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**DISTRICT II**

August 11, 2021

To:

Hon. Charles H. Constantine  
Circuit Court Judge  
Electronic Notice

Patricia J. Hanson  
District Attorney  
Electronic Notice

Hon. Jon E. Fredrickson  
Circuit Court Judge  
Electronic Notice

Jacob J. Wittwer  
Electronic Notice

Samuel A. Christensen  
Clerk of Circuit Court  
Racine County  
Electronic Notice

Katie R. York  
Electronic Notice

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

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2020AP1621-CR

State of Wisconsin v. Arnold B. Flores (L.C. #2013CF482)

Before Gundrum, P.J., Neubauer and Reilly, 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).**

Arnold B. Flores appeals from a judgment of conviction and from an order denying his postconviction motion for sentence modification.<sup>1</sup> Flores asserts that the COVID-19 pandemic is a “new factor” warranting sentence modification, particularly due to his preexisting health conditions increasing his risk of serious illness. Based upon our review of the briefs and record,

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<sup>1</sup> The Honorable Charles H. Constantine entered the judgment of conviction. The Honorable Jon E. Fredrickson entered the order denying Flores’ motion to modify sentence.

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>2</sup> We affirm.

On November 25, 2013, Flores was convicted of possession with intent to deliver cocaine following his no contest plea. The circuit court imposed and stayed a prison term of five years, bifurcated into two years' initial confinement and three years' extended supervision. Flores was placed on probation for a period of four years, and the circuit court ordered 120 days in jail as a condition of probation.

In January 2018, Flores' probation was revoked for violations not specified in the record, and he began serving his initially-stayed sentence of two years in state prison. Flores was scheduled to be released on March 18, 2021. Flores filed a postconviction motion for sentence modification in January 2020, claiming that the spread of COVID-19 in the prison system put him at an increased risk of serious health complications due to his diabetes and high blood pressure. The circuit court denied Flores' motion for sentence modification stating, "COVID-19 is not a fact or set of facts relevant to the imposition of the sentence in this case. Nor does the presence of COVID-19 strike at the very purpose for the sentence selected by this Court." Flores appeals.

A sentence may be modified if a defendant shows the existence of a new factor and that the new factor warrants modification of the sentence. *State v. Harbor*, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. A "new factor" refers to 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,

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2019-20 version.

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). “The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor.” *State v. McDermott*, 2012 WI App 14, ¶9, 339 Wis. 2d 316, 810 N.W.2d 237 (citation omitted). Whether a defendant has met this burden is a question of law that we review de novo. *Id.*

Flores argues that the COVID-19 pandemic constitutes a new factor because the disease and its consequences were “not in existence at the time of sentencing and [are] highly relevant to the imposition of the sentence.” We disagree. Although COVID-19 was unknown to the circuit court during Flores’ sentencing hearing, his high blood pressure, diabetes, and concern for his health while in the prison were not “highly relevant” to imposing his sentence. During this hearing, the circuit court considered the appropriate sentencing factors. The court took note that Flores was not a danger to his community, had a strong work ethic, and had sought treatment for addiction; but he also had a prior criminal record, the charge was “serious” and “aggravated” as it involved cocaine, and his actions required some degree of punishment. As stated by the court, “I think prison is warranted by the nature of the offense and the prior record.” While COVID-19 certainly poses a threat to those incarcerated in the Wisconsin prison system, neither prison conditions nor Flores’ preexisting health conditions were “highly relevant” to the imposition of his sentence. Flores has failed to meet his burden of demonstrating that the COVID-19 pandemic is a new factor for purposes of sentence modification.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*