

8 27 20 This is a mini overview of where we are at, going to as many people as we can in lieu of the regular newsletter. We hope to soon put out a 200 copy newsletter soon and we realize that there has been no newsletter since November of last year.

We recently learned that 258 people tested positive in GBCI for covid- This is on top of the 200+ in WCI and reports are coming in of outbreaks in other places. Time to get serious about getting the vulnerable out of there. We continue with our release mechanisms below and are also seriously exploring a suit. We have learned that your release plans are important also as judges and others consider your plans for housing etc after release along with your concerns while in. So if you can, get that in order as far as impossible now.

Besides getting your information to “the powers” and other activists and on the web, we do work with the media, statewide and local. At present a Green Bay Gazette investigative reporter would like to connect with GBCI prisoners. However she is not allowed to give you her phone. Best way to contact this reporter are: Haley BeMiller, Reporter, Green Bay Press-Gazette. She says: “They can email me through CorrLinks. My account is linked to hbemiller@gannett.com. They can write me at: 435 E. Walnut St. Green Bay, WI 54305”

AN FFUP COVID GATHERING

Evers denies clemency to inmates as high heat, COVID risks raise health concerns

Rory Linnane /Milwaukee Journal Sentinel

www.usatoday.com/story/news/2020/08/11/wisconsin-rejecting-release-requests-prisoner-health-concerns-rise/3311115001

Temperatures in at least one Wisconsin prison have reached at least 87 degrees this summer, intensifying health concerns in prisons, already considered among the most dangerous environments during the coronavirus pandemic.

Gov. Tony Evers has opted not to consider any clemency requests from inmates, and corrections officials have rejected nearly all applications for early release based on health conditions.

Already overcrowded, the population in state-run prisons is rising again after months of decline, though still down since the beginning of the year. More than 21,000 adults are held in buildings designed to house fewer than 18,000.

Inmates and their family members have reported troubling conditions, including poor ventilation, high temperatures and the impossibility of social distancing. In at least one facility, staff are forcing inmates to keep doors closed to restrict airflow in response to coronavirus risk.

“My sister said, ‘I am laying still, not moving, and I am soaking wet,’” said Alisha Niedziejko, whose sister is incarcerated at Robert E. Ellsworth Correctional Center in Union Grove.

Health experts say air restriction could actually worsen the risk. Stagnant air allows any viral droplets to build up inside shared cells. And stifling heat can weaken the body's ability to fight it off.

Ew dmedical school professor who studies effects of heat. “You’re going to get sicker.”

The American Civil Liberties Union has called on Evers to reduce the incarcerated population before further spread of the virus. More than 300 inmates in state prisons have been infected and 21 cases remain active. Outbreaks have been worse in other states’ prisons.

“Wisconsin could be next if it does not respond with more urgency than it has shown so far,” Sean Wilson, manager of the Wisconsin ACLU's Smart Justice Campaign, said in a statement Wednesday.

At least 131 Wisconsin inmates have applied since March 1 for what's known as compassionate release based on their old age or extraordinary health conditions, according to Department of Corrections spokesperson John Beard. A corrections committee has rejected 106 of those cases and forwarded 14 to courts for final decisions. Of those, courts have released two people and denied three while nine await hearings. Another 11 are waiting for consideration by the committee.

'Light in the dark'

It's hard to know exactly how hot it is inside Wisconsin prisons. Staff aren't required to check air temperatures inside, Beard said. But after several calls from concerned sister Niedziejko, staff did take air temperatures at Ellsworth in Union Grove. At 4 p.m. July 7, temperatures ranged from 81 to 87 degrees in cells and hallways, Beard confirmed. Cells do not have air conditioning, while staff offices have air conditioning units for the windows. Inmates can crack their windows and buy small fans if they can afford them. Niedziejko has drawn more than 300 people to a new Facebook group, “Light in the Dark,” looking to support inmates at the facility and beyond.

“They have a right to not undergo extreme heat conditions,” Niedziejko said. “That’s cruel and unusual punishment in my opinion.” In fact, when inmates at a prison in Boscobel sued the state in 2002 and argued the heat constituted cruel and unusual punishment, officials agreed to keep temperatures below 85 degrees. A judge ordered them to install air conditioning in order to meet that goal, case documents show. Other facilities continued operating without air conditioning. In other states, medical examiners have determined inmates have died from hyperthermia, or overheating. Vassallo, from NYU, was called upon as an expert in the Boscobel case. She said overheating could aggravate heart problems, asthma and other medical conditions. In a recent interview, Vassallo said a heat index over 80 degrees is a “dangerous range” and the threat of COVID makes overheating an even more concerning issue.

