

**FILED
10-18-2021
CLERK OF WISCONSIN
SUPREME COURT**

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2021AP0027 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS M. PARKMAN,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
583 D'Onofrio Dr., Suite 1011
Madison, WI 53719
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Defendant-Appellant-
Petitioner

TABLE OF CONTENTS

	Page
Table of Authorities	3
Statement of the Issues Presented for Review	6
Statement of the Criteria Supporting Review	6
Statement of the Case and Facts.....	8
Argument	13
<p>This Court should grant review to determine whether the impact of the COVID-19 pandemic on an individual’s ability to safely complete a sentence of incarceration satisfies the legal standard for a new factor</p>	
<p>A. A trial judge has the inherent authority to modify a sentence where a new factor exists that justifies the modification</p>	
<p>B. The COVID-19 pandemic, and the increased dangers it poses to incarcerated individuals, is a fact highly relevant to a sentence of incarceration</p>	
<p>1. The risks of COVID-19 to incarcerated individuals.....</p>	
<p>2. Given these risks, COVID-19 is highly relevant to a sentence of incarceration.....</p>	
Conclusion	22
Certifications.....	23
Table of Contents to Appendix.....	25

TABLE OF AUTHORITIES

CASES

<i>State v. Parkman</i> , No. 2021AP0027-CR (Wis. Ct. App. Sept. 16, 2021).....	1
<i>McCleary v. State</i> , 49 Wis. 2d 263, 182 N.W.2d 512 (1971).....	20
<i>Rosado v. State</i> , 70 Wis.2d 280, 234 N.W.2d 69 (1975).....	7, 8, 12, 14, 18
<i>State v. Crochiere</i> , 2004 WI 78, 273 Wis. 2d 57, 681 N.W.2d 524.....	13, 14
<i>State v. Franklin</i> , 148 Wis. 2d 1, 434 N.W.2d 609 (1989).....	14
<i>State v. Gallion</i> , 2004 WI 42, 20 Wis. 2d 535, 678 N.W.2d 197.....	13, 14
<i>State v. Harbor</i> , 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828.....	13, 14, 19, 20
<i>State v. Johnson</i> , 210 Wis. 2d 196, 565 N.W.2d 191 (Ct. App. 1997).....	20
<i>State v. Klubertanz</i> , 2006 WI App 71, 291 Wis.2d 751, 713 N.W.2d 116.....	19, 20
<i>State v. Krieger</i> , 163 Wis. 2d 241, 471 N.W.2d 599 (Ct. App. 1991).....	19

State v. Lynch,
105 Wis. 2d 164, 312 N.W.2d 871 (Ct. App. 1981).....19

State v. Michels,
150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989).....14

State v. Salas Gayton,
2016 WI 58, 370 Wis. 2d 264, 882 N.W.2d 459.....20

Wisconsin Legislature v. Palm,
2020 WI 42, 391 Wis.2d 497, 942 N.W.2d 900.....15

CONSTITUTION AND STATUTES

Wis. Stat. § 941.26(4)(b).....8

Wis. Stat. § 943.01(1).....8

Wis. Stat. § 947.01(1).....8

Wis. Stat. § 973.017(2).....20

Wis. Stat. § 973.15(8)(a)2.....7

OTHER AUTHORITIES

Centers for Disease Control and Prevention,, COVID-19
Frequently Asked Questions (updated Sept. 16, 2021),
at <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#spread>.16

- Centers for Disease Control and Prevention, Delta Variant: What We Know About the Science (updated Aug. 26, 2021), *at* <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>16
- Centers for Disease Control and Prevention, Long-Term Effects of COVID-19 (updated Sept. 16, 2021), *at* <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html>.....17
- Centers for Disease Control and Prevention, People at Increased Risk: People with Certain Medical Conditions (updated Aug. 20, 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%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html16
- Emily Hamer, *‘Not everyone has to come to jail’: COVID-19 changes could lead to sweeping transformation*, Wisconsin State Journal (Jul. 11, 2021), *at* https://madison.com/wsj/news/local/crime-and-courts/not-everyone-has-to-come-to-jail-covid-19-changes-could-lead-to-sweeping-transformation/article_72d08a2e-57e3-521d-95ee-a5fa7ac4f49c.html.....17
- Wisconsin Dept. of Human Services, COVID-19: Wisconsin COVID-19 Summary Statistics (October 13, 2021), *at* <https://www.dhs.wisconsin.gov/covid-19/data.htm#summary>15

