Parkman now appeals the court's finding that the COVID-19 pandemic is not a new factor.

The criminal complaint alleged that on March 8, 2019, police responded to a 911 call from T.S. reporting she had been pepper-sprayed by Mr. Parkman. (2:5.) When police arrived, T.S. indicated that during an argument with Mr. Parkman, he became physical with her, caused damage to her closet door, and grabbed the pepper spray that she always carried and used it against her. (2:5-6.) On January 14, 2020, Mr. Parkman pled guilty to the three misdemeanor counts. (18; 49:2.)[1]

Mr. Parkman was sentenced on February 27, 2020. (51.) Pursuant to the plea agreement, the parties were free to argue as to sentence. (49:3.) The state argued that a jail sentence, rather than probation, was appropriate given Mr. Parkman's criminal history. (51:7.) The state recommended concurrent jail sentences totaling six months. (51:4.) Mr. Parkman's attorney agreed that "a period of probation, based on the allegations in this matter, is not an appropriate disposition." (51:8.) However, defense counsel argued that because Mr. Parkman did not have an extensive history of violence and had redeeming qualities including his involvement in the community and his support for and involvement with his child, concurrent sentences totaling 30 days jail was appropriate to "reflect the conduct here and that he's going to be taken out of the community for awhile." (51:9-10, 12-13.)

[1] Additional counts of misdemeanor battery, obstructing, and two counts of felony bail jumping were dismissed and read-in. (49:2-3.) Repeater enhancers that had been charged were dismissed from each count. (49:2.)

The court began by noting, "In imposing sentence, I'm supposed to look at three things – I'm supposed to consider the severity of the offense, the character and rehabilitative needs of the offender, and protecting the public." (51:15; App.103.) Regarding the offense, the court stated, "I can't even imagine how bad it would hurt to get pepper-sprayed in the face," and noted the complaint alleged a responding officer could still smell pepper spray in the apartment. (51:15; App.103.) The court found the severity aggravated by the fact that Mr. Parkman had been in a relationship with T.S. and shared a child with her. (51:16; App.104.) Regarding Mr. Parkman's character, the court noted positive aspects such as his work coaching youth basketball, and the negative aspects of his criminal history dating back to 2012. (51:17; App.105.) Finally, the court stated, "As far as protecting the public – if we're not going to protect women in this community by people who are using OC spray to control them, who are we protecting?" (51:17; App.105.)

The court followed the State's recommendation and sentenced Mr. Parkman to concurrent jail sentences of six months on Counts 3 and 5 and ninety days on Count 7. (51:17; App.105; 20; App.101-02.) The court deemed Mr. Parkman eligible for Huber privileges. (20; App.101-02.) Mr. Parkman was ordered to report to jail on April 24, 2020. (51:17; App.105.)

Between the sentencing hearing and Mr. Parkman's jail report date, a state of emergency was declared in Wisconsin due to the global COVID-19 pandemic. On March 17, 2020, the court, acting *sua sponte*, amended Mr. Parkman's jail report date from April 24, 2020 to June 1, 2020, presumably related to this emergency situation. (25; 26.) The court went on to issue four additional orders on Mr. Parkman's motion

continuing his jail report date due to the ongoing pandemic.[2] (27; 29; 30; 33; 36; 37; 39; 40.)

On September 3, 2020, Mr. Parkman filed a postconviction motion requesting modification of his jail sentence arguing the COVID-19 pandemic was a new factor due to the high risk of spread of the disease in confined indoor settings and Mr. Parkman's underlying health conditions, including asthma and a suppressed immune system, making him more susceptible to serious illness or death should he contract the disease. (35.) Although Mr. Parkman had attempted to set up electronic monitoring through the Dane County Sheriff's Office jail diversion program, he was not accepted into that program. (35:2.) Mr. Parkman would therefore be required to serve his sentence in confinement at the Dane County Jail, where he would be unable to partake in the Huber program because it was indefinitely suspended due to the pandemic. (35:2.) Mr. Parkman subsequently provided the court a letter from his healthcare provider indicating that he is prescribed an immunosuppressant drug. (42.)