Beard said there is no maximum allowable temperature in DOC prisons. When the heat index (factoring in humidity) exceeds 90 degrees, inmates are encouraged to use wet towels, cancel strenuous sports and drink at least six glasses of water per day.

If the heat index reaches 104 degrees, they're encouraged to drink at least 12 8-ounce glasses of water per day and cancel non-essential work involving physical activity.

As Niedziejko sought solutions for her sister, she came across Facebook videos by Niki Wilichowski, who was recently released after spending three years at Ellsworth. Wilichowski was also trying to improve conditions at the facility. Wilichowski inspired her church, Fox River Christian Church in Waukesha, to donate 25 fans to go to inmates who weren't able to purchase their own. She knows how hard it can be to scrape together money; she remembers making 10 cents per hour, working her way up to 45 cents per hour as a meat prep cook.

"Not everybody has family that takes care of them," she said.

Wilichowski was especially concerned about the new closed-door policy, making conditions more stifling. Beard said the policy is due in part to security concerns and in part to the pandemic.

"Keeping doors closed prevents cross-air flow between rooms and also minimizes chances of persons in our care potentially spreading the virus by lingering or talking at each other's open doors," Beard said in an email. It's not so simple, according to health experts. Dr. Jeff Pothof, chief quality officer at UW Health, said while it's possible that small particles of the virus could be carried between rooms sharing air, the primary goal is to have enough air flowing that those particles are quickly diluted by cleaner air.

"Anything that improves air circulation is better than having it be stagnant," Pothof said. "The longer the air stays in one place, the higher the potential viral load could become."

Behind closed doors without proper airflow, any exhaled viral particles will continue to linger and add up in the air. That makes it more dangerous for cellmates, or anyone else exposed to the same air, because they're more likely to breathe in enough of the virus to become infected. It also makes the heat harder to bear, inmates said.

A former Ellsworth inmate, Tammy Wieting, said the summer heat was sweltering even when they could open their doors. She said she had to visit health services multiple times, once in a wheelchair, because she was so dizzy.

Inmates have reported high temperatures at several other facilities as well. Robert Thibault, part of the Incarcerated Workers Organizing Committee, compiled notes from some.

An

"I feel very bad for the elderly and people with health problems ... they are the ones that suffer the most," the inmate wrote. "I am just sitting in my cell writing a letter doing nothing (and) I get soaked in sweat just sitting there."

Niedziejko and Wilichowski both hope to continue bringing attention to conditions inside the prisons. Niedziejko said she's been trying to talk with prison officials about a way to provide air conditioning at Ellsworth and other facilities.

"At the end of the day we're all human beings and if I were an inmate undergoing this treatment I would pray that there was somebody out there to do the same for me," she said.

No clemency for inmates in Wisconsin

Many inmates have applied for early release due to worrisome health conditions. Health experts have noted that the safest response to the pandemic in prisons is to reduce the population of people locked up, allowing those remaining to maintain more distance. Evers and corrections officials have multiple avenues available for this reduction.

This spring, corrections officials did release hundreds of inmates who were locked up, mostly in county jails, not for crimes but for infractions to their parole, probation or supervision agreements. From March 2 to April 27, that population shrank from 3,680 to 1,700. Since then, it has been crawling back up, reaching 2,153 as of Aug. 3.

Inmates and their advocates are disappointed there have been only two "compassionate releases" since March. The 131 applications filed for compassionate release since March is significantly higher than the 13 filed in the same period last year.

The department has additional tools it could use to release more inmates in response to the pandemic, which Beard said it has not used. There's a "special action parole" option to release inmates to parole for the purpose of relieving overcrowding.

Individual wardens also have the option to release inmates when they deem someone is in need of emergency release.

Similarly, Evers has not used his clemency powers to cut short or delay sentences for any inmates. He has instructed the state pardons board to deny clemency to all who haven't completed their sentences.

Dozens of inmates requested waivers from Evers' criteria, asking that they be considered for clemency in light of the pandemic. Rayshun Woods, at Waupun Correction Institution where over 200 inmates have tested positive, said he was worried for his life due to having asthma, diabetes and cystic fibrosis.

