STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2006AP1388-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LORENZO WOOD,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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STATE OF WISCONSIN

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Case No. 2006-AP-1338-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LORENZO WOOD,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

Defendant-Appellant, Lorenzo Wood, by his attorney, Michael D. Kaiser, respectfully petitions this Court, pursuant to Wis. Stats. §808.10 and Rule 809.62, to review the decision of the Wisconsin Court of Appeals, District I, dated July 17, 2007, reversing the Order of the Circuit Court for Milwaukee County, the Honorable Timothy G. Dugan, presiding.

ISSUE PRESENTED

The defendant was sentenced to a 10-year indeterminate sentence and the sentencing judge specifically noted the defendant's parole would likely occur at 40-45% of his sentence. The defendant-appellant was not paroled at 40-45% of his sentence. The

defendant moved the trial court for a modification of his sentence based on a new factor—that parole policy was not and is not consistent with the sentencing court's figure of 40-45%.

The trial court, a different judge presiding, agreed that the sentencing judge relied upon incorrect information but did not expressly find the facts presented to be a "new factor". The trial court, instead of granting the requested modification of sentence, vacated the sentence and held a resentencing, against the continued objection of the pro-se defendant, wherein the trial court handed down the exact same sentence of 10 years.

The defendant appeals this decision of the trial court to determine if the facts presented do constitute a new factor and warrant modification of his sentence rather than resentencing.

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REASONS FOR GRANTING REVIEW

This case presents the opportunity for the Court to clarify the muddled state of the doctrine of the New Factor and associated modification of sentences. The lower courts have mixed and matched rulings on motions for resentencing based on inaccurate information and motions for modification based on new factors. This issue is a matter of law that is likely to recur unless resolved by this Court. Specifically, the issue of a 1994 letter by then Wisconsin Governor Tommy G. Thompson to the Department of Corrections (DOC) regarding the mandatory release of violent offenders as a new factor, negatively affecting parole release should be addressed by this Court in conjunction with a clarification of new factor jurisprudence. The court of appeals has specifically noted that this Thompson letter argument is "an argument that we are seeing with increasing frequency of late". ***State v. Delaney,*** 2006 WI App 37, ¶ 1, 289 Wis. 2d 714, 712 N.W.2d 368.

STATEMENT OF THE CASE

Lorenzo Wood appeals from the Order Denying his Motion For Sentence Modification and Setting Aside the Sentence and For Resentencing issued by the Honorable Timothy G. Dugan on August 17, 2005 (31:1) (App. 132) and the subsequent Judgment of Conviction Corrected issued by the Honorable Timothy G. Dugan on January 30, 2006 (42:1) (App. 133).

Mr. Wood was sentenced by the Honorable Kitty Brennan, after a guilty plea to Armed Robbery-Threat of Force pursuant to Wis. Stat. § 943.32(2) in case

99CF4886, on February 2, 2000 to an indeterminate sentence of ten (10) years. (12:1) (App. 112). Mr. Wood filed a pro-se Motion for Sentence Modification based on a New Factor on December 18, 2003. (22:1) The Honorable Richard J. Sankovitz denied the motion as being premature on January 16, 2004. (23:1-2) (App. 113-14). Mr. Wood filed an almost identical motion pro-se on May 5, 2005. (24:1-19). The Honorable Timothy G. Dugan denied the motion for modification but converted the motion into one for resentencing, over the continued objection of Mr. Wood, and granted said motion on August 17, 2005. (31:1) (App. 132). Mr. Wood was resentenced by the Honorable Timothy G. Dugan on December 9, 2005 to an indeterminate sentence of ten (10) years. (57:1) (App. 133).