Mr. Parkman originally requested the court order him eligible for electronic monitoring under Wis. Stat. § 973.03(4)(a), or, in the alternative, a stay of his sentence for a term of probation pursuant to Wis. Stat. § 973.15(8)(a)2. (35:1.) However, at the December 14, 2020, hearing on his motion, Mr. Parkman clarified that he was no longer seeking an order for electronic monitoring, and instead was only

[2] Mr. Parkman was sentenced by then-Judge Karofsky, who later ordered his jail sentence stayed for 60 days at a time on March 17, 2020, May 29, 2020, and July 28, 2020. (26; 29; 33.) This case was then assigned to Judge Taylor after Justice Karofsky was elected to the Supreme Court. Judge Taylor stayed Mr. Parkman's sentence for another 60 days on September 24, 2020, (37), then on November 24, 2020, stayed the sentence pending a decision on Mr. Parkman's postconviction motion. (40.)

seeking a modification to stay his jail sentence for a one-year probation term. (52:3-4.)

The State objected to the motion, arguing that the COVID-19 pandemic was not a new factor, but even if it was, it did not justify modification of Mr. Parkman's sentence. (52:9.) The State also argued that Mr. Parkman had not provided sufficient evidence to show an elevated risk of COVID-19 because he failed to provide documentation that he suffers from asthma. (52:10.) The State argued another stay of Mr. Parkman's sentence was more appropriate than a modification. (52:10-11.)

The court denied the motion on the basis that the COVID-19 pandemic is not a new factor. (52:25; App.114.) The court agreed that, although COVID-19 had been identified by February 2020, its extent and impact was not understood at the time of sentencing. (52:18; App.107.) However, based on the factors considered by the sentencing court, the postconviction court did not "believe that COVID-19 would have been dispositive or highly relevant to the Court's imposition of this sentence." (52:25; App.114.) The court also relied on case law denying sentence modifications based on arguments about institutional conditions in support of its ruling that the COVID-19 pandemic was not a new factor. (52:19-20; App.108-09.)

Mr. Parkman filed a timely notice of appeal. (95.) After the notice of appeal was filed, the circuit court stayed Mr. Parkman's jail sentence pending the outcome of this appeal. (App.119-21.)

ARGUMENT

THE IMPACT OF THE NOVEL CORONAVIRUS COVID-19 ON MR. PARKMAN'S ABILITY TO SAFELY COMPLETE HIS JAIL SENTENCE IS A NEW FACTOR

Mr. Parkman was sentenced to six months jail in February 2020, when it was still unknown the severity by which Wisconsin and Dane County would be impacted by the then-emerging global COVID-19 pandemic. After several shorter stays of his jail sentence based on the pandemic, Mr. Parkman moved for a sentence modification that would stay the jail time for one year of probation pursuant to Wis. Stat. 973.15(8)(a)2. Mr. Parkman argued that the danger the COVID-19 pandemic posed to incarcerated individuals, and his own greater risk due to underlying health conditions, was a new factor that warranted such a modification. The circuit court denied Mr. Parkman's motion holding that the COVID-19 pandemic was not a new factor because it was not highly relevant to the sentencing factors considered at sentencing, and, because conditions of confinement could not be new factors. Because the court found the legal test for a new factor was not met, it did not exercise its discretion to determine whether the proposed modification was warranted.

The COVID-19 pandemic is a new factor in Mr. Parkman's case because it was unknown at the time of sentencing and is highly relevant to his jail sentence, and therefore, he should be afforded a judicial exercise of discretion to determine whether his sentence should be modified.

A. Legal principles and standard of review

The power to modify a sentence is one of the judiciary's inherent powers. *State v. Crochiere*, 2004 WI 78, ¶ 11, 273 Wis. 2d 57, 681 N.W.2d 524. While a sentence modification may not be based "on reflection and second thoughts alone," a circuit court has the authority to modify its earlier sentencing decision where a new factor exists that justifies a modification. *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828 (internal cites omitted). The power to modify a sentence is exercised to prevent the continuation of unjust sentences. *Crochiere*, 2004 WI 78, ¶ 11.