"There is a great possibility that I can die from this COVID-19," Woods wrote. "I want to see my love ones again, spend time with them. I want to show society that I have changed, I have grown."

At Jackson Correctional Institution, Ryan Lemke also worried about his high risk for complications, noting he has a health condition that requires regular treatments that suppress his immune system. "I'm hoping this finds someone who sees the seriousness of my situation, understands the risk of being in this position at this time, and is able to help," he wrote.

Other governors have released inmates who are particularly medically vulnerable and ordered commutations for thousands of others to reduce overcrowding. In Kentucky, New Mexico and Washington, governors ordered mass commutations for inmates not convicted of violent crimes who were due for release in the coming months. A commutation does not erase someone's record but ends their incarceration early.

ACLU Wisconsin staff said they met with Evers' staff to discuss such options for reducing the incarcerated population. They still hope to see releases. "We'll continue to push that because how fast COVID is spreading," said Melissa Ludin, regional organizer with the ACLU's Campaign for Smart Justice. "These are human lives. We want to see our governor act on the solutions given him for how to get some of these people home." *Rory Linnane reports on public health and works to make*

information accessible so readers can improve their lives and hold officials accountable. Contact Rory at (414) 801-1525 or rory.linnane@jrn.com. Follow her on Twitter at [@RoryLinnane](https://twitter.com/RoryLinnane).

Please use article above and below as you make your arguments for release on whatever release mechanism you use.

DISPARATE ARTICLES AND IDEAS YOU CAN USE- GOOD UPDATES ON COVID

In May the Wisconsin legislative Bureau (LRB) put out a report on court findings around the country and the various release efforts ongoing in WI. Copies available- it lauds the DOC efforts but also goes into the weeds of the ways to obtain release. Something we have not tried is the overcrowding angle. For the courts, proving deliberate indifference seems to be the difficulty nationwide. Our former outreach worker, Ben Turk wrote an excellent article on this. Both are available (2pages on a side)

- 1)LRB Report May 2020: **Emergency release of prisoners due to Covid 19)**
- 2) Ben TURK report (March) **WCI Response to COVID-19 Exposure: Lackadaisical and Punitive.**

INMATE COMPLAINT template by Mustafa:

1) Briefly state who or what is the ONE issue of this complaint. What remedial action are you requesting?
I'm being held in an unsafe living condition due to Covid-19, and the DOC is being deliberately indifferent thereto. I request an elimination of overcrowding, beginning w/my release, and all other medically available treatment and recommended safety precautions

2) Who did you attempt to resolve the issue with, and what was the result? I've written the warden here, and the DOC Secretary Kevin Carr, to no avail. Attached is a copy of my letter sent to both of them (Exhibit #1). Both were ignored and/or denied.

What are the details surrounding this complaint?

There is a Covid-19 pandemic which has already claimed over 100,000 lives in the U.S., prisoners included, and requires social distancing as the main precaution, among other sanitary practices, to guard against infection and potential lifelong injuries or death. Due to this prison operating well beyond its capacity, as well as general overcrowding throughout the DOC, it is impossible for us to social distance and provide other protections for our own safety and lives in here. However, if this facility was operating at capacity, i.e., with all single cells, as it was designed to be, then we could properly social distance.

Currently, prisoners are getting infected at a rate of at least 5 times or greater than that of staff (in some cases as much as 10 times greater), from whom were contracting it. That is because once staff are infected they are able to social distance, and other staff here are provided a level of PPE (Personal Protective Equipment) and sanitary applications, which we are not, to protect themselves against infected prisoners.

See *Helling V. McKinney*, 509 U.S. 25, 31-32 (1993) ("It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."). "It is cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Id.* at 33 (quoting *Youngberg V. Romero*, 457 U.S. 307, 315-316, 73 L. Ed 2d 28, 102 S.Ct. 2452 (1982)). "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. [] . . . a remedy for unsafe conditions need not await a tragic event." *Helling, Id.* at 33.

Thus, this prison and the DOC have an obligation to ensure that overcrowding is eliminated immediately, without further life-threatening delay, and that we are provided the same level of PPE, sanitary applications, and testing as staff, and the same medical treatment available in society, in lieu of our release or while awaiting it.

*NOTE: Complaints regarding inmates health and personal safety are not subject to the 1 complaint per week rule.