PETITION FOR REVIEW

Thomas M. Parkman, Defendant-Appellant, hereby petitions the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. § 808.10 and Wis. Stat. § (Rule) 809.62 to review the decision or order of the Court of Appeals, District IV, in *State v. Parkman*, No. 2021AP0027-CR (Wis. Ct. App. Sept. 16, 2021) (unpublished). (Pet-App. 101-11.)

ISSUES PRESENTED FOR REVIEW

- I. Does the COVID-19 pandemic, and the increased dangers it poses to incarcerated individuals, satisfy the legal test for a new factor that may justify the modification of sentence to incarceration?

The Circuit Court denied Parkman's postconviction motion for sentence modification 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. The Court of Appeals issued a decision affirming the trial court's decision.

CRITERIA SUPPORTING REVIEW

This case raises a novel and important question of law regarding whether the COVID-19 pandemic – which has disproportionately impacted incarcerated individuals – satisfies the legal definition of a new factor under sentence modification. This petition argues the courts below were incorrect in holding that Mr. Parkman did not satisfy his burden of showing that the COVID-19 pandemic, including the danger it poses to incarcerated individuals in general, and to Mr. Parkman because of his pre-existing health conditions in

particular, was a new factor. The resolution of this novel legal question will have statewide impact given the impacts of the COVID-19 pandemic, which continues even to date. *See* Wis. Stat. (Rule) 809.62(1r)(c)2, 3.

Mr. Parkman was sentenced to six months jail for misdemeanor convictions in February 2020, when the severity by which Wisconsin and Dane County would be impacted by the then-emerging global COVID-19 pandemic was unknown. After several continuances 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 COVID-19 was a condition of confinement that could not be a new factor. 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 Court of Appeals affirmed the circuit court's decision on the basis that Mr. Parkman "failed on the second prong of *Rosado*," that is, that the COVID-19 pandemic was not highly relevant to the imposition of his sentence of incarceration. (Pet-App.107-08.) The court held that because "Parkman's sentence was based almost entirely on the nature of the offense and his character, factors unaffected by the pandemic," it was speculative to assume that had the court known about the public health crisis caused by COVID-19, it

would have sentenced Mr. Parkman any differently. (Pet-App.110).

Mr. Parkman's appeal is focused on the legal question of whether the COVID-19 pandemic satisfies the new factor test set forth in *State v. Rosado*: whether it is highly relevant to the sentence and was unknown at the time of the original sentencing. 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). The resolution of this novel legal question will have statewide impact. See Wis. Stat. (Rule) 809.62(1r)(c)2. For these reasons, this Court should grant review.

STATEMENT OF THE CASE AND FACTS

On March 8, 2019, police responded to a 911 call from T.S., who reported that she had been pepper-sprayed by the defendant, Thomas M. 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 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). (18; 49:2.)¹

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.)

Sentencing Hearing

Mr. Parkman was sentenced on February 27, 2020, by the Honorable Jill J. Karofsky. (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.)

The court addressed the following sentence factors: "the severity of the offense, the character and rehabilitative needs of the offender, and protecting the public." (51:15; Pet-App.112.) 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; Pet-App.112.) 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; Pet-App.113.) 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; Pet-App.114.) 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; Pet-App.114.)

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; Pet-App.114; 20.) The court deemed Mr. Parkman eligible for Huber privileges. (20.) Mr. Parkman was ordered to report to jail on April 24, 2020. (51:17; Pet-App.114.)

Postconviction Proceedings

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. (27; 29; 30; 33; 36; 37; 39; 40.)²

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

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.)

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.) Therefore he would 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.)

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 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; Pet-App.119-20.) 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; Pet-App.121-23.)

The court denied the motion on the basis that the COVID-19 pandemic is not a new factor. (52:25; Pet-App.123.) 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; Pet-App.116.) 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; Pet-App.123.) 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; Pet-App.117-18.)