Deciding a motion for sentence modification based on a new factor is a two-step inquiry: first, whether the fact or set of facts constitutes a new factor, and second, whether that new factor justifies modification of the sentence. *Harbor*, 2011 WI 28, ¶¶ 36-37. The defendant has the burden to demonstrate both steps by clear and convincing evidence. *Id.* at ¶¶ 36, 38. If a court determines that the facts do not constitute a new factor as a matter of law, "it need not go further in its analysis" to decide the defendant's motion. *Crochiere*, 2004 WI 78, ¶ 24.

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). Although a new factor must be highly relevant to the imposition of sentence, it need not "frustrate the purpose" of the original sentence. *Harbor*, 2011 WI 28, ¶¶ 48, 52 (withdrawing contrary language from *State v. Michels*, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989) and the cases following *Michels*).

A sentence modification claim is subject to a two-part standard of review. Whether a fact or set of facts constitutes a new factor is a question of law "which may be decided without deference to the lower court's determinations." *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). The circuit court's determination whether a new factor warrants sentence modification is reviewed for an erroneous exercise of discretion standard. *Harbor*, 2011 WI 28, ¶33. In this case, the court found that COVID-19 did not meet the legal definition of a new factor in Mr. Parkman's case. That determination is reviewed de novo.

B. The danger of COVID-19 to incarcerated individuals is highly relevant to Mr. Parkman's jail sentence; therefore, it is a new factor

1. The risks of COVID-19 to incarcerated individuals

COVID-19 is both new and highly relevant to Mr. Parkman's sentence. The novel coronavirus which causes COVID-19 has led to a global pandemic. At the time Mr. Parkman filed his postconviction motion, there had been there have been 77,129 confirmed diagnoses of COVID-19 and 1,142 deaths in Wisconsin, and 5,636 confirmed cases and 40 deaths in Dane County. (35:3.) By the time of this appeal, those number have increased dramatically, to 579,877 cases and 6,639 deaths statewide[3], while in Dane County there have been 42,314 cases and 289 people who have died.[4]

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[3] Wisconsin Department of Health Services, COVID-19: Wisconsin Summary Data (Apr. 4, 2021), *at* https://www.dhs.wisconsin.gov/covid-19/data.htm#summary (updating regularly).

[4] Public Health Madison & Dane County, Dane County COVID-19 Dashboard (Apr. 5, 2021), *at* https://publichealthmdc.com/coronavirus/dashboard (updating regularly).

COVID-19 is a respiratory disease caused by the novel and highly contagious coronavirus SARS-CoV-2.[5] The virus spreads mainly from person to person through respiratory droplets, which is more likely when people are within close contact with each other, e.g., within six feet.[6] People who are infected but do not show symptoms can also spread the virus to others.[7] Concerning variants of the coronavirus, which have been shown to exhibit increased transmissibility, and/or more severe disease, have been identified and cases of these variants have been reported in Wisconsin.[8]

Once contracted, COVID-19 can cause a wide range of symptoms reported – ranging from mild symptoms to severe illness.[9] People of any age who suffer from certain underlying medical conditions, including chronic lung diseases and an immunocompromised state (weakened immune system) due to the use of immune suppressing medicines, may have an elevated risk of severe symptoms should they become infected with COVID-19.[10] Additionally, long-term health effects of the disease are possible:

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[5] Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (updated Apr. 2, 2021), *at* https://www.cdc.gov/coronavirus/2019-ncov/faq.html#spread.

[6] *Id.*

[7] *Id.*

[8] Centers for Disease Control and Prevention, US COVID-19 Cases Caused by Variants (updated Apr. 1, 2021), *at* https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html.

[9] *Supra*, note 5.

