

STATE OF WISCONSIN
Plaintiff
V.

CIRCUIT COURT BRANCH 3 COUNTY Racine
Honorable Emily S. Mueller

Harry S. Fumich
(your name as it appears on judgment of conviction)
Defendant

Case No. 2016-CF001491
(the case no. for the sentence you want modified)

Racine Co.
Courthouse
730 Wi. ave
Racine Wi.
53403

EMERGENCY NOTICE OF MOTION AND MOTION FOR SENTENCE MODIFICATION DUE TO COVID-19

Pursuant to State v. Harbor, 2011 WI 28, ¶ 36, 38, 797 N.W.2d 828 (2011),
Harry Scott Fumich, the Defendant in the above captioned case,
(your name)

moves this court for modification of his/her sentence, based upon the existence of a "new factor", namely the COVID-19 pandemic. The basis for this motion is as follows:

1. On 6-12-2017, the Defendant was convicted of the 1st degree int homicide
(date you were convicted) (list of offense(s) you were convicted of) ^{1 count}

the Defendant was sentenced as follows: Life with out parole.

Explain what sentence you received on each count)

2. The circuit court has the "inherent authority to modify a sentence." State v. Trujillo, 2005 WI 45, ¶ 10, 279 Wis. 2d 712, 721, 694 N.W.2d 933 (2005). "This inherent power can be used to prevent the continuation of unjust sentences and must be exercised within defined parameters." Id. A new factor is one such parameter. Id. It is within the circuit court's discretion to decide whether the new factor warrants sentence modification. Id. at ¶ 11. Therefore, the defendant must first show, by clear and convincing evidence that a new factor exists, and second, that the new factor justifies sentence modification. State v. Harbor, 2011 WI 28, ¶ 36, 38, 797 N.W.2d 828 (2011).

3. 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 the parties." Id. at ¶ 40. Although the new factor must be highly relevant to the imposition - of sentence, it does not need to frustrate the purpose of the original sentence. Id. at ¶ 48.

COVID-19

4. The COVID-19 pandemic warrants either a stay or modification of Mr. Doe's sentence. At the time of Mr. Doe's sentencing, no one knew about the widespread devastation the new strain of coronavirus, which causes

"significant, uncontrolled spread". The Governor noted that by July 29, 2020, 911 Wisconsinites had lost their lives, and that the CDC says the death toll could reach 1,800 by fall.²⁶

¶17. Inmates in Wisconsin do not have much chance of release by DOC officials because of the Truth-in-Sentencing system, nor has the department chosen to seek release for many eligible individuals. At least 131 inmates have applied for compassionate release since March 1st. 106 applications were rejected by the Program Review Committee, 14 cases were forwarded to the courts, and as of August 15, 2020, only 2 cases were granted.²⁷ The DAI took steps to remove this bottleneck by suspending the PRC review requirement in Wis. Adm. Code DOC 302.41, allowing eligible inmates' petitions to be forwarded directly to the court.²⁸ Eligibility includes a viable release plan and proposed residence. Unfortunately, aside from this limited category of qualified inmates, court intervention becomes the only avenue of relief realistically available to prisoners.²⁹

¶18. Federal judges in Ohio and Connecticut granted a preliminary injunction in favor of federal prisoners in an ACLU lawsuit.³⁰ Yet results have been mixed.³¹ Two cases, one from Illinois, *United States v. Pinkerton*, 2020 WL 2083968, (U.S. Dist. CD IL), and a more recent case in Wisconsin, *United States v. Ramsey*, 2020 WL 3798938, (U.S. Dist. E.D. Wis.), are illuminating as to under what circumstances the courts chose to grant relief:

¶19. In *Pinkerton*, decided on April 30, 2020, the court determined that extraordinary and compelling circumstances existed to modify Terri Pinkerton's sentence to time served. She was convicted and sentenced in January, 2017, of conspiracy to manufacture 50 grams or more of methamphetamine, received a sentence of 84 months' imprisonment, and had a projected release date of January 2023. She was diagnosed as having diabetes, hypertension, neuropathy, partial vision loss, and Charcot foot. She had a viable release plan to live with her daughter and son-in-law. The government did not oppose the motion. "The Court concludes that Defendant has established that extraordinary and compelling reasons warrant a reduction in her term of imprisonment."

