

FILED
11-04-2021
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

No. 2021AP27-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THOMAS M. PARKMAN,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

Thomas M. Parkman asks this Court to review a decision by the court of appeals affirming the denial of his motion for sentence modification. The court of appeals concluded that Parkman was not entitled to what he asked the court to do, which was to modify his sentence from six months' incarceration to probation with a stayed jail sentence. The court of appeals¹ agreed with the circuit court that on the record in this case, the health risks posed by the Covid-19 pandemic would not have been "highly relevant" to the imposition of Parkman's sentence, which was "based almost entirely on the nature of the offense and [Parkman's] character, factors unaffected by the pandemic."²

The State opposes review on the ground that the petition satisfies none of the criteria under Wis. Stat. § (Rule) 809.62(1r).

The petition does not satisfy the criteria for review.

The petition asserts that it satisfies the criteria for review listed in Wis. Stat. § (Rule) 809.62(1r)(c)2., (c)3. (Pet. 6, 7, 8.) Under those provisions, a case warrants review if

(c) A decision by the supreme court will help develop, clarify or harmonize the law, *and*

...

2. The question presented is a novel one, the resolution of which will have statewide impact; or

3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

However, this case involves only the application of the well-settled new-factor test to the factual situation.

¹ *State v. Parkman*, No. 2021AP27-CR, 2021 WL 4205068 (Wis. Ct. App. Sept. 16, 2021) (unpublished). (Pet-App. 101–111.)

² (Pet-App. 110.)

The question presented is not novel even though it involves the consideration of health risks from a newly discovered disease. Petitioner does not explain why this case “raises a novel and important question of law.” (Pet. 6.) He merely says it does. But the fact that COVID-19 is a new disease does not make the question presented in this case “a novel one.” The standards for evaluating sentence modification motions are well established and routinely handled by circuit courts. Petitioner has not explained why lower courts need special guidance for applying the new factor test where the pandemic is implicated.

Most importantly, the question presented is *highly* factual in nature and presents no question of law. The court of appeals was skeptical that Parkman “met his burden of showing, by clear and convincing evidence, that he has a ‘higher vulnerability to the disease.’” (Pet-App. 107.) It noted that he had “failed to present any medical documentation confirming that he has asthma or lung problems” beyond his own representations that he did. (Pet-App. 107.) It noted that “the record contains no information regarding the degree of risk COVID-19 poses to him.” (Pet-App. 108.) It added, “Parkman bears the burden here, and without further documentation or testimony on his medical conditions, it is difficult to meaningfully assess his motion.” (Pet-App. 108.)

After noting those factual deficiencies, the court of appeals proceeded to consider the facts surrounding Parkman’s motion: that he declined to seek another stay (the State did not oppose a stay and the circuit court had liberally granted them in this case) but instead wanted the sentence changed to probation. (Pet-App. 108.)

The court of appeals appropriately reviewed the sentencing record in order to answer the question of whether the risk to Parkman, if known at the time, would have prevented the circuit court from imposing a jail sentence. (Pet-App. 108–110.) It concluded that in light of the circuit

court's emphasis on the violent nature of the domestic abuse charge, Parkman's "really full [criminal] record from 2014 on," and his prior failures on probation, the circuit court would not have changed its sentence due to the pandemic. (Pet-App. 109.)

The petition imprecisely characterizes the lower courts' analysis, obscuring how fact-dependent it is. The petition misleadingly states that "[t]he 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." (Pet. 18.) In fact, the court of appeals stated the issue directly and precisely: "The question, then, is whether the COVID-19 pandemic and its particular risks to Parkman would have been 'highly relevant' to the decision to sentence Parkman to *any term of incarceration*, to be served at some indeterminate point in the future." (Pet-App. 108.) Contrary to the Petition's assertion, this is not a "limited view" of the new factor test; it's the correct one.

Finally, the petition is unclear about whether it is posing a question of law or fact. It first states that the question is "whether the COVID-19 pandemic . . . satisfies the legal definition of a new factor under sentence modification." (Pet. 6.) It then states that the question is whether "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." (Pet. 6–7.) It is unclear from these formulations whether Petitioner is arguing that the pandemic is, as a matter of law, a new factor in all cases; or that the pandemic is, as a matter of fact, a new factor in this case.

In any event, it was factual obstacles that prevented Parkman from prevailing in the circuit court and in the court

of appeals. The same obstacles preclude him from satisfying the criteria for further review by this court.

CONCLUSION

Parkman has not shown that the issue presents anything other than the application of settled law to the facts of this case. The case does not warrant review by this Court.

Dated this 4th day of November 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this response is 956 words.

Dated November 4, 2021.

Respectfully submitted,

SONYA K. BICE

Assistant Attorney General

**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b)
(2019–20)**

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

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

Dated November 4, 2021.

Respectfully submitted,

SONYA K. BICE

Assistant Attorney General