[10] Centers for Disease Control and Prevention, People at Increased Risk: People with Certain Medical Conditions (updated Mar. 29, 2021), *at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2

> As the pandemic unfolds, we are learning that many organs besides the lungs are affected by COVID-19 and there are many ways the infection can affect someone's health. While most persons with COVID-19 recover and return to normal health, some patients can have symptoms that can last for weeks or even months after recovery from acute illness. Even people who are not hospitalized and who have mild illness can experience persistent or late symptoms. [11]

Reported long-term symptoms include: fatigue, shortness of breath, cough, joint pain, chest pain, brain fog, depression, muscle pain, headache, intermittent fever, and heart palpitations.[12] Other potentially serious complications may include: inflammation of the heart muscle, lung function abnormalities, acute kidney injury, rash and/or hair loss, neurological problems and psychiatric problems.[13]

Conditions of incarceration create the ideal environment for the transmission of contagious disease, as inmates live, eat, and sleep in close proximity. (35:9-16.) In addition to the dangers of high numbers of people in close quarters, additional risk is posed by the fact that staff leave and return daily, and inmates regularly cycle in and out of the jail. (*Id.*) At the Dane County Jail, inmates entering the jail to begin a sentence quarantine for 14 days in a dorm setting with other newly admitted inmates. (35:4.) Inmates are tested for COVID-19 only if they show symptoms. (*Id.*) At the end of the 14-day

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Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html.

[11] Centers for Disease Control and Prevention, Long-Term Effects of COVID-19 (updated Nov. 13, 2020), *at* https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html.

[12] *Id.*

[13] *Id.*

period, inmates move into general population. (*Id.*) This system was unable to prevent the introduction and spread of COVID-19 within the Dane County Jail. For example, shortly before Mr. Parkman's motion was heard by the circuit court, the jail had the largest cluster in a single facility within Dane County, with 81 people who testing positive for COVID-19 over a 14-day period.[14] At this time, the jail housed approximately 500 inmates, meaning about 16 percent of inmates tested positive.[15] In comparison, only 0.8 percent of the estimated general population of Dane County tested positive for COVID-19 during that time period.[16]

2. The circuit court incorrectly held that COVID-19 is not highly relevant to Mr. Parkman's jail sentence

The circuit court denied Mr. Parkman's motion on the basis that the COVID-19 pandemic would not have been highly relevant to the trial court's considerations at sentencing, even

[14] Public Health Madison & Dane County, Data Notes for the Week of December 3 (Dec. 3, 2020), *at* https://www.publichealthmdc.com/blog/data-notes-for-the-week-of-december-3.

[15] Emily Hamer, *Dane County Sheriff says COVID-19 outbreak in jail 'under control' after last week's spike*, Wisconsin State Journal (Nov. 27, 2020), *at* https://madison.com/wsj/news/local/crime-and-courts/dane-county-sheriff-says-covid-19-outbreak-in-jail-under-control-after-last-weeks-spike/article_18eec5a9-b5da-5265-a396-ecd61dcf9c40.html.

[16] *See supra*, note 14 (reporting 4,464 positive cases in Dane County between November 17, 2020 and November 30, 2020). The United States Census Bureau estimates the population of Dane County at 546,695 people. United States Census Bureau, Quick Facts: Dane County, Wisconsin (July 1, 2019), *at* https://www.census.gov/quickfacts/danecountywisconsin.

if it had been known. (52:25; App.114.)[17] After reviewing the sentencing transcript, the court found that COVID-19 would not have been relevant to the sentencing court, based on "what the [sentencing] Court had in front of [it]." (52:23; App.112.)

The postconviction court noted defense counsel's comments during sentencing that this was not a probation case based on Mr. Parkman's criminal history, as well as the prosecutor's recitation of Mr. Parkman's "extensive" criminal history. (52:21-22; App.110-11.) The postconviction court found that the factors important to the sentencing court were "what the victim went through" and the sentencing court's belief that Mr. Parkman was acting to control the victim with violence; that the sentencing court understood Mr. Parkman was "trying to turn things around," but had "a really full record from 2014 on"; and that "there is a need to protect the public. And protecting the public includes protecting women in the public." (52:23-25; App.112-114.)

The court believed the more appropriate solution for Mr. Parkman was for him to apply for the diversion and Huber programs at the jail. (52:25-26.) The court's statements indicate an incorrect understanding of the facts of the case. First, Mr. Parkman *had* applied for diversion/electronic monitoring prior to his original report date but was informed by the Dane County Sheriff's Office that he was denied participation in the program. (35:2.)[18] Second, Mr. Parkman's

[17] The court agreed with Mr. Parkman that COVID-19 was either not in existence or overlooked by the parties at the time of sentencing in that, although COVID-19 had been identified by February 2020, its extent and impact was not understood at the time of sentencing. (52:18; App.107.)

