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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT I**

September 21, 2021

To:

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Circuit Court Judge  
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Hon. Mark A. Sanders  
Circuit Court Judge  
Electronic Notice

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Annice Kelly  
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John Barrett  
Clerk of Circuit Court  
Milwaukee County  
Electronic Notice

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

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2020AP1882-CR

State of Wisconsin v. Marcus Kendell Wilborn  
(L.C. # 2018CF3375)

Before Brash, C.J., Donald, P.J., and Dugan, J.

**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).**

Marcus Kendell Wilborn, *pro se*, appeals a judgment of conviction and the circuit court's order denying his postconviction motion. He argues that he is entitled to sentence modification based on a "new factor," his ineligibility for the Wisconsin Substance Abuse Program. We

conclude at conference that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup> Upon review, we affirm.

Wilborn was convicted of homicide by negligent operation of a vehicle pursuant to WIS. STAT. § 940.10(1). The circuit court sentenced him to four years of initial confinement and four years of extended supervision. The circuit court made Wilborn eligible for the Wisconsin Substance Abuse Program after he served three years of initial confinement. After sentencing, Wilborn became aware that, despite the circuit court’s determination at sentencing that he was eligible for the Substance Abuse Program, he was prohibited by statute from participating because he was convicted of crime under WIS. STAT. ch. 940. *See* WIS. STAT. §§ 973.01(3g)-(3m). He moved the circuit court to modify his sentence, arguing that his ineligibility for the program was a new factor entitling him to a reduction in his sentence. The circuit court denied his motion.

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 ... it was unknowingly overlooked by all of the parties.”” *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). The defendant has the burden of showing by clear and convincing evidence that a new factor exists. *Id.*, ¶36. Whether a fact or set of facts constitutes a new factor is a question of law. *Id.*

Wilborn contends that his statutory ineligibility for the Substance Abuse Program is a new factor because it was highly relevant to the imposition of his sentence. He contends that the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

circuit court calculated the length of his term of initial confinement based on his participation in the program.

The sentencing transcript does not support Wilborn's assertion. The circuit court did not suggest that it had chosen the length of Wilborn's term of initial confinement based on Wilborn's participation in the drug treatment program. The circuit court's detailed sentencing decision focused on the seriousness of Wilborn's offense and on Wilborn's character, which the circuit court said included many positive aspects. The circuit court did not address the Substance Abuse Program until the very end of its sentencing remarks, when it said that it would make Wilborn eligible for the program after he served three years of initial confinement because he had a long history of using controlled substances. Moreover, the circuit court's statements show that it understood that it was only making Wilborn *eligible* for the program, nothing more. We conclude that Wilborn's eligibility for the Substance Abuse Program is not a new factor and, therefore, he is not entitled to sentence modification.

Upon the foregoing,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed.  
*See* 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*