Wisconsin receives an F+ grade for handling of COVID-19 in prisons

- [Emily Hamer | Wisconsin State Journal Jun 26, 2020](#)

Wisconsin has received an F+ grade from the national American Civil Liberties Union and the Prison Policy Initiative for its handling of the COVID-19 coronavirus crisis in prisons, according to a report that analyzed all states' responses to the pandemic in jails and prisons. Nine states received D grades. The rest, except for Illinois, which was not graded because of pending litigation, received F grades. "This report confirms what we already know to be true: Wisconsin has not done nearly enough to combat the spread of COVID-19 in our jails and prisons," Sean Wilson, Smart Justice Statewide Organizer for the ACLU of Wisconsin, said in a statement. DOC is partway through testing its entire inmate and staff population. As of Thursday, 13,810 of DOC's roughly 22,000 adult inmates had been tested. The ACLU graded states based on several measures including testing, whether masks were given out, data availability, prison and jail population reductions, and orders from governors or

correctional departments related to halting jail admissions or releasing inmates. Points were given out based on the state's performance on each measure. The largest chunk of points available were for significantly decreasing prison and jail populations. Another large chunk came from statewide orders to halt jail admissions or to release vulnerable prisoners and those nearing the end of their sentences — which most states did not do.

(this is a longer article heavy on DOC statements countering ACLU.

Wisconsin lost points because Gov. Tony Evers did not issue orders to release prisoners or stop jail admissions. **On March 23, Evers halted prison admissions**, but ACLU spokeswoman Alyssa Mauk said that action did not count in the report because it was for prisons, not jails. Prison admissions and transfers resumed June 1, with 14-day quarantines required for inmates who move between facilities.

Wisconsin also lost points for not providing a detailed breakdown of its data on the virus in prisons. DOC gives a daily update on COVID-19 cases among prisoners and staff — which it gained some points for — but that data is not broken down by race, the ACLU report notes.

Wisconsin gained partial points for distributing masks to staff and prisoners, and for committing to testing its entire prison population. Prisoners in the state have complained of **a slow response from DOC and inconsistent cleaning and social distancing** practices. They've also said that **not all guards wear masks**, putting them at risk.

DOC has required all staff to wear face masks at 13 of its 37 facilities. Among other measures DOC has taken to address the crisis are: releasing more than 1,600 inmates, giving prisoners masks, enhancing cleaning efforts, locking down prisons with positive cases, quarantining individuals who have been exposed to COVID-19, suspending work release and implementing social distancing wherever possible.

But Wilson, the ACLU organizer, said that's not enough given the gravity of the coronavirus emergency.

“Wisconsin has repeatedly neglected to release vulnerable people from custody, which has endangered the health of incarcerated people, corrections staff, and members of surrounding communities,” Wilson said. “We encourage the governor and Department of Corrections to take immediate action to release vulnerable people and stop this public health catastrophe.”

Update on Release Efforts

NEW! One of our fine now beleaguered litigator guides updated the Public defender template for Motion to Modify Sentence. He took into account the feedback we have got from you- it is much more complete and data on covid is current as to this date(beginning September)- make sure you write of what is happening in your prisons. Guys are getting hearings.

It is difficult to understand why this is so difficult. Executive Directive 31 applications are still being denied by wardens and NOT being passed on to the parole chairman. Confusing language in the PAC108 stops many from even applying and News from the Public defender's sentence modification application is mixed. We hear of some hearing dates coming up with judges and so denials stating “The pandemic cannot be a new factor.” The consistent good news comes from the parole chairman's desk who is the final decider on defer change and he is reducing some. Old Law prisoners are being paroled- a dribbling . The TIS kids are still being dumped without treatment or training only to come right back. There is a new awareness and gathering however and we see we need to do a suit. WE have some complaints underway and are looking for an experienced litigator to be one of the plaintiffs in a joinder suit- we will go after a lawyer but plainitffs “inside” to help guide if we end up doing joinders.

Here are comments on the three release mechanisms.

