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**DISTRICT IV**

October 18, 2013

To:

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

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2013AP294-CR

State of Wisconsin v. James M. Moran (L.C. # 1994CF1022)

Before Lundsten, Sherman and Kloppenburg, JJ.

James Moran appeals an order that denied his postconviction motion for sentence modification on the grounds of an alleged new factor. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

In 1995, the circuit court sentenced Moran on five felony convictions—including two for attempted first-degree intentional homicide—to consecutive indeterminate sentences totaling seventy-two years in prison. The court explained that it had two purposes for the sentences it imposed: first, to protect the victims and the community at large from further assaults; and second, “to provide a substantial incentive to Mr. Moran to reflect on the seriousness of what he has done and to further reflect on his need to reassess his treatment needs and his need to accept responsibility for what he has done.” In conformity with the court’s comments at sentencing, the judgment of conviction contained a notation stating: “Court would request that the Parole Board<sup>2</sup> deny discretionary parole unless the defendant accepts responsibility for his actions.”

In 2012, the parole commission denied Moran his first opportunity for parole and deferred its next consideration of the matter for another three years. Moran then filed a motion for sentencing modification, alleging that he “comes before the court to accept responsibility for his actions,” and that his acceptance of responsibility, in conjunction with the circuit court’s comments at sentencing, changes in the parole system following the implementation of Truth in Sentencing, and the denial of his parole, constitute new sentencing factors.

A circuit court has inherent authority to modify a previously imposed sentence based upon a new factor. *State v. Crochiere*, 2004 WI 78, ¶¶11-12, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828. A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence but

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<sup>2</sup> We note that the administrative entity formerly known as the parole board has been renamed twice since the time Moran was sentenced. It was called the earned release review commission at the time it denied Moran’s first parole opportunity, and is now known as the parole commission. For convenience, we will refer to the administrative entity by its current name.

not known to the trial judge at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. *Harbor*, 333 Wis. 2d 53, ¶¶40, 52 (reaffirming holding of *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). Whether a particular set of facts clearly and convincingly establishes a new sentencing factor is a question of law that we review *de novo*. *Harbor*, 333 Wis. 2d 53, ¶33. However, whether any such new factor warrants a modification of sentence is a discretionary determination to which we will defer. *Id.*

We agree with the circuit court's conclusion that the allegations in Moran's sentence modification motion do not clearly and convincingly establish a new sentencing factor. First, as Moran himself acknowledges, a defendant's rehabilitation does not in and of itself constitute a new sentencing factor. *State v. Kluck*, 210 Wis. 2d 1, 8, 563 N.W.2d 468 (1997).

Second, the circuit court's use of the term "discretionary" to describe parole and its framing of its recommendation to deny Moran parole unless he accepted responsibility as a "request," both demonstrate that the circuit court understood that the ultimate power to decide whether or when to grant Moran parole resided with the parole commission. The letters that Moran claims he can produce to show that the circuit court contemplated the possibility of his parole do not undermine that point. Thus, contrary to Moran's assertion, the record does not establish that the circuit court believed that it was somehow guaranteeing Moran parole "as part of [his] sentence" if he accepted responsibility.

Third, to the extent that the circuit court intended to communicate to the parole commission a recommendation that parole would be appropriate if Moran did subsequently accept responsibility, Moran does not allege any change in the statutes or administrative rules

that would preclude the parole commission from taking the court's recommendation into account. For that matter, Moran's allegations do not even show that the parole commission *did* disregard the circuit court's recommendation at his initial parole hearing. Moran alleges in his motion to the circuit court that his acceptance of responsibility stems from his participation in a restorative justice program that he completed about two months *after* the parole commission had denied him parole. He does not allege that he placed before the parole commission any claim to have accepted responsibility for his crimes. Regardless, his asserted acceptance of responsibility is a matter for the parole commission to consider, not a new factor that warrants resentencing, and he remains free to seek parole on that or other grounds in the future.

IT IS ORDERED that the order denying Moran's motion for resentencing is summarily affirmed under WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*