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**DISTRICT III**

March 3, 2026

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2024AP2462-CR                      State of Wisconsin v. Daniel J. Frausto (L. C. No. 2013CF464)

Before Stark, P.J., Hruz, and Geenen, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Daniel J. Frausto, pro se, appeals from a postconviction order that concluded he is ineligible for the Substance Abuse Program (SAP) on any of his sentences. In addition, Frausto asks us to remand this case to the circuit court with directions to remove certain “boilerplate” restitution language taken from WIS. STAT. § 973.20(11)(c) (2023-24)<sup>1</sup> from his amended judgment of conviction.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2023-24 version.

Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Frausto is statutorily eligible for the SAP for some of his sentences—namely, those sentences imposed for offenses that are not violations of WIS. STAT. ch. 940. Frausto’s statutory eligibility for the SAP on those sentences is a new factor that may warrant the modification of his sentences. We therefore reverse that portion of the postconviction order concluding that Frausto is ineligible for the SAP on all of his sentences, and we remand this matter for the circuit court to determine, in the exercise of its discretion, whether to modify Frausto’s sentences to make him eligible for the SAP for his non-ch. 940 sentences. On remand, the circuit court shall also enter an amended judgment of conviction that does not contain the boilerplate restitution language taken from WIS. STAT. § 973.20(11)(c).

Frausto entered guilty pleas to 13 felony offenses and 4 misdemeanors, pursuant to a plea agreement. At Frausto’s sentencing hearing in May 2015, the circuit court imposed bifurcated sentences on all but one of the felony counts totaling 60 years of initial confinement followed by 50 years of extended supervision.<sup>2</sup>

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<sup>2</sup> On the remaining felony count, the circuit court withheld sentence and imposed 25 years of probation, concurrent with a prior sentence that Frausto was serving at the time of sentencing. On the four misdemeanor counts, the court either granted time served or imposed jail terms that were concurrent with Frausto’s prior sentence.

Frausto was statutorily ineligible for the SAP for four of his bifurcated felony sentences, each of which was for a violation of WIS. STAT. ch. 940. *See* WIS. STAT. § 302.05(3)(a).<sup>3</sup> Frausto was, however, statutorily eligible for the SAP for the remaining eight of his bifurcated felony sentences—i.e., those sentences that were not imposed for violations of ch. 940.

At Frausto’s May 2015 sentencing hearing, the circuit court found him eligible for the SAP for all of the felony counts for which it imposed bifurcated sentences that did not involve violations of WIS. STAT. ch. 940. To effectuate its intent that Frausto be eligible for the SAP on those sentences, the court ordered that Frausto’s sentences on the ch. 940 offenses would be served first, consecutive to one another, and Frausto would then serve his remaining sentences on the non-ch. 940 offenses. *See* DAI Policy 300.00.11 IV(D)(1), <https://doc.wi.gov/DepartmentPoliciesDAI/3000011.pdf> (last visited Feb. 19, 2026) (providing that an inmate may be considered for admission to the SAP on sentences that are statutorily eligible after the inmate first completes the initial confinement portion of any sentences that are statutorily ineligible).

In November 2021, Frausto filed a motion for sentence modification, based on his postsentencing assistance to the State in its prosecution of his accomplice. In April 2023, the circuit court granted that motion and modified Frausto’s sentences such that his total initial confinement was reduced from 60 years to 26 years, and his total extended supervision was reduced from 50 years to 38 years. The court also changed the order in which Frausto was to

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<sup>3</sup> To be eligible for the SAP, an inmate must be “incarcerated regarding a violation other than a crime specified in [WIS. STAT.] ch. 940” or certain crimes against children that are not relevant in this case. WIS. STAT. § 302.05(3)(a)1. In addition, the inmate must be “serving a bifurcated sentence imposed under [WIS. STAT. §] 973.01,” and the sentencing court must have “decided ... that the inmate is eligible to participate in the” SAP. Sec. 302.05(3)(a)2.

serve his sentences. As relevant here, the court ordered that the last sentence Frausto would serve was his sentence on Count 23—a WIS. STAT. ch. 940 offense.

