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**DISTRICT I**

January 11, 2022

To:

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Circuit Court Judge  
Electronic Notice

John Barrett  
Clerk of Circuit Court  
Milwaukee County  
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John D. Flynn  
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Jesus David Gutierrez-Mendoza 00596748  
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You are hereby notified that the Court has entered the following opinion and order:

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2020AP1217-CR      State of Wisconsin v. Jesus David Gutierrez-Mendoza  
(L.C. # 2010CF5414)

Before Brash, C.J., Dugan and White, 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).**

Jesus David Gutierrez-Mendoza, *pro se*, appeals a circuit court order denying his motion seeking sentence modification based on alleged new factors. He also appeals an order denying his motion for reconsideration. 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 (2019-20).<sup>1</sup> We summarily affirm.

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

In November 2012, a jury found Gutierrez-Mendoza guilty of thirteen crimes: one felony count each of second-degree sexual assault of a child, child enticement, and repeated sexual assault of the same child; and ten misdemeanor counts of sexual intercourse with a child who has attained the age of sixteen years. At his sentencing in January 2013, the circuit court imposed an aggregate sentence of fifteen years and nine months of initial confinement and twelve years of extended supervision. In June 2020, Gutierrez-Mendoza moved for sentence modification based on two alleged new factors: the COVID-19 pandemic; and a June 21, 2012 federal court order requiring his deportation to Mexico. The circuit court rejected his claims and then denied his motion for reconsideration. He appeals.

A new factor for purposes of sentence modification 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.” See *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). A circuit court has inherent authority to modify a defendant’s sentence upon a showing of a new factor. See *id.*, ¶35. To prevail, the defendant must satisfy a two-prong test. See *id.*, ¶36. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. See *id.* This presents a question of law, which we review *de novo*. See *id.*, ¶¶33, 36. Second, the defendant must demonstrate that the new factor justifies sentence modification. See *id.*, ¶37. This determination rests in the circuit court’s discretion. See *id.* If a defendant fails to satisfy one prong of the test, a court need not address the other. See *id.*, ¶38.

The COVID-19 pandemic did not exist when Gutierrez-Mendoza was sentenced in 2013. Cf. *Fabick v. Evers*, 2021 WI 28, ¶¶1, 5, 396 Wis. 2d 231, 956 N.W.2d 856. Gutierrez-Mendoza

must demonstrate, however, that the pandemic is not only “new” but also ““highly relevant to the imposition of [his] sentence[s].”” See *Harbor*, 333 Wis. 2d 53, ¶40 (citation omitted). He fails to do so.

The record shows that the circuit court identified punishment as the primary sentencing goal in this case, and the circuit court discussed the factors that it viewed as relevant to that goal and to the secondary objectives of deterrence and rehabilitation. Specifically, the circuit court considered the gravity of the offenses, finding that Gutierrez-Mendoza took advantage of a child and that his conduct was “egregious.” The circuit court discussed Gutierrez-Mendoza’s character, finding that he had “no remorse, no empathy towards that child.” The circuit court also considered the need to protect the community, finding that Gutierrez-Mendoza seized the opportunity to victimize a young girl who trusted him and that he continued that victimization for a significant period of time.

Nothing about the COVID-19 pandemic is relevant to the goals of sentencing that the circuit court identified or to the factors that the circuit court considered when fashioning the sentences imposed. Moreover, Wisconsin courts have repeatedly concluded that post-sentencing health concerns are not grounds for sentence modification, although they may be grounds for challenging conditions of confinement. See *State v. Johnson*, 210 Wis. 2d 196, 204-05, 565 N.W.2d 191 (Ct. App. 1997). Accordingly, while the COVID-19 pandemic is a global tragedy, it does not constitute a “new factor” warranting modification of Gutierrez-Mendoza’s aggregate sentence.

Gutierrez-Mendoza next claims that his impending deportation constitutes a new factor. We first observe that, although no one brought the June 21, 2012 deportation order to the sentencing court’s attention, the presentence investigation report included information that

Gutierrez-Mendoza was in the United States illegally. Further, the prosecutor and Gutierrez-Mendoza both notified the circuit court that he was subject to deportation. The prosecutor told the circuit court that Gutierrez-Mendoza “is likely to get deported after his incarceration or after his sentence is completed”; and Gutierrez-Mendoza frankly acknowledged that he was facing “the fact of deportation or immigration involvement – Immigration and Customs Enforcement involvement.” Accordingly, his likely deportation was neither unknown to the circuit court nor “overlooked by all of the parties” at the time of sentencing. See *Harbor*, 333 Wis. 2d 53, ¶40. Moreover, nothing in the circuit court’s discussion of the sentencing objectives suggests that Gutierrez-Mendoza’s status as a deportable person was “highly relevant” to the goals of punishment, deterrence, and rehabilitation. See *id.* Gutierrez-Mendoza therefore fails to carry his burden to show that the deportation order constitutes a new factor. See *id.*

In sum, Gutierrez-Mendoza has not demonstrated that either the COVID-19 pandemic or his immigration status is a new factor within the meaning of *Harbor*. Because Gutierrez-Mendoza has failed to satisfy the first prong of the new factor analysis, no discussion of the second prong is required. See *id.*, ¶38. We conclude that the circuit properly denied his motions for sentence modification and for reconsideration.

Therefore,

IT IS ORDERED that the circuit court orders 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