- 1) PAC 1.08 :It is my understanding that this is good for both old law prisoners(973.014) and TIS prisoners (973.01) who are over 60(served 10 years or more) or over 65 (served 5 years or more) I have changed the wording on the PAC handout as I am getting complaints by people in their 60s and 70s that they cannot get two physician affidavits to attest to their health conditions. The little incredibly important word **IF** is hidden in the original. **IF** you are not 60 and have been in 10 years minimum or 65 and served 5 years but you have a serious medical condition, you can qualify **IF** you get two physician affidavits. One has to be your DOC doctor. Forget that one. **BUT IF you are over 60 , this is a good one to try as it was devised by the DOC-and my guess is they would love to tout their benevolence.**
- 2) Executive Directive 31: **THESE ARE STILL NOT GETTING TO TATE:** The problem here is that the wardens are denying the petition and not forwarding them to the parole chairman . We suggest you send your exec dir 31 to both Tate and warden at onset OR when warden denies, send his decision with your app to FFUP and I will send on to Tate with cover letter. The exec order is clear, the memo is not:**order:**

B. All requests will be forwarded to the Warden who will review the request to determine if the inmate is statutorily eligible for consideration and forward the request to the Chairperson with a recommendation.

The role of the warden in the directive itself: here is the statement confirming it's existence, which took years: **memo**

We have received your letter regarding Executive Directive 31. Prison wardens have access to ED 31. Persons-in-custody sentenced under TIS are not eligible for ED31. For those that are eligible, they will have to make a request for consideration at the institution. The Parole Commission will consider requests under ED31 upon recommendation from the Warden. Those sentenced under TIS can file a petition to modify bifurcated sentences for geriatric/extraordinary health conditions with the Bureau of Offender Classification and Movement (BOCM) at their institution under DAI policy 302.00.13.

EXECUTIVE DIRECTIVE 31 has been in many FFUP newsletters and IS working IF they do get to Parole Chairman Tate. Write me for the printout if you do not have it. There is no application proper- the important thing is the definition of "Extraordinary conditions" and that there is no requirement for affidavits of doctors. It is ONLY for OLD law prisoners: - The beauty of this directive is its broad criteria:

"Extraordinary Circumstances" means advanced age, infirmity or disability of the inmate, need for treatment or services not available within the correctional institution, as sentence to a term of imprisonment that is substantially disparate from the sentence usually imposed for a particular offense, or other circumstances warranting an early release which are made known to the sentencing court pursuant to section PAC 105(1) (a), Wis Adm, Code."

The full one page EXECUTIVE DIRECTIVE 31 has been in many FFUP newsletters and people are getting hearings on it working IF they do get it to Parole Chairman Tate. Write me for the printout if you need it and send both to warden AND Tate.

The most hopeful is the sentence modification template the Public defenders in Madison made out in March and one of our litigator guides recently updated. We hear of hearings in front of judges and denials stating the pandemic is not a new factor. It depends on your judge. = Racine and Fond du Lac seem to be "no goes." I have include a few squinched articles here and suggest that you update the judge on the covid generally and how it effects you personally.

DETAILS OF THE THREE MAIN RELEASE MECHANISMS

A) PAC 1.08. Release due to extraordinary health condition or age., WI ADC § PAC 108

(1) Eligibility. An inmate serving a bifurcated sentence imposed under *s. 973.01, Stats., or, notwithstanding s. 973.014 (1g) (a) or (2), Stats., serving a life sentence imposed under s. 973.014, Stats.,* may petition the commission for modification of the inmate's sentence to be released to extended supervision **if the inmate meets one**, of the following eligibility criteria:

(a) The inmate is 65 years of age or older and has served at least 5 years of the term of confinement in the prison portion of the bifurcated sentence for a sentence imposed under *s. 973.01, Stats.,* or has served at least 5 years for a life sentence imposed under *s. 973.014, Stats.* **OR**

(b) he inmate is 60 years of age or older and has served at least 10 years of the term of confinement in the prison portion of the bifurcated sentence for a sentence imposed under *s. 973.01, Stats.,* or has served at least 5 years for a life sentence imposed under *s. 973.014, Stats.* **OR**

(c) The inmate has an extraordinary health condition. (forget this)

(2) Right to representation. An inmate who is eligible to petition for modification of the sentence under this section has a right to be represented by counsel in proceedings under this section. An inmate or the department on the inmate's behalf, may apply to the state public defender for determination of indigency and appointment of counsel under *s. 977.05 (4) am), Stats.,* before or after the filing of the petition.

(3) Petition. An inmate who files a petition for release under this section shall include all of the following in support of his or her petition:

(a) Date of birth.

(b) Dates of incarceration for current sentence.

