STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2021AP1755-CR
Appeal No. 2021AP1758-CR

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STATE OF WISCONSIN,

       Plaintiff-Respondent,

    v.

MICHAEL LEE MUEHL,

       Defendant-Appellant.

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On Appeal from the Final Orders Entered
in the Circuit Court for Waushara County,
The Honorable Guy D. Dutcher Presiding

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## REPLY BRIEF OF
## DEFENDANT-APPELLANT

_____

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## ARGUMENT

### I. A Remand to the Circuit Court is not the Appropriate Action Because the Circuit Court's Denial Indicates ERP/CIP Ineligibility is a New Factor.

Mr. Muehl states a new factor exists in this case (his ERP/CIP ineligibility). (Brief in Chief at 10). Thus, the issue for appeal is not whether a new factor exists, but whether the circuit court erred by determining that new factor failed to justify modifying its sentence.

In contrast, the State argues the circuit court found no new factor exists. Therefore, it claims the circuit court never addressed the second prong of the sentence modification analysis: whether the new factor justifies modification of the sentence. (State's Brief at 9). Thus, the State asks this Court to determine if a new factor exists; and if so, to remand the matter to the circuit court.

Such a remand is not needed.

First, the circuit court never stated explicitly that Mr. Muehl's ERP/CIP ineligibility was not a new factor.

Next, the circuit court answered the second prong of the sentence modification analysis. The circuit court jumped directly to the second prong: answering whether it would have acted differently in light of the information (new factor).

The second prong of the test from *Harbor* asks whether the circuit court might have done the sentence differently had it known of the new factor. *State v. Harbor, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828* ¶ 50. (Brief in Chief at 14). Here, the circuit court's denial states Mr. Muehl presents no information "that would have impacted the Court's determination that a 16-month term of Initial Confinement was appropriate." Effectively, the court says it would not have acted differently had it known about his ERP/CIP ineligibility—this is the circuit court's answer to the second prong of the *Harbor* test.

And because the court only answers the second prong of the Harbor test when the first prong is satisfied, the circuit court must have recognized ERP/CIP ineligibility as a new factor.

Next, the State (at 7) cites to *State v. Schladweiler*, 2009 WI App 177, ¶1, 322 Wis. 2d 642, 777 N.W. 2d 114, where this Court determined the DOC's denial of placement into the CIP was not a new factor. Notably, the State points out how this Court emphasized the court's explanation of its sentence indicated nothing about the sentence being premised on the defendant's acceptance into CIP. *Id.* at ¶14. The State then compares Mr. Muehl's sentence to Schladweiler's sentence because Mr. Muehl's sentence also lacked any explanation for the sentence in reference to programming (CIP/ERP). (State's Br. At 7-8).

But, unlike *Schadweiler*, the court's explanation of Mr. Muehl's sentence did not stop at the sentencing hearing. It involves further explanation. In this case, the circuit court later explains that the 13-month minimum confinement period was conditioned on Mr. Muehl completing the ERP/CIP when Mr. Muehl requested clarification while in prison. (R.39).

Thus, Mr. Muehl's assertion that his 13-month minimum confinement period was in part connected to his ERP/CIP eligibility is not so much an "assumption," (State's Br. At 8) but a reasonable inference based on the court's explanation.

In sum, a remand to the circuit court would only give the circuit court a second chance to review its answer to the second prong of the *Harbor* test—would it have done anything differently? It already decided it would not. Thus, the proper question on appeal remains: was that decision clearly erroneous?

II. **This Court May Properly Decide this Issue Rather than Dismiss it as Moot.**

Mr. Muehl asks this court to modify his judgment of conviction to reflect an additional three months' sentence credit because he will have completed his sixteen-month incarceration term prior to the resolution of

this appeal. (Br. in Chief at 16). The State (at 9) questions whether this appeal is moot.

For several reasons, the Court may properly decide this issue.

To start, resolution of this issue may have a practical effect. An issue is moot when its resolution will have no practical effect on the underlying controversy. *Warren v. Link Farms, Inc.*, 123 Wis. 2d 485, 487, 368 N.W.2d 688 (Ct. App. 1985). Even though Mr. Muehl will have completed his confinement period before this appeal is resolved, he remains on extended supervision for six months after his confinement period. Should his extended supervision be revoked at any point during that six months, the relief requested (three months sentence credit) could apply to any period of reconfinement.

Further, this Court may decide this issue because it is an issue likely to be repeated yet evade appellate review. See *State ex. rel Unnamed Person No. 1 v. State*, 2003 WI 30, ¶19, 260 Wis. 2d 653, 660 N.W.2d 260. Here, the imposition of a minimum confinement period conditioned on successful program completion is such an issue. As this issue involves prison early release programs, likely, in some cases, an appeal will not be completed within that brief time frame as prison sentences can range from one year to life sentences. Accordingly, since some of those one-year sentences may involve minimum confinement periods conditioned on program completion, and the appellant would likely be finished with their confinement period prior to appellate review, it is proper to address this issue: whether a circuit court erroneously exercises its discretion in denying a sentence modification when the circuit court expressly conditioned a shorter sentence on successful completion of ineligible treatment programs.

## CONCLUSION

For the reasons given above, and those contained in Mr. Muehl's Brief in Chief, the circuit court's order denying Mr. Muehl's Sentence Modification Motion should be reversed; instead, Mr. Muehl requests an order to modify his judgment of conviction to include three months in sentence credit.

Respectfully submitted,

Dated this 2nd day of March, 2022.

<u>Electronically signed by Jonathan D. Gunderson</u>
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-7-

## RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) (bm) and (c) for a brief. The length of this brief is 972 words

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