Counsel timely filed his appellate brief-in-chief on September 18, 2006. On July 17, 2007, the Court of Appeals, District I, reversed the decision of the Honorable Timothy G. Dugan and remanded the case to the trial court with instructions to vacate the sentence ordered by the Honorable Timothy G. Dugan on December 9, 2005, deny the motion for modification, and reinstate the original sentence of the Honorable Kitty Brennan. (Slip Op. 1-11, App. 101-111). The court of appeals held that the 1994 Thompson letter and Mr. Wood being held in prison longer than the period intended by the sentencing court was not a new factor. (Slip Op. 9, App. 109).

STATEMENT OF FACTS

On December 20, 1999 Mr. Wood plead guilty to and was convicted of Armed Robbery-Threat of Force pursuant to Wis. Stat. § 943.32(2) in case 99CF4886. (42:1) (App. 112). On February 2, 2000, the Honorable Kitty K. Brennan of the Milwaukee County Circuit Court sentenced Mr. Wood to ten (10) years of consecutive prison (42:1) (App. 112). The judge stated in her remarks:

> THE COURT: ... You are not a person to be thrown away. You are a person we want back in the community, and we do want you to be a productive member eventually.
> I also have to take into consideration parole. This is not a truth-in-sentencing case. This is under the old law. Under the old law I know and you know that you will be paroled. Generally speaking, the Department of Corrections paroles at about 40-45 percent of the sentence for a crime of this nature. I know that because the DOC has given us a chart, and it says that on the chart, and I have taken into consideration when you are likely to be paroled. And that is a factor in the sentence as well.

(55:26).

On December 18, 2003, Mr. Wood filed a Notice of Motion and Motion to Modify Sentence, arguing that the Department of Corrections parole practices were not consistent with those expressed by the Honorable Kitty K. Brennan on February 2, 2000 and he would not be released to parole at 40-45 percent of his sentence. (22:2-11). He argued that the change in parole policy presented a "new factor" that should warrant modification of his sentence because it frustrated the purposes of the original sentencing court. (22:10).

The motion was assigned to the Honorable Richard J. Sankovitz, who responded with an Order, dated January 16, 2004, denying Mr. Wood's motion as "premature". (23:1-2) (App. 113-14).

> Mr. Woods' (sic) motion is impressive. It presents a very thorough, comprehensive study of a possible shift in parole policy and a much better-than-average discussion of applicable law. It raises the distinct possibility that he will serve more time in prison than Judge Brennan expected, through no fault of his own. If a defendant can demonstrate clearly and convincingly that (1) the sentencing court has premised the sentence on a certain expectation about when the defendant would be paroled and (2) that this premise is unfounded due to a change in sentencing policy, this "new factor" (an event or development that frustrates the purpose of the original sentence) would justify a modification of the sentence. State v. Franklin, 148 Wis. 2d 1, 14 (1989); State v. Michels, 150 Wis. 2d 94, 99 (Ct. App. 1989). However, by my rough estimate, Mr. Woods (sic) will not have served forty-to-forty (sic) percent of his consecutive sentences (72 to 81 months) until at least sometime between May, 2005 and February, 2006. Before that time, he cannot claim to have been prejudiced by a supposed shift in parole policy. Only at that point would it be possible for the court to conclude that Judge Brennan's purposes in determining the length of his sentences have been frustrated. For this reason, the motion must be denied as premature.

(23:1-2) (App. 113-14).

On May 5, 2005, Mr. Wood filed an almost identical Notice of Motion and Motion to Modify Sentence because he had then passed the 40-45% mark in his sentence. (24:1-19). The motion was assigned to the Honorable Timothy G. Dugan, who set a briefing

schedule. (25:1). The matter was fully briefed by Mr. Wood, pro-se, and the Milwaukee County District Attorney's office and came on for hearing on August 16, 2005. (26; 29; 56).

The Honorable Timothy G. Dugan immediately addressed Mr. Wood's motion as a motion for a resentencing, not modification. (56:2) (App. 116). However, the Judge did state "[a]nd, therefore, you're asking for a resentencing under the circumstances of a new fact that was not known to the Judge at the time of sentencing." (56:2) (App. 116). Mr. Wood continued to argue for a modification due to a new factor, but the court held that the proper remedy was resentencing, not modification. (56:2-12) (App. 116-26).