(c) *note this is where confusion occurs and I have changed the order of the phrases)*

IF the inmate is alleging that he or she has an extraordinary health condition, affidavits of 2 physicians, as defined under *s. 448.01 (5), Stats.,* who practice in this state, setting forth the inmate's • diagnosis; medical condition, including physical or mental limitations or disabilities, treatment, and One of the affidavits shall be from the inmate's current attending physician.

(d) A signed authorization on a form specified by the commission, authorizing the release of a copy of the petition and supporting documentation to the sentencing court, the district attorney, and victims of the inmate's crime for purposes of reviewing and processing the petition.

(e) Other information as required by the commissioner.

(4) Hearing.

(a) Upon receipt of a petition from an inmate, the commission shall review the petition to determine if the inmate is eligible for consideration under sub. (1). If the inmate meets one of the criteria for review, the commission shall schedule the petition for hearing to determine whether the public interest would be served by a modification of the inmate's sentence under s.

302.1135, Stats. The commission may seek additional information regarding the factual bases of the inmate's petition for sentence modification under this section, including additional medical information.

(b) The commission shall notify in writing the inmate, the district attorney, any victims of the inmate's crime, the attorney representing the inmate, if applicable, the agent of record, the institution social worker, and the institution record office staff, of the date, time and location of the hearing. The commission will notify victims through the department's office of victim services. The notice of hearing shall be sent to the last-known address of the inmate's victim, postmarked at least 10 days before the date of the hearing.

(c) In advance of the hearing the commission may request from the agent or social worker additional information, including the inmate's release plan. The commission may request the department to provide information concerning the inmate's status regarding civil commitment under ch. 980, Stats., and community notice under ss. 301.45, 301.46, and 301.47, Stats.

(d) The commissioner conducting the hearing shall review the inmate's social service and legal files prior to the hearing.

(e) The commission shall permit the inmate, the attorney representing the Inmate, if applicable, the district attorney, and any victims of the inmate's crime to attend the hearing and give a written or oral statement regarding the inmate's petition for sentence modification, specifically addressing the issue of whether the public interest would be served by the modification. During the hearing the commission may request additional information. The hearing may be held in person, by telephone, videoconferencing or other virtual communication means at the discretion of the commission.

(f) Information about the address of a victim will not be released or disclosed.

(g) The inmate has the burden of proving by the greater weight of the credible evidence that a modification of the sentence under this section would serve the public interest.

(h) The hearing shall be recorded. A transcript shall be prepared only upon an order of the court which has jurisdiction over a petition for judicial review of the decision.

(5) Decision. (a) Upon conclusion, of the hearing, the commissioner conducting shall prepare a report for submission to the chairperson. The report shall contain a summary of the information provided at the hearing, including relevant documents, a recommendation to approve or deny the petition, and the justification for the recommendation.

(b) The commission may defer making a decision or hold a decision in abeyance in order to receive additional relevant information, including medical information. If additional information is received, the commission shall reconvene the hearing. Notice will be given to individuals who were present at the initial hearing. The hearing may be held in person, by telephone, videoconferencing or other virtual communication means at the discretion of the commission.

(c) The chairperson shall issue a decision on the petition based on the report and documents submitted by the commissioner.

1. If the petition is approved, the chairperson shall modify the sentence by establishing a new release date and give notice to the department. The department shall release the inmate to extended supervision within 30 days after the date on which the commission modified the sentence. The modification shall reduce the term of confinement in the prison portion of the inmate's sentence and lengthen the term of extended supervision imposed so that the total length of the sentence originally imposed does not change.
2. If the petition is denied, the inmate may not file another petition within one year of the date of the denial.
3. The commission shall provide notice of its decision in writing to the inmate, the district attorney, any victims of the inmate's crime, the attorney representing the inmate, if applicable, the agent of record, the institution social worker, and the institution record office staff.

(6) Appeal. (a) An inmate may seek review of the decision to deny the petition for modification only by common law writ of certiorari.

(b) The state may appeal the decision to grant the petition to circuit court.