At the sentence modification hearing, the circuit court stated its belief, based upon a representation in the 2015 presentence investigation report, that Frausto was not eligible for the SAP on any of his sentences. The court stated, “If I am mistaken on that, the Department of Corrections [(DOC)] can correct that. So we’ll note for the minutes that, even though I believe the presentence suggested he was not eligible, if he, in fact, is . . . , the [DOC] should allow him to participate in” the SAP. The court entered an amended judgment of conviction on May 2, 2023, which contained a checked box indicating that Frausto was not eligible for the SAP.

At the sentence modification hearing, Frausto had also requested that his judgment of conviction be amended to state that restitution could be collected from his “prison earnings account only,” to prevent the DOC from using gifts from Frausto’s friends and family members to satisfy his restitution obligation. Consistent with that request, Frausto’s May 2, 2023 amended judgment of conviction expressly stated that “restitution is to be paid while the defendant is serving his prison term from the funds in his prison wage account only.” However, the amended judgment also contained boilerplate language taken from WIS. STAT. § 973.20(11)(c), which ordered Frausto to authorize the DOC “to collect, from the defendant’s wages and from other monies held in the defendant’s inmate account, an amount or a percentage which the department determines is reasonable for restitution to victims.”

On May 3, 2023, one day after his amended judgment of conviction was entered, Frausto filed a motion asking the circuit court to further amend the judgment to remove the boilerplate restitution language taken from WIS. STAT. § 973.20(11)(c). He argued that this amendment

would be consistent with the state of the law regarding restitution at the time of his sentencing in May 2015.

On the same date, Frausto also moved the circuit court to amend his judgment of conviction to state that he is eligible for the SAP and to allow him to serve his sentences on the WIS. STAT. ch. 940 offenses first, so that he will not be disqualified from participating in the SAP on the remaining counts. The State filed a response stating that it did not “object to modifying the [judgment] to allow [Frausto] to serve his consecutive sentences first and have program eligibility on the non[-]940 sentences.”

On January 22, 2024, the circuit court issued an order denying Frausto’s request “for an order instructing DOC to limit the amounts taken from his account to pay restitution.” However, the court granted Frausto’s “request to amend the Judgment of Conviction to list the Chapter 940 offenses first,” stating that “the Court’s intent at sentencing was to provide Frausto the opportunity to participate in substance abuse programing, including early release.” Nevertheless, the court did not enter an amended judgment of conviction changing the order of Frausto’s sentences or stating that he was eligible for the SAP on his sentences for the non-WIS. STAT. ch. 940 offenses.

On April 19, 2024, Frausto filed another motion asking the circuit court to strike the boilerplate restitution language taken from WIS. STAT. § 973.20(11)(c) from his judgment of conviction. In a June 19, 2024 order, the court concluded that “the boilerplate language imposing ... § 973.20(11)(c) does not apply to Frausto” because “[t]hat subparagraph was not in effect when the Court imposed sentence, and it does not reflect the Court’s intent when ordering restitution.” The court therefore granted Frausto’s motion to strike the boilerplate language from

his judgment of conviction and further ordered that the judgment be amended to state, “Restitution is to be paid while the defendant is serving his prison term from the funds in his prison wage account only, not to exceed 50%.” An amended judgment of conviction containing that language was entered on June 19, 2024. The amended judgment, however, still contained the boilerplate language from § 973.20(11)(c). In addition, the amended judgment did not change the order of Frausto’s sentences and continued to contain a checked box indicating that Frausto was not eligible for the SAP.

On August 21, 2024, Frausto filed a motion “to amend judgment of conviction to reflect all orders of the circuit court.” (Formatting altered.) Specifically, Frausto asked the court to amend his judgment of conviction to: (1) state that he should serve his sentences on the WIS. STAT. ch. 940 offenses first; (2) check the box indicating that he is eligible for the SAP; (3) remove the boilerplate restitution language taken from WIS. STAT. § 973.20(11)(c); and (4) include “clear terms of collection, from wages only as set forth on the record.”