> THE COURT: ... And, in fact, you submitted documentation that a modification of that parole policy occurred and that, in fact, the Department was not releasing people in that time frame. And, therefore, you're asking for a resentencing under the circumstances of a new fact that was not known to the Judge at the time of sentencing. ...
>
> Now your argument – what that is, is that is an inaccurate fact, and a judge has to sentence somebody on accurate facts.
>
> So you don't go back and say, okay, we're just going to modify what she did. You go back to the starting point where you've entered your plea; the State has made a recommendation on which the plea was based; and then the State would argue for its sentence that it recommended. You, on your behalf, the argument would be made as to what you believe an appropriate sentence would be, but then it's left to the discretion of the Court to impose whatever sentence the Judge thinks is appropriate. ...
>
> Well, modification of the sentence isn't the appropriate remedy for what occurred, and it is to

> go back and sentence you with accurate information. And she considered something that was inaccurate.

(56:2-9) (App. 116-23).

Judge Dugan found that Judge Brennan considered inaccurate information when sentencing Mr. Wood and entered an order vacating Mr. Wood's sentence and ordered a resentencing. (31:1;'56:9) (App. 131; 132).

On December 9, 2005, Mr. Wood was before Judge Dugan again for resentencing. (57:1). Defense counsel argued for a sentence consistent with the original intent of Judge Brennan—a sentence of six (6) years which, considering the time already served, would put him at or near his mandatory release date:

> MR. THORNTON: ... In order to effectuate the goal that the original sentencing court had because now D.O.C. holds inmates to their M.R. date of two-thirds of the sentence, was are asking the Court to impose a sentence of six years.

(57:7).

Judge Dugan sentenced Mr. Wood's to a ten (10) year indeterminate sentence, identical to his original sentence, after stating: "Had I sentenced you back in 1999, I would have sentence you a lot longer than the ten years on this case..." (57:15; 42:1) (App. 133). Judge Dugan did not mention the likelihood or timing of Mr. Wood's release to parole. (57).

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO CLARIFY AND HARMONIZE THE LAW OF MOTIONS FOR MODIFICATION BASED ON NEW FACTORS WITH MOTIONS FOR RESENTENCING BASED ON THE CONSTITUTIONAL REQUIREMENT OF BEING SENTENCED ON ACCURATE INFORMATION.

A. Introduction and Standard of Review

The appellate courts in Wisconsin have ruled on numerous cases involving modification motions based on "new factor" arguments and likewise have ruled on numerous cases involving motions for resentencing based on constitutional challenges to a defendant being sentenced on incorrect information. However, the published cases on point have muddled the two concepts, leaving defendants like Mr. Wood guessing as they come back to the trial court whether they will receive a modification or be resentenced.

NEW FACTOR

A trial court may, in its discretion, modify a criminal sentence upon a showing of a new factor. ***State v. Hegwood***, 113 Wis. 2d 544, 546, 335 N.W.2d 399, 401 (1983). Whether a set of facts is a new factor is a question of law which the Court of Appeals should review de novo. ***Id.*** at 546-47.

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.

Rosado v. State, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).

Whether a new factor warrants a modification of sentence rests within the trial court's discretion and is reviewed under an abuse of discretion standard. ***Id.*** at 546. An appellate court shall sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175, 184 (1982). Discretion contemplates a reasoning process that depends of the facts that are in, or can reasonably be inferred from, the record and on a conclusion based on proper legal standards. ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512, 519 (1971).