In *Ramsey*, decided on July 7, 2020, the court determined that extraordinary and compelling reasons existed to modify Roderick Ramsey's sentence to time served and house arrest for up to 365 days. He plead guilty to conspiracy to distribute 100 grams or more of heroin and four counts of heroin distribution, and in January, 2019, received a sentence of 60 months, with a projected release date in November 2022. He was diagnosed as having type 2 diabetes, obesity, and hyperlipidemia, a known pattern for heart disease. He had a solid release plan to live with his long-term girlfriend and their two children. The government opposed the motion on the grounds that COVID-19 was not, by itself, a new factor and that he was receiving adequate medical care.

The court analyzed other cases from around the country which "have granted compassionate release where the defendant suffers from a serious condition that increases the likelihood of severe consequences from COVID-19." ("The government further argues that the mere existence of the COVID-19 pandemic does not provide a basis for sentence reduction. I agree; the statute requires the prisoner to show that his individual case presents extraordinary

and compelling circumstances. See United States v. Somerville, No. 2:12-CR-225-NR, 2020 WL 2781585 (W.D. Pa. May 29, 2020) at *7-8 (noting that courts have often denied motions based on only generalized or speculative fear about the risk of infection, granting release where the defendant suffers from a serious condition that increases the likelihood of severe consequences from COVID-19.)")

The government also argued that even though defendant does have conditions placing him at higher risk, he is receiving adequate medical care for them. the Court reasoned the government's argument misses the point. ("Defendant does not argue for release based on inadequate medical care. Rather, he contends that he is at heightened risk of dying if he does." See United States v. Clark, No. 4:08-CR-00096, 2020 WL 3395540, at *6 (S.D. Iowa June 17, 2020) (finding that a similar government argument "misses the point").")

¶20. Mr. Doe here presents the following extraordinary and compelling reasons in support of sentence modification due to COVID-19:

Mr. Doe is 53 years old. He/she has served 47 months and 4 days years of their sentence. His date is From Oct 5-2016 to Sept 9-2020 NO release date

Mr. Doe is diagnosed with the following health conditions: Covid 19 positive
Asthma, thyroid disease, heart disease

Other considerations: legs, hips, calves, ankles, feet, thighs.
severe lower extremities / upper arms.
Damage Due to Covid 19
also I plead guilty to these offenses with NO jury trial

Mr. Doe proposes the following release plans, including residence: To live in TLP or halfway house up to parole agent. or live in Boarding House.
Halle Rescue Racine wi. seek employment after hearing apply for SSD

¶21. There are several release mechanisms available to the DOC. These include:

- °Wis. Stat. s. 302.31(9) Use of jails.
- °Wis. Stat. s. 302.27 Contracts for temporary housing for detention of persons on probation or prisoners. As amended by 2017 WI Act 89, a prisoner who is eligible for minimum custody can serve their sentence at a county jail with Huber release. A sheriff can then choose to release eligible prisoners to the Home Detention Program under s. 302.425. Wis. Adm. Code DOC 302.20 governs the criteria for such transfers.

°Wis. Stat. s. 304.02 Special action parole release, and Wis. Adm. Code DOC 302.34 Special action release program govern releases for prisoners sentenced before 1999, many of whom are eligible for parole under s. 304.06.

°Both the jails, under Wis. Stat. s. 302.35, and the DOC under s. 304.115, have authority to remove prisoners in an emergency. Governor Evers has proclaimed a public health emergency.

¶22 Aside from the executive branch's authority to release inmates, the courts have several mechanisms available to them:

°Wis. Stat. s. 973.195, sentence adjustment, which allows certain inmates to be released at 75% or 85% of their term of initial confinement. Unfortunately, for inmates with consecutive terms, each must be considered individually[32]. Thus, sentence adjustments result in release only in cases where the final consecutive term is currently being served.

°Wis. Stat. s. 302.113(9g), the compassionate release mechanism, allows inmates who either have an extraordinary health condition or who are 60 years old and have served at least ten years of their sentence, or 65 years old and have served a minimum of five years of their sentence, to petition the court for release. Interpretations vary regarding this section's applicability to consecutive terms[33]. Moreover, courts may not be broadly aware that the DAI suspended the PRC review prerequisite and that referral to the courts has been expedited[34].

