

## SENTENCE MODIFICATION

2005

### **1) What is a sentence modification?**

A sentence modification is often called a “time cut.” It is one of the most common forms of relief sought by inmates in Wisconsin. A sentence modification motion is simply a request to a court to reduce the length of a sentence or sentences.

### **2) Where is the motion brought?**

A sentence modification motion is generally brought to the same judge who imposed the sentence. If the original sentencing judge is no longer available, a different judge will be assigned to the case.

### **3) What grounds are necessary to get a sentence modification?**

A motion to modify a sentence may be based on either of two grounds: the presence of a “new factor,” or a showing there was an “abuse of discretion” by the sentencing court. It is not easy to succeed on any sentence modification motion. However, for the reasons explained below, a motion based on a “new factor” is more likely to be successful than one based on “abuse of discretion.”

### **4) What is a “new factor?”**

A new factor is defined as “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, 73 (1975). This means that you would go back to the judge who sentenced you and argue that you have new information that will convince the judge that your sentence should be changed.

Since *Rosado*, the definition has been tightened up even more. In *State v. Michels*, 150 Wis. 2d 94, 441 N.W. 2d 278 (Ct. App. 1989), the court held that a new factor must be an event or development that “frustrates” the purpose of the original sentence. There must be some connection between the factor and the sentencing which strikes at the very purpose for the sentence.

Under this definition, there are a number of situations in which a new factor may be present. Some examples are:

- a. **The sentence was based on inaccurate or incomplete information.** See, e.g., *State v. Stafford*, 2003 WI App 138, ¶ 4, 265 Wis. 2d 886, 667 N.W.2d 370; *State v. Longmire*, 2004 WI App 90, ¶ 47, 272 Wis. 2d 759, 681 N.W.2d 534. However, this new information must be of major significance—minor errors are unlikely to be sufficient. Furthermore, there must be a good explanation of why the defendant did not correct this misinformation at the time of sentencing.
- b. **The judge misunderstood the law relevant to sentencing.** For example, if the judge did not know it was possible to impose a concurrent sentence, a new factor might be the information that such a sentence may be legally imposed.
- c. **The judge misunderstood the consequences of the sentence.** For example, if the judge mistakenly thought that the defendant would be immediately eligible for parole, a new factor might exist. Similarly, a new factor may exist if the judge based the sentence on the mistaken belief that certain treatment programs were available, or that the defendant was not going to have his probation in another case revoked. See *State v. Norton*, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656. However, the defendant would have to show that the judge actually considered these factors at the time of sentencing. See *State v. Franklin*, 148 Wis. 2d 1, 434 N.W. 2d 609 (1989); *State v. Ramuta*, 2003 WI App 80, ¶ 20, 261 Wis. 2d 784, 661 N.W.2d 483, 2003 WI App 80.
- d. **Significant changes in the inmate's situation occur.** This might include a serious, life-threatening illness. However, the defendant would still have to prove that the judge would have given a lighter sentence had he or she known of the illness. See *State v. Michels*, 150 Wis. 2d 94, 441 N.W. 2d 278 (Ct. App. 1989).
- e. **Other important information that the judge was unaware of at sentencing.** For example, the court of appeals has ruled that post-sentencing assistance to law enforcement may be a new factor. See *State v. Doe*, 2005 WI App 68, 280 Wis. 2d 731, 697 N.W.2d 101.

##### 5) What is NOT a new factor?

There are a number of situations in which courts consistently find that no new factor exists. These include:

- a. **Institutional progress.** No matter how few conduct reports you have received, or how many courses, treatment groups, or degrees you have completed in prison, this information is unlikely to be viewed as a new factor. If you are serving a parolable sentence, the courts consider institutional progress something for the Parole Commission to consider. See *State v. Krueger*, 119 Wis. 2d 327, 351 N.W. 2d 738 (Ct. App. 1984); *State v. Ambrose*, 181 Wis. 2d 234, 240, 510 N.W.2d 758 (Ct. App. 1993). It is also true, however, if you are serving a TIS sentence. See *State v. Crochiere*, 2004 WI 78, 273 Wis. 2d 57, 681 N.W.2d 524.