INACCURATE INFORMATION

A defendant has a constitutionally protected due process right to be sentenced upon accurate information. ***State v. Johnson***, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct.App. 1990) (citing ***U.S. v. Tucker***, 404 U.S. 443, 447 (1972)). Whether a defendant has been denied this due process right is a constitutional issue that an appellate court reviews de novo. ***State v. Coolidge***, 173 Wis. 2d 783, 789, 496 N.W.2d 701 (Ct.App. 1993).

In order to succeed on a motion for resentencing based on inaccurate information, "a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court

actually relied on the inaccurate information." ***State v. Tiepelman***, 2006 WI 66, ¶ 31, 291 Wis. 2d 179, 717 N.W.2d 1. "Only after the defendant meets this burden to show that the sentencing court actually relied on inaccurate information, does the burden then shift to the state to establish that the error was harmless." ***Id.*** at ¶ 3.

B. The sentencing courts and appellate courts are mixing and matching these two concepts, independently altering defendants' motions, and generally creating confusion of the two separate principles.

In the present case, the circuit court independently converted Mr. Wood's motion for sentence modification into one for resentencing. (Slip Op. 11, App. 111) The confusion seems to be the distinction between a "new factor" and "inaccurate information" and the remedies for each. Numerous published cases indicate the confusion of motions based on a new factor and defendants requesting modification but ending up with the court discussing resentencing and inaccurate information or vice versa:

In ***State v. Carter***, 208 Wis. 2d 142, 146, 560 N.W.2d 256 (1997), the court, discussing resentencing, makes reference to the court considering "information ... that the sentencing court was unaware of at the initial sentencing", a concept associated with new factor and sentence modification.

In ***State v. Ramuta,*** 2003 WI App 80, ¶ 3, 8, 261 Wis. 2d 784, 661 N.W.2d 483, Ramuta brought a motion for *sentence modification* and the court of appeals stated "if

after sentencing it turns out that there was something that would have been important to the sentencing court but was either unknown or unknowingly overlooked, the court may *resentence* the defendant *to take the new matter into account."* (emphasis added).

In ***State v. Norton,*** 2001 WI App 245, ¶ 1, 13, 248 Wis. 2d 162, 635 N.W.2d 656, the court of appeals found that the trial court relied upon *inaccurate information* and remanded for *resentencing* stating that "the circumstances do constitute a *new factor* and *resentencing* is required because the *inaccurate information* relied on by the trial court *frustrates the purpose of the sentence.*" (emphasis added).

In ***State v. Delaney,*** 2006 WI App 37, ¶ 4, 289 Wis. 2d 714, 712 N.W.2d 368, the court of appeals held that then-Governor Thompson's 1994 letter to the DOC was not a change in parole policy that "constituted a *'new factor'* entitling [Delaney] to *resentencing.*" (emphasis added).

Further similar examples of this confusion exist in other recent published cases from the court of appeals. See ***State v. Moore,*** 2006 WI App 162, ¶ 7-8, 295 Wis. 2d 514, 721 N.W.2d 725; ***State v. Montroy,*** 2005 WI App 230, ¶ 6-7, 287 Wis. 2d. 430, 706 N.W.2d 145; ***State v. Prager,*** 2005 WI App 95, ¶ 8-10, 281 Wis. 2d 811, 698 N.W.2d 837; ***State v. Hall,*** 2002 WI App 108, ¶ 31, 255 Wis. 2d 662, 648 N.W.2d 41.

The court of appeals in the present case stated, "[w]e acknowledge that language has, on occasion, been imprecise." (Slip Op. 5, App. 105). The trial court addressed the two independent concepts during Mr.

Wood's post-conviction motion hearing. (56:2-12) (App. 116-26) The court classified what happened in Mr. Wood's case as an inaccurate information case requiring resentencing as evidence by its ruling. (31:1; 56:9) (App. 131; 132). However, this trial court again muddled the concepts, stating that Mr. Wood was really "asking for a *resentencing* under the circumstances of a *new fact that was not known to the Judge at the time of sentencing*." (56:2) (App. 116) (emphasis added).