On October 24, 2024, the circuit court issued a written order vacating its January 2024 order permitting Frausto to serve his sentences on the WIS. STAT. ch. 940 offenses first, stating the prior order was “issued in error” and “creat[ed] an illegal sentence.” The court explained that although its “original intent [w]as that Frausto be able to partake in the [SAP] on the counts that do not involve Chapter 940 offenses,” the court could not “find Frausto eligible when he is serving sentences for both Chapter 940 offense[s] and non[-]Chapter 940 offenses” because he is not an “eligible inmate” under WIS. STAT. § 302.05(3)(a)1. The court also stated that it had “no authority to renumber counts on a judgment of conviction.” With respect to the restitution issue, the court stated that, “to give effect to the Court’s Order of June 19, 2024, restitution should be paid from prison wages only, not to exceed 50%.”

The circuit court entered an amended judgment of conviction on October 24, 2024, and subsequently entered another amended judgment of conviction on November 4, 2024. Both of those amended judgments reflect that Frausto is not eligible for the SAP and that the last sentence he serves will be his sentence on Count 23—a WIS. STAT. ch. 940 offense. In addition, while both amended judgments state that “[r]estitution is to be paid while the defendant is serving his prison term from the funds in his prison wage account only, not to exceed 50%,” they both also contain the boilerplate restitution language from WIS. STAT. § 973.20(11)(c).

On appeal, with respect to SAP eligibility, Frausto argues that the circuit court’s January 2024 order granting his request to amend his judgment of conviction to list the WIS. STAT. ch. 940 offenses first was “valid” and that the court erred by vacating that order “sua sponte” in October 2024. Frausto also asserts that the circuit court’s “unambiguous oral pronouncement and sentence determination to list 940 offenses first and provide eligibility for the [SAP] are undisputed facts of record,” and this court “can correct at any time clerical errors that do not reflect the judgment that the circuit court actually pronounced.” Frausto therefore asks us to vacate the October 2024 order and direct the circuit court, on remand, to “correct” his judgment of conviction “to reflect [that his sentences on the ch.] 940 offenses run first” and that he is eligible for the SAP on his sentences for the non-ch. 940 offenses.

The State, in turn, concedes that the circuit court “made an error of law when it determined in its October 2024 order that Frausto is statutorily ineligible for [the] SAP.” Contrary to the court’s reasoning, the State argues that WIS. STAT. § 302.05(3)(a)1.

only precludes SAP participation on sentences regarding [WIS. STAT. ch.] 940 counts and certain offenses against children. Nowhere does it state that a sentence for such offenses categorically renders sentences on otherwise eligible SAP offenses

ineligible. [Sec.] 302.05(3)(a)1. Rather, ... § 302.05(3)(a)1. allows defendants to participate in the program so long as they are not being “incarcerated regarding a violation” of one of the ineligible crimes. [Sec.] 302.05(3)(a)1. This means that defendants are not statutorily precluded from participating if they have completed serving the initial confinement portion of any ineligible offenses.

Although the State concedes that the circuit court made a legal error regarding Frausto’s eligibility for the SAP on his non-WIS. STAT. ch. 940 sentences, the State also argues that the court’s error does not automatically require the entry of an amended judgment of conviction restructuring Frausto’s sentences and making him eligible for the SAP on the non-ch. 940 sentences. Instead, the State argues that “[w]hat Frausto really requests is a sentence modification based on a new factor.” See *State v. Harbor*, 2011 WI 28, ¶¶35-37, 333 Wis. 2d 53, 797 N.W.2d 828. The State “does not dispute for the limited purposes of this appeal that Frausto’s statutory eligibility for [the] SAP is a new factor,” but the State asserts that we should remand this case for the circuit court to apply the second step of the new factor sentence modification test by “exercis[ing] its discretion to determine whether a sentence modification [is] warranted.” The State contends that, if the court determines on remand that sentence modification is warranted, it may then “exercise its discretion to restructure Frausto’s sentences to facilitate SAP participation.”<sup>4</sup>