°Wis. Stat. s. 973.19 Motion to modify sentence. The court has inherent power, if a new factor is shown, to grant discretionary modification of a defendant's sentence. *State v. Noll*, 2002 WI App 273, 258 Wis.2d 573, 653-N.W.2d 895. As explained above, a new factor can be something that was not then in existence at the time of sentencing. Whether or not a new factor is highly relevant for purposes of sentence modification is not determined by the thing not then existence at the time of sentencing alone, but by its impact on the imposition of sentence. *Harbor*, Id.

¶23. In the event of sentence modification by the court, there remains the question of how to modify the sentence. Wis. Stat. s. 973.15(8)(a)1. allows a sentence to be stayed for legal cause. A public health emergency could be sufficient legal cause when its impact on a defendant renders their sentence violative of our State's constitution and laws. Wis. Const. Art. I, s. 6, and Wis. Stat. s. 302.08 Humane treatment and punishment follow the US Constitution's Eighth Amendment prohibition against cruel and unusual punishments. Because the DOC is not utilizing their full authority to protect prisoners, and because the Governor has stated he will not consider clemency, pardon, or commutations for imprisoned individuals[34], this responsibility falls to the court.

¶24. Mr. Doe asks the court to modify his/her sentence to allow for immediate release from confinement. Whether the court chooses to adjust his sentence, restructure it, or stay it, or merely declare what course of action the DOC should be taking in this case, Mr. Doe seeks immediate relief to avoid irreparable harm. He asks the court to construe his motion liberally in order to grant the relief sought.

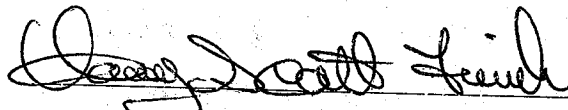
¶25. Mr. Doe is willing to allow the court to convert his motion for sentence modification into a motion for resentencing if the court does not find grounds for modification exist. See State v. Wood, 2007 WI App 190, 305 Wis.2d 133, 738 N.W.2d 81 (Once the trial court found that grounds for sentence modification did not exist, particularly with an unrepresented defendant, the trial court should not have converted a motion for sentence modification into a motion for resentencing in the absence of a clear, unequivocal, and knowing stipulation by the defendant.)

¶26. Mr. Doe asks for a hearing before the court by audiovisual means and waives entitlement to in-person appearance under Wis. Stat. s. 885.60(2), as may be approved by the court. Please ask the clerk of court to contact this institution to schedule a hearing by calling Greenbay Courthouse. (Institution telephone number)

IN CONCLUSION, as of August 5, 2020, the coronavirus has infected 18 million individuals world-wide and caused over 700,000 deaths.³⁶ As of August 20, 2020, the nationwide prisoner death toll is now equal to the number of Wisconsin residents who have lost their lives to the COVID-19 pandemic. Leaving defendant in prison, unable to socially distance, and at greatly increased risk of contracting a potentially fatal viral infection which currently has no cure, is a cruel and inhumane punishment. Mr. Doe was not sentenced to death, but is at very real risk of this outcome simply by virtue of his confinement. He does not ask to get out of serving his time. He only asks not to forfeit his life in service of his sentence.

Dated this 9 day of September, 2020

Respectfully submitted,



(your signature)

(your typed or printed name)

Harry Scott Fumich

(your address)

PO Box 12033 GB CI

DEFENDANT PRO SE

Greenbay, WI.

54307-9033

#120028

cc: name and address of District Attorney

Ms. Maureen Martinez | Ms. Patricia Hanson

730-WI ave Racine Co. Courthouse

Racine WI. 53403

Footnotes

1. Coronavirus Map: Tracking the Spread of the Outbreak, The New York Times (March 30, 2020), at <https://nyti.ms/2U4kmud> (updating regularly).

2. Outbreaks in Wisconsin, WI Department of Health Services, (March 29, 2020)

<https://www.dhs.wisconsin.gov/outbreaks/index.htm> (updating regularly).