This confusion in the circuit courts and in the court of appeals should be clarified by the Supreme Court in order to provide litigants and judges with precedent that would hopefully result in reduced litigation of these issues.

C. The remedies of resentencing and sentence modification are distinct and serve two different purposes. That circuit courts are seemingly interchanging the two is not trivial or harmless.

The purpose of giving a circuit court the authority to modify a sentence due to a new factor is to allow the court to effectuate the original purpose of the sentencing judge, where it has otherwise been frustrated, and modify accordingly. See ***State v. Michels***, 150 Wis. 2d 94, 441 N.W.2d 278 (Ct. App. 1989). To order a resentencing necessarily means that "the initial sentence is a nullity; it ceases to exist." ***State v. Carter***, 208 Wis.2d 142, 154, 506 N.W.2d 256 (1997). Therefore, the remedy associated with presentation of a new factor cannot be obtained through a resentencing--and it was not in this case-- because the intent of the original sentence, along with the entire sentence, vanish upon vacation.

This distinction between modifcation and resentencing is also being muddled as circuit courts are receiving cases on remand and being incorrectly told to *resentence* based on *new factors*. Like Judge Dugan in the present case, courts are resentencing and specifically considering the previous, now vacated sentence, contrary to the holding in ***Carter***, but not using that consideration of the initial sentence to modify accordingly to bring about the purposes of the original sentencing court.

II. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO ESTABLISH THAT, WHERE A SENTENCING COURT SPECIFICALLY CONSIDERS HOW MUCH TIME A DEFENADANT WILL ACTUALLY SERVE INCARCERATED, A POLICY CHANGE OR OTHER FACTOR OUTSIDE THE CONTROL OF A DEFENDANT MUST BE CONSIDERED A NEW FACTOR BECAUSE IT FRUSTRATES WHAT THE SENTENCING COURT WISHED TO ACCOMPLISH, AND REQUIRES A DOWNWARD MODIFICATION OF SENTENCE.

A. Introduction and Standard of Review

As the court of appeals noted recently, the present case includes "an argument that we are seeing with increasing frequency of late: that a 1994 letter from then Wisconsin Governor Tommy G. Thompson to the Department of Corrections (DOC) regarding the mandatory release of violent offenders negatively affected his parole eligibility and therefore constitutes a new factor...". ***Delaney***, 2006 WI App 37, ¶ 1. Furthermore, the original sentencing court in the present case specifically mentioned how much time of actual prison

time was expected, placing Mr. Wood's case into a special category of cases where the intention of the sentencing court is frustrated by a shift in policy of the DOC. (55:26).

A trial court may, in its discretion, modify a criminal sentence upon a showing of a new factor. ***Hegwood***, 113 Wis. 2d at 546. Whether a set of facts is a new factor is a question of law which the Court of Appeals should review de novo. ***Id.*** at 546-47.

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.

Rosado, 70 Wis. 2d at 288.

Whether a new factor warrants a modification of sentence rests within the trial court's discretion and is reviewed under an abuse of discretion standard. ***Id.*** at 546. An appellate court shall sustain a discretionary act if it finds that the trial court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d at 414-15. Discretion contemplates a reasoning process that depends of the facts that are in, or can reasonably be inferred from, the record and on a conclusion based on proper legal standards. ***McCleary,*** 49 Wis. 2d at 277.

B. Given the timing of Mr. Wood's original sentencing, February 2, 2000, just one month after the onset of Truth in Sentencing (TIS), it is not surprising that the Honorable Kitty Brennan would fashion an indeterminate sentencing with a clear intention of dictating the defendant's "initial confinement" period by considering his likely parole.

Judge Brennan specifically mentioned TIS in her comments at Mr. Wood's sentencing.