Mr. Parkman filed a timely notice of appeal, (95), and the circuit court stayed Mr. Parkman’s jail sentence pending the outcome of this appeal. (Pet-App.128-30.)

Appellate Proceedings

Parkman appealed the circuit court’s denial of his postconviction motion, arguing that 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. (*See Generally* Pet’r’s Appellate Br.)

The Court of Appeals affirmed the trial court’s denial of the postconviction motion, concluding that Mr. Parkman “fail[ed] on the second prong of *Rosado*: he has not shown that the COVID-19 pandemic and his purported ‘higher vulnerability to the disease’ would have been ‘highly relevant to the imposition of the sentence.’” (Pet-App. 107.) The court found that Mr. Parkman “has not demonstrated that the combined circumstances of his health status and the COVID-

19 pandemic would have been ‘highly relevant’ to the imposition of his sentence,” that is to “the decision to sentence Parkman to *any term of incarceration*, to be served at some indeterminate point in the future.” (Pet-App. 108.) The court concluded that this set of facts was not highly relevant to the imposition of Mr. Parkman’s sentence. (*Id.*)

Mr. Parkman herein petitions the Wisconsin Supreme Court for review of the trial court’s denial of his postconviction motion for sentence modification, on the basis that the COVID-19 pandemic is a new factor justifying modification.

ARGUMENT

This Court should grant review to determine whether the impact of the COVID-19 pandemic on an individual’s ability to safely complete a sentence of incarceration satisfies the legal standard for a new factor.

A. A trial judge has the inherent authority to modify a sentence where a new factor exists that justifies the modification

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 COVID-19 pandemic, and the increased dangers it poses to incarcerated individuals, is a fact highly relevant to a sentence of incarceration

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 and "a unique public health crisis the likes of which few among us have ever seen." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 165, 391 Wis.2d 497, 942 N.W.2d 900 (Hagedorn, J. dissenting). At the time Mr. Parkman filed his postconviction motion, there had 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 his appeal, those numbers had increased dramatically, to 579,877 cases and 6,639 deaths statewide, while in Dane County there have been 42,314 cases and 289 people who have died. (*See* Pet'r's Appellate Br. at 8.) Presently, despite the availability of vaccines for COVID-19, sixteen counties in Wisconsin had critically high case activity levels during the time period of September 29, 2021 through October 12, 2021.³ The remaining 56 counties, including Dane County, had very high case activity levels during this time period.⁴

³ Wisconsin Dept. of Health Services, Wisconsin COVID-19 Summary Statistics (Oct. 13, 2021), at <https://www.dhs.wisconsin.gov/covid-19/data.htm#summary> (updating regularly).

⁴ *Id.*

COVID-19 is a highly communicable respiratory disease spread from person to person mainly through respiratory droplets, which is more likely when people are within close contact with each other, e.g., within six feet.⁵ People who are infected but do not show symptoms can also spread the virus to others.⁶ The Delta variant of the coronavirus, now the predominant variant in the United States, has shown to be more infectious and leads to increased transmissibility when compared with other variants, even in some vaccinated individuals.⁷

Once contracted, COVID-19 can cause a wide range of symptoms – ranging from mild symptoms to severe illness.⁸ 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-19.⁹ Some people who had severe illness with COVID-19 experience multiorgan effects – affecting many, if not all, body systems, including heart, lung, kidney,

⁵ Centers for Disease Control and Prevention, COVID-19 Frequently Asked Questions (updated Sept. 13, 2021), at <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#spread>.

⁶ *Id.*

⁷ Centers for Disease Control and Prevention, Delta Variant: What We Know About the Science (updated Aug. 26, 2021), at <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

⁸ *Supra*, note 5.