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NEW update of Motion to Modify Sentence/notes from litigator guide who updated this motion:

A few important notes to the person that chooses to file this motion:

- Don't just fill in the blanks. Personalize it!
- If you have a health condition and are older, you're more likely to have it granted.
- If you were sentenced or committed your crime before 1999, and are parole-eligible, explain this to the judge in your motion.
- If you have a violent crime, including a sex case, know that victim's have input in these matters.
- Judges will want to know you've completed treatment. Also, a judge won't release you homeless to the streets. If you need a TLP, get your PO's blessing first that they're willing to put you in one.
- Make a second copy and mail it to the District Attorney in your case. Don't think the clerk will just make the copy for you. If you have no money on your account, apply for a legal loan from the business office. You can also send this to FFUP for copies.

STATE OF WISCONSIN CIRCUIT COURT BRANCH _____ COUNTY OF _____

STATE OF WISCONSIN,
Plaintiff
V.

Case No. _____
(the case no. for the sentence you want modified)

(your name as it appears on judgment of conviction)
Defendant

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), _____
(your name)

the Defendant in the above captioned case, 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 _____, the Defendant was convicted of _____
(date you were convicted) (list of offense(s) you were convicted of)

the Defendant was sentenced as follows: _____

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 COVID-19, would cause. As of March 30, 2020, COVID-19 has infected over 729,100 people, leading to at least 34,689 deaths worldwide.¹ In Wisconsin, there are over 1,112 confirmed cases and 13 deaths.² On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.³ Governor Evers declared a State of Emergency on March 12, 2020. On March 17, 2020, Governor Evers ordered that no more than 10 people congregate in a public place, and on March 23, 2020, Governor Evers issued a "safer-at-home" order, requiring all businesses but those providing "essential services" to shut down.⁴

5. The CDC has issued guidance that individuals at higher risk of contracting COVID-19—adults over 60 years old and people with chronic medical conditions such as lung disease, heart disease, and diabetes—take immediate preventative actions, including avoiding crowded areas and staying at home as much as possible.⁵ With confirmed cases in Wisconsin that indicate community spread, we must take every necessary action to protect vulnerable populations and the community at large.

6. Public health and governmental officials are strongly urging the public to practice social distancing, but social distancing is impossible for imprisoned individuals, who are kept in close proximity to one another. Infectious diseases that are uncommon in the general public, such as tuberculosis, form wide-spread outbreaks in prisons. Moreover, Wisconsin's prison system is currently 33% over capacity, and severely understaffed, which can only serve to worsen the problem.⁶

7. Incarceration creates the ideal environment for the transmission of contagious disease. Inmates regularly cycle in and out of jails from all over the country and world, and people who work in the facilities leave and return daily, without screening. Incarcerated people have poorer health than the general population, and even at the best of times, medical care is limited in jails.⁷ Many people who are incarcerated also have chronic conditions which make them vulnerable to severe forms of COVID-19. According to public health experts, incarcerated individuals "are at a special risk of infection, given their living situations," and "may also be less able to participate in proactive measures to keep themselves safe."⁸ "Infection control is challenging in these settings."⁹

8. Inmates are not the only people in the jails and prisons who are at risk. Members of prison and jail staff are also at high risk because of contact with other staff and inmates. There are already confirmed COVID-19 cases for staff and inmates in prisons and jails in Wisconsin. As of March 27, 2020, there have been confirmed staff cases in Waupun Correctional, Columbia Correctional, and the Milwaukee Secure Detention Facility and confirmed cases with inmates at the Dane County Jail.¹⁰ Unfortunately, it is likely COVID-19 could reach all of Wisconsin's prisons and jails.

9. A federal detention center in Manhattan made national news when a former chief medical officer for New York City jails toured the facility May 13th. He noted that infected prisoners were merely sent to a high-security unit to segregate them from the general population, which was "grossly inappropriate for the treatment of any ill inmates, and particularly those suffering from COVID-19"¹¹. Even efforts designed to quarantine infected people are likely to

fail because of the high incidence of asymptomatic infections. A USA Today article noted that 90% of newly diagnosed inmates displayed no symptoms¹²

10. According to a New York Times database that tracks deaths in correctional facilities, as of August 19, 2020, there have been 160,000 infections among guards and prisoners across the country, up 40% in the preceding six-week period. A recent study showed inmates are infected at a rate more than five times the nation's overall rate, and that they also have a higher rate of death, 39 per 100,000 as opposed to 29 per 100,000¹³

11. As of June, there were 65 confirmed cases among Wisconsin prisoners, with 885 inmates under quarantine statewide¹⁴. 415 people in prisons had died nationwide.¹⁵ As of June 1st, Wisconsin state prisons again began accepting jail transfers¹⁶. By July, there were 283 confirmed cases among inmates and 79 cases among staff¹⁷. As of August 19, 2020, over 1,000 inmates in prisons and jails have perished nationwide.¹⁸