> THE COURT: ... You are not a person to be thrown away. You are a person we want back in the community, and we do want you to be a productive member eventually.
> I also have to take into consideration parole. *This is not a truth-in-sentencing case. This is under the old law.* Under the old law I know and you know that you will be paroled. Generally speaking, the Department of Corrections paroles at about 40-45 percent of the sentence for a crime of this nature. I know that because the DOC has given us a chart, and it says that on the chart, and I have taken into consideration when you are likely to be paroled. And that is a factor in the sentence as well.

(55:26) (emphasis added).

C. The purpose of the sentencing court was frustrated by the new factor in this case of Mr. Wood's continued incarceration past the 45 percent mark of his ten year indeterminate sentence.

The purpose of the court's sentence was for Mr. Wood to serve 40-45 percent of the total indeterminate sentence given, or four to four and one-half years. This purpose was frustrated by the fact that the DOC was not, in fact, paroling inmates according to this standard, either at the time of the sentencing, or at the time Mr. Wood's reached 45 percent of his sentence. This fits the exact

definition of a new factor established by this Court in ***Rosado***, 70 Wis. 2d at 288, warranting a modification of sentence to effectuate the purpose of the original sentencing court.

The court of appeals found a new factor in an analogous case where a sentencing court considered the total confinement time a defendant would serve and then later learned the defendant was, in fact, going to serve more. ***Norton,*** 2001 WI App 245 at ¶ 16, 248 Wis. 2d at 170-71. At Mr. Norton's sentencing, the court and the parties discussed in detail the fact that Mr. Norton's probation on another case would not be revoked. ***Id.*** at ¶ 11, 248 Wis. 2d at 168. The Court relied on this fact when handing down a sentence. ***Id.*** at ¶ 15, 248 Wis. 2d at 170. When his probation was later revoked and he ended up with an additional nine-month consecutive incarceration, the Court of Appeals found that the circuit court unknowingly relied on the fact that revocation would not occur and remanded to the circuit court for resentencing. ***Id.*** at ¶ 16, 248 Wis. 2d at 170-71.

The court of appeals in a subsequent case noted ***Norton*** as:

> an excellent example of how something that happens after sentencing can be a new factor warranting sentencing modification because it frustrates what the sentencing court wanted the sentence to accomplish.

Ramuta, 2003 WI App at ¶10, 261 Wis. 2d at 791.

The court of appeals in the present case held that "the Thompson letter was not a 'new factor'". (Slip Op. 9) (citing ***Delany,*** 2006 WI App 37 at ¶ 4) (App. 109). However, this case is distinguished from ***Delany*** because

in Delaney's case, the original sentencing court did not mention nor rely on the possibility or timing of parole. ***Delany,*** 2006 WI App 37 at ¶ 12. Delaney argued that the court "oversentenced" him and he speculated that the sentencing court must have been relying on the statutory 25% parole eligibility mandate. ***Id.*** at ¶ 11.

In the present case, the original sentencing judge made specific mention of when she believed Mr. Wood would be paroled—not eligible for parole, but actually released from prison. (55:26). This Court is not being asked to speculate as to what the sentencing judge was thinking or what she believed but simply effectuate the intention of Judge Brennan's original sentence which was release after four to four and one-half years.

CONCLUSION

For all of the reasons above, Mr. Wood respectfully requests that this Court review the decision of the Court of Appeals.

Dated this 15th day of August, 2007.

Respectfully submitted,

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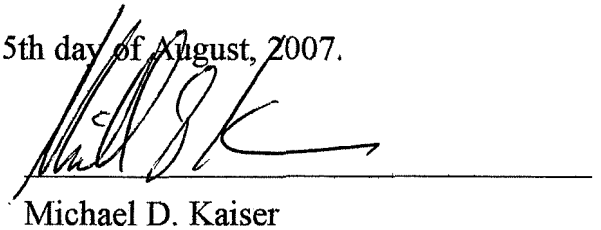
CERTIFICATION

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this petition is 4016 words.

Dated this 15th day of August, 2007.



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