⁹ Centers for Disease Control and Prevention, People at Increased Risk: People with Certain Medical Conditions (updated Aug. 20, 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%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html.

skin, and brain functions – or autoimmune conditions over a longer time with symptoms lasting weeks or months after COVID-19 illness.¹⁰

Long-term health effects of the disease are possible, even where a person did not experience symptoms in the days or weeks after they were infected.¹¹ Reported long-term symptoms include: fatigue, shortness of breath, cough, joint pain, chest pain, brain fog, mood changes, muscle pain, headache, fever, and heart palpitations.¹²

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.*) Dane County has been unable to prevent the introduction and spread of COVID-19 within its jail. For example, an outbreak in the jail during the pendency of Mr. Parkman's postconviction motion resulted in 120 cases of COVID-19 among incarcerated individuals in November and December 2020, months during which the jail housed approximately 500 inmates.¹³

¹⁰ Centers for Disease Control and Prevention, Long-Term Effects of COVID-19 (updated Sept. 16, 2021), at <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html>.

¹¹ *Id.*

¹² *Id.*

¹³ Emily Hamer, 'Not everyone has to come to jail': COVID-19 changes could lead to sweeping transformation, Wisconsin State Journal (Jul. 11, 2021), at https://madison.com/wsj/news/local/crime-and-courts/not-everyone-has-to-come-to-jail-covid-19-changes-could-lead-to-sweeping-transformation/article_72d08a2e-57e3-521d-95ee-a5fa7ac4f49c.html.

2. Given these risks, COVID-19 is highly relevant to a sentence of incarceration

The circuit court denied Mr. Parkman's motion for sentence modification, finding that the COVID-19 pandemic would not have been highly relevant to the trial court's considerations at sentencing, even if it had been known. (52:25; Pet-App.114.) The appellate court affirmed on the same basis, finding "this set of facts is not 'highly relevant' to the imposition of Parkman's sentence." (Pet-App.108.)¹⁴

The lower courts determined that the COVID-19 pandemic is not a new factor because it was not highly relevant to the sentencing factors the circuit court was required to consider at the original sentencing. *See State v. Gallion*, 2004 WI 42, ¶ 40, 20 Wis. 2d 535, 678 N.W.2d 197 (sentencing court is to consider the seriousness of the offense, protection of public, and character and rehabilitative needs of defendant in determining sentence). This limited view of what is "highly relevant" to the original sentence 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, or nothing outside the scope of the *Gallion* factors could ever be a new factor. Neither *Rosado* nor any of its progeny place such a limitation on the new factor test.

¹⁴ Both courts agreed with Mr. Parkman that the impact of the COVID-19 pandemic "was a fact unknown or not fully understood 'at the time of the original sentencing.'" (Pet-App.107; 52:18; Pet-App.116.)

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. *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.’”). For this reason, “[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. Yet in this case, both lower courts relied on their review of the original sentencing courts exercise of discretion.¹⁵

¹⁵ The circuit court also seemed to view the impact of COVID-19 on incarcerated individuals as simply a condition of confinement, relying on cases that denied challenges to prison sentences based on prison conditions. (52:19-20; Pet-App.117-18.) The state made similar arguments before both the circuit court and court of appeals. Mr. Parkman distinguished the cases relied on by the circuit court and the state extensively before the court of appeals, (Pet’r’s Appellate Br. at 15-18; Pet’r’s Reply Br. at 6-7), and the court of appeals did not rely on this line of cases in finding that Mr. Parkman had not satisfied the new factor test.

Mr. Parkman maintains his argument that this alternative basis for denying his sentence modification is inapposite to his case, and that none of the case law relied upon by the state or the circuit court support a finding that the unique public health crisis caused by the global COVID-19 pandemic is not a new factor highly relevant to Mr. Parkman’s sentence. See *State v. Lynch*, 105 Wis. 2d 164, 166, 312 N.W.2d 871 (Ct. Pet-App. 1981) (addressing whether lack of mental health treatment satisfied standard for cruel and unusual punishment – not applying new factor analysis); *State v. Krieger*, 163 Wis. 2d 241, 247-48, 259-260 471 N.W.2d 599 (Ct. Pet-App. 1991) (rejecting modification to prison sentence on basis that the “statistical probability that a sex offender will be subjected to physical and psychological abuse in the prison system” constituted cruel

When sentencing a defendant, trial courts must follow requirements set forth by the legislature and by this court: “When making a sentencing determination, a court must consider the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant, as well as any appropriate mitigating or aggravating factors.” *State v. Salas Gayton*, 2016 WI 58, ¶ 22, 370 Wis. 2d 264, 882 N.W.2d 459; Wis. Stat. § 973.017(2). The sentence imposed “should call for the minimum amount of custody or confinement which is consistent with” these three factors. *McCleary v. State*, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). Probation should be considered as the first alternative. *Gallion*, 2004 WI 42, ¶ 25.

