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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 IV**

September 28, 2023

To:

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Circuit Court Judge  
Electronic Notice

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Electronic Notice

Carlo Esqueda  
Clerk of Circuit Court  
Dane County Courthouse  
Electronic Notice

Hans P. Koesser  
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You are hereby notified that the Court has entered the following opinion and order:

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2022AP414-CR

State of Wisconsin v. George W. Ross (L.C. # 2019CF2254)

Before Kloppenburg, P.J., Blanchard, and Nashold, 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).**

George Ross appeals a judgment of conviction and an order denying his motion for sentence modification. 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 (2021-22).<sup>1</sup> We affirm.

Ross argues that the circuit court incorrectly denied his motion for sentence modification that was based on a claimed new factor. A new factor is a fact or set of facts highly relevant to the imposition of sentence, but not known to the sentencing court because it was not then in

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

existence, or was unknowingly overlooked. *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975).<sup>2</sup>

In May 2020, Ross was sentenced on one count of stalking. At the sentencing hearing, the prosecutor and the victim described additional alleged criminal conduct by Ross that occurred the night before the sentencing hearing. The court stated that it believed the new allegations to be true, but that it would not consider them in determining the sentence because, even without the new allegations, the court would impose the maximum sentence based on the conduct that was charged in this case.

On January 20, 2022, Ross filed a postconviction motion. As relevant to this appeal, the motion alleged that, six days after his sentencing, the State charged him with crimes based on the new allegations described at sentencing. Ross's motion further alleged that those charges were dismissed without prejudice on January 7, 2022, and that this dismissal was a new factor warranting sentence modification.

The circuit court denied the motion in March 2022. It observed that the new charges against Ross, after being dismissed on January 7, 2022, had been refiled under a new case number on January 13, seven days before he filed his postconviction motion. The court denied the motion for several reasons. One was that Ross's claimed new factor did not actually exist, because although the new charges were dismissed in January 2022, they were promptly refiled, and the case was ongoing as of the time of the court's decision. The court also concluded that

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<sup>2</sup> The statement of issues in Ross's opening brief also lists as a purported issue whether he received "a fair sentencing hearing." However, the body of the brief does not cite law relevant to that topic and does not develop an argument that is separate from his new-factor argument. Therefore we do not discuss that topic.

any dismissal of the new charges would not be highly relevant to imposition of sentence in this case, because the sentencing court said that it was not relying on the new allegations, and would have imposed the maximum sentence even without considering the new allegations.

Ross appealed that decision in March 2022, and the record was transmitted to this court in April 2022. On appeal, Ross argues that he is entitled to sentence modification because in June 2022 most of the new charges against him were dismissed as part of a plea agreement.

Ross's brief provides a description of those charges and their resolution, but does not provide a supporting citation to the appellate record, contrary to WIS. STAT. RULE 809.19(1)(d) and (1)(e). On appeal, neither party cites to the record to support factual statements about dismissal of Ross's charges in June 2022. They were unable to do that, because the record contains no material related to these events that had not yet occurred at the time the circuit court decided Ross's postconviction motion, or by the time the record was transmitted to this court.

Ross is, in practical effect, asking us to decide for the first time on appeal whether dismissal of the charges in June 2022 is a basis for relief. Ordinarily, this court would not decide an issue raised for the first time on appeal, based on events that happened after the appeal started, and without a proper record. Both parties on appeal fail to provide a forthright acknowledgment of this status, or to explain why we should decide the issue in this posture. However, because the State has not objected to our review of the merits of Ross's argument in this posture, we proceed to address his argument.

Although Ross does not argue that the circuit court erred by denying his motion in March 2022, we briefly address that point. The circuit court correctly determined that Ross's claimed new factor did not actually exist, because the dismissed charges were refiled and ongoing at that

time. At best, Ross had presented a speculative new-factor argument based on possible future events.

We are now told that those events later occurred, in some form, when some of the charges were dismissed in a plea agreement. Ross argues that these dismissals are a new factor because, although the sentencing court said that it was not considering the new allegations, it is “ludicrous” to argue that the new allegations had no effect on his sentence, given the court’s statement that it believed the allegations to be true.

We do not agree that it is facially ludicrous for a sentencing court to state that a defendant is going to receive the maximum sentence, even without consideration of some additional prejudicial information that the court could have taken into consideration. The court here stated that “this case screams for the maximum sentence.” In practical effect, we understand the court to have said that Ross’s alleged new conduct was not being considered because there was no greater sentence that the court would be able to impose because of it. In other words, the court reasonably explained that it was already arriving at the upper sentence limit based exclusively on the conduct actually charged here.

Accordingly, we conclude that Ross has failed to show that the June 2022 dismissal of the new charges is a new factor that would be highly relevant to imposition of sentence.

Therefore,

IT IS ORDERED that the judgment and order appealed from are summarily affirmed under WIS. STAT. RULE 809.21.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*