- b. **Weakness in the evidence, or a violation of rights.** These relate to the conviction, not the sentence. A judge will not modify a sentence based on allegations of such things as illegal arrest, false confession, illegal seizure of evidence, broken plea agreements, or ineffective assistance of counsel. These are things that can only be challenged in other ways, not by a sentence modification motion.
- c. **Post-sentencing lowering of penalties.** The fact that the penalty for your offense was lowered after you were sentenced is generally not a new factor. See *State v. Hegwood*, 113 Wis. 2d 544, 335 N.W.2d 399 (1983). In particular, if you have a Truth-in-Sentencing I (TIS I) sentence, and the penalty for your offense was lowered under TIS II to less than you are serving, this is *not* a new factor for sentence modification. Rather, your remedy would be to apply for sentence adjustment under Wis. Stat. § 973.195, on the basis that the TIS II sentence is lower than the sentence you are serving. See *State v. Trujillo*, 2005 WI 45, ¶¶ 25, 279 Wis. 2d 712, 694 N.W.2d 933, .
- d. **The introduction of sentencing guidelines** recommending a sentence lower than the one you received. See *State v. Macemon*, 113 Wis. 2d 662, 669, 335 N.W.2d 402 (1983).
- e. **Your sentence was greater than your codefendant's.** See *State v. Toliver*, 187 Wis. 2d 346, 361-62, 523 N.W.2d 113 (Ct. App. 1994).
- f. **Post-sentencing health problems.** See *State v. Ramuta*, 2003 WI App 80, 261 Wis. 2d 784, 661 N.W.2d 483.
- g. **Inadequate medical care by the Department of Corrections.** See *State v. Johnson*, 210 Wis. 2d 196, 204, 585 N.W.2d 191 (Ct. App. 1997).

**6) Who has the burden of proving a “new factor?”**

The inmate has the burden of providing by “clear and convincing evidence” that a new factor exists. See *State v. Crochiere*, 2004 WI 78, ¶¶ 14, 273 Wis. 2d 57, 69, 681 N.W.2d 524.

Although the appellate case law on new factor sentence modifications is grim, it is possible to succeed with a motion, if you can distinguish controlling case law from your case, and if you have a compelling factual claim to bring to the sentencing judge. See Comment, *Sentence Modification by Wisconsin Trial Courts*, 1985 WIS. LAW REV 195; Comment, *Wisconsin Sentence Modification: A View from the Trial Court*, 1989 WIS L. REV. 441. Both articles discuss the distinction between what the appellate case law says and what trial courts actually do in terms of sentence modification, and point out the policy considerations that guide trial courts in their decisions.

It is important to understand that a new factor sentence modification involves a two-step process. First, the sentencing judge must find that a new factor exists. Then, the judge must exercise discretion to determine whether or not to modify the sentence. See *State v. Smet*, 186 Wis. 2d 24, 34 519 N.W.2d 697 (Ct. App. 1994). The best way to evaluate whether you have a potentially successful argument for new factor sentence modification is to review the sentencing transcript, and then consider whether the sentencing judge would be inclined to change the sentence based on the information you can now demonstrate.

### **7) What is “abuse of discretion?”**

Besides a new factor, a sentence modification can be based on an abuse of discretion. See *Klimas v. State*, 75 Wis. 2d 244, 246, 249 N.W. 2d 285, 286 (1976). There are several circumstances in which it might be argued that the court abused its discretion at the time of sentencing. For example, if the judge failed to give reasons for the sentence, gave improper weight to any single factor, or gave improper reasons for the sentence, an abuse of discretion may exist. See *State v. Martin*, 100 Wis. 2d 326, 302 N.W. 2d 665 (1975); *McCleary v. State*, 49 Wis. 2d 263, 182 N.W. 2d 512 (1971). In addition, an abuse of discretion may exist if the sentence is unduly harsh. See *McCleary*, 49 Wis. 2d at 293.

It is even more difficult to get a sentence modification on “abuse of discretion” grounds than on “new factor grounds. This is because the judge who will hear the sentence modification motion is usually the same judge who sentenced you. If that judge failed to give the reasons for the original sentence, it is all too easy for the judge to simply give reasons for the sentence at the sentence modification hearing. It is also hard to get a sentence modified on the ground that it is “unduly harsh.” Judges have wide discretion, and very few sentences are reduced on this ground. Even if your sentence is much longer than the sentences of others who committed the same, or similar crimes, a judge will not reduce the sentence unless there are compelling reasons.

In any case, in the absence of a new factor, it is usually for the appellate court, not the trial court, to reevaluate the appropriateness of a sentence. This is achieved by appealing the original sentence under Wis. Stat. § 809.30, rather than by filing a motion for sentence modification.

### **8) When can the sentence modification motion be made?**

A sentence modification motion based on “new factors” may be made at any time, even though the time for appeal has passed. See *Hayes v. State*, 46 Wis. 2d 93, 101-102, 175 N.W. 2d 625 (1970).

However, it is less clear whether a sentence modification motion based on abuse of discretion may be brought in the trial court outside of the 90-day deadline imposed by Wis. Stat. § 973.19. In *Klimas v. State*, the Wisconsin Supreme Court indicated that there is no

time limit on an “abuse of discretion” motion. *Klimas*, 75 Wis. 2d at 246. Some later court of appeals decisions appear to limit “abuse of discretion” claims to direct appeals under Wis. Stat. § 809.30 or to motions under § 973.19. See *State v. Macemon*, 113 Wis. 2d 662, n.3, 335 N.W. 2d 402, n.3 (1983); *State v. Noll*, 2002 WI App 273, ¶¶ 10-11, 258 Wis. 2d 573, 653 N.W.2d 895. However, the court of appeals recently stated that an “abuse of discretion” motion may be brought at any time. See *State v. Grindemann*, 2002 WI App 106, ¶ 21, 255 Wis. 2d 632, 648 N.W.2d 507, citing *State v. Cresci*, 89 Wis. 2d, 495, 504, 278 N.W.2d 850 (1979) (sentencing court has inherent authority to modify sentence based on either new factor or abuse of discretion).