[18] The court's error on this point seemed to stem from a misunderstanding about Mr. Parkman's motion to be placed on electronic monitoring under Wis. Stat. § 973.03(4)(a) in lieu of his jail sentence. (*See*

eligibility for the Huber program was rendered meaningless due to the program's cancellation during the pandemic. (35:2, 7.)

The court's determination that the COVID-19 pandemic is not a new factor because it was not highly relevant to the sentencing factors considered misapplies the new factor test and ignores the purpose of allowing sentence modifications based upon new factors. That a factor must be "highly relevant to the imposition of the sentence," *Rosado*, 70 Wis. 2d at 288, does not require that it be highly relevant to a particular factor on which the sentence is based. *See State v. Gallion*, 2004 WI 42, ¶ 40, 20 Wis. 2d 535, 678 N.W.2d 197. Obviously, if a factor did not exist at the time of sentencing, it could not have been considered at that time, but that factor may still be highly relevant to the sentence that the court imposed. *See State v. Klubertanz*, 2006 WI App 71, ¶ 35, 291 Wis.2d 751, 713 N.W.2d 116 ("The 'new factor' analysis does not depend upon a circuit court's review of its exercise of discretion in imposing the original sentence for the obvious reason that the circuit court could not have taken into account in sentencing information that it did not have."); *see also Harbor*, 2011 WI 28, ¶ 50 ("A circuit court might conclude that its entire approach to sentencing would have been different had it been aware of a fact 'that is highly relevant to the imposition of sentence.'").

In this case, COVID-19 is highly relevant to the choice between a six-month jail sentence and other the other sentencing options faced by the court for Mr. Parkman's

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35; 52:2-3.) Because Mr. Parkman chose to abandon that motion at the postconviction motion hearing, he did not present the court with additional information regarding either his rejection from the diversion program or the court's authority to place him on electronic monitoring under section 973.03(4)(a).

misdemeanor convictions. In every case, the court shall impose a sentence that "call[s] 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 (quotation omitted). Further, probation must be considered as the first alternative. *Id.* at ¶ 25.

This calculus – whether confinement or supervision is appropriate, and if confinement, what length – is altered by the new risks presented by COVID-19. It is unlikely, for example, that defense counsel would have conceded probation as a sentencing option had the risks of COVID-19 been considered. And evidence that circuit court *did* find the COVID-19 pandemic highly relevant to Mr. Parkman's jail sentence is found in the fact that his jail report date was delayed by the court *sua sponte* when the emergency nature of the pandemic first became known.

It's true that COVID-19 may not be highly relevant in every case, such as those involving violent felonies, very-lengthy (or life) sentences, or where a defendant lacks an underlying condition or risk factor. But it is highly relevant in Mr. Parkman's case.

3. Whether the COVID-19 pandemic is a new factor in this case is not controlled by existing case law denying sentence modifications based on prison conditions

The court agreed with Mr. Parkman that COVID-19 "poses a particular challenge in an incarceration setting," "something that's extremely hard to control in a jail sentence, given the living situations, the reduced ability to safely take proactive measures -- such as social distancing -- to keep yourself safe." (52:19; App.108) However, it erroneously

treated this fact as a "prison condition" which could not support the modification of Mr. Parkman's sentence:

> But Wisconsin courts have generally held that prison conditions are not new factors under relevant case law, and I'll point you to *State v. Lynch*, 105 Wis.2d 164 at 171. There, the defendant requests for a sentencing modification because of a lack of mental health care in prison was said -- was deemed not to be a new factor.
>
> In *State v. Johnson*, 210 Wis.2d 196 at 205 -- this is a Court of Appeals 1997 decision. They held that a man being denied a liver transplant was not a new factor as that term of art has been construed.
>
> So I do think that COVID-19 could be distinguished from these cases in that its existence is not entirely related to internal policies or standards adopted by the Wisconsin Department of Corrections, but I still think that we don't have a lot of case law.

