

**FILED  
07-20-2021  
CLERK OF WISCONSIN  
COURT OF APPEALS**

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

REPLY BRIEF OF  
DEFENDANT-APPELLANT

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## ARGUMENT

### **The COVID-19 pandemic is a new factor; therefore, this case should be remanded to determine whether modification of Mr. Parkman's sentence is warranted**

Mr. Parkman appeals the denial of his motion to modify his six month jail sentence by staying the jail sentence for one year of probation, on the basis that the danger the COVID-19 pandemic poses to incarcerated individuals, especially those with underlying health conditions like Mr. Parkman, is a new factor. In his brief-in-chief, Mr. Parkman argued the court erred in finding that the COVID-19 pandemic was not highly relevant to the sentencing factors considered at sentencing, because the impacts of COVID-19 on the safety of inmates in the jail was one that is highly relevant to the decision between probation and a jail sentence.

In response, the State argues the COVID-19 pandemic is not highly relevant to the circuit court's sentencing decision, because "there is no connection between the factors the court considered and any of the ramifications of the proliferation of COVID-19." (Resp. Br. at 9.) Just as the circuit court did, the State misapplies the new factor test and ignores the purpose of allowing sentence modifications based upon new factors – the correction of unjust sentences. *State v. Harbor*, 2011 WI 28, ¶ 51, 333 Wis. 2d 53, 797 N.W.2d 828.

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). The answer to whether a new factor is highly relevant to the sentence imposed cannot be found simply by reviewing the

sentencing factors pronounced by the circuit court: “[t]he ‘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.” *State v. Klubertanz*, 2006 WI App 71, ¶ 35, 291 Wis. 2d 751, 713 N.W.2d 116. In limiting its focus to specific sentencing factors, the State ignores the larger decision made by the court in imposing sentence – whether to impose probation or jail – to which the COVID-19 pandemic is highly relevant.

The State argues that fact of the presence of COVID-19 in the jail has only a “tenuous” connection to the considerations of the court at sentencing. But in this case, as in most misdemeanor cases, the sentencing court’s decision was a decision between probation or jail, and the court was required to consider probation as a first option at sentencing. *State v. Gallion*, 270 Wis. 2d 535, ¶ 25, 20 Wis. 2d 535, 678 N.W.2d 197. Had the COVID-19 pandemic been known to the court at the time of sentencing, its calculus in considering probation versus jail could not have been the same. *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.’”).

The State makes no attempt to argue otherwise, for understandable reasons. COVID-19 is precisely the type of new fact that would change a court’s approach to sentencing – and without doubt *has* changed sentencing considerations in courtrooms around the state, particularly in cases where the person being sentenced is more vulnerable to the disease, such as Mr. Parkman, and is facing a short term of incarceration, such as Mr. Parkman.

The State also argues that the dangers posed to incarcerated individuals by COVID-19, including those with pre-existing health conditions like Mr. Parkman, are simply conditions of confinement that are not new factors. The State is wrong.

The State relies on *State v. Klubertanz* and *State v. Krieger* for the proposition that conditions of confinement “are not highly relevant to a sentence and therefore, are not new factors.” (Resp. Br. at 9-10.)<sup>1</sup> As detailed in Mr. Parkman’s brief-in-chief, neither case stands for the broad proposition that conditions in an institution can never be a new factor warranting sentence modification. (App. Br. at 17-18.) And, the cases certainly provide no support for the proposition that the impacts of a deadly pandemic on incarcerated individuals cannot be considered a new factor. *See Klubertanz*, 2006 WI App 71, ¶ 1 (relating to sexual assault of defendant in prison); *Krieger*, 163 Wis. 2d 241, 247-48, 471 N.W.2d 599 (Ct. App. 1991) (relating to defendant’s claimed risk of being sexually assaulted in prison).

Importantly, the deaths and illnesses caused by COVID-19 in Wisconsin institutions cannot be cured by a “change in prison [or jail] conditions,” the remedy proposed in *Klubertanz* and *Krieger*. The fact is that many of the precautions necessary to contain the spread of COVID-19 are simply impossible in

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<sup>1</sup> In his brief-in-chief, Mr. Parkman distinguished the cases relied upon by the circuit court for this proposition in denying his postconviction motion. (*See* App. Br. at 15-17 (distinguishing *State v. Lynch*, 105 Wis. 2d 164, 312 N.W.2d 871 (Ct. App. 1981) and *State v. Johnson*, 210 Wis. 2d 196, 565 N.W.2d 191 (Ct. App. 1997)).) The State makes no argument to the contrary. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (“propositions of appellants are taken as confessed which [respondents] do not undertake to refute”).

an institutional setting. It is therefore not clear what “administrative remedies” the State believes Mr. Parkman could have sought, (resp. br. at 9), that would protect him from exposure to COVID-19 during his jail sentence. The COVID-19 pandemic is not a “prison condition” that can be addressed through administrative complaints within an institution.

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.

### 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 20th day of July, 2021.

Respectfully submitted,

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

I certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,058 words.

Dated this 20th day of July, 2021.

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