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 misdemeanor convictions. For example, the lower courts overlooked the direct relevance of the public health crisis on aspects of the original sentence like the granting of Huber release privileges. Because of the pandemic, these privileges have been suspended indefinitely and are unavailable to any inmate serving a sentence in the Dane County Jail. (35:2, 7.)¹⁶

and unusual punishment and holding that, unlike a new factor, an eighth amendment violation is not a basis for a sentence modification); *State v. Johnson*, 210 Wis. 2d 196, 202-03, 565 N.W.2d 191 (Ct. Pet-App. 1997) (defendant’s claim of inadequate medical treatment in prison not a new factor because his medical condition was known to the court at sentencing); *State v. Klubertanz*, 2006 WI App 71, ¶ 1, 291 Wis. 2d 751, 713 N.W.2d 116 (fact that defendant was sexually assaulted in prison is not a new factor).

¹⁶ In fact, the circuit court not only overlooked this fact, but it incorrectly based its decision in part on its misunderstanding of the current situation at the jail. The court stated that the more appropriate solution for Mr. Parkman was for him to apply for the diversion and Huber programs at the jail. (52:25-26.) In fact, Mr. Parkman had applied for diversion/electronic monitoring prior to his original report date but was

The sentencing court was required to consider probation as a first option. *State v. Gallion*, 270 Wis. 2d 535, ¶ 25, 20 Wis. 2d 535, 678 N.W.2d 197. It hardly seems speculative to assume that defense counsel would not have conceded probation as a sentencing option had the risks of COVID-19 been considered. 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, if for no other reason that the arguments from the parties related to sentencing would not have been the same.

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. The court of appeals disputes this significance, finding the stay "does not bear on whether that sentence should be served *at all*." (Pet-Pet-App.110.) The court of appeals bases its decision on the presumption that there is no prejudice to Mr. Parkman from an indefinite postponement of his jail sentence. Mr. Parkman should not be forced to choose between a timely resolution of his misdemeanor sentence and his health and safety in a public health crisis.

Without a doubt, COVID-19 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. *See 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

informed by the Dane County Sheriff's Office that he was denied participation in the program. (35:2.) And of course, Mr. Parkman's eligibility for the Huber program was rendered meaningless because the program was canceled due to the pandemic. (35:2, 7.)

fact ‘that is highly relevant to the imposition of sentence.’”). Likewise, the COVID-19 pandemic is highly relevant to Mr. Parkman’s jail sentence, and therefore meets the legal standard for a new factor that may justify modification of his sentence.

CONCLUSION

For the reasons presented herein, this Court should grant review of this case.

Dated this 18th day of October, 2021.

Respectfully submitted,



JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
583 D’Onofrio Dr., Suite 1011
Madison, WI 53719
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Defendant-Appellant-
Petitioner

CERTIFICATION AS TO FORM/LENGTH

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) 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 petition is 5590 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 18th day of October, 2021.

Signed:



JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
583 D'Onofrio Dr., Suite 1011
Madison, WI 53719
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Defendant-Appellant-Petitioner

TABLE OF CONTENTS TO APPENDIX

	Pages
September 16, 2021, Court of Appeals Decision.....	101-111
Circuit court’s pronouncement of sentence during February 27, 2020 sentencing hearing (51).....	112-114
Circuit court’s oral decision on postconviction motion during December 14, 2020 hearing (52).....	115-124
Judgment of Conviction, December 14, 2020, denying postconviction motion (44).....	125-127
Judgment of Conviction, February 5, 2021, staying sentence pending appeal.....	128-130

A P P E N D I X

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition for review, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

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 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 18th day of October, 2021.

Signed:



JENNIFER A. LOHR
State Bar No. 1085725

LOHR LAW OFFICE, LLC
583 D'Onofrio Dr., Suite 1011
Madison, WI 53719
(608) 515-8106
jlohr@lohrlawoffice.com

Attorney for Appellant