(52:19-20; App.108-09.)[19] These cases are distinguishable from the current COVID-19 pandemic situation and do not support the court's ruling that the COVID-19 pandemic is not a new factor.

[19] The court also looked to federal case law, noting federal courts granting sentence modifications due to COVID-19 did so under the authority of a federal compassionate release statute, and therefore were distinguishable. (52:20; App.109.) The court also referenced compassionate release for inmates with health conditions under Chapter 302 (52:20; App.109). Under section 302.113(9g), an inmate serving a bifurcated sentence for an offense other than a Class B felony may be released if the inmate has an extraordinary health condition. Wis. Stat. § 302.113(9g)(b)3. As Mr. Parkman is not serving a bifurcated sentence, that provision is inapplicable in his case.

State v. Lynch is easily distinguished from this case because the sentence modification sought was not based on a new factor, but "on the grounds that [the sentence] was 'excessive and unduly harsh such as to constitute an abuse of discretion.'" 105 Wis. 2d 164, 166, 312 N.W.2d 871 (Ct. App. 1981). Lynch argued that the trial court abused its discretion by sentencing him to prison without determining on the record that appropriate mental health treatment was available and would be provided to him in prison. *Id.* The appellate court reviewed the trial court's exercise of sentencing discretion and found the sentence "was reached in a rational fashion upon consideration of proper factors." *Id.* at 168. Further, the sentence was not cruel and unusual punishment, as there was no showing of deliberate indifference by the prison to a serious medical need. *Id.* at 169-70. Because Mr. Parkman is not arguing that the sentencing court erroneously exercised its discretion or that his sentence was excessive or unduly harsh, *Lynch* is not applicable to his motion.

State v. Johnson, is also distinguishable because the factor alleged to be new was actually known to the court at the time of sentencing. 210 Wis. 2d 196, 202-03, 565 N.W.2d 191 (Ct. App. 1997). Johnson sought a reduction in his prison sentence based on his claim that he was receiving inadequate medical treatment in prison because the prison denied him a liver transplant. *Id.* at 201-202. The trial court concluded that Johnson had not raised a new factor because his medical condition was known to the court at sentencing. *Id.* at 202. The appellate court agreed, finding that the sentencing court took into consideration Johnson's medical condition and that the failure of prison authorities to further process Johnson for a liver transplant "did not frustrate that court's original intent in imposing sentence." *Id.* at 203-204. Here, there is no dispute that neither the parties nor the court were aware of the extent

of the COVID-19 pandemic at the time Mr. Parkman was sentenced.

In addition to the fact that the information alleged to be new was known to the sentencing court, *Johnson* is also distinguishable because court based its holding on the now overruled "frustrates the purpose" standard for determining a new factor. *Id.* at 205 & n.6 (construing "new factor" under the standard set in *Michels* as one that "must be an event or development which frustrates the purpose of the original sentence"); *contra Harbor*, 2011 WI 28, ¶ 51 ("Requiring the court to conclude that the purpose of the original sentencing was frustrated would undercut the purpose underlying sentence modification, which is to allow a circuit court discretion to modify sentences in an appropriate case.").

Also distinguishable is case law argued by the State holding that a showing that one is at higher risk of "physical, sexual, and psychological abuse" while incarcerated was not a new factor to warrant sentence modification. (52:11.) The court did not explicitly rely on these cases in its holding, and they do not support the court's determination that the COVID-19 pandemic is not a new factor.

The State cited *State v. Krieger*, but the modification sought in that case was not based on a new factor. 163 Wis. 2d 241, 247-48, 471 N.W.2d 599 (Ct. App. 1991). Instead, like in *Lynch*, Krieger sought a modification of his prison sentence on the grounds that it constituted cruel and unusual punishment because of the "statistical probability that a sex offender will be subjected to physical and psychological abuse in the prison system." *Id.* Krieger had argued this information was a new factor before the trial court, but abandoned that argument on appeal and argued *only* that that the trial court erred in refusing to review the sentence for an abuse of discretion because the