**9) If I can show a new factor, or show an abuse of discretion, will my sentenced be reduced?**

Not necessarily. If you request sentence modification on the basis that the sentencing judge abused his or her discretion, the judge can keep the original sentence, and simply offer better reasons for it.

Similarly, the sentencing judge is not required to reduce the sentence, even the judge finds that a valid new factor exists. The judge still has a great deal of discretion, and may decide that a reduction of the sentence would depreciate the seriousness of the offense, or create an unreasonable risk to the public. Therefore, a judge might be reluctant to modify a sentence even where an inmate shows a new factor, if the inmate has refused treatment programs, or has had numerous conduct reports. Similarly, if an inmate has been given many chances before, either through probation or parole, or had a sentence reduced on other occasions, a judge may refuse any additional reduction.

**10) What if I just want to get my consecutive sentences run concurrent with each other?**

This is no different than any other sentence modification—it is just as difficult to get sentences “run together.” You must still use the same sentence modification procedure, and you must still show a “new factor” or “abuse of discretion.”

**11) Is there any risk in bringing a sentence modification motion?**

For practical purposes, there is very little risk in bringing a motion to modify your sentence. However, it is remotely possible that a judge could find new factors which could justify an *increase* in the sentence. In one case with special circumstances, an increase was upheld. See *State v. Sepulveda*, 119 Wis. 2d 546, 350 N.W. 2d 96 (1984).

**12) If I have grounds for a sentence modification motion, when should I file the motion?**

As noted above, a “new factor” sentence modification motion may be made at any time. Therefore, even if you have grounds for presenting a motion, it is important to file at the most advantageous time. For example, there may not be much point in filing a motion shortly after sentencing, unless you have strong reason to believe that the judge would change the sentence length. It may sometimes be better to establish a good institutional record, or wait until other facts develop. Since your first motion could have a better chance for success than later motions, it should be filed only after careful consideration.

**9) Do I have a right to a lawyer on a sentence modification motion?**

No. Outside of a direct appeal under Wis. Stat. § 809.30, a defendant has no right to State Public Defender appointed counsel to bring a sentence modification motion. LAIP sometimes represents inmates on sentence modification motions. But given the large demand for LAIP services, and the program’s limited resources, you should not count on LAIP to bring a motion on your behalf. In addition, LAIP will not bring a motion for an inmate if the motion has little or no chance of success. Sentence modifications are very difficult to get, and there is no point in filing a motion that will fail.

Attached to this information sheet is a fill-in-the blank *pro se* motion that you can use as a model, if you decide to proceed on your own. Remember, it is important to be clear and specific about the factual and legal bases for your sentence modification motion. Also remember to mail a copy of the motion to the District Attorney, at the time you file the motion.

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STATE OF WISCONSIN

CIRCUIT COURT

\_\_\_\_\_ COUNTY

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STATE OF WISCONSIN,

Plaintiff,

Case No. \_\_\_\_\_

(the case no. for the sentence you want modified)

v.

\_\_\_\_\_  
(your name as it appears on the Judgment of Conviction)

Defendant.

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**MOTION FOR SENTENCE MODIFICATION**

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Pursuant to *Rosado v. State*, 70 Wis. 2d 280, 234, N.W.2d 69, 73 (1975),

\_\_\_\_\_, the Defendant in the above-captioned case, moves  
(your name)

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

1. On \_\_\_\_\_, the Defendant was convicted of the offense(s)  
(date you were convicted)

of \_\_\_\_\_. On \_\_\_\_\_  
(list offense(s) you were convicted of) (date you were sentenced)

the Defendant was sentenced as follows: \_\_\_\_\_  
(explain what sentence you got on each count)

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2. In *Rosado*, the Wisconsin Supreme Court ruled that a circuit court may modify a sentence if the court finds that a "new factor" exists. A "new factor" is defined





WHEREFORE, on the basis of the "new factor(s)" outlined above, the Defendant asks the court to modify his/her sentence as follows:

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*(If you have a specific request for modification, make it here. If not, just state, "I request that my sentence/confinement time be lowered, at the court's discretion.")*

IN ADDITION, the Defendant asks the court to grant a hearing on this motion, at which the Defendant can appear in person or by telephone.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

Respectfully submitted,

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*(your signature)*  
*(your typed or printed name)*  
*(your address)*  
DEFENDANT PRO SE

cc: name and address of District Attorney