We agree with the State’s analysis. Under the plain language of WIS. STAT. § 302.05(3)(a)1., Frausto is statutorily eligible for the SAP for his non-WIS. STAT. ch. 940

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<sup>4</sup> The circuit court stated in its October 2024 order that it had “no authority to renumber counts on a judgment of conviction.” We agree with the State that modifying Frausto’s judgment of conviction to facilitate his participation in the SAP would not require the court to renumber the counts of conviction. Instead, as the State notes, the court “would simply need to structure the sentences such that the initial confinement periods on the [WIS. STAT. ch.] 940 sentences are completed prior to the commencement of the non-Chapter 940 sentences.”

sentences, even though he is statutorily ineligible for the SAP for his ch. 940 sentences, assuming that he serves the initial confinement portion of his ch. 940 sentences before his non-ch. 940 sentences. When the circuit court modified Frausto's sentences in 2023, it did so under the mistaken belief that Frausto was not eligible for the SAP for any of his sentences. The court remained under that mistaken belief in October 2024. Under these circumstances, we agree with the State that Frausto's statutory eligibility for the SAP for his non-ch. 940 offenses is a new factor that may warrant the modification of Frausto's sentences. We therefore reverse that portion of the October 2024 order stating that Frausto is not eligible for the SAP for any of his sentences. We remand for the circuit court to determine, in the exercise of its discretion, whether Frausto's statutory eligibility for the SAP for his non-ch. 940 sentences justifies a modification of his sentences to facilitate his participation in the SAP. See *Harbor*, 333 Wis. 2d 53, ¶37.

Frausto also asserts that we should remand with directions for the circuit court to remove the boilerplate restitution language taken from WIS. STAT. § 973.20(11)(c) from his judgment of conviction. The State concedes that Frausto is "correct" that § 973.20(11)(c) "went into effect in 2016, which is after he was originally sentenced in 2015." The State further notes that the circuit court "agreed with Frausto in its June 2024 Order and later in its October 2024 Order" that § 973.20(11)(c) does not apply to his sentences in this case. Consequently, the court's June 2024 order granted Frausto's motion to strike the boilerplate restitution language from his judgment of conviction. It is undisputed, however, that the amended judgments entered in June, October, and November 2024 still included that language.

Nevertheless, the State asserts that Frausto's request for removal of the boilerplate language is moot because "Frausto does not now allege that the DOC is collecting funds from his prison wage account in violation of the court's explicit orders in June 2024 and October 2024

that ‘restitution should be paid *from prison wages only*, not to exceed 50%.’” Accordingly, the State contends that this court “need not address Frausto’s restitution claim.” See *State v. Fitzgerald*, 2019 WI 69, ¶21, 387 Wis. 2d 384, 929 N.W.2d 165 (explaining that an issue is moot when its resolution will have no practical effect on the underlying controversy and that courts generally decline to reach moot issues).

In his reply brief, however, Frausto asserts that despite the language in his judgment of conviction stating that restitution is to be collected from his prison wages only and is not to exceed 50% of his wages, the DOC “follows the boilerplate language instead of the internal comments” added to the judgment. Frausto further asserts that he raised this argument on multiple occasions in the circuit court, and the court granted his request to remove the boilerplate language knowing that his judgment of conviction already contained language limiting the collection of restitution to 50% of his prison wages.

We agree with Frausto that, under these circumstances, his argument regarding the boilerplate restitution language in his judgment of conviction is not moot. We further agree with Frausto that the circuit court’s June 2024 order expressly granted his request to remove the boilerplate language from the judgment. Contrary to the court’s June 2024 order, however, Frausto’s judgment of conviction was never amended to remove that language. We therefore direct the court, on remand, to enter an amended judgment of conviction that does not contain the boilerplate restitution language from WIS. STAT. § 973.20(11)(c).

Therefore,

IT IS ORDERED that the postconviction order is summarily reversed in part, and the cause is remanded to the circuit court with directions. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*