conditions of confinement make the sentence unduly harsh and unconscionable. *Id.* at 258. The court of appeals found it was "not necessary…to consider whether conditions of confinement can be grounds for modification of a sentence," because Krieger failed to establish that the conditions of his confinement violated his eight amendment rights. *Id.* at 258-59. Even if an eighth amendment violation was established, the remedy would not be a sentence modification, but through the appropriate writs challenging prison condition. *Id.* at 259-60. The court of appeals did not evaluate whether the information Krieger presented about his statistical likelihood of sexual assault in prison was a new factor. Nor did it issue a general rule that conditions of confinement are not new factors. Rather, the court's holding was that, unlike a new factor, an eighth amendment violation is not a basis for a sentence modification. *Id.* at 259-260.

The State also relied on *State v. Klubertanz*, in which the court addressed the denial of a motion for sentence modification on the basis that the sentence became unduly harsh because Klubertanz was sexually assaulted while in prison. 2006 WI App 71, ¶ 1, 291 Wis. 2d 751, 713 N.W.2d 116. The court determined the argument was correctly addressed under the "new factor" jurisprudence, and that sexual assault in prison is not a new factor. *Id.* Because Klubertanz specifically argued that the motion should be addressed under the unduly harsh standard and not as a new factor, the court found an "implicit concession" that the sexual assault was not a new factor. *Id.* at ¶ 14. Further, like in *Johnson*, in holding a prison sexual assault was not a new factor, the court relied on the "frustrates the purpose" standard that has since been overruled. *Id*; *contra Harbor*, 2011 WI 28, ¶ 51.

As established *supra* at B.2, the COVID-19 pandemic is a new factor because it was not in existence at the time of sentencing and is highly relevant to the jail sentence imposed on Mr. Parkman. The cases cited by the trial court and the prosecutor at the postconviction motion hearing do not mandate otherwise. The COVID-19 pandemic is not a "prison condition" that can be addressed through administrative complaints within an institution, nor is Mr. Parkman arguing that his sentence is unduly harsh or an erroneous exercise of sentencing discretion. Instead, it is a factor highly relevant to his sentence, in that it would have impacted the decision on sentencing had it been known.

C. This case should be remanded to determine whether modification of Mr. Parkman's sentence is justified

Once a defendant has demonstrated the existence of a new factor, then the circuit court must exercise its discretion determine whether the new factor justifies modification of the sentence. *Harbor*, 2011 WI 28, ¶ 37. Because the trial court found that COVID-19 was not a new factor, it did not exercise its discretion to determine whether a sentence modification was justified by the COVID-19 pandemic.

The question for this court therefore, is not whether Mr. Parkman's sentence should be modified, that is a discretionary decision for the circuit court to make. *Franklin*, 148 Wis. 2d at 7 (court of appeals "improperly decided to determine itself whether Franklin's sentence should be modified"); *Barrera v. State*, 99 Wis. 2d 269, 282, 298 N.W.2d 820 (1980), *cert denied*451 U.S. 972, 101 S.Ct. 2051 (1981) ("An appellate court must not exercise the trial court's discretion.") Instead, the question here is whether COVID-19, and the dangers associated with its spread in the jail, is a new factor allowing

the circuit court to exercise its discretion and modify a Mr. Parkman's sentence based upon his personal circumstances.

It is the circuit court that should be permitted to exercise its discretion in these fact-specific circumstances to decide whether modification is warranted, in light of the risks COVID-19 raises.

CONCLUSION

For the foregoing reasons, Mr. Parkman respectfully requests the Court to reverse and remand with directions to the circuit court to determine whether sentence modification is warranted by the new factor.

Dated this 5th day of April, 2021.

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 5,248 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 by mail on all opposing parties.

Dated this 5th day of April, 2021.

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CERTIFICATION OF MAILING

I hereby certify in accordance with Wis. Stat. 809.80(4), on April 5, 2021, I deposited in the United States mail for delivery to the clerk by first-class mail, ten copies of the defendant-appellant's brief and appendix.

Dated this 5th day of April, 2021.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings 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 of 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 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 confidentiality and with appropriate references to the record.

Dated this 5th day of April, 2021.

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