12. Most recently, Green Bay Correctional Institution, which houses approximately 1,100 inmates at any given time, has gone on lockdown, with 57 confirmed cases as of August 19, 2020. Two days later the number of confirmed cases doubled to 126. With 500 tests still pending confirmation, a 38% infection rate. By Monday, August 24, 2020, the number of confirmed cases again doubled, to 258 inmates.¹⁹

13. As of July, the National Guard had completed testing at 25 of 37 Division of Adult Institution (DAI) facilities. By now, all facilities have undergone at least one round of testing. After all facilities were tested, 9 prisons had positive cases, the majority of the 283 cases occurring at Waupun Correctional Institution, with 227 total²⁰. At that point, the ACLU's Prison Policy Initiative gave Wisconsin an F+ grade for its handling of the COVID-19 coronavirus crisis in its prisons. The report analyzed all states' responses to the pandemic in jails and prisons. Nine states received D grades, the rest (excluding Illinois due to pending litigation) received F grades.²¹

14. As of July 26, 2020, there were 56,940 positive cases in Wisconsin since the crisis began. 970 had died, with 59 deaths in the preceding week.²² As of August 19, 2020, the average single-day increase fell to 690 confirmed cases, the lowest point since July 11. But a higher portion are coming back positive, at 7.8% of 10,570 tests. The 7-day average of test positivity is higher throughout August than at any point since May. There were 69,059 positive cases, with 60,055 (87%) listed as "recovered". 7,918 cases are active (11.5%), 5,505 have been hospitalized (8%), 1,068 have died (1.5%). There were 367 inpatients, 120 of whom were in the ICU.²³

15. The pandemic continues to have a greater toll on minorities. 215,000 more people than usual died in the US during the first seven months of 2020.²⁴ Half of them were African Americans, Hispanics, Native Americans, and Asians. The CDC's official death toll at the end of July was 150,000 Americans. It has since grown to 170,000 as of August 22, 2020. People of color are 40% of the population, but account for 52% of all "excess deaths".²⁵

16. Governor Tony Evers issued an executive order on August 3, 2020, proclaiming a public health emergency. He noted that on June 1, 2020, there were 18,543 confirmed cases of COVID-19 and that on July 1, 2020, the number had grown to 29,199, a 57% increase. That on July 29, 2020, there were 51,049 confirmed cases, a 75% increase from July 1. That on July 26, 2020, the President's COVID-19 Task Force identified Wisconsin as a "red zone" with "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. (*your name*)_____ here presents the following extraordinary and compelling reasons in support of sentence modification due to COVID-19:

_____ is _____ years old. He/she has served _____ years of his/her sentence. His/her release date is presently set as _____.

_____ is diagnosed with the following health conditions and also would like the court to consider the following additional factors: (if appropriate, include update on what is happening with Covid in your prison/ use extra sheets as needed)

_____proposes the following release plans, including residence :

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 and have been for several years. The Parole Commission does not function today as it did in the 1980s and 90s, when many of these inmates were sentenced. Despite having no conduct issues, and having schooling, vocational training and correctional treatment programming long since completed, this relatively small group of inmates remains here long after the courts expected them to when it sentenced them. These inmates have family and friends that steadfastly support them and would provide them residence. They are the most likely to have extraordinary health and age-related conditions and be at the greatest risk. Yet they are limited in the relief they can seek. Theirs is "Untruth-in-Sentencing".
- 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 individually³². 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 terms³³.

Moreover, courts may not be broadly aware that the DAI suspended the PRC review prerequisite and that referral to the courts has been expedited³⁴.

- 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 individuals³⁴, this responsibility falls to the court.

24. _____ 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. _____ 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 _____ 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 _____.
(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.³⁶As 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 _____ day of _____, 20____

Respectfully submitted,

(your signature)

(your typed or printed name)

(your address)

DEFENDANT PRO SE

cc: name and address of District Attorney

Footnotes

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- 12 Kevin Johnson, "Mass virus testing in state prisons reveals hidden asymptomatic infections", April 25, 2020, USA Today.
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14. www.dhs.wisconsin.gov/COVID-19; The Community newsletter, June, 2020, thecommunitynow.us.
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