3. WHO Characterizes COVID-19 as a Pandemic, World Health Organization (March 11, 2020) at <https://ffbit.ly/2W8dwpS>.
4. Gov. Tony Evers to Order Wisconsinites to Stay at Home. Will Close Non-Essential Businesses, JS Online (March 23, 2020) at <https://www.jsonline.com/story/news/politics/2020/03/23/wisconsin-gov.tony-evers-issues-safer-place-order/2897821001/>.
5. People at Risk for Serious Illness from COVID-19, CDC (March 23, 2020) at <https://tbit.ly/2vgUtlP>.
6. WisContext, <https://www.wiscontext.org/lbumpy-path-efforts-cut-wisconsins-prison-numbers>.
6. Laura M. Marusehak et al. (2015). Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12. NCI 248491. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, at <https://www.bjs.gov/content/pub/pdf/mpsfpj1112.pdf>.
- 8 "Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States." (March 2, 2020), at <https://tbit.ly/2W9V6oS>.
9. Id.
10. Wisconsin Department of Corrections, COVID-19 (Coronavirus) Information Home, [https://doc.wi.gov/Pages/COVID19\(Coronavirus\)/COVID19.aspx](https://doc.wi.gov/Pages/COVID19(Coronavirus)/COVID19.aspx); Two Dane County jail inmates test positive for COVID-19, results pending for 6 others FOX6 (March 27, 2020) <https://fox6now.com/2020/03/27/2-dane-county-jail-inmates-test-positive-for-covid-19-results-pending-for-6-others/>.
11. Larry Neumeister, "Fed lockup in Manhattan gets harsh virus review" @6A, May 31, 2020, Milwaukee Journal Sentinel.
- 12 Kevin Johnson, "Mass virus testing in state prisons reveals hidden asymptomatic infections", April 25, 2020, USA Today.
13. fairtrials.org, last visited 8/19/20.
14. www.dhs.wisconsin.gov/COVID-19; The Community newsletter, June, 2020, thecommunitynow.us.
15. Id.
16. Id.
17. The Community newsletter, July 2020. Id.
18. fairtrials.org, Id.
19. Wisconsin Department of Corrections, COVID-19 (Coronavirus) Information Home, Id.
20. "Wisconsin receives an F+ grade for handling of COVID-19 in prisons", June 26, 2020, Madison.com, last visited 8/19/20.
21. Id.
22. Matt Piper, July 26, 2020, Milwaukee Journal Sentinel.
23. Matt Piper, "WI confirms 826 more COVID-19 cases as new tests fail", @6A, August 22, 2020, Milwaukee Journal Sentinel.
- 24 Anna Flag, Damini Sharma, Marshall Project, Mike Stobbe, Larry Fen, Associated Press, " As US deaths mount, virus takes toll on minorities", @6A, August 22, 2020, Milwaukee Journal Sentinel.
- 25 Id.
26. Executive Order No. 82, Tony Evers, Office of the Governor, 2020 WI Reg. Text 561504.
27. Rory Limnane, " Crowded inmates battle heat and virus concerns; Evers wont consider requests for clemency", @1A, August 15, 2020, Milwaukee Journal Sentinel.
28. Division of Adult Institutions, WI DOC, Makda Fessahaye, Administrator, April 23, 2020 memorandum.
29. Bruce Vielmetti, "Inmates seek sentence changes over COVID-19 risk in prisons", @3A, May 14, 2020, Milwaukee Journal Sentinel.
30. See <https://www.acluohio.org/archives/press-releases> "Criminal Justice Press Release", April 13, 2020.
31. Wilson v. Williams, 2020 WL 2542131 (U.S. Dist. CT).
32. State v. Polar, 2014 WI App 15, 352 Wis.2d 452, 842 N.W.2d 531.
33. State ex rel Aumann v. Wis. DOC, Milw. Co., 19CV5638, July 31, 2019 Decision on petition for writ of habeas corpus, Honorable Judge Rothstein.
34. State v. Marshall, 08CF270, July 22, 2020 Decision on pro se motion for sentence modification, Honorable Beau Liegeols, Brown County Circuit Court.
35. Limnane at note 27.
36. See COVID-19 Dashboard, The John Hopkins University, <https://bit.ly/2WD4XU9> (last accessed Aug. 5, 2020)