

“All I Really Want is a Time Cut”: Arguments and Strategies to Get Your Client Sentence Modification

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Greetings. At our presentation, we will be giving you examples of successful claims for sentence modification. In this handout, we will give you an overview of the law related to sentence modification and some helpful points to keep in mind as you search for creative ways to try and achieve sentence modification for your clients.

Background:

- “Wisconsin circuit courts have inherent authority to modify criminal sentences.” *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828.
 - While this is a rather broad authority, there are some parameters:
 - A circuit court may not modify a sentence based on mere reflection or second thoughts. *State v. Grindemann*, 2002 WI App 106, ¶24, 255 Wis. 2d 632, 648 N.W.2d 507
 - A court may modify a sentence: (1) to correct an illegal or a void sentence or a clerical error; (2) when the sentence is unduly harsh or unconscionable; or (3) on the basis of a new factor. *State v. Stenklyft*, 2005 WI 71, ¶¶60 & 115, 281 Wis. 2d 484, 697 N.W.2d 769; *State v. Harbor*, 2011 WI 28, ¶35 n.8, 333 Wis. 2d 53, 797 N.W.2d 828.
- It is extremely rare to achieve sentence modification based on the argument that a sentence is legally harsh and excessive.
 - To meet this standard, you have to show that the sentence imposed was “so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Ocanas v. State*, 70 Wis. 2d 179, 183-84, 233 N.W.2d 457 (1975).

- In practice, this means that absent a maximum sentence, you likely will not have any claim; and even if your client did receive a maximum sentence, it is still very difficult to get relief on these grounds

“New Factor”

- The bread and butter of sentence modification litigation is a motion based on a “new factor”
 - The “new factor” standard is set forth in *State v. Harbor*, 2011 WI 28, 333 Wis.2d 53, 797 N.W.2d 828
 - Under *Harbor*, 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 of the parties.” *Id.*, ¶ 40.
 - Thus, you have to show that (1) the information presented was highly relevant to the judge’s sentence and (2) that it is “new” information—meaning it either did not exist at the time of sentence, or, if it did exist at the time, it was unknowingly overlooked by all of the parties
 - Under *Harbor*, you must prove these components by clear and convincing evidence
 - *Important note: Harbor made clear that you do NOT have to show that the new factor frustrates the purpose of the original sentencing*
 - Because of earlier case law, you will often find that the State tries to argue that the defense has not shown that the new factor frustrated the purpose of the sentence—be ready to make clear that this is not the standard
 - Sentence modification based on a “new factor” is primarily geared at the circuit court—should you lose post-conviction, the appellate court will independently review whether the information presented constitutes a “new factor”; however, the Court of Appeals leaves it to the circuit court

to decide whether the factor warrants sentence modification. Thus, even if you obtain a win on appeal, it is still up to the circuit court judge (in all likelihood the same judge who denied your post-conviction motion) to determine whether this warrants modification of your client's sentence.

- "New factor" litigation gives you an opportunity to be creative. A lot of types of information may be able to be considered a "new factor."
 - A few examples: a client's PTSD diagnosis, providing information to the State, new information re: programming eligibility,
 - There is some case law, however, holding that certain things are *not* "new factors." Most notably is a defendant's progress/rehabilitation in prison. See, e.g., *State v. Kluck*, 210 Wis.2d 1, 7-8, 563 N.W.2d 468 (1997), *State v. Krueger*, 119 Wis.2d 327, 335, 351 N.W.2d 738 (Ct. App. 1984).
 - If you are contemplating a new factor argument, make sure you research to see whether there is any case law on the specific type of information you wish to present.

Inaccurate Information as a "New Factor"

- As you will find, many clients prefer sentence modification over other forms of post-conviction relief, as sentence modification typically does not involve risks inherent in other remedies such as plea withdrawal or resentencing.
 - See *State v. Wood*, 2007 WI App 190, 305 Wis. 2d 133, 738 N.W.2d 81, explaining that a circuit court may not convert a motion for sentence modification into a motion for resentencing absent a knowing and unequivocal stipulation by the defendant.
- One of the most common claims for resentencing (meaning a do-over of the sentencing hearing which, absent your client having a maximum sentence, typically involves at least some level of risk) is a claim that the court relied on inaccurate information.

- Case law, however, reflects that the correction of inaccurate information may also constitute a new factor. See *State v. Norton*, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656. Therefore, you may be able to raise your inaccurate information claim instead as a “new factor,” which may be a preferable option for your client.
 - Again, though, keep in mind that a “new factor” sentence modification motion rests primarily in the hands of the circuit court. An inaccurate information claim, however, involves a constitutional due process challenge and thus presents a more favorable standard of review on appeal.

Negotiating Other Issues into Sentence Modification

- It’s always helpful to remember that you can try and negotiate a non-sentence modification issue into a potential stipulation and order for sentence modification, should your client simply wish to achieve sentence modification.
- A great time to reach out to the DA to explore this is once you have filed your post-conviction motion and have either briefing or a hearing scheduled.
- Keep in mind that both the DA and the judge will have to agree. Generally, though not always, to get such an agreement your client will have to waive his or her right to raise other issues on appeal.